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STATE OF SOUTH CAROLINA

FEB 02 2018

IN THE SUPREME COURT

S.C. SUPREME COURT

Certiorari to York County

Honorable Letitia H. Verdin, Circuit Court Judge

JOHNELL PORTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001605

JOHNSON PETITION FOR WRIT OF CERTIORARI
PURSUANT TO AUSTIN V. STATE

Taylor D Gilliam
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR Court err in denying Petitioner relief, where in order to prosecute his post-conviction relief application, Petitioner required the testimony of witnesses, where PCR counsel refused to send subpoenas to witnesses, and where Petitioner was left with no option but to proceed *pro se* and try to subpoena the witnesses himself?

STATEMENT

During its June 2007 term, a York County Grand Jury indicted Petitioner for armed robbery, entering a bank with the intent to steal, kidnapping, conspiracy to commit armed robbery, and possession of a firearm during the commission of a violent crime. App. 819 – 828. Petitioner proceeded to a four-day trial before the Honorable John C. Hayes, III and a jury beginning on July 23, 2007. He represented himself and had the assistance of Daniel D’Agostino as standby counsel. Kevin Brackett and E.B. Springs, IV prosecuted the case on behalf of the State.

At the conclusion of trial, the jury found Petitioner guilty as indicted. App. 639, ll. 3 – 16. Judge Hayes sentenced Petitioner to life without parole on the kidnapping, armed robbery, and entering a bank with the intent to steal charges, five years on the possession of a firearm charge, and five years on the conspiracy charge. App. 649 ll. 13 – 25. The sentences were imposed to run concurrently. Id.

Petitioner’s convictions and sentences were affirmed. Petitioner then filed a timely application for post-conviction relief on July 6, 2011. App. 668. It contained allegations of ineffective assistance of counsel prior to trial, violations of the Sixth and Fourteenth Amendments, and prosecutorial misconduct. App. 675. The State made its Return on or about October 24, 2011. App. 690.

An evidentiary hearing was conducted on January 21, 2014 before the Honorable Michael Baxley. App. 697. James Rutledge Johnson represented the State, and Leah Moody represented Petitioner.

Petitioner elected not to participate in the hearing, and he left the courtroom. App. 713 l. 8 – App. 174 l. 3). The State moved to dismiss the application under Rule 41(B), SCRPC, for

Petitioner's failure to prosecute. App. 714 ll. 4 – 11. Judge Baxley granted the motion. App. 717 ll. 10 – 23.

Because the Notice of Appeal arising out of Petitioner's post-conviction relief application was not served on opposing counsel, Petitioner's appeal was dismissed. He therefore filed a subsequent application for post-conviction relief on or about April 20, 2015. App. 726. The State filed a Return and Motion to Dismiss All Claims Except Austin Review on June 30, 2015.¹ App. 761.

An evidentiary hearing was held before the Honorable Letitia Verdin on August 1, 2016. App. 769. Justin Hunter appeared on behalf of the State, and Nathan Sheldon represented Petitioner. Petitioner was not present. The State consented to allow Petitioner opportunity for relief under Austin v. State. The Court granted the motion. App 774 ll. 10 – 11; App. 776; App. 778 – App. 781. An Amended Order Granting An Appeal Pursuant to Austin v. State was filed on October 14, 2016. App. 782. A second Amended Order Granting an Appeal Pursuant to Austin v. State was filed on July 5, 2017. App. 809.

This petition follows.

¹ 305 S.C. 453, 409 S.E.2d 395 (1991).

ARGUMENT

The PCR Court erred in denying Petitioner relief, where in order to prosecute his post-conviction relief application, Petitioner required the testimony of witnesses, where PCR counsel refused to send subpoenas to witnesses, and where Petitioner was left with no option but to proceed *pro se* and try to subpoena the witnesses himself.

At the evidentiary hearing in his case, Petitioner understandably wished to relieve his PCR counsel following her failure to send subpoenas to witnesses who could have provided relevant testimony for Petitioner's post-conviction relief action. App. 706 l. 12 – App. 707 l. 10. Prior to the hearing, Petitioner and counsel only spoke for forty minutes the week before the evidentiary hearing. Id. Petitioner provided a list of witnesses, and counsel indicated that she “did not see a reason for those witnesses to be present.” Id.

Petitioner, on the other hand, prepared the post-conviction relief application and subsequently proposed amendments. Id. He had a greater understanding of his own case, having filed the application and been present at his own trial: “I know why I had these witnessed subpoenaed. It's a misunderstanding between her and myself and she didn't [subpoena] the witnesses.” Id.

The witnesses who Petitioner wished to be present and able to testify at his PCR included his standby counsel, Daniel D'Agostino; assistant solicitor E.B. Springs; and solicitor Kevin Brackett. App. 707 l. 17 – App. 709 l. 664.

Prior to the appointment of counsel, Petitioner had attempted to subpoena witnesses himself. App. 710 ll. 3 – 22. As he explained during the evidentiary hearing:

This is why [I was] appointed counsel. For me to have my witnesses present. ... I don't have these witnesses. **These are vital to my PCR case.** I need these witnesses.... I can't proceed without them.

Id. (emphasis added).

Petitioner began explaining the importance of each witness but was cut off by the PCR judge. App. 711 l. 14 – App. 713 l. 7. Petitioner did not get a chance to explain the relevance of D'Agostino, Springs, or Brackett. As it were, Petitioner included plausible claims of prosecutorial misconduct in his application for post-conviction relief. However, neither Petitioner nor either of the solicitors was heard on that issue. Because Petitioner had been through previous attorneys, the PCR judge denied his request to relieve counsel and continue the case. Id.

At that point, Petitioner revealed that he would not participate in the case. App. 668 l. 8 – App. 669 l. 11. He left the courtroom, and ultimately his matter was dismissed. App. 672 ll. 10 – 23. PCR counsel did not offer the testimony of the one witness who was present and prepared to testify, appellate counsel. App. 669 l. 14 – App. 670 l. 12. Instead, a continuance was requested and again denied. App. 671 l. 21 – App. 672 l. 23.

The plaintiff has the burden of prosecuting his action, and the trial court may properly dismiss an action for plaintiff's unreasonable neglect in proceeding with his cause. Don Shevey & Spires, Inc. v. American Motors Reality Corp., 279 S.C. 58, 301 S.E.2d 757 (1983). Rule 41(B) of the South Carolina Rules of Civil Procedure provides: “For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him.” SCRCP 41.

Petitioner did not have enough time to confer with counsel regarding the need for these witnesses. In PCR proceedings, the burden of proof is on the applicant to prove the allegations

in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Without these witnesses, he was unable to meet his burden. Petitioner should have been able to explain in greater detail, to counsel and the court, the need for these witnesses.

Rule 71.1(d), SCRPC, provides: “[i]f, after the State has filed its return, the application presents questions of law or fact which will require a hearing, the court shall promptly appoint counsel to assist the applicant if he is indigent. Counsel shall be given a reasonable time to confer with the applicant. Counsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary. Counsel and Petitioner were not given a reasonable amount of time to confer; forty minutes was insufficient to discuss the entirety of Petitioner’s claims and the witnesses who he wanted to appear at the evidentiary hearing. In the alternative, a continuance should have been granted for Petitioner to obtain access to counsel who would be willing to send subpoenas.

“The granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion.” State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005). “An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support.” State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001); see also State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249–50 (Ct. App. 2006)(“An abuse of discretion occurs when the trial court's ruling is based on an error of law”). Even if there was no evidentiary support, “[i]n order for an error to warrant reversal, the error must result in prejudice to the appellant.” State v. Preslar, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct. App. 2005); see also State v. Wyatt, 317 S.C. 370, 372–73, 453 S.E.2d 890, 891 (1995) (stating that error without prejudice does not

warrant reversal). “[R]eversals of refusal of continuance are about as rare as the proverbial hens’ teeth.” State v. Lytchfield, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957).

Our legislature made provisions for indigents in pursuit of PCR to obtain public funding to support their claims for relief:

If the applicant is unable to pay court costs and expenses of representation, including stenographic, printing and legal services, these costs and expenses shall be made available to the applicant in the trial court, and on review, in amounts and to the extent funds are made available to indigent defendants by the General Assembly.

S.C. Code Ann. § 17-27-60.

Our statutory scheme established for payment of attorneys’ fees and litigation expenses in PCR matters is rooted in the state and federal constitutional right to due process of law. As the United States Supreme Court explained in Ake v. Oklahoma, 470 U.S. 68 (1985)

[W]hen a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment’s due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.

Id. at 76.

As a result, states must provide defendants with the opportunity to appeal their cases, transcripts free of charge if necessary to an appellate decision, a waiver of filing fees, and the assistance of counsel at trial and on appeal. Id. The Court explained that a defendant is entitled to “[m]eaningful access to justice.” Id. at 77. A defendant must have “access to the raw materials integral to the building of an effective defense.” Id. The Court went on to hold that a criminal defendant is entitled to competent psychiatric assistance in preparing his defense “when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a

significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.” Id. at 83.

As this Court explained in Bailey v. State, 309 S.C. 455, 459, 424 S.E.2d 503, 506 (1992), “although the State is not required to provide the indigent defendant with unlimited funding, it must ensure that the defendant has competent counsel and the services of experts necessary to a meaningful defense.” In Thames v. State, 325 S.C. 9, 11, 478 S.E.2d 682, 682 (1996), this Court affirmed a trial court’s denial of a PCR applicant’s motion for funding for an expert psychiatric witness.

Petitioner was not requesting funds to hire an expert; he was asking for less. He wanted to be able to ask questions of relevant witnesses in furtherance of his post-conviction relief claims. He was not allowed the opportunity to do so, and as a result, was prejudiced. He was unable to prosecute his claims; the resulting dismissal should be reversed, or in the alternative, his case should be remanded to the trial court for a full hearing on his allegations.

CONCLUSION

Petitioner respectfully requests this Court grant the writ of certiorari, or in the alternative, remand his case to the trial court for a full hearing on his post-conviction relief allegations.

A handwritten signature in black ink, appearing to read "Taylor D Gilliam", written over a horizontal line.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of February, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Johnell Porter states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
 2. He has reviewed the record of petitioner's trial before Judge Letitia H. Verdin, which was held on August 1, 2016, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
 3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.
- Therefore, counsel requests that the Court relieve him as counsel for Johnell Porter.

Respectfully Submitted,



Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

This 2nd day of February, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



Taylor D Gilliam
Appellate Defender

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CERTIFICATE OF SERVICE
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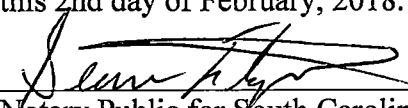
The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Justin J. Hunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Johnell Porter, #240208, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 2nd day of February, 2018.


Taylor D Gilliam

Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 2nd day of February, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: 10/30/2022.