

State of South Carolina **RECEIVED**
In the Supreme Court of S.C. JAN 24 2019
Certiorari to Saluda County, c. SUPREME COURT
Alison R. Lee, Circuit Court Judge

Montavis H. Gaines

Appellant

vs.

State of South Carolina

Respondent

Case No: 2017-CP-41-86

Appellant explanation pursuant to Rule
243 (c). SCACR

Montavis H. Gaines
Waterlee River Corr. Inst.
D-3-44(c)
P.O. Box 189
Rembert SC 29128-0189

Procedural History

During its November 2006 term, the Saluda County Grand Jury indicted Appellant for armed robbery, Criminal Conspiracy, and assault and battery with intent to kill, (2006-GS-41-419, 420, 421). Michael Ray Ellison, Esquire represented Appellant on these charges. Assistant Solicitors H. Franklin Young and Ervin J. Maye, both of the 11th Circuit Solicitor's office, prosecuted the case. On July 24-26, 2007, Appellant proceeded to trial before the Honorable William P. Keesley and a jury. Following deliberations, the jury convicted Appellant as indicted for armed robbery and Criminal Conspiracy and also convicted Appellant of the lesser-included offense of assault and battery of a high and aggravated nature. Judge Keesley sentenced Appellant to a term of imprisonment of twenty years for armed robbery, five years for Criminal Conspiracy, and ten years for ABHAN. The sentences were to be served concurrently.

Appellant filed a timely notice of appeal, and Appellate Defender Katherine H. Hudgins of the South Carolina Commission on Indigent Defense - Division of Appellate Defense, represented Appellant. Following the submission of an Anders brief, Appellant filed a pro se brief. On October 2, 2009, the South Carolina Court of Appeals dismissed Appellant's appeal by unpublished opinion, *State v. Gaines*, Op. No. 2009-4P-446 S.C. Ct. App. filed Oct. 2, 2009. The Remittitur was issued on October 21, 2009.

Appellant filed his first application for post-Conviction relief on November 6, 2009. In that application, he alleged he was being held unlawfully for the following reasons:

1. Ineffective assistance of trial counsel

Respondent made its return on March 3, 2010, requesting an evidentiary hearing be held on March 17, 2010. Appellant Counsel filed an amendment to his application adding the following allegations:

1. "Trial Counsel was ineffective in not discovering an agreement or promise of leniency between the Solicitor's officer and Jerome Rhoads," and
2. "The prosecutor engaged in misconduct in not disclosing such an agreement."

On January 31, 2012, an evidentiary hearing into the matter was convened before the Honorable Eugene C. Griffith, Appellant was present at the hearing and represented by Richard R. Gleissner, Esquire, Assistant Attorney General Keelon E. May, of the South Carolina Attorney General's Office, represented Respondent. After hearing all of the testimony and evidence presented, Judge Griffith issued a written order on April 5, 2012, filed April 11, 2012, denying and dismissing the application with prejudice.

On April 24, 2012, Appellant filed a motion to reconsider pursuant to Rule 59(e) SCRPC, in which Appellant contended the Post-Conviction relief court failed to include a claim counsel was ineffective. Further challenged a claim relating to the testimony of the officers was withdrawn. Appellant Counsel also ask the court to reconsider its finding there was no agreement for Rhoads testimony. The motion was denied by order filed May 24, 2012.

Appellant filed a timely notice of appeal, and Deputy Chief Appellate Defender Wanda H. Carter, of the South Carolina Commission on Indigent Defense-Division of Appellate Defense, perfected an appeal on Appellant's behalf. By order filed December 3, 2014, the South Carolina Court of Appeals denied Appellant's petition for writ of Certiorari. The Remittitur was issued on January 5, 2014.

2013-CP-41-10

Appellant filed his second application for PCR on January 16, 2013, on the following grounds for relief.

1. prosecutorial misconduct: Brady's violation, prosecutor failure to disclosed potentially exculpatory evidence related to the charged offenses.
2. Ineffective assistance of trial counsel.

Respondent made its return and motion to dismiss on October 7, 2013, requesting the application be summarily dismissed as untimely and as successive. On February 6, 2014, the Honorable Benjamin H. Culbertson issued a Conditional order of Dismissal, provisionally denying and dismissing the application. Thereafter, Judge Culbertson issued a Final order of Dismissal, denying and dismissing the application, on September 12, 2014.

Appellant then filed a motion to consolidate the appeal with the appeal from his first Post-Conviction relief action, which was still pending, and an explanation pursuant to Rule 243(c) SCACR, by order filed October 23, 2014. The South Carolina Supreme Court dismissed Appellant's appeal. The Remittitur was issued on November 10, 2014.

5:14-CV-04652-SMC-KDW

Appellant subsequently filed a petition for writ of habeas Corpus, as well as a motion to hold petition in abeyance, with the United State District Court for the District of South Carolina on December 4, 2014.

Respondent filed its return and motion for Summary Judgment on March 30, 2015. Thereafter, the Honorable Kaymani D. West, United State Magistrate Judge, issued a report and recommendation on February 3, 2016, recommending Respondent's motion for Summary Judgment be granted and the petition be denied. The Honorable J. Michelle Childs United State District Judge denied Appellant's petition on March 9, 2016.

and accepted the report and recommendation for summary judgment. Judge Childs also denied a Certificate of Appealability to the Fourth Circuit.

On May 16, 2016, Appellant appealed the District Court's decision by filing an informal preliminary brief with the Fourth Circuit Court of Appeals. The Fourth Circuit denied Appellant's motion for certificate of appealability and dismissed his appeal.

Statement of facts

Richard R. Gleissner was Court Appointed to Represent Appellant during his post-Conviction relief hearing. prior to appellant PCR hearing, Counsel (Richard R. Gleissner) wrote Appellant a letter admitted to Appellant on March 17, 2010, that he has never done a post-Conviction relief (P.C.R.) hearing Claiming to be "unqualified" to represent Appellant during his P.C.R. hearing. The documentation provided indicates that the evidence presented by Counsel was sufficient to Support, the Appointment of New Counsel, Appellant Motion the Court to relieve his Counsel off his Case in June 22, 2010. The lower Court filed to (entertain) Appellant Motion, when Appellant presented Substantial evidence met the requirement by showing a Satisfactory Cause to Rejeat and discharge his Court appointed Counsel. Based upon the preponderance of the evidence presented by Appellant, The fact that the record, when Considered as a whole being Supported by Substantial evidence.

Table of Authorities

Cases

<u>Richardson v. State</u> , 659 S.E.2d 493 (2008)	9, 10
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Question presented

1. The lower Court erred by failing to consider Appellant Motion to relieve his Court Appointed Counsel, who were deemed Unqualified under the Uniform post-Conviction procedure Act, when showing a Satisfactory Cause to refuse and dismiss his Court Appointed Counsel and have another Counsel appointed.

Argument

The lower Court erred by filing to Consider Appellant Motion to relieve his Court Appointed Counsel, who were deemed unqualified Under the uniform post-Conviction procedure Act, when showing a Satisfactory Cause to refuse and dismiss his Court Appointed Counsel, and have another Counsel Appointed.

In the present Case, Appellant must show a Satisfactory Cause, to refuse and dismiss his Court Appointed Counsel, and have another Counsel Appointed, Citing Richardson v. State, 659 S.E.2d 493 (2008). In the Explanation Required by Rule 243(c) of South Carolina Appellate Court Rule (SCACR). Appellant showing that there is an arguable basis for asserting that the determination by the lower Court was improper. Appellant showing of a Satisfactory Cause to reject and discharge his Court - Appointed Counsel Richard R. Bleissner in the above Captioned Case. See attachment Exhibit (A). prior to appellant hearing, PCR Counsel admitted to appellant by letter dated March 17, 2010, that he have never done a PCR matter claiming to be uniquely unqualified to represent the appellant during his P.C.R. hearing who had no familiarity with this area of law.

The Court's finality must realized at some point the Court's need to stop appointing lawyers to PCR applicants who are being subjected to lawyers who has no familiarity with criminal law, who specialized in Real Estate, and foreclosure other than criminal law who never handled PCR actions before.

The state served its return on March 3, 2010, requesting that a hearing be held. Appellant was subjected of not having a full and fair complete bite at the apple during his hearing were the lower court filed to appoint a qualified counsel to promptly assist appellant. This factual situation is semblance and is only applicable in limited circumstances to correct procedural defects were appellant being denied his one full bite at the apple. Furthermore, the lower court did not give appellant the opportunity the waiver of the right to counsel to proceed pro se or have another counsel appointed, by filing to address Appellant Motion to revive his court appointed counsel prior to his PCR hearing. see attachment Exhibit (A). When appellant motion the court to relieve his court appointed counsel off his case in June 22, 2010.

Based upon the preponderance of the evidence presented by appellant. The appellant has established the Satisfactory Charm in Richardson v. State, 659 S.E.2d 493 (2008) case to reject and discharge his court appointed counsel was so trivial of establishing the requirement set forth in Richardson v. State, 659 S.E.2d 493 (2008). Is it ironic that the state didn't take on this issue of the matter? The state hasn't offered the court any explanation as to how the error occurred or why appellant motion to relieve his counsel was not address.

The Appellant, who was seeking post-conviction relief on November 6, 2009, had the right to reject or discharge his court appointed Counsel and proceed pro se or retain his own Counsel. See Richardson v. State, 659 S.E.2d 493 (2008), while there is no Constitutional obligation to appointed Counsel in a P.C.R. matter. see Pennsylvania v. Finley, 481 U.S. 551 (1987). But in South Carolina, a PCR application presents question of law or fact requiring a hearing, and the appellant who is indigent. State law provides that Counsel must be appointed or a knowing intelligent waiver of the right to Counsel must be obtained.

See, South Carolina Code 17-27-60 (2003), Rule 71.1(d) SCRPC Rule of procedure, like statutes, should be given their plain meaning, when the text of a Rule is clear and unambiguous Judicial inquiry is complete. The plain and unambiguous language of Rule 71.1(d) mandates the appointment of Counsel for indigent PCR applications, whenever a PCR hearing is held to determine questions of law or facts. See Whitehead v. State 426 S.E.2d 315 (1992)

Moreover, appellant argues that his case should be a new landmark cases for PCR applicants under this unique circumstance that the law should be re-evaluated base upon the language set inside of Robertson v. State, 418 S.E.2d 505 (2016) which should also be applied to non-capital cases under this statute, specific when the facts fit other subdivisions, although appellant Counsel who was also deemed unqualified and as a result

deficient therefore this Court must make a determination whether under Strickland appellant was prejudice as well in violation of his Constitutional right by denying him a fair and impartial hearing, when many procedural irregularities that occurred during course of Appellant Judicial process that deprive him of due process. See Washington v. State 324 S.C. 232 (1996). Appellant states his PCR Counsel who is far from Qualified, Further, Respondent's had appellant at an Extreme Disadvantage, Not to mention this being their area of Expertise.

Statute of limitations

Additionally, Appellant reliance on Robertson v. State 418 S.C. 505 (2016) Ruling in regards to the filing within the one(1) year limitation granting a successive PCR Application to excuse any default of his Newly raised Claim of unqualified Counsel, meaning from appellant first PCR allway through his Appeals were incomplete. Respondents Cite Austin v. State 409 S.E.2d 395 (1991) Case stated that the only recognized exception to the Rule barring Claims of ineffective assistance of PCR Counsel is found in Austin. Austin is a situation were prior post-Conviction relief Counsel fails to appeal the denial of his Application, which is totally in disposition of Appellant Case before the Court today.

Appellant made the request showing in addition to the record why his new grounds for relief could not have been raised in his previous application decided in 2016. way after appellant previous application which couldn't have been earlier raised in a previous application. See. Aice v. State 409 S.E.2d 392 (1991). This when appellant first discover he could file a successive PCR application until Robertson Ruling was decided by the South Carolina Supreme Court. Just like Robertson v. State 418 S.C. 505 (2016) even though it is a death penalty case, there were a minute issue dictating allegation of ineffective assistance of PCR Counsel. Just like appellant case, but that is not appellant issue before this court today. Appellant claim are specific prior PCR Counsel deemed unqualified under the uniform Post-Conviction relief procedure act. citing S.C. Code 17-27-10-160. and failed to competently to represent appellant by inadequately raised a claim in the original PCR proceeding who was deemed unqualified by raising a claim that he waived said allegation set forth in the application at appellant PCR hearing inside the motion to reconsider per to Rule 59(c) SCRCP. at 415 S.E.2d 384 (1992)

At the PCR hearing Counsel withdrew appellant merit claim that trial Counsel was not ineffectuated for failing to object to the officer's testimony that they knew Appellant by the way Appellant walked because of the officer's previous encounter with Appellant. See post-conviction Relief transcripts page 27 line 2-25 and page 28 lines 1-6. Upon review of the trial transcripts as well, and the records Appellant would show Counsel incompetently for waiving trial Counsel ineffectiveness for failing to object to the officer's testimony identifying Appellant, by the way he walked, from previous encounter, do indeed have merit.

Prior PCR Counsel improperly with-drew appellant claim relating to the testimony of the officer during first PCR hearing. It is clear Appellant didn't enjoyed or complete adjudication on the merits of his original application on this claim.

Furthermore, when Lt. Holloway testified that he had no Appellant all of his life. This did not only bolstered Lt. Turner testimony, but that it was also undue prejudice, because they was testifying as a officer. Further Counsel never ask for a ruling on how the officer's were going to testify. Opinion from personal knowledge or professional knowledge. In viewing the identification of Lt. Turner and Lt. Holloway this opinionated testimony was not only very damaging prejudice to Appellant, but

that it was also impermissible under SCR 701, Opinion testimony by lay witness, and Rule 403 unfair prejudice violated Appellant right to a fair trial, per the U.S. Const. S.C. Const. and by Federal stander.

Moreover, Counsel filed to object or ask for a Curative instruction regarding Lt. Turner and Lt. Holloway testimony to the effect, that the witness could not give an opinion as to who they believe was on the tape, and that the Jury should Strick any such inference from they memory that the Jury should be the ones who has to draw from what they saw on the tape, but this was not done which prejudice Appellant trial.

Conclusion

Appellant request that this Court grant the petition and the case be Remand for an evidentiary hearing on the merits through a preponderance of the Credible evidence presented.

Date: Jan 16, 2019

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Certificate of Service

I, Montavis Gaines, do hereby certify that a true copy of the Appellant explanation per SCACR 243(C) brief, and a copy of the exhibits in this case have been served on Kelly Oppenheimer, at post officer Box 11549 Columbia SC 29211-1549.

Date: Jan 16, 2019

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