STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Spartanburg County

Honorable Robin B. Stilwell, Circuit Court Judge

JOHN WILLIE MACK, SR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001570

BRIEF OF PETITIONER

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ISSUE PRESENTED

The PCR court erred in denying Petitioner Mack a belated appeal from the denial of his application for DNA testing and for failing to find his DNA attorney ineffective for not filing an appeal timely; instead, the PCR judge denied Petitioner's second PCR due to Petitioner's failure to state a cognizable claim under the Post-Conviction Procedure Act because Petitioner asked for a belated appeal; Petitioner's failure to comply with the statute of limitations; and as being successive which was prejudicial to Petitioner because this was his only avenue for the DNA appeal.

STATEMENT

On April 2006, the Spartanburg County Grand Jury indicted Mack on the charges of burglary first degree and grand larceny. App. 364 – App. 367. February 22-23, 2011, Mack proceeded to trial before the Honorable J. Derham Cole and a jury. Mack was represented by Roger Poole, and the state was represented by Barry J. Barnette and Anthony C. Leibert. App. 1. The jury found Mack guilty as indicted. App. 157, ll. 1 – App. 159, ll. 11. The judge sentenced Mack to the mandatory life without parole on the burglary first degree and five years on the grand larceny. App. 168, ll. 14 – 25.

Petitioner Mack appealed his convictions and sentences which were affirmed by the Court of Appeals on April 17, 2013. State v. Mack, Op. No. 2013-UP-161(Ct. App. filed April 17, 2013).

On May 6, 2013, Petitioner Mack filed an application for post-conviction relief (PCR). The state filed a return on March 18, 2014. An evidentiary hearing was held on January 14, 23015 before the Honorable Deadra L. Jefferson. Mack was represented by Leah B. Moody, and the state was represented by Suzanne White. App. 193.

Judge Jefferson denied Mack's PCR application and dismissed it with prejudice. App. 281. Mack's PCR counsel filed a notice of appeal. The Supreme Court denied the appeal on February 1, 2018. Supp. App. 12.

On September 27, 2012 following his conviction at trial, Mack filed an application for forensic DNA testing. App. 294. On October 31, 2014, an evidentiary hearing was held in General Sessions Court before the Honorable J. Derham Cole. Petitioner Mack was again represented by Leah B. Moody, and the state was represented by Barry Joe Barnette and Anthony C. Leibert. App. 299.

Judge Cole issued an order on May 19, 2015 where he denied Mack's application for DNA testing. The judge found that "the items Mack wanted tested were previously subjected to DNA testing and further testing would not provide a more probative result." App. 317 – App. 320.

Mack filed a notice of appeal. On July 16, 2015, the Court of Appeals dismissed Mack's appeal as not timely served. Mack v. State, S.C. Sup. Ct. Order filed July 16, 2015. App. 330; App. 356.

On September 10, 2015, Petitioner Mack filed a second PCR application (2015-CP-42-3806) where he raised two issues: (1) DNA counsel, Leah B. Moody was ineffective for failure to appeal defendant's DNA application timely under the DNA Act Sec. 17-28-90(6); (2) DNA counsel was ineffective for failure to have the trial judge recuse himself from the DNA hearing when requested by the defendant. App. 321-App. 332; App. 356 – App. 357. The state filed a return and motion to dismiss on March 23, 2017. App. 333- App. 339.

An evidentiary hearing was held on June 29, 2017 before the Honorable Robin B. Stilwell. Mack was represented by Rodney Richey, and the state was represented by Valerie Giovanoli. App. 341. The PCR judge ruled on the record at the hearing and granted the state's motion to dismiss Petitioner Mack's PCR application. App. 350, ll. 11 – App. 351, ll. 25. On July 7, 2017, the PCR judge, the Honorable Robin B. Stilwell, filed an order denying Mack's PCR.

Mack's PCR counsel filed a timely notice of appeal. Counsel provided a separate accompanying explanation which provided that Petitioner Mack filed this PCR in order to obtain an appeal from his DNA testing hearing as his DNA counsel did not appeal the denial of his

request for DNA testing. Counsel wrote: "This was the only method he had to get the appeal."

application and dismissing it with prejudice. App. 354-App. 361

STANDARD OF REVIEW

Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We review questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)). The Supreme Court would review questions of law de novo with no deference to the PCR Court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018).

ARGUMENT

The PCR court erred in denying Petitioner Mack a belated appeal from the denial of his application for DNA testing and for failing to find his DNA attorney ineffective for not filing an appeal timely; instead, the PCR judge denied Petitioner's second PCR due to Petitioner's failure to state a cognizable claim under the Post-Conviction Procedure Act because Petitioner asked for a belated appeal; Petitioner's failure to comply with the statute of limitations; and as being successive which was prejudicial to Petitioner because this was his only avenue for the DNA appeal.

Relevant Facts

The main concern in this case is that Petitioner Mack has the right to a belated appeal from the denial of his DNA testing. His DNA counsel failed to file the appeal.

Two of the issues raised by Mack in his first PCR application were that his trial counsel failed to object to the DNA evidence when the state did not produce the tangible items nor pictures of the items swabbed. Mack also raised the issue of misconduct of the solicitor's office and law enforcement because the state did not turn over the blood evidence. App. 355.

Judge Jefferson found that trial counsel was not ineffective because counsel had no "good faith or legal basis" to object to the DNA testing. App. 271. Judge Jefferson also found that Mack's Brady rights were not violated as Mack failed to prove that the state suppressed any evidence. App. 279. The judge denied Mack's PCR application and dismissed it with prejudice. App. 281. The Supreme Court denied Mack's appeal on February 1, 2018. Supp. App. 12.

On September 27, 2012 following his conviction at trial, Mack filed an application for forensic DNA testing. App. 294. Mack claimed that there were two forensic analysis reports with different information. He wrote: "This dispute of DNA testing being done on the tangible

items (light switch, bookshelf, and entertainment center will constitute new evidence because pictures were said to be lost that were to show blood swab locations.) App. 296.

At the evidentiary hearing on October 31, 2014, before the Honorable J. Derham Cole. the state argued that Mack wanted the actual tangible items where the blood was found. App. 299; App. 302, ll. 1 – App. 304, ll. 10. DNA counsel explained that pictures were taken of the actual items where the blood was located. However, the pictures were lost before the case went to trial. The state produced only testimony about these items. Mack never got to see the pictures nor the actual items. Counsel told the court that Mack wanted the actual items because he wanted testing done of those items as related to the DNA. Counsel explained that Mack stated that he was innocent and it was not him. App. 304, ll. 12 – App. 306, ll. 20.

Judge Cole issued an order on May 19, 2015 where he denied Mack's request for DNA testing. The judge found that "the items Mack wanted tested were previously subjected to DNA testing and further testing would not provide a more probative result." App. 317 – App. 320.

Mack filed a notice of appeal. On July 16, 2015, the Court of Appeals dismissed Mack's appeal as not timely served. Mack v. State, S.C. Sup.Ct. Order filed July 16, 2015. App. 330; App. 356.

In his second PCR application filed September 10, 2015 (2015-CP-42-3806), Mack raised two issues: (1) DNA counsel, Leah B. Moody was ineffective for failure to appeal defendant's DNA application timely under the DNA Act Sec. 17-28-90(6); (2) DNA counsel was ineffective for failure to have the trial judge recuse himself from the DNA hearing when requested by the defendant. App. 321-App. 332; App. 356 – App. 357. The state filed a return and motion to dismiss on March 23, 2017. App. 333- App. 339.

At the evidentiary hearing on June 29, 2017 before the Honorable Robin B. Stilwell, the state told the court that they were there to address their motion to dismiss because ineffective assistance of PCR counsel was not a cognizable claim under the Post-Conviction Procedure Act. The state explained that the only exception was the granting of a belated appeal pursuant to Austin v. State, when a PCR applicant's PCR attorney failed to file an appeal. However, the state argued, Austin had not been extended to include counsel in DNA actions as DNA actions were governed by a different section of the code. The state argued that there was no precedent to extend Austin to DNA actions. The state cited the last sentence of section 17-28-60 which provided: "The performance of counsel pursuant to this part shall not form the basis for relief in any post-conviction relief proceeding." App. 341; App. 343, ll. 23 – App. 345, ll. 24.

Mack's PCR counsel argued in return that Mack had a right to appeal. Counsel cited Section 17-28-90 of the DNA Act which provided: "All rules and statutes application in criminal proceedings are available to the applicant." Counsel argued that that section gave Mack the right to have an appeal–even in a PCR case. Counsel told the court that Mack had an attorney for the DNA hearing, so he had "no mechanism of filing that appeal." App. 347, ll. 1 – 23.

PCR counsel said he did not believe that the intent of the Legislature in this statute was to preclude Mack from having an appeal. Counsel argued that in a PCR, if the PCR attorney failed to file an appeal, the defendant was entitled to a belated appeal. Counsel stated that the legislature meant the same for this DNA statute. Counsel asked for an evidentiary hearing to determine what happened with the DNA counsel regarding the appeal. App. 347, ll. 24 – App.348, ll. 21.

The PCR judge ruled on the record at the hearing and granted the state's motion to dismiss Petitioner Mack's PCR application. App. 350, ll. 11 – App. 351, ll. 25. The judge

explained that the law was "contrary to Mack's position." The judge stated that a PCR application was not the venue for challenging PCR counsel's performance. The judge also stated that further DNA testing would not be very productive as the items had already undergone DNA testing. He said that Mack just disagreed with the results. But the judge said: "I don't think that the PCR application questioning deficient conduct of the PCR counsel is appropriate." App. 350, ll. 11 – App. 351, ll. 24.

In his order issued on July 7, 2017 denying Mack's PCR application, Judge Stilwell, found that Mack's PCR application had to be dismissed because he failed to state a cognizable claim under the Post-Conviction Procedure Act at S.C. Code Section 17-27-10 to 160. The order also provided that "an allegation of ineffective assistance of counsel appointed pursuant to the 'Access to Justice Post-Conviction DNA testing Act' did not form a collateral attack on the validity of the conviction or sentence, and may not form the basis for relief in any post-conviction relief action." S.C. Code Section 17-28-60. App. 354-App.361; App. 357 – App. 358.

The judge also ruled that Mack's application had to be dismissed for failing to comply with the Statute of Limitations as it was filed more than one year beyond the expiration of the statutory filing claim. The judge wrote that Mack was convicted in 2011; and he filed this PCR application September 10, 2015. App. 358 – App. 359.

The PCR judge then ruled that this application was successive to the first PCR application in that it could be interpreted as attacking the underlying convictions. App. 359. The order provided that Mack could have raised the new grounds for relief in his prior post-conviction relief application. App. 360.

Mack's PCR counsel filed a timely notice of appeal. Counsel provided a separate accompanying explanation which provided that Petitioner Mack filed this PCR in order to obtain

an appeal from his DNA testing hearing as his DNA counsel did not appeal the denial of his request for DNA testing. Counsel wrote: "This was the only method he had to get the appeal." See Notice of Appeal Explanation. App. 363.

Discussion

In 2008, the South Carolina General Assembly passed the Access to Justice Post-Conviction DNA Testing Act to permit incarcerated individuals, who had been convicted of certain offenses, access to DNA testing. On January 1, 2009, the Act became effective. S.C. Code Ann. § 17–28–10, et seq.

The Access to Justice Post-Conviction DNA Testing Act provides in 17-28-30(A):

A person who pled not guilty to at least one of the following offenses, was subsequently convicted of or adjudicated delinquent for the offense, is currently incarcerated for the offense, and asserts he is innocent of the offense may apply for forensic DNA testing of his DNA and any physical evidence or a biological material related to his conviction or adjudication

S.C. Code Section 17-28-30(A).

Therefore, to apply for forensic DNA testing under this subsection, a person must satisfy four requirements: (1) the person must have pled not guilty to an enumerated offense; (2) the person must have been convicted of the offense; (3) the person must be incarcerated for the offense; and (4) the person must assert his innocence of the offense.

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). Under the plain meaning rule, the court should not alter the meaning of a clear and unambiguous statute. In re Vincent J., 333 S.C. 233, 235, 509 S.E.2d 261, 262 (1998) (citations omitted). Where the statute's language is plain and unambiguous, conveying a clear and definite meaning, the rules of statutory interpretation are not needed and the court should not impose another meaning. Id. (citing Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995)).

S.C. Code Section of the Uniform Post-Conviction Procedure Act provides instances when a person may institute the PCR proceeding. Section (B) provides:

"This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of **direct review** [emphasis added] of the sentence or conviction.

The state in their argument against a belated appeal for Mack cited the last sentence of Section 17-28-60 which provides: "The performance of counsel pursuant to this article shall not form the basis for relief in any post-conviction relief proceeding."

PCR counsel then cited Section 17-28-90 (A) which provides: "All rules and statutes applicable in criminal proceedings are available to the applicant and the solicitor or attorney general as applicable."

Section 17-28-90 (G) provides:

> The applicant and the solicitor or attorney general, as applicable, shall have the right to appeal a final order denying or granting DNA testing by a writ of certiorari to the Court of Appeals or the Supreme Court as provided by the South Carolina Appellate Court Rules.

In Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), the Supreme Court held that the defendant alleged in his second PCR application that he expressed the desire for a review of the denial of his first PCR application but that his counsel failed to timely seek review. He then claimed ineffective assistance of counsel thus requiring a remand for an evidentiary hearing on the issue of whether he had requested a review and was denied the opportunity to seek appellate review. The Court remanded Austin's case for an evidentiary hearing.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper

measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra.*

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

DNA counsel was ineffective for not timely filing an appeal for Petitioner Mack following the denial of his DNA application. Mack was entitled to an appeal. The PCR judge erred in ruling that PCR was not appropriate for ineffective assistance of PCR counsel. DNA counsel was not a PCR counsel as the state made very clear during their argument that the DNA Act was in a separate code from the PCR Procedure Act. Therefore, DNA counsel would be separate from a PCR counsel.

Although the state argued that Austin was not extended to DNA appeals, Petitioner Mack had no other avenue for an appeal from the DNA hearing. His PCR counsel made this clear in the notice of appeal explanation.

The PCR judge erred in ruling that Mack failed to cite a cognizable claim under the PCR Procedures Act. Although Mack's claim is under the DNA Act he still met a claim pursuant to the PCR Act. Section 17-27-20 (A) (4) provides that where exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice. Mack continued to proclaim his innocence and that the DNA testing done previously was

incorrect. Mack was sentenced to life in prison. He deserves to pursue every chance that the state made a mistake.

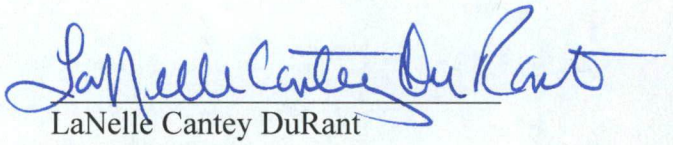
The PCR judge erred in ruling that Mack's PCR application was not in compliance with the statute of limitations without considering the fact that Mack first filed his DNA application in 2012 following his conviction at trial. The point of the second PCR was the DNA ruling without allowing him an appeal.

The PCR judge erred in ruling that this second PCR was successive. Mack had not made this claim of being denied an appeal from his DNA hearing previously.

Mack should be allowed a belated appeal from the denial of his DNA hearing. The DNA hearing was held in General Sessions with the Solicitor prosecuting the case unlike a PCR hearing.

CONCLUSION

Based on the above, Petitioner Mack's case should be remanded for an appeal of the denial of his application for DNA testing.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of April, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
APR 05 2019
SC Court of Appeals

Appeal from Spartanburg County

Honorable Robin B. Stilwell, Circuit Court Judge

JOHN WILLIE MACK, SR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner has been served on John Willie Mack, Sr., #257219, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 5th day of April, 2019.

LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 5th day of April, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.