

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Greenville County

COURT OF COMMON PLEAS

G. Edward Weimaker, Circuit Court Judge

Case No. 2012-CP-23-0811

Shannon Todd, # 236516, Petitioner,

- vs -

STATE OF SOUTH CAROLINA, Respondent.

APPENDIX

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P.O. Box 11549
Columbia, S.C. 29211

Shannon Todd, # 236516
Livesay C.I.
P.O. Box 580
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Petitioner Pro se

Attorney for Respondent

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S.C. SUPREME COURT

INDEX *

Post-conviction Application	1
Return and Motion to Dismiss	13
MEMORANDUM IN OPPOSITION TO RETURN AND MOTION TO DISMISS.	16
FINAL ORDER OF DISMISSAL	22

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It should be noted that the lower court did not conduct an evidentiary hearing and therefore no transcript exists. The Appendix consists only of the Application, motions, Memorandums and orders filed in this action.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

G. EDWARD WEIMAKER, Judge

CASE NO. 2012-CP-23-0811

Shannon Todd, #236516, Petitioner,

- vs -

STATE OF SOUTH CAROLINA, Respondent.

PETITION FOR WRIT OF CERTIORARI

OTHER COUNSEL OF RECORD:

KAREN C. RATIGAN
Assistant Deputy Attorney General
P.O. Box 11549
Columbia, S.C. 29211

Shannon Todd, #236516
LIVESAY C.I.
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Question Presented

DID THE CIRCUIT COURT Judge ERR in this post-conviction action, by dismissing this action under S.C. Code § 17-27-45(a) instead OF construing IT under § 17-27-45(b), where the lower COURT Failed to conduct an evidentiary hearing and no evidence was contained in the Record to dispute Petitioner's sworn statements Found in his PCR Application that demonstrated that the action could NOT have been brought sooner?

STATEMENT OF CASE

In 1998 Petitioner and his wife were involved in a heated argument which the neighbors overheard and called the police. (Appendix pg. 7, paragraph 1). There was no physical contact but for some unknown reason, the responding officer arrested the Petitioner and charged him with criminal domestic violence, (warrant # 25540AL) (Id. at 2). Following the investigation and interview with Petitioner's wife, in which she informed them that there was no battery, assault, or physical contact and that they had simply been arguing over bills, the investigators determined that there was insufficient evidence and Petitioner was informed that the charge had been dismissed, (Id. at 3).

It is believed that a magistrate judge went ahead and convicted the Petitioner in his absence and without providing Petitioner with an opportunity to defend himself and without notifying him that he had been convicted so that he could make a timely challenge to the conviction. (Id. at 4). It is possible that the court did not convict Petitioner in his absence and instead SLED and SCDC have made a clerical error and incorrectly listed the offense as

a conviction. (Id. at 5).

In 2011, Petitioner was incarcerated in SCDC on an unrelated offense and wanted to serve his sentence at a local County Facility, Petitioner Filed the appropriate paperwork with his caseworker and was informed that he was not eligible to go to a county facility because of a conviction for CAV from December 20, 1998. This was the first time Petitioner had ever been informed that there was an alleged conviction on warrant # 25540AL. (Id. at 6).

The Petitioner contended that if he was convicted in his absence, the judges actions deprived him of his constitutional right to a jury trial, the right to confront witnesses against him and to offer defenses to the charge as well as the statutory right to appeal or file a collateral attack of the conviction. (Id. at 7).

Petitioner Filed this Action pursuant to South Carolina Code, § 17-27-45(c) because "IT WAS Filed within one (1) year OF the discovery" OF the Factual and legal basis FOR the claim. (Id. at 8).

The Respondents Filed a Return and Motion to Dismiss contending that the Action was NOT

brought within one (1) year of the conviction as required by § 17-27-45(a), (Appendix pg. 13).

The Petitioner responded in his "Memorandum in Opposition to the States Return and motion to dismiss", (Appendix pg. 16), and contended that the facts and legal arguments found in his sworn application for post-conviction relief, (Appendix pgs. 1-12), clearly demonstrate that an external factor prevented him from bringing his action sooner and that he did not discover the factual and legal basis for his claims until recently.

The circuit court Judge responded with his order of dismissal and ignored Petitioner's sworn facts that he was unaware of the conviction. Even though this was the only evidence in the record concerning "knowledge" of the conviction and the "external factors" which prevented Petitioner from seeking relief sooner, the Judge failed to conduct a hearing into the matter and simply made a boiler-plate claim that Petitioner's allegations were not credible even though there were no facts in dispute. The Judge failed to indicate how Petitioner could have known

OF the conviction, OR SOUGHT RELIEF SOONER, IF he were tried in his absence and NO one every notified him OF the conviction until years later.

Petitioner believes that the lower COURT incorrectly applied § 17-27-45(a) to this Action instead OF § 17-27-45(c). The COURT Failed to recognize that the non-disputed SWORN FACTS constitute an external FACTOR and Justification FOR failing to bring the action SOONER and authorize the bringing OF the action within (1) year OF the discovery OF the Factual and legal basis FOR the claims. FOR these Reasons, Petitioner seeks a CERTIORARI Review.

ARGUMENT

DID THE CIRCUIT COURT Judge ERR in this post-conviction action, by dismissing this Action under S.C. Code § 17-27-45(a) instead of construing IT under § 17-27-45(c), where the LOWER COURT Failed to conduct an evidentiary hearing and no evidence was contained in the Record to dispute Petitioners sworn statements Found in his PCR Application that demonstrated that the action could NOT have been brought sooner?

In conducting PCR Actions, CIRCUIT COURT Judges have fallen into the habit of Refusing to consider Legislatures intent when dealing with the timely filing of Actions. PCR Judges have somehow Formed the belief that Legislature intended all PCR Applications be filed within one (1) year OF the conviction as outlined by S.C. Code, § 17-27-45(a).

However, Legislature recognized that in some cases, there may be external factors that prevent a person from meeting that deadline and authorized the Filing of PCR Applications "within one (1) year OF the discovery" OF the Factual and legal basis FOR the claim. SEE: S.C. Code, § 17-27-45(c).

In the case sub-judice, the Petitioners sworn and undisputed FACTS contained in his Application demonstrate that: (1) he was told by investigators that the charge had been dismissed; (2) IF he were convicted, he was tried in his absence and no one ever informed him OF his conviction; (3) IN 2011 he was incarcerated on an unrelated matter and sought to serve his time in a local County Facility; (4) he was informed that he was NOT eligible because OF a prior conviction FOR CDV from 1998; and (5) this was the first time he had ever heard about the alleged conviction.

These FACTS were undisputed and the Judge should NOT have disregarded them or found them to be non-credible, when he did not conduct a hearing to view Petitioners testimony Regarding these FACTS, and there was no FACTS in dispute because no evidence contradicted Petitioners sworn claims. SEE: e.g. Smith v. State, 369 S.C. 135, 631 S.E.2d 260 (2006) (The defendant's undisputed testimony that he would not have plead guilty to the charges but FOR trial counsels alleged misadvice is sufficient to prove that defendant would NOT have plead guilty); DAVIS v. Zahradnick, 600 F.2d 458, 460 (4th Cir.

1979) (Recognizing that in civil cases, a Plaintiff's "VERIFIED" complaint [or Application] constitutes an affidavit in opposition to Summary Dismissals which create genuine issues of Material Fact precluding Summary Judgment).

It is a well recognized rule that procedural defaults should be waived if cause and prejudice exist or if some external factor prevented the defendant from bringing his action sooner. MURRAY v. CARRIER, 477 US 478 (1986); Wainwright v. Sykes, 433 US 72 (1977); Alexander v. Maryland, 719 F.2d 1241, 1246 (4th Cir. 1983).

So too, South Carolina has recognized that procedural defaults should be overlooked when an explanation or justification for the delay in seeking PCR relief exists. McElrath v. State, 276 S.C. 282, 277 S.E.2d 890 (1981) (noting that the defendant did not allege an explanation or justification for the delay); Butler v. State, ___ S.C. ___, 397 S.E.2d 87, 88 (1990) (allowing relief because only recognized ground for relief after trial, appeal and previous denial of PCR).

Likewise, the State could not show any real prejudice from the delay - such as a

TRANSCRIPT that is no longer available - because a transcript never existed and they are in the same position they would have been in had the PCR ~~been~~ Filed sooner. SEE: Alexander, supra, at 1246 (any prejudice that exists should not be used to prevent attack where the delay is caused by an external factor not attributable to the defendant); Ferguson v. State, 382 S.C. 615, 677 S.E.2d 600 (2009) (statute of limitations should be excused where failure to timely file PCR was result of mental incompetency).

Finally, The PCR Judges, decision should not be upheld when there is no evidence in the record to support it, or its claims that the action could have been brought sooner, Jeter v. State, ___ S.C. ___, 417 S.E.2d 594, 596 (1992) (recognizing that the South Carolina Supreme Court will uphold the PCR Courts decision if there is any evidence of probative value supporting its decision); but see: Brazell v. State, 278 S.C. 253, 294 S.E.2d 343 (1982) (Supreme Court reversed PCR Judges order dismissing application under doctrine of Laches where record did not support finding of prejudice to the state).

In the case sub-judice, the Magistrate's failure to notify Petitioner of an upcoming trial; her act of convicting Petitioner in his absence and failure to notify Petitioner of the conviction afterwards, constitutes "Interference by officials" and justifies cause for excusing the statute of limitations. Brown v. Allen, 344 U.S. 443, 486 (1953).

The Record simply does not support the PCR Judges decision because the record does not even suggest how Petitioner could have known of the conviction prior to its discovery in 2011 or how he could have discovered the factual and legal basis for his claims sooner. Moreover, the Record does not demonstrate how the state could have been prejudiced by the delay - when no transcript ever existed - and therefore could not have been lost, or that even if prejudice did exist, that it was not completely attributable to interference by officials and not that of Petitioner.

CERTIFICATE OF SERVICE

I, Shannon Todd, do hereby CERTIFY that I did cause the foregoing "Petition For writ of certiorari" and the Attached "Appendix" to be served upon opposing counsel this 3 day of November, 2012, by placing a true and correct copy in the prison mail system, with proper postage affixed thereto, and addressed as follows;

Karen C. Rutigan
Assistant Deputy Attorney General
P.O. Box 11549
Columbia, S.C. 29211

s/ Shannon Todd
Shannon Todd.

Notary Alesia Cuffman

Commission Expires 9-29-21

Conclusion

For the foregoing reasons, Petitioner believes that this Honorable Court should grant the WRIT OF CERTIORARI and reverse the ACR COURTS order dismissing Petitioners action.

~~October~~ November 3, 2012

s/ Shannon Todd

Shannon Todd, 236516
LIVESAY C.I.
P.O. Box 580
Una, S.C. 29378

Petitioner Pro se

Notary Alicia Coffman

Commission Expires 9-29-21

FORM 5

STATE OF SOUTH CAROLINA)
)
County of GREENVILLE)
)
SHANNON TODD, # 236516)
Full name and prison number (if any) of Applicant)

IN THE COURT OF COMMON PLEAS

ENTERED COMPUTER

v.)

APPLICATION FOR

State of South Carolina)
)
)
)
)

POST-CONVICTION RELIEF

2012-CP-23- 00811

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INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Livesay Correctional Institution
P. O. Box 580, Una, South Carolina 29378
2. Name and location of Court which imposed sentence Unknown
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) Warrant # 25540AL
(b) _____

SCANNED

App. 1

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) 12/20/1998 \$25.00 fine
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____ N/A
- (b) after a plea of not guilty _____ N/A
- (c) after a plea of nolo contendere _____ N/A
7. Did you appeal from the judgment of conviction or the imposition of sentence?
NO
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. _____ N/A
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. _____ N/A
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. _____ N/A
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____ N/A
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) Apparently I was convicted in my absence and had no idea I had been convicted and therefore never placed on notice that I needed to appeal or challenge the conviction.
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Applicant was deprived of his right to a jury trial.
- (b) Applicant was deprived of his right to put up a defense.
- (c) SLED and SCDC are keeping inaccurate records.
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) N/A (See Attached)
- (b) (See Attached)
- (c) (See Attached)
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

(c) the disposition thereof:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

(d) the date of each such disposition:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. N/A
- ii. N/A
- iii. N/A

(b) the proceedings in which each ground was raised:

- i. N/A
- ii. N/A
- iii. N/A

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) If I were convicted, I was never notified of the conviction and just recently discovered through SCDC
- (b) that I was allegedly convicted of this offense. I am
- (c) bringing this challenge at the first opportunity since

17. Were you represented by an attorney at any time during the course of: the discovery.

- (a) your arraignment and plea? No
- (b) your trial, if any? No
- (c) your sentencing? No
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? No
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? No

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

- i. N/A
- ii. N/A
- iii. N/A

(b) the proceedings at which each such attorney represented you:

- i. N/A
- ii. N/A
- iii. N/A

19. State clearly the relief you seek in filing this application:

The reversal and a new trial if a conviction actually
exists and the removal and expungement of the alleged
conviction if it is simply a clerical error.

20. Are you now under sentence from any other court that you have not challenged?

Yes

STATE OF SOUTH CAROLINA)
)
County of Greenville)

VERIFICATION

I, Shannon Todd, 236516, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Shannon Todd

Shannon Todd, #236516
Livesay C.I.
P.O. Box 580
Una, S.C. 29378

SWORN to and subscribed before me this 30
day of January, 2012.

Alicia Coffman (L.S.)
Notary Public

My Commission Expires: 9/29/2021

STATEMENT OF FACTS

1. In 1998 Applicant and his wife were involved in a heated argument which the neighbors overheard and called the police.

2. There was no physical contact but for some unknown reason, the responding officer arrested the Applicant and charged him with criminal domestic violence (warrant # 25540AL).

3. Following an investigation and interview with Applicants wife, in which she informed them that there was no battery, assault, or physical contact and that they had simply been arguing over bills, the investigators determined that there was insufficient evidence and Applicant was informed that the charge had been dismissed.

4. Upon information and belief, a magistrate judge went ahead and convicted the Applicant of the offense in his absence and without providing Applicant with an opportunity to defend himself. Applicant was likewise never informed by the court, clerk or anyone else that he had been convicted in his absence and if he wanted to challenge the conviction, he must file the appropriate paperwork in a timely manner.

5. It is possible that the court did not convict the Applicant in his absence and instead SLED and SCDC have made a clerical error and incorrectly listed the offense as a conviction.

6. In 2011, Applicant was incarcerated in SCDC on an unrelated offense and wanted to serve his sentence at a local County facility. Applicant filed the appropriate paperwork with his caseworker and was informed that he was not eligible to go to a County facility because of a conviction for CDV from December 20, 1998. This was the first time Applicant had ever

been informed that there was an alleged conviction on warrant # 25540AL.

7. If Applicant was convicted in his absence, the judges actions deprived Applicant of his constitutional right to a jury trial, the right to confront witnesses against him and to offer defenses to the charge as well as the statutory right to appeal or file a collateral attack within one (1) year of the conviction.

8. The Applicant has brought this action pursuant to South Carolina Code, § 17-27-45(c) because "it was filed within one (1) year of the discovery" of the factual and legal basis for the claim.

I. APPLICANT WAS DEPRIVED OF HIS RIGHT TO A JURY TRIAL.

The Sixth Amendment guarantees a defendant a right to a jury trial, Duncan v. Louisiana, 391 U.S. 145, 149 (1968), but the right may be waived if the waiver is knowingly and intelligently made. Singer v. United States, 380 U.S. 24, 34 (1965). The waiver of rights will not be presumed from a silent record. Boykin v. Alabama, 395 U.S. 238, 243 (1969); United States v. Gallop, 838 F.2d 105 (4th Cir. 1988)(courts must entertain every reasonable presumption against waiver of constitutional rights).

II. APPLICANT WAS DEPRIVED OF HIS RIGHT TO PUT UP A DEFENSE THAT WOULD HAVE PREVENTED HIS CONVICTION.

The Sixth Amendment guarantees a defendant the opportunity to confront witnesses and otherwise present a defense. State v. Gillian, 360 S.C. 433, 449-50, 602 S.E.2d 62, 71 (Ct. App.

2004); State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401, 402 (1986) (the due process clause of the Fourteenth Amendment basically "Constitutionalizes" the right to present a defense in an adversary criminal trial); California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)(criminal defendants must be provided a meaningful opportunity to present a complete defense); State v. Hutton, 595 S.E.2d 876, 881 (Ct. App. 2004) (same); State v. Harris, 427 S.E.2d 909, 912 (Ct. App. 1993).

In the case sub-judice, Applicant was accused of Criminal Domestic Violence. The responding officer admitted that when he arrived, he did not witness any physical contact, had no witnesses who saw any physical contact and there were no bumps, scratches or bruises seen on anyone. Further investigation revealed that Applicant's wife informed investigators that there had been no physical contact between her and Applicant and that they had only argued over bills.

Had Applicant been given a jury trial he would have brought out this testimony and evidence and most importantly, the lack of evidence to support the officers accusations which would have resulted in the granting of a directed verdict of acquittal motion.

The Judges actions and failure to notify Applicant of the conviction was an external factor that prevented him from seeking redress sooner. Murray v. Carrier, 477 U.S. 478 (1986)(procedural defaults should be waived if cause and prejudice exist or some external factor prevented the defendant from bringing his action sooner); Wainwright v. Sykes, 433 U.S. 72 (1977)(same); Alexander v. Maryland, 719 F.2d 1241, 1246 (4th Cir. 1983).

Moreover, where the evidence indicates that the defendant is actually innocent, relief should be granted "even without a showing of cause for procedural default". Murray, supra, at 496. In such cases, the principals of finality must yield to imperative of correcting fundamentally unjust incarceration. Engle v. Isaac, 456 U.S. 107, 135 (1982).

So too, South Carolina has recognized that procedural defaults should be overlooked when an explanation or justification for the delay in seeking PCR relief exists. McElrath v. State, 276 S.C. 282, 277 S.E.2d 890 (1981); Butler v. State, ___ S.C. ___, 397 S.E.2d 87, 88 (1990)(allowing relief because only recognized ground for relief after trial, appeal and previous denial of PCR).

Likewise, the State cannot show any real prejudice from the delay - such as a transcript is no longer available - because a transcript never existed and they are in the same position they would have been in had a timely appeal or collateral attack been made. See: Alexander, supra, at 1246 (any prejudice that exists should not be used to prevent attack where the delay is caused by an external factor not attributable to the defendant).

III. IN THE EVENT THAT APPLICANT WAS NOT CONVICTED IN HIS ABSENCE, SLED AND SCDC ARE KEEPING INCORRECT RECORDS WHICH ARE DEPRIVING HIM OF DUE PROCESS OF LAW IN VIOLATION OF THE CONSTITUTION.

Prison officials are required to keep accurate records. Sellers v. Bureau of Prisons, 959 F.2d 307 (D.C. Cir. 1992). Misinformation in a prisoners record can state a Constitutional violation under due process.

Paine v. Baker, 595 F.2d 197, 201-02 (4th Cir.), cert. den., 444 U.S. 925 (1979). Prison officials can be held responsible for false information contained in an inmates records and should be corrected. Compton v. SCDC, Opinion number 26968, (filed May 2, 2011).

Since it is possible that Applicant has not been convicted of this CDV offense, but rather it shows up as a conviction as a result of a clerical error, Applicant requests that SLED and SCDC be ordered to make the appropriate correction.

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Shannon Todd, # 236516, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Shannon Todd
Shannon Todd, ^{Applicant} # 236516

SWORN or affirmed to and subscribed before me this

30 day of January, 2012.

Alicia Coffman
Notary Public

My Commission Expires: 9/29/2021

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Shannon Todd,)
 S.C.D.C. No. 236516,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2012-CP-23-0811

RETURN AND MOTION TO DISMISS

FILED - CLERK OF COURT
 GREENVILLE COUNTY
 2012 JUN -9 PM 2:52

The Respondent, making its Return to the Application for post-conviction relief filed February 2, 2012, would respectfully show this Court:

I.

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court on a conviction unrelated to this post-conviction relief action. The Applicant was arrested on November 15, 1997 for criminal domestic violence (Ticket 25540AL). On February 20, 1998, the Applicant was found guilty after a bench trial. The Honorable Diane D. Cagle sentenced the Applicant to a fine of \$25.00. The Applicant did not file an appeal.

II.

In his current application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Applicant was deprived of his right to a jury trial."
2. "Applicant was deprived of his right to put up a defense."
3. "SLED and SCDC are keeping inaccurate records."

Attached herewith and incorporated herein by reference are the records of the West Greenville Summary Court regarding the subject conviction and the Applicant's records from the

Department of Corrections.

III.

The Respondent submits that this Application for Post-Conviction Relief should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160. S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offense he challenges in this Application on February 20, 1998. This Application was filed on February 2, 2012, which was well after the statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (1985) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, the Respondent requests that this Court summarily dismiss the application for post conviction relief for failure to file within the time mandated by the Post Conviction Procedure Act.

IV.

The Respondent denies each allegation that is not expressly admitted, qualified or

explained.

V.

WHEREFORE, Respondent moves to summarily dismiss the application because it was filed after the statute of limitations had expired.

Respectfully submitted,

ALAN WILSON
Attorney General

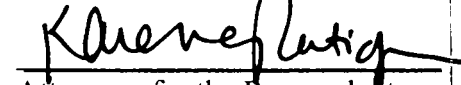
JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY ELLIOTT
Senior Assistant Deputy Attorney General

KAREN RATIGAN
Assistant Deputy Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for the Respondents

June 28, 2012

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF GREENVILLE)
 Shannon Todd, # 236516,) C/A NO. 2012-CP-23-0811
 Applicant,)
 - VS -)
) APPLICANTS MEMORANDUM
 STATE OF SOUTH CAROLINA,) IN OPPOSITION TO THE
 Respondent,) STATES RETURN AND MOTION
) TO DISMISS

FILED-CLERK
 GREENVILLE CO S.C.
 PAUL E. WICKHAM

2012 JUL 18 AM 10:14

The Respondents have filed a Return and Motion to Dismiss the Applicants post-conviction application. The basis of the States dispositive motion is that applicant has failed to meet the Statute of Limitations for bringing the action within one year of the conviction pursuant to S.C. Code Ann. §17-27-45(A).

In contrast, the Applicant contends that an external factor prevented him from bringing his action within one year of the conviction because: (1) he was informed that the charge had been dismissed; (2) he was never sent any notification that he needed to appear in court for a trial; (3)

①

App. 16

never notified that he had been convicted and thus never placed on notice that if he wished to challenge the conviction, he must do so within one year.

Only years later, while incarcerated on an unrelated offense, was Applicant notified that he had the challenged conviction which prevented him from being eligible to work at a local County Facility. Applicant immediately filed this action within one year of the discovery of the conviction.

The Applicant believes that under the unique facts of this case he should be entitled to proceed with his action because the Judge and/or clerk of courts failure to notify Applicant of the conviction is an external factor that prevented him from seeking redress sooner.

The United States Supreme Court has recognized that procedural defaults should be waived if cause and prejudice exist or some external factor prevented the defendant from bringing his action sooner. Murray v. Carrier, 477 U.S. 478 (1986); see also; Alexander v. Maryland, 719 F.2d 1241, 1246 (4th Cir. 1983) (any prejudice that exists should not be used to prevent attack where the delay is caused by an external factor not attributable

(2)

to the defendant). In such cases, the principals of Finality must yield to imperative of correcting fundamentally unjust incarceration. Engle v. Isaac, 456 U.S. 107, 135 (1982).

So too, the South Carolina courts have recognized that procedural defaults should be overlooked when an explanation or justification for the delay is seeking PCR relief exists. McElreath v. State, 276 S.C. 282, 277 S.E.2d 890 (1981); Butler v. State, — S.C. —, 397 S.E.2d 87, 88 (1990) (allowing relief because only recognized ground for relief after trial, appeal and previous denial of PCR).

Contrary to the states argument, our own legislature recognized that external factors might somehow prevent an applicant from meeting the one year statute of limitations set by § 17-27-45(a) and authorized PCR Applications under § 17-27-45(c) if they are filed "within one (1) year of the discovery" of the factual and legal basis for the claim.

Applicant maintains that he brought this action in a timely manner and within "days" of discovering the alleged conviction and the legal basis for the claim. Moreover, it is not altogether certain that applicant was ever convicted at all. It is possible that applicant was never convicted, that someone simply made a

(3)

clerical error at Judge Diane Cagles OFFICE, at SLED'S RECORDS DEPARTMENT OR EVEN WITHIN SCOC. APPLICANT HAS NEVER SEEN ANY PAPERWORK WHICH INDICATES HE WAS ACTUALLY CONVICTED OF THE OFFENSE, SINCE IT IS LIKELY THAT APPLICANT HAS NOT ACTUALLY BEEN CONVICTED OF THE CHALLENGED OFFENSE, BUT IT IS BEING USED TO ENHANCE OR RESTRICT APPLICANT ON HIS CURRENT CONVICTION, THIS COURT SHOULD RETAIN JURISDICTION UNDER THE STATE HABEAS CORPUS ACT AND REVIEW THIS CLAIM AS A NON-CONVICTION WRONGFUL IMPRISONMENT CLAIM UNDER HABEAS CORPUS.

The South Carolina POST-CONVICTION RELIEF ACT AUTHORIZES CHALLENGES TO "CONVICTIONS" AND "SENTENCES". S.C. CODE § 17-27-20(A). THE ACT WAS INTENDED TO BE EXCLUSIVE, TAKING "THE PLACE OF ALL OTHER COMMON LAW, STATUTORY OR OTHER REMEDIES HERETOFORE AVAILABLE FOR CHALLENGING THE VALIDITY OF A CONVICTION OR SENTENCE". Id. at § 17-27-20 (B)

WHERE A PERSON IS WRONGFULLY INCARCERATED OR SUFFERING FROM THE EFFECTS, MISTAKES OR UNCONSTITUTIONAL ACTIONS, A PRISONER MAY BRING A STATE HABEAS CORPUS ACTION. Ex parte Gilchrist, 15 S.C.L. (4 McCord) 233, 235 (1827) (THE OBJECT OF THE HABEAS CORPUS ACT WAS TO "SECURE CITIZEN FROM ILLEGAL AND ARBITRARY IMPRISONMENT"); Sullivan v. State, 251 S.C. 53, 159 S.E.2d 918-19 (1968)

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(Almost any Constitutional Claim may be heard in habeas).

In other words, today, A person who is challenging a "conviction" and "sentence" must do so in a PCR.

However, a person who is challenging his wrongful imprisonment where no actual conviction or sentence took place, may do so in a habeas corpus.

Simply put, Applicant requests that this Court deny the states motion to dismiss and conduct a hearing to determine whether applicant was actually ever convicted. IF applicant were convicted in his absence, the Court should allow the action to proceed under § 17-27-45(c) because external factors prevented him from bringing the action sooner and it was in fact brought within one year of the discovery of the factual and legal basis for the claim.

IF Applicant were not convicted, applicant suggests this Court should construe his action as a state habeas corpus and allow it to proceed to challenge his illegal, arbitrary and unconstitutional effects of the mistakes, clerical errors or known acts of harassment and retaliation by court officers, SLED agents or SCDC personell who have falsified his records in an attempt to further punish applicant for his legal activities.

(5)

WHEREFORE, Premises considered, Applicant
PRAYS that this COURT will deny the Respondents
Motion to Dismiss as a Matter of Law.

Respectfully submitted,

July 2, 2012

5/ Shannon Todd #236516
Shannon Todd, #236516
Livesay C. I. N5 -
P.O. Box 580
Una, SC 29378

FILED-CLERK OF COURT
GREENVILLE CO SC
PAUL WICKENS
2012 JUL 18 AM 10:14

CERTIFICATE OF SERVICE

I, Shannon Todd, hereby certify that I did
Cause the Foregoing to be served upon opposing
Counsel this _____ day of July, 2012, by placing
a true and correct copy in the U.S. mail, with
proper postage affixed thereto, and address as
follows: KAREN RATIGAN, Assistant Deputy
Attorney General, P.O. Box 11549, Columbia,
S.C. 29211

Alicia Hoffman
Notary
9-29-2021
Expiration

5/ Shannon Todd #236516
Shannon Todd #236516
(6)