

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable J. Derham Cole, Circuit Court Judge

ROBERT A. BAKER,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

JUL 08 2019

S.C. SUPREME COURT

RESPONDENT

APPELLATE CASE NO. 2018-001854

PETITION FOR WRIT OF CERTIORARI

VICTOR R SEEGER
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

ORIGINAL

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ISSUE PRESENTED

Whether the post-conviction relief (PCR) court erred in dismissing Petitioner's PCR application for failure to prosecute when the state claimed that it, "had no indication from [Petitioner] what allegations he wanted to pursue at PCR," where there was no showing of unreasonable neglect demonstrated by Petitioner, and where Petitioner's amended PCR application had well defined allegations of ineffective assistance of counsel that put the state on notice as to the allegations he was going to pursue?

STATEMENT

During the July 2010 term, the Lexington County Grand Jury indicted Petitioner on four counts of criminal sexual conduct with a minor in the second degree and two counts of lewd act upon a child. App. 6, ll. 17 – 22.

On July 15, 2010, Petitioner pled guilty before the Honorable R. Knox McMahon. App. 1. David M. Mauldin represented Petitioner. Id. Debra B. Moore represented the state. Id. As a result of this guilty plea, Petitioner violated his probation¹. App. 4, ll. 4 – 9.

At the plea hearing Solicitor Moore explained the negotiated sentence was that, “[Petitioner] is pleading to six indictments... we have also entered into a negotiated 30-year sentence that we would ask Your Honor to consider.” App. 14, ll. 9 – 21.

Judge McMahon accepted Petitioner’s guilty plea was freely, voluntarily, knowingly, and intelligently made. App. 26, ll. 8 – 15. Judge McMahon sentenced Petitioner to twenty years’ imprisonment for the criminal sexual conduct with a minor charges and ten years’ imprisonment for the lewd act with a minor charges, to run consecutive to one another. App. 31, l. 8 – 32, l. 9.

Judge McMahon found that Petitioner willfully violated his probation and revoked Petitioner in full. App. 32, ll. 10 – 15. He said, “whatever maximum amount I can sentence him to, consecutive on that.” Id.

On August 23, 2010 an order was issued clarifying Petitioner’s sentence. App. 43. The order explained that Petitioner’s sentence, including the probationary sentence, totaled forty years’ imprisonment. Id.

¹ In 2006 Petitioner pled guilty to assault and battery of a high and aggravated nature (ABHAN). App. 24, ll. 11 – 19. As a result of the 2006 guilty plea, Petitioner was sentenced to ten years’ imprisonment suspended to five years’ probation. Id. Petitioner acknowledged that the present guilty plea would result in a willful violation of his probation. App. 24, l. 23 – 25, l. 4.

Petitioner filed a direct appeal, and on March 7, 2012, the Court of Appeals in an unpublished opinion affirmed his convictions. State v. Baker, No. 2012-UP-159 (S.C. Ct. App. Mar. 7, 2012); App. 88, ll. 14 – 22. Petitioner filed an application for post-conviction relief (PCR) on March 12, 2012. App. 34 – 42.

The state filed its Return on July 10, 2012. App. 44 – 47. In its Return the state argued that Petitioner’s PCR application should be dismissed for being untimely pursuant to S.C. Code Ann § 17-27-45(a), which requires PCR applicants to file their PCR applications 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 appeal, whichever is later.” Id.

On July 7, 2015, Petitioner filed an amended PCR application with the allegations that plea counsel failed to have Petitioner’s competency evaluated; plea counsel failed to advise Petitioner about how the consequences of his guilty plea would be affected by his probationary sentence; and plea counsel failed to obtain Petitioner’s medical records from the Lexington County Detention Center. App. 49 – 50. Petitioner’s amended PCR application had no ambiguity regarding the allegations of ineffective assistance of counsel; therefore, the state should have been on notice as to what Petitioner was going to argue at PCR.

On July 9, 2015, the state filed an Amended Return and Motion to dismiss that stated Petitioner’s PCR application should still be dismissed for being submitted untimely pursuant to S.C. Code Ann § 17-27-45(a). App. 53 – 56. On September 12, 2015, Petitioner filed a supplement to the Amended PCR application further explaining his allegations of ineffective assistance of counsel. App. 58 – 62. He explained in the supplement that the South Carolina

Department of Corrections (SCDC) was preventing Petitioner from receiving mail, from using the phone, from seeing visitors, and from using the law library. Id.

On June 1, 2017, Petitioner's PCR hearing was held before the Honorable William P. Keesley. App. 63. Petitioner represented himself, pro se. Id. Melody Brown represented the state. Id.

Petitioner made two motions to represent himself on July 26, 2016 and October 25, 2016. App. 66, ll. 9 – 14. At the PCR hearing, Petitioner explained to Judge Keesley that due to suffering from traumatic brain injury Petitioner had trouble understanding the consequences of representing himself. App. 66, l. 16 – 67, l. 1; App. 68, l. 19 – 69, l. 1. Petitioner stated there was no way he could represent himself at his PCR hearing. App. 67, ll. 3 – 8.

Judge Keesley ordered that another attorney be appointed to represent Petitioner and ordered a competency evaluation for Petitioner, so the court can, “know exactly what we’re dealing with.” App. 75, ll. 12 – 19.

Notably, Judge Keesley made those orders after he heard the state's motion to dismiss Petitioner's PCR application for being untimely, and ultimately allowed Petitioner's PCR matter to continue. Id.

Another hearing was held on February 20, 2018, before the Honorable J. Derham Cole. App. 81. Arthur K. Aiken represented Petitioner. Id. Sherrie Butterbaugh represented the state. Id.

The state made an oral motion to dismiss Petitioner's PCR allegations because his application was, “untimely by about 8 months.” App. 84, l. 6 – 86, l. 18. The state also argued that since the case had been pending for years and that Petitioner did not indicate what allegations he was proceeding on at PCR. Id. The state also informed that prior to the February

20, 2018 hearing Petitioner underwent a mental health evaluation and was found to be competent. App. 91, ll. 1 – 6.

PCR counsel Aiken stated that he has not been able to speak with Petitioner to prepare for the hearing. App. 86, l. 19 – 87, l. 25. Aiken explained that SCDC claimed that Petitioner refused to speak with Aiken. Id. However, Aiken added that Petitioner informed Aiken that he did want to speak with Aiken but, in accordance with his September 2015 supplement to his amended PCR application, SCDC was preventing Petitioner from seeing visitors or using the phone to speak with Aiken. Id.; App. 58 – 62.

PCR counsel Aiken then argued against the state’s motion to dismiss Petitioner’s PCR allegations because Petitioner’s direct appeal tolled the PCR statute of limitations until March 7, 2012. App. 88, l. 2 – 90, l. 4; State v. Baker, No. 2012-UP-159 (S.C. Ct. App. Mar. 7, 2012). Petitioner filed his PCR application on March 12, 2012, five days after the Court of Appeals issued its opinion. Id.

In an order filed on September 6, 2018, Judge Cole denied Petitioner relief and dismissed his PCR application without a hearing pursuant to Rule 41(b), SCRCF, because “[Petitioner] has shown unreasonable neglect in prosecuting his post-conviction relief action.” App. 93 – 95; SCRCF 41. Judge Cole found that Petitioner was given multiple opportunities to be heard but “continually frustrated the process of prosecuting his case.” Id.

However, the order also mischaracterized counsel Aiken’s statements at the February 20, 2018 hearing. Id. The order stated Aiken indicated that the reason he and Petitioner could not communicate was because Petitioner refused to speak to Aiken. Id.

The record showed that Aiken also stated that Petitioner informed him it was the facility that prevented Petitioner and Aiken’s communication. App. 88, l. 2 – 90, l. 4. Aiken then argued

against the state's motion to dismiss Petitioner's PCR application, indicating he did not believe that Petitioner caused the communication breakdown. Id.

This petition for writ of certiorari follows.

ARGUMENT

The post-conviction relief (PCR) court erred in dismissing Petitioner’s PCR application for failure to prosecute when the state claimed that it, “had no indication from [Petitioner] what allegations he wanted to pursue at PCR,” where there was no showing of unreasonable neglect demonstrated by Petitioner, and where Petitioner’s amended PCR application had well defined allegations of ineffective assistance of counsel that put the state on notice as to the allegations he was going to pursue.

Relevant Facts

Petitioner’s allegation in his first PCR application was that plea counsel failed to introduce evidence of mental incompetency at the time of the plea hearing. *Id.* His subsequent amendment to his PCR application and his supplement to that amendment did not obfuscate his allegations such that the solicitor had notice of what Petitioner was alleging at his PCR hearing. App. 49 – 50; App. 58 – 62; App. 86, ll. 8 – 18.

Petitioner allegations were memorialized in his amended PCR application that: Plea counsel failed to have Petitioner’s competency evaluated; plea counsel failed to advise Petitioner about how the consequences of his guilty plea would be affected by his probationary sentence; and plea counsel failed to obtain Petitioner’s medical records from the Lexington County Detention Center. App. 49 – 50.

Thus, the fact that some years had passed between the guilty plea hearing and Petitioner’s PCR hearing on February 20, 2018 did not create ambiguity in Petitioner’s allegations such that the state was on notice to what Petitioner planned to argue at PCR. App. 86, ll. 8 – 18. Similarly, the amendment and supplement to Petitioner’s PCR application did not create such an ambiguity

either. Id. Therefore, the record contradicts the state's argument that they had "no indication" from Petitioner as to what allegations he wanted to pursue at PCR.

Petitioner's PCR allegations were dismissed without a hearing for failure to prosecute pursuant to Rule 41(b), SCRPC. App. 93 – 95. The lower court's dismissal of Petitioner's PCR application without a hearing for failure to prosecute was an error because there was no showing of deliberate delays or unreasonable neglect on the part of Petitioner. Petitioner was deprived of his "one bite of the apple," and should be granted a new PCR hearing to allow for his allegations of ineffective assistance of counsel to be heard.

Discussion

"A defendant has the procedural right to one fair bite at the apple. That is, every defendant has a right to file a direct appeal and one PCR application." Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582–83 (2002). In this case, Petitioner was denied his "one fair bite at the apple" when his PCR application was improperly dismissed without a hearing for failure to prosecute.

Petitioner's amended PCR application put the state on notice as to what allegations Petitioner was going to bring at the February 20, 2018 PCR hearing. App. 49 – 50. Therefore, the state *did* have an indication as to how to prepare for the hearing.

As a rule, the plaintiff has the burden of prosecuting his action, and the trial court may properly dismiss an action for the plaintiff's unreasonable neglect in proceeding with his case. Don Shevey & Spires, Inc. v. American Motors Reality Corporation, 279 S.C. 58, 301 S.E.2d 757 (1983). As such the dismissal for failure to prosecute was an error because the record did not support a finding that Petitioner was unreasonably neglectful in prosecuting the matter. McComas v. Ross, 368 S.C. 59, 62, 626 S.E.2d 902, 904 (Ct. App. 2006).

In Jordan v. State, 276 S.C. 168, 276 S.E.2d 781 (1981) Jordan filed an application for post-conviction relief asserting he was provided ineffective assistance of counsel when his trial counsel failed to file the direct appeal Jordan requested. Id. at 169, 626 S.E. 2d at 904. This Court disagreed because, “[Jordan] escaped from South Carolina custody... some sixteen months after his conviction... and is presently incarcerated in another state.” Id. This Court held that Jordan’s actions were the cause of the failure to prosecute because he evaded, “the process of the Court and refuse[d] to submit himself to its jurisdiction. Id. (citing State v. Murrell, 33 S.C. 83, 11 S.E.682 (1890); State v. Johnson, 44 S.C. 556, 21 S.E. 806 (1895). Therefore, because Jordan was at fault for the delay; trial counsel was not ineffective for failure to prosecute and Jordan’s convictions were affirmed. Id. at 169, 626 S.E. 2d at 904.

At the February 20, 2018 hearing, the state moved to have Petitioner’s PCR allegation dismissed pursuant Rule 41(b), SCRPC, for failure to prosecute. App. 84, l. 9 – 86, l. 18. The state argued that since Petitioner was appointed Aiken as his attorney, “the state has had no indication from [Petitioner] what allegations he wants to proceed on.” App. 86, ll. 5 – 7. The state further argued that they did not know what allegations Petitioner was going to proceed to PCR with because the case had been pending since 2011 and because Petitioner filed an amendment and supplement to his PCR application. App. 86, ll. 8 – 18.

PCR counsel Aiken explained that there was confusion with a telephone conference with Petitioner and himself scheduled the week before the February 20, 2018 PCR hearing. App. 86, ll. 19 – 25. Aiken stated that he was not able to speak to Petitioner, “to go over his allegations and determine exactly what [Petitioner] wanted to proceed with.” Id.

Aiken informed the court that SCDC told him that Petitioner did not want to speak to him App. 87, ll. 19 – 25. However, Aiken added that Petitioner said he did want to speak to Aiken and it

was the facility that caused the communication breakdown. Id. Aiken further stated that he was not asserting Petitioner had not been cooperative with him., but that their lack of communication was a result of confusion at SCDC. App. 87, ll. 2 – 4. No evidence was presented that Petitioner did not want to speak to Aiken to prepare for the PCR hearing.

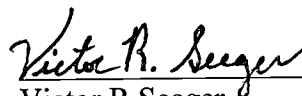
Therefore, unlike in Jordan, Petitioner was not unreasonably neglectful in his prosecution of his PCR case. Here, Petitioner did not make any deliberately dilatory actions. The reason for dismissal for failure to prosecute was that the state did not know what allegations Petitioner was proceeding on because he did not speak to PCR counsel Aiken and because he filed “numerous” motions in this case. App. 86, ll. 8 – 18; App. 93 – 95.

Upon a closer investigation both of the state’s arguments fall flat. The confusion as to what allegations Petitioner was proceeding on at PCR was caused by SCDC when they prevented Petitioner speaking to PCR counsel Aiken. App. 87, ll. 2 – 25. Thus, the fact that the state did not know what allegations Petitioner was proceeding on, despite having been on notice from Petitioner’s amended PCR application, was not the fault of Petitioner. See Jordan, supra. Regarding the “numerous” motions, Petitioner filed *an amendment and a supplement* to his PCR application, which he is entitled to do and should not be held against him.

Therefore, the dismissal for failure to prosecute pursuant to Rule 41(b) SCRPC was improper because there was no evidence presented that Petitioner was unreasonably neglectful in the prosecution of his PCR case. McComas v. Ross, 368 S.C. 59, 62, 626 S.E.2d 902, 904 (Ct. App. 2006). Accordingly, Petitioner was denied his “one bite of the apple” and should be granted a new PCR hearing. Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582–83 (2002).

CONCLUSION

By reason of the foregoing arguments Petitioner respectfully requests that this Court grant certiorari to allow for full briefing on this issue.



Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of July, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County

Honorable J. Derham Cole, Circuit Court Judge

ROBERT A. BAKER,

PETITIONER

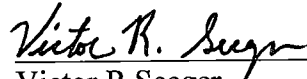
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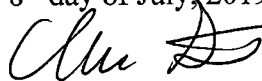
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Taylor Z. Smith, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Robert A. Baker, #341795, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 8th day of July, 2019.



Victor R Seeger
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 8th day of July, 2019.



(L.S)
Notary Public for South Carolina
My Commission Expires: October 26, 2019