

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SUMTER COUNTY
Court of Common Pleas
Post Conviction Relief

S.C. SUPREME COURT

R. Ferrell Cothran, Jr., Circuit Court Judge

Lower Court Case No.: 2016-CP-43-2223

James Daniel Jones #210933,..... Appellant,

vs.

State of South Carolina,Respondent.

EXPLANATION PURSUANT TO RULE 243 (c)

That in explanation pursuant to Rule 243 (c), the Appellant would respectfully submit the following:

The Lower Court should not have summarily dismiss the Appellant's Post-Conviction Relief Case as being successive to the previous application(s) for Post-Conviction Relief. Although successive applications for Post-Conviction Relief are disfavored, Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980), the exception for successive applications under S.C. Code § 17-27-90 states that any "new ground" for relief are forbidden unless the Appellant states a "sufficient reason" why new grounds for relief were not raised or were not properly raised in the previous application. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Appellant contends the new ground(s) for relief in the Post-Conviction Relief Application are legitimate

claims in a successive application under S.C. Code § 17-27-90 because (1) it is "So novel that it's legal basis was not reasonably available to counsel", or Appellant, at the time of the earlier proceedings, and (2) constitute "Newly Discovered Evidence". Reed v. Ross, 104 S.Ct. 2901 (1984).

PROCEDURAL HISTORY

A. Underlying Conviction

On December 5, 2016, an Application for Post Conviction Relief was filed asking for specific relief. On June 20, 2018 an Amended Application for Post Conviction Relief was filed challenging the conviction on the following basis:

1. That on July 22, 1992, the applicant's charges of kidnapping and criminal sexual conduct (assault with intent to commit) were nolle processed on the basis of failure of the victim to cooperate.
2. On May 19, 1994, a document was executed titled "Notice to Restore."
3. The Applicant contends that the Court has adopted a specific, bright-line rule that requires a court to dismiss charges when a solicitor has nol prossed the charges and fails to re-indict a criminal defendant upon these charges.

The Petitioner was served with a copy of the State's Return and Motion to Dismiss on August 31, 2018. A proposed Conditional Order of Dismissal was attached.

On November 27, 2018, a Return to the State's Motion for Summary Dismissal was filed.

A Conditional Order was signed by the Court and served upon Counsel for the Petitioner on January 31, 2019.

The Applicant would contend that this case was not administratively removed from the Docket but was Nolle Prossed. Therefore it would have been required that he be reindicted before he could be tried on these charges.

On June 7, 1994, the Applicant proceeded to Jury Trial before the Honorable Paul E. Short. The Applicant was found guilty and was sentenced to thirty (30) years for Kidnapping, a consecutive term of thirty (30) years for Assault with Intent to Commit Sexual Conduct 1st Degree and a consecutive term of ten (10) years for Robbery.

ARGUMENT

Our Supreme Court has held in Mackey v. State of South Carolina, 357 S.C. 666, 595 S.E. 2d 241 (2004) that where charges are nol prossed, the State must re-indict.

A nolle prosequi is an entry by the prosecuting officer indicating that he has decided not to prosecute a case. State v. Gaskins, 263 S.C. 343, 347, 210 S.E.2d 590, 592 (1974). Our Supreme Court has held that all proceedings following an entry of a nolle prosequi are void because the indictment was no longer valid. State v. Charles, 183 S.C. 188, 199, 190 S.E. 466, 470 (1937). In the case of In re Brown, the Court has held that a solicitor's nolle prosequi of an indictment charging police officer with fatally shooting third party prevented the trial court from taking jurisdiction, thus rendering any subsequent proceedings void. 294, S.C. 235, 237, 363 S.E. 2d 688, 689 (1988).

The Court has adopted specific, bright-line rule that (1) establishes that a nolle prosequi upon charges extinguishes the State's prosecution upon those charges; (2) treats charges nol prossed as if they never existed; and (3) requires a court to dismiss charges when a solicitor has nol prossed the charges and failed to re-indict a criminal defendant upon those charges.

RESPONSE TO CONDITIONAL ORDER

The Applicant responded to the Conditional Order of Dismissal as follows:

Section 17-27-20 South Carolina Code regarding uniform Post-Conviction Procedure Act provides for persons who may institute proceedings exclusiveness of remedy (A) any person who has been convicted of or sentenced for a crime and who claims that 1) That the conviction or sentence was in violation of the Constitution of the United States or the Constitution or Laws of the State. 2) That the Court was without jurisdiction to impose the sentence.

In addition, Lance v. State 279 S.C. 144, 303 SE 2d 100 (1983) provides that South Carolina Code Ann. 17-27-20, allows the provisions of the act to be invoked by the one claiming the right to have a sentence vacated, set aside or corrected.

On June 20, 2018, the Applicant filed an Amended Application for Post Conviction Relief. In that Amended Application, the Applicant alleged the following:

That the Applicant was initially arrested and charged with Assault with Intent to Commit Sexual Conduct First Degree, Kidnapping and Robbery. These charges were dated December 3, 1991.

It appears that on or about January 1992 the Applicant was indicted on the above charges. On July 22, 1992, the charges of kidnapping and criminal sexual conducted (assault with intent to commit), were nolle processed on the basis of failure of the victim to cooperate. On May 19, 1994, a document was executed titled "Notice to Restore". This document states that the case of Assault with Intent to Commit Criminal Sexual Conduct was administratively removed from the docket of pending case with leave to restore and notice was given that this case is restored for trial.

The State argues that the Applicant is barred from raising this issue as untimely brought, successive and by the doctrine of Res Judicata. The Applicant would respectfully request that a hearing be set in order that he may be heard on this issues. The case of Mackey clearly establishes a bright line in which reindictment is required. It is a violation of the Applicant's Constitutional rights and due process for the State not to have reindicted him on this charge for which he was sentence. Respondent's procedural argument does not excuse the fact that this was not done. In fact based upon the South Carolina Post Conviction Relief Manual Co-authored by three former and/or current Assistant Attorney General's it is arguable that Mackey also stands for the position that the sentencing Court was without jurisdiction to impose sentence.

“Subject matter jurisdiction and the sufficiency of the indictment are two distinct concepts.” S.C. Post Conviction Manual

It is arguable that the Court was without Jurisdiction to impose sentence without re-indictment and that this issue may be raised at any time.

In addition, the State argues the issue of Res Judicata. However, the Appellant would assert that this issue has never been heard on the merits and as such the Applicant is requesting a hearing on this matter.

The Court found in its Order of Dismissal that pursuant to §17-27-90 South Carolina Code of Law, a successive Post-Conviction Relief Applications is forbidden. That successive Applications are forbidden unless the Appellant, who bears the burden of proof, can point to a sufficient reason why new grounds for relief were not properly raised in previous applications. Aice v. State, 305 SC 448, 409 SE 2d 398 (1991).

A Defendant requesting a new trial based on after discovered evidence must show that the evidence:

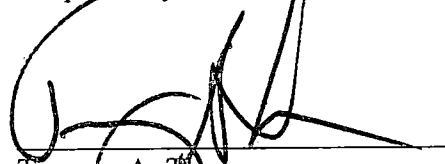
(1) Is such as would probably change the result if a new trial was had; (2) Has been discovered since the trial; (3) Could not by the exercise of due diligence have been discovered before the trial; (4) Is material to the issue of guilt or innocence; and (5) Is not merely cumulative or impeaching. *Hayden v. State*, 278 S.C. 610, 611-12, 299 S.E. 2d 854, 855 (1983).

The Appellant contends that this new evidence meets the above criteria. In this matter there is a genuine issue of material fact regarding the after discovered evidence and the issue of whether the Application is successive or untimely filed.

The Summary dismissal of a PCR Application is appropriate only when it is apparent on the face of the Application that there is no need for a hearing to develop any facts and the Appellant is not entitled to relief. *McCoy v. State*, 401 S.C. 363, 737 SE2d 623 (2013).

Therefore, the Appellant would respectfully request that he be allowed to proceed with this appeal.

Respectfully submitted,



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September 4, 2019