

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

JOHN WILLIE MACK, SR.

V.

STATE OF SOUTH CAROLINA,

RECEIVED
PETITIONING

DEC 20 2019

SC Court of Appeals

RESPONDENT

APPELLATE CASE NO 2017-001570

Appeal from Spartanburg County

Honorable Robin B. Stilwell, Circuit Court Judge

Unpublished Opinion No. 2019-UP-386

PETITION FOR REHEARING

Petitioner requests rehearing pursuant to Rule 221(a), SCACR, because this Court overlooked or misapprehended certain points in reaching its decision. Respectfully, this Court overlooked the fact that the DNA Act does allow for applications for post-conviction relief. Further, in denying Petitioner's request for a belated appeal of the denial of his DNA application this Court is precluding Petitioner from getting the full and complete adjudication of his petition on the merits that he is entitled to under the jurisprudence of this state.

This Court found Petitioner was statutorily barred from raising a claim of ineffective assistance of DNA counsel in a PCR application based on the last sentence of S.C. Code Ann.

§ 17-28-60 which states, “The performance of counsel pursuant to this article shall not form the basis for relief in any post-conviction relief proceeding.” However, respectfully, this Court failed to consider the DNA Act as a whole. When the DNA Act is read in full it is apparent that Petitioner is not foreclosed from pursuing this avenue of relief. S.C. Code Ann. § 17-28-110(B) states “*Nothing in this article prohibits a person from filing an application for post-conviction relief pursuant to Chapter 27, Title 17*” (emphasis added).

The language in these two sections creates an inherent conflict within the statute. While each section, taken on its own, is clear and unambiguous, statutes are not intended to be read in a piecemeal fashion, taking only those parts which best serve a particular position. Citizens for Quality Rural Living, Inc. v. Greenville County Planning Commission, 426 S.C. 97, 825 S.E.2d 721 (2019) (The intention of the legislature when enacting a statute must be gleaned from the entire section and not simply clauses taken out of context). Courts, when interpreting a statute, should not concentrate on isolated phrases within the statute; a statute must be read as a whole and sections that are part of the same general statutory law must be construed together and each one given effect. Id.

Furthermore, if a court cannot reconcile the conflict within the statute then the “last legislative expression” rule applies. Under that rule, where it is impossible to harmonize two sections of a statute, the subsequent section must prevail over the prior one, being the last in point of time or order of arrangement. See, Feldman v. South Carolina Tax Commission, 203 S.C. 49, 26 S.E.2d 22 (1943) (under the principle that the last expression of the legislative will is the law, where conflicting provisions are found in the same statute, or in different statutes, the last in point of time or order of arrangement prevails); See also Jolly v. Atlantic Greyhound Corp, 207 S.C. 1, 35 S.E.2d 42 (1945). Applied to the present case, Petitioner would not be

barred from filing a PCR claim of ineffective assistance of counsel for failing to file an appeal under the DNA Act because the subsequent section specifically states that “*nothing in this article prohibits a person from filing an application for post-conviction relief*” pursuant to the PCR Act. See, S.C. Code § 17-28-110(B) (emphasis added).

In interpreting the statute to resolve the conflict, it is apparent that PCR claims are not barred in their entirety. The language relied on by this Court, that performance by counsel appointed pursuant to the DNA Act “shall not form the basis” for a PCR, means it shall not be the *sole basis for an initial application* for PCR. The language expressed later in the DNA Act makes it clear that a PCR application could include ineffective assistance of DNA counsel on any issue.

Admittedly, in Petitioner’s second PCR application the only basis asserted was failure of DNA counsel to file an appeal of the denial of his DNA application. However, Petitioner did everything within his power to ensure that he would not need to file a second PCR application. Petitioner initially filed the application under the DNA Act on September 27, 2012, *while his direct appeal was still pending and eight months prior to the filing of his original PCR application*. The hearing on the DNA Act application was held on October 31, 2014. Two and a half months later the PCR hearing was convened. At that point in time, the DNA court had not issued a decision on Petitioner’s DNA Act application.

At the PCR hearing, Petitioner correctly *requested a continuance pending the outcome of the DNA Act application hearing* that had been held on October 31, 2014. This request was denied, and Petitioner was forced to proceed on his PCR application without a ruling from the DNA Court. The PCR application was dismissed with prejudice on April 10, 2015. One month

after the PCR court issued an order of dismissal, the DNA court finally issued an order denying Petitioner's application for retesting.

When DNA counsel failed to file an appeal of the DNA court's decision, Petitioner's only option was to file a second PCR application seeking the relief that he was entitled to under the statute – a belated appeal because DNA counsel failed to file one. Procedurally, Petitioner did everything correctly. He should have been able to have the DNA Act application resolved, prior to the PCR hearing, because it was filed first in time. Petitioner recognized the need to continue the PCR hearing so that he could consolidate any claims against DNA Counsel into his then pending PCR application. However, the PCR court erred in failing to continue the evidentiary hearing.

Importantly, Petitioner is not seeking a full-scale review of the performance of DNA Counsel. He is merely requesting that the Court consider the *very limited issue* of whether DNA counsel was ineffective for failing to file an appeal. Petitioner is well within his right to have the decision of the DNA court reviewed by the appellate courts. The DNA Act explicitly creates the right to an appeal by any party to the application. See S.C. Code Ann. § 17-28-90(G). Petitioner should not be foreclosed from pursuing this path due to actions and circumstances beyond his control.

A ruling in Petitioner's favor would not "open the floodgates" to PCR claims based solely on ineffective assistance of DNA counsel because Petitioner has presented an extremely narrow issue to the Court. Petitioner, like the complainant in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), is seeking the appellate review that he is entitled to under the law. In Austin it was noted that the right to seek appellate review of the denial of PCR is *expressly authorized* by state law. The same is true of rulings coming from applications filed under the DNA Act.

S.C. Code § 17-28-90(G) *expressly and explicitly authorizes the right of either the applicant or the state to appeal* a final order under the Act through a writ of certiorari.

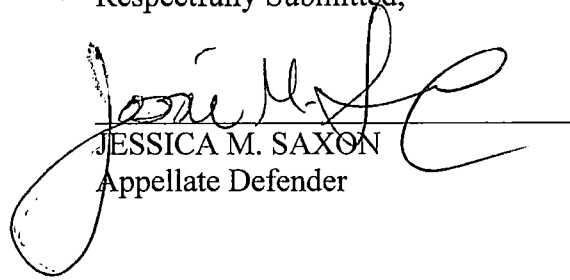
Notably, at the same time the Court issued its decision in Austin, the decision in Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991), was handed down. In Aice, the court addressed whether a second PCR application filed on the ground that the first complete PCR application was insufficient due to ineffective PCR counsel was proper. In holding that Aice was not entitled to a second PCR application and hearing the Court stated:

“We have held that the PCR rules “contemplate an adjudication on the merits of the original petition, one bite at the apple as it were.” Gamble v. State, 298 S.C. 179, 178, 379 S.E.2d 118, 119 (1989). This phrase aptly delineates the distinction between the Austin and Aice cases. *Austin never received a full “bite” at the apple, as he was prevented from seeking any review of the denial of his PCR application.* We therefore provided him with a remedy in order to effectuate the purposes of the Uniform Act and of the PCR rules. Conversely, Aice seeks to have more than one procedural “bite” at the apple. Aice has filed an original PCR application and has been allowed to seek review of the ruling against him. We refuse to grant his request for a second chance, and again we do so in order to effectuate the purpose of the Act and rules.”

Aice at 452 (emphasis added).

Under this Court’s current decision, Petitioner is now foreclosed from getting his one full “bite” at the apple as he has been prevented from seeking appellate review of the denial of a DNA application when DNA counsel failed to file an appeal. Here, as in Austin, the failure of counsel to file an appeal constituted ineffective assistance of counsel. Petitioner respectfully request rehearing. Under these extraordinary circumstances the only way to correct this unfairness to Petitioner is to craft a remedy similar to that in Austin which allows Petitioner to move forward with the belated appeal of the denial of his request for DNA retesting.

Respectfully Submitted,



JESSICA M. SAXON
Appellate Defender

This 20th day of December, 2019.

STATE OF SOUTH CAROLINA
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Appeal from Spartanburg County

Honorable Robin B. Stilwell, Circuit Court Judge

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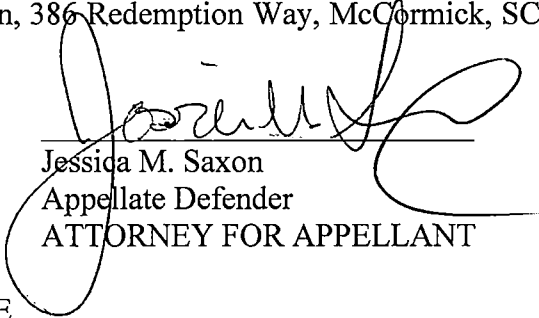
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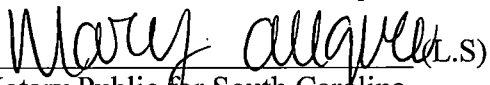
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and John Willie (2) Mack, #257219, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 20th day of December, 2019.



Jessica M. Saxon
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 20th day of December, 2019.



Notary Public for South Carolina
My Commission Expires: May 12, 2027.