

CT 2010
173546

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

William H. Seals, Jr., Circuit Court Judge

THOMAS MCCALL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR judge err in refusing to grant a continuance based on the fact that petitioner was denied funds to pay an investigator to serve subpoenas compelling attendance of certain witnesses and to continue to investigate the allegations of ineffective assistance of counsel?

STATEMENT

In June 2006, the Florence County Grand Jury indicted McCall for assault and battery of a high and aggravated nature [ABHAN], criminal sexual conduct first degree [CSC] and possession of cocaine base, indictments #2006-GS-21, 869, 868, 867. On January 29, 2007, McCall appeared before the Honorable Michael G. Nettles and pled guilty. Attorney Scott P. Floyd represented McCall. Judge Nettles sentenced McCall to 5 years for ABHAN, 3 years concurrent for possession and 20 years consecutive for CSC. A timely notice of intent to appeal was filed and a brief pursuant to Anders v. California, 386 U.S. 738 (1967), was submitted on McCall's behalf. The South Carolina Court of Appeals dismissed the appeal. State v. McCall, 2009-UP-273 (filed June 2, 2009).

McCall filed a first application for post conviction relief on November 13, 2008. The direct appeal, however, was still pending and the application was dismissed without prejudice pursuant to Rule 71.1(b) SCRCP. On July 16, 2009, McCall filed a second application for post conviction relief. The State filed a return on March 25, 2010. An evidentiary hearing was held before the Honorable William H. Seals, Jr. on July 13, 2010. In a written order signed September 22, 2010, Judge Seals denied relief and dismissed the application. A timely notice of intent to appeal was filed on September 30, 2010. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to grant a continuance based on the fact that petitioner was denied funds to pay an investigator to serve subpoenas compelling attendance of certain witnesses and to continue to investigate the allegations of ineffective assistance of counsel.

At the beginning of the evidentiary hearing PCR counsel for McCall moved for a continuance. (App. p.57, lines 1-20). Counsel stated:

The reason I cite this is, we had a prior order giving us access to an investigator who had started doing some work on the matter. Of course, as Your Honor might be aware, about, I want to say a week or so ago, got a note from Indigent Defense. They had no money to pay any expenses such as investigators and experts and things of that nature on civil matters such as PCRs. And as it relates to that I've informed my client that obviously Mr. Glen Harrell who is an investigator in Sumter working the case, obviously realized he's no longer going to get paid, he ceased working and obviously that would impact being able to subpoena witnesses.

(App. p. 57, lines 2-14). The State opposed the continuance asserting that there was probably no need for an investigator because McCall entered guilty pleas. (App. p. 57, lines 22-25). The judge denied the motion for continuance stating, "I 'm gonna deny it, it is a guilty plea anyway; it wasn't a trial." (App. p. 58, lines 1-2). The PCR judge erred.

During the PCR hearing McCall asserted that plea counsel was ineffective in failing to subpoena witnesses. (App. p. 60, lines 9-25). McCall testified that he gave plea counsel the names and addresses of Andrell Black and Cedric Gregg and two other people he could not remember and counsel never subpoenaed the witnesses. (App. p. 61, lines 1- p. 62, line 1). Plea counsel testified that McCall never gave him the names and addresses of any alibi witnesses. (App. p. 76, lines 1-2).

Rule 71.1(d), SCRPC, provides, "If, after the State has filed its return, the application presents questions of law or fact which will require a hearing, the court shall promptly appoint

counsel to assist the applicant if he is indigent. Counsel shall be given a reasonable time to confer with the applicant. Counsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary.” In Gary v. State, 347 S.C. 627, 630, 557 S.E.2d 662, 663 (2001) the South Carolina Supreme Court wrote, “Under this rule, an indigent applicant who is granted a hearing has a statutory right to be represented by a court-appointed attorney. Al-Shabazz v. State, 338 S.C. 354, 364, 527 S.E.2d 742, 747 (2000) citing Whitehead v. State, 310 S.C. 532, 426 S.E.2d 315 (1992).”

S.C. Code §17-27-60 provides, “If the applicant is unable to pay court costs and expenses of representation, including stenographic, printing and legal services, these costs and expenses shall be made available to the applicant in the trial court, and on review, in amounts and to the extent funds are made available to indigent defendants by the General Assembly.” At the time of the PCR hearing, an order had already been signed authorizing PCR counsel to hire an investigator to interview witnesses and serve subpoenas. According to PCR counsel, the investigator had been hired and had started work on the case but stopped working when he learned he would not be paid.

McCall was entitled to appointed PCR counsel to fully investigate the case. Appointed PCR counsel sought funds to pay for an investigator to assist in the preparation of the case. Funds for the investigator were approved. The investigation, however, was cut short when the investigator learned he would not be paid. McCall was entitled to a full investigation and assistance in serving subpoenas and compelling witness attendance at the evidentiary hearing. The PCR judge erred in refusing to grant a continuance.

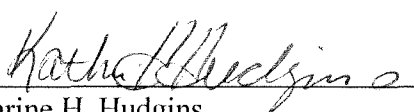
“The granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion.” State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct.App.2005). “An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support.” State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001); see also State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249–50 (Ct.App.2006) (“An abuse of discretion occurs when the trial court’s ruling is based on an error of law.”). Even if there was no evidentiary support, “[i]n order for an error to warrant reversal, the error must result in prejudice to the appellant.” State v. Preslar, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct.App.2005); see also State v. Wyatt, 317 S.C. 370, 372–73, 453 S.E.2d 890, 891 (1995) (stating that error without prejudice does not warrant reversal). “[R]eversals of refusal of continuance are about as rare as the proverbial hens’ teeth.” State v. Lytchfield, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957).

The PCR judge’s refusal to grant a continuance of the PCR case because the action resulted from McCall’s guilty plea is an error of law amounting to an abuse of discretion. McCall was prejudiced by the error of law. McCall alleged that plea counsel was ineffective in failing to interview witnesses prior to the plea. A judge had signed an order effectively finding that investigation was required. In PCR proceedings, the burden of proof is on the applicant to prove the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The judge’s refusal to grant a continuance until funds were secured to pay the investigator to complete his work deprived McCall of the ability to meet his burden in the PCR case. A hen’s tooth is found.

CONCLUSION

Based on the above argument, the order of the PCR judge should be reversed, the case remanded for further investigation and a new PCR hearing.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of April, 2011.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

William H. Seals, Jr., Circuit Court Judge

THOMAS MCCALL,

PETITIONER,

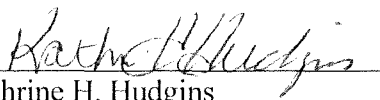
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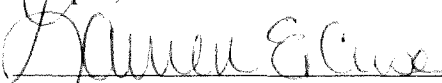
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on David Spencer, Esquire this 26th day of April, 2011.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 26th day
of April, 2011.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.