



ALAN WILSON
ATTORNEY GENERAL

July 27, 2011

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Thomas McCall, Jr., #286886 v. State of South Carolina
2009-CP-21-1083

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

David Spencer
Senior Assistant Attorney General

DS/ab
Enclosures

cc: Kathrine H. Hudgins, Esquire (2 copies)

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Florence County
William H. Seals, Jr., Circuit Court Judge

Thomas McCall,

Petitioner,

vs.

State of South Carolina,

Respondent.

**RETURN TO PETITION
FOR WRIT OF CERTIORARI**

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ISSUE PRESENTED

The PCR court did not abuse its discretion in denying Petitioner's motion for continuance where Petitioner failed to show prejudice.

STATEMENT OF THE CASE

Petitioner McCall was indicted for assault and battery of a high and aggravated nature (ABHAN), criminal sexual conduct first degree (CSC), and possession of cocaine base. McCall pled guilty as charged on January 29, 2007. McCall was represented by Scott P. Floyd, Esquire. The Honorable Judge Michael G. Nettles sentenced McCall to five years imprisonment for ABHAN, three years concurrent imprisonment for the drug charge, and twenty years consecutive imprisonment for CSC.

McCall appealed his guilty plea conviction. The appeal was dismissed by the Court of Appeals pursuant to Anders v. California, 386 U.S. 738 (1967). State v. McCall, 2009-UP-273 (S.C. Ct. App., filed June 2, 2009).

McCall filed a PCR application on July 16, 2009, and after the State filed its return, a hearing was convened at the Florence County Courthouse before the Honorable Judge William H. Seals, Jr., on July 13, 2010. McCall, through his PCR counsel, moved for a continuance, which was denied. Then following a hearing, Judge Seals denied the application by written order dated September 22, 2010.

McCall appealed and seeks a writ of certiorari from this Court. The State's return to the petition for writ of certiorari follows.

STATEMENT OF FACTS

At the guilty plea hearing, the prosecution provided Judge Nettles with facts to support the charges, as follows in part:

McCall and his brother brutally assaulted their half-sister while she was about four months pregnant. McCall threw a blanket over her head and beat her. The brother held the victim down and kicked her in the stomach. Police responded to a call, and the two brothers fled when they arrived. App. pp. 8-9.

The following morning, at approximately 4:30 a.m., McCall arrived at his sister's residence with a Black Hawk .38 pistol. At gunpoint, McCall made his sister disrobe in the hall. When she was going too slow, he tore her clothes, including her brassiere. In his brother's room, he forced his sister to perform oral sex – in his words, to “try to humiliate her.” He then had forcible intercourse with her and ejaculated inside her. He struck her head with the pistol. After he went into another room, she fled the house stark naked and ran across the road to a neighbor's house. They let her in and provided her clothes, and they also called the police. McCall left, went to his mother's house for breakfast, and threw the gun in the woods. App. pp. 8-13.

McCall agreed that the facts related by the prosecution were true and accurate. App. p. 17, lines 7-10.

ARGUMENT

The PCR court did not err in denying Petitioner’s motion for continuance where he failed to demonstrate prejudice.

McCall alleges the PCR court should have granted his motion for continuance arguing he did not have funds for the investigator. McCall failed to explain in his motion why an investigator was needed, what allegations were being investigated, or what benefits might possibly accrue from further investigation. McCall argued he did not have funds to serve potential witnesses, but failed to specify who these witnesses were, what they would have testified about, or what efforts were taken to attain their presence in lieu of subpoena.

“The grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record.” Plyer v. Burns, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007) (citation omitted). “Moreover, the denial of a motion for a continuance on the ground that counsel has not had time to prepare is rarely disturbed on appeal.” Id.

The applicable rule concerning the grant of continuance in a PCR case is Rule 40(i), SCRC¹, which sets out the rule as follows:

(1) *For Cause.* As actions are called, counsel may request that the action be continued. If good and sufficient cause for continuance is shown, the continuance may be granted by the court. . . .

¹ See S.C. Code § 17-27-80 (“All rules and statutes applicable in civil proceedings are available to the parties”). See Rule 71.1(a), SCRC¹ (stating that the Rules of Civil Procedure apply to PCR actions “to the extent that they are not inconsistent with the Act.”).

(2) *For Absence of Witness.* No motion for continuance of trial shall be granted on account of the absence of a witness without the oath of the party, his counsel or agent, to the following effect, to wit: That the testimony of the witness is material to the support of the action or defense of the party moving; that the motion is not intended for delay; but is made solely because the party cannot go safely to trial without such testimony; that there has been due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the court that the motion was not intended for delay. . . . A party applying for such postponement on account of the absence of a witness shall set forth under oath in addition to the foregoing matters what fact or facts she believes the witness if present would testify to, and the grounds for such belief.

In the instant case, no effort was made in the motion to suggest which witnesses would have been called or what their expected testimony would be. McCall failed to offer anything to satisfy the PCR court that the motion was not intended for delay. Further, even assuming McCall was unable to subpoena these witnesses, McCall failed to provide any indication that these witnesses were contacted and asked to voluntarily appear without subpoena. If this Court was to assume that the witnesses would have been McCall's brother and McCall's three friends², it is quite logical to expect they would be willing to help their friend or relative without the coercion of a subpoena. However, his testimony should not be considered, since McCall did not raise his motion again once the hearing began.

² He could only remember the name of two of his friends. App. p.61. Counsel testified that McCall never provided him the names or addresses of any alibi witnesses. App. p. 76. Counsel testified he was ready for trial, and McCall thought his sister would not testify against him, but McCall backed out of trial when he saw his sister in the courtroom. App. pp. 73-74; p. 76.

McCall, during his PCR testimony, was vague on how they would have helped him at trial. On direct, he testified they were present during “the so-called” event. App. p. 60, lines 19-24. On cross-examination, McCall changed his mind and said they were alibi witnesses. App. pp. 63-64. It is not clear what testimony his brother and friends supposedly would be able to provide.

Further, McCall had his opportunity to complain about his counsel not attaining these witnesses when he pled guilty. However, according to McCall’s self-serving PCR testimony, he chose to lie to Judge Nettles instead. App. pp. 66-69. McCall told Judge Nettles he was happy with his attorney and his attorney did everything he asked him to do. App. pp. 22-23. Even if McCall was sincere in his belief about those witnesses assisting his defense, McCall waived his allegations concerning his counsel’s failure to subpoena the witnesses when he chose to not bring the matter to Judge Nettles’ attention.

McCall failed to meet his burden of showing a continuance was necessary and consequently, the PCR court did not err. The petition for writ of certiorari should be denied.

CONCLUSION

For the above stated reasons, the petition should be denied. If this Court sees fit to grant this petition for writ of certiorari, respondent would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

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BY: 

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PETITIONER,

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THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Kathrine H. Hudgins, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211

This 27th day of July, 2011



NORMA BIGBEE
LEGAL ASSISTANT