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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Circuit Court Case No. 2012-CP-32--02180
Appellate Case No. 2020-001037

John Henry.....Applicant/Appellant

v.

State of South Carolina.....Respondent/Respondent

APPELLANT’S STATEMENT OF ISSUES ON APPEAL

INTRODUCTION

This is a PCR appeal. In the underlying case, the trial court dismissed the Appellant’s Application on the grounds that the Application is barred as both successive and untimely under the applicable statute of limitations. As required by Rule 243(c) SCACR, the Applicant/Appellant, John Henry (Henry) submits the following Statement to show an arguable basis for asserting that the trial court erred in dismissing Henry’s Application on these grounds.

FACTS

From January 12 to January 14, 2004, Henry was tried on Indictments charging him with murder, attempted armed robbery, burglary first degree, criminal conspiracy, and kidnapping. During the trial, Henry’s co-defendant Quincey McCoy (McCoy) was the State’s star witness. In fact, McCoy’s testimony was the only evidence admitted in Henry’s trial that established a connection between Henry and the crimes with which Henry was charged. Henry was convicted by the jury of

murder, attempted armed robbery, burglary first degree, criminal conspiracy, and kidnapping. Henry was sentenced to life imprisonment for murder and burglary first, 30 years for kidnapping, 20 years for attempted armed robbery, and 5 years for criminal conspiracy.

A timely notice of Appeal was filed, and the appeal was perfected. The South Carolina Court of Appeals vacated Henry's kidnapping conviction and sentence but affirmed the remaining convictions and sentences. The Clerk of the South Carolina Court of Appeals issued the Remittitur on February 13, 2006.

Prior to Henry's trial, his attorney served a Discovery Motion on the State. The Discovery Motion demanded that the State disclose, inter alia:

Any promises, rewards, and inducements made to all co-defendants, defendants, witnesses, or potential witnesses, regardless of whether they will testify at trial, and

Any offers or grants of immunity made to any witness relating to any fine, forfeiture, sentence, charge reduction, prosecution or punishment in this or any other case or potential case.

The only "deal" disclosed with McCoy was an agreed upon reduction of one of his charges from murder to voluntary manslaughter.

During his direct examination of McCoy at Henry's trial, the State's attorney had McCoy testify that his only "deal" was a charge reduction from murder to voluntary manslaughter, that he faced 15 years to life, and that his ultimate sentence was completely up to the sentencing judge. (App. pp. 5-7 and pp. 9-10- Excerpts from Trial Transcript) Since he knew only of the charge reduction, Henry's attorney cross-examined McCoy only on the reduction from murder to voluntary manslaughter. (App. pp. 8-9-Excerpts from Trial Transcript)

On January 29, 2007, Henry filed his first PCR action 2007-CP-32-0329. In that action, Henry alleged that he was being held unlawfully for the following reasons:

- 1) ineffective assistance of counsel

- 2) lack of subject matter jurisdiction; and
- 3) denial of due process.

By Order dated April 19, 2010 and filed April 21, 2010, the PCR judge denied and dismissed the application with prejudice.

Henry filed a notice of appeal on this first PCR. Henry's appellate counsel filed a Petition for Writ of Certiorari under Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988). The South Carolina Court of Appeals denied the Petition for a writ of Certiorari, and the clerk issued the remittitur on May 30, 2013.

On April 25, 2011, Henry filed his second PCR action 2011-CP-32-1605. In the second PCR action, Henry alleged that he was being held unlawfully for the following reasons;

- 1) ineffective assistance of appellate counsel; and
- 2) insufficiency of the Indictment.

The PCR Court issued a final Order of dismissal on June 29, 2012. No appeal was taken from that Order.

On May 29, 2012, Henry filed his current PCR. In his initial Application on this PCR, Henry alleged that he was being held unlawfully for the following reasons;

- 1) insufficiency of Indictment;
- 2) ineffective assistance of appellate counsel; and
- 3) perjury and prosecutorial misconduct.

On January 7, 2016, Henry first discovered that contrary to the State's denial in discovery and contrary to testimony elicited by the State at trial, McCoy received favorable consideration in exchange for his cooperation. (App. pp. 1 and 2-Affidavit of Henry and Envelope) On that date, Henry first received copies of the transcripts of McCoy's guilty plea hearing and sentencing hearing from Circuit Judge William P. Keesley. (App. pp. 1 and 2-Affidavit of Henry and Envelope)

McCoy states in the transcript of his sentencing that he had a “deal” for 15 to 30 years. (App. p. 65-Excerpt from McCoy Sentencing Hearing) McCoy also presented a letter to the Court prior to his sentencing in which he makes the same assertion. (App. pp. 128-131-Letter from McCoy) Moreover, at the same sentencing hearing, the State’s attorney states that he “did tell Mr. McCoy and his attorney that I would detail his cooperation with the State.” (App. p. 59-Excerpt from McCoy Sentencing Hearing) (App. p. 100-Excerpt from Transcript of McCoy’s PCR hearing)¹ This transcript received on January 7, 2016 was the first information that Henry ever possessed that suggested that the State had committed a willful Brady violation in failing to disclose McCoy’s “deal” and had elicited false testimony from McCoy at his trial.

By Order dated June 26, 2016, Henry was permitted to amend his initial Application filed in his current PCR to include the following claims;

- 4) that his Indictment was the product of perjury and a criminal conspiracy to cover up that perjury; and
- 5) that he is entitled to a new trial under Rule 29(b) SCRCrP. based on after-discovered evidence that the prosecutors at his trial failed to disclose that they gave favorable treatment to Henry’s testifying co-defendant, McCoy.

On November 26, 2017, Henry further amended his Application in his current PCR to allege that he is being held unlawfully because of “willful violations of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and other South Carolina and federal cases governing mandatory disclosure by the prosecution in criminal cases.”

¹ Before McCoy’s sentencing, counsel met with the sentencing judge. During this meeting, the State’s attorney secured an advisory opinion from the sentencing judge that McCoy’s sentence would be 15-20 years. The State had a “wink and a nod deal” with McCoy. (App. pp. 104-105 and pp. 112-113-Excerpts from McCoy’s PCR hearing).

ARGUMENT

I. INTRODUCTION TO ARGUMENT

In its Motion, the State alleges that this Court should grant it summary judgment for two reasons:

- 1) Henry's current PCR action is barred as successive as a matter of law under S.C. Code §17-27-90; and
- 2) Henry's current PCR is barred as a matter of law under the one-year statute of limitations for PCRs. S.C. Code §17-27-45(a).²

There are genuine issues of material fact on both positions because there is evidence that Henry did not discover and could not have discovered by reasonable diligence his Brady PCR grounds until, at the earliest, January 7, 2016.

II. THE SUMMARY JUDGMENT STANDARD IS A HIGH HURDLE FOR THE MOVING PARTY TO CLEAR.

Summary judgment is appropriate only where there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Calvert v. House Beautiful Paint and Decorating Center, Inc., 313 S.C. 494, 443 S.E.2d 398 (1994); Rule 56(c) SCRPC. In deciding whether there are any genuine issues of material fact, the court must construe all inferences arising from the evidence against the moving party. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corporation, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999).

Even when there is no dispute as to evidentiary facts, but only as to the conclusions to be drawn from them, summary judgment should be denied. Redwend Limited Partnership v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003). Moreover, summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Middleborough Horizontal Property Regime Council of Co-owners v. Montedison, S.p.A., 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995).

² The State styles its Motion as one to dismiss, but resolution of the Motion requires consideration of factual matters outside the pleading. Since matters outside the pleadings must be considered, the State's Motion is considered one for summary judgment. Rule 12(b) SCRPC.

In cases in which the burden of proof is the preponderance of the evidence, “the non-moving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment.” Hancock v Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) The scintilla of evidence standard is met “if there is any evidence at all in a case ... tending to support a material issue” Henry C. Black Black’s Law Dictionary 1207 (5th ed. 1979) (emphasis added).

Summary judgment is a drastic remedy. Cunningham v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003). Summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues. 352 S.C. at 391, 575 S.E.2d at 552.

III. THERE IS A GENUINE ISSUE OF MATERIAL FACT ON THE QUESTION OF WHETHER HENRY’S CURRENT PCR IS BARRED AS SUCCESSIVE UNDER S.C. CODE § 17-27-90.

S.C. Code § 17-27-90 generally bars successive PCRs. However, the bar of S.C. Code § 17-27-90 has an exception that encompasses situations in which the applicant can point to a “sufficient reason” why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground in a subsequent application is limited to those grounds that “could not have been raised ... in the previous application.” Aice, 305 S.C. at 450, 409 S.E.2d at 394.

Henry’s Brady PCR grounds fall within the “sufficient reason” exception recognized in Aice. Henry did not discover these grounds until, at the earliest, January 7, 2016; therefore, those grounds could not have been raised in his prior PCR applications filed in 2007 and 2011. It is also not for the State to allege any technical argument that these grounds could have been raised in prior PCR Applications since the only reason that they were not raised earlier is that the State arguably did not comply with its discovery obligations before Henry’s trial.

There is a genuine issue of material fact on the question of whether Henry’s Brady PCR grounds fall within the “sufficient reason” exception to the successive PCR bar in S.C. Code § 17-27-90. Therefore, this trial court erred in dismissing Henry’s Application on the grounds that all claims in that Application were successive..

IV. THERE IS A GENUINE ISSUE OF MATERIAL FACT ON THE QUESTION OF WHETHER HENRY'S CURRENT PCR IS BARRED BY THE ONE-YEAR STATUTE OF LIMITATION IN S.C. CODE § 17-27-45(a).

The one-year statute of limitations in S.C. Code § 17-27-45(a) has an exception set forth in S.C. Code § 17-27-45(c). S.C. Code § 17-27-45(c) states:

If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

Henry filed his current PCR application in 2012 almost four years before he discovered or by the exercise of reasonable diligence should have discovered the evidence supporting his Brady PCR grounds. There were genuine issues of material fact on the statute of limitation grounds in the State's Motion; therefore, the trial court erred in dismissing Henry's Application on those grounds.

CONCLUSION

Henry established genuine issues of material fact on both the issue of whether his Brady violation PCR claims were barred as successive and the issue of whether those claims were barred by the applicable statute of limitations. Therefore, the trial court erred in dismissing Henry's PCR Application

Respectfully Submitted,



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