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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ON WRIT OF CERTIORARI TO ORANGEBURG COUNTY
Court of Common Pleas
The Honorable Edgar W. Dickson, PCR Judge

Appellate Case No. 2019-001099

RUSSELL MONTGOMERY

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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PETITIONER’S STATEMENT OF ISSUE ON CERTIORARI

The PCR judge erred in dismissing petitioner’s PCR claim that the new rule prohibiting impeachment via the use of a prior armed robbery conviction per the holding in State v. Broadnax¹ should apply retroactively to his case.

RESPONDENT’S COUNTERSTATEMENT OF ISSUE ON CERTIORARI

The PCR court correctly rejected Petitioner’s assertion that the holding in *Broadnax* constitutes a basis for treatment under section 17-27-45(B) because *Broadnax* constitutes a new rule under *Teague* such that it does not apply retroactively on collateral review nor does it fall within either of the *Teague* exceptions.

¹ 401 S.C. 238, 736 S.E.2d 688 (S.C. Ct. App. 2013); and 414 S.C.468, 779 S.E.2d 789 (S.C. 2015).

STATEMENT OF THE CASE

In August 2002, the Orangeburg County grand jury indicted Russell Montgomery (Petitioner) for kidnapping (2002-GS-38-1573) and armed robbery (2002-GS-38-1574). (App. 398–401). On July 16, 2003, Applicant proceeded to a jury trial before the Honorable Edward B. Cottingham. Margaret Peggy Hinds, Esquire (Counsel) represented Petitioner. The jury convicted Petitioner as indicted of kidnapping and to the lesser-included offense of strong arm (i.e. common law) robbery. (App. 309). Judge Cottingham sentenced Petitioner to consecutive terms of twenty years' imprisonment for kidnapping and fifteen years for robbery. (App. 323–24).

Direct Appeal

Petitioner filed a timely notice of appeal. Appellate Defender Robert M. Dudek perfected Petitioner's appeal by filing an *Anders*² brief and petition to be relieved as counsel with the Court of Appeals. (Supp. App. 1). Petitioner did not file a *pro se* brief in response. The Court affirmed Petitioner's convictions and granted appellate counsel's request to withdraw on April 20, 2005. *State v. Montgomery*, 2005-UP-285, (S.C. Ct. App. filed April 20, 2005) (Supp. App. 12). Petitioner subsequently filed a petition for rehearing, which was denied by Order dated June 22, 2005. (Supp. App. 14, 20). The case was remitted back to the circuit court on July 27, 2005. (Supp. App. 21).

Initial Post-Conviction Relief Action (2006-CP-38-0209) and Subsequent Appeal

On February 21, 2006, Applicant filed his initial PCR application, alleging he was being held in custody unlawfully due to ineffective assistance of counsel. Specifically, Applicant alleged ineffective assistance of trial counsel based on:

² *Anders v. California*, 386 U.S. 738 (1967).

1. Failure to properly prepare trial of this case;
2. Failure to request continuance based on untimely receipt of discovery;
3. Failure to move to suppress evidence;
4. Failure to object to evidence and witnesses not timely revealed in response to discovery request;
5. Failure to object to impeachment evidence;
6. Failure to request exclusion of impeachment evidence
7. Failure to object to improper questions by Solicitor; and
8. Such other grounds as may become apparent after a complete review of the record.

(Supp. App. 22). The State made its return on December 7, 2006, requesting an evidentiary hearing on Petitioner's claims of ineffective assistance of counsel. (Supp. App. 30). On January 12, 2007, the PCR court convened an evidentiary hearing before the Honorable James C. Williams, Jr. Petitioner was present at the hearing and represented by C. Bradley Hutto, Esquire. Assistant Attorney General Lance S. Boozer appeared on behalf of the State. On February 26, 2007, Judge Williams issued an order denying the application on all grounds and dismissing with prejudice. (Supp. App. 25).

Petitioner filed a timely notice of appeal. Appellate Defender Kathrine H. Hudgins perfected Petitioner's appeal by filing a *Johnson*³ petition. (Supp. App. 41). Petitioner filed a *pro se* brief in response. (Supp. App. 50). The case was subsequently transferred from the Supreme Court to the Court of Appeals. On January 30, 2009, the Court of Appeals denied the petition and granted appellate counsel's request to withdraw. (Supp. App. 63). The case was remitted back to the circuit court on February 20, 2009. (Supp. App. 65).

³ *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988).

Federal Habeas Corpus Action (2009-cv-00778-HMH)

On March 31, 2009, Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court, District of South Carolina. Petitioner raised the following grounds for relief (verbatim):

1. Ineffective assistance of counsel
 - a. Failure to request continuance based on untimely receipt of discovery;
 - b. Failure to suppress evidence;
 - c. Failure to object to evidence and witnesses not timely revealed in response to discovery request;
 - d. Failure to object to impeachment evidence;
 - e. Failure to request exclusion of impeachment evidence; and
 - f. Failure to object to improper questions by Solicitor.
2. Whether the courts erred by allowing [Petitioner] to be impeached with his prior Robbery Conviction. Where he was on trial for Robbery, since the prejudicial effect of that conviction outweighed [*sic*] its probative [*sic*] value under Rule 403 S.C.R.E., And the Court failed to conduct the requisite State –v– Colf Analysis?

(Supp. App. 66). The State filed a return and motion for summary judgment on August 10, 2009, to which Petitioner filed a response on September 16, 2009. (Supp. App. 84, 99). On December 21, 2009 the Honorable William M. Catoe, United States Magistrate Judge, issued a report and recommendation that the State's motion for summary judgment be granted and the petition dismissed with prejudice. (Supp. App. 120). Petitioner filed objections to the report and recommendation on January 14, 2010. (Supp. App. 132). The Honorable Henry M. Herlong, Jr., United States District Judge, issued an order accepting the report and recommendation, granting the motion for summary judgment, and dismissing the petition with prejudice on January 20, 2010. (Supp. App. 152).

Second Post-Conviction Relief Action (2011-CP-38-0857) and Subsequent Appeal

On June 20, 2011, Petitioner filed his second PCR application, alleging he was being held in custody unlawfully based on the following (verbatim):

1. Does the extraordinary circumstances in the instant case entitle Petitioner to a second application to address the remaining issue the PCR court failed to address in the original application, since PCR counsel failed to file a timely Rule 59(e) motion to address all of Petitioner's claims that were presented in his original application and this court's barring of hybrid representation that precluded Petitioner from filing a pro-se Rule 59(e) motion, that resulted in a denial of due process and equal protection.

(Supp. App. 164). The State made its return and motion to dismiss on October 9, 2012, requesting the action be summarily dismissed because it was filed after the statute of limitations had expired and is successive to Petitioner's prior PCR action. (Supp. App. 187). The Honorable Diane S. Goodstein subsequently issued a Conditional Order of Dismissal on November 12, 2012, provisionally denying and dismissing the action, while giving Petitioner twenty days from the date of service of said order in which to show why the dismissal should not become final. (Supp. App. 195). On October 18, 2012, Petitioner responded by way of a document captioned "Answer to Respondents Motion for Dismissal." (Supp. App. 201). The Honorable Edgar W. Dickson issued a Final Order of Dismissal on May 16, 2013, denying relief and dismissing the application with prejudice. (Supp. App. 203).

Petitioner filed a timely notice of appeal. (Supp. App. 206). On September 10, 2013, this Court dismissed Petitioner's for failure to provide this Court with (1) a proof of service showing that the notice of appeal has been timely served on opposing counsel as required by Rule 203(d)(1)(B)(i), SCACR; (2) a copy of the order(s) on appeal as required by Rules 203(d)(1)(B)(ii), SCACR; and (3) a notice of appeal that contains the information required by Rule 203(e)(1),

SCACR and Rule 243(b), SCACR. (Supp. App. 216). The case was remitted back to the circuit court on February 20, 2009. (Supp. App. 65).

Third Post-Conviction Relief Action (2013-CP-38-01201)⁴

On September 27, 2013, Petitioner filed his third PCR application, alleging he was being held in custody unlawfully based on the following (excerpted verbatim):

1. Ineffective assistance of counsel
 - a. Failure to request continuance based on untimely receipt of discovery;
 - b. Failure to object, move to suppress;
 - c. Failure to object to evidence and witnesses not timely revealed in response to discovery;
 - d. Failure to object to impeachment evidence;
 - e. Failure to request exclusion of impeachment evidence; and
 - f. Failure to object to improper questions by Solicitor.
2. New case law precedent (Christopher Broadnax Appellate v. State).

(App. 328–52). The State made its return and motion to dismiss on May 16, 2014, requesting the action be summarily dismissed because it was filed after the statute of limitations had expired; is successive to Petitioner’s prior PCR actions; and is barred by the doctrine of *res judicata*. (App. 355–63). Judge Goodstein subsequently issued a Conditional Order of Dismissal on May 26, 2014, provisionally denying and dismissing the action, while giving Petitioner twenty days from the date of service of said order in which to show why the dismissal should not become final. (App. 364–71). Applicant filed a response, and the Court thereafter ordered a hearing on the State’s motion to dismiss.

⁴ Petitioner filed a subsequent PCR application on December 30, 2013 (2013-CP-38-01488). The PCR court directed the Orangeburg County Clerk to merge the application into case number 2013-CP-38-01201. (App. 353–54).

On July 20, 2017, the PCR court convened a hearing before Judge Dickson. (App. 372–86). Petitioner was present at the hearing and represented by Arthur K. Aiken, Esquire. Assistant Attorney General Ruston W. Neely appeared on behalf of the State. On June 6, 2019, Judge Dickson issued an order granting the State’s motion to dismiss, denying relief, and dismissing the application with prejudice. (App. 387–97). This appeal follows.

STATEMENT OF FACTS

Petitioner was convicted of kidnapping and robbing victim Travis Guess. Guess was approached at his home at gunpoint and taken. The victim testified as to the kidnapping and robbery, and identified Petitioner. (App. 104–07). Both Kevin Mack and Marcus Guess, who were guest at the home when the incident started, testified that a man with a white covering about his face showed up with a gun and shot in the ground, though each man ran away following the first gunshot. (App. 69; 81–82).

The victim was forced into his car, and had to escape while the car was in motion, which resulted in the car hitting a utility pole. (App. 107; 128–29; 170). An officer happened to be on patrol in the area and saw the accident. Petitioner was standing by the passenger side of the car with a white shirt around his neck. He wandered away from the car and threw the white shirt down. Officers recovered a white t-shirt and a 9mm gun. Petitioner also had the keys to the car and the victim's wallet. (App. 153; 170–73; 179; 185).

Later investigation revealed what appeared to be a bullet hole in the ground at the victim's home. (App. 154). At trial, Petitioner testified that he never had a gun, but admitted taking money and having a white t-shirt tied around his head, even though he essentially denied everything else. (App. 232–41).

STANDARD OF REVIEW

In PCR matters, the standard of review depends on the specific issue involved. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Appellate courts will uphold a PCR court's findings of fact if there is any probative evidence in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

ARGUMENT

The PCR court correctly rejected Petitioner’s assertion that the holding in *Broadnax* constitutes a basis for treatment under section 17-27-45(B) because *Broadnax* constitutes a new rule under *Teague* such that it does not apply retroactively on collateral review nor does it fall within either of the *Teague* exceptions.

The Uniform Post-Conviction Procedure Act⁵ states a person may institute a PCR action where a binding judicial authority

imposes upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

S.C. Code Ann. §17-27-45(B).

Petitioner contends this Court’s holding in *Broadnax* constitutes a watershed rule of criminal procedure such that it should be applied to his case retroactively. The United States Supreme Court’s decision in *Teague v. Lane* governs whether *Broadnax* should apply retroactively to cases on collateral review.⁶ 489 U.S. 288 (1989). Under *Teague*, when the Supreme Court announces a new constitutional rule of criminal procedure, the rule’s effect on a defendant’s conviction depends upon whether the rule is “new” or “old” and whether the defendant’s case is pending on direct or collateral review. *Id.* at 301–10. New constitutional rules of criminal

⁵ S.C. Code Ann. §§ 17-27-10 to -160 (2014).

⁶ In *Aiken v. Byars*, this Court noted it “ha[d] not addressed whether it should employ a more expansive analysis for determining retroactivity after *Danforth* . . . , which held that state courts can use a broader test than *Teague*.” 410 S.C. 534, 539 n.4, 765 S.E.2d 572, 575 n.4 (2014) (citing *Danforth v. Minnesota*, 552 U.S. 264, 282 (2008), (holding *Teague* “does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed ‘nonretroactive’ under *Teague*”). This Court found “it unnecessary to [determine whether to use a broader test in that case] because [the new rule] is clearly retroactive under *Teague*.” *Id.*

procedure generally do not apply to cases “which have become final before the new rules are announced.” *Id.* at 310; *cf. Pantovich v. State*, 427 S.C. 555, 562–63, 832 S.E.2d 596, 600 (2019) (“Fundamentally, a collateral review proceeding is ill-suited for announcing a new rule of substantive law pertaining to an underlying trial . . .”). Consequently, a “new” rule will generally apply only to criminal cases pending on direct review, while an “old” rule will apply to cases on both direct and collateral review. *Whorton v. Bockting*, 549 U.S. 406, 416 (2007) (citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)).

A rule is “new” within the meaning of *Teague* if it “breaks new ground or imposes a new obligation on the States or the Federal Government.” *Id.* at 301. In other words, “a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant’s conviction became final.” *Id.* In contrast, a rule is “old” if a “court considering the defendant’s claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule the defendant seeks was required by the Constitution.” *O’Dell v. Netherland*, 521 U.S. 151, 156 (1997) (citation omitted).

The rationale underlying *Teague*’s “new rule” analysis is that the “[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system.” *Id.* at 309. When making a determination whether an announced rule is “new” or “old,” a court must consider “whether reasonable jurists could have differed” on whether the rule was compelled or dictated by existing precedent. *Beard v. Banks*, 542 U.S. 406, 414 (2004). Thus, “[t]he ‘new rule’ principle . . . validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.” *Lockhart v. Fretwell*, 506 U.S. 364, 372–73 (1993) (citation omitted)).

If reasonable jurists at the time of the conviction could have differed as to whether the rule was compelled or dictated by existing precedent, the rule must be considered “new.” *Beard*, 542 U.S. at 414. Further, the fact that the United States Supreme Court indicates that its current decision is “within the logical compass” of an earlier decision, or even “controlled by” a prior decision, is not conclusive for purposes of deciding whether the decision is a new rule pursuant to *Teague*. *Butler v. McKellar*, 494 U.S. 407, 415 (1990). It is clear that a decision announces a new rule if it expressly overrules a prior decision; however, it is more difficult to determine whether a decision announces a new rule when it extends the reasoning of prior cases. *Graham*, 506 U.S. at 467 (citation omitted).

If a court determines that a case has announced a new rule of constitutional law and therefore would not ordinarily be applied retroactively, the court must then consider whether the new rule fits into either of two narrow exceptions set forth in *Teague*. *But see Talley v. State*, 371 S.C. 535, 541, 640 S.E.2d 878, 881 (2007) (“In general, the question of whether a decision announcing a new rule should be given prospective or retroactive effect should be addressed at the time of the decision.”).

First, a new rule should be applied retroactively if it places “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.” *Teague*, 489 U.S. at 307. Second, a new rule should be applied retroactively if it requires the observance of “those procedures that . . . are implicit in the concept of ordered liberty.” *Id.* (internal citations and quotation marks omitted). In other words, the *Teague* exceptions are reserved exclusively for (1) substantive rules and (2) “watershed” rules of criminal procedure.

Like Petitioner, the defendant in *Broadnax* was on trial for armed robbery and kidnapping. Pursuant to Rule 609(a)(2) and *State v. Al-Amin*, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003), the

trial court admitted the defendant's prior armed robbery convictions during his testimony without weighing probative value against prejudice.⁷ *Broadnax*, 414 S.C. at 471, 779 S.E.2d at 790. Overruling *Al-Amin* and reaffirming the rule articulated in *State v. Bryant*,⁸ this Court held that "armed robbery is not a crime of dishonesty or false statement for purposes of impeachment under Rule 609(a)(2)." *Broadnax*, 414 S.C. at 476, 779 S.E.2d at 793.

This Court explained that "for impeachment purposes, crimes of 'dishonesty or false statement' are crimes in the nature of *crimen falsi* 'that bear upon a witness's propensity to testify truthfully.'" *Id.* (quoting *Adams v. State*, 284 Ga. App. 534, 644 S.E.2d 426, 432 (2007)). However, this Court emphasized that its holding does "not preclude the admission of prior convictions for armed robbery; rather, it merely enables a trial judge to conduct a balancing test pursuant to Rule 609(a)(1) when the State seeks prior convictions for armed robbery to impeach a criminal defendant's testimony." *Broadnax*, 414 S.C. at 478, 779 S.E.2d at 794.

At the time of Petitioner's trial, impeachment evidence on his prior 1993 and 1995 robbery convictions was properly permitted under *Al-Amin*. The new impeachment rule in *Broadnax* does not constitute a watershed rule such that it goes to "the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction," such as a right to counsel at trial. *Teague*, 489 U.S. at 311. Compare *Aiken*, 410 S.C. at 540, 765 S.E.2d at 575 (holding that the United States Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), which held that a sentencing

⁷ Under Rule 609(a)(2), SCRE, if a crime is viewed as one involving dishonesty, the court must admit the prior conviction because, prior convictions involving dishonesty or false statement must be admitted regardless of their probative value or prejudicial effect. In *Al-Amin*, the Court of Appeals held that armed robbery was a crime of "dishonesty or false statement," rendering it automatically admissible for impeachment purposes under Rule 609(a)(2). 353 S.C. at 426–27, 578 S.E.2d at 44.

⁸ In *Bryant*, this Court held the trial court erroneously admitted the defendant's prior firearms convictions under Rule 609(a)(2) without weighing the probative value and prejudicial effects of their admission because the firearms offenses were not crimes involving dishonesty. 369 S.C. 511, 517, 633 S.E.2d 152, 155–56 (2006).

scheme that mandates imposition of life without possibility of parole on juvenile offenders constituted cruel and unusual punishment under the Eighth Amendment, “creates a new substantive rule, and should therefore apply retroactively”), with *State v. Belcher*, 385 S.C. 597, 613, 685 S.E.2d 802, 810 (2009), *overruled on other grounds by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019) (applying *Teague*, 489 U.S. 288) (“Because our decision represents a clear break from our modern precedent, today’s ruling is effective . . . for all cases which are pending on direct review, . . . but will not apply to convictions challenged on post-conviction relief), and *State v. Stukes*, 416 S.C. 493, 500, 787 S.E.2d 480, 483 (2016) (Supreme Court’s holding that trial court’s jury instruction that testimony of the victim need not be corroborated in prosecutions for criminal sexual conduct was unconstitutional applies to cases pending on direct review but not in post-conviction relief). Rather, the holding in *Broadnax* simply provides a new procedural rule which reinforces the discretion placed upon the trial judge in making evidentiary determinations. *Cf. Talley v. State*, 371 S.C. 535, 543, 640 S.E.2d 878, 882 (2007) (“Generally, new procedural rules should not be applied retroactively to cases on collateral review . . .”).

CONCLUSION

Based on the foregoing argument, this Court should deny certiorari and affirm the PCR court's dismissal of Petitioner's PCR application. Should this Court grant the petition, the State seeks permission to more fully brief the issues discussed above.

Respectfully submitted,

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