

THE SUPREME COURT OF SOUTH CAROLINA

RECEIVED

JAN 15 2021

S.C. SUPREME COURT

RE: Eugene Thomas v. State

Appellate Case No. 2020-001617

Explanation Pursuant to Rule 243(c), SCACR

On September 10, 2012, Applicant proceeded to a jury trial. The following day, the jury convicted Applicant of the lesser included offense of Attempted Armed Robbery and as indicted of the Burglary and weapons charges. Judge Dennis sentenced Applicant to life imprisonment without the possibility of parole (LWOP) for attempted armed robbery pursuant to section 17-25-45 of the South Carolina Code.

Applicant filed a timely notice of appeal. Following briefing and oral argument, the Court of Appeals affirmed Applicant's convictions in an unpublished opinion issued October 15, 2014, State v. Thomas Op. No. 2014-UP-360 (S.C. Ct. App. filed Oct. 15, 2014). The case was returned to the circuit court on 11-3-2014.

* Initial PCR Action (2015-CP-23-2998) And Subsequent Appeal

Applicant filed his first PCR action on May 7, 2015, alleging he was being held in custody unlawfully based on:

1. Counsel failed to communicate the full extent and consequence of the plea offer;
2. Counsel failed to object to constructive amendment of the

* See attachment (3)

indictment and failed to move for a verdict in arrest of judgment and entry of judgment of acquittal based upon lack of jurisdiction for undicted attempted armed robbery offense;

3. Counsel failed to move to suppress the gun and dice gain obtain during search incident to arrest;

4. Counsel failed to present an alibi defense and instead opted for last closing argument;

5. Counsel failed to investigate or research;

6. Counsel failed to object to the State's closing argument insinuating prior bad acts;

7. Counsel failed to object to erroneous jury charge;

8. Prosecutorial misconduct via failure to disclosed state's finger print analyst.

The State made its return on November 30, 2015, requesting an evidentiary hearing be held on Applicant's claim of ineffective assistance of counsel. On August 24, 2016, the Court convened a hearing at the Greenville County Courthouse. At the conclusion of the hearing, the record was left open because Applicant's alibi witnesses were not available to testify. The hearing reconvene on August 27, 2016. On November 4, 2016, Judge Hayes issued an Order denying the application on all grounds and dismissing with prejudice.

The Applicant object to this standard of dismissal by Judge Hayes, the dismissal as recorded for the Order issued October 27,

2016, to wit: Wherefore I find Applicant has not proved by a preponderance of evidence that trial counsel was ineffective on any of the grounds presented by Applicant at the post conviction relief hearing. Therefore, Applicant's application for post conviction relief is denied and dismissed with prejudice. In McCray v. State 408 S.E.2d 241 (S.C. 1991) the Supreme Court announced, remand was required on appeal from denial of post conviction relief, where post conviction court dismissed movant's ineffective assistance of counsel allegations without making finding of fact on specific allegations raised violating statute and precluding appellate review. Code 1976, §17-27-80, U.S.C.A. Const. Amend. 6; in Fishburn v. State, 832 S.E.2d 584 (S.C. 2019) the Supreme Court, James J., held that remand was required for trial court to make finding of fact and conclusion of law on duly raised post conviction claim of ineffective assistance of counsel, even though defendant did not filed motion for ruling on claim abrogating Marlar v. State, 653 S.E.2d 266 and Hunbert v. State, 548 S.E.2d 862.

The William Court held that §2254(d)(1)'s "contrary to" clause required the rejection of state court decision which were "substantially different from the relevant precedent of this court." The Court gave an example of a misinterpretation of Strickland v. Washington, 466 U.S. 668, 694 (1984);

If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different, "opposite in character or nature," and mutually opposed" to our clearly established precedent because we held in Strickland that the petitioner need only demonstrate a "reasonable probability that ...the result of the proceeding would have been different." William v. Taylor 529 U.S. 362, 405-409 (2000).

II. CURRENT APPLICATION

On March 15, 2019, while the appeal from Applicant's first PCR action was pending, Applicant filed a second PCR application, alleging he was being held in custody unlawfully base on:

1. Denied due process in violation of my 5th, 6th, 8th and 14th amendment.
2. Newly Discovered evidence and fraud upon the court.
3. The court was without jurisdiction to impose sentence, which is subject matter jurisdiction.

On February 11, 2020, Applicant filed an amended application to include the following claims.

4. Petitioner was denied due process in violation of his 6th and 14th Amendment under Strickland v. Washington 466 U.S. 668 (1984) due to Petitioner's PCR counsel inadequate assistance of counsel at a critical stage at initial-review collateral proceeding.

- a. Petitioner assert this ground pursuant to §17-27-90 of

South Carolina code which states the following. A ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original supplemental or amended application. This was reserved for Austin v. State review.

5. Appellate Counsel failed to file petition for writ of certiorari of a ineffective assistance of trial counsel for ruling to the highest state court and preserve for federal review.

A. Trial counsel was ineffective for failure to investigate and research whether or not Applicant's 1981 conviction was a qualifying conviction for LWOP.

b. Trial counsel was ineffective for failure to suppression of gun that was ultimately entered into evidence.

c. Trial counsel was ineffective for failure to object to open and closing argument to the jury by referring to, or relying upon evidence not admitted into evidence ...

6. PCR Counsel at a initial collateral review failure to raise ineffective assistance of trial counsel claims of meritorious value that was listed in PCR Application:

a. Inadequate assistance of PCR counsel at a critical stage at a initial review collateral proceeding.

b. Trial counsel failed to communicate full extent and consequences of plea offer

c. Trial counsel fail to object to erroneous jury charge

d. Trial counsel failed to object to Prosecutor's closing argument that had insinuated bad acts

e. Trial counsel failed to object to a consecutive amendment of the indictment.

f. Trial counsel failed to object to the Brady violation of prosecutor failure to disclosed state's fingerprint analyst was not certified by SLED .

g. Applicant's counsel on direct appeal was ineffective for failure to raise reversible error which was meritorious and objected by trial counsel.

The Respondent alleges this application should summary dismissed because it was filed after the statute of limitation has expired, it is successive to Applicant's prior PCR actions and is barred by the doctrine of res-judicia. The Applicant objects, first the statute of limitations, the Austin v State in Hope v State 492 S.E.2d 76 n.1 (1997) permitting a belated appeal pursuant to Austin in 1992 from denied of a PCR. Austin policy would be frustrated if the one year statute of limitation applied to procedural errors made by PCR court. Austin is intended to act as an applicant's final safeguard against unjust procedural errors, even errors in the application of the statute of limitations. In the case application first PCR was dismissed by the preponderance of evidence standard and this application should have been remand

for a new hearing. We remember the Respondent alleging that Applicant filed a second PCR while his first was still pending, the second PCR could have been amended to the first pursuant to rule 15, SCRCP, and that would have prevented successive. moreover, ineffective assistance of appellate counsel's decision to present one preserved issue and not to present the PCR Court used the preponderance of evidence standard in its order prejudice the Applicant. See Tisdale v. State, 594 S.E.2d 166 (S.C. 2004) Effective appellate counsel has an obligation to raise all meritorious issues on appeal. The State failed to call the error of using the incorrect standard of law to the PCR judge's attention by way of a rule 59(c), SCRCP motion put the error on the State. When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the Court must examine the record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Eppenger v. McFadden 2014 WL 4195862 quoting Gray v Greer 800 F.2d 644, 646 (U.S. Court of Appeal 7th Cir. 1996). This requires a hearing.

CONCLUSION

Wherefore, having explained why dismissal of PCR was improper the Applicant prays for a hearing.

Respectfully Submitted

December 29 2020

Eugene Thomas
Eugene Thomas