

RECEIVED

FEB 08 2021

SC Court of Appeals

RECEIVED

FEB 10 2021

IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

S.C. SUPREME COURT

APPEAL FROM SUMTER COUNTY
COURT OF COMMON PLEAS

Kristi P. Curtis...CIRCUIT COURT JUDGE

Case No.:2006-CP-43-1241

Herbert Bell.....Appellant,

v.

The State.....Respondent.

ISSUE ON APPEAL

DID THE LOWER COURT ERR IN RULING THAT THE CURRENT APPLICATION IS SUCCESSIVE?

RELEVANT FACTS

Petitioner concedes to the "PROCEDURAL HISTORY" as noted in the "FINAL ORDER OF DISMISSAL".

ARGUMENT

Petitioner contends that the findings of the PCR judge that the current pcr application is successive is in err based on the following:

To support that finding, his Honor first points to Applicant's allegation of denial of due process and reliance on Odom v. State, 377 S.C. 256, 523 S.E.2d 753(S.C.1999). His Honor states that Applicant's reliance of Odom is misplaced. He states that "As Odom notes, all applicants are entitled to a full and fair opportunity to present claims in one pcr application.Id. That applicant did receive such an opportunity because his

subsequent application (2006-CP-43-1902) received a full evidentiary hearing on the merits and he was appointed counsel. Applicant could have brought the claims he listed in his first filed pcr application at the evidentiary hearing in the 2006-CP-43-1902 action by simply amending that application or calling the court's attention to the first-filed action."see FINAL ORDER OF DISMISSAL, PAGE 10, DATED 11-23-2020.

Petitioner contends that his honor is mistaking in his findings that applicant is relying on Odom's note that "[a]ll applicants are entitled to a full and fair opportunity to present claims in one pcr action." Petitioner is referencing Odom's note of his right to have the claims raised in his ORIGINAL application heard on their merits.see PETITIONER'S "REPLY TO CONDITIONAL ORDER OF DISMISSAL" PAGE 2, DATED 4-30-2019, also see Odom v. State, 337 S.C. 256, 523 S.E.2d 753(1999)(Under the pcr rules, an applicant is entitled to a full adjudication on the merits of the original petition,...); Aice v. State, 305 S.C. 448, 409 S.E.2d 392, 395(1991);and Gamble v. State, 298 S.C. 176, 178, 379 S.E.2d 118, 119(1989).

A review of the record, as well as his honor's own admission in his ruling, shows that the current application (2006-CP-43-1241) is the original application, as it was filed on August 2, 2006, and the subsequent application (2006-CP-43-1902) was filed on November 9, 2006. Therefore, the state was required by law, S.C.Code Ann.§17-27-90 to adjudicate the merits of applicant's original application.see S.C.Code Ann.§17-27-90: "All grounds for relief available to an applicant under this chapter

must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.'

It is clear that the current claims have not been adjudicated on their merits. His Honor attests to this fact in his order when he states that, "Applicant received a full evidentiary hearing on the merits of his second-filed November 2, 2006, application, at which time he was represented by pcr counsel. Applicant could have brought the claims he listed in his first-filed pcr application at the evidentiary hearing in the 2006-CP-43-1902 action by simply amending that application or calling the court's attention to the first-filed action.'see ORDER PG.10, DATED 11-23-2020.

This then means that Petitioner was denied his rights to have his claims that were raised in his original application adjudicated as mandated by S.C. Code Ann. §17-27-90. This is a direct violation of Petitioner's rights to due process under Article 1§3 of the South Carolina Constitution and the 14th amendment of the U.S. Constitution.

What's more, is that not only did Applicant not receive a

rullington the merits of the original application, he did not receive a ruling on the merits of the subsequent application.

In the original application filed on August 2, 2006, Applicant raised the following claims: 1. Entrapment; 2. Unlawful arrest; 3. violation of my 4th amendment rights; and 4. constructive denial of ineffective assistance of counsel.

In the second application filed on November 9, 2006, Applicant raised the following claims: 1. Sixth amendment violations; 2. Federal government dismissed the same case for lack of probable cause; and 3. Ineffective assistance of trial counsel.

The only claim that the pcr judge ruled on was "Was trial counsel ineffective because he failed to conduct an independent investigation and additional investigation could have led to a finding that the search warrants were not valid. see ORDER PAGE 3, DATED 11-23-2020.

This then means that the pcr judge failed to comply with S.C. Code Ann. §17-27-80s mandate that he make findings of facts and conclusions of law on each issue raised in the application. The pcr judge's failure to follow §17-27-80's mandate and pcr counsel's failure to file a Rule 59(e), motion to alter or amend judgment, procedurally barred applicant from seeking appellate review of any of the claims raised in the original 9or subsequent applications. Marlar v. State, 375 S.C. 407, 653 S.E.2d 266(2007). Therefore, applicant did not receive a ~~full and fair~~ adjudication on the merits of his original or subsequent application.

So, regardless of which application the state deems to be the original application, at the very least, Applicant is entitled to

an Austin review to see whether he knowingly and intelligently waived his right to seek appellate review of his claims raised in the first and second application. see Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991).

Lastly, Petitioner contends that the pcr judge erred in his ruling concerning his allegations of "procedural and subject matter jurisdiction" and his reliance on State v. Funderburk, 259 S.C. 256, 191 S.E.2d 520 (1972).

His Honor fails to note that Funderburk deals with more than whether the lower court lacks jurisdiction upon a conviction through usage of a null indictment. The court also found that acts of a court with respect to a matter as to which it has no jurisdiction are void.

- That is the point that petitioner was making through the usage of Funderburk. That because the state failed to adhere to the mandates of state law, S.C. Code Ann. §17-27-30 and 90, concerning the adjudication of the original claims in the original application, the pcr court lacked procedural or subject matter jurisdiction to adjudicate the subsequent application. see State v. Funderburk, 259 S.C. 256, 191 S.E.2d 520 (1972) (Acts of a court with respect to a matter as to which it has no jurisdiction are void).

CONCLUSION

The current application should be remanded to the lower courts to be heard on its merits.

This 3 day of February 2021

BY: *John A. Bell*

PRO SE

1578 CLARENCE COKER HIGHWAY
TURBEVILLE S.C. 29162