STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Spartanburg County

Court of Common Pleas, R. Keith Kelly, Presiding

[C/A No.2019-CP-42-01727]

Lonnie Geter, #288401 -- APPELLANT,

-vs-

State of South Carolina -- RESPONDENT,

APPELLATE CASE NO. 2021-000235

APPELLANT'S WRITTEN EXPLANATION

PURSUANT TO RULE 243(c), SCACR.

INTRODUCTION

COMES NOW, above captioned Appellant, Lonnie Geter, pro-se, respectfully lodging his written explanation pursuant to SCACR 243(c).

Procedural History

Appellant is presently confined in the South Carolina Department of Corrections pursuant to commitment orders of the Spartanburg County Clerk of Court. Appellant was indicted during

the October 2002 term of the Spartanburg County Grand Jury for common law robbery (2002-GS-42-04633); burglary, first degree (2002-GS-42-04634), and assault and battery of a high aggravated nature (2002-GS-42-04635). Appellant was represented by Jennifer L. Johnson, esq. and the State was represented Robert Coler esq. of the Seventh Circuit Solicitor's Office.

Trial and Direct Appeal

On December 4, 2002, Appellant proceeded to trial before the Honorable J. Derham Cole and a jury. The jury found Appellant guilty as indicted on December 6, 2002. Judge Cole sentenced Appellant to concurrent prison terms of fifteen years for the robbery, life for the burglary, and ten years for the ABHAN. Appellant filed a timely notice of appeal and the direct appeal was perfected by Daniel T. Stacey, esq. Stacey filed a no merit Anders brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals denied relief and dismissed the appeal by way of an unpublished opinion. State v. Geter, Op.No.2004-UP-413 (S.C.Ct.App.filed June 24, 2004). The Remittitur was handed down on July 28, 2004.

First PCR Application

Appellant filed an application for post conviction relief ("PCR") on August 29, 2004 (2004-CP-42-02852). After conducting a hearing into the matter the PCR Court denied the first PCR application. A timely appeal was taken and on November 19, 2008, the South Carolina Supreme Court denied relief.

Federal Proceedings

On June 9, 2009, Appellant filed a petition for federal habeas relief. C/A No.8:09-1589-PMD-BHH and after a full round of

federal proceedings relief was denied. Geter v. McCall, 2010 WL 2640221 (D.S.C. 2010). A timely appeal to the United States Fourth Circuit Court of Appeals was taken and subsequently denied. Geter v. McCall, 412 Fed.Appx. 564 (4th Cir.2011). Appellant timely filed for certiorari to the United States Supreme Court, which was also denied. Geter v. McCall, 565 U.S. 840 (2011).

2nd PCR Application

Appellant filed a second PCR application on August 10, 2015, (2015-CP-42-03424). After the State made it's Return, the Court on October 31, 2013 the Honorable J. Mark Hayes, II issued a Conditional Order and on May 19, 2017 the Honorable J. Derham Cole issued a Final Order denying relief and dismissing the application. No appeal was taken from that application.

CURRENT APPLICATION

Applicant filed the instant application (2019-CP-42-01727) on May 14, 2019, alledging (1) newly discovered evidence in the form of E-mails between original defense counsel and the assistance solicitor Robert Coler regarding "a plea offer" which was never conveyed to Appellant from trial counsel constituting ineffective assistance of counsel.(Appendix (A). The State filed their Return and motion to dismiss on August 16, 2019. Appellant being pro-se and unskilled in law filed a Rule 59(e) motion to which the Court construed as a reply to the Conditional Order. (Appendix (B). The lower court issued a Final Order of dismissal on February 15, 2021. Appellant filed a timely notice of appeal and on March 5, 2021, this Court advised Appellant he has twenty days within which to provide this Court with a written explanation as to why the application should not be considered successive. Appellant

received this Court's instructions March 9, 2021 via Institutional Legal. Per this Court's notice the written explanation is as follows:

Argument

THE LOWER COURT ERRED IN DENYING THE INSTANT APPLICATION AS SUCCESSIVE AND FAILURE TO SET FORTH A PRIMA FACIE CASE FOR NEWLY DISCOVERED EVIDENCE.

FACTS

Appellant submits the lower court erred in denying and dismissing the instant PCR application without conducting an evidentiary hearing into the matter. Appellant submits there exists evidence of material facts not previously presented and therefore the application was not required to be filed within one year after the conviction, but rather, in accordance with Coats, supra and S.C. Code Ann. §17-27-45(c) only required Appellant to filed the application within one year of actual discovery of the facts.

Appellant filed the instant PCR application and attached exhibits (E-mails) May 14, 2019 pursuant to S.C. Code Ann. §17-27-45(c) and Coats v. State, 352 S.C. 500, 575 S.E.2d 557 (2003) based on an August 1, 2018 correspondence from the Seventh Circuit Public Defender's Office, where that office forwarded Appellant with e-mails concerning plea negotiations between trial counsel and the solicitor prior to the trial in Appellant's case.(Appendix (A)). The Respondent's moved to summarily dismiss the application on August 16, 2019, alleging "untimeliness, successiveness, barred by the doctrine of laches, and failure of

appellant to set forth a prima facie case for newly-discovered evidence. Respondent's provided the Court with a [proposed] Conditional Order denying relief. On August 20, 2021 the Court signed the Conditional Order three (3) days after it was submitted by the Attorney General's Office, allotting Appellant 20-days within which to supply the Court with sufficient reason as to why the application should not be summarily dismissed. (Appendix (B)).

Appellant being pro-se, unskilled in law with the assistance of the prison law clerk filed a Rule 59(e) motion to alter and/or amend. (Appendix (C)). On February 15, 2021 the lower court issued a Final Order (Appendix (D)). Denying relief the Court said it reviewed Appellant's response in full and finds it insufficient to warrant an evidentiary hearing. The Court's Order further goes on to state that "Appellant has continued to fail to establish a prima facie case of newly discovered evidence. The Court reiterates Appellant's claim that the plea offer made by the solicitor was conveyed to him by his trial counsel, the Court merely reviewed the e-mails along side Appellant's application refutes the claim, is in error.

The Court's Order addressing the e-mails states: "The November 25, 2002 e-mail from counsel to the State reflects that counsel initiated negotiations by proposing a potential deal. The Court correctly finds that the November 26, 2002 response from the State [is initially favor[able]. The Court's Order then finds, "the December 2, 2002 e-mail indicates Applicant "didn't seem very interested in the original offer" and impl[ies] a new proposal was provide [to] the State, which the State rejected."

The Court then erroneously found "taken together, the e-mails (1) do not reflect any firm plea offer from the State and (2) that Applicant was appraised of counsel's negotiation efforts and was disinterested." Appellant submits this finding is in error because, while the Court found the response from the State favorable it is the negative emphasis the Court put on the December 2, 2002 e-mail. Applicant would submit that at this stage he is only required to make a prima facie showing of "the existence of material facts." The very material facts that require an evidentiary hearing, live testimony from counsel and the State regarding the substance of the e-mails and negotiations.

The Court correctly found that the August 1, 2018 correspondence is the letter by which the e-mails were provided to Appellant. However, the Court erred in concluding that the August 1, 2018 correspondence somehow reflects that the copies of the e-mails were provided to Appellant as early as July 11, 2017, nearly two years before the application was filed. The alleged substance of what trial counsel's letter convey is too vague regarding the July 11, 2017 letter. Appellant suggest the very purpose of an evidentiary hearing and requiring live testimony and taking of evidence is to not leave the truth to conjecture.

In order to be entitled to a successive PCR application, the applicant must establish that the grounds raised in the subsequent application could not have been raised in the previous application. Tilley v. State, 334 S.C. 24, 511 S.E.2d 689 (1999).

Accordingly, Appellant's claim falls within the rule providing when there is evidence of material facts not previously presented, the PCR application was to be filed within one year

after the actual discovery of the facts. Appellant submits that the e-mails were received via the August 1, 2018 correspondence. Therefore, Appellant timely filed the instant application on May 14, 2019, thus, within one year of the actual discovery of the e-mails.

In Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009), the court said it was not always necessary for a defendant to offer objective evidence to support of a claim of actual prejudice. Id. Instead, depending on the facts of the case, a defendant's self-serving statements may be sufficient to establish actual prejudice. citing Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000)(rejecting objective evidence requirement established in Judge, 321 S.C. 554, 562, 471 S.E.2d 146, 150 (1996).

The issue raised in the instant application could not have been raised in the initial PCR application because the facts did not come to light until the August 1, 2018 correspondence from the Public Defender's Office regarding the e-mails and negotiations. The matter should be remanded with instructions to appoint Appellant counsel and conduct an evidentiary hearing at the lower court's earliest convenience.

CONCLUSION

Based on the aforegoing statement of facts, citations of authorities relied on and incorporating the pleadings in this matter that this Honorable Court will find the lower court erred in finding the instant application as successive, and in the alternative this Court will remand to the lower court with instructions to appoint counsel and conduct an evidentiary into the matter in the interest of justice.

Respectfully Submitted,

/s/ Lonnie Geter

Lonnie Geter, pro-se