

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM SUMTER COUNTY
Court of General Sessions
Honorable Kristi F. Curtis, Circuit Court Judge

S.C. SUPREME COURT

Case No. 2020-001710

The State,Respondent,

v.

Herbert Lee Bell,Appellant.

RULE 243(c) EXPLANATION

Herbert Lee Bell, by and through the undersigned counsel, submits this supplemental explanation, pursuant to Rule 243(c) of the South Carolina Rules of Appellate Procedure, as to the lower court’s improper determination that the instant post-conviction relief action is barred because it is successive.¹

This appeal arises from a final order by the Honorable Kristi F. Curtis, filed on December 7, 2020 in the Third Judicial Circuit, dismissing Appellant’s original post-conviction relief application recorded as filed on August 2, 2006 (2006-CP-43-1241).² For reasons unexplained in the record, the Sumter County Clerk’s Office did not promptly transmit this original application to the Respondent, as required by statute, but instead sent it on June 9, 2017. During that almost eleven-year delay, Appellant later sought post-conviction relief in other applications having never received any explanation or understanding as to why his initial application was ignored. The

¹ The undersigned incorporates by reference Mr. Bell’s *pro se* Rule 243(c) explanation.

² Appellant verified his application on July 26, 2006.

confusion caused by this significant and inexcusable procedural irregularity directly led to and caused Appellant's failure to raise issues from his original application in his subsequent applications. Accordingly, for these reasons and those stated herein, any determination by the lower court that this application is successive is in error, this appeal should be heard, and the case remanded for an evidentiary hearing on the grounds set forth in the original application.

BACKGROUND

Appellant has served almost fifteen years of his twenty-five year sentence for trafficking crack cocaine (2004-GS-0180) in the South Carolina Department of Corrections. In March of 2006, a jury convicted Appellant for the above offense after he was tried *in absentia*, and the Honorable Clifton Newman sentenced Appellant to the applicable statutory mandatory minimum for the indicted charge.³ Appellant filed an appeal of his conviction related to the propriety of the trial in absence and the State's failure to provide its fingerprint expert's report. The South Carolina Court of Appeals affirmed the conviction and sentence on May 7, 2008.⁴

As noted above, Appellant signed and verified the instant, *pro se* post-conviction relief application on July 26, 2006. The Sumter County Clerk of Court recorded the same on August 2, 2006. However, the Clerk's office did not promptly transmit the application to Respondent until almost eleven years later. Having received no word or explanation as to the status of this original application, and fearing he may have done something incorrectly or presented an improper ground, Petitioner filed another application on November 9, 2006 (2006-CP-43-1902). Appellant was appointed counsel and an evidentiary hearing was conducted on October 26, 2009. The circuit

³ Six months prior to this trial, the Honorable Matthew J. Perry, at the request of the U.S. Attorney's Office, dismissed a federal indictment for the same alleged conduct. This request followed Judge Perry granting, in part, a suppression motion by Appellant. *See attached* (Criminal Docket Report for Case # 3:05-cr-00549).

⁴ *State v. Bell*, Op. No. 2008-UP-249 (S.C. Ct. App. May 7, 2008).

court denied relief and dismissed Appellant's second application on December 30, 2009. After two motions to reconsider,⁵ Appellant's appointed counsel filed a *Johnson* petition on Appellant's behalf. Appellant also filed a *pro se* response. This Court denied certiorari on July 30, 2012.⁶

In 2017, Appellant, much to his surprise, received notice of the continued pendency of the instant application filed eleven years prior. He had long believed that application had been resolved against him. Judge Curtis dismissed the instant application on December 7, 2020, and Appellant filed his notice of appeal on December 31, 2020.

ARGUMENT

As an initial matter, as outlined above, the application at issue in this case is not actually successive as this application was the original and first application filed by Appellant.⁷ The fault for why this application (and the grounds therein) has never been adjudicated lies with the Sumter County Clerk of Court which failed to satisfy its statutory duty to "promptly bring [the application] to the attention of the court and deliver a copy . . . to the Attorney General." S.C. Code Ann. § 17-27-40. This failure prevented the proper functioning of the statutory post-conviction regime and clearly prejudiced Appellant through no fault of his own. Had the clerk's office complied with the statute, Appellant would have had notice, either prior to or shortly thereafter, that his first petition was properly filed and still pending.⁸ However, that notice never came throughout the pendency

⁵ As noted in the lower court's order, the initial motion to reconsider, filed by counsel, was sent to the incorrect judge and not served on the Respondent.

⁶ The lower court's order further outlines the procedural history regarding Appellant's subsequent PCR and federal habeas litigation, a recitation of which is not necessary for consideration of the issue currently before the Court.

⁷ In fact, nowhere in the Order does the circuit court state explicitly that the application is barred as successive.

⁸ This conclusion is supported by the requirement that "[w]ithin thirty days after the docketing of the application, or within any further time the court may fix, the State shall respond by answer of by motion . . ."

of the second application, leaving Appellant (a non-lawyer) to follow the course set by his appointed counsel and further cementing Appellant's misapprehension of the propriety of his original claims. In short, the clerk's failure to transmit the application as required perpetuated and caused Appellant to not raise those issues again.

And it is that failure which clearly establishes the error in the circuit court's central holding in denying this application. In dismissing the application, the court held that "Applicant could have brought the claims 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." Order at 10. This ruling simply ignores the profound impact the eleven-year delay—caused solely by the Sumter County Clerk of Court—had on Appellant's understanding of what issues he could later bring before the court. That impact drastically diminished how "full and fair" Appellant's opportunity was to bring his claims in one PCR as outlined in *Odom v. State*, 337 S.C. 256, 260 (1999).

Accordingly, the extreme procedural irregularity caused by the Clerk of Court's inexplicable eleven-year failure in this instance has denied Appellant's due process. See *Washington v. State*, 324 S.C. 232, 236-37 (1996). That same procedural irregularity likewise establishes the error in the lower court's ruling and counsels against barring this appeal as successive. As this Court found in *Washington*, the instant case presents "one of those rare exceptions" where the interest of finality is outweighed by the interests of justice and due process:

"Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice."

Id. at 237 (quoting *Aice v. State*, 305 S.C. 448, 451 (1991)). The system failed Appellant by not fulfilling its statutory obligations. The files in clerk's offices across this State are filled with orders dismissing inmates' PCR applications due to their failure to precisely comply with the rules for PCR actions. The Court should not countenance allowing the system itself to fail in its duties to comply with the same rules, and thereby deny Appellant a full and fair opportunity to present all of his claims.

CONCLUSION

For the reasons stated herein, the Court should not dismiss this appeal, and the Court should remand this case for an evidentiary hearing.

Respectfully submitted,

/s Peter Phillips

Peter Phillips

SC Bar No. 68389

Blazer Law Firm

1037 Chuck Dawley Blvd.

D100

Mount Pleasant, SC 29464

843-732-4441

843-989-0042 (fax)

Email: peter@blazerlaw.com

Attorney for Appellant Herbert Lee Bell

April 22, 2021

Charleston, South Carolina

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Megan Harrigan Jameson, Esquire
mjameson@scag.gov
Office of the Attorney General
PO Box 11549
Columbia, SC 29211

By s/ Peter Phillips

Peter Phillips
SC Bar No. 68389
Blazer Law Firm
1037 Chuck Dawley Blvd.
D100
Mount Pleasant, SC 29464
843-732-4441 (o)
843-989-0042 (f)
Email: peter@blazerlaw.com

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