THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SALUDA COUNTY
THE Honorable Walton J. McLeod IV. circuit court Judge
APPELLATE CASE NO: 2019-CP-41-0156

Frank Tolen Jr,. . . . . Petitioner

V.

STATE OF SOUTH CAROLINA . . . . . .Respondent

PETITION FOR WRIT OF CERTIORARI

Frank Tolen Jr,. #246966
Pro se, Marion 261
Broad River Corr. Inst.
4460 Broad River Rd.
Columbia, S.C. 29210

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1. In Applicant Application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on following reason: . . . . . .

2. The sentence was in violation of the constitution of the United States and the constitution and law of this state. . . . . .

(A) The Applicant was denied the protections afforded him under the constitution of the United States in as much as his fifth, sixth, and fourteeth Amendment rights were denied. . . . . .

The court was without jurisdiction to impose sentence". . . .

(B) Trial court was without jurisdiction to sentence Applicant under the statutory guidline of title 17-25-45, rendering his sentence unlawful". . . . . .

3. The sentence exceeds the maximum allowed by law". . . . . .

4. There exits evidence of material facts, not previously presented and heard, that requires vacation of the sentence in the interest of justice". . . . . .

Applicant requests relief as follows:
"Vacation of unlawful sentence, remand for resentencing". . . .

Applicant filed a "Brief and memorandum of law in support of PCR Application,"raising the following issues: . . . . . .

1. Did the trial court have jurisdiction to sentence the Applicant to life imprisonment pursuant to S.C. code Ann. § 17-25-45? . . . . . .

2. Did the Applicant meet the criteria necessary to qualify for sentencing pursuant to S.C. code Ann. § 17-25-45? . . . . . .

On October 28, 2019, Applicant filed a motion for judgment by Default. . . . . .

Conclusion . . . . . .

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ISSUES PRESENTED

1. Was Applicant sentence in violation of the constitution of the United States and the constitution and law of this state.

A. Was Applicant denied the protection afforded him under the constitution of the United States in as much as his fifth, sixth, and fourteenth Amendment rights were denied.

2. Was this court without jurisdiction to impose sentence.

3. Was trial court without jurisdiction to sentence Applicant under statutory guidelines of title code § 17-25-45, rendering his sentence unlawful.

3. Did Applicant sentence exceeds the maximum allowed by law.

4. Did there exists evidence of material facts, not previously presented and heard, that requires vacation of the sentence in the interest of justice.

Applicant requests relief as follows:
"Vacation of unlawful sentence remand for resentencing.

1. Did the trial court have jurisdiction to sentence the Applicant to life imprisonment pursuant to S.C. code Ann. § 17-25-45?

2. Did the Applicant meet the criteria necessary to qualify for sentencing to S.C. Ann. § 17-25-45?

STATEMENT OF CASE

An incident occurring on October 2, 1996. The state charged the Applicant Frank Tolen, with armed robbery and possession of a firearm by a person previously convicted of a crime of violence. A. 359-60, 362-63.

The state tried Applicant on these charges from January 27-28, 1998 before the Honorable James W. Johnson, Jr,. and a jury. A.1-314. Assistant solicitor Ervin J. Haye and Julius H. Baggett, prosecuted. Vannie Williams, Jr,. represented Applicant. The jurors convicted and judge Johnson sentence Applicant to life without the possibility of parole pursuant to S.C. code § 17-25-45 for armed robbery and five years imprisonment for possession of a firearm by a person convicted of a crime of violence the sentence was concurrent.

Applicant did not appeal the conviction or sentence. On April 15, 1998, Applicant filed and application for post-conviction relief (hereinafter" PCR) A. 316-19. By order dated November 15, 2000, the Honorable Rodney A. Peoples allowed a belated appeal pursuant to White v. State, 263 S.C. 110, 108 S.E. 2d 35 (1974) A. 341. This court affirmed the convictions and sentence. Tolen v. Sates (S.C. S.Ct. OP. No. 2002-MO-024) filed March 22, 2002). A. 373-74.

On May 17, 2002, Applicant filed a second PCR application A. 375-79. On December 13, 2002, the served a return. A 390-94. On April 17, 2003, the Honorable Kenneth Goode Jr. convened a PCR hearing. A. 396-433 by written an order dated June 17, 2003, judge Goode granted post-conviction relief. A. 435-43. This court granted the state's petition for writ of certiorari on December 19, 2005, the "dismiss[ed] certiorari as improvidently granted with respect to the PCR court's ruling on the issue of the state's failure to give proper notice of intent to seek a sentence of life imprisonment without parole pursuant to S.C. code § 17-25-45(H) (2003). The court also held, the remainder of the holdings of the PCR court are vacated and the matter is remanded for a new trial. Tolen v State, S.C. S.Ct. memorandum OP.No. 2005-MO-061(filed December 19, 2005). a. 444-45

The state tried Applicant a second time during the week of November 11, 2006, before the Honorable Williams P. Keesley and a jury. A. 445-727. Irvin Kaye again represented the state Andrew Thompson, defended Applicant, the jurors convicted Applicant and judge Keesley sentenced him to life imprisonment without the possibility of parole for armed robbery pursuant to S.C. code § 17-25-45 and five years concurrent for possession of a firearm by a person convicted of a crime of violence the sentence are concurrent.

Applicant Appealed. The court of appeals affirmed the conviction and sentence. State v. Tolen, (S.C. Ct. App. unpublished OP.No. 2009-UP-220) (filed May 26, 2009) A. 743-44.

On June 30, 2009, Applicant filed A PCR application A. 745-50 The Honorable R. Lawton McIntosh convened a hearing on January 30, 2013, A. 773-890. Stephen D. Geoly represented Applicant and Ashleigh R. Wilson represented the state. By written order dated march 15, 2013, judge McIntosh denied the PCR. A. 892-910.

On April 12, 2013, Applicant filed a Rule 59(e) motion 911-14. Judge McIntosh denied that motion on or about April 23, 2013. A. 917-18.

Applicant then filed a timely Petition for writ of certiorari with the South Carolina supreme court that was denied on December 10, 2014 subsequently, Applicant filed a petition for writ of habeas corpus in the United States District court of South Carolina on June 22, 2015, by order dated September 26, 2017, the Honorable R. Bryan Harwell denied the petition and certificate of appealability.

Applicant appeal with counsel Elizabeth Anne Franklin-Best. Donald John Zelenka Deputy Attorney General represented the state. Applicant brief was submitted July 31, 2018, and decided August 3, 2018. case No. 17-7399 (1:15-cv-02503-RBH).

HISTORY OF CURRENT APPLICATION

On July 10, 2019, Applicant filed a application for post-conviction relief (PCR) July 15, 2019, that application was received and filed by the Saluda county clerk of court. Respondent received a copy of application July 22, 2019, according to the records of that office.

On October 28, 2019, the applicant filed a motion for judgment by default on the Respondent's that motion was received and clocked stamped filed November 5, 2019, by the Saluda county clerk of court Respondent received that motion for judgment by Default.
"No hearing has been held on that matter as of to date.

January 9, 2020 and January 21, 2020 Applicant wrote the Honorable Daniel E. Shearouse, clerk of court S.C. supreme court, requiring why he is being denied access to the lower court by the respondent refusal to repond to any applicant's merit issues.

The Honorable Daniel E. Shearouse, responded to applicant's letter informing applicant the Rule of the courts to have his case heard.

Applicant was later Granted a motion to Reinstate March 3, 2020, by the supreme court of South Carolina ordering the respondent ten (10) days to file its return appellate case No. 2020-000109, lower court No. 2019-CP-41-00156,

March 13, 2020 the respondent's motion the court for extended of time to submit their respondent's return to the petition for original jurisdiction.

March 16, 2020, respondents requested extended of time until March 23, 2020. The respondent return was clocked stamped filed with the Saluda county clerk of court March 24, 2020 at 2:06 pm (see return and motion to dismiss).

April 1, 2020, applicant filed a timely motion for Default entry on respondent it was received April 6, 2020 for failing to timely respond to the March 23, 2020, order.

April 8, 2020, respondent file it's return to the petition for an extraordinary writ pursuant to Rule 245, SCACR In the supreme court.

April 17, 2020, Applicant filed his timely objection and reply to the respondent return to the petition for an extraordinary writ pursant to Rule 245, SCACR, on all parties.

May 27, 2020, respondent motion the court to file a motion to file return out of time and response to applicant's motion for entry of Default.

June 3, 2020, Applicant filed his timely objecting to granting respondent's motion to file return out of time and response to applicant's motion for entry of Default on all parties.

The respondent filed its first conditional order of dismissal, April 10, 2020, the Honorable Walton J. McLeod IV signed that order, that order was clocked stamped filed by the Saluda county clerk of court April 23, 2020, at 9:31 am.

May 7, 2020, applicant filed his timely objection and reply to respondent conditional order of dismissal on all parties.

July 9, 2020, the respondent file its <u>second</u> conditional order of dismissal the Honorable Walton J. McLeod IV signed that order that order was also clocked stamped filed by the Saluda county clerk of court July 20, 2020, at 9:02 AM.

August 3, 2020, applicant motion the court for an extension (20) days August 5, 2020, applicant motion was clocked stamped and filed by the Saluda county clerk of court.

August 10, 2020, applicant filed it's second timely objection and reply to respondent conditional order of dismissal on all parties.

August 24, 2020, the supreme court of South Carolina order pursuant to Rule 245, SCACR, and Key v. Currie, 305 S.C. 115, 406 S.E. 2d 356 (1991) we decline to entertain the following matters in this court original jurisdiction.

September 15, 2020, applicant filed objection to the supreme court order on all parties.

September 22, 2020, the supreme court of South Carolina Daniel E. Shearouse clerk of court respond back to applicant objection.

November 24, 2020, applicant received from Broad River mailroom respondent proposed final order of dismissed, to the Honorable Walton J. McLeod IV, dated November 17, 2020, with that proposed final order of dismissal respondent's submitted documents in support of that order to the court.

On December 3, 2020, applicant filed its timely objection to respondent proposed final order of dismissal, on all parties.

On December 18, 2020, applicant received from Broad River mailroom respondent letter dated December 9, 2020, the signed and filed Finalorder of dismissal, the order was signed december 1, 2020, and clocked stamped filed by the Saluda county clerk of court December 6, 2020, at 2:27 pm.

December 29, 2020, applicant filed a timely notice of motion and motion to alter or amend judgment pursuant to Rule 59(e) SCRCP on all parties with documents in support motion.

February 4, 2021, the Honorable Walton J. McLeod IV received applicant motion to alter or amend judgment pursuant to Rule 59(e).

February 10, 2021, applicant received respondent's return to applicant's motion to alter or amend pursuant to Rule 59(e), SCRCP.

March 22, 2021, applicant received the Honorable Walton J. McLeod IV signed March 1, 2021, order denying motion to alter or amend pursuant to Rule 59(e), SCRCP.

APPLICABLE LEGAL PRINCIPLES

In determining whether trial defense counsel provided ineffective assistance of counsel, pursuant to the sixth and fourteenth Amendments, this court must apply the standards set forth in Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, the defendant "must show that counsel's representation fell below an objective standard of reasonableness, "which must be judged under "prevailing professional norms.

To identify the prevailing professional norms, in addition to settled case law, courts look to the American Bar Association Criminal Justice Standards (Defense Function), the National Legal Aid & Defender Association Performance Guidelinea for Criminal Defense Representation, the Department of Justice Compendium of Standards for Indigent Defense Representation, "criminal defense and public defender organizations, authoritative treatises, and state and city bar publications. Padilla v. Kentucky, 559 U.S. 356, 367 (2010).

In assessing the investigation in Strickland, the court stated that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitation on investigation." Any decision to halt investigation must be assessed for reasonableness. 466 U.S. at [illegible]. "The presumption of adequate representation based on a valid trial strategy disappears when trial counsel acknowledged there was no trial strategy in mind" concerning the deficient performance. Smith v. State, 386 S.C. 562, 568, 689 S.E. 2d 629, 633 (2010).

Once the defendant asserting ineffective assistance of counsel has established counsel's failure to comply with the prevailing professional norms, he must affirmatively prove that this deficiency has prejudiced him. Specifically:

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sfficient to undermine confidence in the outcome.

Strickland, 466 U.S. at . The totality of the evidence must be considered in deciding whether the defendant was prejudiced by counsel's errors.

"This court will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law. "Walker v. State, 2012-211267, 2014 WL 1052609 (S.C. Mar. 19, 2014) (quoting Lomax v. State, 379 S.C. 93, 101, 665 S.E. 2d 164, 168 (2008)).

REASON WHY THE WRIT SHOULD BE GRANTED

(A) The PCR court erred in not finding counsel was ineffective.

Applicant Argues he should have never been re-tried by the same prosecutor who previously had actual conflict of interest issue in Applicant's prior case. (See App. p. 402, line 15 - p. 404, line 1) on the ground that the co-defendant's counsel was the lawpartner for the prosecuting solicitor (Julius H. Baggett) an actual conflict of interest exists where an Attorney owes a duty to a party whose interest are adverse to the defendant's. Jackson v. State, 329 S.C. 345, 495 S.E. 2d 768 (1991).

This conflict of interest still exists (Julius H. Baggett) was the former judge in 1990 who sentence Applicant to a consecutive 3 to 6 YOA that was used by the prosecutor to enhance Applicant current sentence pursuant to 17-25-45. In Applicant first trial January 26-27 1998, and second trial November 7-9, 2006.

Tuten v. State, NO-81-6756, Dorzynski v. U.S., U.S. at 435, U.S. v. Hunt, 661 F. 2d 72, 75 (6th cir. 1981) U.S. v. Arrington, 618 F. 2d 1119, 1123 (1980).

The prosecutor should have recused himself from Applicant case due to the concurrent prejudice conflict of interest. A constitutionally intolerable probability of bais exists when the same person serves as both accuser and adjudicator in a case. Williams v. Pennsylvania, 136 S.Ct. 1899, 195 L.Ed. 2d 132. Supreme court of the United States (2016). Also in Caperton v. A.T. Massey Coal Co., S.Ct. 2252 173 L.Ed. 2d 1208.

Respondents never refuted that this prejudice conflict of interest never happened throughout the whold proceeding that (Julius H. baggett) was the sentencing judge of Applicant YOA and is the prosecutor in Applicant's prior and current case. Applicant should be granted resentencing

(B). The PCR court erred in finding that Applicant current PCR application was filed after statute of limitation had expired; successiveness of Applicant being barred by the doctrine of resjudicata.

Subject matter jurisdiction can be raised at any time timely or untimely. Applicant concurrent conflict of interest should have been raised in his previous trial but wasn't due to counsel ineffectiveness.

In Foxworth v. State, 275 S.C. 615, 275 S.E. 2d 415 (1981); And Arnold v. State, 309 S.C. 157 420 S.E. 2d 832 (1992) section 17-27-90 of the South Carolina code state:

"Unless the court finds a ground for relief asserted which for "sufficient reason" was not asserted or was inadequately raised in the original supplemenful, or Amended application.

Under this statute successive post-conviction relief application are for bidden unless an applicant can indicate a "sufficient reason.

Applicant repeated conflict ofinterest still remains in his case from the pervious application (Julius M. Baggett) was the former judge in 1990 who sentence Applicant to a YOA and is the current prosecutor in both of Applicant trials.

Sanders v. U.S., 373 U.S. 1 (1963) conventional notions of finalty of litiggation has no place where life or liberty is at stake and infringement of constitutional rights is alleged"

U.S.v. Ohio Power Co., The interest in finality of litigation must yield wher interest of justice would make unfair strict application of supreme court's Rules.

Resjudicata should not beable to prevent Applicant from raising a merit issue that is a "sufficient reason" despite the time limitations.

Accordingly, the PCR court's findings as to this issue should be reversed.

(C) The PCR court erred in not finding that applicant YOA conviction and sentence was applied retroactively by the state to enhance applicant sentence pursuant to 17-25-45.

Applicant March 22, 1990 YOA should not have used for enhancement pursuant to 17-25-45. Applicant pleaed guilty to a lesser charge and received A 1 year 1 to 6 YOA nor should Applicant April 20, 1990 consecutive 3 to 6 due to the concurrent conflict of interest the respondent has never provided any evidence to this court showing that the 1998 or 1990 YOA statute states that a offender can be sentence twice under that chapter 24-19-50.

Applicant prior YOA sentence was applied retroactively Welch v. U.S., 136 S.Ct. 1257, Teague v. Lane, 489 U.S. 288, 310, 109 S.Ct. 1060, 103 L.Ed. 2d 334;

Both of Applicant's prior crimes was committed in 1989 Applicant pleaed guilty in 1990 to both charges, had Applicant been properly informed by counsel back then that those YOA guilty pleas could later be used in the future proceeding Applicant would have not pleaed guilty.

A plea made in ignorance of it's consequences entered in ignorance and is invalid, Hazel, 275 S.C. 392, 271 S.E. 2d 602.

Accordingly, the PCR court's findings to this issue should be reversed.

(D) Did the PCR court erred in accepting the state's proposed final order of dismissal, Affidavit of service from SCDC indicates the conditional order of dismissal was personally served on Applicant on October, 2020.

Applicant argued that the respondent submitted a false fraudulent document with it's proposed final order of dismissal to the court that was later signed by the court granting order, a hearing should have been held for the sake of fairness and truthful Applicant never received any conditional order of dismissal from "any" SCDC [officer].

Respondent admits erroneously stating upon when conditional order of dismissal was filed and that was accepted by the court, but when Applicant screams foul", it's not even consider for the truth in this matter. A hearing should have been held with all parties who's names are on that fraudulent document that was submitted to the court by the respondent.

Accordingly, the PCR court findings as to this issue should be revered and a hearing should be held.

Therefore, the Applicant would submit that the PCR court erred in not granting re-sentencing, due to the state's concurrent prejudice conflict of interest, an Applicant's prior YOA conviction and sentence was applied retroactively by the respondent to enhance sentence pursuant to title 17-25-45.

CONCLUSION

For these reason, this court should reverse the order of the lower court and grant Applicant a re-sentencing.

Respectfully Submitted

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Columbia, South Carolina

4/2/21 date

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Frank Tolen, ... Applicant

V.

STATE OF SOUTH CAROLINA . . . . . Respondent

CERTIFICATE OF SERVICE

The under signed hereby certifies that a true copy of the brief of Applicant has been served upon opposing counsel and court's

S/ Frank Tolen Jr.,
Frank Tolen, Jr.
Pro se

Sworn to and subscribed before me
This 2nd day of April 2021
[illegible] (L.S.)
Notary Public For South Carolina
My Commission Expires: 7-27-2021,