

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Roger M. Young, Circuit Court Judge

MICHAEL DAYSE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001583

PETITION FOR WRIT OF CERTIORARI

Taylor D Gilliam
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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S.C. SUPREME COURT

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ISSUE PRESENTED

Whether the PCR court erred in dismissing Petitioner's post-conviction relief action for failure to prosecute after Petitioner did not appear at the evidentiary hearing, where Petitioner never received notice of the evidentiary hearing, and where there was no evidence that Petitioner acted with unreasonable neglect in proceeding with his case?

STATEMENT

With Hurricane Irma rapidly approaching and a potential mistrial looming if Petitioner's trial was postponed due to weather, the state hurriedly called Petitioner's case for trial before the Honorable Clifton Newman in Charleston on September 7, 2017. App. 1. Marian Askins and Daniel Cooper served as the assistant solicitors, and Robert Gailliard represented Petitioner. Petitioner had been indicted in March 2016 by a Charleston County grand jury on the charge of exploitation of a vulnerable adult under S.C. Code Ann. § 43-35-85(D). App. 281 – 282.

Petitioner's trial, unable to extend to Friday, September 8, 2017 due to the courts being closed, lasted one day. App. 134 ll. 7 – 10. After a note from the deliberating jury was read at 5:27 p.m., trial court brought the jury back into the courtroom to answer multiple questions. App. 242 l. 22 – App. 246 l. 16. Minutes later, the jury found Petitioner guilty as indicted. App. 246 l. 24 – App. 247 l. 19. Judge Newman sentenced Petitioner to five years' incarceration suspended after eighteen months, with three years' probation. App. 257 ll. 7 – 13.

Petitioner filed an application for post-conviction relief on December 14, 2017. App. 261 – 270. It contained allegations of ineffective assistance of counsel, including claims that trial counsel was not prepared for trial. App. 268. The state made its Return on or about March 19, 2018. App. 271 – 275.

An evidentiary hearing was scheduled for May 24, 2018 before the Honorable Roger M. Young. App. 276. Christopher Murphy represented Petitioner, and Kelly Oppenheimer appeared on behalf of the state. The PCR court dismissed Petitioner's action for failure to prosecute after Petitioner did not appear. App. 277 l. 2 – App. 278 l. 9. An Order dismissing the case for failure to prosecute was signed on May 24, 2018. App. 280.

Petitioner then filed a *pro se* Notice of Appeal with this Court which indicated that he did not receive notice of the hearing date. This petition follows.

ARGUMENT

The PCR court erred in dismissing Petitioner’s post-conviction relief action for failure to prosecute after Petitioner did not appear at the evidentiary hearing, where Petitioner never received notice of the evidentiary hearing, and where there was no evidence that Petitioner acted with unreasonable neglect in proceeding with his case.

Trial counsel was hired three days before Petitioner’s trial which took place on Thursday, September 7, 2017. App. 249 ll. 14 – 16. The defense appeared to be at the mercy of the assistant solicitors who seemed insistent to call the case for trial. Unable to secure the testimony of a key witness, trial counsel failed to request a continuance, and the parties proceeded with closing arguments and jury charges at 4:00 p.m. on a Thursday with the knowledge that the court would be closed the next day and possibly longer due to inclement weather.

At the outset of Petitioner’s one-day trial, the trial judge indicated that “if the case isn’t over today a mistrial will be declared. I don’t intend to be in the middle of a hurricane or hurricane evacuation.” App. 6 ll. 6 – 10.

The plaintiff has the burden of prosecuting his action, and the trial court may dismiss an action for plaintiff’s unreasonable neglect in proceeding with his cause. Don Shevey & Spires, Inc. v. American Motors Reality Corp., 279 S.C. 58, 301 S.E.2d 757 (1983). In those cases where this Court has affirmed dismissal of actions based on a failure to prosecute, the dismissals were imposed to maintain the orderly disposition of cases in the face of repeated warnings to the offending party or multiple opportunities to proceed with trial, and only then upon a finding of unreasonable neglect. See Small v. Mungo, 254 S.C. 438, 443, 175 S.E.2d 802, 804 (1970) (finding no abuse of discretion where counsel was apparently in his office and plaintiff and

witnesses were at work when case was called for trial, and counsel informed the court that he could not appear for hours); Bond v. Corbin, 68 S.C. 294, 294–95, 47 S.E. 374, 374 (1904).

Dismissal is a harsh sanction which “should be resorted to only in extreme cases.” McCargo v. Hedrick, 545 F.2d 393, 396 (4th Cir. 1976). The Fourth Circuit has said that the trial court must consider four factors before dismissing a case for failure to prosecute: (1) the plaintiff’s degree of personal responsibility; (2) the amount of prejudice caused the defendant; (3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion; and (4) the effectiveness of sanctions less drastic than dismissal. Hillig v. Comm’r of Internal Revenue, 916 F.2d 171, 174 (4th Cir. 1990). The Court of Appeals has found dismissal too harsh a sanction in a case where the plaintiff inadvertently was not present at the start of trial. McComas v. Ross, 368 S.C. 59, 626 S.E.2d 902 (Ct. App. 2006).

Petitioner testified in his defense at trial and filed an in-depth post-conviction relief application; he was involved with his case at every turn. App. 189 – 216; App. 261 – 269. He cited to relevant case law in his post-conviction relief application. See Gaddy v. Douglass, 359 S.C. 329, 597 S.E.2d 12 (Ct. App. 2004). He drafted a “Motion for Post Conviction Relief” and corresponded with the Charleston County clerk of court. App. 268 – 270. The fact that he filed a *pro se* Notice of Appeal after receiving the Order dismissing his case shows that he intended to be involved with his case and see it through:

The *pro se* Notice of Appeal filed by Petitioner plainly sets forth the fact that Petitioner did not receive notice of the evidentiary hearing. Therefore, he did not act with unreasonable neglect in proceeding with his case. The state’s Return noted that Petitioner was represented by counsel (“[b]ecause Applicant has been appointed an attorney, and not Applicant, is the only individual authorized to file amendments to this application”), so Petitioner likely did not receive

notice of the evidentiary hearing, from either the clerk of court or counsel for Respondent. It fell to his appointed counsel to notify him.

The three-page evidentiary hearing transcript shows that the bailiff went out into the hall and called Petitioner's name three times. App. 277 ll. 3 – 7. PCR counsel remarked that he had not heard from Petitioner. App. 277 ll. 11 – 13. Quite notable was the following exchange between the PCR court and PCR counsel:

Q: All right. Was he sent notice of this hearing?

A: I don't believe - - I said - - I'm looking through my file now, and **I don't have a notice of the hearing**. The reason is I don't have any contact information for him. Whenever someone is out, I always have my girls look on the Internet to try and find the person, or I'll call probation to try and get an address that is up-to-date for him and then contact him from there, and I have not had any contact information throughout the entire time I've been appointed in this case, so - -

App. 277 ll. 14 – 24 (emphasis added). The state then moved to dismiss for failure to prosecute, and PCR counsel acquiesced. App. 277 l. 25 – App. 278 l. 9.

Candidly, a quick search on the website of the South Carolina Department of Probation, Parole and Pardon Services¹ yields information on Petitioner. His age, year of birth, main offense, supervision type, and supervision dates are all listed. Importantly, the supervision begin date was December 1, 2017, and the end date is November 30, 2022. Upon information and belief, PCR counsel could have obtained an address and contact information by contacting the South Carolina Department of Probation, Parole and Pardon Services.

If PCR counsel did not have contact information for Petitioner "throughout the entire time [he has] been appointed in this case," Petitioner would not have known anything about his post-conviction relief action. There is no evidence in the record to support a knowing, willful, or

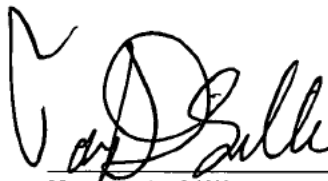
¹ *Name Database Search, South Carolina Department of Probation, Parole and Pardon Services*, <https://www.dppps.sc.gov/Offender-Supervision/Offender-Search/Offenders/MICHAEL-L-DAYSE> (last visited May 3, 2019)

neglectful act or failure to act by Petitioner during the course of his PCR matter which could serve as justification to dismiss his case.

This Court has held that where a plaintiff, first on the trial docket, is absent on the first day of trial, on the afternoon of trial, and again the next morning, a dismissal for failure to prosecute is proper. Bond v. Corbin, 68 S.C. 294, 47 S.E.374 (1904). There is no evidence of unreasonable neglect in this case, and the PCR judge incorrectly dismissed this case for Petitioner's failure to prosecute.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant certiorari to allow full briefing on the issue.

A handwritten signature in black ink, appearing to read 'Taylor D Gilliam', written over a horizontal line.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of May, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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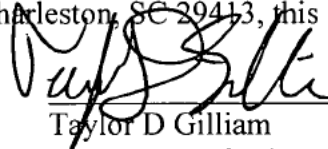
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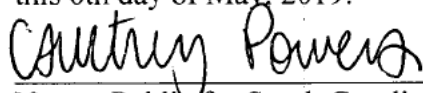
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Benjamin Limbaugh, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Michael Dayse, at PO Box 21968, Charleston, SC 29413, this 6th day of May, 2019.



Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 6th day of May, 2019.

 (L.S)

Notary Public for South Carolina
My Commission Expires: MAY 2, 2027.