

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Richland County

Honorable L. Casey Manning, Circuit Court Judge

KENNETH DARRELL RIVERA,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-000654

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the post-conviction relief court erred when it summarily dismissed Petitioner's post-conviction relief application without a hearing where Petitioner stated a claim that was cognizable for review?

STATEMENT

During the December 2019 term, the Richland County Grand Jury indicted Petitioner for contraband possession by a prisoner. App. 9 – 10. On December 3, 2019, Petitioner pled guilty before the Honorable Robert E. Hood. App. 15. Jonathon Cornish represented Petitioner. Id. Grayson Hill represented the state. Id. Petitioner was sentenced to one-year-imprisonment to run concurrently¹ with his other charges.

On February 10th, 2020, Petitioner filed an application for post-conviction relief (PCR) where he alleged his attorney was ineffective for failing to object to his guilty plea to possession of a weapon by an inmate where Petitioner had already been punished by the South Carolina Department of Corrections (SCDC) such that the guilty plea constituted a second conviction for the same crime which violated Petitioner's Constitutional protection against double jeopardy. App. 1 – 10. On August 5th, 2020, the state filed its return and motion to summarily dismissed for failure to state a cognizable claim for relief. App. 11 – 14.

On August 12th, 2020, the PCR court issued a Conditional Order of Dismissal provisionally denying and dismissing Petitioner's PCR application. App. 15 – 17. On September 4th, 2020, the PCR court served the Conditional Order of Dismissal on Petitioner and gave him twenty days to argue why the dismissal should not become final. App. 47.

On September 9th, 2020, Petitioner responded to the Conditional Order of Dismissal. App. 19 – 22. Petitioner reiterated his claim that his guilty plea was a violation of his Fifth Amendment protection against double jeopardy because he was already subject to a disciplinary action from SCDC for the same charge. Id.

¹ Petitioner was serving a sentence for armed robbery at the time of his guilty plea. App. 59.

On June 1st, 2021, the PCR court filed a Final Order of Dismissal. App. 47 – 49. The PCR court determined that the double jeopardy clause of the Fifth Amendment of the Constitution did not apply in this case because it only protects against “a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense,” and a disciplinary hearing is not a criminal prosecution. App. 48.

This petition follows.

ARGUMENT

The post-conviction relief court erred when it summarily dismissed Petitioner's post-conviction relief application without a hearing where Petitioner stated a claim that was cognizable for review.

Relevant Facts

Petitioner allegedly possessed an improvised weapon while he was an inmate in the custody of SCDC. App. 9; App. 26 – 29. Petitioner pled guilty to being an inmate possessing contraband on December 3rd, 2019. App. 15.

Petitioner filed an application for post-conviction relief where he alleged that his Fifth Amendment Constitutional protection against double jeopardy was violated because he was disciplined in SCDC for his possession of contraband and subsequently was punished with one-year-imprisonment from the plea court following his guilty plea for the same offense. App. 1 – 10. The PCR court summarily denied Petitioner's PCR application without a hearing because Petitioner allegedly failed to state a claim cognizable for relief. App. 15 – 17; App. 47 – 49. The PCR court specifically found that double jeopardy did not apply to Petitioner's case because the disciplinary action he received from SCDC and his guilty plea to possessing contraband did not constitute two convictions for the same offense under double jeopardy principles. App. 48.

Discussion

The PCR court erred when it summarily dismissed Petitioner's PCR application without a hearing for failure to state a claim where Petitioner stated a claim cognizable for review by the PCR court because a disciplinary action taken by SCDC can be considered a conviction for double jeopardy purposes if the disciplinary action was punitive in nature, as opposed to remedial. See State v. Blick, 325 S.C. 636, 481 S.E.2d 452 (Ct. App. 1997). The PCR court

should have held a PCR hearing to determine if the disciplinary action was sufficiently punitive as to function as a conviction for double jeopardy purposes.

Summary dismissal of a PCR application without a hearing is appropriate *only* when (1) it is apparent on the face of the application that there is no need for a hearing to develop any facts and (2) the applicant is not entitled to relief. S.C. Code Ann. § 17-27-70(b) and (c). “When considering the State's motion for summary dismissal of an application, where no evidentiary hearing has been held, the circuit court must assume facts presented by an applicant are true and view those facts in the light most favorable to the applicant. Similarly, when reviewing the propriety of a dismissal, this Court must view the facts in the same fashion.” Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005); See S.C. Code Ann. § 17-27-80 (2003) (PCR actions are governed by usual rules of civil procedure); see also Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 (2002); Al-Shabazz v. State, 338 S.C. 354, 364, 527 S.E.2d 742, 747 (2000).

The PCR court cited State v. Blick, 325 S.C. 636, 481 S.E.2d 452 (Ct. App. 1997) for the proposition that Petitioner being punished by SCDC for possessing contraband and his subsequent guilty plea to being an inmate in possession of contraband did not trigger constitutional protections against double jeopardy. App. 48. The PCR court’s reliance on Blick here was misplaced because the holding in Blick was limited to the SCDC administrative punishment of “administrative segregation for a total of 120 days and suffered good time credit loss of 60 days” that Blick received. Blick, at 638 – 39, 481 S.E.2d at 453 – 54.

Blick was imprisoned for grand larceny and second-degree burglary when he was accepted into the extended work release program of SCDC. Blick, at 638, 481 S.E.2d at 453 Pursuant to his release, he signed an agreement with SCDC setting forth the regulations under

which he was to live. Id. He was allowed to go to work but was subject to a curfew and was required to be at home at a certain time. Id.

On January 27th, 1995, an officer called Blick's home at 10:00 a.m. and was told by Blick's father that he would be home in twenty minutes. Id. When Blick returned home on the evening of January 29th, his father told him the officer had been calling and he was to return to the work release center. Id. Blick called the center that evening and was told to report immediately, but he waited until the next day to report and was taken back into custody. Id.

On February 13th, 1995, an SCDC administrative hearing was held where Blick was punished with "administrative segregation for a total of 120 days and suffered good time credit loss of 60 days." Blick, at 638 – 39, 481 S.E.2d at 453 – 54. Thereafter, Blick was indicted on May 8th, 1995, for escape and on December 6th, 1995, Blick pled guilty. Id.

The plea court determined that Blick had already been punished by SCDC such that his guilty plea constituted double jeopardy. Id., at 640, 481 S.E.2d at 454. Consequently, the plea court dismissed Blick's charge for escape. Id.

The state appealed and the Court of Appeals reversed the plea court's dismissal. Blick, at 642, 481 S.E.2d at 455. In its decision, the Court of Appeals discussed the difference between a punitive administrative punishment and a remedial administrative punishment. Id. The latter did not trigger the double jeopardy clause of the Fifth Amendment to the United States Constitution; however, the former "may constitute punishment for purposes of double jeopardy." Id.

The Court of Appeals held that Blick's guilty plea did not violate his Fifth Amendment right protecting against double jeopardy because the specific administrative punishment Blick received was not punitive but remedial in nature. Blick, at 642, 481 S.E.2d 456 – 57. "Looking at the particular facts of this case, we find the loss of 60 days of good time credit and the imposition

of 120 days of administrative segregation is not so divorced from the remedial goal of the government to encourage good conduct and maintain order in the prison as to constitute punishment for double jeopardy purposes.” Id.

In the present case, there was no finding in the record that the punishment SCDC imposed on Petitioner for his contraband violation was remedial and not punitive in nature. The punishment by SCDC could have been found to be severely punitive in nature such that Petitioner’s guilty plea constituted a second punishment for double jeopardy purposes under Blick. Blick, at 642, 481 S.E.2d at 455. Accordingly, the PCR court erred when it summarily dismissed Petitioner’s PCR application without a hearing because the PCR court never made a finding that the disciplinary action imposed by SCDC was not punitive in nature such that his subsequent guilty plea to the same offense did not violate his Constitutional protections against double jeopardy, and Petitioner should be afforded a full hearing to present his PCR allegations.

CONCLUSION

By reason of the foregoing arguments, Petitioner requests that this Court vacate the order of dismissal and remand his case to the post-conviction relief court for a full hearing; or in the alternative, grant certiorari to allow for full briefing on this issue.

s/ Victor R. Seeger
Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of August, 2021.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kenneth Darrell Rivera states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent Petitioner.
2. He has reviewed the record of petitioner's request for post-conviction relief and the order denying relief issued by Judge L. Casey Manning on June 11, 2021, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Kenneth Darrell Rivera.

Respectfully Submitted,

s/ Victor R. Seeger
Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of August, 2021.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson 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.”

s/ Victor R. Seeger
Victor R Seeger
Appellate Defender

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This 19th day of August, 2021.