IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Perry H. Gravely, Circuit Judge

Lower Court Case Number 2019-CP-23-7165

Appellate Case Number 2021-000997

Jaques Jamar Sullivan.....Petitioner,

v.

State of South Carolina.....Respondent.

BRIEF OF APPELLANT

Jaques Jamar Sullivan, Pro Se
Perry Correctional Institution
430 Oaklawn Road
Pelzer, SC 29669

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Other Authorities:

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I S S U E S O N A P P E A L

1. Whether the Lower Court erred when ruling Appellant failed to present a Prima Facie case that he is entitled to a new trial when factual determination was made without an evidentiary hearing?

2. Whether the Lower Court abused its Section 17-27-70(a), statutory discretion when it belatedly fixed Respondent's time to respond to the Application for Post-Conviction Relief four (4) months after notice of default and the Court found Respondent prepared to answer three (3) months sooner, and when in light of Respondent's flagrant disregard for the Rules of Civil Procedure the Court falsely attributed the delay to "remote work restrictions initiated due to the pandemic"?

3. Whether the Lower Court's granting Respondent's Motion to Dismiss, based exclusively upon affirmative defenses which were waived by Respondent due to their default, caused Appellant the necessary prejudice requisite for obtaining a judgment by default?

S T A T E M E N T O F T H E C A S E

In his second and current application for post-conviction relief, Appellant alleged he is being held in custody unlawfully for the following reasons:

1. "Ineffective assistance of counsel for failure to discharge his duty of due diligence to investigate the evidence, facts, and witness(es) in the case":
   a. "Counsel failed to properly and fully investigate the case";
   b. "Trial counsel did not properly investigate whether a law enforcement officer properly followed the application procedures for applying for a wiretap;
   c. Trial counsel did not properly investigate whether a law enforcement officer properly obtained a court order authorizing a wiretap;
   d. Trial counsel did not properly investigate whether an intercepted communication was disclosed illegally;
   e. Trial counsel did not properly investigate whether a law enforcement officer furnished a copy of his application for a wiretap and/or the court order authorizing the wiretap;
   f. Trial counsel did not ensure that the reporting of the wiretap to the federal government was done properly;
   g. Trial counsel did not inform Applicant and the court that the wiretap did not conform to state law;
   h. Trial counsel did not move to suppress evidence;
   i. Trial counsel did not inform Applicant and the court that a law enforcement officer illegally gathered evidence; and
2. "Ineffective assistance of counsel for failure to provide a proper defense for physical evidence in this case";
3. "Fraud upon the court, pursuant to SCRCP 60(B)(3)(4); and
4. "After discovered evidence".

On March 19, 2020, Applicant filed a motion for judgment by default, pursuant to Rule 55, SCRCP. On April 22, 2020 Respondent completed the return to the application. On July 24, 2020 Respondent served their return, which was filed July 28, 2020.

On August 17, 2021, the Court granted Respondent's Motion to Dismiss, excusing Respondent's default to "restrictions initiated due to the pandemic". (Order, Page 6, footnote 1).

In the Final Order of Dismissal, the lower court rules that Appellant had not established his claim to post-conviction frelief by satisfactory evidence, stating the application was not filed within the time required by the Uniform Post-Conviction Procedure Act, was impermissibly successive and Appellant failed to make a prima facie case that Appellant has after-discovered evidence that entitled him to a new trial. (Order, pg. 6, pgh. 5, lns. 7-9; pg. 7, pgh. 1, lns. 1-2). Secondly, the Court denied Appellant's motion for default because it found no prejudice suffered from Respondent's late filing. (Order, pg. 7, pgh. 2, lns. 1-4). Thirdly, entry of default judgment, according to the court, is an extreme remedy that should be avoided in post-conviction relief cases. (Order, pg. 7, pgh. 3, lns. 1-2). Lastly, the lower court denied Appellant's motion for default because it is now moot.

After dispensing as such with Appellant's Motion for Default Judgment, the lower court proceeded to dismiss the case upon Respondent's Motion to Dismiss, based exclusively upon the affirmative defenses listed above. (Order, pg. 10, pgh. 2, lns 6-8).

P R O C E D U R A L H I S T O R Y

Appellant is confined in the South Carolina Department of Corrections pursuant to orders of committment from the Greenvuille County Clerk of Court. The Appellant was indicted at the March 2009 term of the Greenville County Grand Jury for trafficing cocaine (2008-GS-23-7026, count 1), posession of a weapon during the commission of a violent crime (2009-GS-23-7027, count 2) and

possession of marijuana (2008-GS-23-7027). He was represented by Daniel J. Farnesworth, Sr., Esquire.

After the State brought the case to trial, the Appellant was found guilty. On July 15, 2009, the Honorable Edward W. Miller sentenced the Applicant to concurrent terms of twenty-five years for trafficing cocaine, five years for possession of a weapon during the commission of a violent crime, and time-served for possession of marijuana, second offense. Judge Miller also levied a consecutive sentence of six months for criminal contempt.

A notice of Appeal was filed at the South Carolina Court of Appeals, J. Falkner Wilkes, Esquire, perfected the appeal. The Court of Appeals affirmed the Appellant's convictions and sentences. State v. Sullivan, Op. No. 2011-UP-446 (S.C.App. filed October 11, 2011). The Remittiur was sent on October 27, 2011.

On October 1, 2012, Appellant filed his first Application for Post-Conviction Relief. The Respondent made its Return on May 2, 2013. An evidentiary hearing was convened on April 22, 2014 at the Greenville County Courthouse. The Appellant was present and represented by J. Bradley Bennett, Esquire. Karen Ratigan, Esquire, of the South Carolina Office of the Attorney General represented the Respondent. At the PCR hearing, Appellant proceeded solely upon the issue of whether trial counsel had a conflict of interest in this case. On the 13th day of August, 2014, the Honorable D. Garrison Hill, Presiding Judge, Thirteenth Judicial Circuit, signed an Order denying theApplication.

A R G U M E N T A N D A U T H O R I T Y

I. The Lower Court erred when ruling Appellant failed to present a Prima Facie case that he is entitled to a new trial when factual determination was made without an evidentiary hearing.

The entirety of the Lower Court's ruling is based upon the premise that Appellant could not, and did not, make a Prima Facie showing of any constitutional violation. However, such inquiry was erroneously limited to review of the procedural bars of (1) statute of limitations and (2) successiveness of the application. The South Carolina Supreme Court has made it clear that such inquiry is not based upon procedural bars, but the inquiry first extends into the question of whether the application is with merit:

> "The record reflects that the return to the appellant's application for post-conviction relief was filed some 11 months after the initial petition. No extension had been granted the State, either by the applicant or the court. Section 17-606 of the Cumulative Supplement of the Code requires that the State file its return within 30 days after the docketing of the application. Appellant contends that he is entitled to relief because the return was not timely filed. The lower court held that no prejudice has been shown. Having concluded that the appellant's application was without merit, we agree the delay in filing the return was not prejudicial and constituted no basis for the relief sought. Herring v. State, 262 S.C. 597, 206 S.E.2d 885, 886 (1974)(per curiam). (Emphasis supplied). Followed in Kneece v. State, 269 S.C. 177, 236 S.E.2d 746 (1977).

It appears the Lower Court had forgotten that and Application for Post-Conviction Relief pursuant to 17-27-10, et seq., IS A CIVIL ACTION! South Carolina Rules of Civil Procedure, Rule 71.1, "Pose-Conviction Relief Actions", paragraph (a) "Procedure", states, "The

procedure for post-conviction relief is provided by the Uniform Post-Conviction Procedure Act (Act), S.C. Code Ann. §§17-27-10 to 120 (1985). The South Carolina Rules of Civil Procedure shall apply to the extent that they are not inconsistent with the Act." (Emphasis supplied). Subsection (c) of same states, "Independent Action: An application under the Act is an independent civil action."

a. Prima Facie Case:

"Prima Facie" means being sufficient to establish a fact or raise a presumption unless disproved or rebutted; based on what seems to be true on first examination, even though it may later be proved to be untrue -- a prima facie showing. "At first sight; on first appearance but subject to further evidence or information". "The establishment of a legally required rebuttable presumption. A party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor." Black's Law Dictionary, 2019 (2019 Edition).

"A state court ruling that the petitioner failed to allege a prima facie case with respect to his claims is a determination on the merits entitled to differential review. The pleadings must be construed liberally, and all well pled facts must be presumed true." Rules Civ. Proc., Rule 12(b)(6), Doe v. Bishop of Charleston, 754 S.E.2d 494 (S.C. 2014).

"A Motion to Dismiss" for failure to state a cause of action should not be granted if facts alleged and inferences reasonable deducible therefrom entitle the plaintiff to relief under any theory; further, the complaint [application] should not be dismissed merely

because the court doubts the plaintiff will prevail in the action." Rules Civ. Proc., Rule 12(b)(6). Bergstrom v. Palmetto Health Alliance, 358 S.C. 388, 596 S.E.2d 42 (1004), reh'g. denied (May 25, 2004).

In Mose v. State, 420 S.C. 500, 803 S.E.2d 718 (2017) the Court stated:

> "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 application is not entitled to any relief." Citing Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005).

"When considering the State's motion for summary dismissal of an application, where no evidentiary hearing has been held, the PCR judge must assume facts in light most favorable to the applicant." Leamon, supra., 363 at 434, 611 S.E.2d at 495. "When reviewing the propriety of a dismissal, an appellate court must review the facts in the same fashion." Id.

"In determining whether any triable issues of fact exist, the circuit court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." Manning v. Quinn, 294 S.C. 383, 385, 365 S.E.2d 24, 25 (1988). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." Osborne v. Adams, 346 S.C. 4, 7, 550- S.E.2d 319, 321 (2001).

"Where a defendant alleges, in a successive post-conviction relief (PCR) application, facts that would establish an exception to either the statute of limitations or the prohibition against successive PCR applications, and those facts are not conclusively refuted by the record before the PCR court, a question of fact is raised which can only be resolved by a hearing." Robertson v. State, 418 S.C. 505, 798 S.E.2d 29 (2016), citing S.C. Code Ann. §§17-27-45(A), 17-27-70(B), 17-27-90.

In the present case, Sullivan presented two sets of facts which would provide exceptions to both the statute of limitations and the prohibition against successive petitions: (1) after-discovered wiretap law violations, and (2) the mental incompetence of his trial attorney.

Addressing the mental competency issue, there are due process issues regarding Appellant's trial counsel's representation when he was suffering from dementia. He suffered from this mental disease prior to, during and after my trial and 2014 PCR hearing. Everyone involved in the PCR process, my attorney, the State's attorney, the PCR judge, my former trial counsel, everyone knew about this issue except for Appellant.

Appellant only recently learned, from David Michael Burress, an inmate at Perry Correctional Institution, that Counselor Daniel J. Farnesworth, Jr., had represented him and during a Federal Habeas Corpus evidentiary hearing it was a dispositive issue in Burress' favor against the State.

As for the legal issues revolving around the illegal wiretapping violations, their being learned of at a later time should be obvious and worthy of exemptions from the aforementioned procedural bars.

Appellant directs the Court's attention to the fact that one of the statutory grounds for relief under the Uniform Post-Conviction Procedure Act is when there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction and sentence in the interests of judgment. In Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993) the circuit court granted post-conviction relief to Clark on the basis of newly discovered impeachment evidence. The Supreme Court granted the State's petition for a writ of certiorari to review the decision. The Court stated that to obtain a new trial based upon after discovered evidence, a party must show that the evidence:

(1) would probably change the result if a new trial was had;

(2) has been discovered since the trial;

(3) could not have been discovered before trial;

(4) is material to the issue of guilt or innocence; and,

(5) is not merely cumulative or impeaching.

The August 17, 2021 Order by the Honorable Judge Gravely denying Appellant's Motion for Default Judgment and granting Respondent's Rule 12(b)(6) Motion to Dismiss is devoid, completely empty, of any factual determination pursuant to Clark v. State, supra., as to whether Appellant did or did not make an adequate showing of the five (5) factors enumerated above. The factual determinations, as had been show, cannot be achieved without first being reviewed during a hearing in open court.

Insomuch as Appellant, in his application for post-conviction relief, raised factual matters which may entitle him to a new trial based upon after-discovered evidence, and the Lower Court has not made any factual determination regarding those specific matters

as required by this Supreme Court in Clark, supra., Appellant suggests that perhaps this Court should declare the Lower Court Order inadequate and then remand the case to the Lower Court for a Clark-type evidentiary hearing to determine if Appellant is entitled to a new trial based upon this after-discovered evidence.

2. The Lower Court abused its Section 17-27-70(a), statutory discretion when it belatedly fixed Respondent's time to respond to the Application for Post-Conviction Relief four (4) months after notice of default and the Court found Respondent prepared to answer three (3) months sooner, and when in light of Respondent's flagrant disregard for the Rules of Civil Procedure the Court falsely attributed the delay to "remote work restrictions initiated due to the pandemic".

There is no dispute between the parties, nor even in the Order denying Appellant's Motion for Default Judgment and granting the Respondent's Motion to Dismiss pursuant to Rules Civ. Pro. 12(b)(6), S.C. Code., that on March 19, 2020 Respondent was already in default and Applicant/Appellant gave notice and Motion. (Order, pg. 4, pgh. 4). There is no dispute that Respondent's Motion to Dismiss was prepared and signed April 22, 2020. (Order, pg. 5, fn. 1). There is no dispute that Respondent did not appear until filing said Motion on July 28, 2020. (Id.)

The Lower Court excused Respondent's default as excusable because, "...Respondent's counsel originally completed the return to the application on the date in April but was unable to serve and file it until July due to the remote work restrictions initiated during the pandemic." (Id.)

Appellant suggests Judge Gravely either doesn't read what he is signing, or he does not mind appearing rediculous. It does not take three (3) additional months to place a document in the envelopes and mail them under pandemic work restrictions. This three (3) month additional disregard is exemplary of the disregard Respondent has for the Rules of Civil Procedure in their entirety. The judge's signature exemplifies the judge's disregard for Appellant's rights.

Respondent did not request an extension of time within which to file a response to the application, and Appellant did not grant Respondent any extension. There is no provision made for circuit court actions which alter or extend the time for filing as set out in the Uniform Post-Conviction Procedure Act or the Rules Civ. Proc. However, the Supreme Court of South Carolina's "Operation of the Appellate Courts During the Coronavirus Emergency", Appellate Case No. 2020-000447, provides the best example of judicial generosity to parties during this time:

> (L)(1) Extensions of Time. Both the Supreme Court and Court of Appeals are aware thsat this crisis will increase the need for extensions to be granted. While this order remains in effect, no filing fee will be required for a motion for an extension. Further, since it is important for lawyers and self-represented litigants appearing before the Appellate Courts to take actions to protect themselves and their families, the due dates for all Appellate Court filings due on or after the effective date of this order are hereby extended for twenty (20) days.
> (L)(2) Forgiveness of Procedural Defaults Since March 13, 2020. In the event a party to a case or other matter pending before an Appellate Court was required to take certain action on or before March 13, 2020, but failed to do so, that procedural default is hereby forgiven, and the required action shall be taken within twenty (20) days of the date of this order.

While the above directive is not dispositive to this case, Appellant cites it as an example of what this very Court has determined to be equitable under the pandemic difficulties. The Respondet was to have answered the application prior to March 13, 2020 and did not; therefore, this case fell within the "Forgiveness of Procedural Default" category of cases. Thus, under this interpretation, even with the forgiveness (which, reminder, applied only to appellate cases), it is reasonable to conclude Respondent was again in default April 2, 2020.

Using the above as the standard of reasonableness, there should be no forgiveness for Respondent who failed to prepare a response for signature until April 22, 2020, and negligently (grossly, that is) squandered 92 additional days where the only task to perform was place same in the mail (128 days after the example of April 2nd when forgiveness in appellate courts ended).

Section 17-27-70(a) grants the circuit judge discretion to set the time for answering the application. In this case, there was no request by Respondent to set the time, but Judge Gravely used this statute to justify his excusing the default.

The South Carolina Court of Appeals has held, "This court cannot substitute its judgment for that of the trial judge and will not disturb the trial court's decision absent a clear showing of abuse of discretion." (Emphasis supplied). Ricks v. Weinrauch, 293 S.C. 372, 360 S.E.2d 535 (Ct. App. 1987); accord In re Estate of Weeks, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct.App. 1997). "This court cannot substitute its judgment for that of the trial judge and will

not disturb the trial court's discretion absent a clear showing of abuse of discretion." Ricks, 293 S.C. at 374, 360 S.E.2d at 536; Ammonds v. Hood, 288 S.C. 278, 279, 341 S.E.2d 816, 818 (Ct.App. 1986). In reviewing a trial judge's exercise of discretion, the issue before an appellate court is not whether it believes good vcause existed to set aside the entry of default, but whether the trial court's determination is supported by the evidence and not controlled by an error or law. Pilgrim v. Miller, 350 S.C. 637, 640-41, 567 S.E.2d 527, 528 (Ct.App 2002).

South Carolina Rules of Civil Procedure provide: "For good cause shown the court may set aside an entry of default...." Rule 55(c), SCRCP. Thus, under the rule, the standard for granting relief from an entry of default is "good cause". Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct.App. 1989), and is more lenient than the standard for granting relief from default judgment under Rule 60(b), SCRCP. Ricks v. Weinrauch, 293 S.C. 372, 374, 360 S.E.2d 535, 536 (Ct.App. 1987) (citing H. :Lightsey, J. Flanagan, South Carolina Civil Procedure, 82 (2nd Ed. 1985).

"Public policy favors the disposition of cases 'on their merits rather than on technicalities.'" (Emphasis supplied). Bage, LLC v. Southeastern Roofing Co. of Spartanbug, Inc., 373 S.C. 457, 470, 646 S.E.2d 153, 160 (Ct.App. 2007), citing Mictronics, Inc. v. South Carolina Department of Revenue, 345 S.C. 506, 511, 548 S.E. 2d 223, 226 (Ct.App. 2001), and Columbia Pools, Inc., v. Galvin, 288 S.C. 59, 339 S.E.2d 524 (Ct.App. 1986). "Rule 55(c) should be'liberally construed to promote justice and dispose of cases on the merits."

Dixon v. Besco Eng'g., 320 S.C. 174, 178, 463 S.E.2d 636, 638 (Ct. App. 1995); Ricks, 293 S.C. at 374-75, 360 S.E.2d at 536; see also Mann v. Walker, 285 S.C. 194, 328 S.E.2d 659 (Ct.App. 1985) (holding under the earlier statutory provisions for default judgment pursuant to section 15-27-130 of the 1976 Code of Laws of South Carolina, the rules dealing with default are liberally construed to see that justice is promoted and to strive for the disposition of cases on their merits).

In deciding whether to set aside an entry of default, the factor which should be considered are: (1) the timing of the motion for relief; (2) whether the defendant has a meritous defense; and (3) the degree of prejudice to the plaintiff if relief is granted. Wham, 298 S.C. at 465, 381 S.E.2d at 501-502; Weeks, 329 S.C. at 255.

3. Whether the Lower Court's granting Respondent's Motion to Dismiss, based exclusively upon affirmative defenses which were waived by Respondent due to their default, caused Appellant the necessary prejudice requisite for obtaining a judment by default?

Rule 55(e), South Carolina Rules of Civil Procedure, reads as follows:

> "No judgment by default shall be entered against the State of South Carolina or an office or agency thereof, against minors, incompetents, or parties to a suit for divorce or annulment of marriage or ageinst a party upon when service of summons was made by publication, and who did not subsequently make appearance in the action, or in any in rem action, unless the claimant establishes his claim to relief by evidence satisfactory to the Court."

This case is of first impression. The rule of proving one's case to win judgment by default serves only to prevent the nonmoving from defending itself. This shifts the burden of proof from the question of whether the movant was prejudiced by the delay to "whether the movant is prejudiced by the lower court's denial of judgment by default."

This shift in the dispositive factors creates a state-created liberty or property interest in the evidentiary hearing and/or the opportunity to prove Appellant's case.

> "The application of the appellant for post-conviction relief was based entirely upon his claim that he did not have the effective assistance of counsel because of his rights under the provisions of the Constitution of the United States. The allegations set forth a prima facie violation of the appellant's constitutional rights, and raised a question of fact which could only be determined in the lower court by an evidentiary hearing." Rogers v. State, 261 S.C. 288, 199 S.E.2d 761 (1973)

In this case, the Lower court ignored the Respondent's blatant disregard for the Uniform Post-Conviction cedures Act and the South Carolina Rules of Civil Procedure, justifying months delay after the Respondent's return to the application was completed and signed, allowed Respondent to proceed upon waived affirmative defenses, and dismissed the application by a ruling based exclusively upon those waived affirmative defenses. [Applicant acknowledges the Lower Court's right to employ these affirmative defenses sua sponte, but this court rules upon Respondent's defaulted and waived pleadings.]

"An affirmative defense is waived if not pled." RIM Associates v. Blackwell, 359 S.C. 170, 182, 597 S.E.2d 152, 159 (Ct.App. 2004);

Howard v. S.C. Dept. of Highway, 343 S.C. 149, 152, 538 S.E.2d 291, 294 (Ct.App. 2000).

"A party can waive a statute of limitations defense." McLenden v. S.C. Dept. of Highways Pub. Transp., 313 S.C. 525, 525-26, 443 S.E.2d 539, 540 (1994). "Waiver of [statute of] limitations may be shown by words or conduct. Thus, waiver may result from ... failure to claim the defense, or by any action or inaction manifestly inconsistent with an intent to insist on the statute[i.e., blatant default]". Merde v. Conway Hosp., Inc., 304 S.C. 313, 315, 404 S.E.2d 33, 34 (1991) (emphasis supplied) (citing 54 C.J.S. Limitation of Actions §22 (1987).

"[A] defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute had been induced by the defendant's conduct". Black v. Lexington Sch. Dist. No. 2, 327 S.C. 55, 61, 488 S.E.2d 327, 330 (1997).

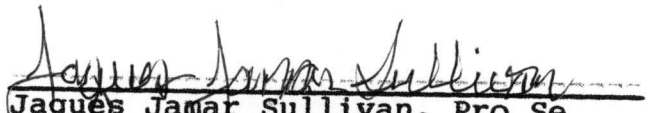
"The issue of whether a defendant is estopped from claiming the statute of limitations is a question of fact to be determined by the judge, and summary judgment is appropriate only where there is no evidence of conduct on the [Respondent's] part warranting estoppel." Id., at 61, 62 n.1, 488 S.E.2d at 330, 331 n.1.

In summary, Appellant's state-created liberty or property interest in having his case decided upon the merits as created by Rule 55, SCRCivP, was unconstitutionally denied him due to the Lower Court's relying upon affirmative defenses which were waived by the Respondent. Appellant is entitled to an evidentiary hearing and a judgment based upon the merits of his case.

C O N C L U S I O N

WHEREFORE, Appellant requests this Court to declare his rights in his favor and against Respondent and remand this case to the Court of Common Pleas for an evidentiary hearing in a manner consistent with this Order, and that this Court grant any such and further relief as may be deemed appropriate and equitably just.

RESPECTFULLY SUBMITTED:



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Dated: 11/23/01