

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Dianne S. Goodstein, Circuit Court Judge

Case No. 2013-000167

William A. Cudd #280216

Appellant,

vs.

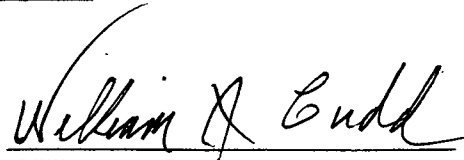
William R. Byars, Jr., Director, S. C.
Dept. of Corrections; and Alan Wilson
Attorney General for South Carolina

Respondents.

FINAL BRIEF OF APPELLANT
FROM DENIAL OF HABEAS CORPUS

Date

April 1, 2013



William A. Cudd, #280216
1657 Jonesville Hwy.
Union, SC 29379
ATTORNEY PRO SE

RECEIVED

APR 03 2013

SC Court of Appeals

ORDER OF PAGES

COVER PAGE

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES.....ii

STATEMENT OF ISSUES ON APPEAL..... 1

STATE OF THE CASE..... 2

STATEMENT OF FACTS..... 3

EXHAUSTION OF REMEDIES 4

JURISDICTION OF COURT..... 5

ARGUMENT I..... 8

ARGUMENT II.....11

CONCLUSION..... 13

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

EXHAUSTION OF REMEDIES 4

JURISDICTION OF THE COURT 5

ARGUMENT I:
THE COURT OF COMMON PLEAS ERRED TO DENY APPELLANT'S HABEAS CORPUS PETITION BECAUSE THE BALANCE OF HIS TERM OF INCARCERATION SHOULD BE TERMINATED BASED ON THE REMEDIAL NATURE OF THE OMNIBUS CRIME REDUCTION AND SENTENCING ACT 8

ARGUMENT II:
THE LOWER COURT ERRED TO DENY APPELLANT'S HABEAS CORPUS PETITION THROUGH A DETERMINATION THAT APPLICATION OF THE AMENDED STATUTE, SOUTH CAROLINA CODE SECTION 44-53-370 (B) (2), WOULD NOT RESULT IN APPELLANT'S IMMEDIATE RELEASE FROM CUSTODY 11

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Berry v. State, 675 S.E.2d 425, 381 S.C.630 (S.C. 2009)..... 10

Gibson v. State, 495 S.E.2d 426 (S.C. 1998)..... 5, 6

Hooks v. Southern Bell Telephone Co., 351 S.E.2d 900 (1986).. 9

Keeler v. Mauney, 500 S.E. 2d 123 (S.C. 1998)..... 6,

McMaster v. S. C. Retirement System, 608 S.E.2d 843, 362 S.C.360 (S.C. 2005) . 9

Simpson v. State, 495 S.E.2d 429 (S.C. 1998).....5, 6

Wiesart v. Stewart, 665 S.E.2d 187, 379 S.C.300 (S.C. App. 2008)..... 9

STATUTES

S.C. Code Section 17-17-10..... 5

S. C. Code Section 17-17-20 5

S.C. Code Section 17-17-30..... 5

S.C. Code Section 17-17-100 5

S.C. Code Section 17-27-20 5

S.C. Code Section 24-13-65 5, 9

S.C. Code Section 24-13-100 11

S.C. Code Section 24-13-125 9

S.C. Code Section 24-13-150(A) 11,12

S.C. Code Section 24-13-210 9

S.C. Code Section 24-13-660 9

S.C. Code Section 24-21-560 9,11

S.C. Code Section 44-53-370 (b) (2) 1,8,9,11,12

OTHER AUTHORITIES

Fourteenth Amendment to the United States Constitution7

South Carolina Omnibus Crime Reduction
and Sentencing Act of 20108, 9, 10, 11, 12

South Carolina Constitution, Art. 1, §185

South Carolina Constitution, Art. 5, §205

STATEMENT OF THE ISSUES ON APPEAL

- I. DID THE COURT OF COMMON PLEAS ERR TO DENY APPELLANT'S HABEAS CORPUS PETITION, WHEN THE APPELLANT'S TERM OF INCARCERATION SHOULD BE TERMINATED UNDER THE OMNIBUS CRIME REDUCTION SENTENCING REFORM ACT?

- II. DID THE LOWER COURT ERR TO DENY APPELLANT'S HABEAS CORPUS PETITION THROUGH A DETERMINATION THAT APPLICATION OF THE AMENDED STATUTE, S. C. CODE SECTION 44-53-375 (B) (2), WOULD NOT RESULT IN APPELLANT'S IMMEDIATE RELEASE FROM CUSTODY?

STATEMENT OF THE CASE

On December 3, 2001, the Appellant pled guilty in Dorchester County South Carolina, to manufacturing marijuana. The Court sentenced the Appellant to a determinate sentence of fifteen (15) years, and he was remanded to the State Department of Corrections. The Appellant's sentence was to be completed after service of eighty-five percent (85%) and without parole.

After legislative action culminated in passage of the Omnibus Crime Reduction and Sentencing Act, Appellant filed a Petition For Habeas Corpus Relief with the Dorchester County Court of Common Pleas on June 25, 2011. The foundation of Appellant's habeas petition rested in the remedial nature of the criminal statute under which the Appellant was sentenced. The Petition was denied on December 20, 2012.

On January 10, 2013, the Appellant served the Notice of Appeal with the Respondents and the Court.

STATEMENT OF FACTS

On June 25, 2011, the Appellant submitted a petition for habeas corpus relief and motion to proceed In Forma Pauperis to the Dorchester County Clerk of Court. On September 29, 2011, the Administrative Judge for Dorchester County granted Appellant's motion to proceed In Forma Pauperis, and a review hearing was scheduled for February 23, 2012.

At the motion review hearing the Appellant appeared Pro Se, and the Respondent was represented by Christopher D. Florian, of the General Counsel's Office. After hearing arguments from the parties, the Honorable Judge Goodstein requested additional legal authority for Respondent's Motion to Dismiss. On March 22, 2012, the Appellant submitted a reply brief in support of Appellant's habeas petition. When the Appellant attempted to acquire a copy of the transcribed motion review before Judge Goodstein, the Office of Court Administration notified Appellant that the transcription equipment had malfunctioned, and that a transcribed copy of the record was unavailable.

The Honorable Dianne S. Goodstein dismissed Appellant's habeas petition with prejudice on December 20, 2012. This appeal follows Judge Goodstein's order to dismiss.

EXHAUSTION

On December 3, 2001, Appellant pled guilty in Dorchester County, South Carolina to manufacturing marijuana. Appellant was sentenced to the Department of Corrections for fifteen (15) years, to be completed upon service of eighty-five percent (85%), and without parole. Appellant did not appeal his conviction or sentence.

On November 27, 2002, Appellant filed an application for post-conviction relief. On January 18, 2006, an evidentiary hearing was convened to adjudicate Appellant's allegations. On May 25, 2006, Appellant's application for post-conviction relief was denied. Appellant appealed to the South Carolina Supreme Court, seeking a Writ of Certiorari. Appellant's petition for certiorari was denied on June 12, 2008.

Petitioner sought a Writ of Habeas Corpus from the Federal District Court on July 8, 2008. On September 25, 2009, the Honorable R. Bryan Harwell issued an order granting the State's motion for summary judgement. Appellant appealed to the Fourth Circuit of Appeals, and on September 10, 2010, the Fourth Circuit Court denied Appellant's petition. The Appellant petitioned the United States Supreme Court for a writ of certiorari, but was denied on March 15, 2011. All remedies available to the Appellant have been exhausted.

JURISDICTION

This court has jurisdiction over the parties and matter herein pursuant to South Carolina Code Sections 17-17-10, 17-17-30, and 17-17-100. Further, Article I, Section 18, and Article 5, Section 20, of the Constitution for the State of South Carolina invests a detainee the right to petition the Court for review of unlawful detentions.

The Court of Appeals has jurisdiction to hear this case because it is situated within the narrow confines of judicial rules which permit a court to consider petitions for habeas corpus relief. Over the course of three cases heard between January and March of 1998, the South Carolina Supreme Court held that the Uniform Post-Conviction Act severely limited the availability of habeas corpus, in that the "Act" takes the place of all other common law, statutory or other remedies heretofore available for challenging the validity of a conviction or sentence. S. C. Code Section 17-27-20. However, the Supreme Court acknowledged that in some cases the Courts may hear and grant habeas corpus petitions to those few persons who can clear the procedural hurdles.

In Gibson vs. State, 495 S.E.2d 426 (S.C. 1998), the Supreme Court held that a habeas petitioner must first exhaust all available post-conviction remedies. Further, a petitioner must allege sufficient facts to show why other remedies are unavailable or inadequate, and that the issues raised in the habeas petition could not have been raised in a prior post-conviction application. The Court's opinion in Gibson appeared to enumerate a clear set of rules for seeking habeas relief from the lower courts.

On the same day in which Gibson was decided, the Court also decided Simpson vs. state, 495 S.C. 429 (S.C. 1998). Like Gibson, supra, Simpson involved a

constitutionally inadequate malice charge to the jury, which the defendant failed to raise at his post-conviction hearing. In an attempt to raise the belated issue, Simpson filed a petition for habeas relief with the Supreme Court.

Though the supporting facts of Gibson and Simpson were practically identical, the Court took a more severe stance when deciding Simpson. The Court held that, “we now hold that a matter which is cognizable under the Act may not be raised by a petition for a writ of habeas corpus before the circuit or other lower court.” (Simpson, at 431, internal citation omitted). At first blush, the Court’s decision appears to end the court’s ability to hear habeas petitions, but in the concluding paragraphs, the Court held, “However, our action today does not suspend the writ, but merely curtails its use to those situations where the act would not be applicable.” Simpson at 431). The Court acknowledged that in some cases it would be necessary for the lower court to review and possibly grant petitions for habeas corpus relief.

Finally, in Keeler vs. Mauney, 500 S.E.2d 123 (S.C. App. 1998), the Court of Appeals interpreted and applied the rules established in Gibson and Simpson, holding that “The import of the holdings in Gibson and Simpson are clear. A Person is procedurally barred from petitioning the circuit court for writ of habeas corpus where the matter alleged is one which could have been raised in a PCR application.” (Keeler, at 124). This holding states that a defendant is procedurally barred from petitioning the lower court for habeas corpus relief on any ground which could have been raised in a prior PCR application, or at a prior time period.

The Court of Appeals’ decision in Keeler accomplishes several objectives. First, it validates the continued efficacy of the rules established in Gibson and Simpson for

seeking habeas corpus relief in the lower court. Second, it provides a firm rule for petitioning the lower court for a writ of habeas corpus: A person may seek habeas relief "where the matter alleged is one which could not have been raised in a prior proceeding."

The factual basis underlying the instant petition for habeas corpus did not exist prior to July of 2010, and therefore the Petitioner could not have included the present claims in his original post-conviction application. A legislative expansion of the rights available to Appellant has rendered the balance of Appellant's sentence void.

A remedy of post-conviction relief in the present context must be viewed as inadequate, because pursuing that avenue of relief would result in one to three years of additional incarceration of the Appellant. The balance of Appellant's present sentence now stands void, and an additional period of incarceration would only compound the harm to Appellant. Consequently, post-conviction relief is an inadequate remedy for the due process violations being exacted on the Appellant.

As the Appellant has exhausted all remaining avenues of relief, save that afforded by the present action, this Court's jurisdiction and authority are proper and necessary in order to remedy the Constitutional due process violations arising from Appellant's continued detention. Upon belief and knowledge, the Appellant alleges that the Respondents are in violation of the Appellant's Fourteenth Amendment Due Process Rights, in that Appellant has served out the maximum allowable term of imprisonment to which the Court sentenced him, and that the excessive portion of Appellant's sentence should be declared void, and the Appellant discharged from custody.

THE COURT OF COMMON PLEAS ERRED TO DENY APPELLANT'S HABEAS CORPUS PETITION BECAUSE THE BALANCE OF HIS TERM OF INCARCERATION SHOULD BE TERMINATED BASED ON THE REMEDIAL NATURE OF THE OMNIBUS CRIME REDUCTION AND SENTENCING ACT.

A statutory amendment to South Carolina Code Section 44-53-370(b) (2) altered the status of Appellant's lawful term of incarceration by decreasing the length of time which must be served in order to satisfy the trial court's judgment. The previous sentence guidelines required service of eighty-five percent (85%) of Appellant's sentence in order to satisfy the fifteen (15) year term of incarceration. However, the guidelines established by the Omnibus Crime Reduction and Sentencing Reform Act (Reform Act) require the Appellant to serve but fifty-one percent (51%); the variance effected through allowance of additional good conduct credits.

Further, the Reform Act altered the status of Appellant's sentence by providing for earlier consideration for parole, participation in community-based re-entry programs, and additional sentence reduction through educational credits. Prior to the Reform Act, these opportunities were available to the Appellant in a more restrictive form.

The Appellant holds the Reform Act's amendments to S. C. Code Section 44-53-370(b)(2), must be applied retroactively to the Appellant, in that the amendments are remedial in nature, and do not affect Appellant's substantive rights. The Appellant may presently receive good conduct credits to the value of fifteen percent (15%) of his sentence, and the Reform Act amendments merely increase that percentage to forty-nine percent (49%). As the Reform Act amendments affect the remedy and not the substantive right, they must be applied retrospectively to Appellant's sentence.

The South Carolina Court of Appeals defined 'remedial' as "A statute is remedial when it creates new remedies for existing rights or enlarges the rights of persons under liability." Hooks vs. Southern Bell Telephone Co, 351 S.E.2d 900 (1986). The relevant amendments to S. C. Code §44-53-370(b)(2), created no new rights benefiting Appellant, but only enlarged Appellant's existing rights, and therefore the amendments must be applied to Appellant's sentence.

As noted above, prior to enactment of the Reform Act, the Appellant was eligible to receive good conduct credits equal to fifteen percent (15%) of his sentence, pursuant to S. C. Code §24-13-210. Further, the Appellant was eligible to participate in the litter control program, work release, the designated facilities worker program, and the community supervision program (See S. C. Code Sections 24-13-65; 24-13-125; 24-13-660; and 24-21-560). Consequently, the Reform Act does not create new rights or privileges which the Appellant seeks to take advantage of, but merely enlarges the rights and privileges currently available to the Appellant.

A statute is remedial and applies retroactively when it creates new remedies for existing rights, or enlarges the rights of persons under disability, unless it violates a contractual obligation, creates a new right, or divests a vested right. Wiesart vs. Stewart, 665 S.E. 2d 187, 379 S.C. 300 (S.C. App. 2008). A statute may be in part remedial and in part penal. McMaster vs. S.C. Retirement System, 608 S.E.2d 843, 362 S.C. 360 (S.C. 2005). As the Reform Act's amendments to S. C. Code §44-53-370 (b)(2) affects the remedy - not the substantive rights - to which the Appellant is entitled, those remedies must be applied retrospectively to the Appellant.

The Legislature has clearly stated its purpose in passage of the Reform Act”

“It is the intent of the General Assembly to preserve public safety, reduce crime, and use correctional resources most effectively. Currently, the South Carolina correctional system incarcerates people whose time in prison does not result in improved behavior and who often return to South Carolina communities and commit new crimes, or are returned to prison for violations of supervision requirements. It is, therefore, the purpose of this act to reduce recidivism, provide fair and effective sentencing options, employ evidence-based practices for smarter use of correctional funding and improve public safety.”

(Section 1; Omnibus Crime Reduction and Sentencing Reform Act of 2010)

Admirable goals, no doubt; but goals which can only be reached through an equitable, common-sense application of the statutes aimed at reaching those goals. An application of the Reform Act to Appellant’s case would not entail the creation of new rights or privileges, but only new remedies for existing rights. The savings clause of the Reform Act, Section 65, is in conflict with the clearly stated intent of the Legislature to provide fair and effective sentencing options, and efficiently use correctional resources. In construing a criminal statute, courts are guided by the rule of lenity - the principle that any ambiguity must be resolved in favor of the accused. Berry vs. State, 675 S.E.2d 425, 381 S.C. 630 (S.C. 2009)

II.

THE LOWER COURT ERRED TO DENY APPELLANT'S HABEAS CORPUS PETITION THROUGH A DETERMINATION THAT APPLICATION OF THE AMENDED STATUTE, SOUTH CAROLINA CODE SECTION 44-53-370(B) (2), WOULD NOT RESULT IN APPELLANT'S IMMEDIATE RELEASE FROM CUSTODY.

The Respondents have posited an argument that even if the penalty as amended by the Reform Act were applied to Appellant's case, it would not result in Appellant's immediate release from custody. (Respondent's Motion to Dismiss, p.4). The Respondent's argument arises from the amended language of S. C. Code §44-53-370 (b)(2), which reads:

Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this item for a third or subsequent offense in which all prior offenses were for possession of a controlled substance pursuant to subsections (c) and (d), may have the sentence suspended and probation granted, and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits. In all other cases, the sentence must not be suspended nor probation granted.

The Respondent argues that under the amended language, offenders are eligible for parole, but if not granted parole, they are still required to serve 85% of their sentences. (Respondent's Motion to Dismiss, p.4). However, the Respondent's argument fails on two fronts.

First, the Respondent relies on the amended statute S.C. Code §24-13-150(A), which states "Notwithstanding any other provisions of law ... an inmate convicted of a 'no parole offense' as defined in Section 24-13-100 ... is not eligible for early release, discharge, or community supervision as provided in Section 24-21-560, until the inmate has served at least eighty-five percent of the actual term of imprisonment imposed."

The Respondent has erred by subordinating the Reform Act to the older statute.

The Reform Act is the more recent statute, and therefore the controlling statute. One must assume the Legislature knew of the existence of Section 24-13-150(A), when the Reform Act was drafted. Nevertheless, the Legislature clearly stated in the Reform Act "Notwithstanding any other provision of law..." meaning, despite any statutes to the contrary, the Reform Act amendments are to be implemented.

Second, the Respondent argues that even if the Reform Act is applicable to Appellant, it makes him only eligible for parole; not immediate release. The Respondent has misinterpreted the meaning of S. C. Code §44-53-370(b) (2).

The Reform Act holds that third or subsequent offenders in which all prior offenses were for possession will receive the full panoply of privileges afforded most inmates. For those convicted of a third or subsequent offense in which all prior convictions were not possession charges, the sentence may not be suspended nor probation granted. That is, the sole limitations on those third offenders whose prior convictions were not for possession is the unavailability of probation and/or a suspended sentence. If the Legislature intended all third offenders with prior convictions other than possession to be excluded from receiving good conduct credits, education credits, or work release, the Legislature would have stated as much, just as it stated "...the sentence must not be suspended nor probation granted." Clearly, the Appellant is eligible for immediate release should the Reform Act be applicable to Appellant's case.

CONCLUSION

WHEREFORE, having shown good and just cause, the Appellant respectfully moves this Court for an Order granting his immediate release from custody.

Respectfully submitted,

Dated February 5, 2013.

Is/ William A Cudd

William A. Cudd #280216

1657 Jonesville Highway

Union, South Carolina 29379

APPELLANT, PRO SE

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Case No. 2013-000167

William A. Cudd #280615

Appellant,

vs.

William R. Byars, Jr., Director, S. C.
Dept. of Corrections, and Alan Wilson, Attorney
General for South Carolina

Respondents.

DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

1. Dismissal Order dated December 20, 2012;
2. Letter of Request for hearing transcript;
3. Appellant/Petitioner's Reply brief in response to the Respondent's Motion To Dismiss.
4. Respondent's Memorandum In Support of Motion to Dismiss;
5. Respondent's Reply Brief to Appellant/Petitioner's petition for habeas corpus;
6. Appellant/Petitioner's petition for habeas corpus relief.

I certify that this designation contains no matter irrelevant to this appeal.

Dated: February 5, 2013

William A. Cudd
William A. Cudd #280615
1657 Jonesville Hwy.
Union, SC 29379

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goldstein, Circuit Court Judge

Case No. 2013-000167

William A. Cudd, #280216

Appellant,

v.

William R. Byars, Jr., Director, S. C. Dept. of Corrections;
and Alan Wilson, Attorney General for South Carolina,

Respondents.

CERTIFICATE OF SERVICE

I, William A. Cudd, hereby certify that I have this date served upon the Respondents a true copy of Appellant's DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL, by placing same into the United States Mail, first class postage affixed, and addressed as follows:

Office of the General Counsel
South Carolina Dept. of Corrections
Post Office Box 21787
Columbia, SC 29221

Mr. Alan Wilson
South Carolina Attorney General
Post Office Box 11549
Columbia, SC 29211

Dated: February 5, 2013.

William A. Cudd
William A. Cudd #280216
1657 Jonesville Hwy.
Union, SC 29379
APPELLANT, PRO SE

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2013-000167

William A. Cudd, #280216,

vs.

Appellant,

William R. Byars, Jr., Director, S. C.
Dept. of Corrections; and Alan Wilson,
Attorney General for South Carolina

Respondents

CERTIFICATE OF SERVICE

I hereby certify that I have this date served upon the Respondents a true copy of APPELLANT'S FINAL REPLY BRIEF by placing same into the United States Mail, first class postage affixed, and addressed as follows.

Office of the General Counsel
South Carolina Dept. of Corrections
Post Office Box 21787
Columbia, SC 29221-1787

Mr. Alan Wilson
South Carolina Attorney General
Post Office Box 11549
Columbia, SC 29211

RECEIVED

APR 03 2013

SC Court of Appeals

Dated: April 1, 2013

Is/ William A. Cudd
William A. Cudd, #280216
1657 Jonesville Hwy.
Union, SC 29379

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2013-000167

William A. Cudd, #280216,

Appellant,

vs.

William R. Byars, Jr., Director, S. C.
Dept. of Corrections; and Alan Wilson,
Attorney General for South Carolina

Respondents

CERTIFICATE OF COUNSEL

The undersigned certifies that this FINAL BRIEF complies with Rule 211(b) SCACR.

Office of the General Counsel
South Carolina Dept. of Corrections
Post Office Box 21787
Columbia, SC 29221-1787

Mr. Alan Wilson
South Carolina Attorney General
Post Office Box 11549
Columbia, SC 29211

Dated: April 1, 2013

William A. Cudd
William A. Cudd, #280216
1657 Jonesville Hwy.
Union, SC 29379