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Dec 29 2021

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Orangeburg County

Honorable Edgar W. Dickson, Circuit Court Judge

GEORGE N. MOSES,

PETITIONER,

V.

THE STATE,

RESPONDENT.

APPELLATE CASE NO 2020-000093

REPLY BRIEF OF PETITIONER

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ARGUMENT IN REPLY

The circuit court's citation to section 17-28-40 was not a mere scrivener's error. The circuit court relied upon the wrong section in analyzing whether Petitioner had met his burden of proof. Further, there are not proper grounds in the record upon which this Court could affirm the denial of Petitioner's application for testing under the DNA Act.

Respondent's counterstatement of the issue on certiorari and the vast majority of the Brief of Respondent is non-responsive to the order of this Court mandating the narrow procedural issue to be briefed. As an officer of the court counsel for Petitioner will confine her analysis and argument¹ to the issue this Court ordered the parties to address which was whether the circuit court erred in finding Petitioner failed to meet the requirements of section 17-28-40(C) rather than the requirements of section 17-28-90(B).

The order denying Petitioner's application for DNA testing states

An application for post-conviction DNA testing under the Act requires, *inter alia*, an applicant to (a) *demonstrate that identity was a significant issue* during the original court proceedings; (b) *explain* how testing of DNA would provide a substantially more probative result than the evidence submitted at trial; and (c) *explain* how any exculpatory DNA results would constitute new evidence that would probably change the result of the defendant's conviction if a new trial was granted. *S.C. Code Ann. § 17-28-40(C)(5)-(8)*.

App. 692-693 (emphasis added).

Respondent has suggested that the circuit court's citation to section 17-28-40 could be the result of "a mere scrivener's error." BOR pg. 21. That is a spurious argument as the language preceding the citation is culled directly from section 17-28-40. Only section 17-28-40(C)(5) requires an applicant demonstrate that identity *was or should have been* a significant issue during

¹ Counsel would be prepared to answer any questions this Court may have regarding the merits of Petitioner's application, as well as further questions on error preservation, if this Court sees fit to grant oral argument in this matter.

trial. In comparison, section 17-28-90 (B)(3)-(4) require an applicant show that the *items* sought to be tested *are material to the issue of the applicant's identity* as the perpetrator of the offense. Additionally, only section 17-28-40(C)(6) requires an applicant *explain* how the requested testing would provide a substantially more probative results if the physical evidence or biological material sought to be tested was previously subjected to DNA testing. Likewise, 17-28-40(C)(7) uses the word “explain” whereas the comparable factor in 17-28-90 does not. The circuit court’s citation to section 17-28-40 was not a mere scrivener’s error, but an error of law requiring reversal.

Respondent next contends that this Court should affirm the circuit court’s denial of Petitioner’s DNA application even though the circuit court relied on the wrong factors because both sections require a finding that “if the requested DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the results of applicant’s conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching.” See S.C. Code Ann. §§ 17-28-40(C)(7) and 17-28-90(B)(5). Respondent relies upon State v. Davis, 278 S.C. 544, 545, 298 S.E.2d 778, 779 (1983), in which our state Supreme Court found “the fact that the trial judge gave the wrong ground for his decisions does not preclude affirmance upon a proper ground sustained by the record.” This reliance is misplaced as the case at bar can be distinguished from Davis.

In Davis, the defendant was charged with murder and subsequently convicted of voluntary manslaughter. Davis at 779, 298 S.E.2d at 545. During trial evidence was adduced that the defendant was intoxicated at the time of the killing. The trial court, over defendant’s objection, instructed the jury on voluntary manslaughter reasoning that the defendant’s intoxication could have eliminated the element of malice from the killing. Id.

The Supreme Court found this was error because voluntary intoxication would not impair a person's ability to act with malice aforethought to reduce murder to voluntary manslaughter. Id. However, the Court upheld the trial court's decision to charge voluntary manslaughter because "a witness had testified that the defendant and the victim had been 'fighting.' From this circumstance of 'provocation' and 'heat of passion,' guilt of voluntary manslaughter could be fairly and logically deduced and was thus a proper matter for jury determination." Id., 298 S.E.2d at 546. In Davis there was evidence from the trial that the parties had been in a fight which supported giving the voluntary manslaughter charge. The existence of that evidence rendered the fact that the trial court based its charging decision on the wrong ground harmless. The same cannot be said of Petitioner's case.

The only factor raised and argued at the evidentiary hearing was 17-28-40(C)(5). Both counsel for Petitioner and the State focused on why identity *was or should have been at issue at trial*, rather than why the items Petitioner sought to test would be *material to the issue of identity*. App. 644, l. 16 – App. 646, l. 3; App. 650, l. 18- App. 651, l. 11; App. 655, l. 14-App. 656, l. 5. At no point was argument made regarding whether the items Petitioner sought to have tested were material to the issue of identity, nor were the other factors in section 17-28-90 properly addressed. Without evidence or argument pertaining to the factors of 17-28-90 there is no "proper ground" in the record upon which this Court could affirm the denial of the application.

The order denying testing further illustrates the lack of a proper ground for affirmance. Not only did the court fail to address the proper factors but it limited its analysis to only three of the factors in 17-28-40. More importantly, it analyzed those factors under an improper framework. In finding that identity was not or should not have been an issue at the original trial the circuit court relied solely upon Petitioner's statements to law enforcement and his trial

testimony, despite the admonition to consider identity “notwithstanding the fact that the applicant may have...made or is alleged to have made an incriminating statement or admission as to identity.” S.C. Code Ann. § 17-28-40(C)(5).

The court next found that Petitioner had failed to explain how the requested DNA testing would provide a substantially more probative result. However, an applicant only has to show how the requested testing would provide a substantially more probative result “if the physical evidence or biological material sought to be tested *was previously subjected to DNA testing.*” S.C. Code Ann. § 17-28-40(C)(6) (emphasis added). The items that Petitioner sought to have tested were never previously submitted for DNA analysis and all that Petitioner had to show was that the items had not been tested. The court then based its final ruling that any exculpatory results would not change the results of Petitioner’s conviction on the erroneous belief that Petitioner was required to show identity was or should have been at issue during trial. At no point did the court address whether the items would be material to identity “notwithstanding the fact that the applicant may have made or is alleged to have made an incriminating statement or admission as to identity.” S.C. Code Ann. § 17-28-90(B)(3)-(4). The circuit court based its denial of the application entirely on the contention that identity was not an issue at the trial, and because there was not argument or evidence on the proper factors outlined in section 17-28-90, there are no proper grounds that this Court could use to affirm the denial of Petitioner’s application.

Not only did the circuit court err in analyzing the wrong factors but the parties erred in arguing the wrong factors at the hearing. In fact, there was so much confusion on how to handle applications filed for testing under the DNA Act that two years after filing his application Petitioner had to have the Supreme Court intercede and issue direction to the circuit court simply

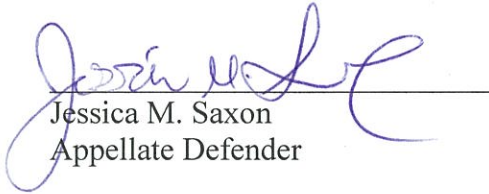
to obtain an evidentiary hearing. App. 639-641. Clearly both the bench and bar would benefit from clarification by the appellate courts on the proper procedure to be followed in the handling of these applications.

Finally, Respondent dedicated a substantial portion of his brief to error preservation. The record is clear that no objections were made and no motions to reconsider were filed. However, the record also makes clear that everyone involved, from Petitioner's DNA counsel to the Solicitor to the circuit court did not properly address Petitioner's DNA application. To deny Petitioner access to DNA testing on these grounds would be fundamentally unfair. The appellate courts of this state have relaxed procedural rules in the interest of justice and in those rare cases where "extraordinary action" is required. See Simmons v. State, 416 S.C. 584, 788 S.E.2d 220 (2016). Petitioner's case is one that requires such an "extraordinary action" as he has been denied a proper hearing on his application and the ruling in his case was based on the incorrect section of the DNA Act.

A new hearing on the merits would not prejudice the State nor grant Petitioner freedom. It would merely ensure Petitioner receives the due process of law that he is entitled to. As our Supreme Court stated in Mangal v. State, the United States Supreme Court case Martinez, as well as the state Supreme Court case of Simmons, *supra*, "counsel us that there are situations where *the interests of justice require...courts to be flexible with procedural requirements before...applicants suffer procedural default on substantial claims.*" Mangal 421 S.C. 85, 99, 805 S.E.2d 568, 575 (2017) (emphasis added). Fundamental fairness dictates that Petitioner be granted a new hearing.

CONCLUSION

Based on the arguments contained above, as well as those in the original Brief of Petitioner, Petitioner respectfully requests that this Court remand this matter to the circuit for a new hearing on his application for post-conviction DNA testing.



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This 29th day of December, 2021.