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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Orangeburg County
Court of Common Pleas
The Honorable Edgar W. Dickson, Chief Administrative Judge

Appellate Case No. 2021-000673

BRUCE HOUSER, #243356, PETITIONER,

vs.

STATE OF SOUTH CAROLINA, RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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[1] 305 S.C. 453, 409 S.E.2d 395 (1991).
[2] 352 S.C. 215, 574 S.E.2d 200 (2002).

STATEMENTS OF ISSUE ON PETITION FOR WRIT OF CERTIORARI

Petitioner's Statement of Issue on Petition for Writ of Certiorari

"Did the lower court err in finding that Petitioner's current Application for Post-Conviction Relief should be denied and denied and dismissed with prejudice pursuant to the doctrine of *laches*?"

Respondent's Counterstatement of Issue on Petition for Writ of Certiorari

Though the lower court properly dismissed Petitioner's third application for post-conviction relief challenging his 1997 convictions pursuant to the doctrine of *laches*, where the application was filed nineteen years after his initial conviction; was filed eight years after an order granting belated review of his 2002 post-conviction relief action; and where Petitioner offered no explanation or justification for the nearly decade long delay, should this Court remand this matter to the circuit court for an evidentiary hearing so the circuit court may make specific findings on Petitioner's Austin v. State allegation and Respondent's motion to dismiss pursuant to the doctrine of *laches* as required by Whitehead v. State?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. Petitioner was indicted at the November 1997 term of the Orangeburg County Grand Jury for murder (1997-GS-38-00467) and possession of a firearm during the commission of a violent crime (1997-GS-38-00874). Petitioner was represented by Charles Grose, Esquire. On August 7, 1997, Petitioner proceeded to a jury trial before the Honorable Luke N. Brown. Petitioner was convicted as indicted and Judge Brown sentenced Petitioner to confinement for life.

Petitioner filed a timely notice of appeal and an appeal was perfected on his behalf by the South Carolina Office of Appellate Defense. Following briefing, on January 13, 1999, the South Carolina Supreme Court affirmed Petitioner's convictions and sentences via unpublished opinion. State v. Houser, Op. No. 99-MO-005 (1999).

Petitioner filed his first application for post-conviction relief on February 3, 2000. In his application, Petitioner alleged he was being held unlawfully for the following reasons:

1. Ineffective assistance of trial counsel
    a. [Petitioner's] trial counsel did not develop enough evidence at trial to obtain a jury charge on voluntary manslaughter

Respondent made its Return to the application on November 30, 2000. An evidentiary hearing into the matter was convened on October 30, 2001, at the Carl Knight Law Complex. Petitioner was present and represented by Carl B. Grant, Esquire. By Order dated February 22, 2002, the Honorable Diane S. Goodstein denied and dismissed Petitioner's application with prejudice. Petitioner subsequently filed a "Motion to Alter and Amend Judgment and Order or In the Alternative for A New Hearing", pursuant to Rule 59(e), SCRCP, dated March 29, 2002.

Following the Order of Dismissal, Petitioner's PCR Counsel filed a notice of appeal on

April 19, 2002. On October 22, 2002, Robert M. Pachak, Assistant Appellate Defender for the South Carolina Office of Appellate Defense, notified this Court that Petitioner's Rule 59(e) motion had not yet been ruled on by the PCR Court and therefore requested the appeal be dismissed without prejudice until such time the PCR Court had ruled on the motion. Thereafter, on October 23, 2002, the Supreme Court of South Carolina dismissed the appeal without prejudice. The remittitur was returned to the lower court on November 8, 2002.

A hearing on Petitioner's 59(e) motion was convened on November 4, 2004, at the Calhoun County Courthouse. Petitioner was present at the hearing and represented by Carl Grant, Esquire. By Order dated June 6, 2005, and filed June 14, 2005, Judge Goodstein denied Petitioner's pending 59(e) motion.

Petitioner filed his second application for PCR on April 6, 2006, in which he alleged PCR counsel from his first PCR action was ineffective for failing to seek appellate review of the denial of Petitioner's PCR. Respondent made its Return to the application on October 26, 2007. An evidentiary hearing into the matter was convened on May 19, 2008, at the Calhoun County Courthouse. Clarissa W. Joyner, Esquire, represented Petitioner. At the hearing, Respondent consented to allow Petitioner to appeal from the denial of his previous PCR application. The Honorable James C. Williams, Jr. granted Petitioner a belated PCR appeal by order dated July 22, 2008, and filed November 18, 2008.

Petitioner filed his third application for post-conviction relief on May 4, 2016, in which he alleged he was denied the right to appeal his first and second PCR actions. Respondent made its Return and Motion to Dismiss to the application on April 23, 2018, seeking summary dismissal of the application as barred by the statute of limitations, because the matter is successive to Petitioner's prior actions, and because the matter is barred by the doctrine of *laches*.

The Court issued a Conditional Order of Dismissal, filed April 27, 2018, provisionally denying and dismissing the action. Petitioner filed a response to the Conditional Order of Dismissal on May 9, 2018. The Honorable Edgar W. Dickson, acting in his capacity as Chief Administrative Judge, issued a Final Order of Dismissal, signed May 3, 2021, and filed May 13, 2021. In the Final Order of Dismissal, Judge Dickson found the Court's previous finding in favor of summary dismissal of the action based on the statute of limitation and the previous finding in favor of summary dismissal based on the successiveness of the action were not appropriate. However, the Court found the action must be summarily dismissed pursuant to the doctrine of *laches*.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls, 422 S.C. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The lower court properly dismissed Petitioner's third application for post-conviction relief challenging his 1997 convictions pursuant to the doctrine of *laches*, where the application was filed nineteen years after his initial conviction; was filed eight years after an order granting belated review of his 2002 post-conviction relief action; and where Petitioner offered no explanation or justification for the nearly decade long delay; however, this Court should remand this matter to the circuit court for an evidentiary hearing so the circuit court may make specific findings on Petitioner's Austin v. State allegation and Respondent's motion to dismiss pursuant to the doctrine of *laches* as required by Whitehead v. State.

Petitioner argues Judge Dickson, acting in his capacity as Chief Administrative Judge of Common Pleas matters in the First Judicial Circuit, erred by finding Petitioner's third application for post-conviction relief should be summarily dismissed pursuant to the doctrine of *laches*. In support of that claim, Petitioner contends he was denied the right to appeal from the denial of his initial PCR action and did not receive an appeal from his second PCR action where belated review was granted.

As an initial matter, the State would note that a claim of ineffective assistance of PCR counsel is a non-cognizable allegation. See, e.g., Coleman v. Thompson, 501 U.S. 722 (1991) (holding that the Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions); Aice v. State, 305 S.C. 448, 452 n.2 409 S.E.2d 392, 295 n.2 (1991); see also Wainwright v. Torna, 455 U.S. 586 (1982) (holding that where there is no constitutional right to counsel there can be no deprivation of effective assistance); cf. Kelly v. State, 754 S.E.2d 377, 377 (S.C. 2013) (holding Martinez v. Ryan, 566 U.S. 1 (2012),[3] is "not applicable to state post-conviction relief actions") (reaffirmed by Robertson v. State, 795 S.E.2d 29, 31 (S.C. 2016)).

[3] The State would note that the Supreme Court in Martinez explicitly refused to extend its "narrow exception" to "attorney errors in other kinds of proceedings, *including appeals from initial-review collateral proceedings*." 566 U.S. 1, 16. The Court explained that "the limited nature" of its holding "reflect[ed] the importance of the right to the effective assistance of *trial* counsel," which is "a bedrock principle in our justice system." Id. at 12, 16.

In this case, Petitioner alleges Chief Administrative Judge Dickson errantly dismissed his third post-conviction relief action and as a consequence, Petitioner was denied the right to appeal from the dismissal of his 2002 post-conviction relief application. Petitioner further alleges he was denied a PCR appeal from his initial application because his prior post-conviction relief counsels were ineffective for failing to timely file notice of appeal. The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Austin recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. Id. Austin "is limited to its particular factual situation..." Aice, 305 S.C. at 452, 409 S.E.2d at 394. Pursuant to Austin, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application. Here, Petitioner's initial PCR application was dismissed in 2002. Subsequent to that dismissal, Petitioner filed a second PCR application and had an evidentiary hearing where he was granted belated appellate review pursuant to Austin in 2008. Following the 2008 Order granting belated appellate review, Petitioner failed to timely file a notice of appeal and therefore, failed to avail himself of his right to meaningful belated appellate review of his initial post-conviction relief hearing.

Although South Carolina affords criminal defendants the opportunity to appeal, this right may be lost through a variety of actions by an appellant, such as: (1) failure to timely serve a notice of appeal under Rule 203, SCACR; (2) failure to serve and file an initial brief and designation of matter under Rule 208(a)(4), SCACR; or (3) failure to serve and file a record on appeal and final brief under Rules 210 and 211, SCACR. *See* Rule 231, SCACR. see State v. Serrette, 375 S.C. 650, 654 S.E.2d 55 (2007). As a consequence of Petitioner's failure to file a notice of appeal from the Order granting belated Austin review and because he did not file his third post-conviction relief

application until 2016 – eight years after he was originally granted belated review the Chief Administrative Judge correctly found Petitioner's application was barred by the doctrine of *laches.*

Laches is equitable doctrine defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Hallums v. Hallums, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). See also Strickland v. Strickland, 375 S.C. 76, 650 S.E.2d 465 (2007). The doctrine of *laches* generally prevents an Appellant from seeking collateral review of his conviction, especially where the delay affects the availability of evidence to refute the Appellant's claims. McElrath v. State, 276 S.C. 282, 277 S.E.2d 890 (1981); Honeycutt v. Ward, 612 F.2d 36 (2nd Cir. 1979). Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002). Witness memories and physical evidence will have naturally faded and degraded. State v. Serrette, 375 S.C. 650, 654 S.E.2d 554 (Ct. App. 2007). To ensure finality of litigation, our courts require reasonable diligence in pursuing collateral relief. This requirement "guards the state's legitimate expectation that it will not be called upon without due cause, to defend the integrity of convictions that occurred many years ago, where records and witnesses are no longer available." McElrath, 276 S.C. at 283.

In Whitehead v. State, this Court held the doctrine of *laches* may be raised as a defense to Austin post-conviction relief claims that an applicant's counsel was ineffective for failing to seek review of denial of post-conviction relief application. Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002). In that case, Whitehead's first PCR application was denied in 1992 following an evidentiary hearing, and there was no appellate review of his case. He then filed a second application in which he alleged, among other things, he was entitled to an Austin review of his first PCR action because his first PCR counsel failed to file an appeal of his first application. He then received an evidentiary hearing in which the PCR court granted his request for belated

appellate review finding his testimony credible. Subsequently, he filed a petition for certiorari and, while preparing the appendix, his counsel discovered the transcript from the 1992 evidentiary hearing was unavailable. Petitioner petitioned the Court to remand the matter back to circuit court for a reconstruction hearing. This Court denied that motion and ordered the parties to brief the issue of "whether, in an instance such as this, a PCR applicant may be barred from seeking Austin review by the doctrine of *laches*." This Court ultimately decided four things. First, *laches* may be raised as a defense to an Austin claim. Whitehead, 352 S.C. at 219, 574 S.E.2d at 202. Second, *laches* is an affirmative defense that must be pled and the failure to plead an affirmative defense is deemed a waiver of the right to assert it.[4] Id. Third, in cases where *laches* is properly raised as a defense to an Austin claim, the PCR court will hear evidence on the defense and at the same time hear the Applicant's Austin claim on the merits. Id. The Court required the PCR court to make specific findings on the *laches* issue as well as specific finding on the Austin claim. Fourth and finally, this Court granted Whitehead's motion for reconstruction of the record and remanded the case back to circuit court. Id at 203.

In the present case, Petitioner argues the PCR court erred when it applied *laches* as a defense. However, Respondent pleaded *laches* as an affirmative defense in its return and motion to dismiss. As Whitehead requires, *laches* was raised as an affirmative defense and pleaded. Respondent did not waive *laches* as a defense to Petitioner's Austin claim. Therefore, the Court should have – and still needs to – hear evidence on and make findings on Respondent's motion to dismiss the 2016 post-conviction relief action pursuant to the doctrine of *laches* and Petitioner's evidence on the Austin allegation as required by Whitehead.

[4] The Court found the state neither raised *laches* in its return to petitioner's second PCR application nor in its motion to dismiss thus waving the right to raise the defense of *laches* in the case.

CONCLUSION

For the foregoing reasons, this Court should remand this matter to the circuit court for an evidentiary hearing to make specific findings as required by Whitehead on Petitioner's Austin allegation and Respondent's motion to dismiss pursuant to the doctrine of *laches*.

Respectfully submitted,

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