

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
HONORABLE DERHAM COLE
2006-CP-42-1166, 1167

THE STATE OF SOUTH CAROLINA
RESPONDENT,
vs.
JOHN MACK,
APPELLANT.

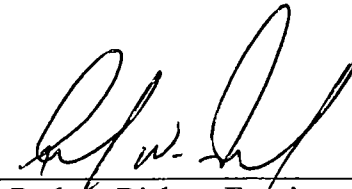
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MAR 14 2022

S.C. SUPREME COURT

NOTICE OF APPEAL

John Mack appeals the denial of his Application for Forensic DNA Testing. The Application for Forensic DNA testing was heard and denied by the Honorable J. Derham Cole, Circuit Judge on October 31, 2014 and Order issued on May 18, 2015 and filed on May 19, 2015. The Appellant was granted the right to appeal the Application for Forensic DNA Testing pursuant to an Order issued by the Honorable Grace Gilchrest Knie issued on February 2, 2022 and filed on March 7, 2022. The Appellant received notice of the order on March 7, 2022.



Rodney Richey, Esquire
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Other Counsel of Record:
Derrick Balsa, Esquire
Spartanburg County Solicitor's Office
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Investigator Burgess took swabs of the blood found in all three sites and sent it to SLED for DNA testing.

Manuel John Ortuno, a forensic DNA analyst from SLED, testified that he examined the DNA from the blood swabs taken from Moss' house and determined that the DNA belonged to the same unknown individual. On February 10, 2006, there was a CODIS (combined DNA index system) hit identifying Defendant. On April 1, 2009 Investigator Burgess collected a buccal swab from Defendant and sent the swab to SLED for DNA testing.

On October 20, 2009, Ortuno compared the DNA from the blood swabs from Moss' house to the DNA from Defendant's buccal swabs. Ortuno concluded that the DNA samples collected from Moss' house originated from Defendant. Furthermore, Ortuno testified that the probability of randomly selecting an unrelated individual having the same DNA profile matching the DNA found in Moss's house was approximately one (1) in 1.3 quadrillion individuals.

At trial, both Moss and Max Ballard, who was Moss' landlord, testified that they did not know Defendant, and they did not give Defendant consent to enter Moss' house.

On February 22-23, 2011, Defendant proceeded to trial before the Honorable J. Derham Cole. At the end of the trial, the jury found Defendant guilty as charged. Judge Cole sentenced the Defendant to the mandatory sentence of life without possibility of parole based upon Defendant's prior conviction for first-degree burglary.

On April 17, 2013, the South Carolina Court of Appeals affirmed Defendant's conviction. (Op. No. 2013-UP-161)

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The Defendant's PCR action is currently pending in which Leah Moody, Esquire was appointed to represent Defendant. Pursuant to §17-28-60, SC Code of Laws (1976, as amended), Ms. Moody was appointed to represent Defendant in this action as well.

DISCUSSION

It appears to be the Defendant's position that he is entitled to relief because the State did not actually take physical custody of the light switch in the victim's residence, as well as her entertainment center and bookshelf. At trial, Investigator Burgess testified that those three (3) items were processed and the samples sent to SLED for DNA analysis. The results were then entered into CODIS. SLED received a CODIS match identifying the Defendant as a match. A confirmatory test, which Defendant opposed, was ordered and those results also matched the Defendant's DNA. At trial, the Defendant did not raise the issue of wanting the actual items produced.

As stated above, the probability of a random individual other than Defendant matching the DNA results is 1 in 1.3 quadrillion. SLED agent John Ortuno testified at trial that quadrillion is 15 zeros, billion is 9 zeros, and trillion is 12 zeros. Agent Ortuno went on to explain that to reach the number of 1.3 quadrillion, you would have to count every individual on the planet 400,000 times.

In the case of District Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52 (2009), the United States Supreme Court held that "... after conviction, with nothing to lose, the defendant could demand DNA testing in the hope that some happy accident - for example, degradation or contamination of the evidence - would provide the basis for seeking post-conviction relief. Denying the opportunity for such an attempt to

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game the criminal justice system should not shock the conscience of the Court.”

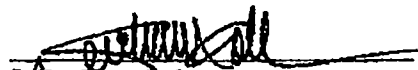
CONCLUSION

The items Defendant is seeking to be tested were previously subjected to DNA testing and further testing would not provide a more probative result. Defendant’s application does not state a sufficient basis for this court to grant relief under this Act.

Accordingly, the Defendant’s application is:

DENIED.

Dated 5/18/15


J. Derham Cole
Judge of the Seventh Judicial Circuit

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
THE STATE OF SOUTH CAROLINA,

VS.

JOHN W. MACK, SCDC#257219,

Defendant.

) IN THE COURT OF GENERAL SESSIONS
)
)
) WARRANT NO. 2006-GS-42-1166, 97C. SUPREME COURT
) K112716 K112715
)
)
) **ORDER**
) (Consenting to Belated Appeal)

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MAR 14 2022

CLERK OF COURT
SPARTANBURG COUNTY
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This matter comes before the Court on a remand from the South Carolina Supreme Court.

The Defendant was represented by Rodney Richey, Esquire. The State was represented by Derrick Balsa, Esquire of the Seventh Circuit Solicitor's office.

PROCEDURAL HISTORY

A Spartanburg County grand jury indicted Mack for first degree burglary, and grand larceny in April 2006. Prior to trial the state served Mack with notice of intent to seek a life sentence pursuant to S.C. Code § 17-25-45. On February 22, 2011, the state represented by Barry J. Barnette and Anthony C. Leibert called the case to trial before the Honorable J. Derham Cole and a jury. Mack was represented by Roger Poole. Mack was found guilty as indicted. Judge Cole sentenced Mack to life without parole on the burglary charge, pursuant to the life without parole statute, and five years imprisonment on the grand larceny charge. Mack appealed his convictions and sentences. While his direct appeal was pending, Mack filed a pro se application for retesting of the DNA in his case under the Access to Justice Post-Conviction DNA Testing Act (the DNA Act) on September 27, 2012. On April 17, 2013, the Court of Appeals affirmed Mack's convictions in State v. Mack, 2013-UP-161(Ct. App. filed April 17, 2013). Mack then filed a PCR application on May 6, 2013. The state filed a return dated March 18, 2014. An

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evidentiary hearing to address Mack's PCR application was held on January 14, 2015. The Honorable Deadra Jefferson presided over the PCR hearing. The state was represented by Suzanne White. Mack was represented by Leah Moody. At the conclusion of the PCR hearing the court denied Mack's PCR application. An order of dismissal was filed on April 10, 2015. Mack immediately filed an appeal of the PCR court's decision. On February 1, 2018, the Court denied certiorari. As stated above, Mack filed a pro se application for retesting of the DNA in his case while his direct appeal was still pending. On October 31, 2014, a hearing was convened before the Honorable J. Derham Cole. Barry Barnette and Anthony Leibert represented the state. Mack was again represented by Leah Moody. The order denying Mack's request for DNA testing was filed on May 19, 2015. DNA counsel filed the Notice of Appeal out of time. Mack filed a notice of appeal of the DNA court's denial. On July 16, 2015, the Court of Appeals dismissed Mack's appeal as not timely served. On September 10, 2015, Mack filed a second PCR application wherein he alleged that DNA counsel was ineffective for failing to appeal the decision of the DNA court. The state filed a return and motion to dismiss on March 23, 2017, arguing that Mack had failed to state a cognizable claim under the PCR Act, that the application was not filed within the statute of limitations, and that the application was successive to Mack's initial PCR application. A hearing was held on June 29, 2017, before the Honorable Robin B. Stilwell, solely to address the state's motion to dismiss. Mack was represented by Rodney Richey. The state was represented by Valerie Giovanoli. The court heard argument from both parties before granting the state's motion to dismiss. On July 7, 2017, the PCR court filed an order denying Mack's second PCR application and dismissing it with prejudice. The order from the DNA Act hearing was filed one month after the initial PCR court's order of dismissal which had been filed on April 10, 2015. No evidentiary hearing was ever held on the merits of Mack's

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PCR application which is the subject of this appeal. Rodney Richey, filed an appeal of Judge Stilwell's order. Counsel also filed a separate accompanying explanation which provided that Mack had filed the second PCR application as the only means to appellate review of the order issued by the DNA court. Former Appellate Defender LaNelle Durant filed a petition for writ of certiorari on March 16, 2018. The state filed its return on July 12, 2018. The case was transferred to the Court of Appeal on July 25, 2019, and certiorari was granted on March 6, 2019. The Court of Appeals affirmed the second PCR court's decision in Mack v. State, 2019-UP-386 (Ct. App. filed December 18, 2019). Mack filed a petition for rehearing on December 20, 2019. The Court of Appeals denied the petition for rehearing on January 23, 2020. Mack sought a writ of certiorari to the Supreme Court to review the decision by the Court of Appeals. The Supreme Court granted certiorari on August 7, 2020 and remand the case to General Session Court on May 20, 2021.

AGREEMENT OF THE PARTIES

1. The action was filed on September 27, 2012 and denied by The Honorable J. Derham Cole on October 31, 2014.
2. The Notice of Appeal filed by Defendant's counsel was not filed timely;
3. Because of the untimely filing of the Notice of Appeal, the Defendant is entitled to a belated appeal on his application for Access to Justice Post-Conviction DNA Testing Act claim;

CONCLUSION

IT'S SO ORDERED that the Defendant, John W. Mack, is granted a belated appeal on his application for Access to Justice Post-Conviction DNA Testing Act claim.

AND ITS SO ORDERED.

CLERK OF COURT
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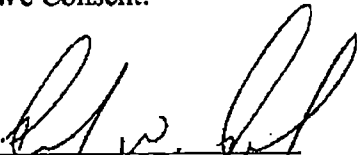
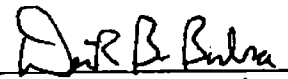
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The Honorable Grace Gilchrest Knie
Judge of the Seventh Judicial Circuit

Dated: 2/15, 2022.

We Consent:


Rodney Richey, Esquire
Attorney for the Defendant
Derrick Balsa, Esquire
Attorney for the State

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JUDICIAL DISTRICT NO. 7

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JUDICIAL DISTRICT NO. 7