

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to York County

Honorable Thomas A. Russo, Circuit Court Judge

ERIC ADAMS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000578

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred by finding petitioner did not provide any evidence that he attempted to file his PCR application in a timely manner where the uncontested testimony was that petitioner had timely delivered his PCR application into the prison mail system, and where petitioner immediately retained counsel when he learned the application had not been filed because of circumstances totally beyond his control?

STATEMENT

Petitioner was indicted by a York County grand jury on September 24, 2015 for trafficking in cocaine, trafficking in crack cocaine and possession with intent to distribute marijuana. App. 87-88; 91-92; 95-96. Jack Swerling represented Petitioner. App. 102. A negotiated plea was entered before the Honorable John C. Hayes, III, on January 28, 2016. App. 1; App. 5. In accordance with the negotiations Petitioner made an allocution during the plea hearing that all the drugs recovered in the home were his alone and nothing belonged to his co-defendant Robbins who was his fiancé. App. 5, ll. 14-17; App. 15, ll. 17-25; App. 16, ll. 10-14. Judge Hayes accepted the negotiated plea sentencing Petitioner to twelve years on each trafficking charge and five years on the possession with intent to distribute marijuana charge, all to run concurrently. App. 17-18.

A PCR application was filed with the York County Clerk of Court on August 7, 2017, alleging ineffective assistance of counsel and involuntary guilty plea as grounds for relief. App. 21-27. On October 25, 2017 the state filed a return and motion to dismiss on the ground that the PCR application was filed outside of the statute of limitations. App. 28-31. The PCR court entered a conditional order of dismissal, dismissing the PCR application as untimely filed, on November 13, 2017. App. 33-35.

PCR Counsel Tommy Thomas filed a return to the conditional order of dismissal arguing that Petitioner believed his application had been timely filed, that there were grounds for Petitioner's PCR and that there was "excusable neglect" that could account for the late filing of the PCR application. App. 40-43. Counsel Thomas asked for a hearing to be held prior to dismissal of the application. App. 42.

In response the state filed a return and motion to dismiss all claims except a White v. State¹ review. App. 44-49. A hearing was held on January 29, 2019 in front of the Honorable Thomas A. Russo. App. 50. Petitioner was represented by Tommy Thomas. The state was represented by Janell Gregory. App. 50. Petitioner and Jack Swerling testified at the hearing. App. 51. Prior to testimony Counsel Thomas framed the hearing as “just a motion hearing to resolve this motion from the State.” App. 54, ll. 14-16. “This motion from the state” being the motion to summarily dismiss Petitioner’s application in its entirety that the state renewed prior to the hearing. App. 54, ll. 7-9.

After testimony and closing arguments the PCR found Petitioner had not met his burden of proof. App. 74, ll. 3-12. In the order of dismissal, the PCR court stated that Petitioner had failed to provide any evidence that applicant did attempt to file his application in a timely manner. App. 81. The PCR application was dismissed with prejudice. This petition follows.

¹ 263 S.C. 110, 108 S.E.2d 35 (1974)

ARGUMENT

The PCR court erred by finding petitioner did not provide any evidence that he attempted to file his PCR application in a timely manner where the uncontested testimony was that petitioner had timely delivered his PCR application into the prison mail system, and where petitioner immediately retained counsel when he learned the application had not been filed because of circumstances totally beyond his control.

Relevant Facts

Petitioner testified that while incarcerated at McCormick prison he mailed his PCR application sometime during June 2016, after having another inmate help him fill out the application. App. 56, l. 23-App. 57, l. 22. Petitioner purchased an envelope and stamp for the application and to the best of his knowledge it went out in the McCormick mail. App. 58, ll. 5-12. Petitioner eventually contacted Counsel Thomas to inquire about the status of his PCR application. App. 58, ll. 14-23. Counsel Thomas informed Petitioner that the York County Clerk of Court had no record of his PCR application being filed. App. 59, ll. 3-9. Subsequently, Counsel Thomas filed a PCR application on behalf of Petitioner in August 2017, which was just over six months past the statute of limitations. App. 59, ll. 10-22. Petitioner had been under the mistaken belief that his PCR application had been filed as of June 2016. App. 59, ll. 23-25

On cross-examination Petitioner admitted that he did not have any proof of mailing the first PCR application in June 2016. App. 63, ll. 1-2. When Petitioner was transferred from McCormick to Tyger River² several of his personal papers were lost. App. 63, ll. 3-5. However, when Petitioner was informed there was no record of his PCR application being filed in June 2016, he attempted to review the outgoing mail log from McCormick prison, as the prisons are

² This Court can take judicial notice that the inmate search detail record of SCDC from doc.sc.gov shows Petitioner's transfer from McCormick to Tyger River prison in April of 2017.

supposed to keep a record of all outgoing mail. Petitioner sought to review this outgoing mail log from the McCormick mail room to prove that he had timely filed his PCR application but was unsuccessful in obtaining the information. App. 63, ll. 6-11. It is unclear from the record whether Petitioner was unsuccessful in his attempt to review the outgoing mail log kept at McCormick or if he was unsuccessful in finding a copy of his originally mailed PCR application in the outgoing mail log.

Discussion

Petitioner is entitled to equitable tolling of the PCR statute of limitations due to circumstances, both beyond Petitioner's control and unavoidable despite due diligence, that prevented Petitioner from making a timely filing. See Ferguson v. State, 328 S.C. 615, 618, 677 S.E.2d 600, 602 (2009) (holding that PCR applicant's failure to timely file due to mental incompetency warranted equitable tolling of the statute of limitations). Equitable tolling is a doctrine reserved for extraordinary circumstances. Pelzer v. State, 378 S.C. 516 520, 662 S.E.2d 618, 620 (2008). "Any resort to equity must be reserved for those rare instances where, due to circumstances external to the party's own conduct, it would be unconscionable to enforce the limitation period against the party and gross injustice would result." Id. at 522-23, 677 S.E.2d at 621 quoting Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000).

Petitioner maintains that he properly filed his PCR application in June of 2016 when he placed it in the prison mailbox at McCormick. The general rule is that mailing does not constitute filing. Gary v. State, 347 S.C. 627, 629, 557 S.E.2d 662, 663 (2001). However, when a person is incarcerated this bright line rule is changed and filing occurs at the time the inmate delivers the legal document to prison authorities for mailing. Houston v. Lack, 487 U.S. 266 (1988).

In Houston, petitioner appealed the dismissal of his habeas corpus petition. The appeal was stamped “filed” one day after the statutory filing period had run. Houston at 268-69. In challenging the dismissal the petitioner presented evidence that he timely filed his appeal by showing the date of submission to prison authorities as noted in the prison log for outgoing mail. Id. at 268. The United States Supreme Court stated,

Unlike other litigants, pro se prisoners cannot personally travel to the courthouse to see that the notice is stamped “filed” or to establish the date on which the court received the notice. Other litigants may choose to entrust their appeals to the vagaries of the mail and the clerk's process for stamping incoming papers, but *only the pro se prisoner is forced to do so by his situation...Worse, the pro se prisoner has no choice but to entrust the forwarding of his notice of appeal to prison authorities whom he cannot control or supervise and who may have every incentive to delay. No matter how far in advance the pro se prisoner delivers his notice to the prison authorities, he can never be sure that it will ultimately get stamped “filed” on time. And if there is a delay the prisoner suspects is attributable to the prison authorities, he is unlikely to have any means of proving it, for his confinement prevents him from monitoring the process sufficiently to distinguish delay on the part of prison authorities from slow mail service or the court clerk's failure to stamp the notice on the date received.*

Id. at 270–72 (1988) (emphasis added).

Ultimately, the Court ruled that a prisoner’s control over the process of filing an appeal “necessarily ceases as soon as he hands it over to the only public officials to whom he has access – the prison authorities – and the only information he will likely have is the date he delivered the notice to those prison authorities and the date ultimately stamped on his notice.”

Id. at 272. This holding is commonly referred to as the “prison mailbox rule.” E.g., Houston, 487 U.S. 266 (1988), Jones v. U.S.; 879 F. Supp.2d 492 (E.D. N.C. 2012); Mose v. State, 420 S.C. 500, 803 S.E.2d 715 (2017).

The courts of this state have adopted the holding in Houston finding that the “unique conditions of incarceration require a holding that the statute of limitations should be tolled if the circumstances warrant.” Mose v. State, 420 S.C. 500, 510, 803 S.E.2d 715, 722 (2017). In

Mose, the petitioner maintained he had timely filed his PCR application when it was placed in the prison mailbox on February 18, 2014. Id. at 504-506, 803 S.E.2d at 720-21. However, the application was not stamped “filed” until March 10, 2014 which was three days after the statute of limitations ran. Id. Mose argued that he had complied with the deadline when he gave his application to prison authorities, that through no fault of his own the application was delayed in arriving at the clerk of court, that he had made a good faith effort to meet the deadline, and that the dismissal of the PCR application was “unfair, unreasonable, and in violation of the spirit of the PCR statutory boundaries regarding filing deadlines.” Id.

The state argued that Mose was similarly situated to the defendant in Pelzer, *supra*, and that Mose’s application was properly dismissed as untimely. Id. The state maintained Mose had offered no proof that the application was timely mailed, that the only certain date was the date it was stamped filed, and that Mose has offered no extraordinary circumstances to warrant tolling of the statute of limitations. Id. This Court held that Mose was entitled to equitable tolling based on the uncontradicted evidence that he had released control of his PCR application on February 18, 2014 when he delivered it into the prison mail system, within the statutorily set one-year limit, and that in viewing the facts presented in the light most favorable to Mose, he was prevented from timely filing for PCR due to circumstances beyond his control. Id. at 512, 803 S.E.2d at 723.

Petitioner finds himself in a similar situation to that of Mose. Petitioner maintained that he mailed his PCR application sometime in June 2016, well within the statutory one-year time limit and that to the best of his knowledge it was properly sent out through the prison mail system. When Petitioner did not receive any information on the application after many months, he contacted Counsel Thomas who investigated the matter and realized that no application had

been received by the York County Clerk of Court. Upon realizing that no application had been received Petitioner immediately retained Counsel Thomas who, in turn, immediately filed a PCR application on behalf of Petitioner.

Petitioner testified that he had lost personal papers during the transfer between prisons, so he no longer had proof he sent out the application. Further, when he was told his application was never received, he attempted to confirm with the McCormick mail room the date the application was sent out. The state offered no evidence to contradict Petitioner's version of events and the court merely relied on the fact that Petitioner did not offer any other evidence, outside of his testimony, in dismissing the application.

While Petitioner did not offer outside proof of the date on which he mailed his application, his testimony was, much like Mose's affidavit, *uncontested*. Further, as soon as the error was discovered, Petitioner sought to remedy it by directly hiring Counsel Thomas. While the application was roughly six months late, the late filing occurred through no fault of Petitioner's and due to circumstances outside of his control. Petitioner had no other means to file his PCR application outside of the prison mail. As the Supreme Court noted in Houston,

"[I]f other litigants do choose to use the mail, they can at least place the notice directly into the hands of the United States Postal Service...and they can follow its progress by calling the court to determine whether the notice has been received and stamped, knowing that if the mail goes awry they can personally deliver notice at the last moment or that their monitoring will provide them with evidence to demonstrate either excusable neglect or that the notice was not stamped on the date the court received it. Pro se prisoners cannot take any of these precautions."

Houston at 271 (emphasis added). Petitioner had no control over his application once it was in the prison mail system and had no way to guard against it being mailed late, lost in the mail, or never being filed.

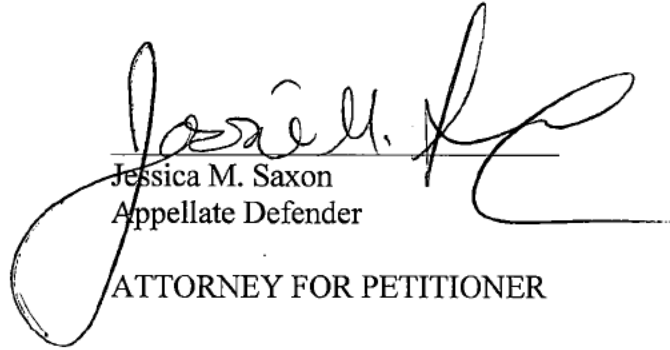
Importantly, the PCR court, in dismissing Petitioner's application as untimely, never ruled that Petitioner's testimony regarding his PCR application at the motion hearing was not credible. The court ruled that Petitioner did not provide *any evidence* that he did attempt to timely file his PCR application, essentially ignoring Petitioner's testimony. App. 80-81. That is not the proper standard upon which to base a decision for summary dismissal. As stated in Al-Shabazz v. State, 388 S.C. 354, 364, 638 S.E.2d 742, 747, when a court is "considering the State's motion for summary dismissal of an application, a judge must assume facts presented by an applicant are true and view those facts in the light most favorable to the applicant."

A review of the record shows that the hearing before Judge Russo was not a full evidentiary hearing where the merits of Petitioner's PCR claims would be considered, but a motion hearing to determine the state's motion for summary dismissal. Counsel Thomas clearly stated, at the beginning of the motion hearing, that its purpose was to address the summary dismissal motion. Thus, the PCR should have assumed the evidence, in the form of testimony presented by Petitioner, was true. That testimony when viewed in the light most favorable to Petitioner, supports equitable tolling of the PCR statute of limitations in this case.

Under the PCR rules, an applicant is entitled to a full adjudication on the merits of the original petition, "one bite at the apple." Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Barring a Petitioner from his "one bite at the apple" does not promote the "interest of fairness in the pursuit of justice" but "punishes applicants for delays beyond their control." Mose, at 511, 803 S.E.2d 723. Petitioner did everything within his power to ensure his PCR application was timely filed. The malfunction of the prison mail system and the U.S. Postal Service should not be held against him. Justice requires that Petitioner be allowed to have his PCR application considered, on its merits, at a full PCR evidentiary hearing.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's writ of certiorari to allow full briefing on this issue.



Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

This 4th day of November, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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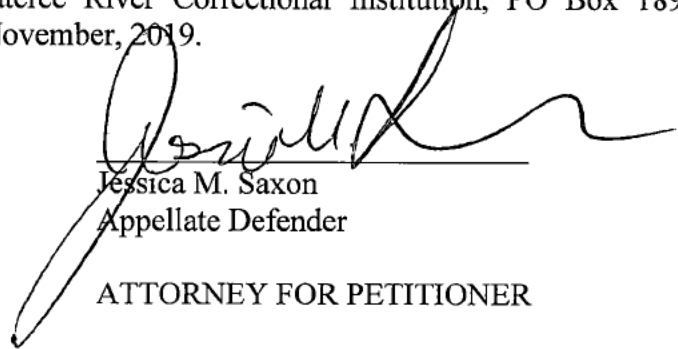
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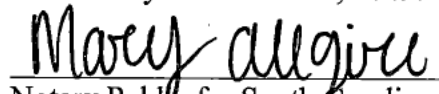
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Janell Gregory, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Eric Adams, #366880, at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128-0189, this 4th day of November, 2019.



Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 4th day of November, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.