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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Lexington County

Honorable Walton J. McLeod, IV, Circuit Court Judge

WORTH EDWARD COOK III,

RESPONDENT,

V.

THE STATE

APPELLANT

APPELLATE CASE NO. 2021-001267

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the circuit court erred in summarily dismissing Petitioner's application for DNA testing under the Access to Justice Post-Conviction DNA Act (the Act) where the court did not apply the correct standard for deciding when summary judgment is proper and considered the wrong section of the Act in making its decision?

STATEMENT OF THE CASE

On March 9, 2013, the family of David Diblasi (Victim) filed a missing person's report with the Lexington County Sheriff's Department (LCSD) stating that Victim had not been seen since February 25, 2013. The report included that Victim's 1996 white Isuzu pickup truck and Honda 200 motorcycle were also missing. App. 221, l. 19-App. 222, l. 15; App. 226, ll. 3-22. During the investigation into Victim's disappearance, detectives discovered that his TD Bank card had been used at a local Wal-Mart after his reported disappearance. Detectives recovered surveillance video and still shots from the transaction at Wal-Mart which showed Worth Cook (Petitioner) and Ricky Barnes (Barnes) using Victim's card on March 6, 2013 to purchase diapers, socks, and a slow cooker. App. 62, ll. 13-18.; App. 228, l. 13-App. 229, l. 14. Petitioner was eventually identified as the last person to see Victim before his disappearance. App. 289, ll. 12-16.

Detectives with LCSD executed a search warrant on Petitioner's home on April 4 and 5, 2013. App. 316, ll. 4-12. During the search, officers found suspected blood on two Wal-Mart bags, a dresser, the living room wall, and a pair of shoes. App. 616, ll. 13-19. In the backyard, underneath a partially buried trashcan, officers located the body of Victim wrapped in a Clemson blanket and shower curtain. App. 493, ll. 12-23; App. 495, l. 2-App. 496, l. 14. The autopsy revealed that Victim had been stabbed twelve times with a single-edged knife blade: nine times in the head and neck area, twice in the back, and once in the stomach. The fatal blow was a stab wound through the left eye socket into the brain. App. 665, l. 21-App. 667, l. 11

During the January 2014 term of court, Petitioner was indicted by the Lexington County grand jury for one count of murder. App. 1095-1096. On February 29, 2016, the State, represented by Shawn Graham and Micah Caskey called the case to trial before the Honorable R.

Knox McMahon and a jury. App. 1. Petitioner was represented by Sally Henry and Beth Fullwood. App. 1.

At trial, Petitioner testified that he met Victim on February 25, 2013, at the home of a mutual friend. During that meeting, Victim asked Petitioner to complete some mechanical repairs on his truck and motorcycle. App. 757, l. 4-App. 758, l. 6. After spending the day driving around to collect debts owed to Victim and getting high on methamphetamine, the pair returned to Petitioner's home where he completed the work on Victim's vehicles. App. 759-App. 768. Victim paid Petitioner for the work he had done on the vehicles and then left. App. 770, l. 15-App. 771, l. 20. While the State alleged that Petitioner killed Victim without a clear motive, Petitioner asserted he acted in self-defense.

Petitioner testified that after Victim had left his home Shannon Tart, his then girlfriend who was seven to eight months pregnant, returned home for the evening. App. 698, ll. 6-8; App. 772, ll. 17-App. 773, ll. 2. Tart was in the back of the home when Victim burst through the door with a knife and attacked Petitioner. A fight ensued. App. 774 – App. 789. Both Petitioner and Tart testified that Tart attempted to intervene, but Victim kicked her in her stomach, knocking her into a dresser and rendering her unconscious. App. 702, l. 21-706, l. 13. Petitioner testified he was able to twist away from Victim as he kicked Tart, grabbed a knife, and stabbed Victim multiple times, eventually delivering the fatal blow to his eye. App. 780, l. 6-App. 783, l. 3. Petitioner, who was on probation and had various drugs in his home, was scared to call the police to report the incident. App. 786, l. 14-App. 787, l. 10. He ended up cleaning up the scene and burying Victim's body in a shallow grave in his backyard. Petitioner then enlisted Barnes to help him chop up the truck and motorcycle and sell the scrap. App. 788, l. 4-App. 791, l. 8.

During trial, the State introduced numerous statements from Petitioner that conflicted with his trial testimony. App. 293; App. 309; App. 619; App. 644. The State elicited testimony from multiple witnesses that Victim had at least \$2000 and numerous bundles of heroin on his person when he disappeared that was never recovered. App. 267, ll. 1-22; App. 284, ll. 7-23; App. 916. There was further testimony that, after his disappearance, Petitioner and Barnes allegedly attempted to sell heroin that was packaged in distinctive packaging only Victim was known to use. App. 597, ll. 9-App. 599, l. 22. Additionally, the State introduced DNA swabs from Petitioner's living room wall and from a Wal-Mart bag removed from Petitioner's home. App. 481, ll. 9-21; App. 488, ll. 9-16. The DNA from the swabs was matched to Victim. App. 587, l. 4-21. This was the only DNA evidence the State introduced at trial.

After a five-day trial, Petitioner was found guilty of murder. App. 974, ll. 6-14. Judge McMahon sentenced Petitioner to thirty-five years imprisonment. App. 990, ll. 2-5. Petitioner appealed his conviction and sentence. Petitioner's appeal was dismissed in an unpublished opinion. State v. Cook, Op. No. 2018-UP-139 (Ct. App. filed April 4, 2018). Petitioner next filed an application for post-conviction relief on May 4, 2018. The State filed its return on August 16, 2018. An evidentiary hearing was held on April 5, 2019, before the Honorable Walton J. McLeod, IV. By written order dated June 27, 2019, Petitioner's PCR application was denied and dismissed with prejudice. Petitioner appealed the PCR court's denial of his application. The petition for writ of certiorari was denied by the South Carolina Court of Appeals on August 11, 2021.

On November 16, 2020, Petitioner filed an application for post-conviction DNA testing under the Access to Justice Post-Conviction DNA Testing Act (The Act). App. 992-1029. In the

application, Petitioner asserted his innocence and requested that the following items undergo mitochondrial DNA (mtDNA) testing:

Gloves shown to be worn by victim in grave site photos; black shoes 10 ½ in size found in applicant's home; Clemson blanket found wrapped around body of victim; bandana found in back of applicant's home; pregnancy test found in the back of applicant's home; DNA swabs from applicant's home; jeans, shirt, socks, thermal underwear bottoms, underwear briefs, thermal underwear top, knit long sleeve shirt, hoody with front zip and any other clothing the victim was wearing; plastic bag from victim's head; DNA swabs from white van confiscated in relation to murder case...any evidence that applicant does not know about he would like to request DNA testing on that as well.

App. 1013-1014. Petitioner argued that the DNA testing of these items would exclude him as the perpetrator of the crime and would likely reveal the identity of the person or persons who committed the murder. App. 1015; App. 1024-1025.

The State filed a response to Petitioner's application along with a motion for summary judgment on February 5, 2021. App. 1030-1044. The State argued that Petitioner was not entitled to testing because he had not established all the factors set forth in S.C. Code Ann. § 17-28-90(B). The State claimed that Petitioner did not make any argument as to how DNA testing would exclude him as a suspect, that any DNA testing or results therefrom would not be material to the issue of Petitioner's identity as the perpetrator of the offense considering the testimony of Tart and Petitioner at trial, that the testing could not produce exculpatory results and that testing would not provide results that would change the outcome of Petitioner's trial. Finally, the State asserted Petitioner was not making the application to demonstrate innocence, but solely to delay the execution of a sentence or the administration of justice. App. 1040-1043.

Petitioner filed a *pro se* reply to the State's response and motion for summary judgment on March 1, 2021. App. 1045-1064. Petitioner stated in his reply that he did not kill Victim and that both he and Tart had fabricated their in-court testimony at the advice of a "jail house

lawyer.” App. 1048-1049. Petitioner asserted that DNA testing of the items would show he was not the perpetrator¹ of the murder in numerous ways. He argued that Victim had not been killed in his home and that retesting the swabs from the alleged blood spots on the wall would show that the spots were from paint, not blood. App. 1054-1056. Petitioner stated testing the gloves and clothing that Victim was buried in would exclude him as the perpetrator of the murder and point to the guilty party, presumably because Petitioner’s DNA² would not be found on the items. App. 1057-1059. Petitioner also amended his application to specify that he wanted all the items collected from the white van to be tested. App. 1058.

A conditional order denying Petitioner’s application and granting the State’s motion for summary dismissal was filed on July 1, 2021. App. 1065-1070. In the order, the court found that Petitioner had not met the requirements of S.C. Code Ann. § 17-28-90(B) and could not meet the requirements of the Act based on “the evidence presented at trial, including Applicant’s testimony and that of another eyewitness.” App. 1067-1069. The order further stated that Petitioner had offered no argument as to why the DNA testing would exclude him as the person responsible for the murder but only made conclusory statements. The order also concluded that the application was made not to demonstrate innocence but only to delay the execution of a sentence or the administration of justice. App. 1069.

Petitioner responded to the conditional order on June 21, 2021. App. 1071-1090. Petitioner argued that any statements or testimony he made regarding his identity as the perpetrator of the murder were not to be considered in determining the application for DNA

¹ Petitioner also argued that the lack of decomposition of Victim’s body at the time it was recovered from the shallow grave in early April did not support the State’s theory that victim had been killed and buried by Petitioner at the end of February. App. 1050-1054.

² However, Petitioner did assert that he and victim engaged in a sex act the night that Diblasi went missing and therefore his clothes should be checked for semen and hair. App. 1060.

testing. App. 1074-1077. He then provided the court with cases from other jurisdictions where individuals who had confessed to a crime were later exonerated through post-conviction DNA testing. App. 1077-1081. Petitioner highlighted that there were several items which had never been previously tested and therefore the State could not know if the results would have an impact on a future trial. App. 1084-1086. Finally, he asserted that he was not making the application to delay the execution of a sentence as he was already serving the thirty-five-year, day for day sentence that had been imposed upon him. App. 1087-1088.

A final order denying Petitioner's application for DNA testing under the Act and granting the State's motion for summary dismissal was filed on October 7, 2021. App. 1091-1094. The final order adopted the findings of fact and conclusions of law from the conditional order and rebutted Petitioner's claim that the denial of the application was wholly based on the statements Petitioner had made at trial. App. 1093. The court found that any testing would not be material to the issue of Petitioner's identity as the perpetrator of the offense, that Petitioner's application was unspecific and did not provide for why further testing would be relevant, and that further testing would not make any fact of consequence more-or-less probable, nor would testing provide substantially more probative results. App. 1093.

ARGUMENT

The circuit court erred in summarily dismissing Petitioner’s application for DNA testing under the Access to Justice Post-Conviction DNA Act (the Act) where the court did not apply the correct standard for deciding when summary judgement is proper and considered the wrong section of the Act in making its decision.

The appellate courts of our state have yet to announce the framework under which to analyze the propriety of summary dismissal pursuant to S.C. Code Ann. § 17-28-50(C). Section 17-28-50(C) authorizes a court to summarily dismiss an application when the court “is satisfied, on the basis of the application, the responses, or the motion of the solicitor or Attorney General, as applicable, that the applicant is not entitled to DNA testing and no purpose would be served by any further proceedings.” Notably, that language is strikingly similar to the language contained in the Uniform Post-Conviction Procedure Act which also authorizes a court to summarily dismiss a PCR application when the court is “satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings...” S.C. Code Ann. § 17-27-70(b). Considering the similarity of these statutory provisions, that both deal with post-conviction matters, Petitioner respectfully submits that the analysis applied to PCR application summary dismissals should also apply to summary dismissals under the Act.

When considering the propriety of summary dismissal of a PCR application without a hearing “a judge must assume facts presented by an applicant are true and view those facts in the light most favorable to the applicant.” Wilson v. State, 348 S.C. 215, 217, 559 S.E.2d 581, 582 (2002) (citing Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (2000)). Further, the court may only summarily dismiss a PCR application when “(1) it is apparent on the face of the

application that there is no need for a hearing to develop any facts and (2) the applicant is not entitled to relief.” Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005). Stated differently the court may grant a motion for summary judgment only when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. McCoy v. State, 401 S.C. 363, 369, 737 S.E.2d 623, 626 (2013); see also Kagan v. Simchon, 429 S.C. 516, 523, 839 S.E.2d 106, 109 (Ct. App. 2020). The appellate courts must view the facts in the same fashion when reviewing the appropriateness of a dismissal. Leamon, at 434, 611 S.E.2d at 494.

Applying this standard to applications under the Act would require a court to assume the facts in the application are true, view those facts in the light most favorable to the applicant, and then determine whether a hearing is necessary to develop any facts stated in the application. Importantly, this standard, much like the Act itself, does not place a burden of proof upon an applicant at the summary dismissal stage.

S.C. Code. Ann. § 17-28-40, aptly titled “Form and Contents of Application” sets for the eight factors that must be detailed in any application for testing under the Act. Pursuant to section (C) the application must, under penalty of perjury:

- (1) identify the proceedings in which the applicant was convicted or adjudicated;
- (2) give the date of the entry of the judgment and sentence and identify the applicant's current place of incarceration;
- (3) identify all previous or ongoing proceedings, together with the grounds therein asserted, taken by the applicant to secure relief from his conviction or adjudication;
- (4) make a reasonable attempt to identify the physical evidence or biological material that should be tested and the specific type of DNA testing that is sought;
- (5) *explain* why the identity of the applicant was or should have been a significant issue during the original court proceedings, notwithstanding the fact that the applicant may have pled guilty or nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity;
- (6) *explain* why the physical evidence or biological material sought to be tested was not previously subjected to DNA testing, or if the physical evidence or biological material sought to be tested was previously subjected to DNA testing,

provide the results of the testing and explain how the requested DNA test would provide a substantially more probative result;

(7) *explain* why if the DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the applicant's conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching; and

(8) provide that the application is made to demonstrate innocence and not solely to delay the execution of a sentence or the administration of justice.

S.C. Code Ann. § 17-28-40(C) (emphasis added). The answers provided to the factors enumerated in section 17-28-40(C) are what should be considered when determining whether to grant an applicant a hearing or to deny the application without a hearing. While the factors in sections 17-28-40 and 17-28-90 share similarities they are not identical. Most notably, the factors in section 17-28-40 are not subject to a burden of proof. Under section 17-28-40 an applicant need only *explain* their reasoning as to each factor. Only once a hearing on the application is granted must an applicant then prove the factors set forth in S.C. Code Ann. § 17-28-90(B) by a preponderance of the evidence.

In the case *sub judice* the court dismissed Petitioner's application for DNA testing ruling that even viewing the evidence in the light most favorable to Petitioner, he had failed to establish the factors in S.C. Code Ann. § 17-28-90(B) by a preponderance of the evidence. This ruling was not proper for numerous reasons. First, the standard for summary judgment requires a court to not only consider the facts in the light most favorable to the non-moving party but to first *assume the facts presented by the non-moving party are true*. Under that framework, the court must then determine whether a material issue of genuine fact exists before granting or denying summary judgment.

In his application, Petitioner asserted he was actually innocent, that the trial testimony of he and Tart was fabricated, that the alleged biological material recovered from his home was red paint, and that the testing of the previously untested items would reveal the identity of the actual

perpetrator of the crime. The State relied heavily on the testimonies of Petitioner and Tart as a basis to deny the application. It further concluded that any DNA that might be discovered would not change the outcome of Petitioner's conviction. For summary dismissal to be proper in this matter, the court would have had to assume that the assertions by Petitioner were true, including that the trial testimony was fabricated. Assuming these facts as true creates a factual dispute, particularly surrounding the testimonies of Petitioner and Tart, which could only be properly resolved at a hearing on the application.

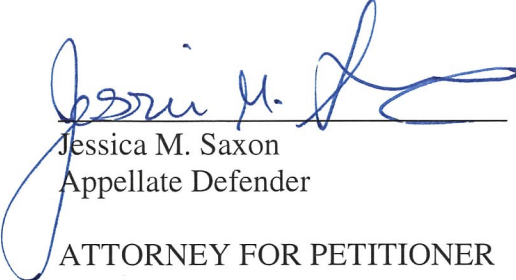
Second, the Act only requires the factors enumerated in section 17-28-90(B) to be proven *if* a hearing is granted. The proper factors to be considered when determining whether to grant a hearing or dismiss an application are found in section 17-28-40. Those factors are not subject to the preponderance of evidence standard and require only an explanation by the applicant as to why he or she believes the requested testing would be relevant. Petitioner's application for DNA testing, on its face, met the requirements of section 17-28-40. The court dismissed Petitioner's application because he failed to prove the statutory factors in 17-28-90(B) by a preponderance of the evidence. However, Petitioner was not required to prove those factors in his application and would only be required to prove those factors once the court granted him a hearing as it was required to do. Additionally, the court took into consideration Petitioner's statements both before and during trial. The Act, in both sections 17-28-40 and 17-28-90, plainly prohibits the consideration of any incriminating statement or admission as to identity in determining whether to grant or deny an application.

When the facts in Petitioner's application are assumed to be true, they create factual disputes that can only be resolved at a hearing. Further, even if this Court chose to adopt a different standard of review for summary dismissal from the Act, Petitioner's application was not

properly dismissed because the lower court considered the wrong factors and evidentiary burden in dismissing Petitioner's application for DNA testing. Summary dismissal is a drastic procedural step that should be reserved for the rarest of cases, where it is evident from an application and responses that nothing can be gained from further proceedings. Considering all the facts in the light most favorable to Petitioner, he was entitled to a hearing with appointed counsel on the merits of his application for post-conviction DNA testing.

CONCLUSION

Based on 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 7th day of June, 2022.

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Jun 07 2022

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Lexington County

Honorable Walton J. McLeod, IV, Circuit Court Judge

WORTH EDWARD COOK III,

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THE STATE

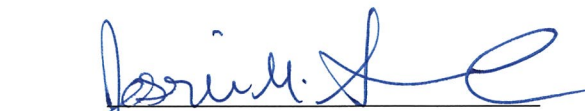
APPELLANT

APPELLATE

CASE NO. 2021-001267

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, 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 have been served upon Melody J. Brown, Esquire, at the primary e-mail address listed within the Attorney Information System (AIS); and on Worth Edward Cook, #293532, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 7th day of June, 2022.


Jessica M. Saxon
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From: [Warren, Kaylynn](#)
To: mbrown@scag.gov
Cc: abennett@scag.gov; [Saxon, Jessica](#)
Subject: 2021-001267 Worth Edward Cook, III v. The State
Date: Tuesday, June 7, 2022 3:46:39 PM

Good Afternoon,

Please find attached for service in the above-referenced case the Appendix (Volumes I-III) and the Petition for Writ of Certiorari with the accompanying Certificate of Service which will be filed today, June 7, 2022, with the Court of Appeals via OneDrive. Because this case does not appear on C-Track, please respond to confirm receipt.

Respectfully,

Kaylynn

Kaylynn Warren

Legal Assistant

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Office of Appellate Defense

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