SHANNON D. MCGEE, SR., v. JOSEPH MCFADDEN, WARDEN

BRIEF IN OPPOSITION

APPENDIX "D"

submit the case to a jury. Frazier, 386 S.C. at 531, 689 S.E.2d at 613 (citing Weston, 367 S.C. at 292-93, 625 S.E.2d at 648). The second ground was Judge Couch erred in submitting the written charge to the jury. Submission of a written copy of the jury charge is left to the trial judge's discretion. State v. Turner, 373 S.C. 121, 129, 644 S.E.2d 693, 697 (2007) (citing Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000)). Here, Judge Couch did not abuse his discretion in submitting a written charge.[3] The third ground for mistrial was Judge Couch erred in not allowing trial counsel to impeach Kinloch with convictions older than ten (10) years because the "probative value would not outweigh its prejudicial effect." (Trial Tr. 92:22-25). The Court finds no error in Judge Couch's ruling that would have been a viable appellate issue. See State v. Black, 400 S.C. 10, 27, 732 S.E.2d 880, 889 (2012) (stating it is a heavy burden to demonstrate the prejudicial effect of a remote conviction is substantially outweighed by its probative value). Finally, trial counsel re-raised his objection to the case being called on short notice. Again, as discussed above, Judge Couch's decision on the continuance motion was not a viable appellate issue. Bozeman, 307 S.C. at 175, 414 S.E.2d at 146 (citing Babb, 299 S.C. at 451, 385 S.E.2d at 827; Pendergrass, 270 S.C. at 1, 239 S.E.2d at 750). Because Applicant's suggested appellate issues are not viable, he was not prejudiced by appellate counsel's decision to not brief them. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (no ineffective assistance of appellate counsel where applicant's alleged issues are not meritorious).

C. Prosecutorial Misconduct

[3] The Court notes trial counsel initially consented to submission of the written charge (Trial Tr. 200:12-16), so this issue was likely not preserved for appellate review. See State v. Stanko, 402 S.C. 252, 270, 741 S.E.2d 708, 717 (2013) ("Appellant cannot argue now on direct appeal that the trial court erred in acquiescing to his express and informed desire.").

The Court finds Applicant failed to meet his burden of proving prosecutorial misconduct from the solicitor's presentation of evidence relating to Kinloch. The Court finds this issue was raised and decided in Applicant's direct appeal. Applicant's amended application alleges the solicitor made false representations to Judge Couch about the solicitor's prior contact with Kinloch. This allegation is part and parcel of the Brady violation Applicant alleged at trial and on appeal based on the solicitor's failure to disclose a letter written by Kinloch. This allegation of a Brady violation was raised on appeal from Applicant's conviction. See State v. McGee, Op. No. 2009-UP-539 (S.C. Ct. App. filed Nov. 19, 2009) ("On appeal, he argues the trial court erred in denying his motion for a new trial based on the State's Brady v. Maryland violation."). Because the issue was ruled upon by the Court of Appeals, Applicant cannot now challenge it on collateral review. Humbert v. State, 345 S.C. 332, 338, 548 S.E.2d 862, 866 (2001) ("PCR is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal." (citing Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993))).

Regardless, Applicant has not shown any conduct by the solicitor prejudiced his right to a fair trial. Riddle v. Ozmint, 369 S.C. 39, 45, 631 S.E.2d 70, 73 (2006). Trial counsel extensively attacked Kinloch's credibility. The jury was aware of Kinloch's prior conviction and pending charges. Because trial counsel effectively called Kinloch's credibility into question with his prior crimes, the impeachment evidence of Kinloch's desire to assist the State did not deprive Applicant of a fair trial. State v. Cheeseboro, 346 S.C. 526, 554, 552 S.E.2d 300, 314-15 (2001) ("Where there is an abundance of evidence detailing the witness's unabashed disrespect for the law, the nondisclosure of other impeaching evidence does not deprive the defendant of a fair trial." (citing State v. Gunn, 313 S.C. 124, 437 S.E.2d 75 (1993))). Therefore, the solicitor's

actions "do not rise to the level of bring[ing] the trustworthiness of the verdict into question[.]" (Order of Judge Couch at p. 5, Nov. 9, 2006).

D. State v. Langford

Applicant's final allegation is that the State's calling of his case for trial violates the South Carolina Constitution as outlined in the South Carolina Supreme Court's decision in State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012). This Court finds that Langford cannot be retroactively applied to Applicant's case, that the State complied with the law as it existed at the time of Applicant's trial, and that Applicant was not prejudiced by having his case called to trial.

Prior to the Supreme Court's decision in Langford, exclusive control of the criminal docket was vested in the circuit solicitor. See S.C. Code § 1-7-33.[4] The Supreme Court declared in Langford this exclusive control violated the separation of powers principle of Article 1, Section 8[5] of the South Carolina Constitution. Langford, 400 S.C. at 428-29, 735 S.E.2d at 475. There can be no doubt, and the testimony and arguments at this hearing demonstrate, that this decision announced a new rule of law that is a deviation from the existing practice in General Sessions courts across the state. See Talley v. State, 371 S.C. 535, 541, 640 S.E.2d 878, 881 (2007) ("[A] case announces a new rule when it breaks new ground or imposes a new obligation

[4] Section 1-7-33 provides that:

> "The solicitors shall attend the courts of general sessions for their respective circuits. Preparation of the dockets for general sessions courts shall be exclusively vested in the circuit solicitor and the solicitor shall determine the order in which cases on the docket are called for trial. Provided, however, that no later than seven days prior to the beginning of each term of general sessions court, the solicitor in each circuit shall prepare and publish a docket setting forth the cases to be called for trial during the term."

[5] S.C. Const. art I, § 8 provides that:

on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." (citing Teague v. Lane, 489 U.S. 288 (1989))). This Court is thus required to determine if this new rule is to be applied retroactively on collateral review. "Generally, new procedural rules should be not applied retroactively to cases on collateral review[.]" Id. at 543, 640 S.E.2d at 882 (citing Teague, 489 U.S. at 305). A new rule should not be applied retroactively when it is "a clear break with the past[.]" United States v. Johnson, 457 U.S. 537, 549 (1982) (quoting Desist v. United States, 394 U.S. 244 (1969). Because Langford announced a new rule constituting a clear break from past procedure, the Court finds it cannot be applied retroactively on collateral review.[6]

The record is clear the solicitor complied with the law at the time of Applicant's trial. Trial counsel was provided a copy of the trial docket well in advance of trial and had the opportunity to make a motion for continuance when he felt the trial should not go forward. Thus, the State complied with section 1-7-33 in calling Applicant's case for trial.

Regardless, Applicant had not shown he was prejudiced by the solicitor exercising his authority under section 1-7-33. See Langford, 400 S.C.at 446, 735 S.E.2d at 484 (requiring the defendant to show he was prejudiced by the solicitor's exclusive docket control, and finding he was not prejudiced). Applicant's only argument for prejudice was counsel did not have adequate

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"In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other."

[6] The Court also notes that, were Langford to apply retroactively, every conviction resulting from solicitor's exclusive docket control would be subject to collateral attack. See Teague, 489 U.S. at316 ("We therefore hold that, implicit in the retroactivity approach we adopt today, is the principle that *habeas corpus* cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to all

time to prepare for trial. This argument is not supported by the record. As discussed above, trial counsel interviewed witnesses and investigated the case to the extent Applicant provided leads to investigate. Applicant's Exhibit Number 1, trial counsel's trial notebook, shows trial counsel was thoroughly prepared for trial despite the short notice. The trial transcript reveals trial counsel subjected the State's case to a "meaningful adversarial testing[.]" United States v. Cronic, 466 U.S. 648, 659 (1984). Furthermore, Applicant failed to articulate any information that could have been uncovered had a continuance been granted. Thus, the short notice did not render trial counsel's performance so lacking as to make the result of the trial unreliable. Id. (citing Davis v. Alaska, 415 U.S. 308 (1974)); see also Avery v. Alabama, 308 U.S. 444, 450 (1940) (finding no prejudice where counsel was appointed in a capital case only three days before trial and the trial court denied counsel's request for additional time to prepare). Because Applicant was zealously represented by trial counsel at his trial, the Court finds he was not prejudiced by the solicitor's exclusive control of the docket.

E. All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present sufficient evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application.

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defendants on collateral review[.]"). Certainly such an extreme result was not intended by the Supreme Court in

Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal. It is therefore

ORDERED that the Application for Post-Conviction Relief is denied and dismissed with prejudice and Applicant is remanded to the custody of the Respondent.

THE HONORABLE STEVEN H. JOHN
Resident Judge
Fifteenth Judicial Circuit

January 22, 2014
~~Conway~~, Georgetown, South Carolina

declaring section 1-7-33 unconstitutional.