

SUPREME COURT OF ARKANSAS

Wooten v. State, 2010 Ark. 467

370 S.W.3d 475 (2010) · Decided December 2, 2010

OPINION

GUNTER, J.

JIM GUNTER, Justice. 1,Wooten asks this court to recall our mandate and allow him to pursue a second Rule 37 proceeding. He asserts that he meets this court’s stringent criteria for providing this extraordinary relief.

Because this is a criminal appeal in which the death penalty has been imposed, and the petitioner is asking this court to recall our mandate, we have jurisdiction pursuant to Ark. Sup.Ct. R. 1-2(a) (2) & 5-3(d). We grant the motion to recall the mandate. Wooten was convicted of capital murder, criminal attempt to commit capital murder, and aggravated assault, and was sentenced to death, thirty years, and six years, respectively.

This court affirmed those convictions in *Wooten v. State*, 325 Ark. 510, 931 S.W.2d 408 (1996) (*Wooten I*). Wooten then hired James Clawson to represent him in postconviction proceedings. On April 21, 1997, Clawson filed on Wooten’s behalf a petition for postconviction relief that was not verified by Wooten. This petition was denied by the circuit court, but this court reversed and remanded for appropriate written findings and an evidentiary hearing if necessary pursuant to Rule 37.3.

Wooten v. State, 338 Ark. 691, 1 S.W.3d 8 (1999) (*Wooten II*). In June 2000, the circuit court again denied postconviction relief, and no appeal from that order was filed by Clawson. James Clawson surrendered his law license on June 7, 2001.

In *re Clawson*, 49 S.W.3d 99 (Ark.2001) (*per curiam*). Alvin Schay was then appointed to represent Wooten, and we granted Wooten’s motion for rule on clerk in his appeal of his denial of postcon-viction relief. See *Wooten v. State*, 347 Ark. 370, 64 S.W.3d 708 (2002) (*Wooten III*). This court subsequently affirmed the denial of postconviction relief in *Wooten v. State*, 351 Ark.

241, 91 S.W.3d 63 (2002) (*Wooten IV*). On October 2, 2003, Wooten filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Arkansas, alleging that both his convictions and sentence were in violation of various provisions of the United States Constitution. Specifically, Wooten asserted that his trial counsel had been constitutionally ineffective for (1) failing to argue, during the guilt phase of his trial, that mental health issues prevented him from formulating the necessary mens rea for capital murder, and (2) failing to present certain mitigating evidence during the sentencing phase of his trial.

In an opinion issued September 19, 2006, the district court found Wooten's arguments without merit and denied the petition for writ of habeas corpus. *Wooten v. Norris*, No. 5:03cv00370, 2006 WL 2686925 (E.D.Ark. Sept. 19, 2006).

In March 2007, attorney J. Blake Hendrix filed a motion with this court to appear as counsel and also tendered a motion to recall the mandate in Wooten's case. We denied the [a]motion to appear as counsel on April 26, 2007, and made no mention of the tendered motion to recall the mandate. No further action was taken on the case in this court until October 2009; meanwhile, the judgment of the federal district court was affirmed by the Eighth Circuit Court of Appeals on August 26, 2009.

Wooten v. Norris, 578 F.3d 767 (8th Cir.2009). In its opinion, the Eighth Circuit noted that the district court had declined to stay the federal case and hold federal proceedings in abeyance pending further exhaustion of state remedies.

The court also found that Wooten's claims in his federal appeal were procedurally defaulted because they had not been presented to the state courts. In sum, the Eighth Circuit found that, while Wooten may be entitled to relief in the form of a recall of the mandate from this court, "this is a case for which the federal courts can provide no relief because of post-conviction counsel's failure to exhaust the allegedly meritorious claims." *Id.* at 785.

The court concluded: "Because Wooten's Motion to Recall and Reopen is not a proper vehicle for exhausting state remedies in Arkansas or creating a state record that might support federal habeas claims, it was proper for the district court to reject his Rule 59(e) motion and his motion to stay federal proceedings." *Id.* at 786.

On October 1, 2009, Wooten's current counsel, which includes three out-of-state attorneys from the Federal Community Defender Office of the Eastern District of Pennsylvania, and local attorney J. Blake Hendrix, filed an application for permission to be appointed as counsel in Wooten's case. Counsel also tendered a "Motion to Clarify Status of Motion to Recall the Mandate." We granted counsels' application for permission to be | appointed as counsel on Wooten's behalf on November 5, 2009, and on December 10, 2009, we denied the motion to recall the mandate without prejudice and with the right to refile a motion to recall the mandate.

On December 28, 2009, another motion to recall the mandate was filed on Wooten's behalf, and this court decided to submit the motion as a case, which is now presently before the court. Wooten asserts that this court should recall the mandate in his case and allow him to pursue a second Rule 37 proceeding. He claims that his case satisfies the criteria for recalling the mandate under this court's precedents in *Robbins v. State*, 353 Ark.

556, 114 S.W.3d 217 (2003), *Lee v. State*, 367 Ark. 84, 238 S.W.3d 52 (2006), and *Collins v. State*, 365 Ark. 411, 231 S.W.3d 717 (2006). In *Robbins*, the defendant was convicted of capital

murder and given the death sentence. Nearly two years after this court affirmed his conviction and sentence, Robbins petitioned this court to reopen his case and alleged that a mistake was made by this court in failing to recognize that the jury was inconsistent in its completion of Verdict Form 2, which deals with mitigating circumstances.

According to Robbins, this court reversed a death sentence and remanded for resentencing for precisely the same inconsistency in Verdict Form 2 in *Willett v. State*, 322 Ark. 613, 911 S.W.2d 937 (1995). This court explained that we will recall a mandate and reopen a case only in extraordinary circumstances, and in Robbins's case, there were three specific factors that prompted the decision to recall the mandate: (1) a decision had been cited to the court which was on all fours legally with the issue presented; (2) the dismissal of proceedings in federal court because of unexhausted state-court claims; (3) the appeal was a death case that required heightened scrutiny.

The Robbins opinion stressed that the situation was "one of a kind, not to be repeated." 353 Ark. at 564, 114 S.W.3d at 223. Wooten argues that the same three considerations enumerated in Robbins require a finding of "extraordinary circumstances" and a recall of the mandate in his case.

First, he argues that, like Robbins, he has "arguably meritorious" claims that have not been reviewed by this court, and he has cited this court to a decision, namely the Eighth Circuit opinion discussed above, that shows he has compelling claims for relief.

Second, he, like Robbins, was unable to obtain a review of his claims in federal court because his claims had not been addressed in state court. And third, his case, like Robbins, is a death-penalty case where heightened scrutiny is required.

We find that Wooten has misconstrued the meaning of the Robbins criteria for recalling the mandate. First, Wooten misunderstands the first factor, which is a case cited to this court that is "on all fours legally with the issue presented." Wooten cites the Eighth Circuit opinion as fulfilling this requirement, but Robbins was referring to a recent case handed down by this court, prior to the affirmance of Robbins's case, that is directly contrary to Robbins's death sentence.

See Robbins, 353 Ark. at 565, 114 S.W.3d at 223. Even the Eighth Circuit opinion explained that, in Robbins, this court "determined that it had the inherent authority and jurisdiction to recall its own mandate in a death-penalty case where a defendant alleged an error that was identical to an error in another capital case for which the same court had recently granted \ (relief. " *Wooten v. Norris*, 578 F.3d at 783 (emphasis added).

Wooten has also misconstrued the second criteria in Robbins, which is that federal proceedings have been dismissed because of unexhausted state claims. Robbins's habeas corpus petition was dismissed by the federal district court without prejudice on the basis that Robbins had not exhausted his state remedies, specifically noting that state courts had not examined his

inconsistency-in-the-verdicts argument under Willett.¹ In the present case, however, the federal district court denied Wooten's request to hold federal proceedings in abeyance, and the Eighth Circuit affirmed both that decision and the denial of Wooten's petition for writ of habeas corpus.

So Wooten has clearly failed to meet the second criteria in Robbins. Indeed, the only criteria that Wooten has successfully met under Robbins is that his case is a death-penalty case that requires heightened scrutiny.

In Lee, the defendant was convicted of capital murder and sentenced to death. His conviction and sentence were affirmed by this court, and we also affirmed the circuit court's later denial of Lee's petition for postconviction relief under Rule 37. Lee then filed for habeas corpus relief in federal court, and the federal district court determined that it was necessary to hold the petition in abeyance to allow Lee to seek additional recourse in state court.

This decision was based on the district court's concern over possible impairment of Lee's counsel during the Rule 37 proceedings. Lee then petitioned this court to recall the mandate and | 7reopen post-conviction proceedings, arguing that his Rule 37 counsel was impaired by alcohol use during the time he represented Lee in postconviction proceedings, a fact admitted to by counsel.

In discussing the criteria necessary to establish the extraordinary circumstances that would warrant a recall of the mandate, the Lee opinion enumerated the Robbins factors as follows: (1) the presence of a defect in the appellate process; (2) a dismissal of proceedings in federal court because of unexhausted state court claims; (3) the appeal was a death case that required heightened scrutiny.

See Lee, 367 Ark. at 88, 238 S.W.3d at 55.² This court held that in Lee's case, there was a defect in the appellate process: "Certainly, the intoxication and subsequent impairment of Lee's appointed counsel during the Rule 37 proceedings constitute a defect because of the exacting requirements of Rule 37.5 regarding the appointment of qualified counsel in postconviction proceedings for a person under a sentence of death." *Id.*, 238 S.W.3d at 55.

This court determined that the second factor was also met, as the decision to hold Lee's federal petition in abeyance, instead of dismissing the petition, was based on a procedural issue that would have resulted in Lee being barred from returning to federal court to refile his petition because of the one-year statute of limitations imposed on habeas petitioners.

Thus, we granted Lee's motion to recall the mandate and remanded the case to the circuit court. In the present case, Wooten asserts that he suffered the same type of "counsel-related 'defect'" in his Rule 37 proceedings. He argues that he was denied the assistance of qualified counsel because his attorney, James Clawson, was, *inter alia*, ineligible to practice law, had perpetrated fraud upon both Wooten and the courts, and was "embroiled in his own legal troubles." He also argues that he meets the second and third criteria as explained in his discussion of Robbins, *supra*.

Wooten claims that his Rule 37 counsel was, at the time of his representation of Wooten in this case, ineligible to practice law. This is apparently because Clawson was disbarred in Oklahoma in 1993, and Wooten believes that disbarment resulted in an automatic disbarment in Arkansas, too.

However, under the rules of professional conduct in effect at the time, that disbarment would be reciprocal and result in his disbarment in Arkansas only upon the filing of the disbarment order with the Committee on Professional Conduct. Section 7(F) of the Procedures Regulating Professional Conduct of Attorneys at Law (1993) provides: (1) The disbarment or suspension of any person from the practice of law in any other state shall operate as a disbarment or suspension of such person from the practice of law in this State under any license issued to such person by the Arkansas Supreme Court prior to his disbarment in such other state.

(2) Upon presentation of a certified order or other proper document of a tribunal or a corresponding disciplinary authority of another jurisdiction evidencing disbarment or suspension, the Committee shall cause a like sanction to be imposed and shall notify the Clerk of such action. Notice of the Committee's action shall be sent to the attorney's mailing address on record with the Clerk.

See also Rules of Professional Conduct, Rule 16 (1993). However, until the time that ^documentation was filed with the Committee and an order was entered, Clawson was still eligible to practice law in Arkansas. This court was not notified of Clawson's Oklahoma disbarment until 2001, at which time he surrendered his Arkansas license in lieu of being disbarred.

So Wooten is mistaken that Clawson was ineligible to practice law at the time of his representation. Additionally, it appears that there was no requirement to report disbarment in another jurisdiction until the most recent amendment to our rules on January 14, 2010. See Procedures Regulating Professional Conduct, Section 14(a) (2010). And finally, as to the second and third criteria under Robbins and repeated in Lee, Wooten has again failed to meet the second criteria.

Finally, in Collins, the defendant was convicted of capital murder and sentenced to death on October 21, 1997. His conviction and sentence were then affirmed by this court on June 3, 1999. Pursuant to Rule 37.5(b)(1), counsel was then appointed to pursue Rule 37 relief, but there was nothing in the record to show that the appointed attorneys were qualified under Rule 37.5.

Furthermore, the Rule 37 petition filed with the circuit court on October 12, 1999, was not verified by Collins. Two additional Rule 37 petitions were filed on October 13, 1999, and October 14, 1999, again without verification from Collins.

The State filed a response, but no action was ever taken on the petitions. In fact, no action was taken in the case until January 31, 2003, when a new attorney was appointed to represent Collins.

Collins also filed several pro se petitions in 2003. A hearing was eventually held on May 20, 2004, at which the parties referred to a petition under Rule 37.5, but no corresponding petition was in the record.

The order ultimately denying the Rule 37 petition was presumably based on the hearing, the judge's notes, and a memorandum prepared by Collins's counsel summarizing the May 20, 2004 hearing. This court specifically noted that none of the petitions filed since 1999 had complied with Rule 37.5.

In this court's analysis, we explained that Rule 37.5 provides specific procedures setting out how postconviction relief is to be pursued, including deadlines that must be met, and in this case, there was clearly "a breakdown in the postconviction relief proceedings." 365 Ark. at 415, 231 S.W.3d at 720.

We also noted that, while we have affirmed denial of postconviction relief even if the petition was not verified in cases where the defendant did not receive a sentence of death, a death-penalty case was one which demanded unique attention to procedural safeguards.

We therefore remanded the case to circuit court for the appointment of Rule 37.5 qualified counsel and to allow Collins to file a verified petition for postconviction relief that complied with Rule 37.5. Wooten asserts that there was a similar "breakdown" in his postconviction proceedings because the Rule 37 petition filed by Clawson was never verified or otherwise authorized by Wooten.

Therefore, Wooten argues, he should be allowed to proceed with renewed postconviction proceedings that will allow his "compelling claims of constitutional error" to be addressed by the Arkansas courts. Arkansas Rule of Criminal Procedure 37.1(c) requires that a petition seeking relief pursuant to the rule be verified.³ The verification requirement for a postconviction-relief petition is of substantive importance to prevent perjury.

Carey v. State, 268 Ark. 332, 596 S.W.2d 688 (1980). To serve this purpose, a petitioner must execute the verification, and if the petitioner is represented by counsel, counsel may not sign and verify the petition for him. Boyle v. State, 362 Ark. 248, 208 S.W.3d 134 (2005) (per curiam). A trial court cannot consider the issues in a petition which does not comply with the verification requirement of the rule.

See Shaw v. State, 363 Ark. 156, 211 S.W.3d 506 (2005) (per curiam). As noted above, this court will routinely affirm the denial of postconviction relief if the petition is not verified; however, death-penalty cases are afforded unique procedural safeguards.

In addition to this court's ruling in Collins, we have also remanded a Rule 37 appeal for verification when a petition for postconviction relief in a death-penalty case was not properly

verified, rather than dismissing the petition. *Howard v. State*, 366 Ark. 453, 236 S.W.3d 508 (2006).⁴ We find that, in the present case, the lack of verification constitutes a defect or breakdown in the appellate process that requires a recall of the mandate.

While there is no constitutional right to a postconviction proceeding, when a state undertakes to provide collateral relief, due process requires that the proceeding be fundamentally fair. *Porter v. State*, 339 Ark. 15, 2 S.W.3d 73 (1999). And while this court has held Rule 37.5 does not govern Wooten's postconviction review, we have also held that the "intent and purpose" behind the rule should apply.

Wooten II, 338 Ark. at 696, 1 S.W.3d at 11. *Porter*, *supra*, is instructive in this regard: In light of the fact that this is a case involving the death penalty and the fact that Rule 37.5 has in effect cured the instant situation from recurring, coupled with the ambiguous circumstances surrounding appellant's legal representation, and the requirements of due process, we hereby hold that fundamental fairness, in this narrowest of instances where the death penalty is involved, dictates an exception in the present matter to allow appellant to proceed with his Rule 37 petition.

339 Ark. at 19, 2 S.W.3d at 76. While *Porter* involved an appeal from the denial of postconviction relief on procedural grounds, and not a recall of the mandate, the same reasoning applies to the present case. The fact remains that there has yet to be filed a Rule 37 petition for postconviction relief in the circuit court that has been verified by Wooten, which is in direct contravention to the dictates of Rule 37.

Therefore, we grant the motion to recall the mandate. Motion granted. BROWN, J., concurs. HANNAH, C.J., and WILLS, J., dissent.. As explained in the discussion of *Lee v. State*, *infra*, this requirement from *Robbins* was later expanded to include situations where federal proceedings are held in abeyance so a petitioner may pursue any unexhausted state claims..

The changed wording in the first requirement appears to come from this court's decision in *Engram v. State*, 360 Ark. 140, 200 S.W.3d 367 (2004), in which this court clarified that the purpose of recalling the mandate and reopening the case in *Robbins* was to correct an error in the appellate process, specifically an error that was made during this court's review, and the recall of the mandate was intended to give this court an opportunity to address an issue that it should have addressed before..

This verification requirement was a part of the rule at the time Wooten's Rule 37 proceedings took place. See Ark. R.Crim. P. 37.1(d) (1997).. *Howard* also involved an appeal from the denial of postconviction relief, not a recall of the mandate.