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IN THE COURT OF SPECIAL APPEALS OF MARYLAND

ADNAN SYED,	*	
Appellant,	*	
v.	*	Application for Leave to Appeal (Post-Conviction)
STATE OF MARYLAND,	*	No. 2519 September Term, 2013
Appellee.	*	

* * * * * * * * * * * *

RESPONSE TO THE STATE'S MOTION TO STRIKE APPELLANT'S SUPPLEMENT TO APPLICATION FOR LEAVE TO APPEAL THE DENIAL OF POST-CONVICTION RELIEF AND REQUEST FOR REMAND

Appellant, Adnan Syed, by and through his attorney, C. Justin Brown, and pursuant to Maryland Rule 8-431(b), hereby submits his Response to the State's Motion to Strike Appellant's Supplement to his Application for Leave to Appeal the Denial of Post-Conviction Relief and Request for Remand and respectfully requests that this Honorable Court deny the State's Motion. In support, Appellant states the following:

I. PROCEDURAL HISTORY

On January 27, 2014, Appellant filed a timely Application for Leave to Appeal the Denial of Post-Conviction Relief (the "ALA"), in which he argued that the post-conviction court erred when it rejected his claims that his trial counsel was ineffective for (1) failing to investigate an alibi witness, Asia McClain, and (2) failing to seek a plea offer.

On September 10, 2014, this Court entered an Order directing the State to file a response relating to the second issue. The State filed its Response on January 14, 2015.

On January 20, 2015, Appellant filed a Supplement to his ALA (the "Supplement") in which he requested that this Court remand his case to the Circuit Court in light of material

evidence that has emerged since the closure of his Post-Conviction proceedings and since submission of the ALA because "justice will be served by permitting further proceedings." Md. Rule 8-604(d). He also requested that, in the alternative, this Court consider both issues raised in his ALA because the issues are meritorious and inextricably intertwined.

On January 27, 2015, the State filed a Motion to Strike the Supplement. In its Motion, the State argued that the Supplement should be stricken because it was (1) filed outside the 30-day time period for filing an ALA; (2) not explicitly authorized by a statute or rule; (3) not authorized by an order of this Court; and (4) not accompanied by a request for an order from this Court allowing its submission. (Mot. to Strike at 2). The State further contended that the Supplement "relies substantially on evidence that Appellant acknowledges existed since 1999, but was not presented at the proceedings below or in his application for leave to appeal." (Mot. to Strike at 2). Finally, the State argued that Appellant purposefully delayed filing the Supplement until after the State filed its Response to the ALA. (Mot. to Strike at 2). For the reasons discussed below, the Court should deny the State's Motion.

II. ARGUMENT

a. This Court's Consideration of the Supplement Is in the Interests of Justice.

In the Supplement, Appellant made a detailed argument why this Court's consideration of the Supplement is in the interests of justice.[1] Appellant filed the Supplement in order to request that this Court remand his case to the Circuit Court in light of material evidence that has emerged since the closure of the post-conviction proceedings. In the alternative, he urges this Court to consider both issues raised in the ALA because they are inextricably intertwined and meritorious.

[1] Appellant incorporates the Supplement herein by reference.

Specifically, in the Supplement, Appellant requested that this Court remand the case so that the Circuit Court can consider the testimony of alibi witness Asia McClain, the witness who was most central to his post-conviction proceeding, but who did not testify at that hearing. Since the filing of the ALA, in January 2015, undersigned counsel obtained an Affidavit from McClain, which was submitted to this Court with the Supplement. (Supp. to ALA Ex. 7 (McClain Affidavit)). In the Affidavit, McClain explains that she had a conversation with a State prosecutor who was handling the post-conviction hearing, in which he discussed the evidence against Appellant in a manner that seemed designed to get McClain to think Appellant was guilty and that she should not participate in the post-conviction proceedings. His comments led her to decide not to testify on Appellant's behalf. (Supp. to ALA Ex. 7 at ¶ 28). Further, she contends that the same prosecutor misrepresented her statements during that conversation at the post-conviction hearing, and this prompted her to come forward with the truth about what happened. (Supp. to ALA Ex. 7 at ¶ 29, 32).

Appellant filed the Supplement with this Court because this Court currently has jurisdiction of the case and, therefore, has the power to remand the case. *See* Md. Rule 8-204(f)(4). Remand is proper here because it is in the interests of justice. McClain's contentions in her Affidavit are serious, and the Circuit Court should be able to consider them. If it is true that the prosecutor discouraged McClain from testifying, then this would amount to a violation of Syed's due process rights because he was arguably prevented from calling his witness at the post-conviction hearing. *See Campbell v. State*, 37 Md. App. 89 (1977) (ordering new trial on due process grounds when prosecutor discouraged the testimony of a potential defense witness and caused that witness not to testify). This allegation, as well as the alleged misrepresentation by the prosecutor, are both the type of conduct that invokes the "interests of justice" standard.

See id.; *see also Curry v. State*, 54 Md. App. 250 (1983) (remanding for new trial when, among other reasons, the prosecutor made a misrepresentation to the jury about the backgrounds of State witnesses).

Further, if this Court agrees that it is in the interests of justice that McClain be permitted to testify at the post-conviction hearing, then remand would be the most efficient way to achieve that result. Remand makes sense here due to Appellant's procedural posture under the Uniform Post-Conviction Procedure Act. The Act allows him to file a post-conviction petition and then, if that is denied, he may request that the proceeding be re-opened. The re-opening of the post-conviction proceeding is permitted when "the court determined that the action is in the interests of justice." Md. Code Ann., Crim. Pro., § 7-104. This process would be made more efficient by resolving the issue of McClain's testimony now, rather than later.

b. The State's Arguments to Strike the Supplement Are Not Meritorious.

As explained above, the State presented six reasons why Court should strike the Supplement. Each reason is without merit.

First, while the Supplement was filed outside of the time period the filing of the ALA, the ALA was timely filed, and the Supplement addresses the same legal issues that were raised in the ALA. Appellant does not contest that filing a supplement to introduce new legal issues that could have been raised, but were not raised, would be improper. However, here, the new evidence and the arguments raised in the Supplement are based on the exact same two legal issues that Appellant previously raised in the timely ALA. Therefore, the purpose of the filing deadline for applications for leave to appeal would not be frustrated by this Court's consideration of the Supplement.

Second, while Appellant is not aware of any rule or statute that expressly permits the filing of supplements to applications for leave to appeal, there is also no statute or rule that expressly prohibits such filings. Appellant is similarly unaware of any case in which this Court has stricken a supplement to an application for leave to appeal for the reasons given by the State, and the State does not cite to any such cases in its Motion. In contrast, this Court has allowed the filing of a supplement in the context of an application for leave to appeal the denial of post-conviction relief. *See Unger v. State*, 427 Md. 383, 397, 407–11 (2012) (referring to and considering the defendant's supplement to his opposition to the State's application for leave to appeal and conditional cross-application for leave to appeal that was belatedly filed in the Court of Special Appeals).

To the extent that the filing of a motion for leave to file the Supplement or an order from this Court expressly permitting its consideration of the Supplement is necessary, Appellant has submitted both with this Response. *See* attached Motion and Proposed Order. This Court has previously granted a motion for leave to file a supplement to an application for leave to appeal filed by undersigned counsel in another case. *See* Order granting Motion for Leave to File an Application for Leave to Appeal in *Bashawn Montgomery v. State*, No. 2227, Sept. Term 2013 (currently pending before this Court).

Finally, contrary to the State's assertions in its Motion, the evidence presented in the Supplement has not existed since 1999, and Appellant did not purposefully delay filing the Supplement until after the State submitted its Response. Appellant's counsel did not receive McClain's Affidavit, on which the arguments in the Supplement are substantially based, until January 13, 2015—only one day before the State filed its Response. (Supp. to ALA Ex. 7 at 3).

After receiving McClain's Affidavit, appellant counsel filed the Supplement as promptly as possible—within one week of receiving McClain's Affidavit. (Supp. to ALA Ex. 7 at 3).

While the State may wish that this Court strike the materials presented in the Supplement on technical grounds, any such concerns are greatly outweighed by the interests of justice and the meritorious nature of the arguments.

III. CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Honorable Court deny the State's Motion to Strike Appellant's Supplement to his Application for Leave to Appeal the Denial of Post-Conviction Relief and Request for Remand.

Respectfully Submitted

/ S /

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of February, a copy of the foregoing was provided to the following:

Edward Kelley
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Criminal Appeals Division
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Baltimore, MD 21202

/ S /

C. Justin Brown