

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
HONORABLE Edward W. Miller

Indictment No. 2007-GS-23-592

FILED IN CIRCUIT COURT
PAUL E. STEINBERG
CLERK OF COURT
GREENVILLE, SC

2013 MAY 24 PM 3:04

STATE OF SOUTH CAROLINA,

RESPONDENT,

vs.

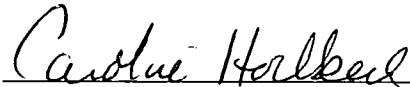
ELLIOT J. BROWN

APPELLANT.

NOTICE OF APPEAL

Appellant ELLIOT J. BROWN, appeals from the Order and Sentence of the Honorable Edward W. Miller, Circuit Court Judge, dated January 9, 2008.

Respectfully submitted,



Caroline M. Horlbeck, Esq.
Greenville County Courthouse
Greenville, SC 29601
Attorney for Appellant

Date: May 24, 2013

Other Counsel of Record: Howard Steinberg, Assistant Thirteenth Circuit Solicitor
305 Ea. North Street, Suite 325, Greenville SC 29601

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MAY 28 2013

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
THE HONORABLE Edward W. Miller

C.A. No. 2007-GS-23-592

STATE OF SOUTH CAROLINA

RESPONDENT,

vs.

ELLIOTT J. BROWN

RESPONDENT.

PROOF OF DELIVERY

I certify that I have served the Notice of Appeal on Howard Steinbert, the SC Office of Appellate Defense and the SC Attorney General's office by depositing a copy thereof in the United States Mail, postage prepaid, on August 18, 2009, addressed as follows:

Howard Steinberg, Esq.
305 Ea. North Street
Suite 325
Greenville, SC 29602

S.C. Office of Appellate Defense
P.O. Box 11433
Columbia, SC 29211

Karen Ratigan, Esq., Attorney General
P.O. Box 11549
Columbia, SC 29211

May 23, 2013

Caroline M. Horlbeck
Caroline M. Horlbeck
101 Whitsett St.
Greenville, SC 29601
(864)-315-9919

RECEIVED

MAY 28 2013

SC COURT OF APPEALS

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
Elliott Brown,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
C.A. No. 2011-CP-23-4514

**ORDER GRANTING RESPONDENT'S
PARTIAL MOTION TO DISMISS AND
APPLICANT'S REQUEST FOR
WHITE V. STATE BELATED APPEAL**

2013 MAY -3 PM 4:41
CLERK OF COURT
GREENVILLE
SOUTH CAROLINA

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed July 8, 2011. The Respondent made its return and partial motion to dismiss on December 30, 2011. A hearing into the matter was convened on April 18, 2013 at the Greenville County Courthouse. The Applicant participated through teleconference and was represented at the hearing by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

PROCEDURAL HISTORY

The Applicant is confined in Federal Correctional Institution Allenwood Medium facility in White Deer, Pennsylvania. The Applicant was indicted at the February 2007 term of the Greenville County Grand Jury for trafficking marijuana (2007-GS-23-0592). He was represented by Monte Desai, Esquire.

On January 9, 2008, the Applicant pled guilty to possession with intent to distribute marijuana, second offense. He was sentenced by the Honorable Edward W. Miller to eighteen (18) months of home incarceration. The Applicant did not appeal.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel:
 - a. Misadvised about the elements of the offense.
 - b. Failed to object to the factual basis for the guilty plea.
 - c. Failed to file an appeal.
2. Involuntary guilty plea.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Partial Motion to Dismiss

This Court finds the Respondent's partial motion to dismiss issues related to the Applicant's guilty plea must be granted due to failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §§ 17-27-10, et. seq. (2003). South Carolina Code Ann. § 17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The Applicant pled guilty to the offense he challenges in this Application on January 9, 2008. The Applicant was therefore required to file his application before January 9, 2009. This Application was filed on July 8, 2011, which was approximately two (2) years and six (6) months after the statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. See McDonnell v. Consolidated Sch. Dist. of Aiken, 315 S.C. 487, 489, 445 S.E.2d 638, 639 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (2003) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from

2


the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Therefore, all issues related to the Applicant’s January 9, 2008 guilty plea hearing – except for the issue of a belated appeal – must be dismissed.

Belated Appeal

This Court finds the Applicant’s allegation that he was denied a direct appeal is meritorious. Trial counsel must ensure that a criminal defendant is made fully aware of his appeal rights. White v. State, 263 S.C. 110, 118, 208 S.E.2d 35, 39 (1974). In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure required by Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). Id. Where the post-conviction relief judge determines that the applicant did not freely and voluntarily waive their appellate rights, the applicant may petition the South Carolina Supreme Court for review of direct appeal issues pursuant to White v. State. See Rule 243(i)(1), SCACR; Davis v. State, 288 S.C. 290, 291, n.1, 342 S.E.2d 60, 60, n.1 (1986) (“Even where the post-conviction relief judge makes this finding, he may not grant relief on this basis. Instead, the applicant must petition this Court for a White v. State review.”).

Counsel for Respondent stated she had spoken to plea counsel in this case, who admitted he failed to properly file an appeal. As such, the Respondent agreed the Applicant was entitled to a belated appeal from his guilty plea hearing. The Court affirmatively finds the Applicant did not knowingly and voluntarily waive his right to a direct appeal. The Court concludes the Applicant is entitled to a belated review of his conviction. The Applicant’s lack of a direct appeal can be remedied by a petition for belated review pursuant to White v. State.

All Other Allegations

As to any and all allegations that were raised in the application and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

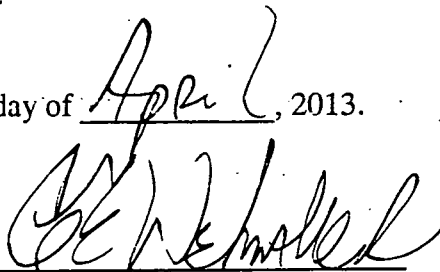
CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant is entitled to a belated direct appeal of his criminal conviction pursuant to White v. State.

IT IS THEREFORE ORDERED:

1. That the Respondent's partial motion to dismiss is granted;
2. That the Applicant's request for a belated appeal is granted; and
3. Within thirty (30) days of service of this Order, counsel for the Applicant must file a Notice of Appeal to secure the appropriate review of the Applicant's convictions. Counsel and the Applicant are directed to Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986) and Rule 243(i), SCACR for the appropriate procedure for securing belated appellate review.

AND IT IS SO ORDERED this 24 day of April, 2013.



G. Edward Welmaker
Resident Judge
Thirteenth Judicial Circuit



South Carolina

CAROLINE M. HORLBECK

ATTORNEY AT LAW

101 WHITSETT ST.
GREENVILLE, SOUTH CAROLINA 29601
horlbecklawfirm@gmail.com

(864) 315-9919
Fax(864) 232-4756

May 24, 2013

Via Regular Mail

The Honorable Jenny Abbott Kitchings
S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: State vs. ELLIOT J. BROWN


Dear Ms. Kitchings:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondents. The Notice has been filed with the Greenville County Clerk of Court.

These matters are being referred to the Office of Appellate Defense in that we were participating as Court appointed counsel at trial.

Thank you for your attention to this matter.

Yours very truly,


Caroline M. Horlbeck, Esq.

Enclosure

cc: Thirteenth Circuit Solicitor's Office
Office of the Attorney General
Office of Appellate Defense

RECEIVED

MAY 28 2013

SC Court of Appeals

NOTICE TO APPELLATE DEFENSE

To: Division of Appellate Defense/ Office of Attorney General

From: L. Bellamy

Date: May 28, 2013

Re: Notice of Filing of Notice of Appeal

Case Name: The State v. Elliot J. Brown

Case Number: 2007-GS-23-592

County: Greenville

Date of Filing: May 28, 2013

Filed by: Caroline M. Horlbeck, Esquire

Judge: The Honorable Edward W. Miller

Hearing Date: January 9, 2008

Guilty plea: No