

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FIFTH JUDICIAL CIRCUIT

Octavius Livingston,) Civil Action No. 2011 CP 40 4375
)
Plaintiff,)
)
vs.) Notice of Appeal
)
State of South Carolina,)
)
Defendant.)
)

RECEIVED
JUN 03 2013
SC Court of Appeals

Pursuant to Rule 203, SCACR, Plaintiff Octavius Livingston appeals from the order and judgment of the Honorable R. Knox McMahon Court filed May 7, 2013, in the Richland County Court of Common Pleas dismissing his post-conviction relief petition. A copy of the order and judgment is attached.

NELSON MULLINS RILEY & SCARBOROUGH LLP

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JUN 06 2013

S.C. Supreme Court

By: William C. Wood, Jr.
William C. Wood, Jr.
SC Bar No. 015111
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Attorneys for Octavius Livingston

Columbia, South Carolina

5/31, 2013

Other Counsel of Record: Robert Corney
Office of the S.C. Attorney General
P.O. Box 11549
Columbia, SC 29211
Attorney for the State of South Carolina

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Octavius Livingston, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: Notice of Appeal

Counsel Served:

Robert Corney
Office of the S.C. Attorney General
P.O. Box 11549
Columbia, SC 29211

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JUN 06 2013

S.C. Supreme Court



Jennifer Lee
Administrative Assistant

May 31, 2013

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP
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JUN 03 2013

SC Court of Appeals

May 31, 2013

The Honorable Jeanette W. McBride
Clerk of Court
Richland County Judicial Center
Post Office Box 2766
Columbia, SC 29202-2766

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1015 Sumter Street - 5th Floor
Columbia, SC 29201

RE: Octavius Livingston #330587
Case No.: 2011-CP-40-04375
Our file no.: 32668/01634

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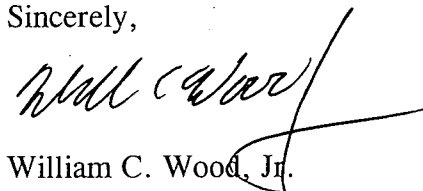
JUN 06 2013

Dear Ms. McBride & Ms. Kitchings:

S.C. Supreme Court

Enclosed please find two copies of a Notice of Appeal in the above-referenced matter. Please file one and return a clocked-in copy to me via our courier. Should you have any questions, please do not hesitate to contact me.

Sincerely,



William C. Wood, Jr.

WCWJR:jlee
Enclosures

cc: Robert Corney, Esq.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2011CP4004375

Octavius #330587 Livingston

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 14th day of May, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Octavius #330587 Livingston William C. Wood, Jr.
ATTORNEY(S) FOR THE PLAINTIFF(S)

Megan E. Harrigan
ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

RICHMOND COUNTY
 FILED
 2013 MAY -7 PM 12:25
 JEANETTE W. MCBRIDE
 CLERK OF COURT
 RECEIVED
 JUN 03 2013
 SC Court of Appeals

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Octavius Livingston)

Plaintiff)

v.)

State Of South Carolina)

Defendant.)

IN THE COURT OF COMMON PLEAS

CASE NO.
2011-CP-400-4375

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

FILED
RICHLAND COUNTY
2013 MAY -7 PM 12:25
JEANETTE W. McBRIDE
C.L.P. & G.S.

Plaintiff's Attorney: William C. Wood, Bar No. Address: Post Office Box 11070 Columbia, South Carolina 29211 phone: fax: e-mail: other:	Defendant's Attorney: Megan E. Harrigan, Bar No. Address: Post Office Box 11549 Columbia, South Carolina 29211 phone: 803-734-3737 fax: 803-734-4113 e-mail: mharrigan@scag.gov other:
---	--

MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
 FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
 PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

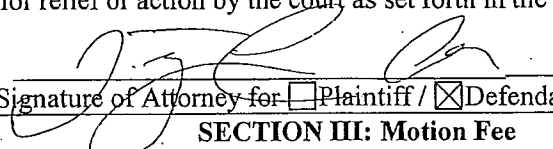
Nature of Motion: _____

Estimated Time Needed: _____ Court Reporter Needed: YES / NO

SECTION II: Motion/Order Type

Written motion attached
 Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


 Signature of Attorney for Plaintiff / Defendant

April 29, 2013
 Date submitted

SECTION III: Motion Fee

PAID - AMOUNT:
 EXEMPT: Rule to Show Cause in Child or Spousal Support
 (check reason) Domestic Abuse or Abuse and Neglect
 Indigent Status State Agency v. Indigent Party
 Sexually Violent Predator Act Post-Conviction Relief
 Motion for Stay in Bankruptcy
 Motion for Publication Motion for Execution (Rule 69, SCRPC)
 Proposed order submitted at request of the court; or,
 reduced to writing from motion made in open court per judge's instructions
 Name of Court Reporter: _____
 Other: _____

JUDGE'S SECTION

Motion Fee to be paid upon filing of the attached order.
 Other: _____

JUDGE: _____
 CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed: _____

Collected by: _____

MOTION FEE COLLECTED: _____
 CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL CIRCUIT

Octavius Livingston,) Civil Action No. 2011 CP 40 4375
)

Applicant,)
)

vs.)

State of South Carolina,)
)

Defendant.)
)

Order of Dismissal

JEANETTE W. McBRIDE
 S.C.P. & G.S.

2013 MAY - 7 PM 12:25

RICHLAND COUNTY
 FILED

This post-conviction relief matter was heard on August 17, 2012. Applicant was represented by appointed counsel William C. Wood, Jr., of Nelson Mullins Riley & Scarborough, LLP. The State was represented by attorney Robert Corney of the Attorney General's office. At the hearing, Applicant withdrew claims of ineffective assistance of trial and appellate counsel based on their failure to effectively object or argue against the admission of certain hearsay evidence at trial on Confrontation Clause ground. Instead, Applicant chose to pursue only the ground for relief asserted through counsel in his amended application for relief.

Applicant requests that the Court vacate his sentence (not his conviction) and return the case to the General Sessions Court for resentencing based upon a change in the law under 2010 S.C. Acts 273 which amended S.C. Code Ann. § 44-53-370 to lower the mandatory minimum sentence from 15 to 10 years and provided eligibility for various ameliorative sentencing options such as a suspended sentence, probation, and parole not previously available to Applicant at the time of his original sentencing.

SCANNED

At the hearing, the Court had before it a copy of the transcript of the proceedings against Applicant, the records of the Richland County Clerk of Court, and Applicant's records from the South Carolina Department of Corrections.

PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was true bill indicted at the April 2008 term of the Richland County Grand Jury for Distribution of Cocaine – Third Offense (2008-GS-40-001666). Marcus Whitlark, Esquire, represented Applicant on the charge. On September 11, 2008, Applicant appeared before The Honorable James R. Barber, III, where he proceeded to jury trial and he was found guilty of the charge as indicted. Applicant was sentenced to fifteen (15) years imprisonment on the charge. The State *nolle prossed* one count of Trafficking Cocaine – Third Offense and one count of Distribution of Cocaine – Third Offense subsequent to the conviction.

A Notice of Appeal was filed and an Anders brief submitted on Applicant's behalf by Katherine Hudgins, Esquire, of the South Carolina Commission on Indigent Defense. By order dated January 25, 2011, the South Carolina Court of Appeals granted Ms. Hudgins motion to be relieved and dismissed the appeal. The Remittitur followed thereafter.

FINDINGS OF FACT

Applicant was arrested February 18, 2008, for Distribution of Cocaine (Warrant No. I- 891813). According to the Richland County Clerk's records, the charge was "received" and "filed" on February 26, 2008. On April 16, 2008, the Richland County

Grand Jury true bill indicted Applicant for Distribution of Cocaine – Third Offense or Above (2008-GS-40-1666). Applicant was called to stand trial on the charge on September 11, 2008, at which time he was found guilty by a jury and sentenced to fifteen (15) years imprisonment, the mandatory minimum at the time under S.C. Code § 44-53-370(b)(1) (2003) (“A person who [distributes] a controlled substance classified in Schedule II...is guilty of a felony and, upon conviction, for a...third or subsequent offense....must be imprisoned not less than fifteen years nor more than thirty years...”). A Notice of Appeal was filed on September 22, 2008, and a final Anders brief was submitted to the South Carolina Court of Appeals on December 22, 2009.

On February 9, 2010, during the pendency of Applicant’s appeal, the South Carolina Senate read for the first time Senate Bill No. 1154, introduced as the “Omnibus Crime Reduction and Sentencing Reform Act”. On June 2, 2010, Act 273 cited as the “Omnibus Crime Reduction and Sentencing Reform Act of 2010” was signed into effect by the Governor. Roughly seven and a half months later, Applicant’s appeal was dismissed by the South Carolina Court of Appeals by order dated January 25, 2011.

ISSUE

Applicant contends that because his case was pending on direct appeal at the time the Act was signed into effect by the Governor, he should be afforded the benefit of the changes made thereto. Specifically, under Section 37 of the Act, S.C. Code § 44-53-370(b)(1) was amended to require a person convicted of distribution of a Schedule II drug as a third offense “be imprisoned not less than ten years nor more than thirty years”. It is this change in the mandatory minimum sentence *from* fifteen (15) *to* ten (10) years which Applicant seeks to take advantage of through this PCR action.

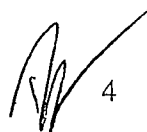


LEGAL ANALYSIS

Generally, “[i]n the absence of a controlling statute, the common law requires that a convicted criminal receive the punishment in effect at the time he is sentenced” *State v. Varner*, 310 S.C. 264, 265, 423 S.E.2d 133, 133 (1992). Prospective application of amending statutes passed after sentencing is ordinarily presumed. *Id.* at 266, 423, S.E.2d at 134. However, a person may be entitled to the benefit of mitigated punishment enacted by the legislative amendment while a conviction is on appeal if the statute so provides *only* when the amendment becomes effective *before* sentence is pronounced.” *Id.* “In *Varner*, the Court stated that ‘[i]n the absence of a controlling statute, the common law requires that a convicted criminal receive the punishment in effect at the time he is sentenced, unless it is greater than the punishment provided for when the offense was committed.’ ” *State v. Gay*, 343 S.C. 543, 553, 541 S.E.2d 541, 546 (2001) (citing *Varner* at 265, 423 S.E.2d at 133).

The South Carolina Supreme Court's recent decision in *State v. Dawson*, 27238, 2013 WL 1319782 (S.C. Apr. 3, 2013) further clarifies the law on this issue. In *Dawson*, the Court determined that the Defendant was not entitled to be sentenced under the Omnibus Crime Reduction and Sentencing Reform Act of 2010, S.C. Acts NO. 273, which became effective after the Defendant committed the crime but **before** she was sentenced. The Act contained a savings clause identical to the savings clause at issue in the present case. The Court in *Dawson* held that

the Act unambiguously states its sentencing amendments do not apply to actions arising under the amended laws. Specifically, the Act's savings clause states the Act 'does not affect pending actions' founded on an amended or repealed law' or alter, discharge, release, or extinguish any penalty...incurred under the repealed



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or amended law, unless the repealed or amended provision shall so expressly provide.

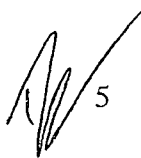
Id. The Court went on to hold that "because Appellant committed [the offense] in October 2009-prior to the Act's effective date-her criminal prosecution arose from, and her penalty was incurred under, the former version of [the section]." *Id.*

When applied to the present case, *Dawson* makes clear that Applicant was still subject to the penalties set forth in S.C. Code § 56-1-745(a). According to the record before this Court, the Applicant was arrested on February 18, 2008. The charge appears to have been filed on February 26, 2008. Applicant was sentenced by the trial judge on September 11, 2008, roughly twenty-one (21) months before the June 2, 2010, effective date of 2010 Act 273. Therefore, Applicant was correctly sentenced under the statutory scheme in effect at the time of his sentencing, which carried a mandatory minimum fifteen (15) year sentence for Distribution of Cocaine – Third Offense.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

Except as discussed above, this Court finds that the Applicant failed to raise all additional allegations raised in his application at the hearing and has, thereby, waived them. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an

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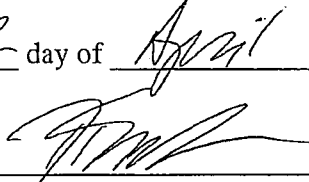
intentional relinquishment of a right is reasonably inferable." *Lyles v. BMI, Inc.*, 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987).

The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

This Court notes Applicant must file and serve a notice of appeal within thirty (30) days from the receipt by counsel 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 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRPC, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention 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 must be denied and dismissed with prejudice; and the Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 12 day of April, 2012.



R. Knox McMahon
Presiding Judge
Fifth Judicial Circuit
Columbia, South Carolina.

LAW OFFICES

NELSON MULLINS RILEY & SCARBOROUGH, L.L.P.

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Nelson Mullins

Nelson Mullins Riley & Scarborough LLP

Attorneys and Counselors at Law

Attention: William C. Wood, Jr.

Post Office Box 11070 / Columbia, SC 29211-1070

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1015 Sumter Street - 5th Floor
Columbia, SC 29201