

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF NEWBERRY)

DOCKET NO.: 2012-CP-36-511

MILO EARL TUDOR,)
)
 Petitioner,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

ORDER GRANTING BELATED
 DIRECT APPEAL PURSUANT TO
 WHITE V. STATE

FILED
 NEWBERRY COUNTY
 2013 MAY 24 AM 10 00
 JOCKIE S. BOWERS
 CLERK OF COURT

PROCEDURAL HISTORY

This matter comes before the Court by way of an Order for Hearing dated November 21, 2012 and a Petition for Writ of *habeas corpus*. Milo Earl Tudor, who is an inmate of the South Carolina Department of Corrections (SCDC), submitted a Petition for a Writ of *habeas corpus* to the Newberry County Clerk of Court. Because of conflicts held by the resident judges of the Eighth Judicial Circuit, the Chief Justice of the Supreme Court of South Carolina issued an order on June 25, 2012, designating the Honorable William P. Keesley to act as Chief Judge for Administrative Purposes related to this matter.

Mr. Tudor is being held for convictions under a three count Indictment, Number 1997-GS-36-00021. The charges are kidnapping, assault and battery with intent to kill (ABWIK), and possession of a knife during the commission of a violent crime. He had a jury trial and was sentenced by The Honorable James W Johnson, Jr. as follows: 30 years, suspended on the service of 15 years, with probation for 5 years on the kidnapping charge; 20 years on the ABWIK charge; and, 5 years on the weapon charge. The sentences run concurrently.

In *Gibson v. State*, 329 S.C. 37, 495 S.E.2d 426 (1998), the Supreme Court of South Carolina discussed the interaction between a Petition for Writ of *habeas corpus* and an application for post-conviction relief (PCR). The Supreme Court held that Gibson's *habeas corpus* petition did not constitute a valid *habeas corpus* petition, but should instead be treated as a PCR Application.

In the document which Mr. Tudor has captioned as a Petition for Writ of *Habeas Corpus*, he begins by stating, "Petitioner has been trying to show and establish in court the ineffectiveness of trial counsel, to perfect direct appeal or advise petitioner of appeal rights, and of post-conviction counsel, to adequately present or argue issues." He asserts due process violation and double jeopardy.

Mr. Tudor has repeatedly raised issues concerning the prosecution of his case and his appeal. He has asserted that he could not be prosecuted on the indictment mentioned above because of what he perceives to be problems with the issuance of two indictments and asserts jurisdictional issues related to the timing of the dismissal of one indictment. The arrest warrant (F-015292) was issued for the ABWIK charge that occurred on September 2, 1996.

An indictment bearing the number 1996-GS-36-00652 (F-015292) was prepared and submitted to the Grand Jury. A true-billed indictment was issued on October 28, 1996 for ABWIK. In 1997, a second indictment was prepared and submitted to the Grand Jury on multiple (three) counts, and it was true billed on January 6, 1997. This indictment included the charge originally set forth in 96-GS-36-00652.

The trial began on August 1997. It appears at trial there was a discussion by the Court of which indictment were being pursued. The State elected to proceed on indictment 97-GS-36-021 containing the multiple counts. The State decided to *nolle prosequi* the indictment 96-GS-36-

652 after the empanelling of the Jury and before a verdict was rendered. An appeal was filed, and the South Carolina Court of Appeals issued an Order of Dismissal on May 5, 1998. The Remittitur was issued on May 21, 1998. The dismissal was based on the failure to pursue the appeal. The issue presented before this Court was never reviewed by the Supreme Court.

Mr. Tudor then filed a federal petition for *habeas corpus*. The United States Magistrate recommended dismissal without prejudice for failure to exhaust all state remedies, and the United States District Judge adopted that report on August 1, 2002.

A PCR action was filed in State Court on August 21, 2002 (Case Number 2002-CP-36-00357). It alleged ineffective assistance of counsel and denial of Mr. Tudor's right to a direct appeal. That action was dismissed by The Honorable James E. Lockemy on June 28, 2004. Counsel for Mr. Tudor filed a petition for certiorari, which was denied by the South Carolina Supreme Court. The Remittitur was issued on September 14, 2005.

Another federal action followed. Mr. Tudor filed for *habeas corpus* in federal Court. The United States District Judge dismissed the Petition by Summary Judgment on January 30, 2007.

A PCR action was filed in State Court (Case Number 2010-CP-36-00154) on April 5, 2010, and amended on May 7, 2010. In that PCR application, Mr. Tudor raised ineffective assistance of counsel. He alleged that trial counsel failed to perfect his direct appeal, file a brief, or advise him of his appellate rights. Mr. Tudor also alleged denial of his right to direct appeal. He asserted that he did not knowingly and intelligently waive his right to appeal. He also alleged that the PCR judge (Judge Lockemy) erred in summarily dismissing his application, maintaining that his counsel did not properly raise his grounds for PCR and denied him a fair hearing. This second PCR claim was dismissed by The Honorable Eugene C. Griffith, Jr. in

2011 for being successive. Mr. Tudor sought to appeal. The case was dismissed and the Remittitur was filed February 24, 2012.

The current Petition for Writ of *Habeas Corpus* is dated April 26, 2012.

On October 31, 2012, the State moved to dismiss this action. Part of the assertion is that the requested relief is procedurally barred.

Mr. Tudor's Petition asserts ineffective assistance of counsel, which is the standard PCR allegation. He also argues due process and double jeopardy issues, and appears to raise jurisdiction.

An evidentiary hearing into the matter was held on March 12, 2013 at the Greenwood County Courthouse before me. The Petitioner was present at the hearing and was represented by Tommy A. Thomas, Esq. The Respondent was represented by J. Rutledge Johnson, Assistant Attorney General.

SUMMARY OF ARGUMENT AND EVIDENCE PRESENTED

Counsel for the Applicant argued that due to numerous errors that Mr. Tudor had been denied his right to Direct Appeal. That he was entitled to his one bite at the apple.

Counsel's argument in part is that the State's decision to *nolle prosequi* indictment 96-GS-36-652, after the jury was empanelled is equivalent to an acquittal. The State would then be barred from proceeding on indictment 97-GS-36-21, which alleged the exact same crime as Indictment 652. Mr. Tudor asserts that objection was made to the State's action by way of Motion, preserving this issue for Appeal.

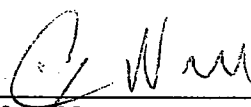
The State made argument that Mr. Tudor was procedurally barred from bringing up this issue at this late date. That his application was successive and barred.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds that the Petitioner is entitled to a review of his direct appeal issues pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). It appears to the Court that this issue was preserved by trial counsel and that Mr. Tudor is entitled to present this issue on appeal. Due to procedural issues, he has not been afforded his one bite at the apple on this matter. There also appears to be evidence that the direct appeal was dismissed for failure to pursue. There is no evidence presented that Mr. Tudor agreed to a dismissal of this appeal.

This Court advises that in order to secure belated review, the Applicant's counsel must file and serve a Notice of Appeal **within thirty (30) days** of the date of service of this Order. Applicant and counsel are directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed.

AND, IT IS SO ORDERED this 21st day of May, 2013



Clifton Newman
Presiding Judge
Eighth Judicial Circuit

Clayton, South Carolina

S E N T E N C E

97

-21

STATE OF SOUTH CAROLINA
Newberry COUNTY

Case # 97-36-000

PLED CONVICTED:
KIDNAPPING

The defendant MILo E. Tudor is committed to the State Department of Corrections for a term of 30 months years and/or pay a fine of \$ _____; provided upon the service of 15 months years and/or payment of \$ _____; plus pay/waive costs and assessments as applicable the balance suspended with probation for 5 months years.

Restitution For physical injury \$ _____
Yes/No Property damage \$ _____
to be paid _____

to clerk for _____
other conditions: 1) No contact, direct or indirect, with victim. 2) Consecutive

Date: August 7, 1997

[Signature]
Presiding Judge

Costs and Assessments:

B.A. Test \$ _____
Non-waivable \$ _____
Not waived \$ _____
Total \$ _____

Deputy/Clerk of Court

I, Jackie S. Eowers, Clerk of Court, Newberry County, South Carolina, do hereby certify that this is a true copy of the original on file in this office.
AUG 14 1997
Jackie S. Eowers
Clerk of Court

S E N T E N C E

STATE OF SOUTH CAROLINA

Newberry COUNTY

Case # 0197
EP -GS-36-21

PLED CONVICTED:

ASSAULT AND BATTERY
WITH INTENT TO KILL

The defendant MILLO E. TUDOR is committed to the

State Department of Corrections for a term of 20 months/years

and/or pay a fine of \$ _____; provided upon the service of

_____ months/years and/or payment of \$ _____; plus pay/waive costs

and assessments as applicable the balance suspended with probation for

_____ months/years.

Restitution

For physical injury \$ _____

Yes/No

Property damage \$ _____

to be paid _____

to clerk for _____

other conditions: Credit for time served since Feb. 16, 1987

Date: August 7, 1997.

[Signature]
Presiding Judge

Costs and Assessments:

B.A. Test \$ _____

Non-waivable \$ _____

Not waived \$ _____

Total \$ _____

Deputy/Clerk of Court

I, Jackie S. Bowers, Clerk of Court, Newberry County, South Carolina, do hereby certify that this is a true copy of the original on file in this office.
Jackie S. Bowers
Clerk of Court

AUG 14 1997

SENTENCE

STATE OF SOUTH CAROLINA

Newberry COUNTY

Case # 97 -GS-36-21

PLED/CONVICTED: USE OF KNIFE
IN COMM. OF A VIOLENT CR.

The defendant M. L. E. Tudor is committed to the State Department of Corrections for a term of 5 ~~months~~ years and/or pay a fine of \$ _____; provided upon the service of _____ months/years and/or payment of \$ _____; plus pay/waive costs and assessments as applicable the balance suspended with probation for _____ months/years.

Restitution For physical injury \$ _____
Yes/No Property damage \$ _____
to be paid _____

to clerk for _____
other conditions: Concurrent

Date: August 7, 1997

[Signature]
Presiding Judge

Costs and Assessments:

B.A. Test \$ _____
Non-waivable \$ _____
Not waived \$ _____
Total \$ _____

Deputy/Clerk of Court

I, Jackie S. Bowers, Clerk of Court, Newberry County, South Carolina, do hereby certify that this is a true copy of the original on file in this office.

AUG 14 1997

Jackie S. Bowers
Clerk of Court