

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
THE HONORABLE G. EDWARD WELMAKER

RECEIVED

CA No. 2011-CP-23-6247

JUL 08 2013

S.C. SUPREME COURT

JOHN A. YOUNG,

APPELLANT,

vs.

STATE OF SOUTH CAROLINA

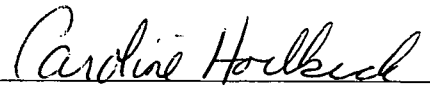
RESPONDENT.

FILED - CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2013 JUL -2 P 4:42

NOTICE OF APPEAL

Appellant JOHN A. YOUNG, appeals from the Order of the Honorable G. Edward Welmaker, Circuit Court Judge clocked June 7, 2013

Respectfully submitted,



Caroline M. Horlbeck, Esq.
101 Whitsett St
Greenville, SC 29601

Date: July 2, 2013

Other Counsel of Record: Karen Ratigan, Esq.
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE SUPREME COURT

John A. Young,)
)
)
Appellant,)

C.A. No. 2011-CP-23-6247

-vs-)

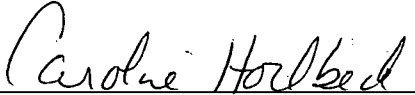
CERTIFICATE OF SERVICE

State of South Carolina,)
)
)
Respondent.)
_____)

This is to certify that I am an employee in the law office of Caroline M. Horlbeck, attorneys for Applicant, and that I have this day caused to be served upon the person(s) named below Applicant's Notice of Appeal by placing copies of same in the United States mail, with adequate postage thereon, addressed as follows:

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

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


Caroline M. Horlbeck

Greenville, South Carolina

July 3, 2013

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 John Abraham Young,)
 S.C.D.C. No. 234948,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2011-CP-23-6247

ORDER OF DISMISSAL

2013 JUN - 7 P 4: 09
 FILED CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL B. WICKLISHNER

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed September 20, 2011. The Respondent made a return and motion to dismiss on March 13, 2012 and an amended return and partial motion to dismiss on June 12, 2012. An evidentiary hearing was convened on April 16, 2013 at the Greenville County Courthouse. The Applicant was present and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant's plea counsel, Brian P. Johnson, Esquire testified at the PCR hearing. The Court had before it the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, and the return.¹

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant waived

¹ At the end of the PCR hearing, this Court held the record open for the parties to attempt to obtain the guilty plea transcript. Counsel for the Respondent has advised the Court that the court reporter has been unable to produce the transcript. This Court finds, however, that the transcript is not necessary for the disposition of this case.

presentment to the Greenville County Grand Jury for trafficking cocaine base (crack cocaine) (200 or more grams) (2009-GS-23-3087). He was represented by Brian P. Johnson, Esquire.

On November 9, 2009, the Applicant pled guilty. He was sentenced by the Honorable Edward W. Miller to nine years for trafficking crack cocaine (28-100 grams), second offense. 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 plea counsel:
 - a. Failed to explain this was a second offense.
 - b. Failed to object, challenge, or move to quash the indictment.
 - c. Failed to appeal.
2. Involuntary guilty plea:
 - a. Was not informed he was pleading guilty to a second offense.
3. Subject matter jurisdiction:
 - a. Court lacked jurisdiction over this as a second offense as the Applicant was never convicted of a first offense.
 - b. Indictment was improperly amended.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe the witness who testified at the hearing, and to closely pass upon his credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Partial Motion to Dismiss

The Respondent moved for a partial dismissal of all issues in the PCR application – except for whether the Applicant is entitled to a review of direct appeal issues – based upon the

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.

This Court finds the Respondent's motion is well taken. The Applicant pled guilty to the offense he challenges in this application on November 9, 2009. The Applicant was therefore required to file his application before November 9, 2010. This application was filed on September 20, 2011, which was more than ten (10) 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 this Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Accordingly, this Court grants the Respondent's partial motion to dismiss all issues raised in the PCR application except for the allegation regarding a review of direct appeal issues.

Review of Direct Appeal Issues

The Applicant alleges in his PCR application that he is entitled to a review of direct appeal issues. Plea counsel testified he did not review the right to appeal in this case but that plea judges generally advise of this right during the plea hearing. Plea counsel testified, however, there were no legal issues to appeal from the guilty plea hearing. Plea counsel testified

Applicant never asked him to file an appeal and that he would have done so if requested.

This Court finds the Applicant is not entitled to a review of his direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Plea counsel has a constitutionally imposed duty to consult with the defendant about an appeal only when there is reason to think either: (1) that a rational defendant would want to appeal or (2) that this defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S. Ct. 1029, 1036 (2000). In order to make this determination, “courts must take into account all the information counsel knew or should have known.” Id. (citing Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 2066 (1984)). Although not determinative, a highly relevant factor will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because a plea may indicate the defendant seeks an end to judicial proceedings. Id.

There being nothing in the record to indicate that the Applicant reasonably demonstrated to plea counsel that he was interested in appealing, this Court finds the allegation is without merit and must be dismissed. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (“The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.”).

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds they have been abandoned.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not met his burden of proving he is entitled to relief. Therefore, this PCR application must be denied and

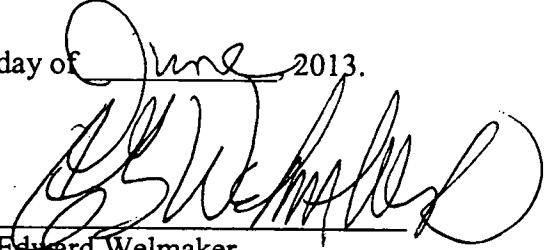
dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.


IT IS THEREFORE ORDERED:

1. That the Respondent's partial motion to dismiss is granted;
2. That the Applicant failed to meet his burden of proving he is entitled to a review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974); and
3. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 6 day of June 2013.



G. Edward Welmaker
Presiding Judge
Thirteenth Judicial Circuit


_____, South Carolina.

CAROLINE M. HORLBECK
ATTORNEY AT LAW

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

PCR

RECEIVED
Tel: 864-315-9919
Fax: 864-232-4756

JUL 08 2013

S.C. SUPREME COURT

July 3, 2013

Via Regular Mail

Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: JOHN A. YOUNG v. State

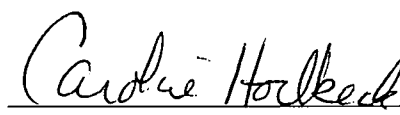
Dear Mr. Shearouse:

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.

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JUL 08 2013

S.C. SUPREME COURT

Enclosure

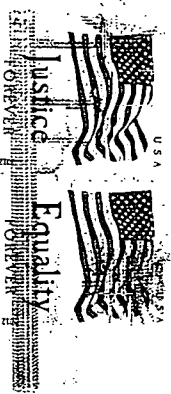
cc: Office of the Attorney General
Office of Appellate Defense

CAROLINE M. HORIBECK

Attorney At Law

101 WHITSETT ST.
GREENVILLE, SOUTH CAROLINA 29601

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Via Regular Mail

Mt. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

29211133030

