

STATE OF SOUTH CAROLINA
South Carolina Court of Appeal

Bryan Murray
Petitioner
V.
The State
Respondent

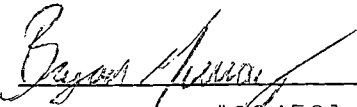
CASE #2023-001770

MOTION TO STAY APPEAL
SCACR rule 246(a)

Comes now the above named petitioner motioning this court to stay pending appeal pursuant to rule 246(a) OF the SCACR.

Petitioners request is being submitted due to petitioner filing motion to alter or amend judgement Pursuant SCRCF 59(e) "filed on 3/18/24 in the Richland County 5th Judicial Circuit Court in which petitioner awaits a ruling!

Petitioner has provided this court and the 5th judicial circuit solicitors office a copy of motion 59(e) for record.


Bryan Murray #284701
A.C.I. / F2A-14
1057 Revolutionary Trail
Fairfax, S.C. 29827

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SC Court of Appeals

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Fairfax, SC 29827

Jeanette W. McBride
Richland County Clerk of Court
P.O. Box 2766
Columbia, SC 29202-2766

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In Re: Bryan Murray #284701 v. State of S. Carolina
Case No: 2001-GS-4006714

SC Court of Appeals

Dear Ms. McBride,

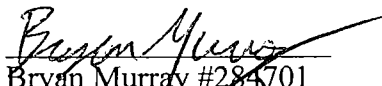
Please file the enclosed motion in above captioned case and also forward a copy to the following indicated below:

The Honorable Jocelyn Newman
1701 Main Street
Columbia, SC 29201

Daniel R. Goldberg, Esq.
1701 Main Street
Columbia, SC 29201

I would also like to request that a copy be returned to me for my personal records. Thank you for your assistance in this matter.

Respectfully Submitted,


Bryan Murray #284701

Cc:
The Honorable Jocelyn Newman
Daniel R. Goldberg, Esq.

State of South Carolina

Richland County

In the Court Of General Sessions

Fifth Judicial Circuit Court

Bryan Murray #284701
Petitioner

Case NO: 2001-GS-4006714

vs.

Motion to Alter or Amend A
Judgment Pursuant to S.C.R.C.P 59 (e)

State of South Carolina
Respondent

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SC Court of Appeals

Introduction

Comes now the above-named Petitioner Pro Se Motion to Alter or Amend Judgement Pursuant to S.C.R.C.P 59(e). This motion is being entered after oral denial/judgement(s) of Petitioner’s Motion for Sentence Reconsideration by The Honorable Jocelyn Newman in which a hearing was held on 10-31-2023.

Evidence in Support

I.

Petitioner’s Motion for Sentence Reconsideration was filed on 7-27-2023 in the Richland County Fifth Judicial Circuit Court and a hearing was held on 10-31-2023. Petitioner raised the issue to reconsider sentence by requesting the court run his five (5) year consecutive non-violent sentence of Criminal Conspiracy concurrent with the thirty (30) year Armed Robbery/Attempted Armed Robbery concurrent sentence that he is now serving. At the hearing, evidence was submitted by way of testimony from Respondent’s Witness (Former Deputy Solicitor Johnny Gasser) who originally prosecuted the case and Petitioner’s Co-defendant counsel (Michael McMullen) stating that on the day of sentencing (6-4-2002), the original negotiated plea for the above-mentioned offenses were that all sentences be ran/served concurrently for a thirty (30) year term of imprisonment under S.C. Code 16-11-330 for Petitioner and Petitioner’s Co-defendant in exchange for their plea, in which terms were agreed upon by both parties.

Petitioner next raises the issue that his current projected max-out date per S.C. Dept. of Corrections reflected an error in the sentence imposed as to the sentence negotiated. Petitioner's sentencing sheet(s)/sentencing order(s) were erroneous and displayed discrepancies by having 1) “Without Negotiations or Recommendation” box marked with a “x”, instead of the

“Negotiated Sentence and/or Recommended by the State” box(es) marked, 2) concurrent box marked with a check and scratched out and lastly the consecutive box being checked which was acknowledged and mentioned on record by the Court. Petitioner submits evidence that supports reason(s) why this matter should be taken into consideration by the Court to alter or amend judgement(s) due to testimony on record by Respondent’s Witness (Gasser) and Petitioner’s Co-defendant Counsel (McMullen) stating that the original negotiated plea agreement were for all sentences to be ran/served concurrently and the sentencing order(s) does not reflect with clarity those terms agreed upon by both parties.

Also at the hearing, Petitioner’s Co-defendant counsel by testimony stated that after sentencing on 6-4-2002, he and Petitioner’s trial counsel (Bill Nettles) approached the sentencing judge (The Honorable L. Henry McKellar) to discuss the negotiated sentence and errors made on sentencing sheet(s) and that the issues would be corrected once new sentencing sheet(s) were presented to sentencing judge. These errors were never corrected, resulting in Petitioner receiving a thirty-five (35) year sentence as opposed to the negotiated sentence of thirty (30) years, which was the basis of Petitioner’s filing Motion For Sentence Reconsideration so that his issue could be addressed and reviewed by the Court.

Petitioner argues that the Respondent failed to honor the negotiated plea agreement regarding the above-mentioned offenses. This failure along with the ineffective assistance of trial counsel’s failure to ensure Respondent adhered to the agreement rendered all of his pleas involuntary. See Sprouse v. State, 355 S.C. 335, 585 S.E.2d278(2003, Davie v. State, 381S.C.601,675 S.E. 2d. 416 (2009).

In Santobello v. New York, the United State Supreme Court established that state prosecutors are obligated to fulfill the promise they make to defendants when those promises serve as inducement to defendants to plead guilty and that the promise of one prosecutor in the office bound all prosecutors in the office. 404 U.S. 257, 92 S. Ct. 495, 30 L.Ed. 427 (1971). Fed. Rules Crim.Proc. Rule 11, 18 U.S.C.A.

In Thrift, this court contemplated the common problem of how to uncover the terms of an oral plea agreement and resolved this issue prospectively by establishing a bright line rule limiting its review of plea agreements “to those terms which are fully set forth in the record.” 312 S.C. 282, 440 S.E. 2d 341 (1994). During recitation at the hearing held on 10-31-2023, Respondent Witness (Gasser) and Petitioner’s Co-defendant counsel (McMullen) stated that negotiations for Petitioner and Petitioner’s Co-defendant was that both were to receive thirty (30) year concurrent sentence in exchange for their plea, to be served concurrently. Such breach of plea negotiation/agreement are per se prejudicial and is warranted remand for specific performance of plea agreement. Sprouse v. State, 355 S.C, 335, 585 S.E. 2d 278 (2003).

II. The Violation of Sixth Amendment-Right to Effective Assistance of Counsel/ The Violation of Fourteenth Amendment-Due Process and Equal Protection Clauses.

Petitioner was denied Motion for Sentence Reconsideration based on ground(s) that appeal was filed untimely. Petitioner filing was for his sentence to be reconsidered; however he would like to present to the Court how appeal became untimely.

Under Strickland, the purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to defense in order to constitute ineffective assistance under the Constitution. Strickland v. Washington (466 U.S.668); 14th U.S.C.A.

Facts by testimony from Respondent's Witness (Gasser) at the hearing are that a negotiated plea deal for Petitioner had been agreed on by both parties in the matter, however trial counsel (Nettles) failed to ensure that the court sentencing order(s) reflected the terms of negotiations. Petitioner's sentencing sheet(s) are supported evidence on record that the aforementioned discrepancies on the sentencing order did not reflect with clarity the terms and conditions agreed upon by Respondent and Petitioner. Trial Counsel's ineffective of assistance and deficient performance prejudiced Petitioner in such a way, that he was sentenced to a thirty-five (35) year term of imprisonment when the negotiated plea was a thirty (30) year term of imprisonment and for all offense to be served concurrently, which is in violation of the Eighth Amendment Cruel and Unusual Punishment Clause in Support of Fourteenth Amendment Due Process and Equal Protection Clauses.

Petitioner submits evidence for the record that he timely petitioned for post-conviction relief (See Exhibit A; 03-CP-1922) which was filed on 4-14-2003 with amended application filed on 7-11-2005 by court-appointed counsel (Tara D. Shurling) raising the issues of Sixth and Fourteenth amendment violations claiming trial counsel's failure to communicate with Petitioner about the possibility of appealing a guilty plea and failure to file notice of direct appeal without Petitioner's consent. Petition was denied. Appeal was taken. Appeal was denied.

In South Carolina, a post-conviction relief (PCR) proceeding is a collateral attack on a criminal conviction. This means the action is not necessarily to challenge the sufficiency of the conviction itself, but the general process surrounding the conviction such as counsel's representation, the actions of the prosecutors or other aspects of the criminal proceedings. However, a post-conviction relief action is not a substitute for a direct appeal and cannot be filed while a direct appeal is still pending pursuant to Rule 71.1(b) SCRPC.

The sole discretion of trial counsel to not file a direct appeal without Petitioner's consent prejudiced his fundamental right to effective assistance of counsel by Petitioner having to exhaust the remedy of PCR or forfeit his appeal process altogether due to trial counsel's deficient performance of failing to file a timely notice of appeal on behalf of Petitioner after sentencing.

Trial counsel was retained for the purpose of effective representation. After client is convicted and sentenced, trial counsel in all cases has a duty to make certain that client is fully aware of right to appeal and should give client his professional judgment whether appeal should be taken and ascertain whether client wishes to appeal. Appellate Court Rule 407, Rules of Prof. Conduct, Rule 1.3. Therefore, under Rules of Prof. Conduct, Rule 1.16, counsel is required to take all necessary steps as may be reasonably practicable to protect the client's interests and counsel who is retained solely for purpose of trial of nonindigent criminal defendant must serve and file a Notice of Appeal as required by Rule 203, SCACR. See In Re Anonymous Member of

the Bar, 303 S.C. 306, 400 S.E. 2d. 483 (191). This ineffectiveness resulted in the denial of Petitioner's Motion for Sentence Reconsideration on the ground(s) that appeal was filed untimely, showing prejudice under Strickland v. Washington 466 U.S. 668, 104 S. Ct. 2052 (1984). Counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, and applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E. 2d 624 (1989). Petitioner asserts his claim to overcome the presumption to receive relief set forth in Strickland, by providing facts that he did not consent to trial counsel's failure to file Notice of Appeal, regardless that he was convicted pursuant to guilty plea rather than at trial, that he was satisfied with attorney at time of sentencing and that sentencing court advised him of his right to appeal. U.S. v. Stearns, 68 F. 3d. 328 (1995) U.S.C.A. Const. Amend. 6.

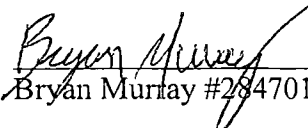
Conclusion

Petitioner has filed a notice of appeal (Appellate Case No. 2023-001770) seeking review of the circuit court's denial of his post-trial motion which remains held in abeyance pending receipt of written notice of order/judgment(s) on ruling. Petitioner has not received written notice of order as of this date.

Wherefore, based on the factual evidence, relevant and/or relative case laws that Petitioner has provided to the Court pertaining to his Motion for Sentence Reconsideration, Petitioner humbly request that the Court and/or Respondent grant relief by requiring specific performance in the form of reversing oral denial, vacate sentences and remand for resentencing consistent with original plea agreement. Petitioner also request that if relief is granted, he be appointed counsel for effective assistance for this matter as he is entitled to under the Sixth and Fourteenth Amendment of the U.S. Constitution as well as Article I, Section 14 of the S. Carolina Constitution. In Sprouse v. State, the court chose to require specific performance of the plea agreement whereas requiring specific performance is the most efficient option because it eliminates the need for a new trial or new plea hearings, and also grants the parties nothing more or nothing less than the benefit for which they originally bargained. 355 S.C. 335, 585 S.E. 2d. 278 (2003).

Date: 3-18-2024

Respectfully Submitted,


Bryan Murray #284701

PROOF OF SERVICE

I, Brian Murray, attest that this correspondence along with proof of service has been served by way of the u.s.p.s. with sufficient postage to the following

s.c. court of appeals, pob. 11629, col. a, s.c. 29211

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Date: 4/1/2024

/s/ Brian Murray

APR 08 2024

SC Court of Appeals

In The Court of Common Pleas
Richland County, SC

Case No: 2001-GS-4006714

Certificate of Service

I, Bryan Murray, the petitioner in the above-captioned case hereby declares under penalty of perjury that on this date below, I have served a true copy of motion upon the listed below by placing a copy in an envelope and in an institutional mailroom official's possession for depositing in the U.S. Mail, First Class postage affixed and addressed as indicated below:

Jeanette W. McBride
Clerk of Court, Richland County
P.O. Box 2766
Columbia, SC 29202-2766

Daniel R. Goldberg, Esq.
1701 Main Street
Columbia, SC 29201

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SC Court of Appeals
Respectfully Submitted,

Date: 3-18-2024

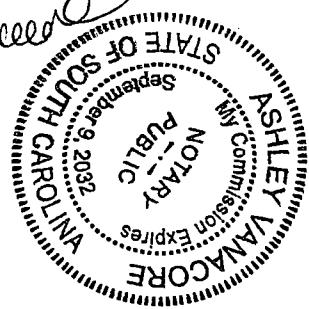
Bryan Murray
Bryan Murray #284701
A.C.I/ BWA-14
1057 Revolutionary Trail
Fairfax, S.C. 29827

Notary Public:

Sworn to and subscribed before me: Ashley Vanacore

This 18th day of March, 2024 @

My commission expires: 9/9/32



Brian Murray #284901
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1057 Revolutionary Trail
Fairfax, S.C. 29827

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