

STATE OF SOUTH CAROLINA )  
COUNTY OF LAURENS )

LYNN W. LANE, CLERK OF COURT  
IN THE COURT OF COMMON PLEAS  
EIGHTH JUDICIAL CIRCUIT  
2013 JUL -8 A 9: 26

Russell Leon David, Sr., #240689, )  
Applicant, )

2013-CP-30-0243  
LAURENS COUNTY  
CLERK OF COURT

v. )

FINAL ORDER OF DISMISSAL

State of South Carolina, )  
Respondent. )

**RECEIVED**

AUG 12 2013

**SC Court of Appeals**

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed March 22, 2013. The Respondent (the State) made its Return and Motion to Dismiss on May 6, 2013, requesting that the Application be summarily dismissed. Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal dated May 9, 2013, provisionally denying and dismissing this action, while giving the Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final.

In a document titled "Reply to Order of Dismissal Return Motion," the Applicant argues he is entitled to an evidentiary hearing on his right to review under Austin v. State<sup>1</sup>. This Court has reviewed the Applicant's response to the State's motion to dismiss in its entirety, in conjunction with the original pleadings, and finds that a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final.

<sup>1</sup> 305 S.C. 453, 409 S.E.2d 395 (1991).

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First, the Applicant's understanding of Austin v. State is misplaced. An Austin appeal is available after an initial PCR application has been adjudicated and PCR counsel failed to file an appeal on the Applicant's behalf after the Applicant requested or when PCR counsel fails to file the appeal within the statutory time limits as prescribed by Rule 243, SCRCP. Here, the Applicant has not applied for PCR on this conviction before and therefore, there has not been an initial PCR application to be adjudicated. Thus, Austin is inapplicable.

Second, the Applicant alleges his counsel was ineffective for not challenging his convictions on the ground of double jeopardy when he was charged and plead guilty to murder and lynching. As these are two distinct and separate charges, with the elements of the crime differing from one another, and as there was only one conviction for each charge, double jeopardy is inapplicable. Further, in order to properly challenge these convictions, the Applicant must have filed his application with the statute of limitations.

S.C. Code Ann. Â17-27-45(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 South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offense(s) he challenges in this Application on March 26, 1997. The Applicant was therefore required to file his application before March 27, 1998. This Application was filed on March 22, 2013 which is more than fifteen (15) years beyond the time

that the statutory filing period had expired. The Applicant has provided no sufficient reason why he failed to file his application within the statute of limitations.

Additionally, the Applicant argues plea counsel was ineffective for not advising him concerning a direct appeal and thus, is entitled to a belated review of appellate issues through PCR pursuant to White v. State<sup>2</sup>. However, counsel has a constitutionally-imposed duty to consult with a 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 particular defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029 (2000). As the Applicant has provided no sufficient prove that counsel had a good faith basis to appeal the plea or that he demonstrated to counsel that he was interested in appealing, Applicant is not entitled to a review under White. Further, the Applicant has had fifteen (15) years to bring this claim, and this Court finds no reason why the Applicant could not have or did not file his application within the past fifteen years.

Accordingly, this Court finds no reason why the Conditional Order of Dismissal should not become final. This Court also finds an evidentiary hearing is unnecessary to decide this case.

IT IS THEREFORE ORDERED that, for the reasons set forth in the Court's Conditional Order of Dismissal, the Application for PCR is hereby denied and dismissed with prejudice.

This Court hereby notifies the Applicant that he must file and serve a Notice of Appeal within thirty (30) days of the service of this Order to secure appellate review. See Rule 203, SCACR. The Applicant's attention is directed to Rule 243, SCACR., for the procedures following the filing and service of the notice of appeal.

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AND IT IS SO ORDERED this 27<sup>th</sup> day of June, 2013.

EC Griffith

Eugene C. Griffith, Jr.  
Chief Administrative Judge  
Eighth Judicial Circuit

Newberry, South Carolina.

A TRUE COPY OF ORIGINAL

Lynn W. Lancaster  
Lynn W. Lancaster  
Laurens County CCCP & GS