

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

Aug 16 2024

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

S.C. SUPREME COURT

The Honorable Kristi Lea Harrington, Circuit Court Judge

Case No.: 2013A1010205847

State of South Carolina..... Respondent

v.

Ishmel J. Lemon.....Appellant/ Defendant

NOTICE OF BELATED APPEAL

Ishmel J. Lemon appeals his convictions and sentences entered on December 14, 2015 imposed by the Honorable W. Jeffrey Young for Burglary 1st; The Honorable Maite Murphy issued the attached order signed on December 29, 2023 allowing Appellant/ Defendant to file a belated appeal.

/s/Christopher L. Murphy
Christopher L. Murphy
c/o 622-B Windermere Blvd.
Charleston, SC 29412
Phone: 843-800-1187
Email: cmurphy@rlattorneys.com

August 16, 2024

Charleston, SC 294

Ag
GS
Sol
Atty

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
)

Ishmel J. Lemon, #310411,

) CASE NO. 2022-CP-10-1043
)

Applicant,

)

v.

)

ORDER OF DISMISSAL

State of South Carolina,

)

Respondent.

)

)

2024 JAN 18 PM 15
CLERK OF COURT
M.L.

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by Ishmel J. Lemon's (Applicant) on March 3, 2022. Respondent made a return and motion to dismiss all claims (other than Applicant's claim related to a belated appeal) as barred by the statute of limitations. On October 18, 2023, a hearing convened before the Honorable Maite Murphy. Applicant was present and represented by Christopher L. Murphy, Esquire. Assistant Attorney General Danielle Dixon represented Respondent. During the hearing, Applicant waived all claims other than his belated appeal claim. Applicant testified on his behalf during the hearing. Additionally, the parties stipulated that trial counsel James W. Smiley, Esquire, was relieved at the end of Applicant's trial *in absentia* and did not speak to Applicant thereafter. The parties further stipulated that Lauren Williamson, Esquire—whom Applicant hired to file a motion for reconsideration—provided Applicant a pro se notice of appeal from at the motion hearing in February 2016, which Applicant attempted to file. After considering the records, this Court finds Applicant failed to prove he is entitled to a belated appeal. This Court further finds Applicant waived his remaining claims, which would have been barred by the statute of limitations. Thus, this application is denied and dismissed with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections serving a thirty-year sentence. In March 2014, the Charleston County Grand Jury indicted Applicant for first-degree burglary (2014-GS-10-1310). On March 2, 2015, Applicant and a codefendant proceeded to a jury trial before the Honorable W. Jeffrey Young. James W. Smiley, Esquire, represented Applicant. David L. Osborne and Gregory K. Voight prosecuted the case. Applicant was not present at trial despite having adequate notice. (Tr. 42). The jury convicted him as indicted, and Judge Young sealed the sentence. (Tr. 42). At the conclusion of trial, Judge Young granted Mr. Smiley's request to be relieved. (Tr. 411). On December 14, 2015, Applicant appeared before the Honorable Kristi Lea Harrington for sentencing. Pursuant to the sealed sentence, he was sentenced to thirty years' imprisonment.

On December 22, 2015, Applicant filed a motion to reconsider the sentence.¹ Lauren E. Williams, Esquire, represented Applicant. On February 18, 2016, Applicant filed a *pro se* notice of intent to appeal. On May 18, 2016, the appeal was dismissed for failure to timely serve Respondent. State v. Lemon, App. Case No. 2016-000308. The remittitur was sent June 14, 2016.

Applicant's Initial Post-Conviction Relief Action (2014-CP-15-0127)

Applicant filed his first PCR application on December 29, 2015, while his motion to reconsider the sentence was pending. In that application, Applicant alleged he was being held in custody unlawfully based on ineffective assistance of counsel and various constitutional violations. Applicant also asserted he was entitled to a late appeal pursuant to White v. State. As relief, Applicant sought "[t]he State's Plea Offer of Seven (7 yrs) years; and A New Trial."

Respondent filed a return requesting summary dismissal without prejudice. On February

¹ According to the public index, this motion was denied on August 9, 2018.

16, 2018, the Honorable Kristi Lea Harrington summarily dismissed the application without prejudice pursuant to Rule 71.1(b), SCRPC, finding that at the time the application was submitted, the time in which Applicant could appeal had not passed.

CURRENT APPLICATION

Applicant *untimely* commenced this current application on March 3, 2022. Applicant asserts he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. "Trial Counsel failed to file Appeal after I directed him to my fourteenth Amendment right to due process was violated and my sixth amendment."
 - b. Counsel "never objected to the proceeding of the trial with knowing his client wasn't present to face his accusers."

Applicant did not state what relief he is seeking. At the hearing, Applicant waived allegation 1(b) and proceeded only on allegation 1(a). This Court finds Applicant voluntarily waived allegation 1(b) and dismisses this ground with prejudice.²

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the records before it, including the Charleston County Clerk of Court records of the underlying convictions, Applicant's records from the South Carolina Department of Corrections, the transcript from Applicant's trial, Applicant's appellate records, the records from Applicant's first PCR, and records of the current application. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. After a careful review, this Court finds Applicant has failed to carry his burden of proof. Below are this Court's findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code (2017).

² Alternately, this Court finds allegation 1(b) is barred by the statute of limitations, as asserted by Respondent in its amended return. See S.C. Code Ann. § 17-27-45(A).

*ALLEGATION 1(A): BELATED APPEAL PURSUANT TO WHITE V. STATE*³

This Court finds Applicant did not prove he is entitled to a late appeal. When counsel has consulted with the defendant regarding the right to appeal, "[c]ounsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." Flores-Ortega, 528 U.S. at 478. Where an accused establishes in a PCR hearing that he was unconstitutionally deprived of his statutory right to a direct appeal, the South Carolina Supreme Court, upon an appeal of the PCR decision, will review the trial record and pass upon all issues properly raised and argued as if the direct appeal had been perfected. White, 263 at 119, 108 S.E.2d at 39-40.

At the PCR hearing, Applicant testified he retained Smiley to represent him at trial. He acknowledged he was "on the run for another charge" and was tried in his absence. Applicant stated he hired Williamson to file a motion to reconsider the sentence, but the judge denied his motion from the bench. He testified he spoke to Williamson about an appeal and attempted to file a pro se notice of appeal. Applicant further testified he was referred to James Falk, Esquire.

This Court finds Applicant did not prove he was unconstitutionally deprived of his statutory right of a direct appeal. The evidence before this Court establishes Applicant was aware of his right to appeal. At the time Applicant attempted to file the pro se notice of appeal, Applicant's appeal was premature because the motion to reconsider the sentence had not been finally ruled upon. Once the motion to reconsider was denied on August 9, 2018, Applicant waited more than three years to file the instant action seeking a late appeal—notwithstanding the fact Applicant was aware of his right to appeal and had been referred to an attorney about an appeal. Based on the foregoing, this Court finds Applicant knowingly and voluntarily waived his right to appeal. Thus,

³ 263 S.C. 110, 208 S.E.2d 35 (1974). The State conceded the statute of limitations does not apply to White claims.

this claim is denied and dismissed with prejudice.

CONCLUSION

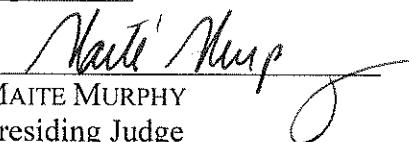
Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. Thus, this application is denied and dismissed with prejudice.

Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty days of receipt by counsel of written notice of entry of judgment. See Rule 203, SCACR. Applicant has the right to an appellate counsel's assistance on appeal. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). If Applicant wishes to appeal, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Rule 71,1(g), SCRCP. Attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for PCR is denied and dismissed with prejudice; and
2. Applicant shall be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED THIS 29 day of Dec, 2023.


MAITE MURPHY
Presiding Judge
Ninth Judicial Circuit

St. George, South Carolina