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August 30, 2013

Via Regular Mail

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

RECEIVED

SEP 3 - 2013

S.C. SUPREME COURT

Re: ALBERT SANTANIO KELLY v. State

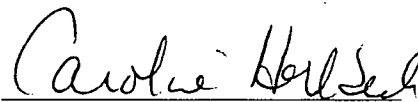
Dear Mr. Shearouse:

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.

Enclosure

cc: Office of the Attorney General
Office of Appellate Defense

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
THE HONORABLE D. Garrison Hill

CA No. 2012-CP-23-4466

ALBERT SANTANIO KELLY,

APPELLANT,

vs.

STATE OF SOUTH CAROLINA

RESPONDENT.

2013 AUG 23 PM 4
FILED-CLERK OF COURT
GREENVILLE CO S C
PAUL B. WICKENSING

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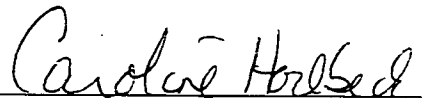
SEP 3 - 2013

S.C. SUPREME COURT

NOTICE OF APPEAL

Appellant ALBERT SANTANIO KELLY, appeals from the Order of the Honorable D. Garrison Hill, Circuit Court Judge clocked August 7, 2013.

Respectfully submitted,



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

Date: August 23, 2013

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

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SEP 3 - 2013

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE SUPREME COURT

Albert Santanio Kelly,)
)
Appellant,)

C.A. No. 2012-CP-23-4466

-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 Appellant, and that I have this day caused to be served upon the person(s) named below Appellant'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

Aug. 30, 2013

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Albert Santanio Kelly,)
 S.C.D.C. No. 277334,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2012-CP-23-4466

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 GREENVILLE CO. S.C.
 PAUL B. WICKER

**ORDER OF DISMISSAL
 GRANTING AUSTIN V. STATE
 BELATED PCR APPEAL**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed July 10, 2012. A hearing into the matter was convened on June 19, 2013 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the August 2004 term of General Sessions for murder (2004-GS-23-5966) and at the July 2005 term for armed robbery (2005-GS-23-2024, count 1) and possession of a weapon during commission of a violent crime (2005-GS-23-2024, count 2). C. Timothy Sullivan, Esquire represented the Applicant.

After the State called the case to trial, the Applicant was found guilty. On October 12, 2005, the Honorable G. Edward Welmaker sentenced the Applicant to consecutive terms of

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forty-five (45) years for murder, fifteen (15) years for armed robbery, and five (5) years for possession of a weapon during commission of a violent crime.

A notice of appeal was filed at the South Carolina Court of Appeals. Joseph L. Savitz, III, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the form of an Anders¹ brief. The Court of Appeals dismissed the appeal. State v. Kelly, Op. No. 2008-UP-530 (S.C. Ct. App. filed Sept. 11, 2008).

The Applicant filed a PCR application on September 25, 2008 (2008-CP-23-7212). The Applicant raised the following issues:

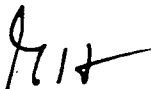
1. Ineffective assistance of trial counsel:
 - a. Failed to object to false testimony given by Investigator Arterburn.
 - b. Failed to object to false testimony given by Shaun Edwards and Charlene Edwards.
 - c. Failed to object to comments in the State's closing argument.
 - d. Failed to request exculpatory evidence:
 - i. Failed to request the brown wallet found in the victim's car.
 - ii. Failed to request the .380 bullets purchased by Shaun Edwards before the murder.
2. Trial issues:
 - a. State witness Donna Wentz lied under oath.
 - b. The confession should have been void.
 - c. Trial judge should have instructed the jury on alibi.

An evidentiary hearing was convened on November 15, 2010 at the Greenville County Courthouse. Elizabeth-P. Wiygul, Esquire represented the Applicant. The Honorable Robin B. Stilwell denied and dismissed the application by order filed February 1, 2011.

ALLEGATIONS

In his current PCR application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

¹ Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).



1. Ineffective assistance of PCR counsel:
 - a. Failed to file a notice of appeal.
2. Ineffective assistance of trial counsel:
 - a. Failed to present exculpatory evidence (a pair of boots, a wallet, bullets).
 - b. Failed to object to solicitor's closing argument.
 - c. Failed to request alibi charge.
3. Due process violation:
 - a. Trial judge did not provide an alibi charge because it was not requested by trial counsel.
4. After discovered evidence:
 - a. Co-defendant Parks contacted the Applicant's family after the first PCR hearing to say he was "sorry for playing a roll [sic] in the wrongful conviction of Applicant and that he . . . lied in order to receive the lower end."
 - b. Co-defendant Wentz contacted the Applicant's family to say the police "forced and pressured her to make false statements and testimony against Applicant at trial."

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. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

A.

At the hearing, counsel for the Respondent stated she had spoken to the PCR attorney who represented the Applicant at the hearing on his first PCR application. Counsel for the Respondent stated the first PCR attorney admitted she failed to file a timely notice of appeal and had then instructed the Applicant to file this second PCR application. As such, counsel for the Respondent noted there was no objection to a belated appeal from the denial of the Applicant's first PCR application.

This Court finds the Applicant's allegation that he is entitled to a review of the issues from the denial of his first PCR application. See Whitehead v. State, 352 S.C. 215, 574 S.E.2d



200 (2002). Where a post-conviction relief judge determines the applicant did not freely and voluntarily waive his appellate rights, the applicant may petition the South Carolina Supreme Court for review of post-conviction relief issues pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).² See also King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992). The Applicant's denial of an appeal can be remedied by a petition for belated review by his current PCR attorney pursuant to Austin v. State.

B.

As to all other issues, this Court finds they must be dismissed for 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.

The Applicant was convicted of the offenses he challenges in this Application on October 12, 2005 and his convictions were affirmed by the South Carolina Court of Appeals on September 11, 2008. The Applicant was therefore required to file his application before September 11, 2009. This Application was filed on July 10, 2012, which was beyond the time 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 the Court to

² Even where the PCR judge makes this finding, he may not grant relief on this basis. The Applicant must petition the Supreme Court for a belated review. Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986).

“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.” Therefore, the Respondent requests that this Court summarily dismiss the application for post-conviction relief for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act.

C.

This Court also finds all other issues must be dismissed because the current application because it is successive to the previous application for post-conviction relief. Successive applications for post-conviction relief are disfavored. See Land v. State, 274 S.C. 243, 246, 262 S.E.2d 735, 737 (1980). South Carolina Code Ann. § 17-27-90 (2003) states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a “sufficient reason” why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). Any new ground raised in a subsequent application is limited to those grounds that “could not have been raised . . . in the previous application.” Id. (emphasis in original). If the Applicant could have raised these allegations in a previous application, then the Applicant may not raise those grounds in successive applications. Id. The Applicant bears the burden of



showing that the allegations could not have been raised previously. Id.

As the Applicant has failed to present any reasons why he could not have raised the current allegations in his previous post-conviction relief application, the Respondent moves for a summary dismissal of the application because it is successive.

D.


This Court finds the Applicant's allegation of after-discovered evidence must be summarily dismissed. The Applicant failed to present any testimony or argument related to this issue at the hearing. As such, he has failed to meet his burden of proving this allegation. 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.").

CONCLUSION

All allegations except the belated appeal pursuant to Austin v. State are barred because they are untimely and successive. The Applicant has proven by a preponderance of the evidence that he did not knowingly and voluntarily waive the appeal of the denial of his first PCR application. Any grounds for relief that are not specifically addressed in this Order are denied for failure to meet the requisite burden of proof.

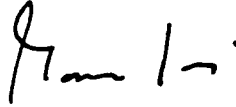
IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice;
2. Within thirty (30) days of service of this Order, counsel for the Applicant must file a Notice of Appeal to secure the appropriate appellate review of the Applicant's first post-conviction relief action. Counsel and the Applicant are directed to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) and Rule 243, SCACR for the appropriate procedure for a belated appeal.



3. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 15th day of August, 2013.



D. Garrison Hill
Presiding Judge
Thirteenth Judicial Circuit

Gaenville, South Carolina.

POST CONVICTION RELIEF HEARING

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

THIRTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA

VS.

ORDER OF APPOINTMENT OF LEGAL
COUNSEL FOR INDIGENT DEFENDANT

Albert Santanio Kelly
Inmate

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SCDC# 277334

SEP 3 - 2013

Lee Correctional Institution
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PCR Case No. 2012-CP-23-04466

1pm

Original Attorney: C. Timothy Sullivan

1-29-13-call 8AM 803-896-249

* * * * *

The defendant contends that he is indigent and in need of services of an attorney as contemplated by law.

THEREFORE, Caroline Horlbeck, Attorney at Law, is appointed as counsel for the defendant.

This 18 day of Oct, 2012

Carl Kleber

Criminal Justice Coordinator

13-28
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CAROLINE M. HORLBECK

Attorney At Law

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GREENVILLE, SOUTH CAROLINA 29601



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Via Regular Mail

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