5th BY

Form 4

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2009CP4004442

Justin #296250 Harshaw vs. **State of South Carolina**

Plaintiff Defendant

RICHLAND COUNTY
FILED
2010 SEP -7 AM 10: 51
JEANETTE W. McBRIDE
C.C.P. G.S.

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other:

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: ______

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; ☐ Statement of Judgment by the Court:

Dated at Columbia, South Carolina, this _____ day of ______________, 2010.

____
PRESIDING JUDGE

This judgment was entered on the _______ day of ______________, 2010, and a copy mailed first class this 8th day of Sept, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

Justin #296250 Harshaw
Charlie J Johnson Jr
Mark Schnee

ATTORNEY(S) FOR THE PLAINTIFF(S)

Brian T Petrano

ATTORNEY(S) FOR THE DEFENDANT(S)

Jeanette W McBride
Clerk of Court

SCRCP APP-24/FORM 4

SCANNED

ATTORNEY GENERAL'S OFFICE
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ADMINISTRATIVE INSTRUCTIONS
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	2009-CP-400-4442
Justin Harshaw , # 296250,	)	
Applicant,	)	
v.	)	CONDITIONAL ORDER OF DISMISSAL (DISMISSING IN PART AND ORDERING A HEARING SOLELY ON THE ISSUE OF A BELATED DIRECT APPEAL)
State of South Carolina,	)	
Respondent.	)	

RICHLAND COUNTY FILED 2010 SEP -2 AM 11:14 JEANETTE W. McBRIDE C.C.P. & G.S.

This matter comes before the Court pursuant to an application for post-conviction relief filed June 24, 2009:

I. PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. The Applicant was indicted at the December 2001 term of the Grand Jury for Richland County for one (1) count of Assualt and Battery With Intent to Kill (2001-GS-40-9361), and one (1) count of Attempted Armed Robbery (2001-GS-40-9360). The Applicant was represented by Jack Swerling, Esq. On September 4, 2003, the Applicant pled guilty as indicted and was sentenced by The Honorable G. Thomas Cooper, Jr., to the incarceration for twenty years for each charge. The Applicant did not appeal his guilty plea or sentence.

In making its decision the Court had before it the records of the Richland County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript.

In his current application for post conviction relief, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1.) Ineffective Assistance of Counsel; and

2.) Violation of Procedural Due Process.

The Applicant has further added language alleging Counsel was deficient for failing to file for direct appeal after the guilty plea. Accordingly, this Court interprets this as an allegation that Applicant was improperly denied his right to a direct appeal.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds that this Application for Post-Conviction Relief must be summarily dismissed, in part, for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160. S.C. 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 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 September 4, 2003. The Applicant was therefore required to file his application before Septmber 4, 2004. This Application was filed on June 24, 2009, nearly five (5) years after the statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (1985) authorizes the 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." Therefore, it is the finding of this Court that this application is hereby dismissed – in part - for failure to file within the time mandated by the Post Conviction Procedure Act.

IV.

However, Applicant claims that he was denied effective assistance of counsel because his trial attorney did not appeal his conviction. There is a strong presumption that plea counsel for the Applicant was diligent in his representation of Applicant and that he performed within the wide range of reasonable professional assistance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal. White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in Anders v. California, 386 U.S. 738 (1967). Id. However, the standard for a guilty plea differs. Absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal) or when the defendant reasonably demonstrated an interest in appealing, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. Roe v. Flores-Ortega, 528 U.S. 470 (2000); Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995). The decision of the South Carolina Supreme Court, in

White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974), holds that even though the post-conviction relief court finds that the Applicant had never voluntarily and intelligently abandoned his appeal, the court has no jurisdiction to grant a belated appeal. However, where an accused establishes in a post-conviction relief hearing that he was unconstitutionally deprived of his statutory right to a direct appeal, the South Carolina Supreme Court, upon an appeal of the post-conviction relief decision, will review the trial record and pass upon all issues properly raised and argued as if the direct appeal has been perfected.

> "[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for 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, 480, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).
> Jones v. State, 677 S.E.2d 20, 23 (2009).

See Turner v. State, Op. No. 26569 (S.C. Sup. Ct. filed Dec. 8, 2008). *Citing* Roe v. Flores-Ortega, 528 U.S. 470 (2000).[1]

Such an allegation raises a question of fact that cannot be conclusively refuted by the record and, therefore, requires that an evidentiary hearing be held. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983); Delaney v. State, 269 S.C. 555, 238 S.E.2d 679 (1977).

Accordingly, this Court finds that the application must be dismissed in part for failure to file within the time mandated by the Post Conviction Procedure Act, and that a hearing must be held solely on the allegation that Applicant is entitled to a belated direct appeal.

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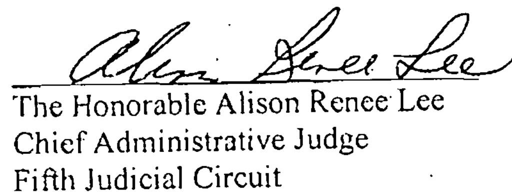
1 Our State Supreme Court's opinion in Turner cites Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995). While the Respondent respects the Court's ruling in Turner, it respectfully notes that by citing Turner, it is not attempting to apply Weathers. It is the Respondent's position (via the submission of this proposed order) that the *per se* rule in Weathers, (also applied in Carey v. Leverette, 605 F.2d 745 (4th Cir. 1979)), is incompatible with the Court's opinion in Roe v. Flores-Ortega. Frazer v. South Carolina, 430 F.3d 696, 708-709 (C.A.4 (S.C.),2005).

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this Application, in part, unless the Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. The Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. The Applicant shall file any reasons he may have with the Richland County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Brian T. Petrano, Esquire
P.O. Box 11549
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 1st day of September, 2010.



The Honorable Alison Renee Lee
Chief Administrative Judge
Fifth Judicial Circuit

Columbia, South Carolina.