

State of South Carolina) In the Supreme Court
County of Richland)

Maurice A. Kelley, 288629)

Appellant,)

v.)

State of South Carolina,)
Respondent.)

CA. NO. 2009-CP-400-5753

Motion For The Appoint-
ment of Counsel

RECEIVED

JUN 15 2011

S.C. SUPREME COURT

To: Daniel E. Shearouse, Clerk of Court For
the Supreme Court of South Carolina.

The above named appellant moves this Honorable Court for an order of appointment of Counsel for Case NO: (2009-CP-400-5753) as cited above. The appellant received a Final order of Dismissal of his P.C.R. (erranting Austin v. State belated P.C.R. appeal) on April 29, 2011. The Appellant has submitted his Notice of appeal to this Court and hopes it be of assistance in providing counsel to represent him in the appellate process. The appellant is unable to pay the cost of attorney fees and prays that this Honorable Court grants his Motion.

Respectfully submitted,

Maurice A. Kelley
MAURICE A. Kelley 288629
386 Redemption Way
McCormick, S.C.
29899

6-10-2011

STLRB

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

JUDGMENT IN A CIVIL CASE

IN THE COURT OF COMMON PLEAS

Case No.: 2004-CP40-4980

Maurice Kelly #288629

versus

State of South Carolina

Plaintiff.

Defendant.

2007 JUL 17 10:53
CLERK OF COURT

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and the verdict has been rendered.
- DECISION BY 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), SCRPC; Rule 41(a), SCRPC (Vol. nonsuit) Rule 43(k), SCRPC(Settled); Other - _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Other : _____

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

Dated at Columbia, South Carolina, this _____ day of _____, 2007.

PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 2007, and a copy mailed first class this _____ day of _____, 2007, to attorneys of record or to parties (when appearing pro-se) as follows:

Attorney(s) for Plaintiff(s):

Attorney(s) for Defendant(s):
Lakesha White Jeffries

s/BARBARA A. SCOTT

CLERK OF COURT

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Maurice Kelly, SCDC # 288629,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

2004-CP-40-4980

ORDER OF DISMISSAL

CLERK OF COURT
2007 JUL 17 4:10:55
COURT OF COMMON PLEAS
RICHLAND COUNTY

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed October 21, 2004. The Respondent made its Return on September 12, 2005. An evidentiary hearing into the matter was convened on May 19, 2006, at the Richland County Courthouse. The Applicant was present at the hearing and was represented by Charlie J. Johnson, Jr., Esquire. The Respondent was represented by Sabrina C. Todd of the South Carolina Attorney General's Office. Also present were Samuel Mokeba, Esquire, the Applicant's guilty plea counsel, and members of the victim's family.

At the hearing, the Applicant testified on his own behalf. Mr. Mokeba testified on behalf of the Respondent. This Court also had before it a copy of the guilty plea transcript, the records of the Richland County Clerk of Court, and the Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that the Applicant is presently confined in the South

Carolina Department of Corrections pursuant orders of commitment of the Richland County Clerk of Court. The Applicant was indicted at the October 2002 term of the Richland County Grand Jury for murder (02-GS-40-10209), armed robbery (02-GS-40-10103); and grand larceny (02-GS-40-10038). He was represented by Mr. Mokeba. On December 1, 2003, the Applicant pled guilty to the charges. He was sentenced by the Honorable G. Thomas Cooper, Jr. to confinement for concurrent periods of forty (40) years for murder; thirty (30) years for armed robbery; and ten (10) years for grand larceny. The Applicant did not appeal his convictions or sentences.

In his current application, the Applicant alleges his confinement is unlawful for the following reasons:

1. Ineffective assistance of counsel in that counsel failed to meet with the Applicant and failed to prepare the case for a trial.
2. Denial of Due Process in that the Applicant met plea counsel for the first time at the guilty plea.
3. The Applicant was never indicted on the subject charges.

At the PCR hearing, counsel for the Applicant indicated the Applicant would proceed on two issues:

1. That the Applicant thought he would be required to serve 85% of his sentence and not day for day and
2. That plea counsel only met with him once before the guilty plea.

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 at the post-conviction relief hearing. 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. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (2003).

In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984); see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 690. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel’s performance was deficient. Under this prong, the court measures an attorney’s performance by its “‘reasonableness under prevailing professional norms.’” Id. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). Second, 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.’” Id. at 117-18, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 689).

With respect to guilty plea counsel, the applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). As discussed below, the Applicant has failed to carry his burden in this action. Therefore, this Court finds that the application must be denied and dismissed.

The challenged convictions arose from the armed robbery of a restaurant and the unrelated murder of Angelo "Rick" Timmons and the theft of Timmons' car. (Plea tr. p.13, line 21 – p.18, line 3.) Employees in the restaurant recognized the Applicant as a former co-employee and identified him from a photo lineup. (Plea tr. p.14, lines 2-9.) A co-defendant admitted involvement in Timmons' murder and the theft of his car and implicated the Applicant in the crimes. (Plea tr. p.18, line 21 – p.20, line 2, p.22, lines 6-14.) Additionally, the Applicant gave two statements, admitting to varying degrees of involvement in the murder and car theft. (Plea tr. p. 20, line 16 – p. 21, line 24.)

The Applicant testified Sheila Mims, his prior attorney on the subject charges, met with him on two occasions, but did not discuss the case. He learned that plea counsel was assigned to his case on the Friday before his Monday guilty plea when plea counsel met with him. The Applicant claimed that plea counsel did not discuss the case, the charges, the potential sentences, or any defenses with the Applicant. Plea counsel told the Applicant he should plead guilty because he was facing a sentence of life without parole. On cross-examination, the Applicant was questioned regarding his statements and answers at his guilty plea, including his admissions of guilt and his then-professed satisfaction with guilty plea counsel. During this examination, the Applicant stated he had lied during his guilty plea.

Plea counsel testified that when he received the case he assigned the file to a law clerk for review and briefing. Counsel requested a meeting with the Applicant on July 28. On November 21, 2003, he met with the Applicant and went over the discovery with him for more than two hours. On November 26, the Applicant told counsel to plead guilty and counsel prepared him for the plea. He also met with the Applicant before the plea. As part of the process, he explained the potential sentence for each crime. On cross-examination, counsel testified he did not know for certain whether he informed the Applicant he would be required to serve each day of his murder sentence.

During the Applicant's guilty plea, plea counsel advised the court that he had discussed the charges with Applicant as well as his rights. (Plea tr. p.8, lines 21 – 24.) The court then discussed each charge and the possible penalty for each. (Plea tr. p.9, lines 3 – 16.) Additionally, the court explained to the Applicant his jury trial rights. (Plea tr. p.9, line 23 – 11, line 4.) The Applicant told the court that he had fully discussed the charges with counsel, that counsel had told him about the State's evidence, and that they had discussed possible legal defenses. (Plea tr. p.11, line 10 – p.12, line 4.) The Applicant reported being fully satisfied with plea counsel and asserted he was pleading guilty of his own free will. (Plea tr. p.11, lines 10 – 13; p.11, lines 6-9, p.12 lines 14 – 16.) Additionally, he admitted his guilt to each crime and apologized and asked for forgiveness for what he described as a "really horrible crime, the most wrong, horrible sin." (Plea tr. p.12, line 17 – p.13, line 6; p.35, line 23 – p.36, line 2.)

The Applicant has failed to establish that counsel rendered deficient performance. As to the issue of the amount of time counsel spent with the Applicant before the guilty plea, this Court finds counsel met with the Applicant twice before the day of the plea in addition to meeting with him on

the day of the plea before the plea commenced. The Court further finds that the first meeting lasted more than two hours and concludes that counsel spent an adequate amount of time with the Applicant. The Court notes that it found plea counsel to be a credible witness and found the Applicant, who testified he had lied to the plea court, less than credible. Additionally, the Applicant has failed to establish he was prejudiced in any way by counsel's representation of him including the amount of time he spent with him preparing for the case.

Regarding the Applicant's understanding about his sentence, the Applicant presented no testimony that counsel misadvised him of how much of his murder sentence he would need to serve before he was eligible for release. Rather, it appears the Applicant asserts he simply had a misimpression regarding this issue. This Court concludes counsel was not required to inform the Applicant that he would be required to serve every day of any sentence he received for murder. Cf. Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2004) (holding counsel is not deficient for failing to advise a defendant pleading guilty regarding parole eligibility). This Court further concludes the Applicant's understanding, uninformed in any way by counsel's performance, cannot serve as the basis for an ineffective assistance of counsel claim. Nor does it otherwise serve as a basis for PCR.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms. This Court also finds Applicant has also failed to prove the second prong of Strickland – that he was prejudiced by plea counsel's performance. Applicant was aware of the benefits of entering a guilty plea and did not present any evidence that but for plea counsel's alleged errors, he would have proceeded to trial rather than pleading guilty. See Hill v. Lockhart, 474 U.S. at 58-59, 106 S. Ct. at 370. This Court concludes Applicant has not met his burden of proving counsel

failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

Any Other Allegations

As to any and all allegations that were or could have been raised in the application or at the hearing in this matter, but were not specifically addressed in this Order, this Court finds Applicant failed to present any probative evidence regarding such allegations. Accordingly, this Court finds that Applicant waived such allegations and failed to meet his burden of proof regarding them. Accordingly, they are dismissed with prejudice.

CONCLUSION

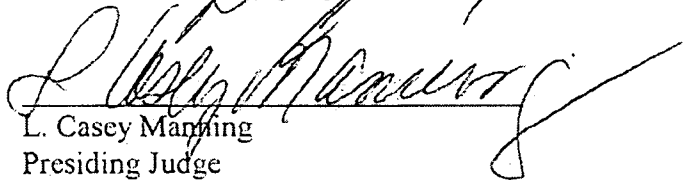
Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner, nor was the Applicant prejudiced by counsel's representation. Therefore, this application for PCR must be denied and dismissed with prejudice.

This Court advises that if the Applicant wants to secure appellate review of this Order, a notice of intent to appeal must be filed and served within thirty (30) days from the receipt of this Order. Pursuant to Rule 71.1(g), SCRCP, PCR counsel must file a notice of intent to appeal on the Applicant's behalf if he wishes to pursue appellate review. The Applicant and counsel are directed to Rules 203, 206, and 227 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

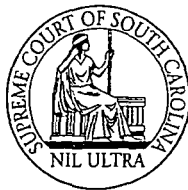
IT IS THEREFORE ORDERED:

1. That the current Application for Post-Conviction Relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 16 day of July, 2007.


L. Casey Manning
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

RECEIVED

MAY 31 2011

TO: Maurice Kelley S.C. SUPREME COURT SCD# 288629
DATE: 5-16-11

We are in receipt of your notice of appeal. It will be necessary for you to provide this office with the following required documents within **ten (10)** days of the date of this notice. Failure to provide the requested documents may result in dismissal of this matter.

- proof of service showing notice of appeal was served on opposing counsel, (Attorney General's Office)
- a copy of the final order of dismissal
- a copy of the conditional order of dismissal (if one was issued)
- a copy of the conditional order of dismissal dated _____.

2009-CP-40-05753

Please return this sheet with the requested documents. Thank you!

The State of South Carolina
In The Supreme Court

Appeal From Richland County
Court of Common Pleas

Alison R. Lee, Administrative Judge

Case No. 2009-CP-400-5753

The State of South Carolina,

Respondent,

v.

Maurice A. Kelly SCD No. 288629,

Appellant.

Proof of Service

I certify that I have served the Notice of appeal on the Respondent in the above captioned case by depositing a copy of it in the United States Mail, postage prepaid, on May 17, 2011, addressed to the Attorney of record, Brian T. Petrano esq, Assistant Attorney General, Post Office Box 11549, Columbia, S.C. 29211.

Maurice A. Kelly
Maurice A Kelly 288629
McCormick Corr. Inst.
386 Redemption Way
McCormick, S.C.
29899

RECEIVED

MAY 31 2011

S.C. SUPREME COURT

Dear Mr. Shearouse,

5-18-11

I received your correspondence today in regards to sending you a copy of Proof of service showing that I have served the Attorney General a copy of my notice of appeal. I sent Proof of service the day prior to receiving your correspondence and I also sent a copy of each order that I received from the lower Court to your office prior to receiving this as well. Being that we're only able to make legal copies on Mondays and Wednesday's in wondering will it still be necessary to provide you with the requested documents being that I've already sent copies of all my orders as well as proof of service of serving the AG prior to receiving this correspondence.

RECEIVED

MAY 25 2011

Maurice J.

SC. DISTRICT COURT

In making its decision the Court had before it the available records of the Richland County Clerk of Court regarding the subject convictions, and/or the Applicant's records from the South Carolina Department of Corrections, the Applicant's application, and the *Respondent's Return and Motion to Dismiss*.

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

9. If you answered *Ano* to (7), state your reasons for not so appealing:

(a) Counsel did not advise me of my Right To appeal.

2

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective assistance of Counsel
(b) Denial of Right To appeal / Subject matter Jurisdiction
(c) Unlawful Guilty Plea / conflict of interest

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) Counsel was unprepared for Trial
(b) Counsel Failed To file notice of appeal / insufficient indictment
(c) did not advise presentment / no lesser included Plea

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) The grounds set forth in (10), was not specifically raised
- (b) due to ineffective assistance of P.C.B. Counsel and counsel's
- (c) Failure to file a Rule 59(e) and failure to appeal issues raised.

19. State clearly the relief you seek in filing this application:

Reverse and Vacate for a new Trial.

1. Memorandum of Law IN Support

Involuntary Guilty Plea

TRIAL Counsel was ineffective for failing to advise me of each and every element of my charges and failed to provide the applicant with due process, equal protection, and fundamental fairness.

In this present application, the applicant alleges he is being held unlawfully because he:

was denied sense of justice, due process and equal protection of law under the fifth, sixth, and fourteenth amendment to the United States Constitution, as well as article 1, § 3 of the South Carolina Constitution. Following the applicant being unlawfully imprisoned pursuant to sections 17-25-10, and 17-19-90 of the South Carolina Code of Laws following the coerced and manipulated guilty pleas under indictments and charges foreseeable numbers, 02-GS-40-10209, 02-GS-40-10103, and 02-GS-40-10038 of documents.

The applicant contends the trial court that accepted his guilty pleas lacked subject matter jurisdiction because his indictments were irregular on their face (not filed with the clerk of court, not dated by foreperson of the grand jury, nor do they contain the applicant's signature waiving presentment

2,

To The Grand Jury); Nor do The applicant's Guilty plea Contain a Lesser included plea; Thus, The indictment is insufficient for conviction for murder and armed robbery as these indictments do not contain the element of a weapon.

See, S.C. Code ANN. 17-19-90; The purpose and effect of this Section Code [1962 Sec. 17-409] is to prevent motions to arrest judgment on grounds based upon an indictment apparent on the face thereof. State v. Lark (1902) 64 S.C. 350, 42 S.E. 175.

Defendant does not waive his right to raise the question on motion in arrest that indictment was found by a Grand Jury illegally drawn under a unconstitutional statute by pleading to the indictment and going to trial. State v. Edwards (1904) 68 S.C. 318, 48 S.E. 395.

S.C. Code ANN. 17-19-40; Special Count for Carrying Concealed Weapons in Case of Murder and Certain Other Crimes (Jurisdiction)? In every indictment for murder, manslaughter, assault and battery, and assault and battery of a high and aggravated nature, and assault and battery with intent to kill, and in every case when the crime is charged to have been committed with a deadly weapon of the character specified in S.C. Code ANN. 16-23-460, there shall be a special count in the indictment for carrying concealed

3,

Weapons and The Jury shall be Required To Find a Verdict on such Special Count. all Cases embraced in The Section, including The Carrying of The Weapons, shall be in The exclusive Jurisdiction of The Court of ~~Judicial~~ General Sessions.

See, State v. Mason, Op. No. 2002-UP-774 (S.C. App. 2002), The Circuit Court does not have subject matter Jurisdiction To Convict a defendant of an offense unless there is an indictment which sufficiently states the offense, the defendant waives presentment, or the offense is a lesser included offense of the crime charged in the indictment. ("The applicant did not waive presentment, and applicant did not plead to a lesser included offense of the crime charged in the indictment.") State v. Primus, 564 S.E.2d 103 (2002); also, Brown v. State, 540 S.E.2d 846 (2001); Browning v. State, 465 S.E.2d 358 (1995).

The subject matter Jurisdiction of The Circuit Court over a matter is fundamental. Anderson v. Anderson, 382 S.E.2d 897 (1989), Issues regarding whether the Circuit Court had subject matter Jurisdiction may be raised at any time. Brown, 343 S.C. at 346, 540 S.E.2d at 848. also see, State v. Smalls, 581 S.E.2d 850 (S.C. App. 2003); State v. Ellison, 596 S.E.2d 596 (2003); Thompson v. State, 593 S.E.2d 139 (2004); (Criminal Conspiracy/Jurisdictional defect, 17-19-96).

4,

BUTLER V. STATE, 397 S.E.2d 87 (1990).

Conflict of Interest

In The instant case, Trial Counsel was inert when Counsel knowingly knew that he had represented one of The applicant's co-defendants (Myrone Kelley) in the past, yet Counsel failed to remove "himself" from the case. The error did prejudice the applicant and rendered the trial fundamentally unfair, and denied his right to effective assistance of Counsel.

An applicant alleging his conviction was unlawful due to a conflict of interest from Counsel's representation bears the burden of showing that a potential conflict actual materialized into a realized conflict adversely affecting Counsel's performance. JACKSON V. STATE, 495 S.E.2d 768 (1998) (citing CUTLER V. SULLIVAN, 100 S.Ct. 1708 (1980); DUNCAN V. STATE, 315 S.E.2d 89 (1984); Budgett V. STATE, 484 S.E.2d 101 (1997)). The Rules of Professional Conduct, whose purpose is to regulate and guide the legal profession in ethical conduct, do not have any bearing on assessing a claim of ineffective assistance of Counsel.

Right To Appeal

In The instant case, The ^{applicant} has a right to appeal the denial of his post-conviction application ~~application~~ decided and filed on July 17, 2007.

5

An applicant is entitled to seek appellate review of the denial of Relief, S.C. Code Ann. 17-27-100 (1985). Applicant must seek appellate review by way of a petition for writ of certiorari with the Supreme Court. Review of the application is discretionary with the court. AUSTIN V. STATE, 409 S.E.2d 395 (1991); KNIGHT V. STATE, 325 S.E.2d 535 (1985).

Applicant is entitled to his "one bite at the apple" and this includes appeal from the denial of post-conviction relief. AUSTIN; AICE V. STATE, 409 S.E.2d 392 (1991).

Thus, pursuant to S.C. Code Ann. 17-27-45 (A), (B), and (C), the applicant is entitled to proceed on this application as the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction and sentence.

Thus, the applicant knowingly and intelligently waive his right to appeal and is entitled to an appeal. LEGG V. STATE, 562 S.E.2d 618 (2002); see also, WILSON V. STATE, 559 S.E.2d 581 (2002); see, CARTER V. STATE, 522 S.E.2d 342 (1999).

Date: 08-03-09

Maurice Kelly

Findings of Fact and Conclusions of Law

SUCCESSIVE

This Court finds that the current application for post-conviction relief must be summarily dismissed because it is successive to his prior application for post-conviction relief. S.C. Code Ann. §17-27-90 provides that:

All grounds for relief available to an application under this chapter must be raised in his original, supplemental or amended Application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding 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.

Successive applications are disfavored and the burden is on Applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).

This Court finds that the current allegations were or could have been raised in the proceedings based on Applicant's prior application for post-conviction relief and thus the current application is successive and barred under S.C. Code § 17-27-90. Applicant has failed to establish sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief;

therefore, he has failed to meet the burden imposed upon him. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); Aice, 305 S.C. 448, 409 S.E.2d 392; Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834.

Belated Direct Appeal

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, 208 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).

A claim of this nature, that Applicant was unconstitutionally denied his right to a direct appeal and is deserving of a belated direct appeal, is subject to the prohibition on successive applications and may not be raised in a second or subsequent application for Post Conviction Relief. Graham v. State, 378 S.C. 1, 3, 661 S.E.2d 337, 338 (2008) ("In the case at hand, petitioner clearly could have raised the issue of the denial of his right to direct appeal in his first PCR

application. Because petitioner failed to raise the issue in his first application, the PCR judge correctly found petitioner was barred from raising it in a successive application.”). Therefore, this Court finds that this allegation is without merit and is hereby denied and dismissed.

§17-27-45(a)

This Court finds that this Application for Post-Conviction Relief should be summarily 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. 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 judgement 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 December 1, 2003. This Application was filed on August 12, 2009, well after the one year 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, this Court finds that the application for post-conviction relief is summarily dismissed for failure to file within the time mandated by statute and for being successive.

awl

Based upon its review of the pleadings in this matter, this Court does not see the need to appoint counsel to represent the Applicant and expresses its intent to summarily dismiss this matter unless the Applicant advises this Court with specific reasons, factual or legal, why it should not dismiss the matter in its entirety. The Applicant is granted thirty (30) 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:

Brian T. Petrano, Esquire
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

AND IT IS SO ORDERED this 15th day of October, 2010.


The Honorable Alison Renee Lee
Administrative Judge
Fifth Judicial Circuit

Columbia, South Carolina

STMBP ✓

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2009CP4005753

Maurice #288629 Kelley
Plaintiff

vs.

State of South Carolina
Defendant

2011 APR 25 PM 2:29
JEANETTE W McBRIDE
C.C.P. 29 G.S.
RICHLAND COUNTY
FILED

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 and heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):
 - Rule 12(b), SCRPC;
 - Rule 41(a), SCRPC (Vol. Nonsuit);
 - Rule 43(k), SCRPC (Settled);
 - Other:
- ACTION STRICKEN (CHECK REASON):
 - Rule 40(j) SCRPC;
 - 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 _____, 2011.

PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 2011, and a copy mailed first class this 25 April 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Maurice #288629 Kelley

ATTORNEY(S) FOR THE PLAINTIFF(S)

Brian T Petrano

ATTORNEY(S) FOR THE DEFENDANT(S)
Jeanette W McBride

Clerk of Court

SCANNED

ATTORNEY GENERAL'S OFFICE

513 BR
RECEIVED 4/29/11

ADMINISTRATIVE INSTRUCTIONS

FILE OPEN END

HAVE SEARCH COPIES MADE

ROUTE TO _____

ORDER: _____ TRANSCRIPT

PEN RECORDS _____ CLERK RECORDS

OTHER: _____

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

KELLEY Maurice A, 288629,)

2009CP4005753

Applicant,)

v.)

State of South Carolina,)

Respondent.)

FINAL ORDER OF DISMISSAL
(Granting Austin v. State belated PCR appeal)

RICHLAND COUNTY
FILED
2011 APR 22 AM 8:58
JEANETTE W. ACERIDGE
C.C.P. & J.S.S.

This matter comes before this Court by way of an application for post-conviction relief filed August 12, 2009. Respondent made its *Return and Motion to Dismiss* on or about October 6, 2010, requesting that the Application be summarily dismissed. Pursuant to this request, and after reviewing the pleadings in this matter and/or any available relevant records attached thereto, this Court issued a Conditional Order of Dismissal (COD) provisionally denying and dismissing this action, while giving the Applicant ~~twenty~~^{thirty} (30) days from the date of service of said Order in which to show why the dismissal should not become final. The Conditional Order of Dismissal was served on this Applicant on or about November 9, 2010.

[Image inserted on next page]

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
Post Office Box 21787 - Columbia, South Carolina 29221

Pursuant to Rule 4(d)(2), SCRCP, the Director of the South Carolina Department of Corrections has designated Sgt S. T. H. (Server) as his duly authorized agent for the purpose of making service of the signed Conditional Order of Dismissal on the below named individual

Maurice Kelley
STATE OF SOUTH CAROLINA) AFFIDAVIT OF PERSONAL SERVICE
COUNTY OF McCormick)

On this 9 day of November, 2010, I served the signed Conditional Order of Dismissal on Inmate M. Kelley, SCDC Inmate No. 288629 by delivering personally and leaving a copy of the same at McCormick Correctional Institution, McCormick, South Carolina. Deponent is not a party to this action.

s/ Sgt S. T. H.
SCDC Server

SWORN TO AND SUBSCRIBED BEFORE ME

this 9 day of November, 2010
Kwame C. Merton (L.S.)
Notary Public for South Carolina
My Commission Expires: Feb 28 2018

ADMISSION OF SERVICE

Service of a copy of the signed Conditional Order of Dismissal is admitted at the S.C. Department of Corrections, McCormick Correctional Institution, MCI, McCormick County, South Carolina, this 9 day of November, 2010.

s/ Maurice Kelley
Inmate Signature
SCDC No. 288629

List case number here

2009-CP-40-5753

In a document captioned "Motion to Object / Reconsider" and dated November 9, 2010, the Applicant renewed the arguments put forth in his PCR application. However, the Applicant's contention that he received ineffective assistance of counsel on his prior post-conviction relief application is not a ground for relief. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Therefore, "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under '17-27-90.'" Aice, 305 S.C. at 451, 409 S.E.2d at 394.

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Austin recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. Id. Austin "is limited to its particular factual situation" Aice, 305 S.C. at 452, 409 S.E.2d at 394. Pursuant to Austin, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application. By way of this proposed Final Order, the Respondent admits that they do not have a good faith argument as to why the Applicant should not be afforded a

belated appeal from his prior PCR (04CP4004980).¹ This Court further finds that the Applicant's allegation that he is entitled to a belated appeal due to his prior PCR attorney's failure to perfect an appeal on his behalf, is not barred and is meritorious. Where a post-conviction relief judge determines that 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); *See also*, King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) which held in relevant part:²

- (1) When the post-conviction relief judge has affirmatively found that the right to appellate review of a previous post-conviction relief order was not knowingly and intelligently waived, the petition shall raise this question along with all other questions petitioner seeks to have reviewed from that order. At the same time this petition is served, petitioner shall serve and file an *Austin* petition addressing the questions from the previous post-conviction relief order. The *Austin* petition shall comply with the requirements of Rule 227(d). The Appendix shall contain the entire records from both post-conviction relief proceedings. Respondent's return to the petition shall address the questions from the latest post-conviction relief order, including whether the right to appellate review of the previous post-conviction relief order was knowingly and intelligently waived. At the same time this return is served, respondent shall serve and file an *Austin* return addressing the questions from the previous post-conviction relief order.
- (2) When the post-conviction relief judge has found that the applicant is *not* entitled to an *Austin v. State* review, the petition shall raise the question of waiver of the right to appellate review of the previous post-conviction relief order along with all other questions petitioner seeks to have reviewed from that order. The petition shall also contain a "Statement of *Austin* Questions" listing the questions to be raised if an *Austin v. State* review is granted. An *Austin* petition addressing the questions will not be allowed unless certiorari is granted on the *Austin v. State* question. King v. State, 308 S.C. 348, 349, 417 S.E.2d 868, 868-69 (1992).

¹ That prior PCR has the Applicant's last name as "Kelly."

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

This Court has reviewed the Applicant's response to the COD in its entirety, in conjunction with the original pleadings, and finds that – but for the belated PCR appeal issue - a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final.


IT IS THEREFORE ORDERED

1. The Application for Post-Conviction Relief is **DENIED AND DISMISSED WITH PREJUDICE.**

- a. Within thirty (30) days of service of this Order, the Applicant shall file a Notice of Appeal to secure the appropriate review of the Applicant's first post-conviction relief action (04CP4004980). The Applicant is directed to Appellate Court Rule 243 for the appropriate procedure for a belated appeal;³ and

2. The Applicant is remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 20 day of April, 2011.


The Honorable Alison Renee Lee
Fifth Judicial Circuit

Columbia, South Carolina.

³ In the alternative, the Applicant can request that this Court appoint counsel for the sole purpose of filing a notice of appeal and forwarding the issue(s) to the Office of Appellate Defense.

RECEIVED

MAY 20 2011

S.C. SUPREME COURT

The State of South Carolina
In The Supreme Court

Appeal From Richland County
Court of Common Pleas

Alison R. Lee, Administrative Judge

Case No. 2009-CP-4005753

State of South Carolina

Respondent,

v.

Maurice A. Kelley, SCDC NO. 288629

Appellant.

Notice of Appeal

Maurice A. Kelley appeals the order of the Honorable Alison R. Lee date April 15, 2011 denying Post-conviction relief Granting Austin v. State belated appeal. Appellant received written notice of the entry of this order April 29, 2011.

May 17, 2011

Other Counsel of Record:
Brian T. Petrano, Esq.
Assistant Attorney General
P.O. Box 11549
Columbia S.C. 29211
Tele: (803) 734-3970
Facs: (803) 253-6282
Attorney For Respondent

Maurice A. Kelley

Maurice A. Kelley SCDC NO. 288629
386 Redemption Way
McCormick, S.C. 29899
Appellant.

The State of South Carolina
In The Supreme Court

Appeal From Richland County
Court of Common Pleas

Alison R. Lee, Administrative Judge

Case No. 2009-CP-400-5753

State of South Carolina

Respondent,

✓

Maurice A. Kelley S.B.C. NO. 288629

Appellant.

PROOF OF SERVICE

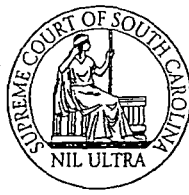
I certify that I have served the Notice of appeal on the Respondent in the above captioned case by depositing a copy of it in the U.S. Mail, postage prepaid, on May 17, 2011, addressed to the Attorney of record, Brian T. Petrano, Esq. Assistant Attorney General, P.O. Box 11549, Columbia, S.C. 29211.

May 17, 2011

Sworn to and subscribed
before me this _____ day
of _____,

my commission exp. _____

Maurice A. Kelley
Maurice A. Kelley # 288629
McCormick Corr. Inst.
386 Redemption Way
McCormick, S.C.
29899



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

TO: Maurice Kelley SCDC# 288629
DATE: 5-16-11

We are in receipt of your notice of appeal. It will be necessary for you to provide this office with the following required documents within **ten (10)** days of the date of this notice. Failure to provide the requested documents may result in dismissal of this matter.

- proof of service showing notice of appeal was served on opposing counsel, (Attorney General's Office)
- a copy of the final order of dismissal
- a copy of the conditional order of dismissal (if one was issued)
- a copy of the conditional order of dismissal dated _____.

2009-CP-40-05753

Please return this sheet with the requested documents. Thank you!

The State of South Carolina
In The Supreme Court

RECEIVED

MAY 16 2011

S.C. SUPREME COURT

Appeal From Richland County
Court of Common Pleas

Alison R. Lee, Administrative Judge
Case NO. 2009-CP-400-5753

Maurice A. Kelley, SCDC NO. 288629 ----- Appellant,

✓
State of South Carolina ----- Respondent.

Notice of Appeal

Pursuant to Rule 203 and 227 SCACR, Maurice A. Kelley, Appeals the Final Order of Dismissal of the Honorable Alison R. Lee dated April 15, 2011 denying his Application for Post Conviction Relief (Granting Austin v State belated PCR appeal). Appellant received written notice of Final Order of Dismissal granting belated Appeal April 29, 2011.

May 11, 2011

Other Counsel of Record:
Brian T. Petrano, Esq.
Assistant Attorney General
P.O. Box 11549
Columbia, S.C. 29211
Telephone (803) 734-3970
Facsimile (803) 253-6283
Attorney For Respondent.

Maurice Kelley
Pro Se Appellant,
Maurice A. Kelley #288629
McCormick Correction Institution
386 Redemption Way
McCormick, S.C. 29899

State of South Carolina
County of Richland

Maurice A. Kelley #288629
Applicant,

v.

State of South Carolina,
Respondent.

In The Court of
Common Pleas.

Certificate of
Service

C.A. NO. 2009-CP-400-
5753

I, Maurice A. Kelley, do hereby Certify that on this day I have submitted a Notice of Appeal and Certificate of Service to be filed with the Supreme Court of S.C. in the above captioned case by depositing same in the U.S. mail, postage prepaid:

Date 5-11-2011

Maurice Kelley

Sworn to and subscribed before
me this 11 Day of May, 2011

Mary G. Markan

My Commission exp: Feb 28, 2016

Maurice Kelley # 288629
S.M.U. B-73
386 Redemption Way
McCormick, S.C.
29899

Ams

The Supreme Court of S.C.
Daniel E. Shearouse, Clerk of Court
P.O. Box 11330
Columbia, S.C.
29211