

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

MAR 03 2014

Certiorari to Newberry County

James W. Johnson, Jr., Circuit Court Judge
S.C. Supreme Court

MILO E. TUDOR,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2013-001242

PETITION FOR ORDER TO RECONSTRUCT
THE RECORD OF APPELLANT'S
TRIAL OR IN THE ALTERNATIVE
AN ORDER SETTING ASIDE HIS CONVICTIONS
AND ORDERING A NEW TRIAL

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, counsel requests an order requiring the parties to reconstruct the record of Petitioner's jury trial held on August 7, 1997, before the Honorable James W. Johnson, Jr. in Newberry County. In the alternative, counsel for Petitioner requests an order setting aside the conviction and ordering a new trial.

In accordance with Rule 240(c), SCACR, counsel submits the following:

1. In January of 1997, the Newberry County Grand Jury, in a three count indictment, indicted Petitioner for kidnapping, assault and battery with intent to kill [ABWIK] and possession of a knife during the commission of a violent crime, indictment #1997-GS-36-00021. Petitioner proceeded to jury trial on August 7, 1997, before the Honorable James W. Johnson, Jr. Attorney Harry DePew represented Petitioner at trial. The jury returned a verdict of guilty on each count. Judge Johnson sentenced petitioner to 30 years suspended upon the service of 15 years for the kidnapping charge, 20 years concurrent for the ABWIK charge and 5 years concurrent for the weapon charge. It appears that a timely notice of intent to appeal was filed but the appeal was not perfected and on May 5, 1998, the appeal was dismissed. The transcript of this trial is no longer available.

2. It appears that Petitioner filed a petition for habeas corpus in federal court. On August 1, 2002, the federal court dismissed the petition for failure to exhaust all state court remedies. On August 21, 2001, Petitioner filed an application for post conviction relief, 2002-CP-36-357. In the application petitioner alleged ineffective assistance of counsel denial of direct appeal. The State filed a return on August 22, 2003. On May 14, 2004, the State, represented by attorney Julie M. Thames, and the Petitioner, represented by attorney Donald B. Hocker, appeared before the Honorable James E. Lockemy. The State moved to dismiss the application based on the statute of limitation and the doctrine of laches. The PCR court did not hear testimony at the May 14, 2004, hearing. In a written order signed June 24, 2004, the PCR judge dismissed the application based on the statute of limitations and the doctrine of laches. In the order of dismissal the PCR judge specifically notes that the trial transcript was no longer available. (Order of Dismissal 2002-CP-36-357, p. 3). A timely notice of intent to appeal was filed and a petition for writ of certiorari pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), filed on Petitioner's behalf. In an order dated August 26, 2005, this court denied the petition for

writ of certiorari. A copy of the Order of Dismissal and the Order Denying the Petition for Writ of Certiorari is attached and made a part of this petition.

3. It appears that Petitioner filed a second petition for habeas corpus in federal court. It appears that on January 30, 2007, the federal court granted the State's motion for summary judgment, denying the habeas claim. On April 5, 2010, Petitioner filed a second application for post conviction relief, 2010-CP-36-0154. On October 17, 2011, the State filed a return and motion to dismiss. On October 25, 2011, the Honorable Eugene C. Griffith, Jr. signed a conditional order of dismissal. On December 9, 2011, Judge Griffith signed the final order of dismissal. On February 3, 2012, this Court dismissed the appeal based on the failure, as required by Rule 243(c), SCACR, to assert an arguable basis for asserting that the determination by the lower court was improper. The final Order of Dismissal from the PCR court and the Order of Dismissal from this Court are attached and made a part of this petition.

4. On September 17, 2012, Petitioner filed a petition for writ of habeas corpus in the Court of Common Pleas in the Eighth Judicial Circuit. The petition was docketed 2012-CP-36-00511. The State filed a return and motion to dismiss on October 30, 2012. On March 12, 2013, an evidentiary hearing was held before the Honorable Clifton B. Newman. Attorney Tommy Thomas represented Petitioner at the hearing. Attorney J. Rutledge Johnson was present on behalf of the State. In a written order signed May 21, 2013, Judge Newman granted a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). A copy of the Order is attached and made a part of this petition.

5. Counsel has confirmed that the trial transcript is unavailable. Neither the Office of Appellate Defense nor the South Carolina Attorney General's Office has a copy of the transcript as it was missing at the time of the first PCR hearing on May 14, 2004. In a letter dated February 7, 2014, Desiree R. Allen, Court Reporter manager for the South Carolina Court

Administration confirmed that the trial transcript from proceedings before the Honorable James W. Johnson, Jr. on August 7, 1997, was no longer available. A copy of the letter is attached and made a part of this petition.

When a trial transcript has been lost or destroyed, the Court may remand to have the record reconstructed. Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002); China v. Parrott, 251 S.C. 329, 162 S.E.2d 276 (1968); Koon v. State, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004); Dolive v. J.E.E. Developers, Inc., 308 S.C. 380, 383, 418 S.E.2d 319, 321 (Ct. App. 1992); State v. Ladson, 373 S.C. 320, 325, 644 S.E.2d 271, 273-274 (Ct. App. 2007). Petitioner seeks reconstruction of the record of the trial held in 1997 to permit meaningful appellate review of the issues raised at trial.

In the alternative, petitioner requests this Court set aside his conviction and sentence and remand for a new trial because it may be impossible to reconstruct the trial transcript in such a way as to provide meaningful review. The trial judge, the Honorable James W. Johnson, Jr., passed away in 2008. The South Carolina Bar website indicates that trial counsel, Harry Depew, is no longer a member of the Bar and his address on file is no longer current. In Deaton v. Leath, 279 S.C. 82, 84, 302 S.E.2d 335, 336 (1983), the defendant's convictions were set aside and a new trial had where the court reporter's equipment malfunctioned and there was no transcript of the trial court proceedings in the case from which to base an appeal. Citing Deaton, this Court denied a request for reconstruction in State v. Serrette, 375 S.C. 650, 652-653, 654 S.E.2d 554, 555 (Ct. App. 2007) where the reason for the lack of transcript was due to the defendant's absence for a ten-year period, which this Court explained was "not a situation where the court reporter's equipment malfunctioned at trial leading to a loss of the trial transcript." The missing transcript in the present case is not due to Petitioner's absence. Petitioner requests this Court order a new trial in his case.

Counsel respectfully requests an order for the reconstruction of the record from Petitioner's trial on August 7, 1997, so that, pursuant to Judge Newman's order granting belated review pursuant to White v. State, counsel may perfect the belated appeal. In the alternative, given the likelihood that it will be impossible to reconstruct the record, counsel requests this Court set aside the conviction and remand for a new trial. **While this petition is pending, Appellant asks this Court to hold the timelines for filing his initial brief and designations in abeyance.**

Respectfully submitted,



Kathrine Haggard Hudgins, S.C. Bar #65321

Appellate Defender

South Carolina Commission on Indigent Defense

Appellate Division

1330 Lady St. P.O. Box 11589

Columbia, SC 29211

(803)-734-1343

khudgins@sccid.sc.gov

March 3, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Newberry County
James W. Johnson, Jr., Circuit Court Judge

MILO E. TUDOR,

PETITIONER,

V.

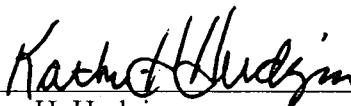
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2013-001242

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the petition for order to reconstruct the record, or in the alternative, an order setting aside the conviction and ordering a new trial in the above referenced case has been served upon J. Rutledge Johnson, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 3rd day of March, 2014.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

SUBSCRIBED AND SWORN TO before me
this 3rd day of March, 2014.



(L.S.)

Notary Public for South Carolina
My Commission Expires: July 24, 2022.

STATE OF SOUTH CAROLINA)
)
COUNTY OF NEWBERRY)
)
Milo Earl Tudor,)
S.C.D.C. No. 243378,)
)
Applicant,)
)
vs.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
IN THE EIGHTH JUDICIAL CIRCUIT

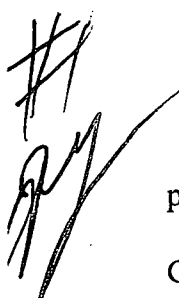
C.A. No. 2002-CP-36-357

**ORDER OF DISMISSAL
WITH PREJUDICE**

Wesley Locklair, Esq. for the Applicant
Julie M. Thames, Assistant Attorney General, for Respondent

This matter comes before the Court by way of an application for Post-Conviction Relief (PCR) filed August 21, 2002. An evidentiary hearing was convened at the Laurens County Courthouse on May 14, 2004. At the hearing, Respondent made a Motion to Dismiss asserting that the Applicant failed to file within the statute of limitations and that the Application was barred by the doctrine of laches.

I. PROCEDURAL BACKGROUND



The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Newberry County Clerk of Court's orders of commitment. The Newberry County Grand Jury indicted the Applicant at the January, 1997, term of General Sessions for kidnaping, assault and battery with intent to kill (ABWIK), and possession of a firearm or knife during the commission of a violent offense. (970GS-36-21). Harry DePew, Esq. represented the Applicant.

On August 7, 1997, the Applicant proceeded to trial, after which he was found guilty of the indicted charges. The Honorable James W. Johnson, Jr., sentenced the Applicant to confinement for thirty (30) years suspended to fifteen (15) years and five (5) years probation on the kidnaping charge, to twenty (20) years on the ABWIK charge, and to five (5) years on the firearm charge, all sentences to run concurrently. A timely Notice of Appeal was filed on the Applicant's behalf. The appeal was dismissed on May 5, 1998, and the remittitur was filed on May 21, 1998.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the records of the County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, and the pleadings and makes the following findings of fact and conclusions of law:

This Court finds that the current application for PCR should be dismissed for failure to comply with the filing procedures of the Post Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160 (Supp. 1999). The Act 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.

S.C. Code Ann. § 17-27-45(a) (Supp. 1999).

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 offenses he challenges in this Application on August 7, 1997. The remittitur from the dismissal of his direct appeal was filed on May 21, 1998. The

Applicant filed this Application on June 21, 2002, more than three years after the one year statutory filing period had expired.

This Court finds this Application is also barred by the doctrine of laches. Laches is (1) neglect for an unreasonable and unexplained length of time under circumstances affording opportunity for diligence to do what in law should have been done; (2) resulting prejudice to the opposing party. Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party; delay alone in assertion of a right does not constitute laches. Ex parte Stokes, 256 S.C. 260, 182 S.E.2d 306 (1971). The Applicant did not offer any explanation as to why he did not pursue this relief earlier. In addition, the Respondent is prejudiced due to the fact that a transcript of the Applicant's trial is no longer available.

III. CONCLUSION

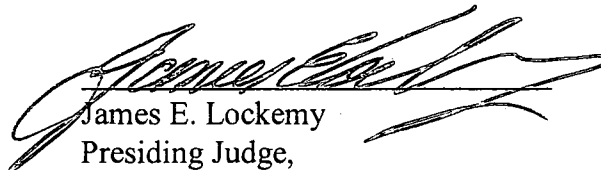
Based on the records, pleadings, the arguments of counsel, and evidence presented this Court finds that the Applicant failed to file his application for post conviction relief within the time mandated by the Post Conviction Procedure Act.

IT IS THEREFORE ORDERED THAT:

1. The Respondent's Motion To Dismiss is hereby **GRANTED** and the post-conviction relief application is **DENIED AND DISMISSED WITH PREJUDICE**.

2. The Court advises the Applicant and his attorney of record that any Notice of Appeal must be filed within thirty (30) days of service of the signed copy. Your attention is directed to South Carolina Appellate Court Rule 227 for appropriate procedures on appeal.

3. The Applicant is remanded to the custody of the Respondent for the completion of his sentence.


James E. Lockemy
Presiding Judge,
Eighth Judicial Circuit

Dillon, South Carolina
June 24, 2004

FORM 4

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

JUDGEMENT IN A CIVIL CASE

CASE NO. *2002-CP-36 357*

PLANTIFF(S)

*Milo Earl
Judson*

DEFENDANT(S)

State of S.C.

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), 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

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

Dated at *Wesley*, South Carolina, this *24* day of *June*, 2004.

S/James E. Lockamy
PRESIDING JUDGE

This judgement was entered on the *28* day of *June*, 2004, and a copy mailed first class this *29* day of *June*, 2004 to attorneys of record or to parties (when appearing pro se) as follows:

Wesley Lockamy, esq.

ATTORNEY(S) FOR THE PLAINTIFF(S)

Bryan W. Oakes

ATTORNEY(S) FOR THE DEFENDANT(S)

Spacie S. Bowles (70)
CLERK OF COURT

The Supreme Court of South Carolina

Milo Earl Tudor, Petitioner,

v.

State of South Carolina, Respondent.

ORDER

JACKIE S. BOWERS
CLERK OF COURT

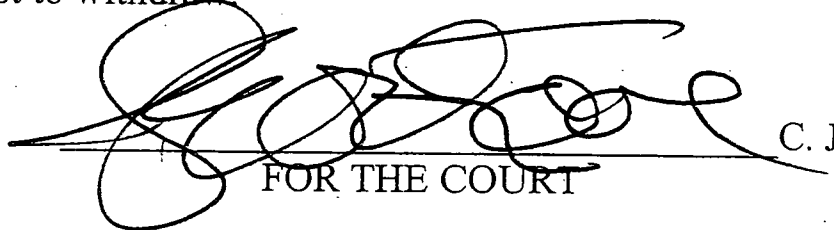
2005 SEP 14 A 10:47

FILED
MEMBERY COUNTY

This matter is before the Court on a petition for a writ of certiorari following the denial of petitioner's application for post-conviction relief.

Petitioner's counsel asserts that the petition is without merit and requests permission to withdraw from further representation. Petitioner has filed a *pro se* petition.

After careful consideration of the entire record as required by *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988), we deny the petition and grant counsel's request to withdraw.


C. J.
FOR THE COURT

Columbia, South Carolina

August 26, 2005

STATE OF SOUTH CAROLINA)
COUNTY OF NEWBERRY)

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

Milo Earl Tudor, #243378,)
Applicant,)

2011-CP-36-1675

v.)

FINAL ORDER OF DISMISSAL

State of South Carolina,)
Respondent.)

FILED
NEWBERRY COUNTY
2011 DEC 16 A 11:58
JACKIE S. DOWERS
CLERK OF COURT

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed April 5, 2010 and amended May 7, 2010. The Respondent (the State) made its Return and Motion to Dismiss on October 17, 2011, 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 October 25, 2011, 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.

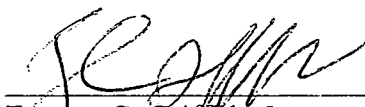
In a document titled "Return To Conditional Order of Dismissal," dated November 10, 2011, the Applicant, through Tommy A. Thomas, Esquire, argues the Applicant was informed by trial counsel that a direct appeal was filed on his behalf. The Applicant also alleges that he was told the next step would be filing an Initial Brief, but was advised on a later date that the direct appeal was dismissed. In essence, the Applicant alleges a denial of a meaningful direct appeal under White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

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. The Applicant has shown no reason why these issues were not litigated in his first PCR application. Further, S.C. Code § 17-27-90 states "[a]ll 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." Accordingly, this Court finds no reason why the Conditional Order of Dismissal should not become final.

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 advises 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.

AND IT IS SO ORDERED this 9th day of December, 2011.



Eugene C. Griffith, Jr.
Chief Administrative Judge

Eighth Judicial Circuit

Winkley, South Carolina.

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2010CP3600154

Milo Earl Tudor	South Carolina State Of
SCANNED	
PLAINTIFF(S)	DEFENDANT(S)

Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant
---------------	---

DISPOSITION TYPE (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), 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; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

S/Eugene C. Griffith, Jr.
Circuit Court Judge

2154
Judge Code

12/09/2011
Date

For Clerk of Court Office Use Only

This judgment was entered on **December 16, 2011**, and a copy mailed first class or placed in the appropriate attorney's box on **December 19, 2011**, to attorneys of record or to parties (when appearing pro se) as follows:

Milo Earl Tudor ,
Tommy Arthur Thomas Attorney at Law P.O. Box 88 Irmo,
SC 29063

J Rutledge Johnson Assistant Attorney General Po Box
11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

S/Jackie S. Bowers(BJB)

Jackie S Bowers - Clerk of Court

Court Reporter

The Supreme Court of South Carolina

Milo Earl Tudor,

Petitioner,

v.

State of South Carolina,

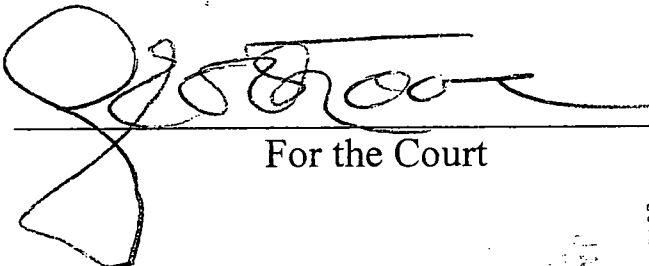
Respondent.

The Honorable Eugene C. Griffith, Jr.
Newberry County
Trial Court Case No. 2010-CP-36-00154

ORDER of DISMISSAL

In the explanation required by Rule 243(c), SCACR, petitioner has failed to show that there is an arguable basis for asserting that the determination by the lower court was improper. Accordingly, this matter is dismissed. The remittitur will be sent as provided by Rule 221(b), SCACR.

IT IS SO ORDERED.



C.J.
For the Court

Columbia, South Carolina

February 3, 2012

cc: Appellate Defense
Tommy Arthur Thomas, Esquire
Staff Attorney J. Rutledge Johnson

FILED
NEWBERRY COUNTY
2012 FEB 24 A 11:06
JACKIE S. BOWERS
CLERK OF COURT

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

)
) IN THE COURT OF COMMON PLEAS
)
DOCKET NO.: 2012-CP-36-511

MILO EARL TUDOR,

)
)
) Petitioner,

) ORDER GRANTING BELATED
) DIRECT APPEAL PURSUANT TO
) WHITE V. STATE

v.

)
)
) State of South Carolina,

)
)
) Respondent.
)

FILED
NEWBERRY COUNTY
2013 MAY 24 AM 10 00
JOKIE S. BOWERS
CLERK OF COURT

PROCEDURAL HISTORY

This matter comes before the Court by way of an Order for Hearing dated November 21, 2012 and a Petition for Writ of *habeas corpus*. Milo Earl Tudor, who is an inmate of the South Carolina Department of Corrections (SCDC), submitted a Petition for a Writ of *habeas corpus* to the Newberry County Clerk of Court. Because of conflicts held by the resident judges of the Eighth Judicial Circuit, the Chief Justice of the Supreme Court of South Carolina issued an order on June 25, 2012, designating the Honorable William P. Keesley to act as Chief Judge for Administrative Purposes related to this matter.

Mr. Tudor is being held for convictions under a three count Indictment, Number 1997-GS-36-00021. The charges are kidnapping, assault and battery with intent to kill (ABWIK), and possession of a knife during the commission of a violent crime. He had a jury trial and was sentenced by The Honorable James W Johnson, Jr. as follows: 30 years, suspended on the service of 15 years, with probation for 5 years on the kidnapping charge; 20 years on the ABWIK charge; and, 5 years on the weapon charge. The sentences run concurrently.

In *Gibson v. State*, 329 S.C. 37, 495 S.E.2d 426 (1998), the Supreme Court of South Carolina discussed the interaction between a Petition for Writ of *habeas corpus* and an application for post-conviction relief (PCR). The Supreme Court held that Gibson's *habeas corpus* petition did not constitute a valid *habeas corpus* petition, but should instead be treated as a PCR Application.

In the document which Mr. Tudor has captioned as a Petition for Writ of *Habeas Corpus*, he begins by stating, "Petitioner has been trying to show and establish in court the ineffectiveness of trial counsel, to perfect direct appeal or advise petitioner of appeal rights, and of post-conviction counsel, to adequately present or argue issues." He asserts due process violation and double jeopardy.

Mr. Tudor has repeatedly raised issues concerning the prosecution of his case and his appeal. He has asserted that he could not be prosecuted on the indictment mentioned above because of what he perceives to be problems with the issuance of two indictments and asserts jurisdictional issues related to the timing of the dismissal of one indictment. The arrest warrant (F-015292) was issued for the ABWIK charge that occurred on September 2, 1996.

An indictment bearing the number 1996-GS-36-00652 (F-015292) was prepared and submitted to the Grand Jury. A true-billed indictment was issued on October 28, 1996 for ABWIK. In 1997, a second indictment was prepared and submitted to the Grand Jury on multiple (three) counts, and it was true billed on January 6, 1997. This indictment included the charge originally set forth in 96-GS-36-00652.

The trial began on August 1997. It appears at trial there was a discussion by the Court of which indictment were being pursued. The State elected to proceed on indictment 97-GS-36-021 containing the multiple counts. The State decided to *nolle prosequi* the indictment 96-GS-36-

652 after the empanelling of the Jury and before a verdict was rendered. An appeal was filed, and the South Carolina Court of Appeals issued an Order of Dismissal on May 5, 1998. The Remittitur was issued on May 21, 1998. The dismissal was based on the failure to pursue the appeal. The issue presented before this Court was never reviewed by the Supreme Court.

Mr. Tudor then filed a federal petition for *habeas corpus*. The United States Magistrate recommended dismissal without prejudice for failure to exhaust all state remedies, and the United States District Judge adopted that report on August 1, 2002.

A PCR action was filed in State Court on August 21, 2002 (Case Number 2002-CP-36-00357). It alleged ineffective assistance of counsel and denial of Mr. Tudor's right to a direct appeal. That action was dismissed by The Honorable James E. Lockemy on June 28, 2004. Counsel for Mr. Tudor filed a petition for certiorari, which was denied by the South Carolina Supreme Court. The Remittitur was issued on September 14, 2005.

Another federal action followed. Mr. Tudor filed for *habeas corpus* in federal Court. The United States District Judge dismissed the Petition by Summary Judgment on January 30, 2007.

A PCR action was filed in State Court (Case Number 2010-CP-36-00154) on April 5, 2010, and amended on May 7, 2010. In that PCR application, Mr. Tudor raised ineffective assistance of counsel. He alleged that trial counsel failed to perfect his direct appeal, file a brief, or advise him of his appellate rights. Mr. Tudor also alleged denial of his right to direct appeal. He asserted that he did not knowingly and intelligently waive his right to appeal. He also alleged that the PCR judge (Judge Lockemy) erred in summarily dismissing his application, maintaining that his counsel did not properly raise his grounds for PCR and denied him a fair hearing. This second PCR claim was dismissed by The Honorable Eugene C. Griffith, Jr. in

2011 for being successive. Mr. Tudor sought to appeal. The case was dismissed and the Remittitur was filed February 24, 2012.

The current Petition for Writ of *Habeas Corpus* is dated April 26, 2012.

On October 31, 2012, the State moved to dismiss this action. Part of the assertion is that the requested relief is procedurally barred.

Mr. Tudor's Petition asserts ineffective assistance of counsel, which is the standard PCR allegation. He also argues due process and double jeopardy issues, and appears to raise jurisdiction.

An evidentiary hearing into the matter was held on March 12, 2013 at the Greenwood County Courthouse before me. The Petitioner was present at the hearing and was represented by Tommy A. Thomas, Esq. The Respondent was represented by J. Rutledge Johnson, Assistant Attorney General.

SUMMARY OF ARGUMENT AND EVIDENCE PRESENTED

Counsel for the Applicant argued that due to numerous errors that Mr. Tudor had been denied his right to Direct Appeal. That he was entitled to his one bite at the apple.

Counsel's argument in part is that the State's decision to *nolle prosequi* indictment 96-GS-36-652, after the jury was empanelled is equivalent to an acquittal. The State would then be barred from proceeding on indictment 97-GS-36-21, which alleged the exact same crime as Indictment 652. Mr. Tudor asserts that objection was made to the State's action by way of Motion, preserving this issue for Appeal.

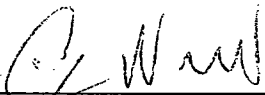
The State made argument that Mr. Tudor was procedurally barred from bringing up this issue at this late date. That his application was successive and barred.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds that the Petitioner is entitled to a review of his direct appeal issues pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). It appears to the Court that this issue was preserved by trial counsel and that Mr. Tudor is entitled to present this issue on appeal. Due to procedural issues, he has not been afforded his one bite at the apple on this matter. There also appears to be evidence that the direct appeal was dismissed for failure to pursue. There is no evidence presented that Mr. Tudor agreed to a dismissal of this appeal.

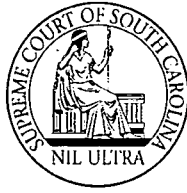
This Court advises that in order to secure belated review, the Applicant's counsel must file and serve a Notice of Appeal **within thirty (30) days** of the date of service of this Order. Applicant and counsel are directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed.

AND, IT IS SO ORDERED this 21st day of May, 2013



Clifton Newman
Presiding Judge
Eighth Judicial Circuit

Clun 4.2, South Carolina



South Carolina Court Administration
South Carolina Supreme Court
Columbia, South Carolina

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February 7, 2014

Daniel Lee Wimbley
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Division of Appellate Defense
P.O. Box 11589
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In re: Milo E. Tudor v. State of South Carolina, 2012CP3600511

Dear Mr. Wimbley:

I am responding to a letter dated January 8, 2014, requesting a transcript from proceedings before Judge James W. Johnson, Jr. on **August 7, 1997**.

Pursuant to Rule 607, court reporter records are retained for a period of five years. If a transcript is not ordered within that five-year period, the records are destroyed. Unfortunately, the records to produce a transcript from proceedings heard before **January 2009** are no longer available. I am sorry that I am unable to assist you further.

Sincerely,


Desiree R. Allen
Court Reporter Manager

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APPELLATE DEFENSE