

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ELLIOT J. BROWN,
Movant,

v.

STATE OF SOUTH CAROLINA,
Respondent.

Appellate Case No. 2013-001144

The Honorable Edward W. Miller
Greenville County
Trial Court Case No. 2011CP2304514

RECEIVED

JUN 23 2014

S.C. SUPREME COURT

MOTION TO RECALL REMITTITUR AND REQUEST
REINSTATEMENT OF MOVANT'S APPEAL

COMES NOW Movant, Elliot J. Brown (hereinafter "Mr. Brown"), pro se, and moves this Honorable Court to Recall Remittitur and Request Reinstatement of Movant's Appeal, pursuant to applicable South Carolina statute and Supreme Court Rule. In support of the instant motion, Mr. Brown states the following:

1. Mr. Brown is currently incarcerated at a Federal Correctional Facility at USP Terre Haute, Terre Haute, Indiana.

2. Mr. Brown was indicted at the February 2007 term of the Greenville County Grand Jury for trafficking marijuana (2007-GS-23-0592). He was represented by Monte Desai, Esq.

3. On January 9, 2008, Mr. Brown pled guilty to possession with intent to distribute marijuana, second offense. He was

sentenced by the Honorable Edward W. Miller to eighteen (18) months of home incarceration. Mr. Brown did not appeal.

4. On June 27, 2011, Mr. Brown filed a Motion and Memorandum of Law, Points and Authorities in Support of Pro SE Petitioner's/Applicant's Application for Post-Conviction Relief Pursuant to South Carolina Code Annotated, Section 17-27-20(a) in the Court of General Sessions, County of Greenville.

5. On December 30, 2011, the Respondent filed its Return And Partial Motion To Dismiss.

6. On January 13, 2012, Mr. Brown received a letter from Ms. Caroline M. Horlbeck informing him that she had been appointed to represent him on his PCR case. See Exhibit "A".

7. On April 24, 2013, the Court of Common Pleas issued its Order granting Respondent's Partial Motion to Dismiss and Applicant's Request for White v. State Belated Appeal. See Exhibit "B". The Court ordered, following its analysis and conclusion:

(1) That the Respondent's Partial Motion to Dismiss is granted;

(2) That Applicant's Request for a Belated Appeal is granted; and

(3) Within thirty (30) days of service of this Order, counsel for the Applicant must file a Notice of Appeal to secure the appropriate review of the Applicant's convictions. Counsel and the Applicant are directed to Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986) and Rule 243(i), SCACR for the appropriate procedure for securing belated appellate review.

See Exhibit "B"

8. On June 20, 2012, Mr. Brown received a letter from Ms. Horlbeck stating: "Also, be advised that I do not handle appeals at all..." On May 29, 2013, he received another let-

ter from Ms. Horlbeck informing him that "...the judge denied [his] PCR petition but [she] ha[s] filed an appeal on [his] behalf..." And, again, on November 18, 2013, Ms. Horlbeck attempted to explain why she failed to comply with the Court's directions with respect to White v. State, and Rule 243(c), SCACR, which requires a written explanation as to why the Court's determination to dismiss Mr. Brown's ineffective assistance of counsel claims because they were barred by the statute of limitations was improper, etc. See Exhibits C-1, C-2 and C-3.

9. On July 9, 2013, the Supreme Court of South Carolina issued its ORDER stating:

Petitioner has failed to provide the explanations required by Rule 243(c) and/or Rule 203(d)(1)(B) of the South Carolina Appellate Court Rules, and requested by this Court's letter of June 11, 2013. Accordingly, this matter is dismissed. The remittitur will be sent as provided by Rule 221(b), SCACR.

And on July 25, 2013, the Court issued its REMITTITUR. See Exhibit "D" (copies of the Order and Remittitur).

10. Mr. Brown had written numerous letters to Ms. Horlbeck, the South Carolina Court of Appeals, and to the Clerk of the Supreme Court of South Carolina inquiring about the status of his appeal, what needed to be done, and why hadn't what needed to be done had not been done. The most telling responses came Mr. Daniel E. Shearouse, Clerk of Court, for the Supreme Court of South Carolina. See Exhibit "E". As Mr. Shearouse's letters reveal, attempted to comply with the Court's directions with due diligence. It was appellate counsel's duty to file the required pleadings but appellate counsel failed to do so. See counsel's explanation for failing to comply with the Court's

instructions set out in a letter to Mr. Brown attached here as Exhibit C-3.

11. Clearly, Mr. Brown's appeal was dismissed by the Court prematurely, without a ruling on the merits of his meritorious claims, due to appellate counsel's ineffectiveness, and no fault of his own. Thus, Mr. Brown contends that appellate counsel's ineffectiveness prejudiced him because it deprived him of his Sixth Amendment right to appeal, his right to the effective assistance of counsel, and his Fifth Amendment right to Due Process. See pages 1 and 2 of Mr. Shearouse's October 04, 2013 letter to Mr. Brown explaining why the Court summarily dismissed his appeal. Exhibit "E".

12. The issues that Mr. Brown sought to raise in his appeal are:

1. Ineffective assistance of counsel:
 - a. Misadvised about the elements of the offense;
 - b. Failed to object to the factual basis for the guilty plea;
 - c. Failed to file an appeal.
2. Involuntary guilty plea based on trial counsel's coercion and misrepresentation that the charges would be dismissed.

13. These claims were never permitted to be presented to the Court for review on the merits due to appellate counsel's ineffectiveness which, thereby, deprived Mr. Brown of his constitutional rights to appeal an adverse order or judgment.

14. The attached Exhibits constitute overwhelming evidence that: (a) Mr. Brown's appeal was dismissed prematurely due to appellate counsel's ineffectiveness; (b) that counsel's egre-

rious errors establishes cause and prejudice with respect to Mr. Brown's appeal following the Court's ruling on his PCR petition; and (c) that Mr. Brown pursued his appeal with due diligence.

15. A motion to recall the remittitur is a unique remedy whereby the movant asks the Court of Appeals or the Supreme Court to reassert its jurisdiction over a case after it has relinquished that jurisdiction by issuing a remittitur following the final determination of the appeal. A motion to recall the remittitur can reinstate a direct appeal and, under certain circumstances, can also act as a habeas petition. See Williams v. Harrison, 368 Fed. Appx. 764, 767-68 (9th Cir. 2010); see also 2010 U.S. Dist. LEXIS 28971::Wright v. Kendall:: March 26, 2010; and 2009 U.S. Dist. LEXIS 91984::Missouri v. Beckwith:: June 26, 2009.

16. Counsel's egregious errors deprived Mr. Brown of his constitutional right, and one opportunity, to appeal the Court's ruling on his PCR petition. The issues Mr. Brown sought to present to the Court on appeal involve violations of his constitutional rights under the State of South Carolina's Constitution and the Constitution of the United States with respect to his Sixth Amendment right to the effective assistance of counsel and his Fifth Amendment rights under the Due Process Clause and the Fourteenth Amendment. At the very least, Mr. Brown is entitled to an evidentiary hearing on these claims as the files and records of this case do not conclusively show that he is not entitled to relief or that his claims are unsubstantiated.

17. Mr. Brown contends that despite his plea of guilty, which he further contends was coerced and based on counsel's false assurances that the charges would ultimately be dismissed, he is actually innocent of the charge "possession with intent to distribute marijuana, a second offense." Tavon Patterson confessed that he was totally and solely responsible for the marijuana in the vehicle. He did so in open court on January 8, 2008. See Exhibit "F" the Affidavit of Tavon Patterson.

18. Mr. Brown also contends that, if not for trial counsel's egregious errors and false representations to him, he never would have pled guilty in this case. He was led to believe that once he explained his factual basis for making the plea, as counsel instructed him to do, the court would dismiss the charges against him. Had counsel not pushed him so persistently in this direction, he would have opted for a jury trial in which he could have proven to a jury beyond a reasonable doubt that he was innocent, particularly in light of Mr. Patterson's confession wherein he admits to full responsibility in possessing the marijuana.

19. In the interests of justice and judicial economy, this Honorable Court should recall its remittitur and reinstate the appeal in this case. Mr. Brown's conviction and sentence is a fundamental miscarriage of justice and, if this Honorable Court fails to recall its remittitur and reinstate the appeal as the evidence and facts of this case compels it to do, this miscarriage of justice, the conviction and sentence of an actually innocent person, would be allowed to persist, thereby bringing into question the public reputation and fairness of the judicial proceedings in this case.

WHEREFORE, for all of the above stated reasons, Mr. Brown prays that this Honorable Court will recall its remittitur and reinstate the appeal in this case, and grant any additional relief the Court deems the facts of this case require.

Dated: June 20, 2014

Respectfully submitted,

/s/ Elliot Brown
Elliot J. Brown
Register No. 43722-037
USP Terre Haute
P.O. Box 33
Terre Haute, IN 47808

pro se

CERTIFICATE OF SERVICE

I, Elliot Brown, hereby certify that on this date I delivered to this institution's mailroom staff a properly addressed envelope with sufficient first-class postage attached, containing an exact copy of my Motion to Recall Remittitur and Request Reinstatement of Movant's Appeal to be delivered to the U.S. Postal Service and, ultimately, delivered to:

Mr. Alan Wilson, Attorney General, P.O. Box 11549
Columbia, S.C. 29211

this June day of 20, 2014.

/s/ Elliot Brown
Elliot J. Brown

Mr. Elliot J. Brown
Register No. 43722-037
USP Terre Haute
P.O. Box 33
Terre Haute, IN 47808

June 20, 2014

Mr. Daniel E. Shearouse
Clerk of Court
1231 Gervais Street
Columbia, South Carolina 29201

RE: Elliot J. Brown v. State
Appellate Case No. 2013-001144
Lower Court Case No. 2011CP2304514

Dear Mr. Shearouse:

Enclosed for filing in the above-styled cause, please find the original and two (2) copies of the following:

1. Motion to Recall Remittitur and Request Reinstatement of Movant's Appeal with attached Exhibits A thru F
2. Certificate of Service

Thank you.

Very truly yours,

Elliot Brown #43722037
Elliot J. Brown

c:file

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JUN 23 2014

S.C. SUPREME COURT

Elliot Brown # 43722037

U.S.P. Terre Haute

P.O. Box 33

Terre Haute, IN 47808

43722-037

Daniel E Shearouse
PO BOX 11330
Clerk Of Court
Columbia, SC 29211
United States

INMATE
IDENTIFICATION
CONFIRMED