

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

DEC 09 2014

Roger L. Couch, Presiding in Cherokee County

S.C. SUPREME COURT

Case No. 2012-CP-11-0770

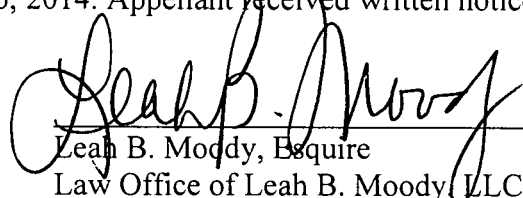
Duston Lenier Rogers, Appellant,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Duston Lenier Rogers appeals the order of the Honorable Roger L. Couch, dated November 21, 2014 and mailed on November 26, 2014. Appellant received written notice of entry of the final order on December 1, 2014.



Leah B. Moody, Esquire
Law Office of Leah B. Moody LLC
235 E. Main Street, Suite 115
Post Office Box 1015
Rock Hill, South Carolina 29731

Other Counsel of record:
Suzanne White, SC Attorney General's Office
Rembert C. Dennis Building
Post Office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-3970

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Roger L. Couch, Presiding in Cherokee County

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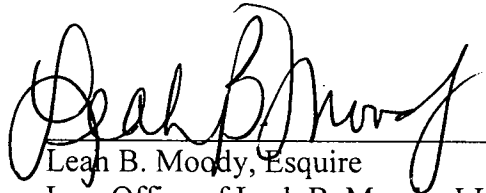
Duston Lenier Rogers, Appellant,

v.

State of South Carolina, Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Suzanne White by depositing a copy of it in the United States Mail, postage prepaid, on December 4, 2014 addressed to its attorney of record, Suzanne White, Post Office Box 11549, Columbia, South Carolina, 29211-1549.


Leah B. Moody, Esquire
Law Office of Leah B. Moody, LLC
235 E. Main Street, Suite 115
Post Office Box 1015
Rock Hill, South Carolina 29731

December 4, 2014

cc Duston Lenier Rogers
Suzanne White, Esq.
Brandy W. McBee, Clerk of Court, Cherokee County
Sharon A. Graham, SCCID

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

JUDGMENT IN A CIVIL CASE

CASE NO: 2012CP1100770

RECEIVED

DEC 09 2014

Duston Lenier Rogers #279924 F-4 vs. State Of South Carolina

S.C. SUPREME COURT

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;
 - 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: _____

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
BRANDY W. MCBEE
2014 NOV 26 PM 1 51

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:

Order of Dismissal

Dated at Gaffney, South Carolina, this the 26th day of November, 2014.

Court Reporter:

s/ Roger L. Couch

PRESIDING JUDGE - Roger L. Couch

This judgment was entered on the the 21st day of November, 2014, and a copy mailed first class this the 26th day of November, 2014, to attorneys of record or to parties (when appearing pro se) as follows:

Leah B. Moody 235 E. Main St., Ste 115 PO Box
1015 Rock Hill, SC 29730

Alan McCrory Wilson PO Box 11549 Columbia,
SC 29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Brandy W. McBee
Brandy W. McBee - Clerk of Court

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHEROKEE)
)
 Duston Lenier Rogers, #279924,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

RECEIVED

DEC 09 2014

2012-CP-11-0770

S.C. SUPREME COURT

ORDER OF DISMISSAL

FILED IN OFFICE OF
 CLERK OF COURT
 CHEROKEE COUNTY, S.C.
 2014 NOV 26 PM 10 55
 BRANDY W. MCBEE

This matter comes before this Court by way of an application for post-conviction relief filed October 26, 2012. An evidentiary hearing on the State's Motion to Dismiss was scheduled for September 17, 2014, at the Spartanburg County Courthouse. The Applicant was present and represented by Leah B. Moody, Esquire. J. Clayton Mitchell represented the Office of the Attorney General.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. The Applicant was indicted at the November 2006 term of the Cherokee County Grand Jury for one (1) count of Possession with Intent to Distribute Crack Cocaine (06-GS-11-0964) and one (1) count of Unlawful Possession of a Pistol (06-GS-11-0965). The Applicant was represented by Edward Lamb, Esquire. On April 4, 2007, the Applicant proceeded to trial and was found guilty as indicted. He was sentenced by the Honorable J. Derham Cole to confinement for a period of fifteen (15) years for Possession With Intent to Distribute Crack Cocaine - 3rd (06-11-0964), and one (1) year for Unlawful Possession of a Pistol (06-GS-11-0965), each sentence to be served concurrently.

A timely Notice of Appeal was filed on behalf of the Applicant by LaNelle C. Durant, Esquire of the South Carolina Office of Appellate Defense. The South Carolina Court of Appeals dismissed the case by written order filed March 10, 2009. State v. Rogers, 2009-UP-136 (S.C. C.t. App. filed March 10, 2009). The case was returned to the lower court by Remittitur dated March 26, 2009.

2009-CP-11-0819

The Applicant subsequently filed his first application for post conviction relief (PCR) on August 24, 2009. The State filed its Return on or about February 19, 2010. An evidentiary hearing was convened on May 24, 2010, at which the Applicant was present and represented by Stanley T. Case, Esquire. The Applicant raised the following issues in his first PCR:

1. Ineffective assistance of counsel, in that
 - a. Counsel failed to object to the sentencing enhancement.

The Honorable J. Mark Hayes, II denied and dismissed Applicant's application with prejudice by written Order dated July 28, 2010. A timely Petition for Writ of Certiorari was submitted to the South Carolina Supreme Court. The appeal was then transferred to the South Carolina Court of Appeals. The South Carolina Court of Appeals denied the Petition by Written Order dated March 7, 2013. The Remittitur was sent down on March 25, 2013.

ALLEGATIONS

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

1. Newly and after discovered evidence
 - i. "Newly discovered evidence of Juror Misconduct and Impartial Jury"
 - ii. "Evidence of material facts not previously presented and heard that requires vacation of conviction and sentence."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the arguments presented at the PCR hearing. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Successive

The Court finds that the current application for post-conviction relief must be summarily dismissed because it is successive to the previous application for post-conviction relief. S.C. Code Ann. § 17-27-90 (2003) states:

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

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 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 v. State, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State,

Statute of Limitations

This Court further finds that this Application for post-conviction relief should also 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 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 offenses he challenges in this Application on April 4, 2007. The Remittitur was returned on March 26, 2009. The Applicant was therefore required to file his application before March 26, 2010. This Application was filed on October 25, 2012; well over two (2) 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) (2003) 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 summarily dismisses the application for post-conviction relief for failure to file within the time mandated by the Post-Conviction Procedure Act.

Newly Discovered Evidence – Juror Misconduct

Furthermore, this Court finds that Applicant's claims of newly discovered evidence in the

form of juror misconduct must be dismissed, as Applicant has failed to set forth any specific allegations of the nature of the evidence. The Uniform Post-Conviction Procedure Act requires that the Applicant must "specifically set forth the grounds upon which the application is based." Section 17-27-50 of the Code of Laws of South Carolina (1976). In an application for post-conviction relief, it is incumbent upon Applicant to make at least a prima facie showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). At the scheduled hearing on the State's motion to dismiss, September 17, 2014, this Court provided Applicant with a period of thirty days in which to amend his application and provide specific grounds on which his allegations were based. As of this time, the Applicant has failed to provide any specific grounds.

Applicant's allegations fail to meet any of the requirements of Rule 8(a) of the South Carolina Rules of Civil Procedure, which provide that a pleading which sets forth a claim must contain: "(1) a short and plain statement of the *facts* showing that the pleader is entitled to relief. . . ." (emphasis added). Applicant has not set forth any facts that would entitle him to relief and has failed to make the minimum prima facie showing. This Court fully appreciates the seriousness of this allegation, especially in light of McCoy v. State, 401 S.C. 363, 737 S.E.2d 623 (2013), but Applicant has not sufficiently pled a claim showing that he is entitled to relief. Therefore, this Court finds that this allegation must be dismissed pursuant to the Uniform Post-Conviction Procedure Act and for failing to state a claim pursuant to Rule 12(b)(6), SCRPC.

CONCLUSION


IT IS THEREFORE ORDERED that, for the reasons set forth above, the Application for PCR is hereby denied and dismissed with prejudice.

This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 21st day of November, 2014.



Roger L. Couch
Presiding Judge

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2014 NOV 26 AM 10 55
BRANDY W. MCBEE

BRANDY W. MCBEE

CLERK OF COURT, CHEROKEE COUNTY
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December 4, 2014

Suzanne White, Esquire
South Carolina Attorney General's Office
Post Office Box 11549
Columbia, South Carolina 29211

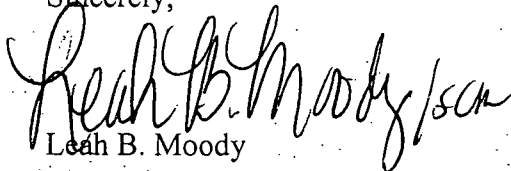
RE: Duston Lenier Rogers v. State of South Carolina
C.A. No.: 2012-CP-11-0770

Dear Ms. White:

The Spartanburg County Court of Common Pleas appointed my office to represent Duston Lenier Rogers in his Post-Conviction Relief action. Please find enclosed a copy of the Notice of Appeal and Proof of Service in this matter.

If you have any questions or concerns, please feel free to contact my office. Thank you.

Sincerely,



Leah B. Moody

LBM/scm

Enclosures

cc Duston Lenier Rogers
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court
Brandy W. McBee, Clerk of Court, Cherokee County
Sharon Graham, SCCID

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December 4, 2014

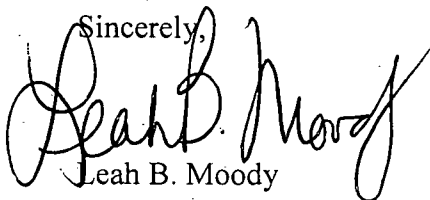
The Honorable Brandy W. McBee
Cherokee County Clerk of Court
Post Office Box 2289
Gaffney, South Carolina 29342

RE: Duston Lenier Rogers v. State of South Carolina
Case No.: 2012-CP-11-0770

Dear Ms. McBee:

Please find enclosed the Notice of Appeal and the Proof of Service in the above-referenced matter.

Sincerely,



Leah B. Moody

LBM/scm

Enclosures

cc Duston Lenier Rogers
Suzanne White, Assistant Attorney General
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court
Sharon Graham, SCCID

Law Office of Leah B. Moody, LLC

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December 4, 2014

Ms. Sharon A. Graham
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11433
Columbia, South Carolina 29211-1433

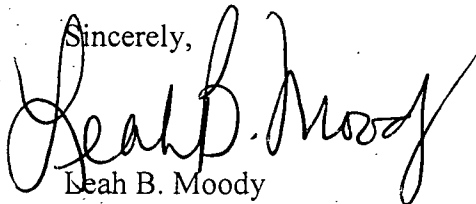
RE: Duston Lenier Rogers v. State of South Carolina
Case No.: 2012-CP-11-0770

Dear Ms. Graham:

The York County Court of Common Pleas appointed my office to represent Duston Lenier Rogers in his Post-Conviction Relief action. Please find enclosed the Notice of Appeal and Proof of Service in the above-referenced matter.

Thank you for your attention in this matter.

Sincerely,



Leah B. Moody

LBM/scm

Enclosures

cc Duston Lenier Rogers
Suzanne White, Esquire
Daniel Shearouse, Clerk of Court, Supreme Court
Brandy W. McBee, Clerk of Court, Cherokee County

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December 4, 2014

Mr. Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29221

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S.C. SUPREME COURT

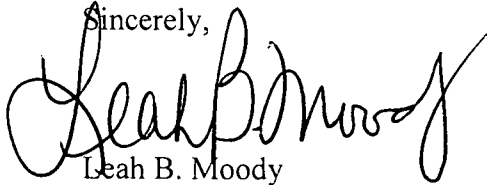
RE: Duston Lenier Rogers v. State of South Carolina
Case No.: 2012-CP-11-0770

Dear Mr. Shearouse:

The York County Court of Common Pleas appointed my office to represent Duston Lenier Rogers in his Post-Conviction Relief action. Please find enclosed for filing the original and two (2) copies of the Notice of Appeal, Proof of Service, and one (1) copy of the Order of Dismissal in the above-referenced case. Please return the clocked copies to me in the enclosed self-addressed, stamped envelope.

Thank you for your assistance with this matter.

Sincerely,



Leah B. Moody

LBM/scm

Enclosures

cc Duston Lenier Rogers
Suzanne White, Esquire
Sharon Graham, SCCID
Brandy W. McBee, Clerk of Court, Cherokee County

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TO:

The Honorable Daniel E. Shearouse
The Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211-1330