

the January 2011 term of the Spartanburg County Grand Jury for murder (2011-GS-42-0161), burglary – 1st degree (2011-GS-42-0158), assault and battery – 3rd degree (2011-GS-42-0159), and grand larceny between \$2,000 and \$10,000 (2011-GS-42-0160)¹. William S. McGuire, Esquire, and Clay Allen, Esquire, represented Applicant on the charges. On April 11, 2011, Applicant pled guilty to murder, assault and battery – 3rd degree, and grand larceny. Pursuant to plea negotiations, the State dismissed the burglary – 1st degree and assault and battery of a high and aggravated nature charges and agreed to not seek the death penalty. The Honorable J. Derham Cole accepted the negotiated sentence and sentenced Applicant to a sentence of life without parole for murder. Judge Cole sentenced Applicant concurrent sentences of five years for grand larceny and thirty days for assault and battery – 3rd degree. Applicant did not appeal his conviction and sentence.

ALLEGATIONS

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

1. Ineffective assistance of counsel, in that;
 - a. Counsel failed to request a mental competency exam or hearing,
 - b. Counsel pushed Applicant to plead guilty based upon the fact that Applicant was assaulted by Detention Center Officers,
 - c. Applicant never saw any proof of what work Counsel did on his case,
 - d. Counsel failed to file notice of appeal after requested by Applicant;
2. Trial or Direct Appeal issues, in that;
 - a. Applicant was under duress at time of crime and questioning,
 - b. Applicant's confession was involuntary,
 - c. Toxicology reports not back from SLED,
 - d. No murder weapon found,
 - e. Violation of Applicant's Miranda rights,

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¹ Upon information and belief, the State also dismissed an additional assault and battery charge.

- f. Could not get a change of venue,
- g. Mitigation investigator was not able to complete a full investigation because Applicant was forced to plead guilty because of the assaults and harassment by Detention Center Officers,
- h. Conflict of interest of Judge Cole and Solicitor Barnette.

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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 and 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).

Statute of limitations

The Applicant pled guilty to the offense(s) he challenges in this Application on April 11, 2011. According to the post-conviction relief statute, the Applicant was therefore required to file his application before April 11, 2012. S.C. Code Ann. §17-27-45 (2003). This Application was filed on December 21, 2012, which was more than eight months beyond the expiration of the statutory filing period. Applicant argued that his application should not be barred by the statute of limitations based upon the doctrine of equitable justice.

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."

This Court finds that the application was filed outside of the statute of limitations. Therefore, all claims, except the Applicant's allegation that counsel was ineffective for failing to

inform him of his right to appeal and file an appeal on his behalf, are dismissed as barred by the statute of limitations.

Belated Review of Direct Appeal Issues

The Applicant alleged that he is entitled to a belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). Counsel has a constitutionally-imposed duty to consult with a defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029 (2000).

The Applicant testified that he knew he had ten days to file an appeal following his guilty plea and was advised of that fact by his attorneys. Applicant testified that he asked counsel about an appeal and was told that they did not think that an appeal was appropriate since Applicant pled guilty. However, Applicant testified that he did not attempt to file an appeal on his own.

Clay Allen, Esquire, testified that he represented the Applicant for almost a year and a half regarding these charges. Allen testified that he asked Mr. William McGuire, Esquire, to join in the representation because of Mr. McGuire's experience with capital litigation because Allen was aware of the possibility of this becoming a capital case. Allen testified that Mr. McGuire had a "providency form" that McGuire used to review charges, possible sentences, rights, and other issues with a client. Allen testified that he was aware of the form and signed as a witness when the Applicant signed the form. The form stated that Applicant was aware that he had ten days in which to file an appeal.

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Allen testified that if the Applicant requested that either counsel file a notice of appeal, either one would have filed a notice of appeal on Applicant's behalf. Allen testified that he has filed a notice of appeal following a guilty plea before and it would have been simple to file if Applicant requested an appeal. Allen testified that the right to appeal was reviewed with the Applicant, but Allen testified that because there were no motions, objections and the sentence was not illegal, he did not know of any appealable issues.

As to the request for a belated review of direct appeal issues, this Court finds the testimony of Mr. Allen to be credible. Further, this Court finds that the Applicant was aware of his right to appeal and the ten day time limit to file an appeal, but was also aware that because of his guilty plea, there would be no issues to base the appeal on. This Court finds that the Applicant did not request that counsel file a notice of appeal on his behalf. This Court also finds that there was no indication from Applicant that he wished to appeal the guilty pleas or sentences. Therefore, this claim is denied and dismissed.

CONCLUSION

Based on the arguments presented at the hearing, case law before this Court, and subsequent analysis, this Court finds that all allegations, with the exception of the request for a belated review of direct appeal issues, in this application should be summarily dismissed for failing to file within the statute of limitations. This Court also finds that the Applicant failed to meet his burden of proof in establishing ineffective assistance of counsel for failing to consult with Applicant on or file a direct appeal on his behalf. Therefore, this application for post-conviction relief must be 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

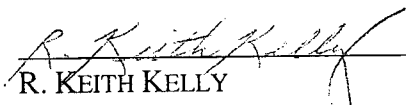
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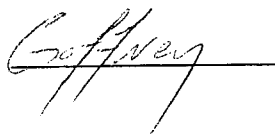
appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. 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 24 day of November, 2014.


R. KEITH KELLY
Presiding Judge

, South Carolina

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