

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Judge

Case No.
(2012-CP-42-3230)

Joseph Franklin Kelly, Appellant,

v.

State of South Carolina, Respondent.

EXPLANATION FOR ERRONEOUS DETERMINATION OF UNTIMELINESS UNDER THE PCR
STATUTE OF LIMITATION

The determination by the lower court that the Appellant's application for post-conviction relief was barred by the statute of limitation was erroneous because the Appellant was not notified of the requirement for sex offender registration by either the court or his counsel at the time of guilty plea, and he did not receive notice from the State of this requirement until nine years after the conviction.

Case law has held that "to satisfy due process a convicted sex offender must have had actual notice." *State v. Latimore*, 397 S.C. 9, 13, 723 S.E.2d 589, 591 (2012).

Further, South Carolina states that "if the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction of or sentence, the application must be filed under this chapter within one year after the

date of actual discovery of the facts by the applicant or after the date when the facts have been ascertained by the exercise of reasonable diligence.” S.C. Code Ann. § 17-27-45(c).

The defendant pleaded guilty on December 17, 2002 to eavesdropping, peeping, or voyeurism under S.C. Code Ann. § 16-17-470. Prior to the entry of this plea the defendant was not informed he was required to register as a sex offender pursuant to S.C. Code Ann. § 23-3-430; therefore not making a knowing and voluntary plea.

On October 10, 2011, nine years after his conviction and after being placed on probation for another offense, the Applicant was notified by the Charleston County Sheriff’s Office that he was required to register as sex offender for the first time. The application for post-conviction relief herein was filed on August 3, 2012. This would have been within one year of his notice.

The lower Court’s conditional order of dismissal fails to consider or even discuss the Applicant’s rights under S.C. Code Ann. § 17-27-45(c), i.e., the discovery rule. This statute provides:

“If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.”

This is precisely the contention of the Appellant here. Appellant asserted in his PCR Application that he was not informed by plea counsel that he would be required to register as a sex offender as a result of his guilty plea to eavesdropping. It was not discussed in the plea

colloquy and nowhere on the sentencing sheet is there a reference to such a requirement.

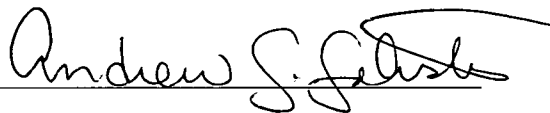
If he had had the opportunity for a hearing, Applicant would have presented evidence and testimony at the hearing on the merits of this case that he did not learn of any requirement to register as a sex offender until on or about October 10, 2011 when he received a letter from the Charleston County Sheriff's Office to this effect. The only reason the issue was raised that time was because Applicant had recently been sentenced to probation in Charleston and the probation department evidently notified the Sheriff that he needed to register based on the 2002 conviction.

In *McCoy, supra*, the PCR applicant had filed an application also that had been summarily dismissed by the PCR court because it had not been filed within one year of conviction. The applicant in *McCoy* relied on the discovery provision of S.C. Code Ann. §17-27-45(c). He learned of juror misconduct some years after his initial conviction. The Supreme Court reversed the conditional dismissal because the applicant did not discover the juror's misconduct until some years later and timely filed his application within one year thereafter.

The discovery rule for PCR cases was also construed by this court in the case of *Coats v. State*, 352 S.C. 500, 575 S.E. 2d 557 (2003). In *Coats, supra*, the applicant had filed an application for PCR based upon his trial counsel's incorrect advice about parole eligibility. At the time of his plea, Coats thought he was parole eligible and the SC Department of Corrections even conducted a parole hearing. However, the applicant learned some time later that he was not eligible for parole. Based upon the discovery rule, the Supreme Court reversed the PCR court's dismissal of the PCR action for failing to comply with the one year statute of limitations.

Because the lower Court failed to properly construe, or to even consider, the discovery exception to the statute of limitation, the trial court's ruling on the claims herein being time untimely under the statute of limitation is erroneous.

January 8, 2015

A handwritten signature in black ink, appearing to read "Andrew J. Johnston", written over a horizontal line.

Andrew J. Johnston, Attorney-at-Law

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