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RECEIVED

MAY 18 2015

May 12, 2015

S.C. Supreme Court

Honorable Daniel E. Shearouse
Clerk
The South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Steven McElrath, SCDC # 328413 v. State of South Carolina
2011-CP-04-2710

Dear Clerk:

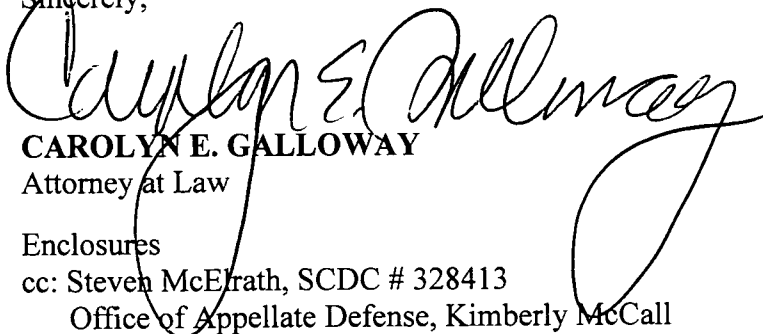
Enclosed for filing are the original and six (6) copies of the Appellant's Notice of Appeal, and a copy of the Order, along with the original and one (1) copy of the Proof of Service to John Walter Whitmire, Assistant Attorney General, Richard A. Shirley, Clerk of Court for Anderson County, South Carolina, and Steven McElrath, SCDC # 328413, Appellant.

I am simultaneously mailing a copy of the Notice of Appeal to the Office of Appellate Defense to request that they handle Mr. McElrath's appeal.

Please return the clocked-in copies of the documents to me in the self-addressed, stamped envelope that is provided.

Thank you for your assistance.

Sincerely,



CAROLYN E. GALLOWAY
Attorney at Law

Enclosures

cc: Steven McElrath, SCDC # 328413
Office of Appellate Defense, Kimberly McCall
John Walter Whitmire, Assistant Attorney General
Honorable Richard A. Shirley
CEG/dr

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Honorable R. Lawton McIntosh, Circuit Court Judge

RECEIVED

MAY 18 2015

Case No.: 2011-CP-04-2710

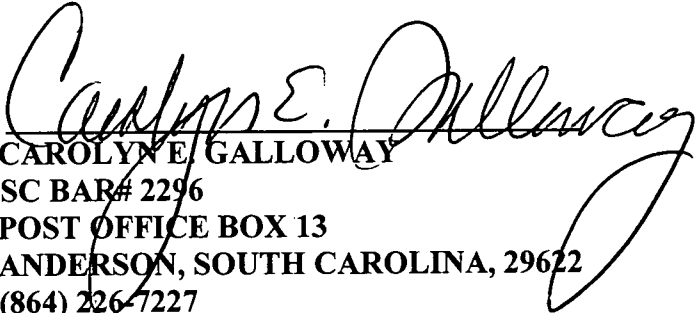
S.C. Supreme Court

Steven McElrath, #328413.....Appellant,
v.
State.....Respondent.

NOTICE OF APPEAL

Steven McElrath, #328413, appeals the judgment of the Honorable R. Lawton McIntosh, dated August 13, 2010. An Order authorizing an appeal of his prior Post-Conviction Relief action pursuant to Austin v. State was issued by Honorable Edgar W. Dickson, dated April 30, 2015 and filed in the Office of the Clerk of Court for Anderson County, South Carolina, on May 6, 2015. Appellant received written notice of entry of this judgment on May 7, 2015.

May 12, 2015


CAROLYN E. GALLOWAY
SC BAR# 2296
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ANDERSON, SOUTH CAROLINA, 29622
(864) 226-7227
Attorney for Appellant

Other Counsel of Record:
John Walter Whitmire, Esquire
Assistant Attorney General
State of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211-1549

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

MAY 18 2015

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

S.C. Supreme Court

Honorable R. Lawton McIntosh, Circuit Court Judge

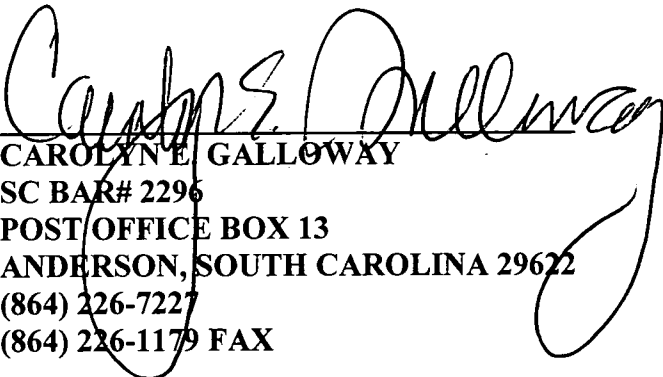
Case No.: 2011-CP-04-2710

Steven McElrath, #328413.....Appellant,
v.
State.....Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal to the Respondent by depositing a copy in the United States Mail, postage prepaid, on May 12, 2015, addressed to its attorney of record, John Walter Whitmire, Assistant Attorney General, State of South Carolina, Post Office Box 11549, Columbia, South Carolina 29211 and to the Appellant, Steven McElrath, SCDC #328413, at McCormick Correctional Institution, 386 Redemption Way, F4B-210, McCormick, South Carolina 29899. A copy was also filed with Richard Shirley, Clerk of Court for Anderson County, South Carolina.

May 12, 2015


CAROLYN E. GALLOWAY
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STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON FOR THE TENTH JUDICIAL CIRCUIT

Steven McElrath,
S.C.D.C. No. 328413

Applicant,

v.

State of South Carolina,

Respondent.

A TRUE COPY
MAY - 6 2015
Richard W. Kuty
CLERK OF COURT

C.A. No. 2011-CP-04-2710

ORDER OF DISMISSAL

COMMON PLEAS
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ANDERSON SC



This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed September 9, 2011. The State submitted its responsive pleadings requesting partial summary dismissal. An evidentiary hearing into the matter was convened on July 30, 2014 at the Anderson County Courthouse. Applicant was present at the hearing and was represented by Carolyn E. Galloway, Esq. The Respondent was represented by Walt Whitmire of the South Carolina Attorney General's Office.

At the hearing, the State stipulated that Applicant would be able to meet his burden to prove that PCR counsel's failure to file a notice of appeal from denial of the C.A. No. 2009-CP-04-0012 Application entitled him to an Austin relief. Counsel for Applicant apprised the Court that she had fully discussed the current PCR Application with Applicant, advised Applicant of the procedural bars against successive and untimely PCR litigation, and was fully prepared to proceed.

This Court also had before it a copy of the transcript from the Applicant's guilty plea proceedings, the records of the Anderson County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the Application for Post-Conviction Relief, the

State's Return, and evidence presented at the hearing.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. Applicant was indicted at the June 2007 term of the Anderson County Grand Jury for kidnapping (2007-GS-04-1896) and criminal sexual conduct – first degree (2007-GS-04-1897). Scott D. Robinson, Esquire, represented the Applicant. On May 19, 2008, Applicant pled guilty as indicted. The Honorable J.C. Nicholson, Jr., consecutively sentenced him to confinement for a period of thirty (30) years for kidnapping and ten (10) years for criminal sexual conduct – first degree.

A Notice of Appeal was filed on Applicant's behalf. The South Carolina Court of Appeals dismissed the appeal on September 23, 2008, for lack of any showing that there was an issue preserved for appellate review. The Remittitur was issued on October 9, 2008.

C.A. No. 2009-CP-04-0012

In his original application for post-conviction relief, Applicant alleged he is being held in custody unlawfully for the following reasons:

- 1) Ineffective Assistance of Counsel
 - a. "Counsel was ineffective in failing to object to the sentence given to Applicant."
 - b. "Counsel was ineffective for failing to provide Applicant with knowledge of a viable defense that was available to him, causing him to accept his guilty plea without full knowledge of the consequences of that plea."
 - c. "Counsel was ineffective for failing to investigate the mental capacity of the Applicant to plead guilty causing the Applicant to enter into a plea of guilty without full understanding of the nature of the plea."
- 2) Involuntary Guilty Plea

A hearing was convened into the matter on June 15, 2010. Applicant was present and was represented by George Sands, Esq. Plea counsel, Charles A. Anderson was present and testified to his course of conduct during the representation concerning the

matters at issue. The State was represented by A. West Lee, Esq., of the Office of the Attorney General. On August 13, 2010, the Honorable R. Lawton McIntosh issued an order denying the Application with prejudice. A notice of appeal was not filed on Applicant's behalf.

C.A. No. 2011-CP-04-2710 (present case)

In his present application for post-conviction relief, Applicant alleged he is being held in custody unlawfully for the following reasons:

- 1) Violation of the 5th and 14th Amds per the Federal, U.S., and S.C. Constitutions.
- 2) Ineffective Assistance of PCR Counsel:
 - a. Failure to file a Rule 59(e);
 - b. Failure to file a notice of appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the stipulations and waivers presented at the evidentiary hearing. Further, this Court reviewed the Clerk of Court records regarding the subject's convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents, the written plea agreement from the General Sessions Records, the record from the original 2009 PCR Application, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact.

A.

At the hearing, the State stipulated that Applicant would be able to meet his burden to prove that PCR counsel's failure to file a notice of appeal from denial of the C.A. No. 2009-CP-04-0012 Application entitled him to an Austin relief where PCR counsel was unable to locate his file to rebut the allegation. Successive PCR Counsel for Applicant apprised the Court that she had fully discussed the current PCR Application with Applicant, advised Applicant of the

procedural bars against successive and untimely PCR litigation, and was fully prepared to proceed on his case. Successive PCR Counsel apprised the Court that Applicant desired a discretionary appeal from Judge McIntosh's order. Successive PCR Counsel also apprised the Court that Applicant wished to abandon any and all allegations that are procedurally barred as untimely and successive.

This Court accepts the stipulation and finds that Applicant was denied an appeal from the decision in his prior post-conviction relief action. "The right to seek appellate review of the denial of PCR is expressly authorized by state law." Austin v. State, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991) (citing S.C. Code Ann. § 17-27-100). "A PCR applicant is entitled to an Austin appeal if the PCR judge affirmatively finds either: (1) the applicant requested and was denied an opportunity to seek appellate review; or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived." Odom v. State, 337 S.C. 256, 262, 523 S.E.2d 753, 756 (1999) (citations omitted). Even if the post-conviction court determines the applicant did not freely and voluntarily waive his appellate rights, the applicant must still petition the South Carolina Supreme Court to determine "whether he was prejudiced by his failure to obtain review of a meritorious issue." Odom, 337 S.C. at 263, 523 S.E.2d at 756 (1999).

Based on the stipulations, the Court finds Applicant did not knowingly and voluntarily waive the right to seek appellate review of Judge McIntosh's order. Accordingly, the Court hereby grants Applicant's request for appellate review of his prior post-conviction relief action pursuant to Austin v. State.

B.

To the extent Applicant seeks to further explore the issues raised in his initial application, the Court finds those issues cannot be revisited in a successive application. S.C. Code Ann. § 17-27-90 requires that:

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.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). Accordingly, the Court finds all remaining grounds should be denied and dismissed because Applicant has not shown a sufficient reason why these grounds should be re-raised in a successive application.

CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant is entitled to an appeal of his prior post-conviction relief action pursuant to Austin v. State.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Counsel and Applicant are directed to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992), for the appropriate procedure for securing appellate review pursuant to Austin v. State.



IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief seeking an appeal pursuant to Austin v. State is granted; and
2. All other grounds for relief are denied; and
3. Applicant shall be remanded to the custody of the Department of Corrections.

AND IT IS SO ORDERED this 30th day of April, 2015.

EDGAR W. DICKSON
Presiding Judge
10th Judicial Circuit

Orangeburg, South Carolina

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ANDERSON SC
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COMMON PLEAS AND
GENERAL SESSIONS

Carolyn E. Galloway

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Honorable Daniel E. Shearouse
Clerk

The South Carolina Supreme Court
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