

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

W. Jeffery Young, Circuit Court Judge

Case No.: 2013-CP-08-1216

Johnny L. Lucas,

Appellant,

v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

Johnny L. Lucas

~~Richard Deas~~ appeals the denial of his Post Conviction Relief application in this case. The Application for relief was denied, following an evidentiary hearing before the Honorable W. Jeffery Young on April 20, 2015.

June 17, 2015



Rodney D. Davis

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Attorney for Appellant

Other Counsel of Record:

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Office of the Attorney General, State of South Carolina

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Attorney for Respondent

FILED
2015 JUN 18 AM 11:34
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

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PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State by mailing a copy of it to the address of record, J. Rutledge Johnson, P.O. Box 11549, Columbia, South Carolina 29211-1549, on JUNE 17, 2015.

6/17, 2015


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2015 JUN 18 AM 11:35
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

FILED

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Johnny L. Lucas, #235656,)
Applicant,)

Case No. 2012-CP-08-1216

v.)

FINAL ORDER OF DISMISSAL

State of South Carolina,)
Respondent.)

CLERK OF COURT
BERKELEY COUNTY, SC

2015 MAY 19 AM 11:55

FILED
[Handwritten initials]

This Post-Conviction Relief matter came before the Court on April 20, 2015, for a hearing on Respondent's motion to dismiss. The Court had before it a copy of the records of the Berkeley County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the pleadings in this matter, the documents from Applicant's prior collateral actions, and the exhibits introduced at the hearing. The Court also heard testimony from Applicant and his trial counsel, Peter D. DeLuca Jr., Esquire. The Court finds as follows:

I. PROCEDURAL HISTORY

A. Underlying Conviction

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. In May 1996, the Berkeley County Grand Jury indicted Applicant for murder (96-GS-08-661) and first degree burglary (96-GS-08-662). Peter D. DeLuca Jr., Esquire, and Jay S. Masty, Esquire, represented Applicant. On February 3-5, 1997, Applicant proceeded to trial before the Honorable Charles W. Whetstone and a jury. The jury found Applicant guilty as indicted. Judge Whetstone sentenced Applicant to life imprisonment. Applicant did not appeal his convictions or sentences.

B. First Post-Conviction Relief Action

Applicant filed his first application for post-conviction relief on March 24, 1997 (1997-CP-08-458). In that application, Applicant raised the following grounds for relief:

1. Ineffective assistance of trial counsel.
 - a. Counsel failed to file an appeal.
 - b. Counsel failed to call a witness to testify at trial.
 - c. Counsel argued against the introduction of fingerprint evidence.
 - d. Counsel inadequately cross-examined the State's witness.
 - e. Counsel failed to argue the fingerprints found on the checks inside the burglarized residence could have resulted from a previous burglary at the same residence.
 - f. Counsel failed to note discrepancies in paint samples taken from vehicles.
 - g. Counsel failed to impeach witness Harold Lindenberg.
 - h. Counsel failed to argue the murder victim died from codeine ingestion rather than gunshot wound.
 - i. Counsel failed to call the murder victim's daughter as a witness.
 - j. Counsel failed to interview Sonya Green or Joyce Shelton.
 - k. Counsel failed to object when the Solicitor argued the Cadillac was the Applicant's vehicle.
2. Denial of due process of law.

On April 28, 2000 the Honorable A. Victor Rawl convened an evidentiary hearing into the application at the Charleston County Courthouse. By order dated August 4, 2000, Judge Rawl denied and dismissed the application.

Applicant filed a timely notice of appeal to the South Carolina Supreme Court. The Supreme Court denied the petition for writ of certiorari by order dated December 13, 2001. The remittitur was sent on December 31, 2001.

C. Federal Habeas Corpus

Applicant filed a Petition for Writ of Habeas Corpus in the United States District Court for the District of South Carolina on May 14, 2002 (C/A No. 0:02-1679-13BD). In that petition he raised the following grounds for relief:

1. Post-conviction relief court erred in finding the Petitioner's trial attorneys were not ineffective in failing to file a notice of appeal on behalf of the Petitioner.

2. Trial court lacked subject matter jurisdiction of the murder charge.
3. Post-conviction relief court erred in finding the Petitioner's trial attorneys were not ineffective in failing to introduce evidence that the paint samples taken from the Cadillac did not match the white paint removed from the victim's truck.
4. Post-conviction relief court erred in not finding counsel ineffective based on failure to move for a directed verdict as to burglary.
5. Post-conviction relief court erred in not finding counsel ineffective for their failure to object and seek a curative instruction with respect to numerous prejudicial arguments by the prosecutor.

By order dated May 16, 2003, the Honorable G. Ross Anderson, Jr. granted the State's motion for summary judgment and dismissed his petition. Applicant filed a Motion to Alter and Amend, which Judge Anderson denied by order dated June 3, 2003.

D. Second Post-Conviction Relief Action

Applicant filed his second post-conviction relief application on April 15, 2004 (2004-CP-08-816). In his second application, Applicant raised the following grounds for relief:

1. Trial Court lacked subject matter jurisdiction to enter a conviction or impose a sentence for murder and burglary- first degree.
2. Ineffective assistance of trial counsel.
 - a. Counsel failed to object to the defective indictment prior to the swearing of the jury.

The Honorable Daniel F. Pieper convened a hearing into the application on March 16, 2005. By order dated August 12, 2005, Judge Pieper denied and dismissed the application.

Applicant filed a timely Notice of Appeal on the denial of his application. Following the filing of a Johnson¹ Petition for Writ of Certiorari, the Supreme Court denied the petition by written order dated September 10, 2007. The remittitur was sent September 26, 2007.

E. State Habeas Corpus

Applicant filed a Writ for Habeas Corpus in the circuit court on March 15, 2010 (2010-CP-08-905). In that action, Applicant raised the following grounds for relief:

¹ Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988).

1. Trial attorneys were ineffective for failing to file a notice of appeal on behalf of Petitioner.
2. Mr. Deluca was ineffective for failing to interview Officer Mason or subpoena him to court.
3. Counsel was ineffective for failing to object to Agent Crimminger's testimony on the ground that it was "hearsay".
4. Counsel was ineffective for failing to move for a directed verdict for the charge of burglary.
5. Attorneys were ineffective for failing to object to Solicitor Badger's bolstering of prosecution witnesses, attorney were also ineffective for failing to make a motion for a mistrial.
6. Counsel failed to object to the judge's faulty charge to reasonable doubt, failed to request a curative charge to the jury, and failed to preserve the issue for appellate review.

The Honorable R. Markley Dennis conditionally dismissed the Petition by order dated August 17, 2010. Judge Dennis issued a final order of dismissal on November 3, 2010. Applicant did not appeal the denial of this petition.

II. CURRENT APPLICATION

Applicant filed the current application on April 20, 2012. In his current application, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. "The Applicant is requesting that this Honorable Court grant him a belated appeal in light of his trial attorneys being ineffective for failing to file a notice of appeal on behalf of the Applicant at the conclusion of trial."

Respondent made a timely Return and Motion to Dismiss on or about June 4, 2014, moving to dismiss the application as successive and untimely. The Honorable Roger M. Young Sr. issued a conditional order of dismissal on June 14, 2013. Applicant filed a timely response to the conditional order, and Judge Young ordered the matter set for a hearing by order filed July 31, 2013.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to

observe each witness who testified at the hearing, and to closely pass upon their credibility. The Court has weighed the testimony accordingly. Viewing the record before it in the light most favorable to Applicant, the Court makes the following findings of fact and conclusions of law pursuant to S.C. Code Ann. § 17-27-80:

A. Successive Application

The Court finds this application should be dismissed because it is impermissibly successive to Applicant's prior collateral actions. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 246, 262 S.E.2d 735, 737 (1980). 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). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." Id. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. Id. The applicant bears the burden of showing that the allegations could not have been raised previously. Id.

Applicant argues he is entitled to a direct appeal of his conviction because he has recently

discovered the return receipt indicating his trial counsels received a letter from him requesting an appeal. However, the issue of whether Applicant is entitled to a direct appeal of his conviction was raised in his initial application, his federal habeas corpus action, and his state habeas corpus action. Furthermore, Applicant admitted at the hearing on this application that he received the return receipt back from the postal service prior to the hearing on the initial application. Trial counsel was available to testify about the return receipt at that hearing. Because this information was available to Applicant for use in his prior Application,² he is not entitled to raise this issue at this juncture. Furthermore, Applicant raised this issue in his state habeas action after he re-discovered the misplaced return receipt. Thus, he cannot relitigate this issue³ at this juncture. Accordingly, the Court finds Applicant has failed to present sufficient reasons why he should be allowed to proceed with a successive application.

B. Untimely Application

The Court further finds this application should be dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-45(a) provides that:

“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

² To the extent Applicant alleges initial collateral counsel failed to utilize the return receipt in the initial application, such an allegation rings of ineffective assistance of collateral counsel. Such an argument is not cognizable in post-conviction relief. Austin v. State, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991) (recognizing that “the constitutional right to counsel does not extend to discretionary appeals on collateral attack”); see also Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (no constitutional right to effective assistance of collateral counsel); Aice, 305 S.C. at 451, 409 S.E.2d at 394 (ineffective assistance of collateral counsel not grounds for successive application). The Court takes no position on whether Applicant may be entitled to raise this issue in Federal Court. See Martinez v. Ryan, 132 S.Ct. 1309 (2012).

³ Even if the Court were to reach the merits of Applicant’s allegation, he would still not be entitled to a direct appeal of his conviction. The return receipt is dated February 18, 1997. Applicant was sentenced on February 5, 1997. Thus, trial counsel would have received the letter requesting an appeal three days after the deadline to file the notice of appeal pursuant to Rule 203(b)(2), SCACR (notice of appeal must be filed ten days after sentence imposed).

sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.”

This statute of limitations applies to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 470, 469 S.E.2d 606, 607 (1996).

Applicant was sentenced on these convictions on February 5, 1997. He was therefore required to file his application before February 5, 1998. This application was filed on April 20, 2012, which was well beyond the expiration of the statutory filing period. Furthermore, as noted above, Applicant has not demonstrated there exists “evidence of material facts not previously presented and heard” that would entitle him to the exemption to the statute of limitations located in S.C. Code Ann. § 17-27-45(c). Accordingly, the Court finds Applicant has failed to present sufficient reasons why he should be allowed to proceed with an untimely application.

IV. CONCLUSION

Based on the foregoing, the Court finds Applicant has not shown a sufficient reason why the application was not successive and untimely. Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application, nor has he presented sufficient reasons why Judge Young’s conditional order should not become final. Therefore, for the reasons set forth above and in the conditional order of dismissal, the Court finds this application for post-conviction relief must be denied and dismissed with prejudice.

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. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel’s assistance in seeking review of the denial of

post-conviction relief. Rule 71.1(g), SCRPC, provides that if Applicant wishes to seek appellate review, counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 12 day of May, 2015.


THE HONORABLE W. JEFFREY YOUNG
Presiding Judge

Sumter, South Carolina

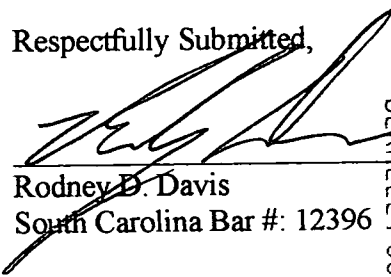
STATE OF SOUTH CAROLINA) IN THE SUPREME COURT OF SOUTH CAROLINA
)
 COUNTY OF BERKELEY)
)
) Case No.: 2013-CP-08-1216
)
 JOHNNY L. LUCAS,)
) Applicant.)
)
) -versus-) REQUEST FOR REPRESENTATION ON APPEAL
)
) STATE OF SOUTH CAROLINA,)
)
) Respondent.)

On behalf of the request of the above-named Applicant, to be represented by the South Carolina Commission of Indigent Defense, Appellate Division (SCCID), the undersigned attorney would show unto this Honorable Court that:

1. He is the attorney for the Applicant-Appellant in the above captioned case. The Applicant-Appellant was in custody during and taken into custody immediately following the Post Conviction Relief (PCR) hearing and was not available to personally sign this request;
2. The Applicant-Appellant was represented by the undersigned attorney as an indigent, pursuant to a contract with the SCCID;
3. The Applicant-Appellant has been informed that he may request assistance from the SCCID Appellate Division in perfecting his appeal;
4. A timely Notice of Intent to Appeal has been filed on the Applicant-Appellant's behalf;
5. The Applicant-Appellant has been informed that nothing requires SCCID Appellate Division to pursue this appeal unless that office's Chief Attorney is satisfied that there is arguable merit to this appeal and that he cannot afford to hire an attorney.

At this time, the Applicant-Appellant requests the aid of the SCCID Appellate Division in perfecting his appeal to the South Carolina Court of Appeals.

Respectfully Submitted,


 Rodney D. Davis
 South Carolina Bar #: 12396

MARY P. BROWN
 CLERK OF COURT
 BERKELEY COUNTY, SC

2015 JUN 18 AM 11:35

FILED

6/17, 2015
 Charleston, South Carolina.



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June 17, 2015

The Honorable Daniel E. Shearhouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RE: Johnny Lucas v. State of South Carolina, Case No.: 2013-CP-08-1216

Dear Mr. Shearhouse:

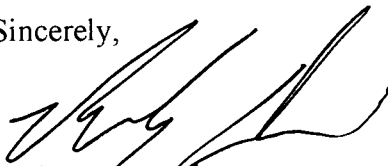
Enclosed for filing is the Notice of Appeal (original and clocked copy) in the above Post Conviction Relief (PCR) case. Also enclosed are the following:

- (1) Proof of service of the Notice of Appeal on the respondent;
- (2) The Order of Dismissal &
- (3) A Request for Representation on Appeal.

The Applicant-Appellant was represented by me as an indigent pursuant to my contract with the South Carolina Commission on Indigent Defense (SCCID) to handle PCR cases. By copy of this letter, I am forwarding a duplicate set of documents to the SCCID.

The Request for Representation on Appeal and the Affidavit in Support thereof are signed by me as attorney for Applicant-Appellant. If you need anything further, do not hesitate to contact me. Thank you for your time and attention to this matter.

Sincerely,



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CC: J. Rutledge Johnson
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