

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Johnny Lee Lucas, #235656,)
)
Applicant,)

Case No.: 2012-CP-08-216

vs.)

State of South Carolina,)
)
Respondent.)

ORDER

FILED
2013 JUL 31 AM 10:35
JAMES P. BRIDGES
CLERK OF COURT
BERKELEY COUNTY, SC

This matter comes before the Court pursuant to an Application for post-Conviction Relief filed April 20, 2012. The State made its Return and Motion to Dismiss dated June 4, 2013, requesting that the application be summarily dismissed.

Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal dated June 11, 2013 and filed June 14, 2013, provisionally dismissing this action. This Court gave Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. The Applicant was personally served by a S.C. Department of Corrections officer on July 5, 2013 with said Order.

The Applicant submitted a response captioned "Response in Opposition to Conditional Order of Dismissal Becoming Final", which was dated July 15, 2013. The Applicant alleged the following reasons that he is entitled to an evidentiary hearing.

7/31/13
email:
ARW
ma 7/31/13
dhp

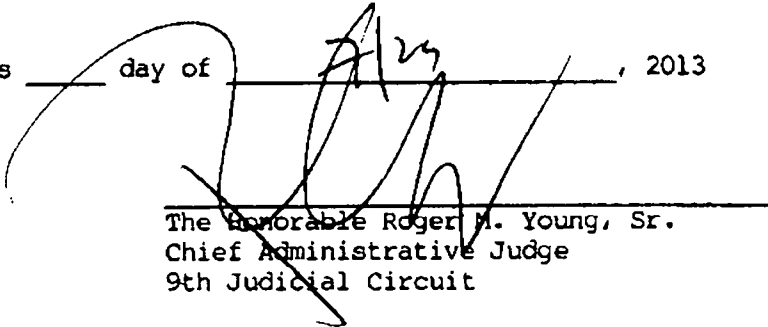
1. That he requested that a notice of appeal be filed on his behalf and did not waive his rights to an appeal;
2. The statute of limitation should not apply in this matter and that this application should not be deemed as successive.

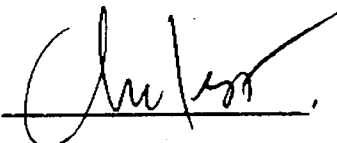
This Court has reviewed the Applicant's Response to the Conditional Order of Dismissal in its entirety, in conjunction with the original pleadings, and finds that the allegations are sufficient to warrant a hearing.

Further, in taking guidance from the recent South Carolina Supreme Court's ruling in the case of McCoy v. State, 737 S.E.2d 623 (2013), which expressed that where a post-conviction relief applicant alleges facts that would establish an exception to either the statute of limitation or the prohibition against successive applications and these facts are not conclusively refuted by the record before the court, as this Court finds in the instant case, a question of fact is raised, which can only be resolved by a hearing.

IT IS THEREFORE ORDERED that, for the reasons set forth in the Applicant's original pleadings and his "Response" to the Conditional Order of Dismissal, the Applicant's request for an evidentiary hearing is GRANTED, and a hearing date is to be set immediately.

AND IT IS SO ORDERED this _____ day of April, 2013


The Honorable Roger M. Young, Sr.
Chief Administrative Judge
9th Judicial Circuit


_____, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

Johnny Lee Lucas, #235656,)
Applicant,)

vs.)

State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

2012-CP-08-121

RESPONSE IN OPPOSITION TO
CONDITIONAL ORDER OF DISMISSAL
BECOMING FINAL

2013 JUL 18 AM 9:33
BERKELEY COUNTY, SC
CLERK OF COURT
P. BROOKH

FILED

This matter is before the Court by way of an application for post-conviction relief filed April 20, 2012. Respondent filed a Return and Motion to Dismiss on June 4, 2013, followed by a Conditional Order of Dismissal filed on June 14, 2013, the "Order" gave the Applicant twenty (20) days from service of the "Order", June 25, 2013, to file a response to show why the "Order" should not become final.

The Applicant, responding to the Conditional Order of Dismissal, filed June 14, 2013, would show this Honorable Court that the "Order" should not become final for the following reasons:

I.

For the benefit of this Response, the Applicant would adopt the Respondent's "History of this Case".

II.

The Applicant's current post-conviction relief application alleges that he is being held unlawfully in custody for the reasons:

"TRIAL ATTORNEYS WERE INEFFECTIVE FOR FAILING TO FILE A NOTICE OF APPEAL ON BEHALF OF THE APPLICANT".

The Applicant ask that this Court reconsider this matter after reviewing this response.

III.

This Court should not summarily dismiss this application because there are conflicting accounts of whether the Applicant asked his trial attorneys to file a notice of appeal on his behalf. In Miller v. U.S.¹, the Fourth Circuit Court of Appeals found that the District Court erred in the granting of summary judgment in favor of the Respondent where the conflicting affidavits created a genuine issue of material fact as to whether petitioner asked counsel to note an appeal. The case was remanded for an evidentiary hearing.

1. 150 F.Supp. 871, 874 (E.D.N.C. 2001)

IV.

This Court should not find that the current application for post-conviction relief must be summarily dismissed because it is successive to the Applicant's prior applications for post-conviction relief. As the Respondent noted, S.C. Code Ann. §17-27-90 provides that:

All grounds for relief available to an applicant under this chapter must be raised in the original, supplemental or amended application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding 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. (emphasis added).

There is sufficient reason why the Applicant did not raise in prior proceedings that he sent the "letter" to his trial attorneys "certified mail" asking them to file a notice of appeal on his behalf. This issue was not adequately raised in the Applicant's prior applications. First, as stated in his application for post-conviction relief, the Applicant states that he misplaced the "green card" that was returned to him after the letter was "delivered" to his trial counsel's office. See page 15 of the post-conviction relief application filed in this case, (2012-CP-08-1216). The Applicant could not adequately raise this issue because he didn't have proof that the "letter"² was

2. The front of the "green card", Exhibit-A, the back of the "green card" and the purchase receipt, Exhibit-B, the letter from Attorney Masty, Exhibit-C, and the letter Applicant mailed to the trial attorneys' office, Exhibit-D, are all attached, see pages 8,9,10 and 11.

delivered to his trial attorneys' office, "the burden of proof at the hearing is on the applicant to prove his allegations by a greater preponderance of the evidence". Banister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Without the "green card" the Applicant could not prove he sent the "letter" certified mail, once the Applicant located the "green card", he immediately filed an action asking for an appeal because he could now prove that his trial attorneys were not truthful when they claimed they never received the Applicant's letter requesting that the attorneys file a notice of appeal on his behalf.

For the reason stated here, this application should not be deemed as being successive. The Applicant did not waive his right to a direct appeal.

As the Respondent noted in the "Conditional Order of Dismissal", page 5, that the Applicant has raised the issue concerning his appeals right in his prior PCR, Federal Habeas Corpus Petition and State Habeas Corpus Petition. This shows that the Applicant has consistently asserted his right to appeal his convictions and sentences in this matter. The courts previously mentioned, all based their decisions on not granting the Applicant a belated appeal on the fact that the first PCR court found that "the trial attorneys testimonies at the first PCR hearing were more credible than that of the Applicant's". But all the time the lawyers were lying and the "green card" proves that

the trial attorneys were not being truthful in their testimonies at the hearing concerning Applicant's request that they file a notice of appeal on his behalf. No state high court, S.C. Court of Appeals nor the S.C. Supreme Court, has ruled on this issue, and no court has ruled on this issue since I found the "green card".

V.

In the "Conditional Order of Dismissal" the statute of limitation argument is based on the South Carolina Supreme Court's findings in the case of Graham v. State, 378 S.C. 1, 3-4, 661 S.E.2d 337, 338 (2008). Graham is distinguishable from the instant case in that Graham was a guilty plea, and Graham never asserted his right to an appeal in his first PCR application. The South Carolina Supreme Court is clear on this issue, "the statute of limitation does not apply where the applicant does not knowingly and voluntarily waive his right to appeal his trial conviction. Wilson v. State, 348 S.C. 215, 559 S.E.2d 581, 582 (2002). In this case, there is not even a hint of a waiver of the Applicant's appeals right.

For the foregoing reasons the Applicant ask that this Court consider the issues raised in this "Response" and not summarily dismiss the PCR application because there are genuine issues of material facts raised herein and the Respondent should not be entitled to judgment as a matter of law.

This 15th day of July, 2013

Respectfully submitted,

Johnny Lee Lucas
Johnny Lee Lucas #235656
MCCI F-4 286-A
386 Redemption Way
McCormick, SC 29899
Applicant

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Johnny Lee Lucas, #235656,
Applicant,

Case No.: 2012-CP-08-1216

vs.

CERTIFICATE OF SERVICE

State of South Carolina,
Respondent.

HARRY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

2013 JUL 18 AM 8:34

FILED

The Applicant certify that he has on this day served a copy of the Response in Opposition to Conditional Order of Dismissal Becoming Final and Propose Order on the Respondent by delivering a copy of same to the McCormick Correctional Institutional mail room, with sufficient postage prepaid and addressed as follows:

Office of the Attorney General
Attn: Ashleigh Wilson, Esquire
P.O. Box 11549
Columbia, South Carolina 29211

This 15 day July, 2013

SWORN to and subscribed before me this

15 day of July, 2013

Notary Public of South Carolina

My Commission Expires 10/11/2021

Johnny Lee Lucas
Johnny Lee Lucas #235656
McCI F-4 286-A
386 Redemption Way
McCormick, SC 29899
Applicant

UNITED STATES POSTAL SERVICE

Official Business



PENALTY FOR PRIVATE
USE TO AVOID PAYMENT
OF POSTAGE, \$300



Print your name, address and ZIP Code here

JOHNNY LUCAS 235656
EVANS ROAD. INST.
P.O. BOX 2951202
BENNETTSVILLE S.C. 29512

Exhibit - A

Exhibit - A

Exhibit-B

PS Form 3811, December 1991
DOMESTIC RETURN RECEIPT

SENDER:

- Complete items 1 and/or 2 for additional services.
- Complete items 3, and 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):

- Addressee's Address
- Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:
 JAY MASTY
 102 MARILYN ST
 GOOSER CREEK, SC. 29445

4a. Article Number
 P 283891164

4b. Service Type
 Registered Insured
 Certified COD
 Express Mail Return Receipt for Merchandise

7. Date of Delivery
 2-18-97

8. Addressee's Address (Only if requested and fee is paid)

5. Signature (Addressee)
 S. Masty

6. Signature (Agent)
 S. Masty

PS Form 3811, December 1991
DOMESTIC RETURN RECEIPT

Exhibit-B

Thank you for using Return Receipt Service.

P 283 891 164

PS Form 3800, April 1995
 TONY LUCAS & ASSY

US Postal Service
Receipt for Certified Mail
 No Insurance Coverage Provided.
 Do not use for International Mail (See reverse)

Sent To	JAY MASTY
Street & Number	102 MARILYN ST
Post Office, State, & ZIP Code	GOOSER CREEK, SC. 29445
Postage	\$ 32
Certified Fee	110
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to Whom & Date Delivered	100
Return Receipt Showing to Whom, Date, & Addressee's Address	
TOTAL Postage & Fees	142
Postmark or Date	FTB 181 PM 1997 0512

385

Exh. 2. f. c

Law Offices
DeLuca and Maucher, L.L.P.

Post Office Box 9, 102 Marilyn Street
Goose Creek, South Carolina 29445

Phone: (803) 572-1711

Fax: (803) 572-1285

PETER D. DELUCA, JR.

MICHAEL A. MAUCHER
(SC, PA)

JAY S. MASTY, LL.M.
(SC, GA)

February 7, 1997

Mr. Johnny Lee Lucas
SCDC# 235655
Evans Correctional Institution
P.O. Box 29512-02
Bennettsville, SC 29512

RE: STATE OF SOUTH CAROLINA v. JOHNNY LEE LUCAS
CASE NOS.: 96-GS-08-661
96-GS-08-662
96-GS-08-663
96-GS-08-664

Dear Johnny:

Needless to say, Pete and I share in your distress over the jury's failure to speak the truth in your case.

As you know, this Firm was Court-ordered to represent you at the trial of this matter. When the trial ended on Wednesday, our representation of you ceased. Nevertheless, I wanted to inform you of certain rights you have to appeal the decision of the jury rendered on February 5, 1997. Under the Rules of Appellate Practice, if you intend to file an appeal of this jury's finding, you must serve that Notice of Appeal within ten (10) days after February 5, 1997. As such, your Notice of Appeal is due on February 15, 1997. By being due, I am recommending that your Notice of Appeal actually be received by the correct parties on or before February 15, 1997. The Notice of Appeal shall be filed with the Clerk of the Supreme Court and the Clerk of Court for Berkeley County. Please note that in addition to filing said Notice of Appeal, there are certain other requirements. I have enclosed a copy of Rule 203, Rule 204 and Rule 206 which I believe to be relevant to your claim at this time. Additionally, I have enclosed a copy of form motions and correspondence to assist you in filing your Notice of Appeal. Also note there is a filing fee of \$100.00 which is to be sent with your Notice of Appeal and correspondence to the Supreme Court. I believe that you may be entitled to file a Motion *in forma pauperis*. This may allow you to waive any filing fee.

Mr. Johnny Lee Lucas

387

Exhibit I

Johnny Lucas, #235656
Evans Correctional Institution
Post Office Box 2951202
Bennettsville, SC 29512-5202

February 13, 1997

Mr. Jay S. Masty, Attorney
Post Office Box 9, Marilyn Street 102
Goose Creek, South Carolina 29445

Dear Mr. Masty:

This is in response to your last letter addressed to me. Dated February 7, 1997 to which I have received here at the ECI Mail Room dated Feb 10, 1997.

Thanks for the legal advise. However, petitioner asserts that counsel's performance was ineffective because counsel failed to perfect an appeal. 410 S.E.2d 575(S.C.App. 1991); 400 S.E.2d 483 (S.C. 1991). State of South Carolina v Johnny Lee Lucas, Case No. 96-GS-08-661 through 96-GS-08-664, is not inapposite. Under the Rule of Appellate Practice, you must serve that Notice of Appeal within ten (10) days after February 5, 1997. Which we have discussed, attorney, Deluca, and myself which you have agreed to do after the verdict were rendered.

Note: Houston v. Lack, 487 U.S. 266, 273-276, 108 S.Ct. 2379 (1988); See United States v. States v. Hollywood Motor Car Co., 458 U.S., at 265, 102 S.Ct., at 3083. Id., at 266, 102 S.Ct., at 3083 (quoting United States v. MacDonald, supra 435 U.S., at 860, 98 S.Ct., at 1552).

I, Johnny Lee Lucas, respectfully request that the Indictment (s) of these matters be forwarded to me through this office.. I look to hear from you on this matter in the near future.

Enclosures

Johnny Lucas
Sincerely, Johnny Lee Lucas

February 13, 1997.

1322 FEB 97
D. Scarce
11 8.14.94 *Johnny*