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August 20, 2015

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

RECEIVED

AUG 24 2015

S.C. SUPREME COURT

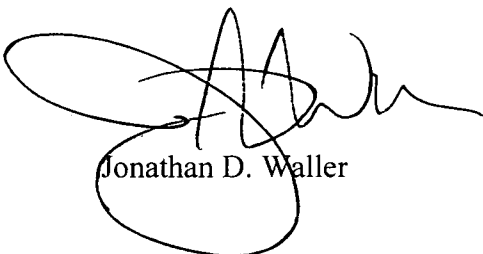
Re: Tonia C. Faile vs. State of South Carolina
C/A No: 2013-CP-38-00903

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Ms. Snell in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-708-6767.

Sincerely,



Jonathan D. Waller

Cc: J. Clayton Mitchell, South Carolina Office of Attorney General

Enclosures

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Maité Murphy, Circuit Court Judge

2013-CP-38-00903

RECEIVED

AUG 24 2015

Tonia C. Faile, #332051,

Appellant,

S.C. SUPREME COURT


v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Tonia C. Faile, #332051, appeals the Order of Dismissal denying her Application for Post-Conviction Relief filed July 1, 2015 and served on counsel by letter dated July 28, 2015, issued by the Honorable Maité Murphy, Presiding Judge, First Judicial Circuit.



Jonathan D. Waller

Giese Law Firm
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Columbia, SC 29201
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803-708-6769 (fax)
jwaller@thegieselawfirm.com
ATTORNEY FOR PETITIONER

This 20 day of August, 2015.

Other Counsel of Record:

J. Clayton Mitchell, Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3319

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Maité Murphy, Circuit Court Judge

2013-CP-38-00903

RECEIVED

AUG 24 2015

Tonia C. Faile, #332051,

Appellant,

v.

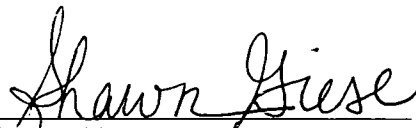
STATE OF SOUTH CAROLINA,

Respondent.

S.C. SUPREME COURT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, J. Clayton Mitchell, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 20 day of August 2015.


Shawn Giese

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

Tonia C. Faile, #332051,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

2013-CP-38-0903

ORDER OF DISMISSAL

FILED
WINNIE B. CLARK
CLERK OF COURT
ORANGEBURG, SC
2015 JUL -1 P 12: 25

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed July 15, 2013. Respondent made its Return on October 10, 2013, requesting an evidentiary hearing be convened. Jonathan D. Waller, Esquire, was appointed by the Orangeburg County Clerk of Court. Respondent filed an Amended Return and Motion to Dismiss on June 4, 2014, requesting that the case be dismissed as filed outside the statute of limitations. A hearing was held on May 18, 2015, at the Dorchester County Courthouse. Applicant was present and represented by Counsel Waller. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent.

Applicant testified on her own behalf at the hearing. Also testifying was Applicant's plea counsel, Glenn Walters, Sr., Esquire. The Court had before it the Orangeburg County Clerk of Court records, Applicant's South Carolina Department of Corrections records, the PCR application, the Return, and the guilty plea transcript.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Orangeburg County. Applicant was true bill indicted during the November 2006 term of the Orangeburg County Grand Jury for Child

ATTEST: TRUE COPY

Winnie B. Clark

CLERK OF COURT
ORANGEBURG COUNTY, SC

Endangerment (2006-GS-38-1881) and Felony DUI Resulting in Death (2006-GS-38-1882). Glenn Walters, Sr., Esquire, represented Applicant. On December 2, 2008, Applicant appeared before the Honorable William P. Keesley, where she pled guilty as indicted. Judge Keesley sentenced Applicant to confinement for twelve (12) years' for Child Endangerment and twelve (12) years' for Felony DUI, with the sentences to be served concurrently. Applicant did not appeal her sentence or convictions.

II. SUMMARY AND EVIDENCE PRESENTED AT THE PCR HEARING

Respondent renewed its motion to dismiss all allegations except for whether Applicant knowingly and intelligently waived her right to file a direct appeal pursuant to White v. State¹. Applicant alleges that she was incompetent during her time in prison and therefore the statute of limitations should be tolled to allow her to proceed to a full merits hearing. Applicant relied on Ferguson v. State, 382 S.C. 615, 677 S.E.2d 600 (2009) (requiring the tolling of the statute of limitations if Applicant can establish that mental incompetence prevented the timely filing of his or her application). Applicant also alleges she did not knowingly and voluntarily waive her right to an appeal her sentence and conviction.

Applicant's Testimony

At the PCR hearing, Applicant testified she was injured in a car crash while intoxicated. Her young daughter died as a result. Applicant explained she was in a wheelchair and was receiving extensive treatment for her injuries while the charges were pending. Applicant testified she became very depressed after the incident and was prescribed multiple pills such as Paxil and Celexa to treat her depression. She was not coping well with the loss of her daughter. She testified her medication changed several times. She testified she was addicted to crack cocaine

¹ 263 S.C. 110, 208 S.E.2d 35 (1974)

and was a frequent user for around eighteen (18) years. She testified she took bible study classes which have helped her manage her situation. Applicant explained she was extremely depressed after the incident and that it took doctors some time to administer the proper dosage of medication. Applicant testified she is functioning much better now. Applicant testified she was never found to be not competent and that her competence was never questioned by her doctors or attorney. She testified she was never diagnosed with a mental illness that would affect her ability to reason and understand the proceedings.

Applicant further testified that she did not waive her right to appeal her sentence and conviction. She testified she was advised of her right to appeal by the plea court but that she did not know of her time constraints in filing a notice of appeal.

Counsel Glenn Walters, Sr.'s Testimony

Counsel testified he has been practicing law for about twenty-five (25) years. Counsel explained the facts of the case to the Court in that Applicant had a dispute, jumped in her car with her baby in her arms and that the child was killed as a result of an accident where it was shown Applicant was intoxicated. Counsel testified it was his standard procedure to advise his clients of their right to appeal and that they would have ten (10) days to do so. He believed he advised Applicant fully of her rights. Counsel explained everyone was happy with the plea deal and emphasized that Applicant was charged with another DUI during the pendency of these charges. Counsel testified Applicant never asked him to appeal and that he never received any correspondence asking him to file a notice of appeal. Counsel stressed that he believed Applicant received a favorable outcome from the plea and that he did not believe there was any reason to appeal the convictions and sentences.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the transcript plea proceeding, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds Counsel's testimony to be credible and persuasive on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below.

This Court finds that, with regards to all issues except for whether Applicant knowingly and intelligently waived her right to file a direct appeal pursuant to White v. State, these issues must be dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §§ 17-27-10, et. seq. (2003). South Carolina Code Ann. § 17-27-45(a) reads as follows:

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

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). Applicant pled guilty to the offenses he challenges on December 2, 2008. Therefore, Applicant

was required to file her application on or before December 3, 2009. This Application was filed on July 15, 2013, approximately three and a half years beyond the time that the statutory filing period had expired.

This Court finds that Applicant has failed to establish that mental incapacity prevented her from timely filing her application as required by Ferguson. This Court finds Applicant failed to meet her burden in proving that she was incompetent at any time. (Plea Trans. p. 6, line 10 – p. 8, line 3). It is noteworthy that Applicant has never been treated for any mental health issues aside from depression. Applicant also testified at the plea hearing that she did not have any issues affecting her competence and was prescribed medication only to treat her for depression and to deal with the loss of her child. Id. This Court finds that Applicant has failed to establish that mental incompetency prevented timely filing within a year of guilty plea, and therefore, finds that the statute of limitations should not be tolled.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. See McDonnell v. Consolidated Sch. Dist. of Aiken, 315 S.C. 487, 489, 445 S.E.2d 638, 639 (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.” Therefore, all issues (except for the White claim) must be dismissed as untimely.

White v. State Analysis

This Court finds allegation that Counsel was ineffective for failing to review and file a notice of appeal on her behalf following the guilty plea is without merit. Counsel has a constitutionally imposed duty to consult with the defendant about an appeal only when there is

reason to think either: (1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal); or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 120 S.Ct. 1029 (2000). Absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal, for example, because there are nonfrivolous grounds for appeal, or when the defendant reasonably demonstrated an interest in appealing, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. Turner v. State, 380 S.C. 223, 670 S.E.2d 373, (2008).

The record before this Court is clear in establishing that Applicant was aware of appellate rights following the entry of her guilty plea. The plea court advised Applicant that if she wanted to appeal she must notify Counsel immediately in writing. (Plea Trans. p. 20, line 20 – p. 21, line 2). Additionally, Counsel informed Applicant of her appellate rights. Accordingly, Applicant's contention that she was never advised of the right to appeal is insufficient to warrant the grant of a review of direct appeal issues pursuant to White v. State.

IV. CONCLUSION

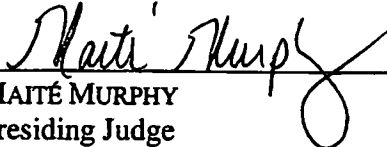
Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant her application. Applicant failed to demonstrate counsel's performance was unreasonable under prevailing professional norms or that the outcome of her plea would have been different had counsel performed differently. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, 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 PCR 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), SCRCP, provides that if Applicant wishes to seek appellate review, PCR 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 shall remain in the custody of the South Carolina Department of Corrections to complete service of her sentence.

AND IT IS SO ORDERED this 24 day of June, 2015.



MAITÉ MURPHY
Presiding Judge

St. George, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

CASE NO.: 2013-CP-38-0903

TONIA C. FAILE, #332051)
)
Plaintiff,)

**MOTION AND ORDER INFORMATION
FORM AND COVER SHEET**

vs.)

STATE OF SOUTH CAROLINA)
)
Defendant.)

FILED
JUL - 1 P 12: 25
WINNIE B. CLARK
CLERK OF COURT
ORANGEBURG, SC

Plaintiff's Attorney:
Jonathan D. Waller, Bar No. 76290
Address:
1315 Blanding Street, Columbia SC 29201
Phone: _____ Fax _____
E-mail: _____ Other: _____

Defendant's Attorney:
J. Clayton Mitchell, Bar No. 101443
Address:
PO Box 11549, Columbia SC 29211
Phone: _____ Fax _____
E-mail: _____ Other: _____

- MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
- FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
- PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: _____
Estimated Time Needed: _____ Court Reporter Needed: YES/ NO

SECTION II: Motion/Order Type

- Written motion attached
- Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

[Signature] 6/4/15
Signature of Attorney for Plaintiff/ Defendant Date submitted

SECTION III: Motion Fee

- PAID - AMOUNT: \$ _____
- EXEMPT: (check reason)
 - Rule to Show Cause in Child or Spousal Support
 - Domestic Abuse or Abuse and Neglect
 - Indigent Status State Agency v. Indigent Party
 - Sexually Violent Predator Act Post-Conviction Relief
 - Motion for Stay in Bankruptcy
 - Motion for Publication Motion for Execution (Rule 69, SCRCP)
 - Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
 - Other: _____

JUDGE'S SECTION

- Motion Fee to be paid upon filing of the attached order.
- Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

- MOTION FEE COLLECTED: \$ _____
- CONTESTED - AMOUNT DUE: \$ _____

ATTEST: TRUE COPY

Winnie B. Clark

CLERK OF COURT

ORANGEBURG COUNTY, SC



ALAN WILSON
ATTORNEY GENERAL

June 29, 2015

The Honorable Winnifa Brown-Clark
Clerk of Court Orangeburg County
Post Office Box 9000
Orangeburg, SC 29115-9000

2015 JUL -1 P 12:25

FILED
WINNIFA B. CLARK
CLERK OF COURT
ORANGEBURG, SC

Re: Tonia C. Faile, #332051 v. State of South Carolina
2013-CP-38-0903

Dear Ms. Brown-Clark:

Enclosed please find the original **Order of Dismissal** signed by the Honorable Maité Murphy, in the above-captioned case, for filing in your office. Please forward a **time stamped copy** back to our office for our file.

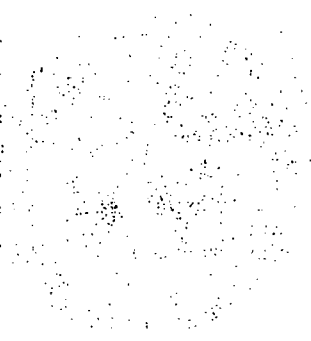
Sincerely,

J. Clayton Mitchell
Assistant Attorney General

JCM/sbm
Enclosure

cc: Jonathan D. Waller, Esquire

ATTEST: TRUE COPY
Winnifa B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC



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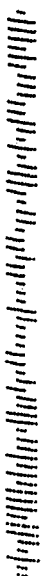
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ALBERT H. COLE
Wm. J. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

THE GIESE LAW FIRM, LLC
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Clerk of Court
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