

AXELROD & ASSOCIATES, P.A.

Attorneys and Counselors at Law

"Success is all that matters"

Stuart Mark Axelrod†
W. Christopher Castro*
Tristan M. Shaffer
Caitlin M. Epley
J. Leon Parrott*

4701 Oleander Drive
Myrtle Beach, SC 29577
Phone: (843) 916-9300
Fax: (843) 916-9311

†Certified Family Court Mediator
*Currently on Active Military Leave
°Licensed in South Carolina and Virginia

September 11, 2015

RECEIVED

SEP 17 2015

S.C. SUPREME COURT

Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: Kevin Brown v. State of South Carolina
Appellate Case No.: 2015-001281

Dear Clerk of Court:

Enclosed please find an original and one copy of an Amended Notice of Appeal, the Order we are appealing in the above referenced matter and the Petition to File Amended Notice of Appeal Out of Time. If you would, please file the Notice of Appeal and return a clocked copy to me in the envelope provided.

Please be advised that I have been court appointed to represent Mr. Brown in this matter.

Thank you for your assistance in this matter. If you have any questions or concerns, please feel free to contact my office.

With kind regards,



Tristan M. Shaffer
Attorney at Law

TMS/kmg
Encl.

cc: Ashleigh R. Wilson, Esquire
Beaufort County Clerk of Court
Appellate Defense
Kevin D. Brown

SUPREME COURT OF SOUTH CAROLINA

APPEAL FROM BEAUFORT COUNTY
In The Court of Common Pleas

Honorable G. Edgar Dickson
Common Pleas Judge
Fourteenth Judicial Circuit

Appellate Case No. 2015-001281

RECEIVED

SEP 17 2015

Kevin D. Brown

Petitioner,

S.C. SUPREME COURT

v.

State of South Carolina,

Respondent.

AMENDED NOTICE OF APPEAL

Petitioner appeals the Order of Dismissal of the Honorable G. Edgar Dickson, dated May 4, 2015 and received by Petitioner on May 29, 2015.

Respectfully Submitted,



Tristan M. Shaffer
4701 Oleander Drive
Myrtle Beach, SC 29577
(843) 916-9300
Tristan@gotaxelrod.com
Attorney for Petitioner

September 11, 2015

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BEAUFORT)
)
 Kevin D. Brown, #156201,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 2013-CP-07-2577

2015 MAY 16 PM 3:56
 BEAUFORT COUNTY S.C.
 CLERK OF COURT

ORDER OF DISMISSAL

Presiding Judge:	The Honorable Edgar Dickson
Applicant's Attorney:	Tristan Shaffer, Esquire
Respondent's Attorney:	Ashleigh R. Wilson, Esquire
Plea Counsel:	Dudley Ruffalo, Esquire
Date of Hearing:	October 29, 2014
Court Reporter:	Wanda H. Rowe

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed October 4, 2013. The Respondent made its Return and Motion to Dismiss on September 11, 2014. A hearing on the Respondent's Motion to Dismiss was held on October 29, 2014 at the Beaufort County Courthouse. The Applicant was present at the hearing and represented by Tristan Shaffer, Esquire. Ashleigh R. Wilson, Esquire, of the South Carolina Attorney General's Office represented the Respondent.

This Court had before it the records of the Beaufort County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the PCR application, and Respondent's Return and Motion to Dismiss.

PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Beaufort County Clerk of Court's orders of commitment. The Applicant was indicted at the

1/7

March 2005 term of the Beaufort County Grand Jury for murder (2005-GS-07-0457), possession of a weapon during the commission of a violent crime (2005-GS-07-0456), and assault and battery with intent to kill (ABWIK) (2005-GS-07-0458). Dudley Ruffalo, Esquire represented the Applicant.

On December 14, 2006, the Applicant pled guilty. The Honorable Carmen T. Mullen sentenced the Applicant to imprisonment for thirty (30) years murder, five (5) years for possession of a weapon during the commission of a violent crime, and twenty (20) years for ABWIK. The Applicant did not appeal his convictions or sentences.

ALLEGATIONS

In his application for post-conviction relief the Applicant alleges he is being held in custody unlawfully for the following reason:

1. Ineffective Assistance of Counsel.
 - a. Counsel failed to provide competent representation, failed to diligently investigate matters concerning the case.
 - b. Counsel failed to fully disclose exculpatory material regarding statement given by the State's key witness.
 - c. Counsel failed to pursue matters on behalf of the Applicant.
 - d. Counsel failed to give Applicant a mental health evaluation.
 - e. Counsel failed to assert whether the Applicant had an informed understanding of direct, substantial, or circumstantial evidence or whether or not he understood the terms "evidence" and "criminal element".
 - f. A conflict of interest existed between Applicant and defense attorney whereas defense attorney conduct involved dishonest, intimidation, and creation his own matter of defense strategy without discussing it fairly.
2. Substantive Due Process Violation.
 - a. Applicant was deprived of a cognizable property rooted in State law.
 - b. Trial court engaged in arbitrary and wrongful acts while using the fairness of fundamental law to implement procedure.
 - c. Applicant was deprived of a constitutionally protected interest.
 - d. Applicant filed a motion to have counsel relieved and trial court judge used substantial actual prejudice as justification to deprive Applicant of diligent representation.

2/7 

3. Procedural Due Process Violation.
 - a. Applicant was denied the opportunity to present meaningful defense.
 - b. Trial court refused to appoint new defense attorney whereas a conflict existed when counsel began coercing Applicant to plea and threatening with veiled threats.
 - c. Defense counsel failure to include adequate notice for Applicant appeal of conviction.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the October 29, 2014 hearing, the Respondent moved to summarily dismiss the Applicant's post-conviction relief application on two bases. First, the State argued the application was filed outside of the statute of limitations outlined in S.C. Code §17-27-45(a). Second, the State argued the Applicant's claim regarding counsel's failure to advise him of his right to appeal should be barred by laches based on the fact that the Applicant's guilty plea transcript is no longer available.

The Applicant was present and took the stand to provide testimony regarding his untimely application. The Applicant testified he was currently serving a thirty-five (35) year sentence for murder. He testified he initially wanted to go to trial, but ultimately pled guilty. He testified he was represented by Dudley Ruffalo, Esquire. The Applicant testified he knew of his right to appeal at the time of his guilty plea and told Ruffalo he wanted to appeal his guilty plea. He testified no appeal was filed by his plea counsel. The Applicant testified further he wrote a letter to Beaufort County in 2007 asking for a PCR application. He testified he returned the application to the Clerk of Court and never heard anything further about the application. The Applicant testified he has a copy of the letter he sent to Beaufort County, but he did not have it in his possession at the time of the hearing. The Applicant testified he filed his current and second PCR application in 2013.


At the conclusion of the Applicant's testimony, this Court took the Respondent's Motion to Dismiss under advisement and gave the Applicant 30 days to submit a copy of the letter he claims he sent to Beaufort County in 2007 requesting a PCR application. The Court issued an order outlining its ruling on November 2, 2014.

As of the date of this Order, the Applicant has not submitted any of the documentation he claimed to possess which would support his testimony that he attempted to file his post-conviction relief application in 2007. This Court closes the record in this matter and grants the Respondent's Motion to Dismiss and find this application is both untimely and barred by laches.

This Court finds this application is dismissed for the Applicant's failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160. S.C. 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). The Applicant was convicted of the offenses he challenges in this Application on December 14, 2006. This Application was filed on October 4, 2013, which was almost six years after the statutory filing period had expired. This Court also notes, the Applicant has failed to provide a satisfactory basis for his filing of his first post-conviction relief application almost seven (7) years after he was convicted. This Court also finds unconvincing and not credible the Applicant's self-serving testimony regarding his attempts to file a PCR application in 2007.

4/7 

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (1985) 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, this Court dismisses this application for post-conviction relief for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act.

This Court also finds the Applicant's claim that counsel failed to advise him of his right to appeal is barred by laches. While ordinarily, White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974) allows an Applicant claiming he was deprived of his statutory right to appeal his conviction or sentence the opportunity to proceed solely on that issue even if his application for post-conviction relief was filed outside of the standard one-year statute of limitations, this Court finds this Applicant is foreclosed from being able to pursue this claim because he waited almost seven (7) years after his guilty plea to claim he wanted to appeal his guilty plea. This Court finds because the Applicant sat on his right to appeal for seven (7) years, the guilty plea transcript can no longer be obtained.


Under South Carolina law, to establish laches, the circumstances must be such as to import that the complainant had abandoned or surrendered the claim or right which he now asserts. Willcox v. Stroup, 358 B.R. 824 (D.S.C. 2006), aff'd, 467 F.3d 409 (4th Cir. 2006), cert. denied, 2007 WL 579531 (U.S. 2007). In order to establish laches as a defense, a party must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the party asserting the defense of laches. Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 673 S.E.2d 448 (2009).

5/7 

This Court finds the Applicant's delay in asserting his right to have this Court review whether or not he voluntarily waived his right to an appeal is prejudicial to the State of South Carolina. Because of the delay in the filing of this application almost seven (7) years after he pled guilty, the guilty plea transcript of the Applicant's proceeding is no longer available. Inability to obtain the Applicant's guilty plea transcript would substantially prohibit the Respondent from fully responding to this claim at an evidentiary hearing. Without a guilty plea transcript, it would also be very difficult for the State of South Carolina to defend against any claims presented on appeal if a belated direct appeal were granted to the Applicant. This Court finds the Applicant's claim that counsel failed to advise him of his right to appeal is barred by laches and the Applicant abandoned his right to appeal by waiting over half a decade to assert his claim.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of written notice of entry of this Order to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely served and filed.


[Signature on the following page.]

6/7 

IT IS THEREFORE ORDERED:


1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 4th day of May, 20 .



Ed The Honorable Edgar Dickson
Presiding Judge
14th Judicial Circuit

Orangeburg, South Carolina.

7/7 

SUPREME COURT OF SOUTH CAROLINA

APPEAL FROM BEAUFORT COUNTY
In The Court of Common Pleas

Honorable G. Thomas Cooper, Jr.,
Common Pleas Judge of the Fifteenth Judicial Circuit

Case No.: 2012-CP-26-1814
Appellate Case No. 2015-000891

RECEIVED

SEP 17 2015

Kevin D. Brown,

Petitioner,

v.

S.C. SUPREME COURT

State of South Carolina,

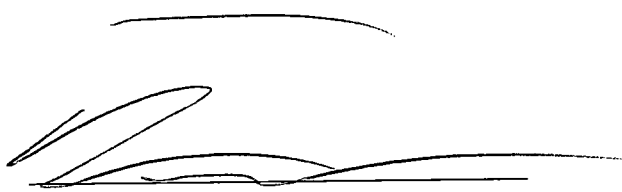
Respondent.

CERTIFICATE OF SERVICE

I certify that on this date, I served the Amended Notice of Appeal upon Respondent by mailing the document to the below address:

Counsel for Respondent:

J. Rutledge Johnson
S.C. Attorney General's Office
P.O. Box 11549
Columbia, SC 29211



Tristan M. Shaffer
4701 Oleander Drive
Myrtle Beach, SC 29577
(843) 916-9300
Tristan@gotaxelrod.com
Attorney for Petitioner

September 11, 2015

00115936 - 1