

The State of South Carolina
In The Supreme Court

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MAY 20 2012

Appeal From Chesterfield County
Court of Common Pleas
Honorable J. Michael Baxley, Circuit Judge

S.C. SUPREME COURT

Billy Lee Kisenby JR, Petitioner

v.

State of South Carolina, Respondent

Explanation

The Petitioner ask that this honorable court intervene in the above case. The Respondents have asked that Petitioner's P.C.R be dismissed pursuant to 17-27-45(a) The Respondents are in error. The Supreme Court has carved out an exception to the statute of limitations for when an Applicant did not knowingly and voluntarily waive his right to appeal from his P.C.R application. *Odum v. State*, 337 S.C. 256, 523, S.E.2d 753 (1999). See also *Austin v. State*, 305 S.C. 409, 409 S.E.2d 395 (1991). The Supreme Court likewise found that the statute does not apply where the Applicant does not knowingly and voluntarily waive his right to appeal his trial conviction. The statute of limitations defense does not apply to a claim that an Applicant was denied their right to a direct appeal or denied their right to have a denial of a P.C.R. See *Wilson v. State*, 348 S.C. 215, 559 S.E.2d 581.

The Petitioner alleges that "He did not knowingly and intelligently waive his right to direct appeal." By law he cannot be barred for challenging the fact he did not knowingly and intelligently waive his right to direct appeal.

Petitioner further challenges in his Amendment to his P.C.R that the former charge of Assault with intent to kill which carried 10 years, was changed and Ratified the 1st day of June, 2011, and Approved the 7th day of June, 2011, to 2nd Degree assault and the Maximum sentence he can receive now is (3) three years. By this law coming into play on effect on June 7th 2011 the (1) year statute of limitations cannot apply.

If the statute of limitations does not apply, a hearing should be held.

After Judge J. Michael Baxley denied Petitioner's P.C.R. on January 10th 2012. The Petitioner received this order on January 13th 2012. On January 14th 2012 Petitioner filed a timely Motion to Alter or Amend a Judgment (Rule 59(e)). If the Judge's order does not sufficiently address all the issues raised at the P.C.R. hearing or in the application, a SCRPC Rule 59(e) motion should be filed requesting clarification.

The Petitioner argued he did not knowingly and voluntarily waive his right to "direct appeal." Petitioner, specifically, clarify that Respondent have intentionally misinformed this Court of his grounds for relief which was alleged within the P.C.R. application. The record is void of any factual allegation or evidence demonstrating Respondent's contention of Applicant claim he did not knowingly and voluntarily waive his right to Direct Appeal. The Statute of limitations cannot be used when challenging direct appeal.

Judge Baxley denied Petitioner's Motion to Alter or Amend a Judgment (Rule 59(e)), "in error, by stating "Applicant dated the document January 14, 2012 but the Clerk's time stamp records the filing date March 9th 2012. Rule 59(e) requires such motions to be served not later than 10 days after receipt or written notice of the order." As such, the Applicant's motion is untimely and is hereby denied."

But Applicant put his Rule 59(e) in the mail on Jan. 14th 2012. The Clerk received it in a timely manner, but the clerk didn't clock in stamp it until the Judge approved my Informa Pauperis Motion. Petitioner wrote the Clerk and asked "why she didn't clock in stamp his Rule 59(e) the day she received it and she stated" as follows:

"MR. Linsby The Clocked Date on Your Paper Work Is The legal Date it was filed.
I know you sent it Earlier But we Cannot file Any Documents Until they are approved by a Judge."

See Attachment #1

Houston v. Lack 103 Sct 2379 (1983) states "that a document is considered filed once it is mailed or received by the courts. Here the Clerk waited (2) months to file it waiting on approval from the Judge to grant my Informa Pauperis.

Due to the Clerk not properly filing Applicant's Rule 59(e) the day she received it and the Judge not understanding that Applicant's case was actually received in court in January of 2012 and the in forma pauperis was approved on March 7th 2012.

This denied him the right to preserve his issues on appeal see:

McCullough v. State, 320 S.C. 270, 464 S.E. 2d 340 (1995)

McCaay v. State, 305 S.C. 329, 408 S.E. 2d 241 (1991)

Pruitt v. State, 310 S.C. 254, 423 S.E. 2d 127 (1992)

Bryson v. State, 327 S.C. 236, 493 S.E. 2d 500 (1997)

Morlan v. State, 375 S.C. 407, 653 S.E. 2d 266 (2007)

Petitioner ask that this court hear his issues. Petitioner cannot be procedurally barred for the issues at hand.

Dated: May 16th 2012

Bill Lee Jr.



CHESTERFIELD COUNTY CLERK OF COURT

200 West Main Street • P. O. Box 529
Chesterfield, South Carolina 29709

Telephone (843) 623-2574

Court of General Sessions
Court of Common Pleas
Register of Deeds

BILLY LEE LIENBY JR 200273
4848 GOLDMINE HIGHWAY OACKALL
KERSHAW CORRECTIONAL INSTITUTE
KERSHAW SC 29067

____ PLEASE FIND THE REQUESTED DOCUMENTS ENCLOSED, THERE WILL BE A 25 CENT FEE FOR EACH DOCUMENT THE NEXT TIME THESE DOCUMENTS ARE REQUESTED.

____ OUR OFFICE DOES NOT HANDLE DETAINERS, YOU WILL HAVE TO CONTACT THE ARRESTING AGENCY THAT PLACED THE DETAINER ON YOU.

____ I HAVE PLACED YOUR LETTER/MOTION REGARDING A SPEEDY TRIAL IN YOUR FILE AND I HAVE MADE A COPY AND FORWARDED TO THE SOLICITORS OFFICE.

____ I HAVE PLACED YOUR LETTER REGARDING YOUR CHARGES TO BE DISMISSED OF IN YOUR FILE AND I HAVE ALSO FORWARD A COPY TO THE SOLICITORS OFFICE.

____ OUR OFFICE DOES NOT HANDLE JAIL TIME YOU WILL NEED TO CONTACT YOUR CASE WORKER TO FIND OUT THAT INFORMATION.

____ OTHER: MR LIENBY THE CLOCKED DATE ON YOUR PAPER WORK IS THE LEGAL DATE THAT IT WAS FILED. I KNOW YOU SENT IT IN EARLIER BUT WE CAN NOT FILE ANY DOCUMENTS UNTIL THEY ARE APPROVED BY A JUDGE.

SINCERELY,
COURT SERVICES SECTION

Attachment #1

FILED
CLERK OF COURT
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CHESTERFIELD COUNTY, SC
BOOK _____ PAGE _____