

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Court of Common Pleas, Richland County
Honorable G. Thomas Cooper

RECEIVED

JUN 08 2016

Circuit Court Case No. 2013-CP-40-07337
Appellate Case No. _____

S.C. SUPREME COURT

Marcus Mageed, 289646, Appellant,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL
(PCR CASE)

Appellant hereby appeals the judgment of the Court of Common Pleas dismissing his action for post conviction relief, **FINAL ORDER OF DISMISSAL** signed by the Honorable G. Thomas Cooper on May 3, 2016, entered of record on May 4, 2016, mailed by the clerk on May 5, 201, and received by Appellant's counsel on May 9, 2016. A copy of said order(s) is/are attached hereto and made a part hereof:



J. Falkner Wilkes (SC Bar #12893)
114 Whitsett Street
Greenville, SC 29601
(864) 242-1292
(864) 271-6035 (facsimile)
jfalknerwilkes@gmail.com
Counsel for Appellant

Other Counsel of Record:

James Clayton Mitchell, III, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-4042
(803) 734-4113 (fax)

Counsel for Respondent

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Circuit Court Case No. 2013-CP-40-07337
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S.C. SUPREME COURT

Marcus Mageed, 289646, Appellant,

v.

State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I certify that on June 6, 2016, I served Appellant's notice of appeal and attached order(s) on the Respondent, and others if indicated, by placing a copy in the U.S. Mail, first class, postage prepaid, addressed as follows, and by electronic means if indicated:

James Clayton Mitchell, III, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
via facsimile also to: (803) 253-6283

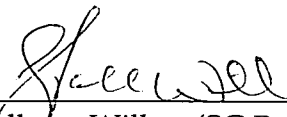
Counsel for Respondent

Also to:

Honorable Jeanette W. McBride
Clerk of Court
POB 2766
Columbia, SC 29202-2766
via facsimile also to: (803) 576-3347

Hon. Daniel E. Shearouse, Clerk
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211
via facsimile also to: (803) 734-1499

Respectfully submitted,



J. Falkner Wilkes (SC Bar #12893)
114 Whitsett Street
Greenville, SC 29601
(864) 242-1292
(864) 271-6035 (facsimile)
jfalknerwilkes@gmail.com
Counsel for Appellant

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2013CP4007337

Marcus #289646 Mageed

State of South Carolina

Marcus Wright

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON): Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): Affirmed; Reversed; Remanded; Other _____

NOTE. ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code 2126 Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 5 day of May, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

J. Falkner Wilkes

James Clayton Mitchell III

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCANNED

JEANETTE W. MCBRIDE
C.P. CLERK
2013 MAY 24 11:03
RICHLAND COUNTY
FILED

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Marcus Mageed, #289646,
aka Marcus D. Wright
aka Marcus Majeed
Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Case No.: 2013-CP-40-07337

FINAL ORDER OF DISMISSAL

RICHLAND COUNTY
FILED
2016 MAY 24 AM 10:27
JEANETTE W. McBRIDE
C.C.P. & G.S.

I. PROCEDURAL HISTORY

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed December 4, 2013. Respondent made its Return and Motion to Dismiss April 11, 2014, 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 filed April 22, 2014, provisionally denying and dismissing this action, while giving the Applicant twenty (20) days from the date of service of said Order to show why the dismissal should not become final. Attached to this Final Order and incorporated herein by reference is an Affidavit of Service dated May 7, 2014, serving the above-mentioned Conditional Order of Dismissal on the Applicant.

Applicant sent a reply to the Conditional Order of Dismissal by and through his attorney, J. Falkner Wilkes, Esq., that was filed on May 7, 2014. This reply contains two (2) main arguments: 1) "The State's failure to appoint counsel prior to the State's filing of a Motion to Dismiss and the Court's entry of an Order violates the Applicant's right to due process," and 2) "Summary Judgement is not appropriate in this case."

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This Court convened a hearing on March 28, 2016. Applicant was present and represented by Counsel Wilkes. Respondent was represented by J. Clayton Mitchell. Respondent renewed its Motion to Dismiss on the grounds that the application was successive and untimely filed. Applicant argued he discovered new evidence which would allow him to proceed on the merits of the ineffective assistance allegation.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

First, Applicant contends his application is neither successive nor untimely because he did not know his prior guilty pleas to carjacking and ABHAN could make him subject to a statutory life without parole sentence if he committed future crimes. He argues this constitutes newly discovered evidence. Second and as to the merits of that allegation, Applicant argues Counsel Johns actively misadvised him that carjacking was not a serious or most serious offense and that if he was properly advised he would not have pleaded guilty and would have proceeded to trial. The Court will address these issues in turn.

Newly Discovered Evidence

This Court finds this information does not meet the requirements for newly-discovered evidence following a guilty plea. Traditionally, in South Carolina, to obtain a new trial based on after discovered evidence, a defendant must show the five (5) factors set forth in State v. Spann, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999). McCoy v. State, 401 S.C. 363, 368 n. 1, 737 S.E.2d 623, 625 n. 1 (2013)(quoting Clark v. State, 315 S.C. 385, 387-88, 434 S.E.2d 266, 267 (1993)).¹ However, this test proved unworkable where the defendant pleaded guilty. "Indeed, the traditional, newly discovered evidence factors are 'difficult, if not impossible to apply when the

¹ See State v. Prince, 316 S.C. 57, 447 S.E.2d 177 (1993). See also Mercer, 381 S.C. at 166, 672 S.E.2d at 565; State v. Needs, 333 S.C. 134, 157-58, 508 S.E.2d 857, 869 (1998); Johnson v. Catoe, 345 S.C. 389, 393 & n. 1, 548 S.E.2d 587, 589 & n. 1 (2001).

moving party pleaded guilty instead of standing trial.” Jamison v. State, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014), (quoting In re Reise, 192 P.3d 949, 954 (Wash. Ct. App. 2008)). As the Court noted in Jamison, in the case of a guilty plea:

[I]t was not an independent trial of fact that determined the defendant’s guilt based upon sworn trial testimony—it was the defendant who acknowledged his own guilt. Because of that simple fact, the trial court handling the post-conviction proceeding is necessarily in a different position. That court does not have the full record of the prior trial, but it does have the defendant’s own statements of guilt. [The traditional, five-factor newly discovered evidence test] presumes that the [PCR] judge is in a position to weigh the new testimony against that provided at the prior trial and assess whether an acquittal verdict would enter based upon new evidence. In the circumstance in which there never was a trial on the charges, the [PCR] court is hampered in that assessment.

Jamison, 410 S.C. at 469-70, 765 S.E.2d at 129-30 (quoting People v. Schneider, 25 P.3d 755, 761 (Colo. 2001)).

As a result, in Jamison, our Supreme Court held where a criminal defendant seeks relief on the basis of after discovered evidence from a guilty plea, relief is appropriate only where the defendant presents evidence showing that (1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is of such a weight and quality that, under the facts of that particular case, the “interest of justice” requires the defendant’s guilty plea to be vacated. Id. at 470, 765 S.E.2d at 130. “In other words, a defendant may successfully disavow his guilty plea only where the interest of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interest in maintaining the finality of guilty-plea convictions.” Id. The Court emphasized the high burden applicant’s face:

In so holding, we caution that it will be the rare case indeed where the interests of justice will require that a knowing and voluntary guilty plea be vacated....on the basis of newly discovered evidence, for an unconditional guilty plea involving an

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admission of guilt and a waiver of trial and all defenses will generally preclude any subsequent challenge to factual guilt.

Jamison, 410 S.C. at 470, 765 S.E.2d at 130; Cf. Reise, 192 P.3d at 955 (finding a defendant may withdraw his guilty plea on the basis of newly discovered evidence only when necessary to correct manifest injustice).

Here, Applicant has failed to meet his burden of proof on both prongs of the test. Applicant has not shown that he filed this application within one year of discovering that he could be subject to a statutory life without parole sentence. Applicant was represented by Tara D. Shurling, Esquire, in his first PCR action. As noted at the hearing, Counsel Shurling questioned Counsel Johns on this exact issue. See First PCR App. p. 104, line 16 – p. 105, line 16. So, Applicant's testimony that he was not aware of the most serious or serious implications is not credible because it was an issue raised in his previous PCR action.² This Court finds Applicant was aware of the issue at his prior PCR action. He cannot now claim that he could not have discovered this information until he was served with a notice of intent to seek LWOP by the Horry County solicitor's office when it was presented in his previous PCR action.

This Court further finds the interests of justice do not require the grant of relief. As is more thoroughly discussed below, Applicant's motivation for pleading guilty was to minimize his exposure and to have all charges against him disposed in an all-inclusive plea. Even accepting Applicant's argument that this application meets the timeliness prong of the test, defendants are routinely sentenced to statutory LWOP when they were unaware of the recidivism consequences from such a plea. See State v. Washington, 338 S.C. 392, 526 S.E.2d 709 (2000)(A prior common-law burglary conviction can be used to seek LWOP, even though it is

² It is also noteworthy that Applicant's testimony in support of his allegations in his first PCR action was found to be not credible. (First PCR App. p. 116). Judge Barber specifically ruled that Applicant's testimony was not credible. (First PCR App. 111, lines 1-4).

not listed as "most serious" or "serious" offense, if it contains the same elements as burglary first degree, a "most serious" offense.); State v. Zulfer, 345 S.C. 258, 547 S.E.2d 885 (Ct. App. 2001)(An out-of-state conviction can be used to trigger LWOP, if the facts of the prior conviction match the elements of the serious or most serious crime under South Carolina's statutes.). The South Carolina Supreme Court has even ruled that a prior uncounseled conviction that does not result in actual imprisonment may be used to enhance a subsequent conviction. State v. Wickenhauser, 309 S.C. 377, 423 S.E.2d 344 (1992). Considering the defendant in Zulfer, he would not have been aware that his out of state guilty plea would subject him to statutory LWOP under South Carolina law. This Court finds that the interests of justice do not require the grant of relief when the appellate courts have approved the use of prior convictions to enhance a sentence where the defendant was unaware of the recidivism consequences stemming therefrom. Finally, the alleged evidence Applicant asserts is not the type of evidence contemplated by this rule.

Ineffective Assistance of Counsel Allegation on the Merits

Even considering this allegation on the full merits, Applicant has failed to meet his burden. First, there is no recognized duty to advise defendants as to the potential for a life without parole sentence if convicted of future crimes. Advice concerning the recidivist consequences is a collateral consequence as conceded by Applicant at the hearing. See Brown v. State, 306 S.C. 381, 412 S.E.2d 399 (1991)(A guilty plea is not rendered involuntary if the defendant is not informed of the collateral consequences of his sentence.). Applicant argues that, although collateral, affirmative misadvice was given by Counsel Johns. This is contrary to Counsel Johns' very credible testimony that she did not advise Applicant on any life without parole consequences. Applicant has not presented the Court with any credible evidence that he

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was misadvised. Therefore, this Court finds there was no misadvice and that the failure to advise on the potential for the imposition of an LWOP sentence is collateral. See Taylor v. State, 404 S.C. 350, 745 S.E.2d 97 (2013)(counsel's failure to advise defendant of the recidivist consequence of his guilty plea was not ineffective assistance).

Finally, this Court also finds Applicant's testimony that he would not have pled guilty if he had known carjacking was a most serious offense to be wholly not credible. It is clear from the credible testimony given by Counsel Johns that the favorable plea offer and the chance to have all charges resolved at once was the clear driver in Applicant's decision to plead guilty. Applicant has failed to meet his burden in that he would have gone to trial if he had known that the carjacking and ABHAN charges could be used as enhancements to seek a LWOP sentence in the future. This allegation is denied and dismissed with prejudice.

III. CONCLUSION

This Court finds that Applicant's current application is successive to Applicant's previously filed applications, was filed outside the statute of limitations, and does not present newly-discovered evidence as contemplated by PCR case law. Accordingly, this Court denies and dismisses the application with prejudice.

IT IS THEREFORE ORDERED that, for the reasons set forth above and in the Court's Conditional Order of Dismissal, the application for PCR is hereby 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

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of post-conviction relief. Rule 71.1(g), SCRCR, 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.

AND IT IS SO ORDERED this 3rd day of May, 2016.



G. THOMAS COOPER, JR.
Presiding Judge
Fifth Judicial Circuit

Counsel, South Carolina

SCANNED

J. FALKNER WILKES

Attorney at Law

114 Whitsett Street
Greenville, South Carolina 29601

Telephone: (864) 282-1292
Facsimile: (864) 271-6035

June 6, 2016

Hon. Daniel E. Shearouse, Clerk
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

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JUN 08 2016


Re: Marcus Mageed, 289646 v. State of South Carolina
Circuit Court Case No. 2013-CP-40-07337
Appellate Case No. _____

S.C. SUPREME COURT

Dear Mr. Shearouse,

Enclosed please find a Notice of Appeal and Certificate of Service in the above captioned case. Also enclosed is a copy of the letter requesting a transcript from the PCR hearing.

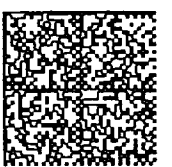
Respectfully submitted,




c.

James Clayton Mitchell, III, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Counsel for Respondent

J. Falkner Wilkes
Attorney at Law
114 Whitsett Street
Greenville, SC 29601



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