

THE

**GIESE**

LAW FIRM, LLC

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JUL 07 2016

July 6, 2016

**S.C. SUPREME COURT**

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

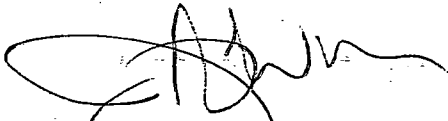
Re: Christopher Roberts vs. State of South Carolina  
C/A No: 2015-CP-38-0646

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 Mr. Roberts 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

2015-CP-38-0646

**RECEIVED**

JUL 07 2016

**S.C. SUPREME COURT**

Christopher Roberts, #360090,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Christopher Roberts, #360090, appeals the Order of Dismissal denying his Application for Post-Conviction Relief, issued by the Honorable Maité Murphy, Presiding Judge, First Judicial Circuit, and served on counsel by letter dated June 8, 2016.



Jonathan D. Waller  
Giese Law Firm  
SC Bar No.: 76290  
1315 Blanding Street  
Columbia, SC 29201  
803-708-6767 (phone)  
803-708-6769 (fax)  
jwaller@thegieselawfirm.com  
ATTORNEY FOR PETITIONER

This 6 day of July, 2016.

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

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APPEAL FROM ORANGEBURG COUNTY  
Maité Murphy, Circuit Court Judge

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2015-CP-38-0646

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**RECEIVED**

JUL 07 2016

**S.C. SUPREME COURT**

Christopher Roberts, #360090,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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CERTIFICATE OF SERVICE

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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 10<sup>th</sup> day of July 2016, to his office located at P.O. Box 11549, Columbia, SC 29211.

  
\_\_\_\_\_  
Kelly Giese

STATE OF SOUTH CAROLINA  
COUNTY OF ORANGEBURG

Christopher Roberts, #360090,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS  
FIRST JUDICIAL CIRCUIT

2015-CP-38-0646

ATTEST: TRUE COPY  
ORDER OF DISMISSAL

*Winnaja B. Clark*  
CLERK OF COURT  
ORANGEBURG COUNTY, SOUTH CAROLINA

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed May 21, 2015. Respondent filed a Return and Partial Motion to Dismiss on November 23, 2015, arguing that the action be dismissed as filed outside the statute of limitations. Jonathan D. Waller, Esquire, was appointed by the Orangeburg County Clerk's Office to represent Applicant. An evidentiary hearing was held on February 23, 2016, 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.

At the PCR hearing, Applicant testified on his own behalf. Also testifying was Applicant's plea counsel, R. Douglas Mellard, Esquire. This 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 Orangeburg County Clerk of Court. In January 2014, the Orangeburg County Grand Jury indicted Applicant for criminal sexual conduct, second degree

(2014-GS-38-0160) and unlawful neglect of child or helpless person (2014-GS-38-0161). Counsel Mellard represented Applicant. On May 19, 2014, Applicant pled guilty as indicted to both counts. The Honorable Diane S. Goodstein sentenced Applicant on the criminal sexual conduct, second degree to twenty (20) years' imprisonment provided upon the service of ten (10) years, the balance is suspended with probation for five (5) years. He was also sentenced to ten (10) years' imprisonment for unlawful neglect of child. Applicant did not appeal his plea or sentence.

In this action, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel in failing to file a notice of appeal.

## II. APPLICABLE LAW

In a post-conviction relief action, Applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

### 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 guilty plea transcript, 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.

**Belated Appeal Pursuant to White v. State**

The State asked this Court to dismiss all issues except whether Applicant is entitled to a review of his direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) because the application was filed outside of the statute of limitations. Applicant pleaded guilty on May 19, 2014, and filed the application on May 21, 2015. This Court granted the State's motion at the hearing and found that this application 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.* 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 application was not filed within one year of Applicant's plea, therefore it is untimely.

The Court then allowed Applicant to present evidence on the belated direct appeal issue.

*Discussion*

Applicant testified he was represented by Counsel Mellard on the charges before the Court. He testified Counsel Mellard asked if he would like to appeal and that they discussed the likelihood of success. He testified that he attempted to file an untimely *pro se* notice of appeal. Applicant acknowledged that Judge Goodstein reviewed his appellate rights and the time frame in which a notice of appeal must be filed. Counsel testified that he did not recall being asked to file a notice of appeal. Counsel explained that he went over a guilty plea checklist with Applicant prior to him pleading that included advice on appealing.

Counsel has a constitutionally-imposed duty to consult with a defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 120 S. Ct. 1029 (2000). There was no evidence or testimony presented that Applicant requested Counsel Mellard file an appeal on Applicant's behalf or that there was a reason for Counsel to believe that Applicant wanted to appeal the conviction or sentence. Furthermore, upon a full review of the record, the Court finds that no grounds existed for an appeal, so any appeal would have been futile. Therefore, this claim is denied and dismissed with prejudice.

#### All Other Allegations

As to any and all allegations that were raised in the application and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

#### 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 his application. Applicant failed to demonstrate <sup>Counsel's</sup> ~~counsel's~~ performance was unreasonable under prevailing professional norms. 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.

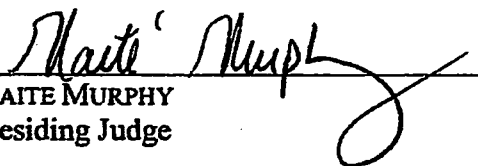
The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d

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), SCRPC, 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 his sentence.

AND IT IS SO ORDERED this 23 day of May, 2016.

  
MAITE MURPHY  
Presiding Judge

St. George, South Carolina

THE

**GIESE**

**LAW FIRM, LLC**

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