

Law Office of Leah B. Moody, LLC

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July 25, 2016

RECEIVED

JUL 29 2016

SC SUPREME COURT

Mr. Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29221

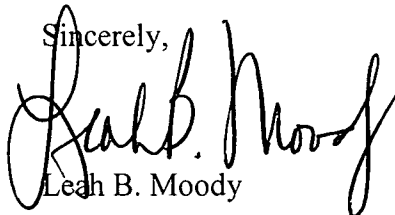
RE: Michael C. Kennedy v. State of South Carolina
Case No.: 2015-CP-46-3222

Dear Mr. Shearouse:

The York County Court of Common Pleas appointed my office to represent Michael C. Kennedy in his Post-Conviction Relief action. Please find enclosed for filing the original and two (2) copies of the Notice of Appeal, Proof of Service, and one (1) copy of the Order of Dismissal in the above-referenced case. Please return the clocked copies to me in the enclosed self-addressed, stamped envelope.

Thank you for your assistance with this matter.

Sincerely,



Leah B. Moody

Enclosure

cc Michael C. Kennedy
Justin Hunter, Esquire
David Hamilton, Clerk of Court, York County
Sharon Graham, SCCID

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

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JUL 29 2016

APPEAL FROM YORK COUNTY
Court of Common Pleas

SC SUPREME COURT

Honorable Frank R. Addy, Jr., Presiding in York County

Case No. 2015-CP-46-3222

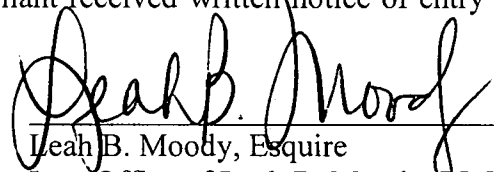
Michael C. Kennedy, Appellant,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Michael C. Kennedy appeals the order of the Honorable Frank R. Addy, Jr., dated May 4, 2016 and mailed on July 13, 2016. Appellant received written notice of entry of the final order on July 18, 2016.


Leah B. Moody, Esquire
Law Office of Leah B. Moody, LLC
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Other Counsel of record:
Justin Hunter, SC Attorney General's Office
Rembert C. Dennis Building
Post Office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-3970

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JUL 29 2016

SC SUPREME COURT

**IN THE STATE OF SOUTH CAROLINA
In The Supreme Court**

**APPEAL FROM YORK COUNTY
Court of Common Pleas**

Frank R. Addy Jr., Presiding in York County

Case No. 2015-CP-46-3222

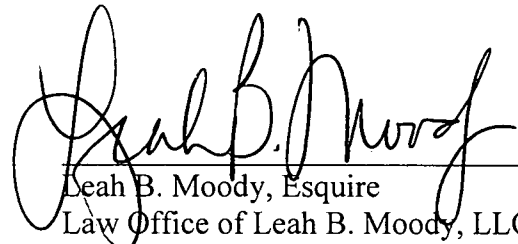
Michael C. Kennedy, Appellant,

v.

State of South Carolina, Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Justin Hunter by depositing a copy of it in the United States Mail, postage prepaid, on 7/25, 2016 addressed to its attorney of record, Justin Hunter, Post Office Box 11549, Columbia, South Carolina, 29211-1549.



Leah B. Moody, Esquire
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July 25, 2016

cc Michael C. Kennedy
Justin Hunter, Esquire
David Hamilton, Clerk of Court, York County
Sharon A. Graham, SCCID

STATE OF SOUTH CAROLINA)
)
 COUNTY OF YORK)
)
 Michael Christopher Kennedy,)
 S.C.D.C. No. 296992,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 OF THE SIXTEENTH JUDICIAL CIRCUIT

2015-CP-46-3222

ORDER OF DISMISSAL

FILED-RECEIVED
 2016 JUL 13 PM 12:14
 DAVID HAMILTON
 C.C.P. & G.S.
 YORK COUNTY, SC

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed October 22, 2015. Respondent made its Return on or about March 10, 2016. An evidentiary hearing into the matter was convened on April 19, 2016, at the Moss Justice Center in York, South Carolina. Applicant was present at the hearing and represented by Leah Moody, Esquire. Justin J. Hunter, Esquire, of the South Carolina Attorney General's Office represented the Respondent. At the hearing, Applicant testified on his own behalf. Melissa Inzerillo, Esquire, also testified. This Court also had before it a copy of the records of the York County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, Applicant's PCR application, and the plea transcript.

I. PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the York County Clerk of Court's orders of commitment. The York County Grand Jury indicted Applicant at the May term of General Sessions for shoplifting (enhancement) (2015-GS-46-00973) and two counts of violation of sex offender registry (failure to register), second offense (2015-GS-46-01602, -00972). Melissa Inzerillo, Esquire represented the Applicant.

On May 27, 2015 the Applicant pled no contest under N.C. v. Alford. The Honorable Eugene C. Griffith, Jr., sentenced the Applicant to forty-eight (48) months imprisonment for shoplifting, three hundred sixty-six (366) days imprisonment for violation of sex offender registry, failure to register and three hundred sixty-six (366) days imprisonment on the second count of violation of sex offender registry, failure to register, to be served concurrently.¹ Applicant did not appeal.

Allegations

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

1. Newly Discovered Evidence
 - a. "Person who committed crime has made a sworn statement of my innocence."
 - b. "They have been sentenced on the crime."
 - c. "They have paid restitution for the crime."

II. SUMMARY AND EVIDENCE PRESENTED AT PCR HEARING

Applicant's Testimony

Applicant testified that he met with Counsel a few times before the plea. He testified that he received a statement from Misty Williford on October 1, 2015 that states that he did not commit the shoplifting crime but that she did and that she paid restitution for it. He testified that he was unable to receive any notification from Ms. Williford giving this information before his plea. He testified he would not have pled guilty if Ms. Williford had been brought to court.

Applicant testified that he was able to get in touch with Ms. Williford prior to the plea and she told him that she committed the crime and that he did not. Applicant testified that he did not tell his attorney because he did not want to tell on her.

¹ In this application, Applicant only challenges his shoplifting conviction.



Misty Williford's Testimony

Ms. Williford testified that she took the DVDs and fled Wal-Mart. She testified that she put the DVDs in her purse while Applicant was at the other end of the aisle. She testified that she talked to Applicant right after his arrest. Ms. Williford testified that she first told Applicant that she committed the crime and that he is innocent in December or January – prior to Applicant's plea in May. She testified that she was not contacted about trial

Counsel Melissa Inzerillo's Testimony

Counsel testified that she was appointed as counsel in November 2014. She testified that she met with Applicant nine to ten times prior to the plea. She testified that she tried to discuss the evidence with Applicant. She testified that she knew there was someone else involved in the crime but Applicant would never reveal Ms. Williford's name. Counsel testified that she later learned of Ms. Williford's identity but Applicant was adamant that Counsel was not to contact Ms. Williford. She testified that Applicant would have been found guilty, especially in light of the surveillance video evidence. She testified that she was unaware of any statement made by Ms. Williford. Counsel testified that Applicant was ready to proceed to trial but decided to plead when he saw Ms. Williford's name on the State's witness list.

III. APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Under S.C. Code § 17-27-45(c), a newly-discovered evidence claim can be timely raised within one year of actual discovery or within one year of when, by the exercise of due diligence, such evidence *could have been* ascertained. When an applicant seeks relief on the basis of newly discovered evidence following a guilty plea, relief is appropriate only when the applicant



presents evidence showing (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 weight and quality that, under the facts of circumstances of that particular case, the "interest of justice" requires the applicant's guilty plea be vacated. Jamison v. State, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014).²

"[I]n South Carolina, a guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights." State v. Rice, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485-86 (2013) (*citing* Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal defendant's right to contest the validity of such a plea is usually, but not definitely, foreclosed. Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (2007). In Jamison, the South Carolina Supreme Court noted it would be a "rare case" where the interests of justice require the vacation of a knowing and voluntary guilty plea involving an admission of guilt and a waiver of trial. Jamison, 165 S.E.2d at 130.

IV. 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 application for post-conviction relief, and the legal arguments made by the

² This Court notes that Jamison held that "the traditional, five-factor newly discovered evidence test is not the proper test for analyzing whether a PCR applicant is entitled to relief on the basis of newly discovered evidence following a guilty plea." Jamison v. State, 410 S.C. 456, 469, 765 S.E.2d 123, 129 (2014).

This Court also notes that the Jamison analysis is proper in this case despite the fact that Applicant's plea was an Alford plea. See State v. Herndon, 403 S.C. 84, 91, 742 S.E.2d 375, 379 (2013) (Holding "the Alford plea is, in essence, a guilty plea and carries with it the same penalties and punishments.")

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.

This Court finds Counsel's testimony to be much more credible than Applicant's testimony. This Court finds that Ms. Williford's statement in her letter to Applicant does not constitute newly discovered evidence. This Court finds that Applicant certainly could have, and did in fact come in contact with Ms. Williford prior to the plea with the same information presented in the letter. Applicant testified that he came in contact with Ms. Williford a short time after his arrest and Ms. Williford testified that she contacted Applicant in December or January prior to Applicant's plea in May. Thus, as Applicant has failed to show that this newly discovered evidence could not have been discovered prior to his plea, this application must be dismissed.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds Applicant has abandoned any such allegations.

V. 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 counsels' 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.

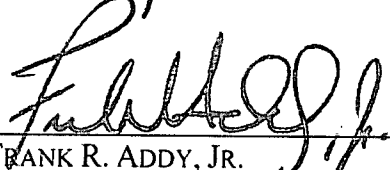


The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), 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.

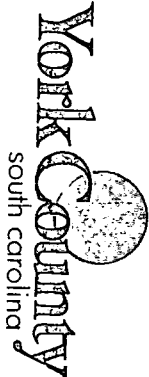
IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. That Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 4th day of May, 2016.

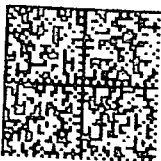

FRANK R. ADDY, JR.
Presiding Judge
Sixteenth Judicial Circuit

Greenwood, South Carolina



CLERK OF COURT'S OFFICE

Post Office Box 649, York, South Carolina 29745-0649



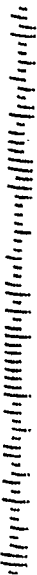
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John B. Moody,
Atty at Law
PO Box 1015
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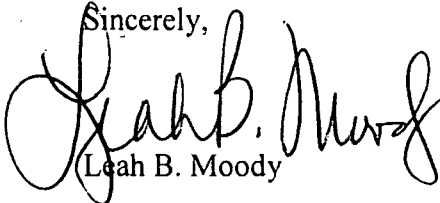
The Honorable David Hamilton
York County Clerk of Court
Post Office Box 649
York, South Carolina 29745

RE: Michael C. Kennedy v. State of South Carolina
Case No.: 2015-CP-46-3222

Dear Mr. Hamilton:

Please find enclosed the Notice of Appeal and the Proof of Service in the above-referenced matter.

Sincerely,



Leah B. Moody

Enclosures

cc Michael C. Kennedy
Justin Hunter, Assistant Attorney General
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court
Sharon Graham, SCCID

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July 25, 2016

Justin Hunter, Esquire
South Carolina Attorney General's Office
Post Office Box 11549
Columbia, South Carolina 29211

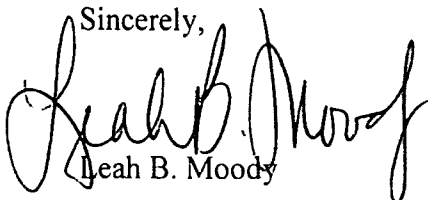
RE: Michael C. Kennedy v. State of South Carolina
C.A. No.: 2016-CP-46-3222

Dear Mr. Hunter:

The York County Court of Common Pleas appointed my office to represent Michael C. Kennedy in his Post-Conviction Relief action. Please find enclosed a copy of the Notice of Appeal and Proof of Service in this matter.

If you have any questions or concerns, please feel free to contact my office. Thank you.

Sincerely,



Leah B. Moody

Enclosures

Cc Michael C. Kennedy
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court
David Hamilton, Clerk of Court, York County
Sharon Graham, SCCID

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July 25, 2016

Ms. Sharon A. Graham
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11433
Columbia, South Carolina 29211-1433

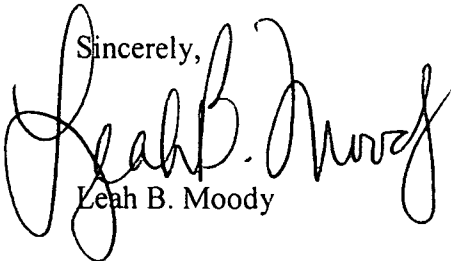
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Case No.: 2015-CP-46-3222

Dear Ms. Graham:

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Thank you for your attention in this matter.

Sincerely,



Leah B. Moody

Enclosures

cc Michael C. Kennedy
Justin Hunter, Esquire
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court
David Hamilton, Clerk of Court, York County

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TO:

The Honorable Daniel E. Shearouse
The Supreme Court of South Carolina
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Columbia SC 29211-1330

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Charlotte NC 282