



LAW OFFICE OF TRICIA A. BLANCHETTE

RECEIVED

JAN -9 2017

S.C. SUPREME COURT

January 9, 2017  
VIA HAND DELIVERY

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

RE: Trevor Fishburne v. State; Docket No.: 2012-CP-15-0604

Dear Sir:

For filing, attached please find an original Notice of Appeal, copies of the Orders issued by the Honorable R. Lawton McIntosh and Honorable Frank R. Addy, Jr., which are the subject of the Notice, and Certificate of Service. I am copying this letter and attached documents on the Office of Appellate Defense with a completed Affidavit of Indigency since Mr. Fishburne is in need of the services of the Office of Appellate Defense for his appeal.

Thank you for your assistance with this matter. Please contact my office with any questions.

Yours truly,

Tricia A. Blanchette  
Attorney at Law

cc: Ruston Neely, Office of the Attorney General  
Office of Appellate Defense  
Berkeley County Clerk of Court (Notice)  
Trevor Fishburne

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

---

RECEIVED

JAN -9 2017

S.C. SUPREME COURT

APPEAL FROM COLLETON COUNTY  
Court of Common Pleas  
Post Conviction Relief  
Honorable Frank R. Addy, Jr., Circuit Court Judge  
Honorable R. Lawton McIntosh, Circuit Court Judge

---

Case No.: 2012-CP-15-0604

---

Trevor Fishburne, 340902,.....Petitioner,

vs.

State of South Carolina,.....Respondent.

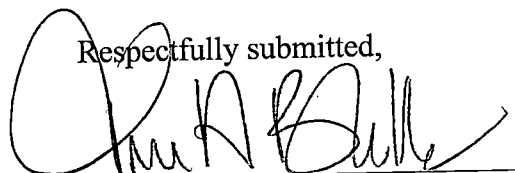
---

NOTICE OF APPEAL

---

Trevor Fishburne, Petitioner, appeals the Order issued by the Honorable R. Lawton McIntosh on May 17, 2016, which was filed on May 20, 2016. Petitioner also appeals the Order of Dismissal issued by the Honorable Frank R. Addy, Jr. on December 5, 2016, which was filed on December 9, 2016. Petitioner, through undersigned counsel, received written notice of the entry of the Order of Dismissal on December 14, 2016.

Respectfully submitted,



Tricia A. Blanchette  
Bar #74904  
PO Box 2147  
Leesville, SC 29070  
(803) 908-3266

January 1, 2017

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

JAN -9 2017

APPEAL FROM COLLETON COUNTY  
Court of Common Pleas  
Post Conviction Relief  
Honorable Frank R. Addy, Jr., Circuit Court Judge  
Honorable R. Lawton McIntosh, Circuit Court Judge

S.C. SUPREME COURT

Case No.: 2012-CP-15-0604

Trevor Fishburne, 340902,.....Petitioner,

vs.

State of South Carolina,.....Respondent.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney at Law, hereby certify that a copy of a Notice of Appeal, with attachments was placed in the United States mail this 9<sup>th</sup> day of January 2017 to Ruston Neely of the Attorney General's Office, at:

Office of the Attorney General  
Att: Ruston Neely, Ast. AG  
PO Box 11549  
Columbia, SC 29211



Tricia A. Blanchette  
Bar #74904  
PO Box 2147  
Leesville, SC 29070  
(803) 908-3266

January 9, 2017

STATE OF SOUTH CAROLINA )  
COUNTY OF COLLETON )

IN THE COURT OF COMMON PLEAS  
FOR THE FOURTEENTH JUDICIAL CIRCUIT

Trevor Fishburne, #340902, )

Case No.: 2012-CP-15-604

Applicant, )

v. )

**ORDER OF DISMISSAL**

State of South Carolina, )

Respondent. )

2016 DEC -9 AM 11:11  
PATRICIA C. GRANT  
COLLETON COUNTY  
COMMON PLEAS

**THIS MATTER COMES BEFORE THE COURT** by way of an application for post conviction relief (PCR) filed August 2, 2012. An evidentiary hearing into the matter was convened on October 20, 2016, at the Beaufort County Courthouse. Applicant was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Johanna C. Valenzuela, Senior Assistant Deputy Attorney General.

Applicant, Applicant's mother, Wanda Glover, and Applicant's plea counsel, E.W. Bennett, Jr., testified at the hearing. This Court also had before it all relevant pleadings and documents, the Clerk of Court records for Colleton County, the South Carolina Department of Corrections' records, the transcript of Applicant's uncompleted trial, and the transcript of Applicant's guilty plea.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Colleton County Clerk of Court. Applicant was indicted at the June 2009 term of the Colleton County Grand Jury for two counts of armed robbery (2009-GS-15-294, -295), assault and battery with intent to kill (ABWIK) (2009-GS-15-293), and possession of a weapon during the commission of a violent crime (2009-GS-15-292). E.W. Bennett Jr., Esquire, represented

Applicant. On May 20, 2010, Applicant pleaded guilty as indicted. The Honorable Perry M. Buckner sentenced him to confinement for twenty (20) years concurrent for ABWIK, twenty-five (25) years concurrent for armed robbery, and five (5) years for possession of a weapon. Applicant did not appeal his convictions or sentences.

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

1. Ineffective Assistance of Counsel
2. "Insufficient Plea"
  - a. "Lack of communication so I can make informed decision due to shaky evidence I was coerced into pleading."

Respondent made its Return and Motion to Dismiss on March 21, 2013, requesting the application be summarily dismissed for failure to file within the time period mandated by the applicable statute of limitations. Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, the Honorable Perry M. Buckner, Jr. issued a Conditional Order of Dismissal dated March 25, 2013, and clocked in by the Clerk of Court on March 27, 2013, provisionally denying and dismissing this action while giving the Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. Applicant filed a response to the Conditional Order of Dismissal, dated April 9, 2013.

In his response to the Conditional Order of Dismissal, captioned "Motion for Judgement on the Pleadings," Applicant appears to allege, for the first time, that the State violated the terms of his plea agreement and that he is therefore serving an unlawful sentence. Applicant argues that the very nature of his claim should bar application of the statute of limitations.

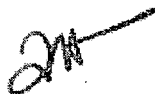


On March 3, 2015 PCR counsel, Tricia A. Blanchette, sent written notice to Respondent and the Colleton County Clerk of Court's Office notifying each party that she had been retained by Applicant. Applicant, through counsel, filed the "Supplemental Response to Conditional Order of Dismissal And/Or Amendment to Application" on September 21, 2015, raising a newly discovered evidence claim and arguing Applicant did not make a knowing and voluntary waiver of his direct appeal. A motion hearing was convened on March 2, 2016, after which the Honorable R. Lawton McIntosh issued an order granting a hearing solely on this issue of whether Applicant is entitled to a belated review of direct appeal issues pursuant to White v. State and denying and dismissing with prejudice Applicant's claims of ineffective assistance of counsel and newly discovered evidence.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. Furthermore, this Court observed the witnesses presented at the hearing, and passed upon all witnesses' credibility, and weighed their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

Applicant alleges counsel was ineffective for failing to file a direct appeal. "Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal." Turner v. State, 380 S.C. 223, 224-25, 670 S.E.2d 373, 374 (2008) (internal citations omitted). Unless defendant intelligently waived the appeal, counsel must either initiate an appeal or comply with the procedure in Anders v. California, 386 U.S. 738 (1967). Id. (citing to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974)). "However, the standard for a guilty plea differs. Absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal (for



example, because there are non-frivolous grounds for appeal) or when the defendant reasonably demonstrated an interest in appealing, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea.” Id. (citing Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995)). “Acts inconsistent with the continued assertion of a right, such as a failure to insist upon the right, may constitute waiver.” Bonnette v. State, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981) (citing 92 C.J.S. Waiver, p. 1063 (1955)).

At the hearing, Applicant testified his guilty plea was not voluntary, his plea was bifurcated from the sentencing hearing, which occurred about a week after the plea was taken, and he was shocked at the twenty-five (25) year sentence which Judge Buckner imposed. Applicant claims he wanted plea counsel to file a direct appeal, plea counsel said he would file an appeal, and plea counsel said he would come over to speak with Applicant after the sentencing. However, Applicant alleges plea counsel never came to see him and did not end up filing a direct appeal. Applicant’s mother also testified at the hearing and claimed plea counsel told her he was “on his way to file the appeal.” She also maintained that she called and went by plea counsel’s office to confirm that plea counsel was going to file an appeal.

Applicant’s plea counsel testified he was appointed to Applicant’s case and, at the time of the plea, had approximately thirty (30) years of experience in criminal law. Plea counsel explained that Applicant was an active client who often faxed, called, and mailed letters to him throughout his representation. Plea counsel testified that Applicant never requested that counsel file a notice of appeal, either orally or in writing. While plea counsel did have a conversation with Applicant’s mom in 2013—approximately three years after the plea and after the filing of this PCR—where she may



have asked about an appeal, no one ever asked for him to file an appeal on Applicant's behalf after the plea. Plea counsel also explained that he did not file an appeal from the guilty plea because he did not see any reason why an appeal should be filed. The judge sentenced Applicant within the recommended sentencing range, properly reviewed all Applicant's rights, and discussed with Applicant the potential ramifications of the plea. In short, plea counsel perceived no legal error on behalf of Judge Buckner warranting an appeal. Plea counsel further explained that, had Applicant requested he file an appeal, he would have filed the notice of intent to appeal, knowing that the Office of Indigent Defense would have taken over the rest of the appellate process.

After reviewing the pleadings, considering the applicable law, reflecting upon the testimony and evidence presented at the hearing, and considering the argument of counsel, this Court finds Applicant is not entitled to a belated appeal.

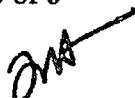
Having observed the testimony offered by Applicant, Applicant's mother, and Applicant's plea counsel, this Court finds the testimony of Applicant's plea counsel substantially more credible than that of Applicant or his mother. Accordingly, this Court concludes Applicant never requested plea counsel file a direct appeal of his guilty plea.

Furthermore and more importantly, from a review of the plea colloquy this Court finds that absolutely no viable grounds existed for an appeal of the guilty plea. Accordingly, even had a direct appeal been requested, it would have been futile, and Applicant suffered absolutely no prejudice.

### CONCLUSION

For the reasons set forth above, this Court declines Applicant's request for a belated appeal and DENIES and DISMISSES Applicant's post-conviction relief application with prejudice.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty (30)

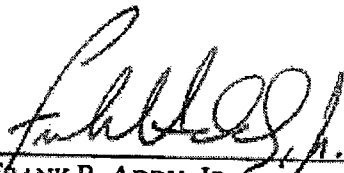
A handwritten signature in black ink, appearing to be "DWA", is written over the page number.

days from the receipt by counsel 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 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

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

**IT IS SO ORDERED.**

  
\_\_\_\_\_  
FRANK R. ADDY, JR.  
Presiding Judge  
Fourteenth Judicial Circuit

December 5, 2016  
Greenwood, South Carolina

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

Case No.: 2012-CP-15-0604

TREVOR FISHBURNE,

Applicant,

v.

STATE OF SOUTH CAROLINA,

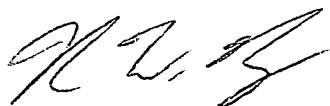
Respondent.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the **Order of Dismissal (2012-CP-15-0604)** has been served upon the applicant's attorney by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

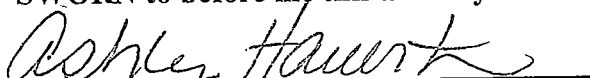
**Mrs. Tricia A. Blanchette, Esquire  
Law Office of Tricia A. Blanchette, LLC  
PO Box 12725  
Columbia, SC 29211**

This 12<sup>th</sup> day of December, 2016.



Ruston W. Neely  
Attorney for Respondent

SWORN to before me this 12<sup>th</sup> day of December, 2016.

  
Notary Public for South Carolina.  
My Commission Expires: 3-18-2023

STATE OF SOUTH CAROLINA )  
COUNTY OF COLLETON )

IN THE COURT OF COMMON PLEAS  
FOURTEENTH JUDICIAL CIRCUIT

Trevor Fishburne, #340902, )  
Applicant, )

2012-CP-15-0604

v. )

ORDER

State of South Carolina, )  
Respondent. )

2016 MAY 20 11 10 AM  
PAINULVA COUNTY  
COLLETON COUNTY  
COMMON PLEAS

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed August 2, 2012. The Respondent (the State) made its Return and Motion to Dismiss on March 21, 2013, requesting that the Application be summarily dismissed for failure to file within the time period mandated by the applicable statute of limitations. Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, the Honorable Perry M. Buckner, Jr. issued a Conditional Order of Dismissal dated March 25, 2013, and clocked in by the Clerk of Court on March 27, 2013, provisionally denying and dismissing this action, while giving the Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. The Applicant filed a response to the Conditional Order of Dismissal, dated April 9, 2013.

In his response to the Conditional Order of Dismissal, dated April 9, 2013, and captioned "Motion for Judgement on the Pleadings," the Applicant appears to allege, for the first time, that the State violated the terms of his plea agreement, and that he is therefore serving an unlawful sentence.

Applicant argues that the very nature of his claim should bar the application of the statute of limitations.

On March 3, 2015, PCR counsel, Tricia A. Blanchette, sent written notice to Respondent and the Colleton County Clerk of Court's Office notifying each party that she had been retained by Applicant. Applicant, through counsel, filed the "Supplemental Response to Conditional Order of Dismissal And/Or Amendment to Application" on September 21, 2015. In this response, Applicant argues that the doctrine of equitable tolling should be applied and the statute of limitations should be relaxed. Applicant also argues the State should be estopped from arguing prejudice due to Applicant's failure to timely file his application. Additionally, Applicant argues that he is in possession of "Newly discovered evidence" under S.C. Code § 17-27-45(c) in the form of an affidavit from Jermaine VanDyke, which would support his allegations for ineffective assistance of counsel and an involuntary guilty plea. Lastly, Applicant argues he is entitled to a belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

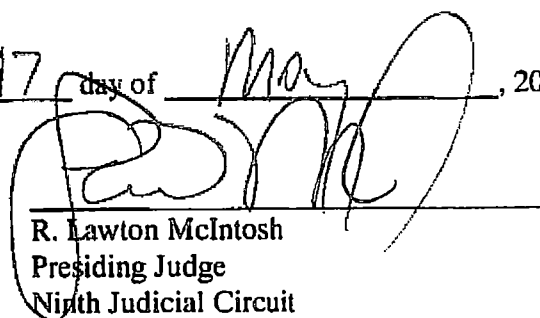
A motions hearing into the matter was convened on March 2, 2016 at the Beaufort County Courthouse. Applicant was presented and represented by Tricia A. Blanchette, Esquire. Respondent was represented by J. Rutledge Johnson, Assistant Deputy Attorney General. Applicant, through counsel, advanced the arguments set forth in the "Supplemental Response to Conditional Order of Dismissal And/Or Amendment to Application." Specifically, Applicant alleged that the affidavits from Mr. VanDyke and Wanda Glover constituted "Newly Discovered Evidence" under S.C. Code § 17-27-45(c). Respondent argued that the Conditional Order should be made final due to Applicant's failure to file his application within the statute of limitations and because the evidence presented did

not constituted "Newly Discovered Evidence" under S.C Code § 17-27-45(c) because this information "could have been ascertained by the exercise of reasonable diligence."

This Court finds Respondent's argument persuasive and agrees with Respondent's position. This Court finds Applicant's Motion for a hearing on the merits of his PCR action or whether he has newly discovered evidence of ineffective assistance of counsel is denied based upon the grounds that Applicant's application is barred as a matter of law by the statute of limitations under S.C. Code § 17-27-45(a) and that the evidence of Applicant's alleged "newly discovered evidence" is not newly discovered evidence under S.C. Code § 17-27-45(c) as a matter of law nor is it newly discovered evidence of ineffective assistance of counsel. Nevertheless, this Court grants Applicant's motion for a hearing on the sole issue of whether or not he is entitled to a belated review of direct appeal issues pursuant to White v. State, *supra*.

IT IS THEREFORE ORDERED that, for the reasons set forth above, Applicant is granted a hearing solely on this issue of whether he is entitled to a belated review of direct appeal issues pursuant to White v. State. It is also ordered that Applicant's claims of ineffective assistance of counsel and newly discovered evidence are denied and dismissed with prejudice.

AND IT IS SO ORDERED this 17 day of May, 2016.

  
\_\_\_\_\_  
R. Lawton McIntosh  
Presiding Judge  
Ninth Judicial Circuit

Andis South Carolina.



State of South Carolina  
The Circuit Court of the Tenth Judicial Circuit

R. Lawton McIntosh  
Judge

Post Office Box 8002  
100 South Main Street  
Anderson, SC 29622-8002  
Phone: (864) 260-4059  
Fax: (864) 224-6320  
lmcintosh@sccourts.org

May 17, 2016

The Honorable Patricia C. Grant  
Colleton County Clerk of Court  
P.O. Box 620  
Walterboro, SC 29488-0028

Dear Madam Clerk:

Please find enclosed an original Order which has been signed by Judge McIntosh in the following matter:

Trevor Fishburne, #340902 v. State of South Carolina  
2012-CP-15-604

Thank you for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Elizabeth Nicholson".

Elizabeth Nicholson  
Law Clerk to R. Lawton McIntosh, Judge  
Tenth (10<sup>th</sup>) Judicial Circuit

efn

enclosure