

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL TO COLLETON COUNTY
Court of Common Pleas

The Honorable Frank R. Addy, Circuit Court Judge

Appellate Case No. 2017-000026

RECEIVED

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S.C. SUPREME COURT

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

v.

State of South Carolina,Respondent.

**RETURN TO EXPLANATION
FOR RULE 243 & 203, SCACR
AND MOTION TO STRIKE**

The only issue at bar is whether the PCR court had probative evidence to deny Petitioner's White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) claim. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). All other issues are barred by Petitioner's failure to appeal within 30 days the Court's Order on May 20, 2016, within 30 days, which dismissed with prejudice Petitioner's ineffective assistance of counsel and newly discovered evidence allegations. Respondent asks this Court to strike all of Petitioner's arguments on appeal that are unrelated to the PCR court's December 9, 2016, decision on Petitioner's White claim.

PROCEDURAL HISTORY

On May 20, 2010, Petitioner pleaded guilty as indicted to two counts of armed robbery, one count of assault and battery with intent to kill (“ABWIK”), and one count of possession of a weapon during commission of a violent crime. Petitioner did not file a direct appeal on his plea or sentence. On August 2, 2012, Petitioner filed his post-conviction relief (“PCR”) application over a year after the statutory filing period had expired. On March 25, 2013, the Honorable Perry M. Buckner signed Respondent’s Conditional Order of Dismissal. On April 9, 2013, Petitioner filed a response to the Conditional Order of Dismissal. On September 21, 2015, Petitioner filed a supplemental response to Respondent’s Conditional Order of Dismissal through his counsel, Tricia Blanchette, Esquire.

On March 2, 2016, the Court heard the State’s motion to dismiss all charges, based on the statute of limitations. On May 20, 2016, the Court issued an order granted the State’s motion to dismiss as to the merits of Petitioner’s PCR claims and newly discovered evidence claim, but granted Petitioner a hearing only on the issue of whether Petitioner was entitled to a belated review of his direct appeal issues pursuant to White. On October 20, 2016, an evidentiary hearing on Petitioner’s potential White claim was held. On December 9, 2016, the Honorable Frank R. Addy filed the Order of Dismissal, dismissing Petitioner’s remaining allegation and held: Petitioner never requested that plea counsel file a direct appeal for him; Petitioner had no viable grounds for an appeal of the guilty plea; Petitioner suffered no prejudice. December Order 5. On January 9, 2017, Petitioner filed a notice of appeal. On January 25, 2017, Petitioner filed his Explanation Pursuant to Rule 243 & 203, SCACR.

ARGUMENT

Petitioner's allegations of ineffective assistance of counsel and newly discovered evidence were dismissed with prejudice on May 20, 2016. May Order 3. The PCR court granted Petitioner an evidentiary hearing only on his White claim. May Order 3. Petitioner had until June 20, 2016 to file a notice of appeal challenging the PCR court's denial of Petitioner's PCR allegations arising out of the May 2016 Order. Petitioner did not file a Notice of Appeal until January 9, 2017. Petitioner's time has run to file a notice of appeal on his PCR allegations. See Rule 203, SCACR. Therefore, Respondent asks this Court to strike all Petitioner's claims not related to his White hearing.

Petitioner's appeal from the PCR court's denial of his White claim concedes there are no direct appeal issues. "[T]he record does not provide meritorious issues for counsel to assert." Explanation 1. Therefore, Petitioner agrees with the PCR court's finding "absolutely no viable grounds existed for an appeal of the guilty plea... Applicant suffered absolutely no prejudice." December Order 5. Thus, it is uncontroverted that Petitioner suffered no prejudice from the denial of his White claim and this appeal should be denied.

{signature block on following page}

Respectfully submitted,

ALAN WILSON
Attorney General

RUSTON W. NEELY
Assistant Attorney General
S.C. Bar No. 100192

By: 

ATTORNEYS FOR RESPONDENT

February 6, 2017.

STATE OF SOUTH CAROLINA)
COUNTY OF COLLETON)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Trevor Fishburne, #340902,)

2012-CP-15-0604

Applicant,)

v.)

State of South Carolina,)

ORDER

Respondent.)

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.

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PERRY M. BUCKNER, JR.
CLERK OF COURT
COLLETON COUNTY
COMMON PLEAS

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).

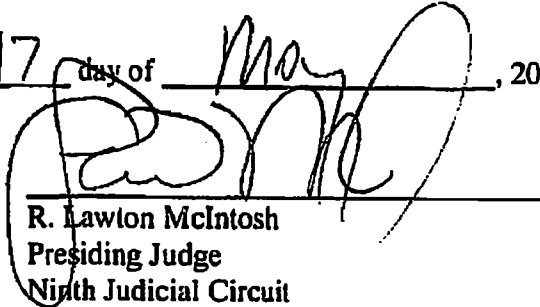
A motions hearing into the matter was convened on March 2, 2016 at the Beaufort County Courthouse. Applicant was presented and represented by Tricia A. Blanchette, Esquire. Respondent was represented by J. Rutledge Johnson, Assistant Deputy Attorney General. Applicant, through counsel, advanced the arguments 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

Anders South Carolina.

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 11:14
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.

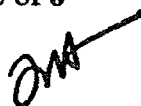
Having observed the testimony offered by Applicant, Applicant's mother, and Applicant's plea counsel, this Court finds the testimony of Applicant's plea counsel substantially more credible than that of Applicant or his mother. Accordingly, this Court concludes Applicant never requested plea counsel file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

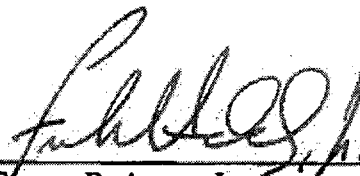


days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), 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,

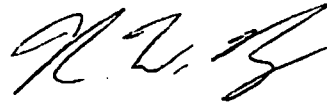
Respondent.

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 12th day of December, 2016.



Ruston W. Neely
Attorney for Respondent

SWORN to before me this 12th day of December, 2016.


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

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal to Colleton County
The Honorable Frank R. Addy, Circuit Court Judge

TREVOR FISHBURNE,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Explanation for Rule 243 & 203, SCACR and Motion to Strike** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Tricia A. Blanchette, Esquire
Law Office of Tricia A. Blanchette, LLC
PO Box 2147
Leesville, SC 29070-0147

This 6th day of February, 2017.



JOCELYN BAKER
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

February 6, 2017

RECEIVED

FEB 06 2017

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

S.C. SUPREME COURT

Re: Trevor Fishburne v. State of South Carolina
Appellate Case No. 2017-000026
Lower Court Case No. 2012-CP-15-0604

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Explanation for Rule 243 & 203, SCACR and Motion to Strike** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Respectfully yours,

Ruston W. Neely
Assistant Attorney General
SC Bar No. 100192

RWN/jyb

Enclosures

cc: Tricia Blanchette, Esquire