

**RICHEY AND RICHEY**  
ATTORNEYS AT LAW

*A PROFESSIONAL ASSOCIATION*

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June 5, 2017

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

**RECEIVED**

JUN 09 2017

S.C. SUPREME COURT

Re: Lee E. Tate, Jr, SCDC# 328637 vs. State of South Carolina  
Case No: 2015-CP-11-0867

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and a Proof of Service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Please filed the copies that I have enclosed and return the copies to me. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,

  
\_\_\_\_\_  
Rodney Richey

RWR/  
enclosures  
cc: Alicia A. Olive, Esquire

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM CHEROKEE COUNTY  
Court of Common Pleas

HONORABLE ROBIN B. STILWELL

2015-CP-11-0867

**RECEIVED**

JUN 09 2017

S.C. SUPREME COURT

LEE E. TATE, JR., SCDC#: 328637,

APPELLANT,

against

STATE OF SOUTH CAROLINA,

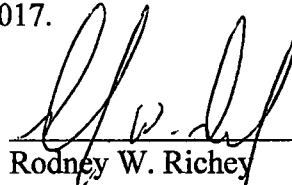
RESPONDENT.

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**NOTICE OF APPEAL**

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Lee E. Tate, Jr. appeals the denial of his Post- Conviction Relief. The Post- Conviction Relief action was heard and denied by the Honorable Robin B. Stilwell, Circuit Judge on March 21, 2017 and Order issued on May 24, 2017 and filed on May 26, 2017. The Appellant received notice of the judgment on May 28, 2017.



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Rodney W. Richey  
Attorney for the Appellant  
Post Office Box 10916  
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(864) 467-0503

Other Counsel of Record:  
Alicia A. Olive, Esquire  
Office of Attorney General State of SC  
Post Office Box 11549  
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM CHEROKEE COUNTY  
Court of Common Pleas

HONORABLE ROBIN B. STILWELL

2015-CP-11-0867

**RECEIVED**

JUN 09 2017

S.C. SUPREME COURT

LEE E. TATE, JR., SCDC#: 328637,

APPELLANT,

against

STATE OF SOUTH CAROLINA,

RESPONDENT.

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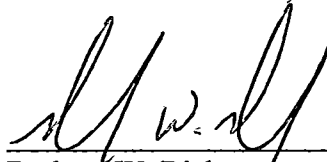
**PROOF OF SERVICE**

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I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on June 5, 2017, addressed to their attorney of record, Alicia A. Olive, Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: June 5, 2017

RICHEY & RICHEY, P.A.



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Rodney W. Richey  
Attorney for the Appellant  
Post Office Box 10916  
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STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CHEROKEE )  
 )  
 Lee E. Tate, Jr., #328637, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
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 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 FOR THE SEVENTH JUDICIAL CIRCUIT

Case No. 2015-CP-11-0867

**ORDER OF DISMISSAL**

FILED IN THE OFFICE  
 CLERK OF COURT  
 2017 MAY 26 A 11:03  
 CHEROKEE COUNTY, SC

This matter comes before the Court by way of an Application for Post-Conviction Relief filed November 30, 2015. Respondent made a Return and Partial Motion to Dismiss on September 28, 2016. The Court convened an evidentiary hearing into the matter on March 21, 2017, at the Spartanburg County Courthouse. Applicant was present at the hearing and represented by Rodney W. Richey, Esquire. Alicia A. Olive, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's counsel, Michael A. Berry, Esquire, also testified. The Court had before it a copy of the transcript, the records of the Cherokee County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, and the pleadings. The Court finds as follows:

**I. PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. Applicant was indicted at the January 2013 term of the Cherokee County Grand Jury for armed robbery (2013-GS-11-0072). Applicant was represented on the charges by Michael A. Berry, Esquire. Applicant pleaded

guilty as indicted before the Honorable Frank R. Addy, Jr. on August 11, 2014. Pursuant to a negotiated sentence, Judge Addy sentenced Applicant to imprisonment for a term of twenty-two years suspended on the service of seventeen years to five years of probation. Applicant did not appeal his guilty plea or sentence.

## **II. ALLEGATIONS**

In his application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel, in that;
  - a. Counsel failed to appeal my sentence after sentencing counsel assured me he would file motion for reconsideration
2. Evidence of Material Facts not Previously Presented, in that;
  - a. Police officer told me that if I plead guilty I would get no more than ten years
3. My Plea was Unknowingly and involuntarily [sic], in that:
  - a. Because the plea was not a lesser included offense of the crime charged in the indictment and I never waived presentment.
4. Denial of Right to Appeal.

Respondent moved to dismiss all allegations, except for Applicant's claim that he was denied the right to appeal, based on Applicant's failure to timely file his PCR application. Applicant proceeded only on the allegation that he was denied the right to a direct appeal.

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

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

**A. Summary of Testimony**

Applicant testified he discussed with counsel appealing his plea. He testified he wanted less time. He thought he could plead guilty and then go back to court. Plea counsel testified he would have discussed Applicant's right to appeal before the plea. Counsel testified there were no issues he could have appealed. Counsel testified Applicant wanted the negotiated sentence. Counsel testified he did not make a motion for resentencing because it was a negotiated sentence.

**B. *White v. State***

Applicant alleges he did not knowingly and intelligently waive his appeal from his guilty plea and seeks belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). This Court finds Applicant has failed to satisfy his burden of proof with respect to this allegation. 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 (2000).

The record and testimony of Counsel and Applicant demonstrate that Applicant accepted an offer to plead guilty with a negotiated sentence of seventeen years of active time. This Court finds Applicant failed to prove by a preponderance of the evidence that he was not advised of the right to appeal. In addition, Applicant failed to prove he reasonably demonstrated to Counsel he was interested in appealing, or that there was reason to think a rational defendant would want to appeal. Counsel credibly testified he would not have effected an appeal based on a negotiated plea. Further, there is no indication in the record Applicant had any basis to appeal from his guilty plea. Accordingly, Applicant's requested relief is denied.

### **C. Statute of Limitations**

This Court finds Applicant's remaining allegations must be procedurally dismissed as barred by the applicable statute of limitations set forth in the Uniform Post-Conviction Procedure Act. See S.C. Code Ann. §17-27-10 to -160. Section §17-27-45(a) provides:

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). Applicant pleaded guilty to the offense he challenges in this application on August 11, 2014. Therefore, Applicant was required to file his application on or before August 12, 2015. This Application was filed on November 30, 2015, which was beyond the expiration of the statutory filing period. A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consol. Sch. Dist. of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, this Court dismisses the remaining allegations in the application for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act.

### **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.

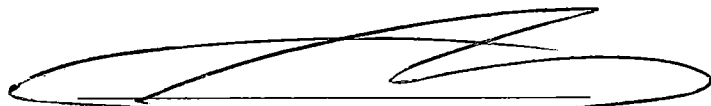
Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

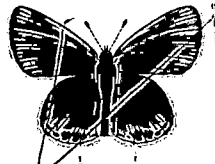
AND IT IS SO ORDERED this 24 day of MAY, 2017.



THE HONORABLE ROBIN B. STILWELL  
Presiding Judge  
Seventh Judicial Circuit

Greenville, South Carolina

RICHEY AND RICHEY, P.A.  
POST OFFICE BOX 10916  
GREENVILLE, SC 29603



NON-MACHINEABLE SURCHARGE 2016

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

NOV 14 2016 10:00 AM

