

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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JUL 28 2017

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Diane Goodstein, Circuit Court Judge

Case No.: 2015CP0201381

James Whaley,

Appellant,

v.

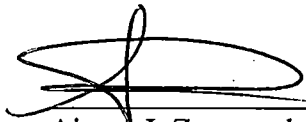
State of South Carolina,

Respondent.

NOTICE OF APPEAL

James Whaley, #357132, pursuant to the Order of Dismissal filed on June 30, 2017 and received by counsel on June 30, 2017 which granted a belated review of direct appeal issues pursuant to *White v. State*, 263 S.C. 110, 108 S.E.2d 35 (1974).

July 28, 2017



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PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Julie Coleman by depositing a copy of it in the United States Mail, postage prepaid, on July 28, 2017, addressed to her office at:

PO Box 11549
Columbia, SC 29211

July 28, 2017


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STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

James Whaley, #357132,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

2015-CP-02-01381

ORDER OF DISMISSAL

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed June 8, 2015. Respondent filed its Return and Motion to Dismiss All Claims But White v. State on September 23, 2015, requesting an evidentiary hearing be convened solely on Applicant's allegation of counsel's failure to perfect an appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). A hearing was held on May 26, 2017, at the Aiken County Courthouse. Applicant was present and represented by Aimee Zmroczek, Esquire. Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office appeared on behalf of Respondent.

At the hearing, Respondent moved to dismiss all allegations beyond the scope of White relief, as the application was filed after the statute of limitations. Respondent further explained to this Court that based on the appellate records in this case as well as on conversations with Applicant's trial counsel, the State was willing to consent to a belated review of Applicant's direct appeal issues pursuant to White v. State. This Court had before it the Aiken County Clerk of Court records, the appellate records, Applicant's South Carolina Department of Corrections records, the PCR application, and the Return.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. Applicant was true bill indicted at the November 2011 term of the Aiken County Grand Jury for disseminating harmful material to a minor (2011-GS-02-01643), lewd act upon a child (2011-G-02-01642). Applicant was true bill indicted at the August 2013 term of the Aiken Country Grand Jury for indecent exposure (2013-GS-02-01272). Applicant was represented by Brian Katonak, Esquire. Applicant underwent trial by jury pursuant to which he was found guilty as charged. On September 12, 2013, he was sentenced by the Honorable Doyet A. Early, III, to confinement for three years for indecent exposure, ten years for disseminating harmful material to a minor, fifteen years for lewd act on a minor running consecutive to the three year sentence and ten years for disseminating harmful material to a minor running concurrent to the fifteen year sentence.

A timely Notice of Appeal was filed on Applicant's behalf. On April 10, 2014, the South Carolina Court of Appeals dismissed the appeal due to Applicant's failure to order the transcript. The remittitur was issued April 28, 2014.

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

1. Ineffective assistance of counsel
 - a. "being that defense attorney or the S.C. Indigent defense office did not order a transcript leading to dismissal of appeal. Appeal was not knowingly, willfully, or intelligently ignored by appellate. Reference White v. State 263 S.C. 110, 208 S.E.2d 35 S.C. 1974). I did not get to fully persue (sic) appeal."
2. "Denied due process/amendment 14§ 1 notes 2644, 2646-2648"
 - a. "Though I do not have a transcript to confirm I state amendment 14, section (1) note 2644 false testimony by prosecution witness, '...includes situation in which

state, although not solicitor, false evidence, allows it to go uncorrected when it appears. They were notified C.05/11/15 via clerk of court.”

3. Denied due process/ Ineffective counsel/no counsel

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds that Applicant’s post-conviction relief allegations must be dismissed as untimely because the application was filed past the statute of limitations, and Respondent’s Partial Motion to Dismiss is granted. However, based on the record before the Court and Respondent’s consent to White relief, this Court finds that Applicant is entitled to a belated review of his direct appeal issues. It is clear from the record that the transcript was never ordered to perfect Applicant’s appeal, resulting in the dismissal of his direct appeal. Therefore, Applicant is granted leave to file a belated appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974).

III. CONCLUSION

This application for post-conviction relief must be dismissed as untimely. However, Applicant is entitled to relief under White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974) and is granted leave to file a belated appeal.

The Court notes Applicant must file and serve the 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), SCRCR, 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 in regard to all allegations except a belated appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974); 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 22 day of June, 2017.



DIANE S. GOODSTEIN
Presiding Judge
Second Judicial Circuit

, South Carolina