The Supreme Court of South Carolina

Leroy Folkes, Petitioner,

v.

State of South Carolina, Respondent.

The Honorable R. Knox McMahon
Lexington County
Trial Court Case No. 2011-CP-32-02503

ORDER

For good cause shown, the request for an extension until May 11, 2012 to serve and file the Petition for Writ of Certiorari and Appendix is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY _____
Clerk

Columbia, South Carolina

April 12, 2012

cc: Deputy Chief Appellate Defender Wanda H. Carter
Assistant Attorney General Kaelon E. May

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

R. Knox McMahon, Circuit Court Judge

RECEIVED
APR 11 2012
S.C. Supreme Court

LEROY FOLKES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR EXTENSION TO FILE PETITION FOR WRIT OF CERTIORARI AND APPENDIX

The undersigned counsel would respectfully request a thirty-day extension in which to file the petition for writ of certiorari and appendix in the above–referenced case. In support of this motion, counsel would respectfully show the Court the following exigent circumstances:

1. The petition for writ of certiorari and appendix in this case are due to be served and filed today, having been extended by one prior order of this Court.

2. Counsel is planning to file the initial brief of appellant and designation of matter in the case of State v. Demetrick McQueen in the Court of Appeals tomorrow, April 12, 2012. Counsel had an oral argument in the case of State v. Kevin J. Williams, Sr. in the Court of Appeals on April 10, 2012. Counsel filed the petition for writ of certiorari and accompanying appendix in the case of Albert C. Smith, II v. State in the Supreme Court on April 9, 2012. Counsel filed the petition for rehearing in the case of State v. Lewis D. Williams in the Court of Appeals on March 30, 2012. Counsel had an

oral argument in the case of Brian Gebhard v. State in the Court of Appeals on March 29, 2012. Counsel filed the petition for writ of certiorari and accompanying appendix in the case of Lenson Clyburn, Jr. v. State in the Supreme Court on March 26, 2012. Counsel filed petitions for writ of certiorari and accompanying appendices in the cases of Glenn Pernell v. State, Sylvester Toomer v. State and William Gladney Harden v. State in the Supreme Court on March 23, 2012. Counsel had an oral argument in the case of State v. Lewis Williams in the Court of Appeals on March 12, 2012. In February 2012, Counsel had oral arguments in the cases of State v. Otis Lamar Bland and State v. James Babb in the Court of Appeals, as well as an oral argument in the case of Benjamin Green v. State in the Supreme Court. Additionally in February, 2012, Counsel filed the petitions for writ of certiorari and accompanying appendices in the cases of Sherinette Wannamaker v. State, Henry Belton v. State, Tony Drayton v. State, William Hickman v. State and John E. Prigmore v. State. Counsel filed the initial brief of appellant and designation of matter in the case of State v. Lawrence Brown in the Court of Appeals in February, 2012 as well.

3. This request is made in good faith, and not for purposes of delay.

WHEREFORE, the undersigned counsel would respectfully request a thirty-day extension in which to file the petition for writ of certiorari and appendix in this case. Counsel requests that the time limits for filing the petition for writ of certiorari be held in abeyance pending a ruling on this motion.

Respectfully submitted,

Wanda H. Carter
Deputy Chief Appellate Defender

April 11, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

R. Knox McMahon, Circuit Court Judge

LEROY FOLKES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies the petition in which to file the petition for writ of certiorari and appendix in the above referenced case has been served upon Kaelon E. May, Esquire, Assistant General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 11th day of April, 2012.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 11th day of April, 2012.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013.

The Supreme Court of South Carolina

Leroy Folkes, Petitioner,

v.

State of South Carolina, Respondent.

The Honorable R. Knox McMahon
Lexington County
Trial Court Case No. 2011-CP-32-02503

ORDER

The request for an extension until April 11, 2012 to serve and file the Petition for Writ of Certiorari and Appendix is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY Brenda F. Shealy
Chief Deputy Clerk

Columbia, South Carolina

March 13, 2012

cc: Deputy Chief Appellate Defender Wanda H. Carter
Assistant Attorney General Kaelon E. May

ORIGINAL

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

March 12, 2012

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

Re: Leroy Folkes v. State of South Carolina

Dear Mr. Shearouse:

The petition for writ of certiorari and appendix in the above-referenced case are due to be served and filed today. Because of my present workload, I respectfully request a thirty-day extension of this deadline. No prior extensions have been requested in this case.

By copy of this letter, I am informing Kaelon May, Esquire, of the Office of the Attorney General, of this extension request.

Thanking you for your cooperation and assistance in this matter.

Sincerely,

Wanda H. Carter
Deputy Chief Appellate Defender

WHC/kam

cc: Kaelon May

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

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Columbia, South Carolina 29211-1589
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Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

January 10, 2012

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
Post Office Box 11330
Columbia, SC 29211

Dear Mr. Shearouse:

The following case falls under the 60 day rule for appeals, and the date we received the transcript is listed to the side.

Leroy Folkes v. State of South Carolina	1/10/2012

I would appreciate you beginning our time limits from the above date, and if you need additional information, or have any questions please contact me.

Thank you for your assistance in this matter.

Sincerely,

Sharon A. Graham

Sharon A. Graham
Administrative Coordinator

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

COPY

November 10, 2011

Ms. Carol M. Thueme
Circuit Court Reporter
P O Box 1981
Irmo, SC 29063

Dear Ms. Thueme:

Please provide us with the following transcript:

The State v. Leroy Folkes Case #: 11-CP-32-02503.

County: Lexington Date of Trial: September 14, 2010

Presiding Judge: R. Knox McMahon

To ensure prompt payment, please sign and complete the enclosed CID FORM 3500 and include the original criminal case number (Indictment number) where the space is provided.

Please number the lines on the paper from 1-25, and include any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments.

If you are aware of any co-defendants or if the Attorney General's Office has already requested a transcript, please let us know.

Sincerely,

Lorene French

Lorene French
Legal Services Coordinator

cc: S.C. Supreme Court
Attorney General's Office

ERVIN & McGUIRE LAW FIRM, LLC

600 COLUMBIA AVENUE
LEXINGTON, SC 29072
*Mailing Address

1400 LAUREL ST., STE. 3
COLUMBIA, SC 29201

803-996-1113
803-359-7806 (FAX)

Matthew M. McGuire, Esq.
mcguirelawfirm@windstream.net

James Ervin, Esq.
james@ervinlaw.net

October 10, 2011

Supreme Court of South Carolina
The Honorable Daniel E. Shearhouse
P.O. Box 11330
Columbia, SC 29211

RE: Notice of Intent to Appeal/Proof of Service
Leroy Folkes, #298608 v. State of South Carolina
PCR, 2011-CP-32-02503

Dear Mr. Shearhouse:

Enclosed please find the Appellant/Petitioner's Notice of Intent to Appeal (Petition for Writ of Certiorari) and Proof of Service in the above matter.

Please let me know if you need anything further.

Very Truly Yours,

Matthew M. McGuire

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Presiding Judge

Case No. 2011-CP-32-02503

Leroy Folks,
S.C.D.C. No. 298608

Appellant,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL/
PETITION OF WRIT CERTIORARI

Leroy Folks appeals the order of the Honorable R. Knox McMahon dated March 11, 2011. Appellant received written notice of entry of this order on September 30, 2011.

October 10, 2011

Matthew M. McGuire
600 Columbia Avenue
Lexington, South Carolina 29072
(803) 996-1113
Attorney for Appellant

Other Counsel of Record:
Kaelon E May
Post Office Box 11549
Columbia, South Carolina 29201
Attorney for Respondent

PROOF OF SERVICE OF A NOTICE OF APPEAL

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon , Presiding Judge

Case No. 2011-CP-32-02503

Leroy Folks,
S.C.D.C. No. 298608,

Appellant,

v.

State of South Carolina, Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on October 10, 2011, addressed to his attorney of record, Kaelon E May, Office of The S.C. Attorney General, P.O. Box 11549 Columbia, SC 29201

October 10, 2011

Matthew M. McGuire
600 Columbia Avenue
Columbia, South Carolina 29072
(803) 996-1113
Attorney for Appellant

COPY

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF LEXINGTON)
)
)
Leroy Folkes, #298608,)
Applicant,)
)
v.)
)
State of South Carolina,)
Respondent.)

2011-CP-32-2503

ORDER OF DISMISSAL AND CONSENT ORDER TO APPEAL PURSUANT TO AUSTIN V. STATE

This matter comes before the Court by way of an Application for Post Conviction Relief (PCR) filed July 6, 2011. The Respondent made its Return on or about September 26, 2011, requesting that all allegations except for Applicant's belated PCR appeal claim be summarily dismissed.

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. The Applicant was indicted at the July 2006 term of the Lexington County Grand Jury for Armed Robbery (2006-GS-32-1915), however Applicant waived presentment. He was represented by Sally Henry, Esquire. On October 20, 2006, the Applicant pled guilty to Attempted Armed Robbery. He was sentenced by the Honorable William P. Keesley to confinement for a period of twenty (20) years.

The Applicant filed a timely Notice of Appeal, and an appeal was thereafter perfected. On appeal, he was represented by Katherine Hudgin, Esquire. The South Carolina Court of Appeals dismissed the appeal and filed its remittitur on August 8, 2008.

On October 3, 2008, the Applicant filed an application for post-conviction relief (2008-CP-32-4048). The Respondent made its Return on June 29, 2009. An evidentiary hearing into the matter was convened on September 14, 2010, at the Lexington County Courthouse. The Applicant was present at the hearing and was represented by Matthew McGuire, Esquire. On March 11, 2011, the Honorable R. Knox McMahon issued an Order denying and dismissing Applicant's application for PCR. The Applicant did not appeal the denial of his PCR application.

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

1. Ineffective Assistance of Counsel
   a) "of calling Bryan Psychiatric Center Doctor;"
   b) failure to adequately present Applicant's mental state as mitigation prior to sentencing;
   c) failure to investigate or prepare case for trial;
   d) failure to call witnesses

2. Involuntary Guilty Plea - counsel's advice as to length of sentence coerced Applicant's guilty plea

3. Ineffective Assistance of Appellate Counsel – "of calling Bryan Psychiatric Center Doctor"

4. Trial Judge abused his discretion at Applicant's sentencing and did not have proper Blair hearing; the plea hearing was not held in compliance with mandates of Rule 11, FRCP

The Applicant filed an amendment to his application for post-conviction relief on July 19, 2011, alleging:

5. Ineffective Assistance of PCR Counsel in that despite Applicant's prior request that an appeal be filed in the event of Applicant's PCR application (2008-CP-32-4048), my attorney failed to do so.

II.

In the Applicant's current PCR application, he argues that his PCR counsel, Mr. McGuire, failed to file a timely notice of appeal from Judge McMahon's order denying post-conviction relief dated March 11, 2011 and filed March 16, 2011. Mr. McGuire states that the failure to file the appeal was an oversight and does not contest that Applicant desired to appeal. Based on Mr. McGuire's representations, the Applicant and Respondent consent to the belated review. I therefore find that the Applicant did not knowingly and voluntarily waive his right to appellate review and is therefore entitled to a belated review of the denial of his first PCR application. Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002). The Applicant's denial of an appeal can be remedied by a petition for belated review by his current PCR attorney pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) with regard to C.A. No. 2008-CP-32-4048.

III.

This Court finds that the current application for post-conviction relief must be summarily dismissed, except for the Austin v. State review, because it is successive to Applicant's prior application for post-conviction relief. S.C. Code Ann. §17-27-90 provides that:

> All grounds for relief available to an application under this chapter must be raised in his original, supplemental or amended Application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding Applicant has taken to secure relief, may not be the basis for a subsequent Application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended Application.

Successive applications are disfavored and the burden is on Applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous

application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).

This Court finds that the current allegations were or could have been raised in the proceedings based on Applicant's prior application for post-conviction relief and thus the current application is successive and barred under S.C. Code § 17-27-90. Applicant has failed to establish sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief; therefore, he has failed to meet the burden imposed upon him. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); Aice v. State, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 420 S.E.2d 834 (1992).

This Court finds, further, that this Application for Post-Conviction Relief should be summarily dismissed, except for the Austin v. State review, for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to –160 (2003). S.C. Code Ann. §17-27-45(a) reads as follows:

> 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 was convicted of the offense(s) he challenges in this Application on October 20, 2006. The South Carolina Court of Appeal's decision was filed and remittitur sent, after Applicant's unsuccessful appeal, on August 26, 2008. This Application was filed on July 6, 2011, well after the one year statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. §17-27-70(c) (2003) 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 finds that the application for post-conviction relief is summarily dismissed for failure to file within the time mandated by statute and for being successive.

IV.

It appearing that counsel for both parties consent to the dismissal of his Application for Post-Conviction Relief and the grant of a belated PCR appeal, and in light of the fact that this Court has not been made aware of any violations of the Applicant's constitutional rights, this Application for Post-Conviction Relief is dismissed.

IT IS THEREFORE ORDERED:

1. That this current Application for Post-Conviction Relief is **denied and dismissed with prejudice.**

2. That the Applicant is granted a belated PCR appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Within thirty (30) days of service of this Order, counsel for the Applicant must file a Notice of Appeal to secure the appropriate review of Applicant's first post-conviction relief action. Counsel and the Applicant are directed to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) and South Carolina Appellate Court Rule 243 for the appropriate procedure for a belated appeal.

3. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 27 day of Sept, 2011

R. Knox McMahon
Presiding Judge
Eleventh Judicial Circuit

Lexington, South Carolina

ORIGINAL

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS
Leroy Folkes, #298608, Applicant, vs. State of South Carolina, Respondent.	)	2011-CP-32-2503 2011-CP-32-2728 ORDER OF MERGER

The applicant in the above-captioned matters has filed two applications for post conviction relief, one which was filed on July 6, 2011(2011-CP-32-2503) and another filed on July 19, 2011 (2011-CP-32-2728). Since an applicant is not generally allowed to have two post-conviction relief proceedings in regard to the same conviction (*See*, Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); S.C. Code Ann. §17-27-90), this Court hereby orders that the two proceedings be merged. The application for post-conviction relief filed on July 19, 2011 (2011-CP-32-2728) will be considered an amendment to the initial application for post conviction relief filed on July 6, 2011 (2011-CP-32-2503).

The Clerk of Court is therefore ordered to merge the two cases, with docket number 2011-CP-32-2503 being the surviving case. Hereafter, the word "Application" will refer to docket number 2011-CP-32-2503; the word "Amendment" will refer to docket number 2011-CP-32-2728, which will be considered as an amendment to the application for post conviction relief.

IT IS THEREFORE ORDERED that the Lexington County Clerk of Court merge docket number 2011-CP-32-2728 into docket number 2011-CP-32-2503, with file 2011-CP-32-2503 being the surviving file and all future pleadings bearing docket number 2011-CP-32-2503. Docket number 2011-CP-32-2728 will be dismissed upon the merger.

AND IT IS SO ORDERED this 16th day of AUG., 2011.

William P. Keesley
Chief Administrative Judge
Eleventh Judicial Circuit

Lexington, South Carolina.

#2

ORIGINAL

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	Case No.: 2008-CP-32-4048
	)	
Leroy Folkes, # 298608,	)	
	)	
Applicant,	)	
	)	
v.	)	**ORDER OF DISMISSAL**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed October 3, 2008. The Respondent made its return on or about June 29, 2009. An evidentiary hearing into the matter was convened on September 14, 2010, at the Lexington County Courthouse. The Applicant was present at the hearing and was represented by Matthew McGuire, Esquire. The Respondent was represented by A. West Lee of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Respondent presented testimony of Applicant's Plea Counsel, Sally Henry, Esquire. This Court also had before it a copy of the transcript from the Applicant's guilty plea proceedings, the records of the Lexington County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the Application for Post-Conviction Relief, the State's Return, and evidence presented during the hearing.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. The Applicant was

indicted at the July 2006 term of the Lexington County Grand Jury for Armed Robbery (2006-GS-32-1915). He was represented by Sally Henry, Esquire. On October 20, 2006, the Applicant pled guilty to Attempted Armed Robbery. He was sentenced by the Honorable William P. Keesley to confinement for a period of twenty (20) years.

The Applicant filed a timely Notice of Appeal, and an appeal was thereafter perfected. On appeal, he was represented by Katherine Hudgin, Esquire. The South Carolina Court of Appeals dismissed the appeal and filed its remittitur on August 8, 2008.

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

1) Ineffective Assistance of Counsel
   a. Failure to adequately present Applicant's mental state as mitigation prior to sentencing.
   b. Failure to investigate or prepare case for trial.
   c. Failure to call witnesses.
2) Involuntary Guilty Plea
   a. Counsel's advice as to length of sentencing coerced Applicant's guilty plea

APPLICABLE LAW

Ineffective Assistance of Counsel

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of Counsel is alleged as a ground for relief, the Applicant must prove that "Counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within

the range of competence required in criminal cases. Courts presume that Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of Counsel. First, the Applicant must prove that Counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, Counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for Counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty Plea Counsel, the Applicant must show that there is a reasonable probability that, but for Counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the Applicant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

An Applicant who enters a plea on the advice of Counsel may only attack the voluntary and intelligent character of the plea by showing that trial Counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for trial Counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial, Roscoe v.

State, 345 S.C.16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993). Given Applicant's burden of proof and the analysis to be applied to this claim, the Applicant's claim of involuntary plea is, in essence, a claim of ineffective assistance of Counsel, and it will be treated as such.

Involuntary Guilty Plea

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

The transcript reflects that the guilty plea was knowingly and voluntarily entered with a full understanding of the charges and consequences of the plea. Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, [an Applicant's] right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63 (1977). Statements made during a guilty plea should be considered conclusively, unless an [Applicant] presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975) *overruled on other grounds by* U.S. v. Whitley, 759 F.2d 327 (4th Cir.1985). This Court finds that Applicant presented no reasons to show that he should be allowed to depart from the truth of the statements he made during his guilty plea hearing.

An Applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial counsel's representation fell below an objective

standard of reasonableness and that there is a reasonable probability that, but for trial counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial, Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993). Given Applicant's burden of proof and the analysis to be applied to this claim, the Applicant's claim of involuntary plea is, in essence, a claim of ineffective assistance of counsel, and it will be treated as such.

SUMMARY OF TESTIMONY PRESENTED AT THE HEARING

Leroy Folkes

Applicant testified that he only met with his attorney on one occasion. He stated the during that meeting he informed her that he was in the psych center for crisis intervention and that he had been on suicide watch. Applicant further alleged that he told Counsel of his mental problems generally. Applicant testified that he only committed the armed robbery in this case to get back to jail because he was not receiving treatment for his mental problems outside the jail and he felt as if he might be a danger to his brother, who he had a falling out with earlier that day, if he did not go back to the psych ward. He further testified that he had been using cocaine and marijuana regularly during that time.

Applicant went on to testify that he explained to counsel that he was not on the appropriate medication. He asserted that as far as he knew she did not subpoena any of the doctors who treated him or the records of the psychiatric facilities in which he was housed. Applicant also stated that Counsel told him the trial court might consider a sentence between five and eight years, but admitted that she did not promise him a particular sentence. Applicant also admitted that he confessed, and led police back to the clothes he wore during the robbery which

were identified on the video surveillance of the store. Applicant went on to say he did not feel Counsel adequately investigated, interviewed witnesses, or prepared his case for trial. He also testified that he felt Counsel coerced him into pleading guilty by telling him she thought he may be able to get a sentence between five and eight years.

Sally Henry, Esquire

Counsel testified that she met with the Applicant on multiple occasions. She testified that during those meetings she discussed with the Applicant the charges against him, the elements of those charges and the possible punishments associated with them. She further testified that she discussed the Applicant's constitutional rights. Counsel testified that she received the State's evidence in the case, and reviewed it with the Applicant. She testified that the evidence, which included the video identification, and the Applicant's confession, weighed heavily against the Applicant.

Counsel testified that she discussed the benefits and drawbacks of going to trial or entering a plea. She stated that she told the Applicant that she thought she could get the court to consider a shorter sentence on the Applicant's behalf but insisted that she never promised the Applicant any particular sentence. Counsel asserted that she felt, with the evidence, that a plea was in the Applicant's best interest, but was adamant that it was the Applicant's own free and voluntary decision to plead guilty. She also testified that during her mitigating statement to the court, she discussed the Applicant's mental health issues. Finally, she testified that because the Applicant wished to plead guilty, she did not interview witnesses, but added that she did not know of any witnesses that might have been helpful to the Applicant's case.

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. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh 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).

Involuntary Guilty Plea

With respect to the Applicant's claim that his guilty plea was entered involuntarily, this Court finds that the Applicant has failed to sustain his burden of proof. This Court finds Counsel's testimony that she never promised the Applicant any particular sentence and that the Applicant chose to plead guilty to be credible, while simultaneously finding the Applicant's testimony on this issue not to be credible. This court further finds that the guilty plea transcript reflects the intelligent and voluntary nature of the Applicant's guilty plea.

The plea court informed the Applicant of the potential sentences he was facing, so he had knowledge that he may get a sentence other than what Counsel allegedly told him he would get. (Tr. p. 11, lines 7-24). The court asked the Applicant how he wished to plead and he replied that he wished to plead guilty. (Tr. p. 13, lines 11-13). The Applicant testified that no one had pressured him or promised him anything to secure his guilty plea. (Tr. p. 9, lines 1-17). He further testified that he was giving his guilty plea freely and voluntarily. (Tr. p. 11, lines 2-3).

Further, Applicant testified that even though he was on medication, he understood what was going on. (Tr. p. 6, lines 2-11). He also agreed with the statement of facts as read by the

solicitor. (Tr. p. 8, lines 9-25). Finally, Applicant testified that he was fully satisfied with the services of his attorney. (Tr. p. 9, lines 17-18).

This Court finds that the transcript of the guilty plea hearing clearly reflects the knowing and voluntary nature of the Applicant's guilty plea. The only evidence presented at the PCR Hearing to contradict the record is the Applicant's own testimony, which this Court does not find to be credible. Therefore, this Court finds that the Applicant's guilty plea was knowingly voluntarily entered, and accordingly denies and dismisses this allegation.

Failure to Investigate and Prepare an Adequate Defense

With respect to this claim, this Court finds that Applicant has failed to meet his burden of proof. This Court finds Counsel's testimony that she received the State's evidence in the case and reviewed it with the Applicant to be credible, while simultaneously finding the Applicant's testimony on this issue not to be credible. Further, because the Applicant voluntarily entered a guilty plea, this Court finds that Counsel was under no duty to undertake additional investigation. As such, this Court finds that the Applicant is unable to prove either ineffective assistance of counsel or resulting prejudice. Accordingly, this allegation is denied and dismissed.

Failure to Call Witnesses

With respect to this claim, this Court finds that Applicant has failed to meet his burden of proof. This Court finds Counsel's testimony that she was not aware of any witnesses who would have been beneficial to the Applicant's case to be credible. Further, because the Applicant voluntarily entered a guilty plea, this Court finds that Counsel was under no duty to undertake additional investigation into finding witnesses. As such, this Court finds that the Applicant is

unable to prove either ineffective assistance of counsel or resulting prejudice. Accordingly, this allegation is denied and dismissed.

Failure to Adequately Present Mental Health Issues

With respect to this claim, this Court again finds that the Applicant has failed to meet his burden of proof. This Court finds Counsel's testimony that she presented arguments relating to the Applicant's mental health in her mitigating statement to the plea court to be credible, as it is supported by the record of the guilty plea hearing. At the same time, this Court finds Applicant's testimony on the issue not to be credible. As such, this Court finds that the Applicant is unable to prove ineffective assistance of counsel or resulting prejudice. Accordingly, this allegation is denied and dismissed.

All Other Claims

Except as discussed above, this Court finds that the Applicant affirmatively waived the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issue at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the 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.

This Court advises 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), SCRCP, provides that if the Applicant wishes to seek appellate review, PCR Counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 227 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

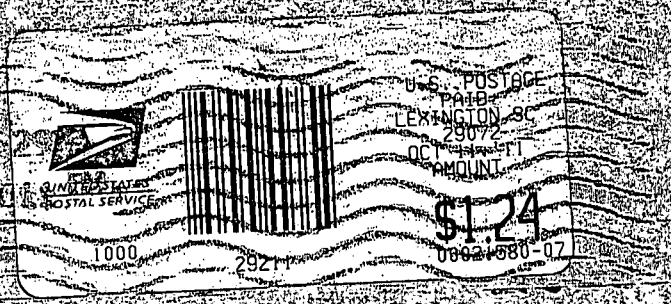
1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 11 day of March, 2011.

R. Knox McMahon
Presiding Judge
Eleventh Judicial Circuit

Lexington, South Carolina.



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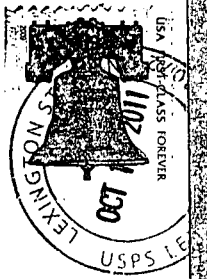

Leroy Folkes

Supreme Court of South Carolina
The Honorable Daniel E. Shearhouse
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Columbia, SC 29211