

LAW OFFICE OF
Kristy Grafton Goldberg, LLC
ATTORNEY AT LAW

October 26, 2017

RECEIVED

OCT 30 2017

S.C. SUPREME COURT

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

RE: Victor Anthony Jones SCDC # 337908, vs. State of South Carolina
Appeal of Case No. 2013-CP-41-0217

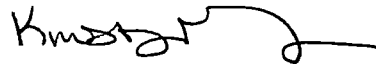
Dear Mr. Shearouse,

Enclosed for filing is a Notice of Appeal in the above referenced case. Also enclosed are a certificate of service and a copy of the original court order which is to be challenged on appeal. I would appreciate it if you could file the Notice of Appeal and mail a date-stamped copy back to me in the enclosed pre-stamped envelope.

By copy of this letter I am informing the Office of Appellate Defense of this Appeal. I was appointed to represent Mr. Jones on his PCR at the trial level so I would ask that the Office of Appellate Defense request the trial transcript within the time required by this Court.

Please let me know if you have any questions or concerns regarding this matter.

Respectfully,



Kristy Goldberg

CC: Johanna Valenzuela
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549

Victor Anthony Jones, SCDC # 337908
Tyger River Correctional Institution
100-200 Prison Road
Enoree, South Carolina 29335

The Honorable Sheri Coleman
Saluda Clerk of Court
100 East Church Street
Saluda, South Carolina 29138

Office of Appellate Defense
Chief Appellate Defender – Robert Dudek
PO Box 11433
Columbia, SC 29211-1433

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

Edward Miller, Circuit Court Judge

Case No. 2013-CP-41-0217

Victor Anthony Jones, SCDC # 337908, Appellant


v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Applicant Victor Anthony Jones hereby appeals from the Order of the Honorable Edward Miller presiding Judge for the 11th Judicial Circuit, filed October 16, 2017 and received by counsel for the Applicant on October 20, 2017 in the matter of Victor Jones v. State of South Carolina, Case No. 2013-CP-41-0217.

October 26, 2017



Kristy Goldberg
Attorney for Applicant

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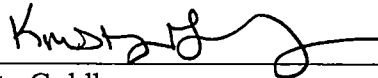
State of South Carolina, Respondent.

Proof of Service

Personally appeared before me, Kristy Goldberg, Esquire, who being duly sworn, deposes
and states:

She is the counsel of record for Applicant;
Service by mail is proper in this instance; and
She has served the NOTICE OF APPEAL on the following party on October 26, 2017 by
depositing one copy in the U.S. Mail, postage prepaid:

Assistant Attorney General, Johanna C. Valenzuela
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211



Kristy Goldberg
Attorney for Plaintiff

Law Office of Kristy Goldberg, LLC.

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Other Counsel of Record:
Assistant Attorney General, Johanna C. Valenzuela
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to orders of commitment of the Clerk of Court for Saluda County. Applicant was indicted at the February 2011 term of the Saluda County Grand Jury for Armed Robbery (2011-GS-41-0150). Applicant was represented by Benjamin A. Stitely, Esquire. Applicant proceeded to trial before the Honorable William P. Keesley from October 30, 2012 to November 2, 2012. The jury found Applicant guilty as indicted. Judge Keesley sentenced Applicant to eleven years confinement.

Applicant was also indicted for armed robbery (2009-GS-41-520), criminal conspiracy (2009-GS-41-517), and possession of a firearm during commission of a crime (2009-GS-41-519). Applicant was served warrants for these charges on July 23, 2009. Applicant pled guilty February 4, 2013, to strong arm robbery (2013-GS-41-076) related to these charges. In exchange for his plea, Applicant received a consecutive term of five years' imprisonment with credit for time served.

II.

In his *pro se* application for post-conviction relief, Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel, in that
 - a. "My lawyer told me not to get on the stand because he would get the last closing argument, and that it wouldn't be good to go on the stand with my record, but I felt I was forced not to."
 - b. "Ineffective representation of counsel my lawyer."

On November 25, 2014, Applicant, via PCR counsel, amended his application to also allege:

- (a) Ineffective assistance of trial counsel - counsel failed to advise Applicant of his right to testify in a limited capacity during the Jackson v. Denno hearing.
- (b) Ineffective assistance of trial counsel - counsel was ineffective by improperly persuading Applicant not to testify in front of the jury during the trial.
- (c) Ineffective assistance of trial counsel - failure to

investigate.

Subsequently on April 23, 2015, Applicant filed a Second Amended Application for Post-Conviction Relief, which amended the indictment for which Applicant sought relief (now 2013-GS-41-076, Strong Arm Robbery) and withdrew his prior claims of ineffective assistance regarding indictment 2011-GS-41-1150. In his Second Amended Application, Applicant alleged, "Trial counsel failed to ensure that the Court awarded him credit for time served as statutorily required."

Applicant proceeded only under the second amended ground at the PCR evidentiary hearing.

III.

At the hearing, plea and trial counsel Benjamin Stitely testified Applicant was in and out of jail in Saluda County on probation revocations when he first attempted to make contact with his client. (T. p. 8.) Applicant's family retained counsel for several pending charges. (T. p. 8-9.) Counsel said Applicant had two separate robbery cases, the second one of which was a stronger case for the State. (T. p. 9.) The other case, which occurred first in time, was "a complete toss-up" for the State. (T. p. 10.) Counsel said the solicitor proceeded to trial on the stronger charge and Applicant then pled guilty after the trial to the weaker charge to avoid the enhanced sentencing of the recidivism statute. (T. p. 10.) Applicant received a five year consecutive sentence for the robbery to which he pled. (T. p. 11.)

Counsel testified Applicant was initially charged with criminal conspiracy (2009-GS-41-517), possession of a firearm during the commission of a crime (2009-GS-41-519), and armed robbery (2009-GS-41-520) for an incident occurring on May 26, 2009. (T. p. 12.) Applicant was not served with these warrants until he was arrested on July 23, 2009 for a separate armed

robbery charge. (T. p. 13-14.) Following the trial for the other armed robbery charge, the indictments listed above were nolle prossed, and Applicant pled guilty to strong arm robbery (2013-GS-41-076). (T. p. 14.) Applicant received a sentence of five consecutive years, with credit for time served. (T. p. 14-15.) Counsel testified that because the solicitor presented the indictment for strong arm robbery the day of the plea, Applicant's records would not have reflected any amount of time served on warrants related to that indictment. (T. p. 15.) Counsel also acknowledged that during the plea hearing, he indicated to the plea judge he would contact the Department of Corrections to clarify how much time Applicant had served prior to his plea, and then he would inform the court of the credit to which Applicant was entitled. (T. p. 17.) However, Counsel did not recall ever going before the plea court again to address Applicant's credit for time served. (T. p. 17.) After reviewing Applicant's records, Counsel testified Applicant received the benefit of two years' credit on the armed robbery case tried before the Honorable Judge Keesley, but Applicant did not receive any credit toward the strong arm robbery plea. (T. p. 27.) Counsel also testified he would have ceased representation of Applicant once Applicant was appointed PCR counsel. (T. p. 29.)

PCR counsel argued Applicant was entitled to one hundred ten days credit for time served after the date of Applicant's arrest until Applicant was bonded out of jail. (T. p. 36.) PCR counsel argued the Department of Corrections likely was not aware Applicant was entitled to credit for those days because the original indictments were nolle prossed, and the new indictment created for the strong arm robbery plea did not indicate the corresponding charges. (T. p. 38.) PCR counsel asked this Court to remand the matter back to Judge Russo for resentencing. (T. pp. 40-46.) The State agreed that if the Department of Corrections had not included Applicant's one hundred ten days of detention after his arrest and prior to his bond, then Applicant was entitled to

those days. (T. p. 47.)

IV.

On August 30, 2016, PCR counsel Kristy Goldberg and Senior Assistant Deputy Attorney General Johanna C. Valenzuela signed and submitted a Consent Order Regarding Credit for Time Served to Judge Russo. Within the consent order, the parties agreed Applicant was incarcerated on charges related to indictment 2013-GS-41-076 for one hundred ten days prior to his guilty plea. The parties also agreed Applicant was entitled to credit for this time served in calculating his five year consecutive sentence for the strong arm robbery plea. Judge Russo signed the consent order, which was then filed September 12, 2016. As a result, this is no longer an issue to be decided by this Court and is moot.

V.

Applicant further alleges counsel was ineffective for his failure to present Judge Russo with additional information regarding his pre-trial detention at the plea hearing. PCR counsel for Applicant asked the Court to remand for resentencing to allow Applicant to present this additional mitigating information to the original sentencing Judge. Specifically, PCR counsel argues two blocks of time at issue.

The first block of time is between May 18, 2012 and November 9, 2012 when Applicant was at the detention center pursuant to a bench warrant. Applicant testified that his Court dates in Saluda were appearance dates for all pending charges. (Tr. 35). At some point Applicant received a bench warrant for missing a Court date, but the bench warrant only named one of his pending charges instead of all of them and did not reference any warrant numbers or indictment numbers related to the incident for which he plead guilty. (Tr. 35, 38-39). PCR counsel for Applicant argued that, if the bench warrant had been complete and correct, it would have

referenced all pending warrant numbers/indictment numbers including the ones related to the incident for which he plead guilty, and accordingly, this time would count towards indictment 2013-GS-41-076.

The second block of time at issue would be the time for which Applicant was in the Department of Corrections on a parole violation while these charges were pending. This was from approximately November 9, 2011 through January 13, 2012. (Tr. 33). PCR counsel argued that the Court had the discretion to award Applicant credit for that time towards his sentence if the information had been presented, but due to trial counsel's failure to provide this information the Court was unable to exercise its discretion. (Tr. 39-40).

Whether or not facts and arguments alleged by Applicant have merit, these facts do not support a cognizable claim for post-conviction relief under any of the statutory grounds. PCR relief is only proper when the application collaterally attacks the validity of the conviction or sentence. *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000). Claims that affect only the duration of the sentence or quality of the inmate's confinement do not affect the validity of the conviction or sentence and therefore are considered non-collateral attacks on the conviction. *Cooper v. State*, 338 S.C. 202, 525 S.E.2d 886 (2000). A credit-related claim or challenge to other conditions of confinement does not fall into that category. *Id.* Here, Applicant is in fact trying to enforce the sentence and is therefore is *not* making a collateral attack on the sentence.

Further, this Court finds plea counsel was not ineffective for failing to present this information to the sentencing judge. Although Applicant argues the plea court had discretion to award credit for the second and third blocks of time, Applicant certainly was not entitled to credit for time served on charges unrelated to the incident for which he plead. Prejudice is not met where this Court can only speculate as to how the information would have aided Applicant

at his plea hearing. Therefore, this application for post-conviction relief is denied and dismissed.

Applicant has withdrawn all prior allegations of ineffective assistance of counsel, and no other allegations were presented at the PCR evidentiary hearing. Accordingly, the Court finds Applicant has abandoned any such allegations.

VI.

Based on the foregoing, this 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.

This Court notes Applicant must file and serve a notice of appeal within thirty days from 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, his post-conviction relief attorney must serve and file a notice of appeal on Applicant's behalf. Applicant and his attorney are directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

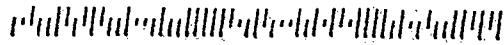
1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 3 day of OCTOBER, 2017.

EDWARD MILLER

EDWARD MILLER
Presiding Judge
11th Judicial Circuit

Tranville, South Carolina



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The Honorable Daniel E. Shearouse
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