

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Cherokee County
Honorable Robin B. Stilwell, Circuit Court Judge

LEE EDWARD TATE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-001304

APPENDIX

LANELLE CANTEY DURANT
Appellate Defender

ALAN WILSON
Attorney General

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

VALERIE GARCIA GIOVANOLI
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

ATTORNEY FOR PETITIONER

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STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
) SEVENTH JUDICIAL CIRCUIT
COUNTY OF CHEROKEE) CASE NO.: 2013-GS-11-072

STATE OF SOUTH CAROLINA)
)
vs.) TRANSCRIPT OF RECORD
)
LEE EDWARD TATE, JR.)

AUGUST 11, 2014
GAFFNEY, SOUTH CAROLINA

BEFORE THE HONORABLE FRANK ADDY

APPEARANCES:

MATT KENDALL, ASSISTANT SOLICITOR
GAFFNEY, SOUTH CAROLINA

ATTORNEY FOR THE STATE

MICHAEL BERRY, ASSISTANT PUBLIC DEFENDER
GAFFNEY, SOUTH CAROLINA

ATTORNEY FOR THE DEFENDANT

SHIRLEY BROOM
16TH Circuit Court Reporter

I-N-D-E-X

NO TESTIMONY TAKEN

E-X-H-I-B-I-T-S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
NO EXHIBITS			

1 (WHEREUPON, LEE EDWARD TATE, JR. IS DULY SWORN BY
2 THE DEPUTY CLERK.)

3 MR. KENDALL - Your Honor, before the Court is Mr.
4 Lee Tate, Jr. on Indictment 2013-72 true billed for one
5 count of armed robbery. He's represented in this case by
6 his Attorney, Mr. Michael Berry. There's a negotiated
7 sentence in this plea of 22 years, suspended upon the
8 service of 17 years and five years probation.

9 The victim in this case has been notified -- I
10 don't see -- Mr. Bobby Poore?

11 (WHEREUPON, NO RESPONSE)

12 MR. KENDALL - I don't think he wanted to be here
13 today. He does request restitution in the amount of eight
14 hundred dollars for damage to the store, as well um --
15 there's a therapist that he went and saw -- in the amount
16 of three thousand seven hundred and sixty dollars that Mr.
17 Tate has agreed to pay. We would also request a no contact
18 provision with Mr. Poore.

19 THE COURT - All right, are we okay to proceed?

20 MR. BERRY - Yes, sir, I'm sorry. I apologize.

21 THE COURT - That's all right.

22 Mr. Berry, you're representing Mr. Tate on these
23 charges?

24 MR. BERRY - Yes, sir, I am.

1 THE COURT - I'm told he wants to plead guilty to
2 the offense of armed robbery. That carries a minimum of 10
3 years, I believe a maximum of 30. Is that correct?

4 MR. BERRY - Yes, sir, Your Honor.

5 THE COURT - Have you explained to him then the
6 penalty he's looking, all of his constitutional rights and
7 you agree with his decision?

8 MR. BERRY - Yes, I do; we've discussed that on
9 numerous occasions.

10 THE COURT - And from your investigation of the
11 facts and circumstances surrounding this incident or these
12 charges, do you believe that the State possesses sufficient
13 credible evidence to prove Mr. Tate's guilt to a jury
14 beyond a reasonable doubt and that if he were to stand
15 trial, his conviction would be likely?

16 MR. BERRY - Yes, sir, Your Honor, I do.

17 THE COURT - Sir, you are Lee Edward Tate, Jr.?

18 MR. TATE - Yes, sir.

19 THE COURT - They're telling me, sir, that you
20 want to plead guilty to the offense of armed robbery. Is
21 that correct?

22 MR. TATE - Yes, sir.

23 THE COURT - The charge of armed robbery carries a
24 maximum of 30 years in jail and a minimum of 10 years.

1 It's also classified as a violent and a most serious
2 offense. Do you understand that, sir?

3 MR. TATE - Yes, sir.

4 THE COURT - It's also an 85 percent offense, a no
5 parole offense. You understand that?

6 MR. TATE - Yes, sir.

7 THE COURT - In this case I am told that you, your
8 attorney and the State have negotiated a sentence of 22
9 years, suspended on an active 17 years imprisonment to be
10 followed by five years probation. Is that correct?

11 MR. TATE - Yes, sir.

12 THE COURT - It is?

13 MR. TATE - Yes, sir.

14 THE COURT - They're seeking restitution and
15 requesting a no contact Order. Because this is a
16 negotiated sentence, Mr. Tate, do you understand if I
17 accept your plea, I'll have no choice but to give you the
18 sentence I've just described to you.

19 MR. TATE - Yes, sir.

20 THE COURT - So I cannot come under that 17 years
21 active; I cannot go over it. Do you understand that, sir?

22 MR. TATE - Yes, sir.

23 THE COURT - Now, I haven't done the math, but
24 you'll have to do 85 percent of that 17 years before you

1 ever hope to -- you can ever hope to get out of prison. Do
2 you understand that, sir?

3 MR. TATE - Yes, sir.

4 THE COURT - And, obviously, once you're released
5 from that sentence, if you violate your probation over the
6 next five years, you're looking at going back to prison for
7 another five years. Do you understand that, sir?

8 MR. TATE - Yes, sir.

9 THE COURT - Now, Mr. Tate, in the last 24 hours,
10 have you taken any medication or any kind of substance that
11 affects your thinking?

12 MR. TATE - No, sir.

13 THE COURT - Have you ever been treated for any
14 kind of mental illness issues, mental retardation, any
15 problems understanding what's going on, anything like that?

16 MR. TATE - No, sir.

17 THE COURT - Mr. Tate, are you, in fact, guilty of
18 this charge?

19 MR. TATE - Yes, sir.

20 THE COURT - I want you to listen very closely;
21 I'm going to ask the solicitor to give me the facts. When
22 he's done speaking, I'll ask you if that's what you did, so
23 please pay very, very close attention to what he has to
24 say. All right?

25 MR. TATE - Yes, sir.

1 THE COURT - Go ahead.

2 MR. KENDALL - Your Honor, this occurred on
3 October 22nd, 2012 at approximately 8:35 in the evening in
4 the area of 405 West Cherokee Avenue. This is a local
5 convenience store. During that time, Mr. Tate, as well as
6 another gentlemen, Mr. Guyton, entered that store. During
7 that time, Mr. Tate was armed with a assault rifle -- I
8 believe it was an AR-15, if I'm not mistaken -- and
9 demanded the money that was in the register. The shop
10 keeper opened up the drawer. Mr. Guyton, the co-defendant,
11 grabbed all the money and ran. The shop keeper actually
12 got a hold of his firearm and fired a couple of shots, some
13 that actually hit Mr. Tate. Mr. Tate left the convenience
14 store and actually walked to a -- not -- well, kind of -- I
15 say walked -- it was on foot to a nearby church where he
16 kind of basically collapsed. An ambulance was summoned.
17 He was found, obviously, there very closely by. He gave a
18 full confession indicating his involvement in that case.
19 The -- he gave a full confession indicating as to what
20 happened. This occurred -- I think the motivation from
21 this -- he had actually been released from jail a few hours
22 prior to this happening, and I think the motivation for
23 this was to pay some people off for bond. And I'll let Mr.
24 Berry go into that if he likes.

1 His criminal record is from 2008, receiving
2 stolen goods in excess of one thousand but less than five
3 thousand, simple possession of marijuana, a purse-
4 snatching, a DUS, possession of a stolen vehicle from 2010.
5 I believe that is it, Your Honor. Well, I'm sorry, um --
6 yes, I believe that is it.

7 We are actually -- as a result of this plea,
8 we're going to dismiss -- the charge he was in on was a
9 threatening a law enforcement officer; it was a family
10 member, basically, and we are going to dismiss that charge
11 as he's pleading guilty to this. And we talked to the
12 victim in that case, as well as the victim in this case,
13 and they were in agreement with it.

14 THE COURT - All right. Mr. Tate, you heard what
15 the State alleges this happened back on October the 22nd,
16 two years ago, where it's alleged you went in with an AR-15
17 and robbed this convenience store. Is that what happened,
18 sir?

19 MR. TATE - Yes, sir.

20 THE COURT - So what they say is true?

21 MR. TATE - Yes, sir.

22 THE COURT - Mr. Tate, I need to review with you
23 your rights that you've giving up by pleading guilty. At
24 any time you have any questions whatsoever about anything I
25 say to you, I want you to stop me, and I'll let you talk

1 with your Attorney, Mr. Berry, as long as you need to.

2 Okay, sir?

3 MR. TATE - Yes, sir.

4 THE COURT - First of all, Mr. Tate, you do
5 understand that this crime is classified as a most serious
6 offense. You understand that?

7 MR. TATE - Yes, sir.

8 THE COURT - There are certain crimes, such as
9 armed robbery, that are classified as most serious. What
10 that means is that once you get done serving this 17 years,
11 if you get out and you're convicted of another most serious
12 offense, the State can seek life without the possibility of
13 parole against you. The Court, the Judge involved, would
14 have no discretion. If you're convicted of that other most
15 serious offense, the Court would have to imprison you for
16 the rest of your life. Do you understand that, Mr. Tate?

17 MR. TATE - Yes, sir.

18 THE COURT - So what we're talking about today is
19 very serious business. Do you understand, sir?

20 MR. TATE - Yes, sir.

21 THE COURT - Other crimes that are classified as
22 most serious are things like murder, voluntary
23 manslaughter, I believe kidnapping, criminal sexual conduct
24 first and CSC with a minor first and, I think, second
25 degree, things of that nature. Do you understand?

1 MR. TATE - Yes, sir.

2 THE COURT - So, again, once you get out, you've
3 got to really make an effort to stay out of trouble,
4 because the rest of your life could be hanging in the
5 balance. You understand, sir?

6 MR. TATE - Plan on it, sir.

7 THE COURT - Good. You do understand also, Mr.
8 Tate, you don't have to plead guilty. If you wanted to,
9 you could have a jury trial on this case.

10 MR. TATE - Yes, sir.

11 THE COURT - You understand?

12 MR. TATE - Yes, sir.

13 THE COURT - At a trial, Mr. Tate, the State would
14 have the burden of proving your guilt beyond a reasonable
15 doubt to the satisfaction of all 12 jurors. You would not
16 have to prove the first thing. The way they would go about
17 trying to meet that burden, is they would call witnesses to
18 testify. One by one the witnesses would come in; they'd be
19 sworn and you and your attorney would have an opportunity
20 to see, hear and confront and cross examination those
21 witnesses. Do you understand?

22 MR. TATE - Yes, sir.

23 THE COURT - That means you could ask those
24 witnesses any question that was relevant any issue involved
25 in this case. Do you understand, Mr. Tate?

1 MR. TATE - Yes, sir.

2 THE COURT - And at trial, Mr. Tate, you have no
3 burden of proof whatsoever. The burden is always on the
4 State to prove your guilt beyond a reasonable doubt. You
5 don't have to prove the first thing, and I would explain
6 that to the jury. If you wanted to, however, you could
7 certainly call your own witnesses to testify. If those
8 witnesses didn't want to come to Court, you could subpoena
9 that. Do you understand?

10 MR. TATE - Yes, sir.

11 THE COURT - So they would not have a choice as to
12 whether or not to come. At trial you would also be free to
13 take the stand in your defense, tell the jury in your own
14 words what did or did not happen. Do you understand?

15 MR. TATE - Yes, sir.

16 THE COURT - If you decided, however, that you
17 didn't want to take the stand, I would explain to the jury
18 that they couldn't hold your failure to take the stand
19 against you. They couldn't even talk about it in deciding
20 whether you're guilty of this particular crime. Do you
21 understand, sir?

22 MR. TATE - Yes, sir.

23 THE COURT - If you plead guilty, though, you
24 waive this Fifth Amendment right of self-incrimination and

1 that you admit to me that you did, in fact, commit this
2 crime. Do you understand, Mr. Tate?

3 MR. TATE - Yes, sir.

4 THE COURT - Additionally, at trial you would be
5 presumed innocent. The way I would explain this
6 presumption of innocence to the jury, I would explain it's
7 like a robe of righteousness placed about your shoulders
8 and that only they, the jury, could strip from you. You
9 understand that?

10 MR. TATE - Yes, sir.

11 THE COURT - What that means right now, Mr. Tate,
12 is in the eyes of the law you're an innocent man, because I
13 haven't accepted your guilty plea yet, and obviously, you
14 haven't been convicted at trial. You understand that?

15 MR. TATE - Yes, sir.

16 THE COURT - If you plead guilty, though, you
17 waive that presumption of innocence. Additionally, at
18 trial, Mr. Tate, you would have the right to present any
19 defense you might have to this charge. I'm sure that's
20 something you've probably talked to Mr. Berry about at
21 length. Is that correct?

22 MR. TATE - Yes, sir.

23 THE COURT - If you plead guilty, though, you
24 waive your right to present any defense; you also waive
25 your right to challenge any of the State's evidence like

1 the confession that you gave to the police. If the police
2 failed to read you your Miranda Rights or if they
3 threatened you or forced you or coerced that confession out
4 of you, I might rule that the confession was involuntary
5 and the jury would never even hear about it. Do you
6 understand, sir.

7 MR. TATE - Yes, sir.

8 THE COURT - You have to answer out loud if you
9 will, please.

10 MR. TATE - Yes, sir.

11 THE COURT - Thank you. I don't know what other
12 additional evidence they have against you, but you do
13 realize by pleading guilty you're waiving your right to
14 present any -- or challenge any of the State's evidence or
15 present any evidence yourself. Do you understand that,
16 sir?

17 MR. TATE - Yes, sir. Could you repeat the one
18 you said just before that?

19 THE COURT - About the Miranda Rights?

20 MR. TATE - Yes, sir.

21 THE COURT - I'm told that you gave a confession
22 to the police.

23 MR. TATE - Yes, sir.

24 THE COURT - If they didn't read you your Miranda
25 Rights, they didn't read you your rights before giving that

1 confession, then we could have what's known as a Jackson v.
2 Denno hearing. I would determine whether or not your
3 rights were read to you. Okay? If the police didn't read
4 you your rights, I completed that your rights were never
5 read to you, I might would -- I would probably suppress
6 that confession; the jury would never hear about that
7 confession. You understand that, sir?

8 MR. TATE - Yes, sir. How would you have
9 evidence?

10 THE COURT - How would you have evidence?

11 MR. TATE - Yes, how would I have evidence?
12 Right.

13 THE COURT - That's an excellent question. It
14 could come down to a simple question of whether or not the
15 police had a form filled out; very often at some parts of
16 the State they'll have a form where they'll actually review
17 with you your rights, having you sign or you initial next
18 to those Miranda Rights. In a Jackson v. Denno hearing,
19 you'd be free to testify just like any other State in this
20 trial. If I concluded that the rights weren't read or the
21 police were fuzzy on it or what have you -- I'm just giving
22 you scenarios ---

23 MR. TATE - Yes, sir.

24 THE COURT - I mean it's possible that the Court
25 could conclude that the confession was not a product of a

1 knowing and voluntary waiver of your Miranda Rights? You
2 understand, sir?

3 MR. TATE - Yes, sir.

4 THE COURT - Is there any concern or additional
5 concern about that? Do you want to talk to Mr. Berry for a
6 moment?

7 MR. TATE - Yeah, yes, sir.

8 THE COURT - Sure. Go ahead. Y'all step aside
9 for just a second.

10 (WHEREUPON, DISCUSSION IS HELD BETWEEN MR. BERRY
11 AND MR. TATE WHICH WAS NOT REPORTED AND OUT OF THE HEARING
12 OF THE COURT.)

13 THE COURT - Are y'all okay to proceed?

14 MR. BERRY - Judge, in this case Mr. Tate was
15 hospitalized, and then once he was released from the
16 hospital he actually was transported to our municipal bond
17 court where he did have a bond hearing in front of our
18 local municipal judge. That judge cautioned him on the
19 record on -- actually in front of a live TV camera, our TV
20 news, and Mr. Tate then proceeded to implicate himself. So
21 we talked about that at length and ---

22 THE COURT - Okay.

23 MR. BERRY - --- how that would be able to be used
24 against him at trial, so -- but that's one question that he
25 had for me.

1 THE COURT - Mr. Tate, what Mr. Berry's probably
2 telling you is that Miranda applies in the situation --
3 legally we call it focused custodial -- custodial
4 interrogation. That is, usually, if you picture yourself
5 sitting there in a room with the police across from you and
6 they're asking you questions about this crime, they've got
7 to read you your Miranda Rights.

8 MR. TATE - Yes, sir.

9 THE COURT - If you voluntarily said something in
10 front of TV cameras and you just sort of blurted it out,
11 Miranda doesn't apply to that. In all likelihood, the
12 State would be able to use that against you.

13 MR. TATE - Yes, sir, I was just apologizing at
14 what I did.

15 THE COURT - Sure. And that sounds like something
16 -- I mean you could challenge that at trial, ---

17 MR. TATE - Yes, sir.

18 THE COURT - --- and maybe for whatever reason, I
19 might conclude that that shouldn't come in or some other
20 judge might conclude that that shouldn't come in.
21 Typically though, a spontaneous statement like that, which
22 is not the product of interrogation, usually that's the
23 kind of evidence that the Court would permit the State to
24 use against you. You understand that, sir?

25 MR. TATE - Yes. Yes, sir.

1 THE COURT - And I guess Mr. Berry's kind of told
2 you the same thing. Is that right?

3 MR. TATE - Yes, sir. Yes, sir.

4 THE COURT - You understand all the rights that
5 I've gone over with you?

6 MR. TATE - Yes, sir.

7 THE COURT - Are you sure that you want to give
8 them up and plead guilty?

9 MR. TATE - Yes, sir.

10 THE COURT - Now, Mr. Berry, you're happy with the
11 Rule 5, Brady response in this case?

12 MR. BERRY - Yes, sir, Your Honor.

13 THE COURT - You've shared that with Mr. Tate, I
14 assume?

15 MR. BERRY - Yes, sir, we've gone over it.

16 THE COURT - Mr. Tate, are you happy with the way
17 that Mr. Berry has tried to help you?

18 MR. TATE - Yes, sir.

19 THE COURT - Have you got any complaints to make
20 against him?

21 MR. TATE - No, sir.

22 THE COURT - Do you need any more time to talk to
23 him about this?

24 MR. TATE - No, sir.

1 THE COURT - So you're totally satisfied with his
2 help?

3 MR. TATE - Yes, sir.

4 THE COURT - And aside from the negotiated
5 sentence in this case, has anyone promised you anything
6 else or held out any other hope of reward to get you to
7 plead guilty?

8 MR. TATE - No, sir.

9 THE COURT - Any one tried to threaten you, force
10 you or coerce you in any way to get you to plead guilty?

11 MR. TATE - No, sir.

12 THE COURT - So you are pleading guilty of your
13 own free will?

14 MR. TATE - Yes, sir.

15 THE COURT - Mr. Tate, are you pleading guilty to
16 this crime because you did commit this crime?

17 MR. TATE - Yes, sir.

18 THE COURT - Have you understood all my questions?

19 MR. TATE - Yes, sir.

20 THE COURT - Is there anything else that you want
21 to ask me about anything that we have discussed?

22 MR. TATE - No, sir.

23 THE COURT - I do find that there is a
24 substantial, factual basis for this plea; it is freely,
25 voluntarily, knowingly and intelligently made; Mr. Tate is

1 happy with Mr. Berry's assistance. I'll accept his plea.
2 Mr. Berry?

3 MR. BERRY - Thank you so much, Your Honor. May
4 it pleas the Court..

5 THE COURT - Yes, sir.

6 MR. BERRY - I'll start off by telling you that
7 I've represented Mr. Tate for 679 days now. He has been in
8 jail since his arrest on these charges, Judge. In your
9 discussions with him, you can obviously tell he's an
10 intelligent individual. Judge, he's 24 years old, and his
11 record does not reflect that, because he's made some very
12 poor decision in his short time as an adult. Judge, we've
13 gone over this case, and I'll tell you that he's been one
14 of the most cooperative clients that I've had. Certainly
15 sitting in jail for two years would make anyone antsy.
16 Let's just get it done and get it over with, whatever it's
17 -- wherever the cards are going to fall. Mr. Tate has been
18 patient, cooperative with me. Judge, from the very
19 beginning, including at the bond hearing that I mentioned
20 earlier, he has at no time denied any involvement with his
21 part in this armed robbery. There's a lot of background to
22 why this actually happened the way that it did. The
23 solicitor kind of touched on some of that, as this was
24 going to be repayment for some of the bond. In discussing
25 that, Judge, the only possible defense that I felt like we

1 would have a chance of raising, would've been a duress,
2 coercion type defense. Under the facts of the case and
3 what Mr. Tate has told me, I don't even know that we
4 would've gotten a jury charge on that, much less had been
5 successful in front of a jury. That's been probably the
6 hardest part of dealing with Mr. Tate, making him
7 understand how that area of the law works and how Your
8 Honor would give that charge, but then it would still be up
9 to a jury to decide whether they felt like that charge was
10 enough to get him off the hook on this offense, Judge. Mr.
11 Tate's come around and has certainly, again, admitted from
12 day one his involvement and has seen why this is the better
13 option for him. Judge, I would tell you that the co-
14 defendant in this case pled guilty to a negotiated 12 year
15 sentence. It's unfortunate that we weren't able to work
16 the same type deal out for Mr. Tate. I understand the
17 State's position, and I think the Court may have noted
18 earlier, it's a different situation when a person goes into
19 a store with a gun. Certainly in this case there's no
20 denying that Mr. Tate was the gunman. So I can understand
21 where they're coming from. Again, Mr. Tate had the option
22 of pleading straight up to this offense and letting the
23 cards fall where they would, and he's made the decision to
24 accept the State's offer, and, again, we appreciate the
25 State for extending that offer to him, and I would just ask

1 that Your Honor go along with the negotiated sentence and
2 give him credit for the six hundred and seventy-nine days
3 that Mr. Tate has been in our local detention center,
4 Judge.

5 THE COURT - Mr. Tate, I'm happy to hear anything
6 that you would like to tell me, sir.

7 MR. TATE - Yes, sir, I -- even though the victim
8 ain't here, I'd like to apologize to the victim. You know,
9 it was kind of childish of what I did, you know, very
10 stupid, but, you know, being this time, fixing to get and
11 go to prison, hopefully I'll learn from my mistakes and get
12 out and be a better man.

13 THE COURT - Mr. Tate, you agree to the
14 restitution that's outlined on this restitution form that
15 you signed?

16 MR. TATE - Yes, sir.

17 THE COURT - All right, well, Mr. Tate, I'm, of
18 course, going along with what it is that you have worked
19 out. I want to, again, emphasize the importance of staying
20 out of trouble when you get out.

21 MR. TATE - Yes, sir.

22 THE COURT - This thing could've gone down a lot
23 worse than it did in a couple of respects. I mean you got
24 shot.

25 MR. TATE - Yes, sir.

1 THE COURT - You could've been killed, and dieing
2 over something like this is probably worse than doing 17
3 years in prison.

4 MR. TATE - Yes, sir.

5 THE COURT - You've built quite a little record
6 for yourself. You're going to be in your late 30's,
7 probably around 36, 37 ---

8 MR. TATE - 36.

9 THE COURT - --- 38 before you get out, somewhere
10 in there, and so you're going to be sacrificing a lot of
11 good years to the department of corrections. Please,
12 please, please, don't be in a hurry to get back in there
13 once you get out. Okay, Mr. Tate?

14 MR. TATE - Yes, sir.

15 THE COURT - The sentence of the Court, sir, is
16 that you're committed to the department of corrections for
17 22 years; that is suspended on the service of 17 years.
18 You're put on probation for five years. You'll get credit
19 for the six hundred and seventy-nine days that you have
20 served in jail. Once you've done that 17 year sentence,
21 you'll have to pay restitution in the amount of four
22 thousand five hundred and sixty dollars to the victims
23 involved in this case. Probation will be tolled while
24 you're in SCDC. Also, while you're on -- once you're
25 released and while you're probation, you'll need to

1 cooperate with any referral that they make to Voc Rehab or
2 Job Corp. You're going to need that in order to get
3 yourself back on your feet once you've done this time.

4 Okay, sir?

5 MR. TATE - Yes, sir.

6 THE COURT - You'll also be subject to random drug
7 testing; you'll have to pay five hundred dollars to the
8 public defender fund. I have noted, however, after two and
9 a half years, if there are no issues with you being on
10 probation, your probation can end early instead of you
11 being on for that full five. Okay?

12 MR. TATE - Appreciate that, sir.

13 THE COURT - Word of advice to you, Mr. Tate.
14 You've got a good piece of time to serve. You're still a
15 young man. SCDC doesn't have as many programs as many of
16 us would like to see them have in terms of rehabilitation,
17 but they do have certain training programs where you can
18 learn skills, skills that are in high demand. Okay? Don't
19 get involved in gangs in SCDC; follow the rules and avail
20 yourself of what programs they do offer. By following the
21 rules, hopefully, they'll get you down to a less secure-
22 type facility sooner, and you'll have more privileges and
23 maybe even better food. Okay? But stay away from the
24 gangs.

25 MR. TATE - Yes, sir.

1 THE COURT - Take advantage and learn as much as
2 you can during this time, and please, don't let me see you
3 back here again. Okay, sir?

4 MR. TATE - Yes, sir.

5 THE COURT - Good luck to you.

6 MR. KENDALL - Your Honor, there was one thing.
7 We'd also request a no contact with Mr. Bobby Poore, if
8 that's okay.

9 THE COURT - Oh, yeah. No contact with these
10 folks, and don't go back around this site. Okay?

11 MR. TATE - Yes, sir.

12 MR. KENDALL - Thank you, Your Honor.

13 MR. BERRY - Thank you so much, Your Honor.

14 (END OF TRANSCRIPT)

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C E R T I F I C A T E

I, Shirley Broom, Official Court Reporter for the Sixteenth Judicial Circuit for the State of South Carolina, do hereby certify that the foregoing 25 pages is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the proceedings of State of South Carolina vs. Lee Edward Tate, Jr., as taken by me in the Court of General Sessions for the Seventh Judicial Circuit August 11, 2014 and provided by me this the 13th day of Sept., 2016.

I do further certify that I am neither of kin, counsel, nor interest to any party herein.



Shirley Broom, CVR-M
Official Court Reporter,
Certified Verbatim Reporter, In and
for the State of South Carolina

FORM 5

STATE OF SOUTH CAROLINA)
County of Cherokee)

IN THE COURT OF COMMON PLEAS

015CP-10867

Lee E. Tate J.R. 328637
Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)
)
)
)

APPLICATION FOR
POST-CONVICTION RELIEF

2015 APR 30 12:22:27
COUNTY CLERK
CHEROKEE

INSTRUCTIONS B READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention PERRY CORRECTIONAL INSTITUTION
PELZER, S.C.
2. Name and location of Court which imposed sentence Cherokee County
COURT House OF General Sessions
3. Name(s) of co-defendant(s) (if any) Demond Guyton
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) ARM Robbery

- (b) _____
- (c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

- (a) _____
- (b) _____
- (c) _____

6. Check whether a finding of guilty was made:

- (a) after a plea of guilty _____
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

No.

8. If you answered Ayes@ to (7), list:

- (a) the name of each Court to which you appealed:
 - i. N/A
 - ii. _____
 - iii. _____
- (b) the result in each such Court to which you appealed:
 - i. N/A
 - ii. _____
 - iii. _____
- (c) the date of each such result:
 - i. N/A
 - ii. _____
 - iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. N/A
 - ii. _____
 - iii. _____

2015 NOV 30 P 2:27
 BRADLEY W. MOSEBE
 CLERK

9. If you answered Ano@ to (7), state your reasons for not so appealing:

(a) Counsel Failed To advise me of The appeal procedures, and Failed To do so:

- (b) _____
- (c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) ineffective assistance of Counsel
- (b) evidence of material facts not previously presented
- (c) my plea was unknowingly and involuntarily
Denial of Right to appeal

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) Counsel Failed To appeal my sentence
- (b) after sentencing Counsel assured me he would file motion for Reconsideration
Police officer told me that if I plead guilty I would get ^{no more than} ten years
- (c) because the plea was not a lesser included offense of the crime charged
in the indictment, and I never waived presentment.

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? NO.
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO.
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO.
- (d) any other petitions, motions or applications in this or any other Court? NO.

13. If you answered Ayes@ to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
 - i. N/A
 - ii. _____
 - iii. _____
 - iv. _____
- (b) the name and location of the Court in which each was filed:
 - i. N/A.
 - ii. _____
 - iii. _____

2015 NOV 30 9 11 27
 BRADLEY W. MOSELEY

iv. _____

(c) the disposition thereof:

i. N/A.

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. N/A.

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A.

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No.

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. N/A

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. N/A

ii. _____

iii. _____

BRADY HOFFEE
2015 NOV 30 PM 13:27

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) N/A
- (b) _____
- (c) _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? Yes
- (b) your trial, if any? _____
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

18. If you answered Ayes@ to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
 - i. Michael Berry Cherokee County Courthouse
 - ii. _____
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. General Sessions Guilty Plea Trial
 - ii. _____
 - iii. _____

2015 NOV 30 10 14 27
 BVA:DJW:KOD/E

015CP-110867

19. State clearly the relief you seek in filing this application:

To receive what The ARRESTING OFFICER OFFERED
me 10 years, To be resentencing, OR Time Reduction

20. Are you now under sentence from any other court that you have not challenged?

No.

Revised 3/2003

STATE OF SOUTH CAROLINA)
County of Cherokee)

VERIFICATION

I, Lee Tate, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Lee Tate

SWORN to and subscribed before me this 24
day of November, 2015.

Tennar Crwell (L.S.)
Notary Public

My Commission Expires: September 25, 2018

BRADLEY W. MOORE
2015 NOV 30 PM 02:27

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Lee Tate, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Lee Tate
Applicant

SWORN or affirmed to and subscribed before me this
24 day of November, 2015.

Tamara Cornwell
Notary Public

My Commission Expires: September 30, 2018

BRANDY M. HOBBE
2015 NOV 30 PM 12:21

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF CHEROKEE)	
Lee E. Tate, Jr., #328637	)	Case No.: 2015-CP-11-0867
)	
Applicant,	)	RETURN AND PARTIAL
	)	MOTION TO DISMISS
v.)	
)	
State of South Carolina,)	
)	
Respondent.)	

In response to the application for post-conviction relief filed by Lee E. Tate, Jr., ("Applicant") on November 30, 2015, Respondent would show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Cherokee County. 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 for a term of twenty-two years suspended on the service of seventeen years to five years of probation. Applicant did not appeal his conviction or sentence.

II.

Applicant alleges that he is being held 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.

For the purpose of this Return, Respondent incorporates by reference Applicant's records from the Cherokee County Clerk of Court and the South Carolina Department of Corrections. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

Applicant claims that he was denied effective assistance of counsel because his plea attorney did not appeal his guilty plea. Respondent submits that trial counsel for the Applicant was diligent in his representation of Applicant and that he performed within the wide range of reasonable professional assistance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). In Strickland, the United States Supreme Court held that a convicted defendant's claim that counsel's assistance was so defective as to require a reversal of a conviction requires that the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Respondent submits that trial counsel's performance was not deficient nor was the Applicant prejudiced in any way by such performance. The decision of the South Carolina Supreme Court, in White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974), holds that even though the post-conviction relief court finds that the Applicant had never voluntarily and intelligently abandoned his appeal, the court has no jurisdiction to grant a belated appeal. However, where an accused establishes in a post-conviction relief hearing that he was unconstitutionally deprived of his statutory right to a direct appeal, the South Carolina Supreme Court, upon an appeal of the post-conviction relief decision,

will review the trial record and pass upon all issues properly raised and argued as if the direct appeal has been perfected.

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, 120 S.Ct. 1029 (2000). The Respondent submits that the Applicant cannot satisfy the requirements set forth in the Roe test. However, the allegation of counsel's failure to advise the Applicant regarding the possibility of an appeal probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983); Delaney v. State, 269 S.C. 555, 238 S.E.2d 679 (1977).

IV.

Respondent submits that, with the exception of Applicant's White claim, this Application for PCR should be summarily dismissed for failure to comply with the filing procedures of 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

current Application was filed on November 30, 2015, which was well 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, Respondent requests that this Court summarily dismiss the application for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act.

V.

Respondent interprets Applicant's claim of "evidence of material facts not previously presented" as an allegation that he is entitled to a new trial based on after-discovered evidence. Respondent submits Applicant is not entitled to an evidentiary hearing as to this issue and it should be dismissed pursuant to Rule 12(b)(6), SCRCPP, for failure to state a claim upon which relief can be granted.

An applicant requesting a new trial based on after-discovered evidence must show that the evidence:

- (1) is such as would probably change the result if a new trial was had;
- (2) has been discovered since the trial;
- (3) could not by the exercise of due diligence have been discovered before the trial;
- (4) is material to the issue of guilt or innocence;
- and (5) is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983). Before a Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing that he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965) ("It is, therefore, incumbent upon the applicant to make at least a *prima facie* showing entitling him to relief."). Applicant has not

shown that the alleged evidence meets *any* of the requirements for after-discovered evidence.

First, this is not evidence that has been discovered since the plea. Where the "evidence . . . was clearly known by and available to [Applicant] at trial," it cannot constitute after-discovered evidence. Hayden, 278 S.C. at 612, 299 S.E.2d at 855-56 (reversing the PCR court and finding no after-discovered evidence where applicant spoke of alleged conspirators several times during trial but did not present them as witnesses and where "evidence" of conspiracy presented at PCR hearing was testimony "that could only be hearsay"). The "material facts" Applicant presents are that a police officer told him that if he pleaded guilty he would get no more than ten years. Therefore, not only does this not constitute evidence, but by Applicant's own admission it was known to him at the time of the plea. Furthermore, these facts are not material to the issue of guilt or innocence and would have had no impact on the result of trial. For these reasons, Applicant has failed to make a *prima facie* showing that he is entitled to relief. Therefore, he is not entitled to an evidentiary hearing on the issue of newly discovered evidence. See MacDougall, 246 S.C. 258, 143 S.E.2d 455 ("It is . . . incumbent upon the applicant to make at least a *prima facie* showing entitling him to relief.").

VI.

This Court should summarily dismiss all claims except Applicant's claim that he was denied the right to a direct appeal, because Applicant has failed to show that "any purpose would be served by further proceedings," and there is no genuine issue of material fact. See S.C. Code Ann. § 17-27-70 (b) ("When a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for so doing."); see also S.C. Code Ann. § 17-27-70(c) ("The court

may grant a motion . . . for summary disposition . . . 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.*").

VII.

Respondent therefore requests that this Court convene an evidentiary hearing on the allegation that counsel failed to perfect an appeal pursuant to White v. State. As to all other allegations, Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VIII.

Respondent denies each allegation not expressly admitted, qualified, or explained in this Return.

IX.

WHEREFORE, having made its Return, Respondent requests that a hearing be held solely on the claim of entitlement to an appellate review pursuant to White v. State.

Respectfully submitted,

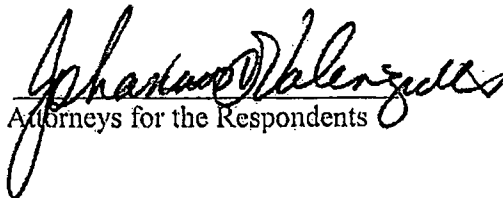
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

JOHANNA C. VALENZUELA
Senior Assistant Deputy Attorney General

ALICIA A. OLIVE
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By: 
Attorneys for the Respondents

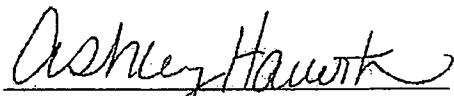
September 28, 2016

STATE OF SOUTH CAROLINA)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHEROKEE)	
)	
	)	2015-CP-11-0867
LEE E. TATE, JR., #328637,)	
)	
Applicant,)	
)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
)	
STATE OF SOUTH CAROLINA,)	
)	
Respondent.)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Partial Motion to Dismiss** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Mr. Rodney Wade Richey, Esquire
Richey & Richey, PA
PO Box 10916
Greenville, SC 29603-0916

DATED this 28TH day of September, 2016.


 Ashley Haworth, Legal Assistant
 For Respondent

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STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG)	
Lee Edward Tate,)	
	)	TRANSCRIPT OF RECORD
Applicant,	)	2015-CP-11-0867
-vs-)	
)	
The State,)	
	)	March 21, 2017
Respondent.	)	Spartanburg, South Carolina

B E F O R E:

HONORABLE ROBIN B. STILWELL, JUDGE

A P P E A R A N C E S:

RODNEY W. RICHEY, ESQUIRE
Attorney for the Applicant

ALICIA A. OLIVE, ESQUIRE
Attorney for the Respondent

Margaret A. Woods
Circuit Court Reporter

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MICHAEL BERRY

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Certificate of reporter 15

NO EXHIBITS INTRODUCED

MOTIONS AND MATTERS

1 THE COURT: We'll call to bar the case of, uh, Lee E.
2 Tate, Jr. vs. the State a South Carolina, that is Case Number
3 2015-CP-11-867. Ms. Olive, I'll be happy to hear from ya.

4 MS. OLIVE: Thank Your Honor. This is Mr. Tate, um,
5 Mr. Tate's present the courtroom today and represented by
6 Rodney Richey. Mr. Tate was indicted in January 2013 Cherokee
7 County for armed robbery, he was represented on that charge by
8 Michael Berry. He pleaded guilty as indicted before Judge
9 Addy on August 11, 2014 pursuant to negotiated sentence, Judge
10 Addy sentenced him to 22 years suspended on the service of 17
11 years to 5 years of probation, he did not appeal that
12 conviction or sentence. He filed this application for
13 post-conviction relief on November 30th 2015. The State filed
14 a return and partial motion to dismiss, um, for failure to
15 file within the 1-year, uh, statute a limitations, um, being
16 that he pleaded guilty on August 11th 2014 and didn't file the
17 application till November 30th 2015; however, one of his
18 allegations is that counsel did not advise him of his
19 right to appeal his guilty plea so we we move to dismiss all
20 allegations except for his allegation that he was denied his
21 right to appeal, um, I will turn it over to Mr. Richey ---

22 THE COURT: Okay.

23 MS. OLIVE: --- at this time.

24 THE COURT: Alright, Mr. Richey.

25 MR. RICHEY: Thank Your Honor. Um, I've discussed with

MOTIONS AND MATTERS

1 my client this, well this application was filed 'bout two
2 months too late, ---

3 THE COURT: Yes.

4 MR. RICHEY: --- slow runnin', now he said he was on
5 lockdown and all this, um, but if the Court is inclined
6 dismiss this, he -- we would -- he will gladly give some brief
7 testimony ---

8 THE COURT: Sure.

9 MR. RICHEY: --- on his appeal and that's what we will
10 give.

11 THE COURT: Okay. Alright, good enough. Alright, you're
12 gonna ---

13 MR. RICHEY: Okay.

14 THE COURT: --- put him up? Alright, Mr. Tate, come up
15 right here (indicating) and move that Bible, put your, let's
16 see, you can just put those papers down.

17 (Whereupon, the applicant came forward.)

18 THE COURT: Put your left hand on that Bible and raise
19 your right.

20 LEE TATE, having been first duly
21 sworn, testified as follows:

22 THE COURT: Okay, you'd ha -- have a seat please,
23 Mr. Tate, then state your full name for the record.

24 THE APPLICANT: Lee Tate.

25 DIRECT EXAMINATION BY MR. RICHEY:

LEE TATE - DIRECT EXAMINATION BY MR. RICHEY

1 Q. Mr. Tate, you you filed this application late because you
2 were on lockdown, correct, ---

3 A. Yes, sir.

4 Q. --- and you couldn't get the stuff, right?

5 A. Yes, sir.

6 Q. Okay. Now as to this appeal, uh, that you, after you
7 pled guilt did you talk to your lawyer about appealin' the
8 case?

9 A. Yes, sir.

10 Q. You did?

11 A. Yes, sir.

12 Q. Now and did he a agree to appeal it or anything?

13 A. Yeah, he s -- he he said that that I I would get a a
14 sumtin' about a rec -- a appeal it, that I could come back and
15 if they weren't satisfied with the 17-year, somethin' like
16 that that I could good back for a resentencin', sumtin' like
17 that, I'm not too familiar with the, with the law so I I was
18 really blind to the facts but, you know.

19 Q. That ya'll didn't testify 'bout appealin' this to the
20 Court of Appeals or anything like that, do you?

21 A. Uh, yeah, yeah, yeah, that's that's what I'm talkin'
22 about.

23 Q. Okay. And did ya'll discuss what kinda issues you had to
24 appeal like the issues in the case?

25 A. Uh, the facts that, uh, I, the fact that I gave a a

LEE. TATE - CROSS-EXAMINATION BY MS. OLIVE

1 written testimony that that he said that it would probly be
2 likely that, you know, that I could, you know, get a less time
3 and, uh, ---

4 Q. So that was the issues ya'll give him, ya'll, that you
5 would appeal and ya'll get less -- you'll get less time?

6 A. Yes, sir.

7 Q. So that's what you discussed with your lawyer about
8 appealin' your case.

9 A. Yes, sir.

10 Q. Okay, answer the questions attorney general have for ya.

11 CROSS-EXAMINATION BY MS. OLIVE:

12 Q. Mr. Tate, um, this was a, you you pleaded guilty and got
13 a negotiated sentence, right?

14 A. Right.

15 Q. Okay. And your testimony today is that you you did
16 discuss with your attorney your right to appeal?

17 A. Right.

18 Q. Okay. Did you ask him to file an appeal?

19 A. Yes, ma'am.

20 Q. Did he tell you that ---

21 A. He came to me like three times and and he was sayin'
22 sumtin' about a plea and and havin' an appeal and all that but
23 he said they wasn't, it ju -- they wasn't satisfied with
24 sentencin', like it was, it was a certain amount a days after
25 I got my sentence that I could come back and be resentenced,

LEE TATE - CROSS-EXAMINATION BY MS. OLIVE

1 that's the only reason why I took the 17 years because I felt
2 like that I coulda got lesser time but I was just tired a
3 sittin' in the county jail, I had already been in county jail
4 for 2 years and I had, was goin' through a lotta problems in
5 the county jail so, you know, I looked at it like it was a,
6 you know, I was gonna go to, come down to Kirkland but I was
7 comin' right back ---

8 Q. Okay.

9 A. --- and that's the only reason why I took the 17 years
10 'cause I I thought I could get it re -- get a resentencin',
11 you know, I I was blind, I didn't, uh, blind to the facts, uh,
12 that that, you know, but I aint, I really didn't know nuttin'
13 about the law, nuttin' like that.

14 Q. Okay, so you pleaded guilty knowing that you were going
15 to get 17 years of active time.

16 A. Yes, ma'am.

17 Q. Okay. And you thought you were gonna be able to come
18 back the next day and ---

19 A. No, ---

20 Q. --- get ---

21 A. --- not the next day. He said it was, it was within 30
22 days or sumtin' like that that that he would file it or 15
23 days, sumtin' like that and it would take a a a little minute
24 for me to get back in court but it wasn't gonna be right right
25 off but, you know, I was already doin' time in the county jail

LEE TATE - CROSS-EXAMINATION BY MS. OLIVE

1 so I was like, you know, it it would be better for me, you
2 know, get away from this county 'cause I was goin' through a
3 lotta stuff down in county jail where I didn't have no
4 mattress and all that sleepin' in a room and slow gettin' fed,
5 huge clothes and stuff so I was goin' through a lot in county
6 jail so I figured I could go ahead and take this plea and
7 still come back because, you know, it -- they, uh, the the
8 officer or the detective over the case when I, when I first,
9 this this first happened, he told me that if I go ahead and
10 confess to what happened he was like, uh, that you could, that
11 I would dismiss this AR-15 that I I got caught a AR-15 which
12 is a federal charge and, uh, he told me I wouldn't get more
13 than

14 10 years and that he would dismiss that charge if I com --
15 complied and told him what happened and I did that and I also
16 spoke with Mr. Berry about that and Scruggs had no problem
17 with admittin' that he said it so, I mean, I, that I don't
18 understand, you know, why I got more than 17 years which I
19 took a, which I I took a negotiated plea, that I did, but I
20 was also thought that I was gonna be able to come back and get
21 resentenced, that's the only reason why I took the 17.

22 Q. Okay, so you're sayin' that -- you're not saying your
23 attorney told you that you were gonna get 10 years.

24 A. No.

25 Q. Okay.

MICHAEL BERRY - DIRECT EXAMINATION BY MR. RICHEY

1 A. He told me it it it it it could happen though if, you
2 know, if he said that, he said if he said that then he probly
3 could make that happen but the first plea they came at me with
4 was like think 26 years, sumtin' like that, I was like no, I'm
5 not takin' that because he told, he promised me that he he
6 wasn't gonna get me no more than 10 years.

7 Q. Okay. Thank you, that's all the questions I have.

8 THE COURT: Okay, any ---

9 MR. RICHEY: No ---

10 THE COURT: --- redirect?

11 MR. RICHEY: --- no questions. We call Mr. Berry.

12 THE COURT: Okay. Mr. Tate, step down, sir, thank you, I
13 appreciate it.

14 THE APPLICANT: Alright.

15 (Whereupon, the applicant left the stand.)

16 (Whereupon, the witness came forward.)

17 MICHAEL BERRY, having been first
18 duly sworn, testified as follows:

19 THE COURT: Alright, Mr. Berry, just take a seat and
20 state your full name for the record if you will, please.

21 THE WITNESS: Michael Berry, B-E-R-R-Y.

22 DIRECT EXAMINATION BY MR. RICHEY:

23 Q. Mr. Berry, did you represent Lee Tate?

24 A. Yes, sir, I did.

25 Q. And what county did you represent him in?

MICHAEL BERRY - DIRECT EXAMINATION BY MR. RICHEY

1 A. Uh, Cherokee County.

2 Q. And do you -- does your, um, law practice involve the
3 practice of criminal law?

4 A. Yes, it does, I'm employed by the public defender's
5 office for the Seventh Circuit.

6 Q. Okay. Um, the issue is, um, when he pled, after he pled
7 did you discuss his rights to appeal with him?

8 A. I would have done that before, um, it's it's my common
9 practice even on simple possession pleas, uh, that I go over
10 the standard plea colloquy that judges have with clients and
11 that would include a client's right to file an appeal and that
12 would have to be done within 10 days of the issuance of the
13 sentence.

14 Q. Did he ask you to file an appeal on his case?

15 A. He never did. Um, we n -- we never talked about any
16 appealable issues that that he thought would've been, uh,
17 raised after the plea.

18 Q. Okay, so he, did he ever contact you in writing or
19 anything?

20 A. I've reviewed my file and I don't have any any letters
21 indicating that he, uh, wished to file an appeal, he never
22 made any contact through family members and I believe I did
23 speak with Mr. Tate after the plea and he did not indicate,
24 um, at that time he wished for me to, uh, file an appeal
25 either.

MICHAEL BERRY - DIRECT EXAMINATION BY MR. RICHEY

1 Q. Do you know whether there's any issues that could be
2 appealed from his guilty plea?

3 A. Um, from my review of the record and from my
4 recollection, uh, there were no issues that were, uh, that I
5 saw that could be raised on appeal.

6 Q. What about this issue about him comin' back and
7 re -- resentence and all that, do you know anything 'bout
8 that?

9 A. I quite honestly do not know what Mr. Tate is referring
10 to, um, it was -- I'll give a little back -- background on the
11 case. Um, there was a plea offer, uh, that was extended and
12 that, uh, plea offer was actually a choice for Mr. Tate that I
13 took to him. On July 11th of 2014 I received from Matt
14 Kendall an assistant solicitor in Cherokee, um, an e-mail
15 where he gave Mr. Tate the option of of taking, uh, the
16 negotiated sentence that he ended up taking or that he could
17 plead straight up and that the solicitor office would still
18 dismiss a threatening a public official charge. Mr. Tate
19 after consultation with him decided, um, that he wanted the
20 assurance of taking the negotiated sentence of the
21 22 suspended to 17 followed by probation

22 Q. So so you don't know anything about this comin' back
23 bein' resentenced.

24 A. Uh, with a negotiated sentence I would never have advised
25 him that we would have had any option to come back.

MICHAEL BERRY - CROSS-EXAMINATION BY MS. OLIVE

1 Q. Okay. Thank you, answer any question attorney general
2 has.

3 CROSS-EXAMINATION BY MS. OLIVE:

4 Q. So your testimony was Mr. Tate never asked you to file an
5 appeal in his case?

6 A. That's correct.

7 Q. Okay. And you would have discussed with him his right to
8 appeal prior to his guilty plea?

9 A. As always.

10 Q. And again, this was a negotiated sentence?

11 A. That's correct.

12 Q. Did you feel you had a basis to file an appeal?

13 A. There were no issues raised that I thought could be
14 appealed.

15 Q. Thank you, that's all the questions I have.

16 THE COURT: Um, any redirect, sir?

17 MR. RICHEY: No, Your Honor.

18 THE COURT: Alright, thank you, sir, I appreciate it,
19 step down.

20 (Whereupon, the witness left the stand.)

21 THE COURT: Anything further from the applicant?

22 MR. RICHEY: No, sir.

23 THE COURT: Anything from the State?

24 MS. OLIVE: No, Your Honor.

25 THE COURT: Any argument that either of you wishes to

MOTIONS AND MATTERS

1 offer to the Court for my edification?

2 MR. RICHEY: None, Your Honor.

3 MS. OLIVE: No, Your Honor.

4 THE COURT: Okay. Alright, um, I'm I'm gonna
5 respectfully deny the application first and foremost on
6 substantive portion of the application it's time barred and
7 this court lacks subject matter jurisdiction that although
8 hearin' the conduct of the proceeding I did, um, read the
9 transcript and it's pretty airtight, there really aren't any,
10 bein' there's no basis for post-conviction relief and no basis
11 to, uh, uh, to believe that the, uh, counsel was inefficient
12 or, excuse me, deficient, uh, in representing, uh, Mr. Tate.

13 With regard to the appeal, um, I find that if s -- the
14 defendant has failed to prove by the preponderance of the
15 evidence that he was not advised of an appeal, also in lookin'
16 at the negotiated transcript and listenin' to, uh, Mr. Berry's
17 testimony, um, I find it credible that, uh, that he would not
18 have, uh, affected an appeal, um, based on the fact that it
19 was a negotiated plea, uh, in a negotiated plea there really
20 aren't any appellate issues, there could potentially be
21 post-conviction relief issues but insofar as appellate issues
22 are concerned, um, insofar as the Court asked all the
23 appropriate questions and makes a determination that it's
24 entered freely and voluntarily, there's really no issue for
25 appeal, um, so based on the the lack of the applicant meeting

MOTIONS AND MATTERS

1 the requisite burden of proof I respectfully deny the same
2 with regard to, uh, the right to appeal. Alright, good luck
3 to you, Mr. Tate.

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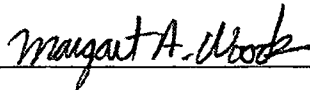
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CERTIFICATE OF REPORTER

I, Margaret A. Woods, Court Reporter in and for the State of South Carolina at Large, hereby certify that I reported the preceding case on March 21, 2017 at the time and place heretofore set forth; and that the foregoing pages numbered from 3 through 14, inclusive, constitute a true and accurate transcription of my stenographic notes of the said proceeding.

I further certify that I am neither attorney nor counsel for, nor related to or employed by any of the parties connected to the action, nor am I financially interested in the action.

August 26, 2017



Margaret A. Woods, Court Reporter

in and for the State of South Carolina at Large.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF CHEROKEE)	
Lee E. Tate, Jr., #328637,	)	Case No. 2015-CP-11-0867
)	
Applicant,)	
)	
v.	)	ORDER OF DISMISSAL
)	
State of South Carolina,)	
)	
Respondent.)	

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.

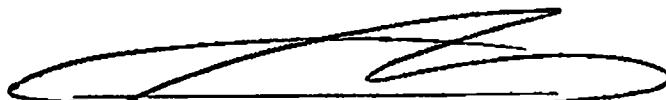
Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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), SCRPC, 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

Chester, South Carolina

13-GS-11-0072

WITNESSES

Gaffney Police Dept.

[Signature]

ARREST WARRANT NUMBER

2012A1120200181

ACTION OF GRAND JURY

[Stamp]
TRUE BILL

Sarah Black

Foreperson of Grand Jury

Date: 1-31-2013

VERDICT

Foreperson of Petit Jury

Date:

The State of South Carolina

County of Cherokee

Barry Barnette, Solicitor

COURT OF GENERAL SESSIONS

JAN 31 2013

TERM

THE STATE

vs.

Lee Edward Tate Jr.

Indictment for

ARMED ROBBERY

SC Code: 16-11-330 (A)

CDR Code: 139

Class FEL/A

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.

2013 JAN 31 PM 12 06

BRANDY W. MCBEE

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHEROKEE)

INDICTMENT

At a Court of General Sessions, convened on JAN 31 2013, the
 Grand Jurors of Cherokee County present upon their oath:

ARMED ROBBERY

That Lee Edward Tate Jr., did in Cherokee County on or about October 22, 2012, while armed with a deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery or attempted robbery reasonably believed to be a deadly weapon, feloniously take from the person or presence of Bobby Poole, by means of force, violence, and/or intimidation, goods or monies of Bargain Spot such goods or monies, with intent to deprive the owner permanently of such property, in violation of §16-11-330 (A), *THE CODE OF LAWS OF SOUTH CAROLINA, (1976)*, as amended.

Against the peace and dignity of the State, and contrary to the statute in
 such case made and provided.


 ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF

CHEROKEE

STATE

VS.

Lee Edward Tate, Jr.

INDICTMENT/CASE#: 2013 -GS- 11 - 072

A/W#: 2012A1120200181

Date of Offense: 10/22/2012

S.C. Code #: 16-11-330(A)

CDR Code #: 139

AKA:
Race: B Sex: M Age: 23
DOB: SS#:
Address:
City, State, Zip: Gaffney, SC 29341
DL# SID#
*CDL Yes No CMV Yes No Hazmat Yes No

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was TO: Robbery / Armed Robbery, robbery while armed or allegedly armed with a deadly weapon (10-30 years)
In violation of § 16-11-330(A) of the S.C. Code of Laws, bearing CDR Code # 139
NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS
Mandatory GPS §17-25-45
The charge is: As indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury, (def.'s initials)
The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST: Solicitor SC Bar # Defendant Michael Berry - Attorney for Defendant SC Bar # 80210

WHEREFORE, the Defendant is committed to the State Department of Corrections County Detention Center, for a determinate term of 22 days/months/years or under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of 17 (seventeen) days/months/years and or payment of \$; plus costs and assessments as applicable*; the balance is suspended with probation for 5 (five) months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on:
The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections. Credit for 679 days = paid.
The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:
RESTITUTION: Deferred Def. Waives Hearing Ordered
Total: \$ 4560 plus 20% fee: \$
Payment Terms:
Set by SCDPPPS

Recipient:
*Fine:
§14-1-206 (Assessments 107.5%)
§14-1-211 (A)(1)(Conv. Surcharge) \$180
§14-1-211 (A)(2)(DUI Surcharge) \$100
§56-5-2995 (DUI Assessment) \$12
§56-1-286 (DUI Breath Test) \$25
Proviso 47.9 (Public Def/Prob) \$500
14-1-212 (Law Enforce. Funding) \$25
4-1-213 (Drug Court Surcharge) \$150
-21-114 (BUI Breath Test Fee) \$50
5-2942(J) (Vehicle Assessment) \$40/ea
to 90.5 (SCCJA Surcharge) \$5
County (if paid in installments) \$18.90
\$448.90

PTUP after 2 1/2 yrs if no issues
days/hours; Public Service Employment
Obtain GED
Attend Voc. Rehab. Or Job Corp. upon release from SCDC
May serve W/E beginning
Substance Abuse Counseling
Random Drug Alcohol Testing
Fine may be pd. in equal consecutive weekly/monthly pmts. of \$ Beginning
\$ Paid to Public Defender Fund

Other: No contact w/ victim & don't go into store involved.

Appointed PD or appointed other counsel, \$47.12 requires \$500 be paid to Clerk during probation.

Presiding Judge
Judge Code: 2159
Sentence Date 8/11/14

Court/Deputy Clerk: Brandi L. McBoe
Order: Shirley Brown

