

Kellum W. Allen, Esq.*
Kellum@TheAllenLawFirm.org

David K. Allen, Esq.
David@TheAllenLawFirm.org



Mailing Address:
P.O. Box 3241
West Columbia, SC 29171

Physical Address:
519 Meeting Street
West Columbia, SC 29169

Office: (803) 764-2328
Toll Free: (844) 839-5170
Fax: (803) 764-2548

April 25, 2018

The Supreme Court of South Carolina
ATTN: Daniel Shearouse, Clerk of Court
PO Box 11330
Columbia, SC 29211

RECEIVED

APR 26 2018

Re: Notice of Intent to Appeal from:
Scott W. Carr, #316318, v. State of South Carolina;
Case Number: 2013-CP-32-02342

S.C. SUPREME COURT

Dear Sir or Madam:

I was Court Appointed, and I expect appellate defense will probably handle the appeal. Enclosed please find a Notice of Appeal (with a copy of the Order being appealed) along with a Rule 243(c) Explanation and Proof of Service. Also enclosed is a copy which I respectfully ask you to stamp as "Received" and return to me in the enclosed stamped envelope.

Thank you for your assistance.

Sincerely:

David K. Allen, Esq.

DKA/idi
Enclosures

cc: Mr. Scott Carr
Sherrie Butterbaugh, Esq.

THE SOUTH CAROLINA SUPREME COURT

RECEIVED

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

APR 26 2018

J. Cordell Maddox, Jr., Circuit Court Judge

S.C. SUPREME COURT
ORIGINAL

Case No.
(2013-CP-32-02342)

Scott W. Carr,.....Appellant

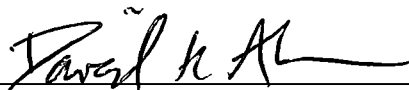
v.

State of South Carolina,Respondent.

NOTICE OF INTENT TO APPEAL

Appellant appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed April 6, 2018, sent by the S.C. Attorney General's Office on April 12, 2018 and received by Counsel on April 16, 2018. Appellant hereby files and serves this Notice of Intent to Appeal by regular mail today, April 25, 2018.

THE ALLEN LAW FIRM, P.A.



David K. Allen
Attorney for Applicant
3241 P.O. Box (29171)
519 Meeting Street
West Columbia, SC 29169
(803) 764-2328
(803) 764-2548 (fax)

Sherrie Butterbaugh, Esquire
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

ORIGINAL

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)
)
Scott W. Carr, #316318,)
)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

2013-CP-32-2342

FILED
2018 APR -6 AM 11:03
LISA M. COHER
CLERK OF COURT
LEXINGTON SC

ORDER OF DISMISSAL

This matter comes before the Court by way of a post-conviction relief (PCR) application filed July 12, 2013. A hearing on the State's motion to dismiss the action was convened on December 11, 2017, at the Lexington County Courthouse. Applicant was present at the hearing and represented by David Allen. Respondent was represented by Sherrie Butterbaugh of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections (SCDC). Applicant was indicted in May 2006 by a Lexington County grand jury for first-degree criminal sexual conduct (CSC) with a minor and lewd act upon a child. (2006-GS-32-1346; -1347). Michael R. Ellisor represented applicant. On June 28, 2006, applicant pled guilty as indicted before the Honorable R. Knox McMahan. The judge sentenced applicant to twenty-eight years for the CSC charge. For the lewd act charge, Judge McMahan sentenced applicant to a consecutive term of fifteen years' imprisonment with the balance suspended to probation upon the service of five years. Applicant did not appeal his pleas or sentences.

ALLEGATIONS

In his application, applicant alleges he is being held in custody unlawfully for the

following reasons:

1. Ineffective assistance of counsel
2. "Applicant is a Mental Health Patient/Medical Disabilities"
3. "Conviction is in violation of Hill v. Lockhart/Strickland v. Washington"

On May 21, 2014, the State submitted its return and moved to dismiss the application asserting it was untimely and filed over five years after the statutory filing period had expired. The Honorable Thomas A. Russo signed a Conditional Order of Dismissal on June 2, 2014, finding the application should be summarily dismissed for failure to file within the time mandated by the Post-Conviction Procedure Act. The judge also gave applicant twenty days to respond to the conditional order. Applicant filed objections to the order on July 14, 2014, stating there was a genuine issue of material fact regarding his mental health status at the time of his guilty plea.

The Court appointed David Allen to represent applicant and PCR counsel moved for discovery. On September 29, 2016, a hearing was held before the Honorable William P. Keesley on the State's motion to dismiss and applicant's motion for discovery. Judge Keesley granted discovery, in part, but limited it to acquiring necessary medical records and ordered a mental health evaluation to determine if applicant lacked competency and, if he did, when it was regained.

The South Carolina Department of Mental Health (DMH) completed an evaluation and, in a report issued August 26, 2017, the examiner found applicant is competent. The report was made part of the record during the hearing held on December 11, 2017. The report's findings were based, in part, on prior records and two interviews with applicant conducted on June 28, 2017, and August 16, 2017.

The report noted applicant had previously been found to be competent to stand trial in

1997 and in 2006, and indicated applicant did not have his first mental health encounter while incarcerated until February 2016, well after filing for post-conviction relief in 2013. Further, SCDC records indicated applicant had not been diagnosed with or treated for a mental illness. The evaluation found applicant was most likely exaggerating or outright feigning symptoms of mental illness, and a diagnosis of any psychotic disorder was not warranted. The report also noted the records reviewed were inconsistent with what applicant stated in his interviews and when confronted with the inconsistencies, applicant became agitated. The evaluation found applicant appeared to have an understanding of trial and PCR procedure, and found a diagnosis of Borderline Intellectual Functioning was not warranted. The examiner found, given the totality of the evidence, applicant was invested in being found not competent and was exaggerating his symptoms, and it did not appear he was experiencing genuine cognitive deficits that would hinder his ability to assist in his defense.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety, including the Lexington County Clerk of Court records, applicant's SCDC records, the PCR application, and the mental health evaluation. Pursuant to S.C. Code Ann. §17-27-80, the Court makes the following findings of fact and conclusions of law based upon the all of the probative evidence presented.

APPLICATION IS UNTIMELY

This Court finds the application must be summarily dismissed for failure to comply with the filing requirements of the Uniform Post-Conviction Procedure Act. The statute 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.

S.C. Code Ann. § 17-27-45(a). Applicant pled guilty to first-degree CSC with a minor and lewd act upon a child on June 28, 2006.¹ Applicant did not appeal his conviction, so he was required to file for PCR on or before June 29, 2007. This action was not filed until July 12, 2013, which was over five years after the statutory filing period had expired.

Applicant alleges he was incompetent when he pled guilty and his mental health issues prevented him from timely filing for post-conviction relief, and argues the Court should extend his one-year time to file. Where an applicant demonstrates the failure to timely file for relief was due to his incompetency, the statute should be tolled and the PCR court "should determine the duration of the incompetency, and whether the application was filed within one year of [the applicant] regaining competency." *Ferguson v. State*, 382 S.C. 615, 619, 677 S.E.2d 600, 602 (2009). Applicant cannot demonstrate he was incompetent either at the time he pled guilty, or during the intervening years when he failed to file this action.

This Court finds applicant has not proven he was incompetent at any time during the proceedings against him, and applicant has failed to demonstrate why his application should not be dismissed as untimely filed. The Court finds the probative evidence shows applicant is competent. Specifically, this Court relied on the evaluation requested by PCR counsel and report prepared by DMH which found applicant is competent and able to assist in this action. The evaluation found applicant was exaggerating or feigning his symptoms of mental illness, was not experiencing genuine cognitive deficits, and no diagnosis of a psychotic disorder was warranted. Further, this Court found persuasive the examiner's comments regarding applicant's demeanor

¹ A transcript of the plea hearing is unavailable. See Rule 607(i), SCACR ("[A] court reporter shall retain the primary and backup tapes of a proceeding for a period of at least five (5) years after the date of the proceeding, and the court reporter may reuse or destroy the tapes after the expiration of that period.").

during his interviews and the previous findings of competency. This Court finds applicant has failed to prove he was continually incompetent sufficient to warrant the tolling of the statute of limitations. Accordingly, this Court finds applicant's PCR application was untimely filed without excuse or justification.

A motion for summary judgment is a proper mechanism 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 . . . 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 this application must be summarily dismissed for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act.

CONCLUSION

Based on the foregoing, the Court finds and concludes applicant failed to timely file for post-conviction relief and the application must be summarily dismissed. This Court concludes applicant has not established any constitutional violations or deprivations requiring this Court to further entertain this untimely application. Therefore, the Court grants respondent's motion to dismiss this PCR application with prejudice.


This Court notes applicant must file and serve a notice of appeal within thirty 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, 409 S.E.2d 395 (1991), applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the applicant's

behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. Respondent's motion to dismiss the PCR application is granted;
2. The PCR application is denied and dismissed with prejudice; and
3. Applicant will remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 30 day of March, 2018.



J. CORDELL MADDOX, JR.
Presiding Judge
Eleventh Judicial Circuit

Anderson, South Carolina

THE SOUTH CAROLINA SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

 ORIGINAL

Case No.
(2014-CP-40-06873)

Scott W. Carr,.....Appellant

v.

State of South Carolina,..... Respondent.

RULE 243(c) EXPLANATION

FAILURE TO MAKE TIMELY APPLICATION

Section 17-27-45(a) requires applications for relief to be filed within one year of the filing of the final appeal decision. However, §17-27-45(c) essentially creates a “discovery rule” caveat to this statute. Applicant contends he acted with reasonable diligence in discovering that his attorney failed to render effective assistance of counsel. Given Applicant’s alleged mental incompetency, it is Applicant’s position that he acted with reasonable diligence and that he filed within a year of “discovering” that he may have grounds for Post-Conviction Relief. In other words, Applicant contends he is in compliance with this statute’s requirement that he raise the issue within one-year from the time he knew (or should have known) of this new evidence [emphasis added].

Moreover, §17-27-45(a) is tolled during any period in which Applicant is found to be incompetent. As discussed in *Ferguson v. State*, the PCR court “should determine the duration


of the incompetence, and whether the application was filed within one year of [the applicant] regaining competency.” *Ferguson v. State*, 382 S.C. 615, 619, 677 S.E.2d 600, 602 (2009).

Applicant alleges that he has been mentally incompetent since well before he entered his plea.

Additionally, Applicant argues any time constraints on his raising this newly discovered evidence should be *equitably tolled* under the circumstances raised in the foregoing section.

Applicant’s incompetency and the passing of his trial-level attorney have created a situation of extenuating circumstances that justify equitable relief in the form of tolling the time constraints related to Applicant’s PCR filing. The case of *Pelzer v. State*, holds in part that such statutes of limitations should be tolled in circumstances where individuals are “unable to obtain vital information bearing on the existence of his or her claim.” *Pelzer v. State*, 378 S.C. 516, 521 (2008).

THE ALLEN LAW FIRM, P.A.



David K. Allen
Attorney for Applicant
3241 P.O. Box (29171)
519 Meeting Street
West Columbia, SC 29169
(803) 764-2328
(803) 764-2548 (fax)

West Columbia, South Carolina

April 25, 2018

THE SOUTH CAROLINA SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

 ORIGINAL

Case No.
(2013-CP-32-03242)

Scott W. Carr,.....Appellant

v.

State of South Carolina,Respondent.

PROOF OF SERVICE

I certify that the foregoing Notice of Appeal and Rule 243(c) Explanation was served on the persons listed below by placing same in the U.S. Mail postage prepaid this day, April 25, 2018.

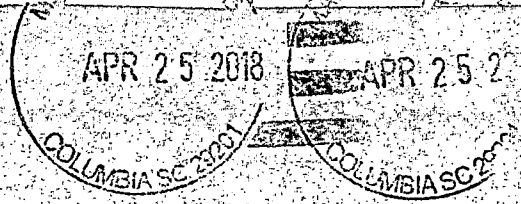
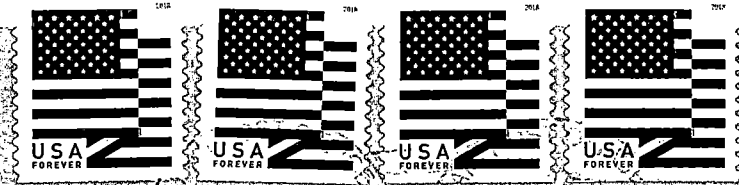
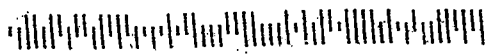
THE ALLEN LAW FIRM, P.A.



David K. Allen
Attorney for Applicant
3241 P.O. Box (29171)
519 Meeting Street
West Columbia, SC 29169
(803) 764-2328
(803) 764-2548 (fax)

Sherrie Butterbaugh, Esquire

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211



David K. Allen, Esq.
The Allen Law Firm, P.A.
P.O. Box 3241
West Columbia, SC 29171

The Supreme Court of South Carolina
ATTN: Daniel Shearouse, Clerk of Court
PO Box 11330
Columbia, SC 29211