

THE BOOZER LAW FIRM, LLC

Lance S. Boozer, Esq.*
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September 10, 2018

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

RECEIVED

SEP 13 2018

The Honorable Clerk of Court
Sumter County
215 N. Harvin Street
Sumter, SC 29150

S.C. SUPREME COURT

**RE: Shakar McLean, #366752, v. State of South Carolina
2017-CP-43-113**

Dear Mr. Shearouse and Mr. Campbell:

Enclosed for filing is a Notice of Appeal pursuant to Rule 243(c), SCACR, in the above-referenced case. Also enclosed are the following:

- (1) Proof of Service of the Notice of Appeal;
- (2) A copy of the Order which is to be challenged on appeal; and
- (3) Prior Order of Appointment of Counsel.

As I was appointed to represent Mr. McLean in his PCR proceeding, I anticipate that the Office of Appellate Defense will represent Mr. McLean in this appeal.

Yours very truly,



Lance S. Boozer

Enclosures

cc: Julie Coleman, AAG
Loriene French, OAD
Shakar McLean, #366752

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

SEP 13 2018

The Honorable Kristi F. Curtis Circuit Court Judge

S.C. SUPREME COURT

Case No. 2017-CP-43-113

Shakar McLean, #366752,Petitioner,

v.

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

NOTICE OF APPEAL

The Petitioner appeals the Honorable Kristi F. Curtis’s Order dated September 4, 2018, denying post-conviction relief to the Petitioner. The Order was received by undersigned counsel on September 10, 2018, denying Applicant’s PCR application for a *White* appeal and dismissing remaining allegations as otherwise untimely. A copy of the Order on appeal is attached to this notice. Pursuant to Rule 243(c), SCACR, undersigned counsel is unable to provide an arguable basis for asserting the PCR court ruling was improper with regard to the finding the application was untimely. Petitioner is advised that he has twenty (20) days from the date of this appeal to file a pro se explanation as to why he believes that this determination by the PCR court was improper. *Dennison v. State*, 371 S.C. 221, 639 S.E.2d 35 (2006).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "L.S. Boozer", is written over a horizontal line.

Lance S. Boozer
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September 10, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SUMTER COUNTY
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The Honorable Kristi F. Curtis Circuit Court Judge

S.C. SUPREME COURT

Case No. 2017-CP-43-113

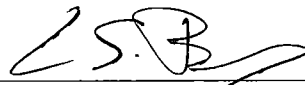
Shakar McLean, #366752,Petitioner,

v.

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

PROOF OF SERVICE

I, Lance S. Boozer, appointed attorney for Petitioner, certify that I have today served within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to Assistant Attorney General Julie Coleman, P.O. Box 11549, Columbia, SC 29211 and Shakar McLean, #366752, Lieber Correctional, 136 Wilborn Ave., Ridgeville, SC 29472. I further certify that all parties required by Rule to be served have been served this 10th day of September, 2018.



Lance S. Boozer
The Boozer Law Firm, LLC
1419 Pendleton Street
Columbia, SC 29201
Tele: 803-608-5543

RECORDED
 2018 SEP -4 PM 11:18
 S. C. CAMPBELL
 CLERK OF COURT
 SUMTER COUNTY, S.C.

STATE OF SOUTH CAROLINA)
 COUNTY OF SUMTER) IN THE COURT OF COMMON PLEAS
) THIRD JUDICIAL CIRCUIT

Shakar Jhalil Aaron McLean, #366752) 2017-CP-43-113
 Applicant,)
)
 v.)
) **ORDER OF DISMISSAL**
)
 State of South Carolina,)
)
 Respondent.)
 _____)

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on January 23, 2017. Respondent submitted its Return and Motion to Dismiss All Claims but White v. State on June 22, 2018. An evidentiary hearing into the matter was convened on July 25, 2018, at the Sumter County Courthouse. Applicant was present at the hearing and was represented by Lance S. Boozer, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General’s Office.

At the evidentiary hearing, Applicant testified on his own behalf. Respondent presented testimony from Timothy L. Griffith, Esquire (“Plea Counsel”). This Court had before it the records of the Sumter County Clerk of Court regarding the subject conviction, Applicant’s records from the South Carolina Department of Corrections, the transcript, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. In January 2015, the Sumter County Grand Jury indicted Applicant for first-degree assault with intent to commit criminal sexual conduct, first-degree assault and battery,

and first-degree burglary (2015-GS-43-0066). The charges arose from an incident occurring on September 7, 2014, when Applicant made entry into the victim's residence by forcing the front door open with an unknown object. Once inside, Applicant went into the victim's bedroom, awoke her by punching her in the face, and attempted to force her to perform unwanted sexual acts upon him. After a fight, Applicant left the apartment, taking the victim's cell phone with him. After the victim identified Applicant in a photo lineup based on her description, Applicant was arrested. At his arrest, his face was scratched from the assault, and he had the victim's cell phone in his possession. DNA scrapings taken from underneath the victim's fingernails matched Applicant. Applicant gave a statement admitting to being at the scene. Tr. 7-10.

Timothy Griffith, Esquire, represented Applicant on the charges. Assistant Solicitor Bronwyn K. McElveen Esquire, prosecuted the case. On January 19, 2016, Applicant pled guilty as indicted before the Honorable R. Ferrell Cothran, Jr. Judge Cothran sentenced Applicant pursuant to the State's recommendation to imprisonment for eighteen years and six months for assault with intent to commit criminal sexual conduct, nine years for assault and battery, and eighteen years and six months for first-degree burglary, to run concurrently. Applicant did not appeal his conviction or sentence.

II. ALLEGATIONS

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

1. Ineffective Assistance of Counsel
2. Failure to file an appeal
3. Actual innocence

At the PCR hearing, this Court heard argument over the State's motion to dismiss and took testimony regarding the claim of failure to file an appeal.

III. SUMMARY OF RELEVANT TESTIMONY PRESENTED

Applicant's testimony

At the hearing, Applicant testified he hired Plea Counsel to represent him at his guilty plea. He stated that, after the plea, his attorney told him he would file an appeal, and he would put in the paperwork for an appeal in fifteen days. Applicant testified that he signed something for the appeal, and Plea Counsel told him this information about the appeal at the courthouse.

Plea Counsel's testimony

At the hearing, Plea Counsel testified it is his practice to discuss the right to appeal with his clients before a guilty plea. He testified he remembered discussing Applicant's right to appeal in this case, and Applicant did not ask him to file an appeal. He stated that if Applicant had asked him to file an appeal, he would have done so. Plea Counsel opined that there was no factual or legal basis to appeal this guilty plea, and there were no objections made during the proceeding.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. This Court finds the State's motion to dismiss should be granted, and Applicant has failed to prove he is entitled to relief under White v. State. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

STATUTE OF LIMITATIONS

This Court finds that all allegations except the allegation regarding a direct appeal should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-

Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160. S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). Applicant pled guilty to the offenses he challenges in this application on January 19, 2016. Applicant was therefore required to file his application on or before January 20, 2017. This Application was filed on January 23, 2017, which was past the time that the statutory filing period had expired.

This Court has considered Applicant's argument that he should not be barred by the statute of limitations based on the court's reasoning in Mose v. State, 420 S.C. 500, 803 S.E.2d 718 (2017). However, this Court finds Applicant has failed to prove any evidence that Applicant was prevented from filing his application in a timely manner by circumstances beyond his control, as was the case in Mose. Accordingly, Applicant's claims are barred by the statute of limitations.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (1985) 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 summarily dismisses the application for post

conviction relief for failure to file within the time mandated by the Post Conviction Procedure Act.

WHITE V. STATE

Applicant claims he did not voluntarily waive his right to a direct appeal because Plea Counsel failed to file a timely notice of appeal after he requested he do so. In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The one-year statute of limitations does not apply to a claim that an applicant was denied his direct appeal. Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 (2002).

Counsel has a constitutionally-imposed duty to consult with defendant about appeal when there is reason to think either (1) that 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, 145 L. Ed. 2d 985 (2000). Although not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings. Id. 528 U.S. at 480, 120 S. Ct. at 1036. To show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed. Id. 528 U.S. at 484, 120 S. Ct. at 1038.

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.

Here, however, this Court finds Applicant has failed to prove he did not knowingly and voluntarily waive his right to a direct appeal. This Court finds very credible Plea Counsel's testimony that he advised Applicant of his right to file an appeal, and Applicant did not make any request for him to file an appeal. Accordingly, this Court finds Applicant knowingly and voluntarily waived his right to a direct appeal of his guilty plea, and he is not entitled to a belated review of direct appeal issues pursuant to White v. State. This allegation is denied and dismissed with prejudice.

V. CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that 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 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that 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:

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 4th day of September, 2018.

Sumter, South Carolina

Kristi Curtis
KRISTI F. CURTIS
Presiding Judge
Third Judicial Circuit

STATE OF SOUTH CAROLINA
COUNTY OF

RECORDED

IN THE COURT OF (Select one.)
 COMMON PLEAS FAMILY COURT

Shakar Jha 1:1

2017 OCT 17 AM 10:47
M. LEAN
* 366753 C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

JUDICIAL CIRCUIT

Plaintiff(s),
-vs-

APPOINTMENT OF COUNSEL OR GAL
(Select one.)

State of South Carolina
Defendant(s).

ORDER
 AMENDED ORDER

TYPE OF CASE/PROCEEDING: (Check one.)

- Post-Conviction Relief (PCR)/habeas case
- SVP case
- Minor Name Change
- Adoption
- Custody and/or Visitation
- Other:
- Juvenile
- Abuse and Neglect

It appears that ^{Shakar} ~~WFL~~, who is a litigant in this case, is entitled to court-appointed counsel or a guardian ad litem.

It further appears that: (Select only one.)

- counsel/guardian ad litem has not yet been appointed by the court; therefore, an appointment for counsel/guardian ad litem is necessary.
- counsel or a guardian ad litem was previously appointed by the court but has indicated either a possible conflict of interest, an entitlement to exemption, or other good cause warranting the appointment of new counsel or guardian ad litem based on: _____
- counsel was previously appointed by the court but has not indicated that the litigant has retained private counsel and is no longer entitled to appointed counsel.
- court appointed counsel has obtained _____, Esquire as substitute counsel pursuant to Rule 608(h)(2); provided, however, only the member who originally received the appointment and who sought substitute counsel shall receive credit.
- Other:
Lance Boozer
1400 Laurel St. Suite 4A
Columbia, SC 29201

counsel lead counsel (if capital PCR case) guardian ad litem

Therefore, it is ordered that ^{Boozer} ~~Boozer~~, hereby is appointed as (Select one.)
for the above-named person. Any counsel or GAL previously appointed is/are hereby relieved.

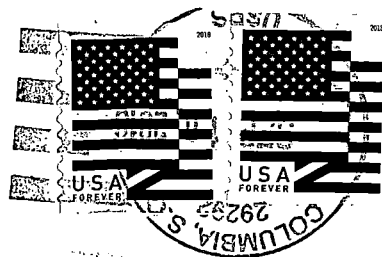
(If Death Penalty PCR Case) It is further ordered that _____, Esquire, is hereby appointed as second counsel in this capital PCR case.

The clerk of court is directed to forward a copy of this order to all persons entitled to notice.

IT IS SO ORDERED THIS 17 DAY OF Oct, 20 17.

THE BOOZER LAW FIRM, LLC

1419 Pendleton Street
Columbia, SC 29201



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