

Rodney D. Davis

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January 16, 2019

RECEIVED

JAN 22 2019

S.C. SUPREME COURT

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

RE: Stephawn Brown v. State of South Carolina, Case No.: 2014-CP-18-0339

Dear Mr. Shearhouse:

Enclosed for filing is the Notice of Appeal (original and clocked copy) in the above Post Conviction Relief (PCR) case. Also enclosed are the following:

- (1) Proof of service of the Notice of Appeal on the respondent;
- (2) The Order of Dismissal &
- (3) A Request for Representation on Appeal.

The Applicant-Appellant was represented by me as an indigent pursuant to my contract with the South Carolina Commission on Indigent Defense (SCCID) to handle PCR cases. By copy of this letter, I am forwarding a duplicate set of documents to the SCCID.

The Request for Representation on Appeal and the Affidavit in Support thereof are signed by me as attorney for Applicant-Appellant. If you need anything further, do not hesitate to contact me. Thank you for your time and attention to this matter.

Sincerely,

Rodney D. Davis

South Carolina Bar #: 12396

101 Meeting Street, 5th Floor

Charleston, SC 29401

(843) 882-5065

Davis@LowcountryLawOffice.com

CC: Christian Saville
Assistant Attorney General

Paula Murdoch
Appellate Division, SCCID

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JAN 22 2019

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

D. Craig Brown, Circuit Court Judge

Case No.: 2014-CP-18-0339

Stephawn Brown,

Appellant,

v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

Stephawn Brown appeals the denial of his Post Conviction Relief application in this case. The Application for relief was denied, following an evidentiary hearing before the Honorable D. Craig Brown on October 2, 2018. A copy of the Order was received by counsel on or about December 17, 2018.

January 14, 2019


Rodney D. Davis

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Attorney for Appellant

Other Counsel of Record:

Christian Saville, Assistant Attorney General

Office of the Attorney General, State of South Carolina

P.O. Box 11549

Columbia, SC 29211-1549

Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

D. Craig Brown, Circuit Court Judge

Case No.: 2014-CP-18-0339

Stephawn Brown,

Appellant,

v.

State of South Carolina,

Respondent.

Stephawn Brown
CLERK OF COURT
DORCHESTER COUNTY


2019 JAN 15 AM 8:10

CERTIFIED COPY

NOTICE OF APPEAL

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January 14, 2018


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Other Counsel of Record:
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Columbia, SC 29211-1549
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JAN 22 2019
S.C. SUPREME COURT

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

D. Craig Brown, Circuit Court Judge

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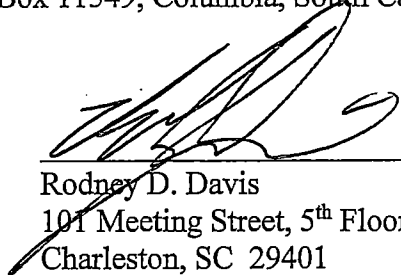
PROOF OF SERVICE

CERTIFIED COPY
2019 JAN 15 AM 8:40
C. James P. McFarland
CLERK OF COURT
DORCHESTER COUNTY

I certify that I have served the Notice of Appeal on the State by mailing a copy of it to the address of record, Christian Saville, P.O. Box 11549, Columbia, South Carolina 29211-1549, on

1/14, 2019.

1/4, 2019


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Attorney for Appellant

Other Counsel of Record:
Christian Saville, Senior Assistant Deputy Attorney General
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P.O. Box 11549
Columbia, SC 29211-1549
Attorney for Respondent

FILED-RECORDED

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

2018 DEC 13

) IN THE COURT OF COMMON PLEAS
) IN THE FIRST JUDICIAL CIRCUIT

Stephawn S. Brown, #354320,

COURT OF COMMON PLEAS
COUNTY OF DORCHESTER

2014-CP-18-0339

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 February 27, 2014. The State first made its return on April 22, 2014. The State subsequently filed an amended return moving to dismiss the application as untimely filed on February 20, 2018. An evidentiary hearing into the matter was first convened on July 10, 2018, at the Dorchester County Courthouse before the Honorable Robin B. Stilwell. Applicant was present at the hearing and was represented by Rodney D. Davis, Esquire. Respondent was represented by Assistant Attorney General Christian Saville of the South Carolina Attorney General's Office. After hearing testimony from Applicant as well as arguments from both parties regarding Respondent's motion to dismiss, Judge Stilwell ordered the parties to reconvene for a later hearing with Applicant's trial counsel present in order for a judge to hear testimony on the merits of the application and therefore be in a better position to make a credibility finding as to whether Applicant's application should be dismissed as untimely or whether the action should be decided on the merits.

An evidentiary hearing was subsequently convened on October 2, 2018, at the Dorchester County Courthouse before the Honorable D. Craig Brown. Applicant was present at the hearing and again represented by Mr. Davis ("PCR Counsel"). Respondent was again represented by Mr.

Saville ("Respondent"). First Circuit Public Defender Mark A. Leiendecker, Esquire ("Trial Counsel"), and Ash Chisolm, Esquire, were both present at the hearing. However, only Trial Counsel testified as he was lead counsel.

Before this Court were the records of the Dorchester County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the trial and plea transcript, the State's return, the State's amended return and motion to dismiss, and Applicant's PCR application. Based on these records and the testimony presented, 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 Dorchester County Clerk of Court. Applicant was indicted by the July 2012 term of the Dorchester County Grand Jury for murder (2012-GS-18-0408) and armed robbery (2012-GS-18-0409). Mark A. Leiendecker, Esquire ("Trial Counsel"), and Ash Chisolm, Esquire, represented Applicant at trial. Assistant Solicitors Russell Hilton and Barney Geise prosecuted the case. On February 11, 2013, Applicant proceeded to trial before the Honorable Edgar W. Dickson but eventually changed his plea and pleaded guilty as indicted on February 14, 2013. Sentencing was deferred until the following day. On February 15, 2013, Judge Dickson sentenced Applicant to forty-nine years for murder and to a concurrent thirty years for armed robbery. Applicant did not appeal from his guilty plea or sentences.

II. ALLEGATIONS

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

1. "Attorney violated my Sixth Amendment and Fourteenth Amendment rights when he stopped my trial and told me to take a guilty plea."

III. SUMMARY OF TESTIMONY PRESENTED

Trial Counsel testified at the PCR hearing, and Applicant testified on his own behalf. Prior to testimony, Respondent renewed its motion to dismiss based on Applicant's failure to timely file the application. Respondent argued the facts of Applicant's case do not give rise to equitable tolling as set forth in Mose v. State, 420 S.C. 500, 803 S.E.2d 718 (2017), as the notary date indicating when Applicant submitted the application to prison officials was February 19, 2014, already four days after the expiration of the statutory filing period. PCR Counsel also cited Mose and argued against the dismissal for failure to timely file on the basis it was only filed twelve days beyond the expiration of the statute of limitations, on the basis Applicant had testified at the previous hearing he had given the application to prison officials for its mailing prior to the expiration of the statute of limitations, and equitable grounds. This Court decided to reserve judgment on whether the application should be disposed of on procedural grounds until after hearing testimony as to timeliness as well as on the substantive merits of Applicant's allegations.

Applicant

Applicant, when confronted with the fact the notarization date on the PCR application indicated he did not submit and sign the application before prison officials until after the statute of limitations had expired, testified whatever the paper indicates is when it was. Applicant was questioned why he claimed at the previous hearing that he had delivered the application to prison officials around two weeks before it was due. Applicant again simply reiterated that it is whatever the paper indicates.

As to the merits of his application, Applicant testified he felt forced to plead guilty because Trial Counsel told him he would get the death penalty if he did not. While Applicant testified he was seventeen years old at the time of trial, though this Court observes he was

actually eighteen at the time of trial. Applicant testified he could not recall the exact number of pretrial meetings with Trial Counsel, but it was more than five.

Applicant testified he and Trial Counsel only discussed his codefendant's testimony once his codefendant decided to plead guilty. Applicant recalled discussing the "hand of one, hand of one" principle of accomplice liability with Trial Counsel.

Applicant acknowledged he told the trial judge he was pleading guilty freely without any promises or threats. GP Tr. p. 8. Moreover, Applicant acknowledged he told the trial judge he was satisfied with his attorneys. GP Tr. p. 10.

Applicant could not recall what exactly Trial Counsel told him "when the trial stopped," but recalls Trial Counsel was advising him not to proceed with the trial. Applicant testified he knew he was looking at a range of forty-five to fifty years pursuant to the guilty plea.

Trial Counsel

Trial Counsel testified this was a very strong case for the State, and he did not recall any plea offers being available prior to trial. According to Trial Counsel, the codefendant's decision to testify was not monumental. Trial Counsel recalled evidence against Applicant for the armed robbery and murder of a Domino's delivery driver included the murder weapon which had DNA matching Applicant and matched the bullet caliber being found in a concealed area by Applicant's apartment, actual food items and receipt from the order placed with the Domino's Pizza restaurant which set up the robbery and murder being found in his apartment, the phone number which placed the order with Domino's matched Applicant's, and codefendant's testimony. Trial Counsel explained the "tipping point" was near the end of the trial when the State attempted to admit ballistics evidence without the actual witness who conducted the testing present. This led to a pause in the proceedings as the issue was discussed and, at that time, the

trial judge informed him he would entertain a guilty plea with a sentencing range of forty-five to fifty years. Trial Counsel saw this as an opportunity to give Applicant a chance to someday leave prison and recommended Applicant plead guilty at that time. Trial Counsel testified he absolutely discussed his opinion of their chances at trial with Applicant and did not feel good about their chances regardless of the ballistics report. In fact, Trial Counsel explained he knew if he moved for a mistrial based on the State's presentation of the ballistic evidence, and the mistrial was granted, the case would be tried again and the actual necessary witness would be present at the next trial.

Trial Counsel testified Applicant did not seem to fail to understand their discussions. Trial Counsel did not recall needing to reiterate information for Applicant but testified he worked to communicate very plainly with Applicant. Trial Counsel testified he reviewed the evidence in this case with Applicant. Furthermore, Trial Counsel explained they held discussions about the guilty plea and discussed everything with Applicant as long as Applicant wanted. Trial Counsel testified it was ultimately Applicant's decision to plead guilty.

Trial Counsel testified to extensive efforts regarding sentencing mitigation. Trial Counsel used the services of a clinical psychologist Dr. David Price to testify to Applicant's abusive upbringing and various difficulties. Trial Counsel described the mitigation was essentially Aiken v. Byars-like mitigation predating Aiken v. Byars.

IV. APPLICABLE LAW

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process

that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

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

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

S.C. Code Ann. § 17-27-45(A) provides as follows regarding the statutory filing period for a PCR application:

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 on 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). 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) 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.”

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witness presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

STATUTE OF LIMITATIONS

This Court finds Applicant’s application must be 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. This decision is dispositive and this Court therefore need not address the substantive merits of Applicant’s application. Nevertheless, this Court does observe Trial Counsel rendered effective and reasonable representation regarding both Applicant’s trial and guilty plea. The record and testimony reflects Trial Counsel was able to strategically procure a plea for Applicant where there had been no previous plea offers, no doubt due largely due to the strong evidence against Applicant for murder and armed robbery. Based on testimony and the record, this Court has every confidence the decision to plead guilty was made by Applicant and this decision was entered into knowingly and voluntarily as Trial Counsel thoroughly discussed the relevant matters with Applicant.

As to the dispositive issue of timeliness of Applicant’s filing, Applicant pled guilty to

murder and armed robbery and was sentenced on February 15, 2013. Accordingly, Applicant's PCR application was due on February 15, 2014. This application was filed February 27, 2014, outside of the statutory filing period. Therefore, this application is dismissed with prejudice for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

This Court heard arguments from both parties at the October 2, 2018, evidentiary hearing regarding the timeliness of Applicant's application and the applicability of Mose v. State, 420 S.C. 500, 803 S.E.2d 718 (2017). This Court finds Applicant's argument that he is entitled to equitable tolling of the statute of limitations to be meritless. In Mose, the South Carolina Supreme Court held Applicant's application, despite being filed three days after the expiration of the statutory filing period, was entitled to equitable tolling because the applicant had delivered his application to prison authorities for mailing within the filing period and the application failed to be filed on time due to circumstances beyond his control. This Court finds Applicant's case is not analogous to Mose, and Applicant is not entitled to statutory tolling. "The [PCR] judge should consider any reasonably verifiable evidence of the date the [application] was purportedly in the possession of prison authorities for purposes of mailing ... In sum, if the circumstances warrant, the statute of limitations shall be tolled from receipt of the document by the prison until formally filed with the clerk's office, provided that the applicant can verify by competent evidence the date prison authorities received the document for mailing." Mose, 420 S.C. at 511 (emphasis in original). Applicant must establish the application was delivered to prison authorities prior to the expiration of the statute of limitations and any delay in the clerk of court's receipt was due to processing. Id. at 510. Here, there is no competent evidence prison authorities received Applicant's application prior to the expiration of the statute of limitations. To the contrary, the notary date on Applicant's application indicates this application was received by

prison authorities on February 19, 2014, when the statute of limitations had already expired. Applicant did not deny this fact at the October 2018 hearing, but rather deferred to the date on the document. This Court therefore finds Applicant is not entitled to equitable tolling of the statute of limitations, and therefore his application must be summarily dismissed with prejudice for failure to comply with the statutory filing requirements.

[Conclusion and signature on following page]

VI. CONCLUSION


Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this court to grant his application or excuse it from the aforementioned procedural bar of the statute of limitations. 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 for failure to comply with the statutory filing procedures; and
2. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 6 day of Dec., 2018.


D. CRAIG BROWN
Presiding Judge
First Judicial Circuit

Flourence, South Carolina

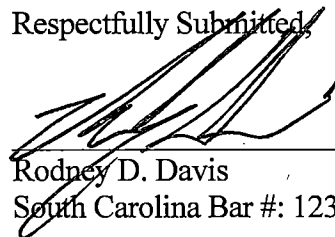
STATE OF SOUTH CAROLINA) IN THE SUPREME COURT OF SOUTH CAROLINA
)
 COUNTY OF DORCHESTER)
) Case No.: 2014-CP-18-0339
)
 STEPHAWN BROWN,)
 Applicant.)
)
 -versus-) REQUEST FOR REPRESENTATION ON APPEAL
)
 STATE OF SOUTH CAROLINA,)
)
 Respondent.)

On behalf of the request of the above-named Applicant, to be represented by the South Carolina Commission of Indigent Defense, Appellate Division (SCCID), the undersigned attorney would show unto this Honorable Court that:

1. He is the attorney for the Applicant-Appellant in the above captioned case. The Applicant-Appellant was in custody during and taken into custody immediately following the Post Conviction Relief (PCR) hearing and was not available to personally sign this request;
2. The Applicant-Appellant was represented by the undersigned attorney as an indigent, pursuant to a contract with the SCCID;
3. The Applicant-Appellant has been informed that he may request assistance from the SCCID Appellate Division in perfecting his appeal;
4. A timely Notice of Intent to Appeal has been filed on the Applicant-Appellant's behalf;
5. The Applicant-Appellant has been informed that nothing requires SCCID Appellate Division to pursue this appeal unless that office's Chief Attorney is satisfied that there is arguable merit to this appeal and that he cannot afford to hire an attorney.

At this time, the Applicant-Appellant requests the aid of the SCCID Appellate Division in perfecting his appeal to the South Carolina Court of Appeals.

Respectfully Submitted,



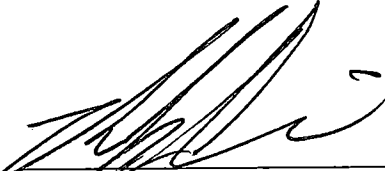
Rodney D. Davis
 South Carolina Bar #: 12396

1/16, 2019
 Charleston, South Carolina.

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)

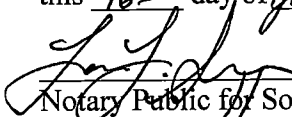
VERIFICATION

PERSONALLY appeared before me, Rodney D. Davis, being first duly sworn, deposes and says that he has read the foregoing *Request for Representation on Appeal* on behalf of Stephawn Brown and the same is true of his knowledge except those matters alleged on information and belief, and as to those matters, he believes them to be true.



Rodney D. Davis
South Carolina Bar #: 12396

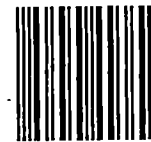
SWORN to and subscribed to me
this 16th day of January, 2019.



Notary Public for South Carolina
My Commission expires 1-11-22



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STON COUNTY PUBLIC DEFENDER
O.T. WALLACE COUNTY OFFICE BLDG.
101 MEETING STREET, 5TH FLOOR
CHARLESTON, SC 29401-2214

The Honorable Daniel E. Shearhouse
Clerk, Supreme Court of South Carolina
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