

MCMAHAN & TAYLOR
ATTORNEYS^{LLC}

May 17, 2019

RECEIVED

MAY 20 2019

S.C. SUPREME COURT

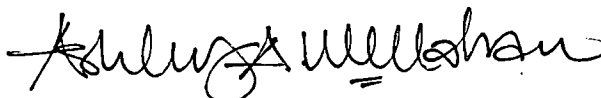
The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: Hector Camo Villafuerte, #334926, v. State of South Carolina
2017-CP-32-04257

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal along with the accompanying Order for the above-referenced matter. By way of this letter I am copying the Office of Appellate of Defense, as I was appointed to represent Mr. Villafuerte.

Best regards,



ASHLEY A. MCMAHAN
ATTORNEY AT LAW

AAM

cc: Hector Camo Villafuerte
Taylor Z. Smith, Asst. Attorney General
Lexington County Clerk of Court
Office of Appellate Offense

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

MAY 20 2019

S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Walton J. McLeod, IV, Circuit Court Judge

Case No. 2017-CP-32-04257

Hector Camo Villafuerte, #334926, Petitioner,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Applicant, Hector Camo Villafuerte, appeals the order of the Honorable
Walton J. McLeod, IV, filed on May 15, 2019.

5/17, 2019

Ashley A. McMahan

ASHLEY A. MCMAHAN, ESQUIRE

MCMAHAN & TAYLOR, ATTORNEYS, LLC

PO Box 5501

West Columbia, SC 29171

803-219-1110

ashley@macvance.com

SC Bar No. 71676

ATTORNEY FOR APPLICANT

Opposing Counsel:
Taylor Z. Smith, Asst, Attorney General
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

STATE OF SOUTH CAROLINA
In The Supreme Court

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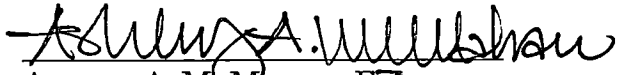
PROOF OF SERVICE

I, Ashley A. McMahan, certify that I have served the within Notice of Appeal on Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Taylor Z. Smith, Asst, Attorney General
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

I further certify that all parties required by Rule to be served have been served.

5/17, 2019


ASHLEY A. McMAHAN, ESQUIRE
McMAHAN & TAYLOR, ATTORNEYS, LLC
PO Box 5501
West Columbia, SC 29171
803-219-1110

PROCEDURAL HISTORY

Applicant is presently confined with the South Carolina Department of Corrections pursuant to orders of commitment from the Lexington County Clerk of Court. During its August 2008 term, the Lexington County Grand Jury indicted Applicant for assault and battery with intent to kill (ABWIK) (2008-GS-32-2748); first-degree criminal sexual conduct (2008-GS-32-2749); and kidnapping (2008-GS-32-2750). Elizabeth C. Fullwood, Esquire, of the Eleventh Circuit Public Defender's Office represented Applicant. On May 26, 2009, Applicant appeared in the Lexington County Court of General Sessions before Judge William Henry Seals, Jr. and pled guilty as indicted to all offenses. Judge Seals accepted Applicant's guilty pleas and sentenced him to a term of imprisonment of twenty years for ABWIK, thirty years for first-degree criminal sexual conduct, and thirty years for kidnapping. The sentences were to be served consecutively.

Applicant filed a timely notice of appeal. Thereafter, on July 22, 2009, the South Carolina Court of Appeals dismissed the appeal for failing to provide the court with a proof of service showing that he timely served the notice on opposing counsel as required by Rule 203, SCACR. The Remittitur issued on August 10, 2009.

On November 13, 2014, Applicant filed a *pro se* application for post-conviction relief (2014-CP-32-4158), alleging the following grounds for relief:

1. My guilty plea was not entered voluntarily, knowingly, or intelligently;
2. I did not voluntarily, knowingly, and intelligently waive my right to appeal; [and]
3. Based on (A) and (B) above I was denied affective [sic] assistance of counsel.

Respondent filed its return and partial motion to dismiss on July 7, 2015, requesting an evidentiary hearing be held on Applicant's allegation his plea counsel was ineffective for failing to file an appeal and requesting all other allegations be summarily dismissed as untimely. Thereafter, Aimee J. Zmroczek, Esquire (Zmroczek), was appointed to represent Applicant. An evidentiary hearing was convened on November 7, 2016, before Judge R. Keith Kelly, circuit court judge. Applicant was present alongside counsel Zmroczek. Respondent was represented by Senior Assistant Deputy Attorney General Johanna C. Valenzuela of the South Carolina Attorney General's Office. At the hearing, Applicant testified on his own behalf and presented the testimony of plea counsel. At the conclusion of the evidentiary hearing, the court took the matter under advisement. Subsequently, the court denied and dismissed the application with prejudice by written order filed December 28, 2016. Applicant did not appeal the denial of relief.

CURRENT ACTION

Applicant filed the current application for post-conviction relief on November 16, 2017, alleging he is being held in custody unlawfully for the following reasons:

1. The Applicant was denied his Statutory Right to appeal his denial of his first PCR Application because he told his PCR Counsel that he wanted to appeal any adverse denial of his PCR Application. Applicant files this PCR Application under Austin v. State, 409 S.E.2d 395 (1991).

At the start of the evidentiary hearing, Respondent moved to dismiss the application based on the affidavit from prior post-conviction relief counsel Zmroczek indicating that she had informed Applicant of his right to appeal the denial of his initial post-conviction relief action and Applicant never requested she file an appeal. This court took this motion under advisement and took testimony from Applicant and Zmroczek.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This court has had the opportunity to review the record in its entirety. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80.

Successive applications, such as the one before this court, are generally disfavored “because they allow an applicant to receive more than ‘one bite at the apple’” Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999); S.C. Code Ann. § 17-27-90. However, Applicant alleges he was denied the right to appeal the dismissal of his previous post-conviction relief application, one of the narrow circumstances that allows an applicant to proceed forward on a successive application. See Odom, 337 S.C. at 261, 523 S.E.2d at 755 (“This Court has allowed successive PCR applications where the applicant has been denied complete access to the appellate process.”).

Inherent in this allegation is a claim that former post-conviction relief counsel was ineffective. The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722 (1991). Therefore, “the contention that prior PCR counsel was ineffective is not *per se* a ‘sufficient reason’ warranting a successive PCR application under [S.C. Code Ann.]§ 17-27-90.” Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991). The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State, 305 S.C. 453, 454, 409 S.E. 2d 395, 396 (1991). Austin provides for a belated appellate review of a prior post-conviction relief action where prior post-conviction relief counsel fails to timely appeal the denial of the application when Applicant requests an appeal. Id. 305 S.C. at 454, 409 S.E.2d at 396; see S.C. Code Ann. § 17-27-100 (specifying the right to appeal final judgment by

post-conviction relief court). But Austin “is limited to its particular factual situation.” Aice, 305 S.C. at 452, 409 S.E.2d at 394.¹ Pursuant to Austin, an evidentiary hearing may be conducted in regards to a successive post-conviction relief application “on the issue of whether in fact the petitioner requested and was denied an opportunity to seek appellate review.” Austin, 305 S.C. at 454, 409 S.E.2d at 396. “If the circuit court finds that the petitioner never in fact sought discretionary review, the petitioner may appeal that finding.” Id., 305 S.C. at 455, 409 S.E.2d at 396. Austin, therefore, allows an applicant to petition the Supreme Court of South Carolina for discretionary review of the dismissal of his initial post-conviction relief application, and may do so outside of the ordinary time limits for bringing such an appeal. To succeed on an Austin claim, an applicant must establish: “(1) the applicant requested and was denied an opportunity to seek appellate review; or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived.” Odom, 337 S.C. at 262, 523 S.E.2d at 756 (1999).

Here, this court finds Applicant has failed to establish he was entitled to Austin relief, as he knowingly and voluntarily waived his right to appeal his prior post-conviction relief action when he was informed of the right to appeal and the time in which such an appeal must be filed and failed to make a timely request that counsel file an appeal on his behalf.

At the evidentiary hearing, testimony was taken from both Applicant and his prior post-conviction relief counsel, Aimee Zmroczek. Applicant testified that he never discussed an appeal with Zmroczek, although he also testified Zmroczek said she would send him a letter telling him how to appeal but she never wrote him. He testified that Zmroczek told him she would write to his after the evidentiary hearing and he never heard from her again. Applicant

¹ Aice was issued in conjunction with Austin, limiting the reach of Austin and holding “that once a PCR applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of prior PCR counsel.” 305 S.C. at 454 n.1, 409 S.E.2d at 396 n.1.

said that he had to write the court to find out his first post-conviction relief case was denied. Applicant acknowledged that he never requested Zmroczek file an appeal after his hearing but stated it was because he did not know his case had been denied.

Zmroczek testified that she was appointed to represent Applicant during her time as a contract attorney for post-conviction relief cases in the Eleventh Judicial Circuit. She testified that she spoke with Applicant immediately after his evidentiary hearing to discuss possible outcomes, including his ability to file an appeal should his application be denied and the time such an appeal must be sought. She testified that the post-conviction relief court took the matter under advisement, but then shortly thereafter denied the application, she as able to visit Applicant and tell him the case was denied shortly after the hearing while he was still at the courthouse. She testified that Applicant never asked her to file an appeal. She further testified that Applicant's primary focus was various health concerns he had. She testified that her standard practice is to notify applicants of the denial of their post-conviction relief case by letter and to advise them of the time for filing any post-hearing motions or appeals and that she believed she did so in this case in both Spanish and English.

In addition to the testimony from Zmroczek, Respondent also presented an affidavit from Zmroczek indicating that she had informed Applicant of his right to appeal the denial of his initial post-conviction relief action and Applicant never requested she file an appeal.

After reviewing the testimony and affidavit presented, this court finds Zmroczek's testimony that Applicant did not timely request she file an appeal on his behalf after being advised on this right and the timelines for such an appeal to be credible. Based on Zmroczek's credible testimony, this court finds that Applicant cannot establish he is entitled to belated appellate review of the denial of his initial post-conviction relief action pursuant to Austin

because he knowingly and voluntarily waived his right to appeal when he failed to take action to secure appellate review after being properly advised the denial of his application and of his appellate rights. Accordingly, this court finds that Applicant is not entitled to file a notice of appeal seeking belated appellate review of the denial of his initial post-conviction relief action pursuant to Austin.

CONCLUSION


Based on all the foregoing, this court finds that Applicant is not entitled to seek belated appellate review of the denial of his initial post-conviction relief action pursuant to Austin. Accordingly, this application is denied and dismissed with prejudice.

This court notes if Applicant wishes to secure appellate review of this dismissal, he must file and serve a notice of appeal within thirty days from the receipt of this order by counsel of record to secure the appropriate appellate review. See Rules 203 and 243, SCACR. Rule 71.1(g), SCRCP, 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:

1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 9TH day of MAY, 2019


WALTON J. MCLEOD, IV
Presiding Judge
Eleventh Judicial Circuit

Lexington, South Carolina

FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE
CASE NUMBER 2017CP3204257**

Hector Camo Villafuerte 334926		South Carolina State of	
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PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge

Judge Code

5/15/2019
Date

For Clerk of Court Office Use Only

This judgment was entered on May 15th 2019, and a copy mailed first class or placed in the appropriate attorney's box on May 15th 2019, to attorneys of record or to parties (when appearing pro se) as follows:

Ashley A. McMahan PO Box 5501 West Columbia, SC
29169

Taylor Zane Smith PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

LISA COMER/jp

Court Reporter

Lisa M. Comer - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

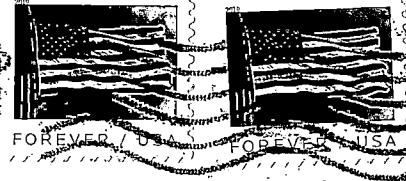
MCMAHAN & TAYLOR

ATTORNEYS

PO Box 5501
West Columbia, SC
29171

COLUMBIA SC 290

17 MAY 2019 FN 2 L



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

29211-133030

