

McMAHAN & TAYLOR
ATTORNEYS^{LLC}

May 17, 2019

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MAY 20 2019

S.C. SUPREME COURT

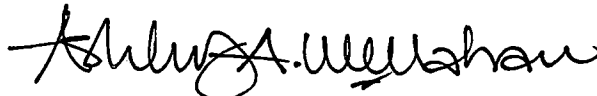
The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: Christopher Manning, #340790, v. State of South Carolina
2018-CP-32-02208

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. Manning.

Best regards,



ASHLEY A. McMAHAN
ATTORNEY AT LAW

AAM

cc: Christopher Manning
Taylor Z. Smith, Asst. Attorney General
Lexington County Clerk of Court
Office of Appellate Offense

Handwritten text: "Handwritten text" (mirrored)

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

MAY 20 2019

APPEAL FROM LEXINGTON COUNTY S.C. SUPREME COURT
Court of Common Pleas

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

Case No. 2018-CP-32-02208

Christopher Manning, #340790, Petitioner,

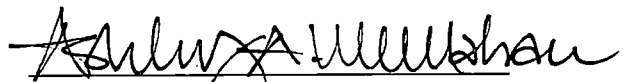
v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Applicant, Christopher Mannin, appeals the order of the Honorable Walton J. McLeod, IV, filed on May 8, 2019.

5/17, 2019



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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

WINDMILL WIND

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STATE OF SOUTH CAROLINA
In The Supreme Court

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MAY 20 2019

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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

Case No. 2018-CP-32-02208

Christopher Manning, #340790, Petitioner,

v.

State of South Carolina, Respondent.

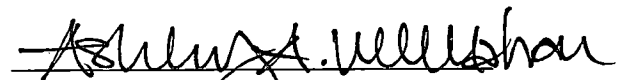
PROOF OF SERVICE

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

midnight

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STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

Christopher Manning, #340790,

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS
) FOR THE ELEVENTH JUDICIAL CIRCUIT
)

) Case No.: 2018-CP-32-02208
)

) **ORDER OF DISMISSAL**
)

FILED
2019 MAY -8 PM 2:08
LISA M. COOPER
CLERK OF COURT
1100 MARKET ST
LEXINGTON, SC 29033

This matter comes before this court by way of an application for post-conviction relief filed on June 27, 2018, by Christopher Manning (Applicant). On June 23, 2016, the State of South Carolina (Respondent or the State) filed its return and partial motion to dismiss, requesting an evidentiary hearing as to whether Applicant was entitled to belated appellate review of the denial of his initial post-conviction relief action pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), and moving for summary dismissal of all other claims as successive to his prior post-conviction relief action and barred by the statute of limitations. An evidentiary hearing into this application was held in Lexington County on April 1, 2019, before this court. Applicant was present at the hearing and represented by Ashley A. McMahan, Esquire. Senior Assistant Deputy Attorney General Megan Harrigan Jameson from the South Carolina Attorney General's Office appeared on behalf of the State. Following the evidentiary hearing, this court denies and dismisses this application in full.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. During its November 2009 term, the Lexington County Grand Jury indicted Applicant for felony driving under the influence (DUI)

resulting in death (2009-GS-32-02855). Circuit Public Defender for the Eleventh Judicial Circuit, Robert M. Madsen, represented him on this charge. On May 11-13, 2010, Applicant proceeded to a jury trial before Judge R. Knox McMahon, circuit court judge. Following deliberations, the jury convicted Applicant as indicted. Judge McMahon sentenced Applicant to a term of imprisonment of eighteen years and also ordered Applicant to pay a fine of ten thousand dollars (\$10,000.00).

Applicant filed a timely notice of appeal and Appellate Defender LaNelle C. DuRant of the South Carolina Commission on Indigent Defense-Office of Appellate Defense perfected an appeal on Applicant's behalf. On appeal, Applicant raised the following issues:

1. Did the trial court err in denying [Applicant's] motion to dismiss the case where the state violated S.C. Code Section 56-5-2953 because the arresting officer did not provide an affidavit certifying that it was physically impossible to provide a video recording as required by the statute because the person needed emergency medical treatment?
2. Did the trial court err in denying [Applicant's] motion to suppress the blood test evidence pursuant to S.C. Code Section 56-5-2946 because there was not sufficient probable cause for an arrest which the statute requires before a blood sample can be drawn because the driver of the vehicle was not identified?
3. Did the trial court err in denying [Applicant's] motion for a mistrial based on prejudice to [Applicant] after the trial judge severed the felony DUI charge and the possession of a schedule three substance (hydrocodone) charge because the jury was told at the beginning of trial that [Applicant] was being tried on both charges, and both indictments were read? [and]
4. Did the trial court err in charging the jury on S.C. Code Section 56-5-2950(b) which was a comment on the facts because the statute begins with: "A person who drives . . ." and the identification of the driver was the primary issue in the trial?

Following briefing and oral argument, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence by published opinion. State v. Manning, 400 S.C. 257, 734 S.E.2d 314 (Ct. App. 2012). Applicant then petitioned for rehearing, which was denied by written order on October 10, 2012. Subsequently, Applicant petitioned the South Carolina Supreme Court for a

writ of certiorari. By written order dated June 11, 2014, the South Carolina Supreme Court denied the petition for a writ of certiorari. The remittitur was issued on June 26, 2014.

Applicant then filed his first application for post-conviction (Case No. 2014-CP-32-03075) relief on August 25, 2014. In that application, Applicant alleged he was being held in custody unlawfully based on:

1. Ineffective Assistance of Trial Counsel;
 - a. Trial Counsel's failure to object and move for a mistrial upon State's knowing use of false/perjured testimony constitutes ineffective assistance of trial counsel;
 - b. Trial Counsel's failure to motion for State-funded independent forensic pathologist to review State expert's conclusion(s) of victim's manner of death, for probability of driver-related injuries as actual cause of death, constitutes ineffective assistance of trial counsel;
 - c. Trial Counsel's failure to object upon Solicitor's misconduct during closing arguments constitutes ineffective assistance of trial counsel;
 - d. Trial Counsel's failure to argue that State's negligent handling of vehicle caused [Applicant] to be deprived of a defense constitutes ineffective assistance of trial counsel; [and]
 - e. Trial Counsel's failure to argue that an insufficient chain of custody, of Hill's blood, deprived [Applicant] of a defense constitutes ineffective assistance of trial counsel.
2. Ineffective Assistance of Appellate Counsel;
 - a. Appellate Counsel's failure to brief the trial judge erred in denying Trial Counsel's motion to suppress constitutes ineffective assistance of appellate counsel.
3. Prosecutor (Solicitor) Misconduct; [and]
 - a. Solicitor Mobley's act of knowingly presenting false/perjury evidence to the jury constitutes misconduct which deprived [Applicant] of his due process right to a fair trial.
4. Fourth Amendment Violation of 'Person.'
 - a. Law enforcement violated [Applicant's] 'person' by ordering, then seizing, [Applicant's] blood without any substantial basis.

Respondent made its return on September 25, 2015, requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on April 18, 2016, before Judge Perry H.

Gravely, circuit court judge. Applicant was present at the hearing and represented by Aimee J. Zmroczek, Esquire. Respondent was represented by Senior Assistant Deputy Attorney General Johanna C. Valenzuela of the South Carolina Attorney General's Office. After hearing all testimony and arguments presented, Judge Gravely issued an order of dismissal denying and dismissing the application with prejudice on August 23, 2016, and filed August 26, 2016. Applicant did not appeal Judge Gravely's order.

CURRENT ACTION

Applicant filed the current application for post-conviction relief on June 27, 2018, alleging he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel; [and]
 - a. "Ineffective assistance of trial counsel for failing to object."
2. Denied Right to Appeal.
 - a. "Austin vs State review because my pcr counsel failed to appeal after this decision. I instructed her to and she didn't notify me of the court's decision den[y]ing me my one bite at the apple."

At the start of the evidentiary hearing, Applicant, through counsel, conceded the only allegation not barred by the statute of limitations and successiveness was whether Applicant was entitled to belated appellate review of the denial of his initial post-conviction relief action pursuant to Austin and conceded summary dismissal was appropriate as to the remaining claims raised in the application. This court granted Respondent's motion to dismiss all remaining claims beyond where Applicant is entitled to belated appellate review of the denial of his initial post-conviction relief action pursuant to Austin. Accordingly, the only allegation that will be addressed in this order is whether Applicant is entitled to belated appellate review of the denial of his initial post-conviction relief action pursuant to Austin.

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 rare 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 (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 South Carolina Supreme Court 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 he discussed appealing his post-conviction relief case with Zmroczek before his evidentiary hearing. He testified that he told Zmroczek he wanted to appeal his case and that Zmroczek responded they needed to focus on the

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.

hearing first, then would determine whether to appeal after the court ruled on his application. He testified that the court took his case under advisement at the end of the hearing and he never heard from Zmroczek again. He testified that he wrote to Zmroczek several times asking for his transcript and for her to send him materials on his case. He also testified that he wanted Zmroczek to send information and documents pertaining to his case to the innocence project. He testified he eventually wrote the clerk of court inquiring about the status of his case and found out three days later that his case has been denied. He then filed this instant action seeking an appeal of the denial of his initial post-conviction relief action. On cross-examination, Applicant acknowledged that he never requested Zmroczek file an appeal after his hearing in the several times he contacted Zmroczek, 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 further testified that Applicant never specifically asked her to file an appeal should his case be denied. 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 she believed she did so in this case. She testified that her standard practice is not to file an appeal unless specifically requested to do so by an applicant and this is based on her understanding of the desire from the appellate courts not to file unnecessary appeals. She testified that Applicant sent numerous letters to her and member of her support staff following his hearing, including numerous requests that she provide information to the innocence project, but never requested she file an appeal on his behalf within the time allowed. She testified

that Applicant finally asked for her to file an appeal but it was well-beyond the time proscribed for filing an appeal. She testified that Applicant filed a complaint with the office of disciplinary counsel against her and once that was dismissed, he filed this second post-conviction relief action seeking belated appellate review pursuant to Austin.

Applicant was called in reply following Zmroczek's testimony and he testified that he never filed a complaint with the office of disciplinary counsel or state bar regarding Zmroczek's performance.

After reviewing the testimony 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. This court finds based on Zmroczek's credible testimony, 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 of his appellate rights. Accordingly, this court finds 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 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.

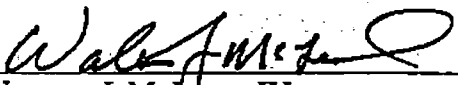
This court notes if Applicant wishes to secure appellate review of this dismissal, he must file and serve a notice of appeal within thirty days from the receipt of this order by counsel of record to secure the appropriate appellate review. See Rules 203 and 243, SCACR. Rule 71.1(g),

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 8TH day of MAY, 2019


WALTON J. MCLEOD, IV
Presiding Judge
Eleventh Judicial Circuit

Lexington, South Carolina

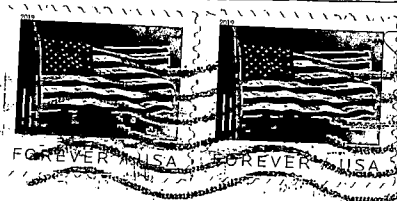
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