

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

SMRC

CASE NUMBER: 2011CP4006548

Cichey #284692 Mayo

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or 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.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Other Non-Suit); 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 _____
- 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 PUBLIC 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
		\$
		\$
		\$

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.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 24 April 2012 to attorneys of record or to parties (when appearing pro se) as follows:

Cichey #284692 Mayo

Brian T Petrano

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Clerk of Court *Jeanette W McBride*

RECEIVED

APR 30 2012

STATE GRAND JURY

SCANNED

STATE OF SOUTH CAROLINA)
 COUNTY OF RICHLAND)
)
)
 Cichey L. Mayo, #284692,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTH JUDICIAL CIRCUIT

2011-CP-40-6548

CONDITIONAL ORDER OF DISMISSAL

RICHLAND COUNTY
 FILED
 2012 APR 24 AM 9:45
 JEANETTE W. McBRIDE
 C.P. & G.S.

This matter comes before this Court by way of an application for post-conviction relief filed October 3, 2011.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. The Applicant was true bill indicted at the September 2001 term of the Richland Grand Jury for Murder, Assault and Battery with Intent to Kill, one (1) count of Armed Robbery and two (2) counts of Attempted Armed Robbery (2001-GS-40-06648/06649/06650/06651/06696). He was represented by attorney Charlie J. Johnson, Jr., Esquire, on the charge(s). On June 4, 2002, Applicant appeared before The Honorable L. Henry McKellar, where he pled guilty to all charges as indicted and was sentenced as follows: forty-seven (47) years imprisonment for Murder, twenty (20) years imprisonment for each count of Attempted Armed Robbery, twenty (20) years imprisonment for Assault and Battery With Intent to Kill, and thirty (30) years imprisonment for Armed Robbery. All sentences were to run

SCANNED

concurrently to each other. A Notice of Appeal was filed untimely by counsel and, do to Applicant's written request to withdraw the appeal, counsel filed no Petition for Reinstatement. The appeal was dismissed by order dated October 28, 2008. The Remittitur was issued November 15, 2002.

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

The record of the proceeding will establish the supporting fact that trial counsel failed to inform me of my right to appeal the plea, conviction, and sentences imposed on me on June 4, 2002. At a date circa August, 2011, it was made known to me by a law clerk at Lee Correctional Institution that my trial counsels' USCA 6th Amendment duty to effectively represent me did not end at the moment I was sentenced, but that their duty extended to counsels' obligation of fully informing me of my right to appeal the sentences imposed on me. Further supporting fact declares that trial counsel was responsible to inform me to the point of determining if I desired to appeal, or, if I would choose to waive my right to appeal proceedings by signing a waiver on the record. Present discovery of counsels' failure to fully inform me of my choice to appeal or waive appeal serves as the motivating factor for the filing of this Application for Post-Conviction Relief. These supporting facts firmly establish my claim that I never made a knowing, intelligent, nor voluntary waiver to abandon my appeal rights. The fact of the record establishes that I did not make any decision at all. Because of trial counsels' failure, I was not aware that I had a choice to make after my plea proceeding and sentencing was completed. I believe, in good faith, that the supporting facts presented herein satisfy the requisite showing for the grant of a belated appeal from my conviction and sentencing.

Applicant also submitted a *pro se* document in response to Respondent's Return and Motion to Dismiss in which he set forth the following objections to the Motion to Dismiss:

now seeks. The foundation for Applicants' redress is anchored in the White ruling, and Applicants' initial discovery of the appeal principle handed down in White, by virtue of a conversation held with a law clerk in the law library at Lee Correctional Institution sometime in August, 2011, and Applicant promptly notified the court of same. In contention to Applicants' claim that he never abandoned his appeal rights, either verbally or by signature, Respondent has made the claim that because of Applicants' plea of guilty, and because Applicant " . . . [d]id not make a timely request to plea counsel to file an appeal . . .", that Applicant is not entitled to the belated appeal. Applicant denies Respondent's claim and makes the declaration under penalty of perjury that he did ask his attorney, Mr. Charlie J. Johnson, Esquire, at the end of his sentencing to appeal, however not in that specific terminology, but, a sincere request nonetheless. Applicant affirms that his trial counsel, Mr. Charlie J. Johnson will attest to the fact that at the immediate moment after Applicant was sentenced Applicant asked him the questions: "Porty seven years?" "What can I do now?" "Where do I go from here?" To these questions attorney Johnson continued staring at his legal papers, as preoccupied, distracted, never looking at Applicant, but responding "I'm not your attorney any more." Applicant states the claim that although he never used the word appeal, his earnest plea for help was actually an urgent supplication to attorney Johnson to appeal the 47 year sentence imposed on Applicant, who at that time was seventeen (17) years old, and stunned that the greater part of his life was going to be spent in prison. Applicant states the valid and meritorious claim that he was, in the only way he knew how, soliciting attorney Johnson to help Applicant in his

distress, but did not have any knowledge, education, or instruction in criminal law sufficient to understand exactly what legal procedure should be pursued after his sentence. HOWEVER, attorney Johnson was well-educated, a veteran attorney at law, and knew, or should have known, that the next correct procedural action available to Applicant was a direct appeal, and Applicant states with hindsight that attorney Johnson should have explained that to Applicant in that moment; the guidelines set down in White strictly requires that attorney Johnson should have taken that last measure of representation after being asked those questions by Applicant. Applicant states the claim that the veracity of his statements will be affirmed as true by attorney Charlie J. Johnson, and that attorney Johnson has personal knowledge that Applicant asked which direction (action) to take immediately after sentencing, but attorney Johnson was neither responsive nor consulting. For these reasons, supported by the attached Affidavit of Applicant, Applicant states that the court should construe Applicants' wounded pleas made to attorney Johnson at the end of Applicants' sentencing as a request for a direct appeal, notwithstanding the fact that Applicant never used the words 'direct appeal'.

In making its decision, the Court had before it the available records of the Richland County Clerk of Court regarding the subject convictions, and/or the Applicant's records from the South Carolina Department of Corrections, the Applicant's application, and the *Respondent's Return and Motion to Dismiss*.

Findings of Fact and Conclusions of Law

Timeliness - S.C. Code §17-27-45(a)

This Court agrees with the Respondent that this Application for Post-Conviction Relief 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). For the purposes of this Order, the Applicant's conviction/sentence was "finalized" on the date of his conviction or the date of the Remittitur from any direct appeal, whichever was later, i.e. November 15, 2002. Adding one (1) year per S.C. Code § 17-27-45(a) and one (1) day per Rule 6(a), SCRPC means that this PCR application had to be filed by November 16, 2003. This Application was filed on October 3, 2011, which was well after the statutory filing period had expired.

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 shall summarily dismiss the application for post

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

BELATED DIRECT APPEAL

This Court further finds the allegations set forth in the application regarding counsel's failure to file a direct appeal must be summarily dismissed. Based on the records before this Court, it appears counsel did in fact file a Notice of Appeal on Applicant's behalf following an unsuccessful Motion for Reconsideration in the trial court. While the Court of Appeals order dismissing the appeal cites some uncertainty about the timeliness of the Notice of Appeal being filed as the Notice itself fails to state when counsel received the order denying the post-trial motion, Applicant ultimately requested counsel withdraw his direct appeal as evidenced by the attached "Notice By the Appellant To Withdraw the Appeal Pending". In doing so, Applicant made his wishes clear to counsel that he did not wish to have his plea and/or sentence reviewed on direct appeal.

Further, the attached Notice to Withdraw serves as confirmation that Applicant was well aware of his right to have a direct appeal as far back as 2002, but chose to sit on his rights for nearly a decade before bringing forth this allegation. Under Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 (2002), the one-year statute of limitations under S.C. Code Ann. § 17-27-45(a) does not apply to a claim that a defendant was denied his right to direct appeal; however, this exception to the procedural time bar is not without limits. The ruling set forth in Wilson should not be applied in a situation such as this to grant untimely relief to a defendant who

fails to take reasonable and diligent steps to appeal his convictions and/or sentences despite having full knowledge of such a right. To ensure the finality of litigation, our courts require defendant's exercise reasonable diligence in pursuing relief, a requirement that "guard's the state's legitimate expectation that it will not be called upon without due cause to defend the integrity of convictions that occurred many years ago, where records and witnesses are no longer available." McElrath v. State, 276 S.C. 282, 283, 277 S.E.2d 890 (1981). Applicant filed this application seeking belated appellate review of his pleas over nine (9) years (3,398 days) after the jurisdictionally imposed time to file a direct appeal had lapsed. Applicant fails to set forth any allegation in his PCR application that he did in fact take diligent steps to seek appellate review, or that he otherwise made reasonable efforts to have his plea/sentence reviewed by the courts. In fact, according to the allegations set forth in the application, Applicant merely alleges counsel failed to advise him of his right to appeal, an allegation that is clearly refuted by the attached Notice to Withdraw. Therefore, this Court finds this allegation to be without merit and, accordingly, Applicant is not entitled to a belated White v. State¹ appeal.

Based upon its review of the pleadings in this matter, this Court does not see the need to appoint counsel to represent the Applicant and expresses its intent to summarily dismiss this matter unless the Applicant advises this Court with specific reasons, factual or legal, why it should not dismiss the matter in its entirety. The Applicant is granted thirty (30) days from the date of service of this Order upon him to show why this Order should not become final. The Applicant shall file any

¹ White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974).