

NOTICE OF APPEAL FROM A PCR DENIAL BY THE COURT OF
COMMON PLEAS

THE STATE OF SOUTH CAROLINA
In Supreme Court of SC

APPEAL FROM SUMTER COUNTY
COURT OF COMMON PLEAS

GEORGE M. McFADDIN, CIRCUIT COURT JUDGE

CASE# 2019-CP-43-1328

The State,

respondent

v.

david a. duren

appellant

NOTICE OF APPEAL

david a. duren #181965, appeals his denial of request in this case. The PCR was denied by the Honorable GEORGE M. McFADDIN. No hearing was held and david a. duren was pro se in this matter. A final Order was filed 1-20-2022. The corrected appeal follows with the required order herein attach and a copy of which is also forwarded to the SCCID Appellate Division.

Dated Feb 14, 2022

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FEB 18 2022

S.C. SUPREME COURT

David a. duren
david a. duren
Perry Corr Inst Q3B214
430 Oaklawn Rd
Pelzer, S.C. 29669

ISSUE

(1). Did the Court Of Common Pleas Judge George M. McFaddin Jr error by signing the final order of dismissal that was prepared by the attorney general office without a court order to either party to prepare such an order, and dismissing the applicant application without an evidentiary hearing, when the applicant alleged that he is suffering the collateral consequence of his prior conviction. See: State v Hahn 2002 WL 118, 238 Wis 2d 889, This court held that a defendant cannot collaterally challenge a prior conviction unless the challenge is based on a "violation of the constitutional right to a lawyer".

The U.S. Constitution requires a trial court to consider an offender's allegations that the prior conviction is invalid only when the challenge to the prior conviction is based on the denial of the defendants constitutional right to a lawyer,

In Mcduffie v State 276 s.c. 229 It states "Where an applicant for post conviction relief alleges in his application that the results of his prior conviction still persist, even though the sentence has been fully served, he is entitled to a evidentiary hearing to determine whether he has been prejudice, See: Jackson v State 331 s.c. 486. The applicant alleged in his objection that he is suffering the collateral consequence of his prior conviction, because his prior conviction violated his sixth amendment right to assistance of counsel.

PCR cases brought under 17-27-20(A)(1), the plain language of the act requires only what the subsection clearly states. [A]ny person who has been convicted or sentenced for a crime; may institute a PCR proceeding, this does not contain an express "In custody requirement.

Instead, the act allows a person who has been convicted of a sentence for a crime to file an action. However "[A] petitioner has standing to petition for a PCR if he is in custody or the results of his prior conviction still persist". Jones v State 322 s.c. 101.102, 470 s.e.2d 110,110 (1996):(emphasis added), See also Mcduffie v State 76 s.c. 229,277 s.e. 2d 595(1981). Thus

an applicant regardless of whether he served time, may bring a PCR action if he demonstrates he is prejudiced by persistent result of his conviction.

(2). Petitioner alleges that he could have raised this issue in his first PCR application, but the court, Judge Jocelyn Newman refused to let him do so. See exhibit (A) transcript of record of court of Common Pleas dated July 26, 2016, page 17 starting at line 10 and ending on page 27, line 17.

The applicant alleges that on 4-4-2002 counsel was appointed 5 minute before he pleaded guilty, The applicant does not denied that counsel was present when he pleaded guilty. The applicant alleges that he was constructively denied the assistance of counsel as required by the sixth amendment of the U.S. Constitution. U.S. v Cronin 466 u.s. 468. Attorney Jack Howel only function was to stand beside the defendant so that Judge Clifton Newman could accept the guilty plea. The attorney performed no other service except signing his name on the sentence sheet. /

Several courts has stated "The constitutional guarantee of assistance of counsel cannot be satisfied by mere formal appointment. Avery v Alabama 308 u.s. 444, 446, 60 S.Ct.321,322. 84 L.Ed 377. (1940), cited in Tucker v Day 969 F.2d 155,159 (5th Cir1992) The Supreme Court has stated, "That a person who happen to be a lawyer in present at a trial... is not enough to satisfy the constitutional command." "As the court further observed in Cronin "[A]lthough counsel is present the performance of counsel may be so inadequate that in effect no assistance of counsel is provided. See Childress v Johnson 103 F.3d 1221. The court further explained that a constructive denial of counsel occurs when the defendant is deprived of the guiding hand of counsel "Powell v Alabama 287 U.S. 45, 69, 53 S.Ct. 55.65, 77 L.Ed 158 (1932).

See exhibit (B) conditional order of dismissal; exhibit (C) applicant's opposition and reply case# 2019-CP-43-1328; exhibit (C) final order.

(3). Only one exception exists to the rule that collateral attack "are of Limits" does not apply to challenges to conviction "obtained in violation of appointment of the right to assistance

of counsel. Under the sixth amendment errors effecting fundamen-
tamental constitutional right may be excepted from procedural
bars which would otherwise prohibit their consideration.
Collateral challenges to a prior conviction used to enhance
a sentence may not be brought during sentencing but may be
brought in a post conviction proceeding based on the enhanced
sentence.

(4). The appellant only request that he be given an evidentiary
hearing to determine if he was prejudice by his prior conviction,
in violation of his sixth amendment right to assistance of counsel
counsel.

Respectfully

David A. Curen

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