

AB

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 Frederick A. Hayzill, #267399,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2010-CP-42-6815

CONDITIONAL ORDER OF DISMISSAL

FILED
 CLERK OF COURT
 SPARTANBURG COUNTY
 2012 MAY 25 AM 8:37
 M. HOPE BLOOMLEY

This matter comes before this Court by way of an application for post-conviction relief filed December 29, 2010. Respondent made its Return and Motion to Dismiss on or about May 17, 2012.

I. PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Applicant was indicted at the July 1999 term of the Spartanburg County Grand Jury for armed robbery (99-GS-42-4106). Michael Bartosh, Esquire, represented him on the charge. On June 22, 2000, the Applicant proceeded to trial and was found guilty as indicted. The Honorable R. Markley Dennis, Jr., sentenced the Applicant to confinement for life pursuant to S.C. Code § 17-25-45(A). The Applicant did not appeal his conviction or sentence.

The Applicant subsequently filed an application for post-conviction relief (PCR) [2000-CP-42-2971] on October 31, 2000, and amended the application on November 22, 2000. In that application, the Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel,
2. Lack of subject matter jurisdiction, and

3. Denial of due process.

Evidentiary hearings were convened during the November 2002 and January 2003 terms of the Spartanburg County Court of Common Pleas. The Applicant was present and represented by Charles P. Edwards, Esquire. The Honorable Donald W. Beatty denied the application by written Order filed on April 22, 2003.

The Applicant filed a timely Notice of Appeal. Following the submission of a brief pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), the South Carolina Supreme Court dismissed the appeal on June 23, 2004. The Remittitur was issued on July 22, 2004.

The Applicant subsequently filed a second application for post-conviction relief (PCR) [2004-CP-42-2868] on August 20, 2004, and amended October 19, 2004. In that application, the Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel;
2. Denial of due process; and
3. Newly discovered evidence.

A hearing convened at the Spartanburg County Courthouse on October 26, 2005. At the hearing, the Applicant also alleged that his prior PCR attorney was ineffective. The Applicant was present and represented by Rodney W. Richey, Esquire. The Honorable Roger L. Couch denied his application by written Order filed on January 4, 2006.

A timely Notice of Appeal was filed on the Applicant's behalf and an Amended Petition for Writ of Certiorari was submitted. Following the submission of a brief pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), the South Carolina Supreme Court dismissed the appeal on August 23, 2007. The Applicant filed a Petition for Rehearing *pro se*, which was denied on September 19, 2007.

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Applicant's Current PCR Application

In his current application and supporting documents for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel; and
2. Denial of due process.

Before this Court are the records of the Spartanburg County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, Applicant's previous PCR records, Applicant's PCR application and Respondent's Return and Motion to Dismiss.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Successiveness

This Court finds that the current application for post-conviction relief must be summarily dismissed because it is successive to his prior application for post-conviction relief. S.C. Code Ann. §17-27-90 provides that:

All grounds for relief available to an application under this chapter must be raised in his original, supplemental or amended Application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding Applicant has taken to secure relief, may not be the basis for a subsequent Application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended Application.

Successive applications are disfavored and the burden is on Applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).

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This Court finds that the current allegations could have been raised in the proceedings based on Applicant's prior application for post-conviction relief and thus the current application is successive and barred under S.C. Code § 17-27-90. Applicant has failed to establish sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief; therefore, he has failed to meet the burden imposed upon him. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); Aice v. State, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 420 S.E.2d 834 (1992).

Res Judicata

This Court further finds that the doctrine of *res judicata* bars the Petitioner's claims. *Res judicata* prohibits subsequent actions by the same parties on the same issues. Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. Id.

The Applicant had a full opportunity to litigate all allegations regarding ineffective assistance of counsel, subject matter jurisdiction, and trial court error in both the state and federal courts. The public interest in finality of judgments requires that litigation must eventually come to an end. Pursuant to Rule 12(b)(6), SCRPC, this Court finds that these claims are barred by *res judicata*.

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Statute of Limitations

This Court further finds 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 (2003). 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). The Applicant was convicted of the offense(s) he challenges in this Application on June 22, 2000. The Applicant was therefore required to file his application before June 22, 2001. This Application was filed on December 29, 2010, which was more than nine years 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) (2003) 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 finds that the application for post-conviction relief is summarily dismissed for failure to file within the time mandated by statute, barred by the doctrine of *res judicata* and because it is successive to his previous applications.

Summary

Pursuant to S.C. Code Ann. §17-27-70(b), the Court intends to dismiss this Application with prejudice unless the Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. The Applicant is granted twenty (20) 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 reasons he may have with the Spartanburg County Clerk of Court and shall serve opposing counsel at the following address:

Suzanne H. White, Esquire

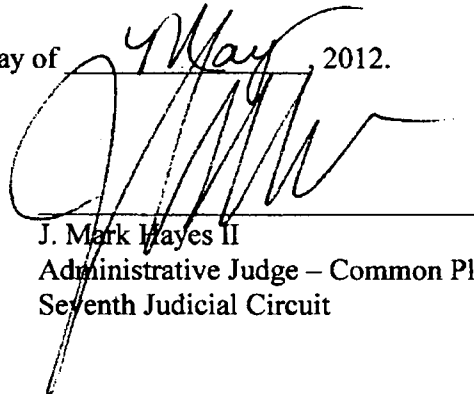
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Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

AND IT IS SO ORDERED this 24th day of May, 2012.



J. Mark Hayes II
Administrative Judge – Common Pleas
Seventh Judicial Circuit

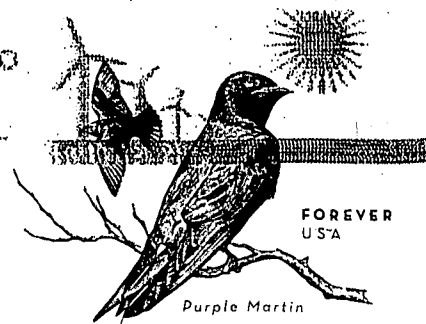
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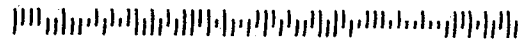
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BRCI
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LEGAL MAIL

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