

STATE OF SOUTH CAROLINA)
 COUNTY OF BERKELEY)
)
 Gary Grant, #280988)
 Applicant,)
))
 v.)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 IN THE NINTH JUDICIAL CIRCUIT

Case No.: 2019-CP-08-806

**CONDITIONAL ORDER OF
 DISMISSAL**

FILED
 20 AUG 11 PM 4:06
 CLERK OF COURT
 BERKELEY COUNTY SC

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Gary Grant (Applicant) on March 29, 2019. Respondent made its Return, requesting the application be summarily dismissed.

I. Procedural History

Petitioner is currently incarcerated in Lieber Correctional Institution. The Berkeley County Grand Jury indicted Petitioner during the February 2007 term for Murder, Armed Robbery, two counts of Burglary-First Degree, and four counts of Kidnapping. Petitioner was represented by Michael T. Bolus, Esquire. Petitioner proceeded with a jury trial. Petitioner was convicted by the jury as indicted. On August 20, 2007, Petitioner was sentenced by the Honorable Deadra L. Jefferson to life for Murder and thirty years for all the remaining charges. The sentences were ordered to be served concurrently.

A timely Notice of Appeal was served on behalf of Petitioner, and an appeal was perfected. On appeal, Petitioner was represented by Robert Dudek, Esquire of the South Carolina Office of Appellant Defense. The appeal was perfected by way of an Anders brief raising the following issue to the South Carolina Court of Appeals:

Whether the court erred by ruling appellant lost the right to the last argument because an antagonistic co-defendant introduced a photographic array, since the

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precedent holding the co-defendant loses the right to last argument in this instance is not justified by logic or fairness and this Court should overrule that precedent?

(*Anders* Brief, App. p. 1002). Petitioner filed a pro se response to the *Anders* brief raising the following issues:

1. Did the court err in sentencing appellant to thirty-years for each kidnapping count when appellant was also sentenced to life imprisonment for murder?
2. Is appellant entitled to have his kidnapping convictions and sentences vacated since the trial court sentenced appellant to life for murder stemming from the same incident?

(*Pro se Anders* brief).

The South Carolina Court of Appeals denied the motion to be relieved as counsel and ordered briefing by the parties on the following issue:

Did the trial court err in sentencing Grant for both the kidnapping and murder of Dexter Perry when Section 16-3-910 of the South Carolina Code (2003) prohibits such a sentence?

(Order Denying Motion to Be Relieved). Both parties then submitted a brief on the merits. On July 11, 2012, the South Carolina Court of Appeals vacated Petitioner's Kidnapping sentence for victim Dexter Perry because Petitioner also received a concurrent Murder sentence for the same victim. *State v. Grant*, 2012-UP-406 (Ct. App. 2012). The Remittitur was issued on July 27, 2012.

Applicant filed his first application for post-conviction relief (PCR) on August 6, 2012, raising the following arguments:

1. Ineffective assistance of counsel
 - a. "Applicant has never been induced into studying legal law until recently as a result of legal events."
2. Due process violation
 - a. "Violations of Applicant's 4th, 5th, 6th, and 14th amendment rights."

At the hearing, Applicant proceeded on the following claims:

1. Ineffective assistance of counsel
 - a. Counsel failed to make a motion regarding a last minute witness.
 - b. Counsel failed to call an EMS worker as a witness at trial.
2. Brady violation

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(PCR Order of Dismissal).

An evidentiary hearing on the matter was convened on November 18, 2014, at the Charleston County Courthouse before the Honorable Stephanie P. McDonald, Circuit Court Judge (“the PCR Court”). Petitioner was present at the hearing and represented by Charles T. Brooks, III, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented Respondent. At the hearing, Petitioner was present and testified. Michael T. Bolus, trial counsel, also testified. On October 14, 2014, the PCR Court issued an Order of Dismissal denying and dismissing the PCR allegations. The order was filed on October 31, 2014. (App. p. 861).

Petitioner filed an appeal from the dismissal of his PCR application by way of a *Johnson* petition for writ of certiorari to the South Carolina Supreme Court. Petitioner was represented by John H. Strom of the South Carolina Office of Appellate Defense. Petitioner raised the following allegation:

Whether trial counsel provided ineffective assistance of counsel by failing to interview the EMS worker who heard decedent’s dying declaration and would have testified that decedent identified Jermain Hartwell as the shooter?

(*Johnson* petition). Collateral appellate counsel certified to the State Supreme Court the appeal was without merit and asked to be relieved as counsel. Petitioner filed a *pro se* response to the *Johnson* petition, raising the following issues to the South Carolina Supreme Court:

1. Extrinsic Fraud at PCR
2. Ineffective Assistance of PCR Counsel

(*Pro se* Response to Johnson Petition). On August 6, 2015, the South Carolina Supreme Court denied the Johnson Petition for Writ of Certiorari and granted counsel’s request to withdraw. The Remittitur was issued on August 24, 2015.

Applicant filed a pro se Petition for Writ of Habeas Corpus (4:16-cv-540-TMC) pursuant to 28 U.S.C. §2254 on February 19, 2016. Respondent filed a motion for summary judgement on April 8, 2016, along with the return and memorandum. Thomas E. Rogers, III, United States Magistrate Judge, issued an order filed April 11, 2016, pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), advising Petitioner of the motion for summary judgment procedure and the possible consequences if he failed to respond adequately. Applicant filed a response in opposition on June 3, 2016.

On September 13, 2016, the Honorable Thomas E. Rogers, III issued the Report and Recommendation that Respondent's motion for summary judgement be granted and the petition be dismissed without an evidentiary hearing. Applicant filed his objection to the Report and Recommendation on October 19, 2016.

On January 26, 2017, the Honorable Timothy M. Cain, United States District Judge adopted the Magistrate's Report and Recommendation granting Respondent's Motion for Summary Judgement and dismissed Applicant's petition. (4:16-cv-540-TMC).

Petitioner filed a pro se Petition for Writ of Habeas Corpus (4:18-2271-TMC-TER) pursuant to 28 U.S.C. §2254. Thomas E. Rogers, III, United States Magistrate Judge, issued an order filed on August 17, 2018, recommending that the §2254 Petition in this case be dismissed with prejudice and without requiring the respondent to file a return, as successive and unauthorized.

On December 11, 2018, the Honorable Timothy M. Cain, United States District Judge, adopted the Magistrate's Report and Recommendation that the petition be dismissed without prejudice and without requiring Respondent to file a return. Further, the court declined to issue a certificate of appealability.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Statute of Limitations

The Court finds that this application must 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. Specifically, the act requires 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 on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).

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). 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) 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.”

Applicant was convicted and sentenced on December 6, 1996. The remittitur from the direct appeal was issued on December 10, 1998. The application was therefore due on December 11, 1999. This application was filed on September 19, 2018, well beyond the statutory filing period. Therefore, the application shall be summarily dismissed for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

Successive Applications

The Court further finds the application must be summarily dismissed because it is successive to Applicant's previous PCR application. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the 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.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can indicate a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised ... in the previous application." Id. at 450. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. Id. Applicant bears the burden of showing the allegations could not have been previously raised. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

Applicant's current allegations were or could have been raised in the proceedings based on Applicant's prior application for post-conviction relief; thus, the current application is successive and barred under S.C. Code Ann. § 17-27-90. Applicant has failed to establish any sufficient

reason why he could not have raised his current allegations in his previous applications for post-conviction relief. Therefore, he has failed to meet the burden imposed upon him, and the Court shall summarily dismiss the application as successive to Applicant's previous PCR application.

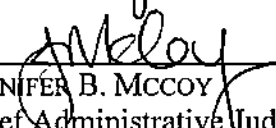
CONCLUSION

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

Office of the Attorney General
Attn: Benjamin Limbaugh, Esquire
PCR Division – 9th Circuit
P.O. Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Berkeley County Clerk of Court and opposing counsel within twenty (20) days, and that the Court will not consider any issues raised in his response if not so timely filed and served.

AND IT IS SO ORDERED this 29 day of July, 2020.



JENNIFER B. MCCOY
Chief Administrative Judge
Ninth Judicial Circuit

Charleston, South Carolina

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ALAN WILSON
ATTORNEY GENERAL

August 7, 2020

The Honorable Leah Guerry Dupree
Clerk of Court, Berkeley County
Post Office Box 219
Moncks Corner, South Carolina 29461-0219

Re: Gary Grant, #280988 v. State of South Carolina
2019-CP-08-806

Dear Ms. Dupree:

Enclosed please find the original **Conditional Order of Dismissal** signed by the Honorable Jennifer B. McCoy, in the above-captioned case, for filing in your office. In addition, please forward proof of service and a time stamped copy back to our office for our file.

Sincerely,

s/ Benjamin Limbaugh
Benjamin H. Limbaugh
Assistant Attorney General

BHL/jj