

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Daniel D. Hall, Circuit Court Judge

Case No. 2020-CP-42-01278

Deven Michael Ford #312731,

Petitioner,


v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

Petitioner Deven Ford appeals the Honorable Daniel D. Hall's Order Denying his Application for Post-Conviction Relief filed on **May 24, 2022**, and the Court's Order Denying Applicant's Motion to Alter or Amend Judgment (Rule 59(e), SCRCP) filed on **September 21, 2022**.


Dayne C. Phillips, Esq.
1614 Taylor Street, Suite D.
Columbia, SC 29201

ATTORNEY FOR PETITIONER

September 22, 2022

Other Counsel of Record:

Chelsey Marto, Assistant Attorney General
South Carolina Attorney General's Office
1000 Assembly Street, Room 519
Columbia, SC 29201

cc:

Amy W. Cox, Spartanburg County Clerk of Court

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
 COUNTY OF SPARTANBURG)
)
 Deven Ford, #312731,)
 Applicant,)
 v.)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 IN THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2020-CP-42-01278

**ORDER DENYING APPLICANT'S
 MOTION FOR RECONSIDERATION**

The matter before this Court by way of an application for post-conviction relief (hereafter "PCR") filed April 9, 2020. Respondent filed their return and motion to dismiss for failure to establish a *prima facie* case of newly discovered evidence on January 11, 2021. A hearing on the State's motion to dismiss was held on February 10, 2022, virtually via Webex. Dayne Phillips, Esquire, represented Applicant. Then-Assistant Attorney General William Ray, Esquire, represented Respondent. By written order signed May 19, 2022, and filed May 24, 2022, this Court denied and dismissed Applicant's PCR action with prejudice. Applicant made a Rule 59(e) motion that was clocked by the clerk's office on June 7, 2022. The State offered a return to the 59(e) on July 6, 2022. A hearing on the motion was held on August 11, 2022, at the Spartanburg County Courthouse.

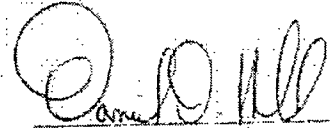
After careful consideration of the arguments of Counsel and review of the record, this Court is unable to discover any material fact or principle of law that has either been overlooked or disregarded, and further finds no error of law or fact not appropriately considered. The order of dismissal issued by this Court contains the appropriate findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code of Laws and

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Carolina Rules of Civil procedure. Accordingly, Applicant's Motion for Reconsideration is DENIED.

IT IS THEREFORE ORDERED that Applicant's motion is hereby DENIED AND DISMISSED.

AND IT IS SO ORDERED this 15th day of September, 2022.



DANIEL D. HALL
Presiding Judge
Seventh Judicial Circuit

Yock, South Carolina

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STATE OF SOUTH CAROLINA)
 COUNTY OF SPARTANBURG)
)
 Deven Ford, #312731,)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 FOR THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2020-CP-42-01278

ORDER OF DISMISSAL

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This matter comes before this Court by way of Applicant’s post-conviction relief application filed April 9, 2020. Respondent made its return on October 7, 2020, requesting an evidentiary hearing be convened. A hearing on the State’s motion to dismiss was held on February 10, 2022, virtually via Webex. Dayne Phillips, Esquire, represented Applicant. Then-Assistant Attorney General William Ray, Esquire, represented Respondent.

Applicant testified on his own behalf at the hearing. Witness Jonathan Martin also testified. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. Findings of fact and conclusions of law are set forth below.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In August 2005, the Spartanburg County Grand Jury indicted Applicant for murder (2005-GS-42-03376) and assault and battery with intent to kill (2005-GS-42-03377). Michael Bartosh, Esquire represented Applicant. Assistant Solicitor Robert Coler, Esquire, prosecuted the case. On December 5, 2005, Applicant pled guilty as indicted before the Honorable Doyet A. Early, III, circuit court judge.

The only recommendation from the State was that the sentences run concurrently. Applicant was sentenced to thirty-seven years' imprisonment for murder and twenty years' imprisonment for assault and battery with intent to kill, sentences running concurrently.

Applicant filed a timely notice of appeal that was perfected by filing a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. *State v. Ford*, 07-UP-365 (S.C. Ct. App. filed Sept. 17, 2007). The remittitur was issued on October 3, 2007.

First PCR Action: (2008-CP-42-0395)

Applicant subsequently filed his first PCR application on January 24, 2008, amended July 30, 2008, and August 22, 2008, in which he alleged the following grounds for relief:

1. Ineffective assistance of counsel;
2. Conflict of Interest; and
3. Involuntary guilty plea.

Respondent made its return on April 9, 2008. An evidentiary hearing into the matter was convened on September 18, 2008, at the Spartanburg County Courthouse. Applicant was present at the hearing and was represented by David Alford, Esquire. Michelle J. Parsons, Esquire, of the South Carolina Attorney General's Office, represented Respondent. On December 14, 2009, the Honorable Roger L. Couch, circuit court judge, issued the order of dismissal denying Applicant's PCR application.

A notice of appeal and motion to be relieved as counsel were submitted by David C. Alford, Esquire, on December 18, 2009, and again on December 21, 2009. Applicant filed a motion to amend or alter judgement, dated January 4, 2010, in which he stated that the PCR Court failed to rule upon his conflict of interest claim. The State served its response to the motion to alter or amend the order of dismissal on January 15, 2010. On March 18, 2010, Judge Couch

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issued the amended order of dismissal.

On June 21, 2010, Elizabeth A. Franklin-Best, Esquire filed a petition for writ of certiorari in the Supreme Court of South Carolina on behalf of Applicant. Respondent made its return, dated October 7, 2010. On November 30, 2011, by written order the South Carolina Supreme Court denied the petition. The remittitur was issued on December 19, 2011.

First Habeas Corpus Action: (8:12-cv-02266-GRA-JDA)

Applicant filed a *pro se* petition for writ of habeas corpus under 28 United States Code Section 2254 on August 14, 2012. Applicant set forth the following grounds for relief:

1. "The Petitioner's right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments, was violated when defense counsel failed to advise the Petitioner of the existence of an exculpatory ballistics test prior to the entry of Petitioner's plea."
2. "The Petitioner's right to the due process of law, as guaranteed by the Fifth and Fourteenth Amendments, was violated by the State's failure to disclose the ballistics report prior to the Petitioner's guilty plea."

Respondent filed its return and motion for summary judgment on or around November 8, 2012. On April 23, 2013, Magistrate Judge Jacquelyn D. Austin issued the report and recommendation that Respondent's motion for summary judgment be granted and Applicant's petition be denied. *Ford v. McCall*, 8:12-cv-02266-GRA-JDA (D.S.C. filed Apr. 23, 2013). Applicant's objection to the report and recommendation was filed on May 13, 2013. On August 14, 2013, the District Court Judge adopted the Magistrate's report and recommendation granting Respondent's motion for summary judgement and dismissed Applicant's petition. *Ford v. McCall*, 8:12-cv-02266-GRA-JDA (D.S.C. filed Aug. 14, 2013).

The notice of appeal was filed on September 11, 2013, by Jeremy A. Thompson, Esquire, on behalf of Applicant. The United States Court of Appeals for the Fourth Circuit denied a certificate of appealability and dismissed the appeal through unpublished order, filed March 10,

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2014. Applicant appealed to the United States Supreme Court on April 23, 2014. The United States Supreme Court denied the petition for writ of certiorari on October 6, 2014.

Summary of Relevant Facts

On December 7, 2004, the victims, Jonathan Martin and Ikethia Davis, followed Applicant and a man named Ken Lilly to pick up money Applicant owed to Martin. (Tr. 17). After a while, the vehicles reached the country and pulled over on the side of the road. (Tr. 17). Applicant exited his car, approached the other car, and fired between four and seven rounds into the car. (Tr. 17). Several of the shots hit Martin, who survived. (Tr. 17). One shot hit Davis in the right chest and into her abdomen. (Tr. 18). Martin pulled off immediately and drove as fast as he could to the restaurant three miles down the road, where he ran inside and got help while Davis remained in the car. (Tr. 18). Martin and Davis were transported to the hospital by the EMS. (Tr. 18). Davis died from the gunshot wounds. (Tr. 18).

Applicant was quickly identified as a suspect because Martin knew Applicant from growing up with him in the same town. (Tr. 18). Davis knew Applicant as well and even dated him on prior occasions. (Tr. 18). Davis gave a dying declaration identifying Applicant as the shooter and Lilly as the driver. (Tr. 18).

Current Action Before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully because of ineffective assistance of counsel in that:

1. "The notarized affidavit from the only living victim and eyewitness, Jonathan Roshun Martin, signed on January 17, 2020, exculpating Applicant of murder and ABWIK, constitutes evidence of material facts not previously presented or heard that, in the interest of justice, requires to vacate Applicant's convictions and sentences resulting from his guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970)." Applicant became aware of the letter and notarized affidavit from the victim, Jonathan Roshun Martin, after the entry of his *Alford* plea, and in the exercise of reasonable diligence, could not have been discovered prior to the entry of the

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- plea.”
- b. “Applicant is filing the application for Post-Conviction Relief within one year of Applicant’s actual discovery of the newly discovered evidence.”
 - c. “The letter and notarized affidavit from the victim, Jonathan Martin, is of such a weight and quality that, under the facts and circumstances of this case, the ‘interests of justice’ requires to vacate Applicant’s convictions and sentences. Specifically, as the only living victim and eyewitnesses in this case. Mr. Martin previously provided a statement to law enforcement that is self-serving and inconsistent with his recent letter and notarized affidavit signed on January 17, 2020, exculpating Applicant of murder and ABWIK. Mr. Martin’s recent disclosure also corroborates the SLED ballistics report that Applicant had no knowledge of prior to his *Alford* plea, and was not in defense Counsel’s file. Mr. Martin also alleged misconduct by the police in fabricating evidence against Applicant. Therefore, this evidence further exonerates Applicant as the shooter in this case.”
 - d. “Based on the facts and circumstances of this case and the newly discovered evidence, Applicant submits the following evidence in support of the ‘interests of justice’ to vacate Applicant’s convictions and sentences.”

At the PCR hearing, Applicant proceeded forward based upon the allegations above. All other allegations raised in his initial application and amendments are deemed waived and abandoned and, accordingly, will not be addressed in this order.

Summary of the Testimony

Jonathan Martin Testimony

On direct examination, Martin stated that he never met current PCR Counsel before. He stated that he felt Applicant was not the perpetrator in the crime he was convicted for and that fact weighed on his conscious. Martin stated that he was pressured into talking to the police and was told that, given his pending charges at the time, he was told he would not be released from jail until he cooperated. Martin stated that he was told by officers that he had to implicate Applicant in the incident and if he did not state that Applicant was the perpetrator he would spend the rest of his life in prison. Martin stated that he never told the officers that he was the shooter. Martin stated that after the deceased victim was shot, she was unconscious and unable to speak. He stated that he never saw her conscious after being shot, that he never saw her speak to

the police, and that he never saw police get into the ambulance with her. Accordingly, he stated she could not have made a dying declaration implicating Applicant. Martin stated that he lied and stated Applicant was the shooter because he "had a lot going on." Martin stated that he thought he may have been present for Applicant's plea hearing, but may have been in SCDC custody at the time. Martin stated that the incident happened a long time ago, but it now feels right to tell the truth. Martin stated that Applicant did not contact him about signing the affidavit and that no one threatened him into signing it. Martin stated he never talked to Applicant about the affidavit, nor anyone at his current PCR Counsel's office. He stated that a private investigator took the affidavit, that he stands by what was stated in the affidavit, and that he is now telling the truth. He stated that he does not know who is responsible for the incident, but states that it was not himself, Applicant, or the deceased. He stated he only implicated Applicant because his unrelated pending charges at the time were used to coerce him into giving a statement, blaming Applicant, but he now holds that Applicant is innocent.

On cross, Martin confirmed that he swore to tell the truth before testifying. He stated he does not remember who was on scene, but stated that Lilly was there and "some other people [he] didn't see." The State then impeached him on this ground and stated that the record showed four people were present; Lilly, Applicant, the deceased, and himself. Martin stated that Applicant did not shoot the deceased, nor did he himself shoot the deceased. Martin stated he is currently incarcerated in Tyger River Correctional Institution and that he was in the same institution as Applicant a few months before signing the affidavit. Martin stated that officers told him he would never be released from prison unless he blamed Applicant for the incident. Martin stated that "everyone in the streets" was saying Applicant committed the crime, but that he has known Applicant was innocent for years and never bothered to bring it to anyone else's attention

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until signing the affidavit.

On redirect, Martin stated that he never saw Applicant shoot the deceased and that he was stating that Applicant was innocent initially, until he was coerced into incriminating Applicant. He stated he was made no promises when making the statements concerning Applicant's innocence and that he has received no benefit from signing the affidavit. Applicant again stated he decided to sign the affidavit because he thinks it is "the right thing to do."

Applicant Testimony

Applicant stated that he had no direct contact with Martin about the affidavit and was not around Martin when the affidavit was made. Applicant stated that his family members hired a private investigator and their families connected to obtain the statement.

On cross-examination, Applicant stated he has known Martin since they were children. He stated that they were friendly towards each other and used to hang out. Applicant stated that his plea counsel just wanted him to go to jail and that he told counsel to talk to Martin before the plea. Applicant stated he was unsuccessful in his first PCR action. Applicant stated that he was incarcerated at Ridgeland Correctional Institution when Martin was, but that the institution separated them. Applicant stated that Martin contacted someone on the street, that their respective families became involved, and then a private investigator then became involved as well. Applicant stated that he did not shoot Ms. Davis and that there is only one person remaining on scene that could have done it because Martin was not responsible either. Applicant stated that he does not remember telling them police he was going to kill Martin, but stated he was lying when he first spoke with the police. Applicant stated that no one promised Martin anything or threatened him into creating the affidavit. Applicant stated that he did not ask Martin to sign the affidavit and did not have anyone else working on his behalf.

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On re-direct, Applicant stated that he told the plea court he wanted more evidence and witnesses presented and that he wanted the opportunity to cross-examine witnesses. Applicant stated that he was unhappy with Counsel because he didn't investigate the case. Applicant stated that the prosecutor never brought up anything about ballistics. Applicant stated that the statements in discovery were typed out by law enforcement and that law enforcement wrote what Applicant orated and that Applicant never stated that he would shoot Martin. Applicant stated he knew exactly how the deceased was shot and what direction the bullet went in. He stated that he did not want to incriminate anyone, but stated that Lilly fired the shots. Applicant stated that he asked for the ballistics report, but it was not in his first PCR Counsel's file and that nothing in the prosecutor's file showed that it was disclosed. Applicant stated he asked for a continuance of his first PCR hearing so that he would be better prepared. Specifically, he stated that he wanted witnesses present that were not at the first PCR hearing, but the continuance request was denied. Applicant stated that his first PCR Counsel did not obtain the ballistics report or investigate witnesses Applicant requested he investigate. Applicant stated that he never housed with Martin and stated that Martin was listed as a victim in his case, so they were kept apart their entire time at Ridgeland.

On re-cross, Applicant stated that he already addressed his ineffective assistance of counsel claims concerning plea Counsel at his first PCR hearing years before this action was filed.

Findings of Fact and Conclusions of Law

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. Before this Court are the Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records,

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the plea transcript, prior PCR records, habeas corpus records, and this PCR action's records. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

Newly Discovered Evidence

Applicant's assertion that he is being held in custody unlawfully as a result of newly discovered evidence, such that he should be entitled to vacation of his sentence and immunity, is without merit. The Uniform Post-Conviction Relief Act states that a person may institute a post-conviction relief action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of material fact not previously presented, the post-conviction relief application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C).

In South Carolina, a guilty plea is regarded as a waiver of non-jurisdictional defects and claims of violations of constitutional rights. *State v. Rice*, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485-86 (2013) (citing *Hyman v. State*, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). Therefore, an applicant requesting a new trial based on after-discovered evidence following a guilty plea must show that:

- (1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the "interest of justice" requires the applicant's guilty plea to be vacated. In other words, a PCR applicant may successfully disavow his or her guilty plea only

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where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interests in maintaining the finality of guilty-plea convictions.

Jamison v. State, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014).

This Court finds Applicant has not established a *prima facie* case of newly discovered evidence. As an initial matter, this Court finds Martin's affidavit and PCR hearing testimony incredible. Martin states that after fifteen years he has finally "realized that it is not right that Mr. Ford is serving time . . . [b]ecause Mr. Ford did not do anything wrong . . ." Coincidentally, this sudden realization occurred a little over a month after both Martin and Applicant were both inmates at Ridgeland Correctional Institution, which may have caused Applicant's and Martin's families to talk about the incident, and ultimately generating the affidavit signed by Martin.

Beyond that, Martin's testimony at the PCR hearing is unbelievable. Specifically, Martin's testimony that officers threatened to imprison him for life if he not only cooperating with the State but blaming Applicant specifically for that incident is fantastical. His claim that the police had it out for Applicant because "everyone on the street said he did it" is unbelievable. Additionally, his failure to state who the shooter was when only four people were present including himself, Applicant, and the deceased is telling. Thus, this Court finds that the affidavit is most likely fallacious and is not grounds to vacate the plea. Additionally, this affidavit contradicts the dying declaration given by the deceased, which also implicated Applicant as the perpetrator. It does not, however, contradict the initial statement given by Martin, where he also blames Applicant for the ordeal.

Additionally, Applicant could have discovered the information contained in the affidavit prior to entering the plea. In the affidavit, Martin states he was with Lilly and Applicant on the side of the road, they were side to side when the shots were fired and he did not "know who

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is responsible for the shooting, although I do know, that it was not Mr. Ford.” Further, he goes on to state that he was unaware that a dying declaration identifying Applicant was given by Davis. Accordingly, since most of the statement discusses that Martin was with Applicant immediately before, during, and after the shooting, the identity of the shooter and Applicant’s implication therein could have and should have been discovered prior to the plea. This is particularly true considering the near life-long relationship Martin and Davis allegedly had with Applicant. At the very least, this familiarity with one another should have allowed Martin and Davis to conclude the shooter was not Applicant if that was, in fact, the case. Further, Applicant should have known Martin misidentified him as the perpetrator before entering the *Alford* plea if he was not, in fact, the shooter and could have pursued this as a defense at trial. His decision to plead, however, led to a waiver of defenses, including the ability to impeach Martin on the stand.

In short, if the contents in the affidavit were true, this evidence could have been discovered prior to entering the plea. Still, because this Court finds the recantation and Martin’s testimony unbelievable, even if this Court found the discovery of the recantation to fall within a year of filing this action, it is not of a weight or quality sufficient to justify vacating the plea. Accordingly, relief is denied on this ground.

Conclusion

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty days of receipt by counsel of the judgment entry’s written notice to secure appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 822 (1991).

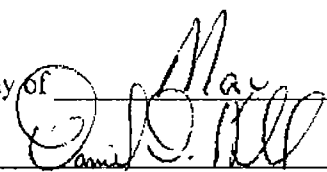
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395 (1991), an Applicant has the right to appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRPC provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

IT IS THEREFORE ORDERED:

1. The PCR application be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 19th day of May, 2022.



DANIEL D. HALL
Presiding Judge
Seventh Judicial Circuit

York, South Carolina.

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