

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT

Cedric A. Colden, #305733)

Case No. ²⁰¹⁶
~~2020~~-CP-02-01269

Applicant,)

v.)

FINAL ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)
_____)

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed June 1, 2016. On June 8, 2017, Respondent made its Return and Motion to Dismiss for failing to file within the time limits mandated by the applicable statute of limitations. This Court hereby finds that the application is untimely and that Applicant is not entitled to equitable tolling under *Ferguson v. State*, 382 S.C. 615, 677 S.E.2d 600 (2009). This Court grants Respondent's Motion to Dismiss and finds as follows:

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. Applicant was indicted at the October 2004 term of the Aiken County Grand Jury for armed robbery (2004-GS-02-1744), kidnapping (2002-GS-02-1746), and murder (2004-GS-02-1748). Applicant proceeded to trial. Reginald Dale Simmons, Esquire, represented Applicant. John Williams Weeks, Esquire, prosecuted the case. On October 28, 2004, the Honorable Reginald Lloyd sentenced Applicant to concurrent terms of thirty years' imprisonment for the armed robbery and kidnapping offenses. Applicant was sentenced to life for the murder offense. Applicant appealed his convictions and sentences. The South Carolina Court of Appeals affirmed the convictions and sentences. The

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Robert J. White
C.C.P. & G.S.
Charlea Griffing
Deputy Clerk

Remittitur was issued on March 8, 2007. Applicant's PCR application was filed over nine (9) years later, on June 1, 2016.

The initial application from June 1, 2016 asserted the following claims:

1. Ineffective assistance of counsel in that;
 - a. "Counsel was ineffective for allowing the state to admit into evidence a statement applicant made while in police custody because the statement was involuntary and induced by a promise not to seek the death penalty."
 - b. "Applicant's Due Process rights were violated when his motion for mental evaluation was denied by the trial court."
 - c. "Trial counsel failed to object to the trial court's abuse of discretion."
 - d. "Applicant's Due Process rights violated by trial court's denial of motion for a continuance."
 - e. "Trial counsel was ineffective for failure to request a lesser included offense jury charge of murder."
 - f. "Trial counsel was ineffective for failure to object to the judge's jury instruction on the facts of his murder offense that reduced the state's burden of proof."
 - g. "Trial counsel failed to object to an erroneous jury charge that violated applicant's Due Process rights."

This matter was initially addressed by Chief Administrative Judge, Doyet A. Early, III, who issued a Conditional Order of Dismissal on June 13, 2017. The Conditional Order provisionally denied and dismissed for failure to timely file the Application within the one-year statute of limitations set forth S.C. Code Ann. § 17-27-45(A), but gave the Applicant twenty days from the date of service of said Order in which to show why the dismissal should not become final. Applicant filed a *pro se* response in opposition to the conditional order. Therein, Applicant asserted that his mental incapacity prevented him from timely filing his PCR application. Attorney Nancy Fennell was assigned to represent Applicant as new PCR counsel. On August 10, 2021, Senior Assistant Deputy Attorney General, Meghan Harrigan Jameson, informed this Court that an equitable tolling hearing pursuant to *Ferguson v. State* may be necessary to address Applicant's assertion.

PCR Counsel Fennell discovered a potential conflict of interest and Ms. Ashley A. McMahan was substituted as PCR counsel on December 16, 2021. Ms. McMahan filed Amended Post-Conviction Relief Application in this matter on May 13, 2022. A hearing, limited to the issue of equitable tolling under *Ferguson*, was held on May 23, 2022. With the express consent of Applicant, this Court and the parties participated in the hearing via virtual attendance. Ms. McMahan represented Applicant in the matter, and the State was represented by Assistant Attorney General, W. Joseph Maye.

CURRENT ACTION

In addition to the claims raised in the original application, Ms. McMahan filed an Amended Post-Conviction Relief Application on Applicant's behalf on May 13, 2022. Therein, Applicant asserts that his mental incapacity tolled the one-year statute of limitations under S.C. Code Ann. § 17-27-45(A). He argued that he:

suffered from depression during the first two years in prison and was unable to timely file a PCR application within the one-year statute of limitations set forth in S.C. Code Ann. § 17-27-45(A). Applicant's depression caused him to isolate himself from others, lack motivation to complete tasks, suffer from sleep deprivation, and encounter significant weight loss. All of these issues taken as a whole, prevented Applicant from timely filing and were both beyond his control and unavoidable despite due diligence. Therefore, Applicant is entitled to equitable tolling. See *Ferguson v. State*, 382 S.C. 615, 677 S.E.2d 600 (2009).

FACTS

Applicant testified on his own behalf at the hearing. He began by describing how he experienced a mental disarray upon being sentenced and sent to jail. He claims he did not eat, sleep, or shower as a result. Applicant testified that because he had difficulty focusing on day-to-day activities, he was not able to focus on fighting his case. He further testified that he did not

want to go on antidepressants because he saw their effects on other inmates. He instead hoped to find relief in the form of communication with other inmates and spiritual counsel.

Applicant testified that his first time seeking medical care in prison was in 2015 for a stab wound. He conceded that he never received medical care or assistance for his alleged depression. Applicant was later transferred to the McCormick Correctional Institution, where he believed his mental state became worse due to the lack of familiar people around him and the violence in the dorms. Applicant testified that he still experiences depression issues, but that his symptoms fluctuate between mild and severe, depending on the day. He testified that he has learned to better cope with his depression, but that it is not a resolved issue. Applicant testified that he did not communicate with his appellate attorney and was not able to focus on his case.

On cross-examination Applicant confirmed that, as stated in his application, his “mental disarray” began when he went to prison and that it lasted for approximately two years. Applicant agreed that in the years after, his condition did improve, but that he has not fully eliminated his struggles. Lastly, Applicant confirmed that none of his symptoms or mental difficulties were diagnosed or documented by a doctor.

APPLICABLE LAW

South Carolina Code of Laws § 17-27-45(A) 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 be properly 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.”

Generally speaking, the remedy of equitable tolling is reserved for extraordinary circumstances beyond the moving party’s control. *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 116, 687 S.E.2d 29, 32 (2009); *Pelzer v. State*, 378 S.C. 516, 662 S.E.2d 618 (Ct. App. 2008); *Mose v. State*, 420 S.C. 500, 507, 803 S.E.2d 718, 721 (2017). The South Carolina Supreme Court stated the following when considering equitable tolling:

In our view, the situations described above do not constitute an exclusive list of circumstances that justify the application of equitable tolling. “The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other.” *Hausman v. Hausman*, 199 S.W.3d 38, 42 (Tex.App.2006). Equitable tolling may be applied where it is justified under all the circumstances. We agree, however, that equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use.

Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 386 S.C. 108, 116–17, 687 S.E.2d 29, 33 (2009). In 2009, the South Carolina Supreme Court handed down the decision of *Ferguson v. State*, wherein it articulated that “in circumstances in which an applicant demonstrates the failure to timely file for PCR was due to mental incompetency, the statute should be tolled.” *Ferguson v. State*, 382 S.C. 615, 619, 677 S.E.2d 600, 602 (2009). The Court went on to hold that if mental competency is shown to have prevented filing, it is not a carte blanche excuse for the applicant to file at any later date. Instead, the duration of incompetency should be determined in consideration of whether the one year statute of limitations expired from the time of regaining competency. *Id.* at 620.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the pleadings, the PCR records submitted to it by the parties, and the applicable law. Before this Court are the Aiken County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, and the records for this PCR action. Under all the circumstances, this Court finds that the pertinent testimony offered by Applicant does not credibly support his allegations for equitable tolling. Based upon the following findings and pursuant to sections 17-27-70 & 45(A) of the South Carolina Code, this Court denies Applicant's request for equitable tolling of his statute of limitations and grant's Respondent's Motion to dismiss the action as untimely.

Applicant has failed to demonstrate that mental incompetency prevented his ability to file his PCR Application

Applicant has failed to present any documentation or testimony from a medical professional demonstrating a diagnosis of mental incompetency or clinical depression that this Court can rely upon in granting the extraordinary remedy that would permit Applicant to evade the statute of limitations for the past nine years.¹ Though he asserts symptoms such as loss of interests, declining hygiene, and weight loss, there is no corroborating proof of such claims and no proof that these symptoms were of such a debilitating nature as to render him *incompetent* and *unable* to file a PCR application in this matter. His claim of depression is based entirely upon self-

¹ Though not controlling authority for state court proceedings, this Court does find the federal cases cited by Respondent to be persuasive and instructive in an area of state law that does not yet have much guidance. See *United States v. Sosa*, 364 F.3d 507, 513 (4th Cir. 2004) (noting that "[a]s a general matter, the federal courts will apply equitable tolling because of a petitioner's mental condition only in cases of profound mental incapacity."); *Holbert v. Greenville Tech. Coll.*, No. 6:11-2846-HMH-KFM, 2012 WL 2923248, at *4 (D.S.C. June 27, 2012) (citing *United States v. Sosa*, 364 F.3d 507, 513 (4th Cir. 2004) (noting that profound mental incapacity arises in exceptional circumstances such as institutionalization or adjudged mental incompetence)).

diagnosis and explanation. Applicant even conceded that he never sought medical care for his alleged depression and actively chose not to consider seeking potential pharmaceutical treatment because of the effects he sees such medications have on other inmates. Such is most certainly his decision to make. However, that decision is also indicative of Applicant's ability to actively consider his illness and make decisions thereto; such is not indicative of *incompetence* rendering Applicant incapable of filing a PCR application.

Moreover, this Court finds that Applicant's claims are insufficient on their face to warrant equitable tolling. Applicant's amended application asserts that he suffered from depression "during the first two years in prison". In similar fashion, his testimony at the evidentiary hearing suggests that his undiagnosed depression was severe upon his incarceration for his crimes and that it improved over the years. These assertions are fatal to Applicant's claims for two reasons. First, Applicant was sentenced on October 28, 2004, and the Court of Appeals affirmed his conviction and sentence on February 20, 2007. *State v. Colden*, 372 S.C. 428, 641 S.E.2d 912 (Ct. App. 2007). As such, more than two years passed before Applicant's statute of limitations even began to run, and his statute of limitations would not have expired until February 21, 2008. The allegation he suffered from debilitating depression "during the first two years of prison" would have had no impact upon his statute of limitations in this matter. Similarly, Applicant testified that his condition improved after the first few years and there is nothing in the record to demonstrate that his alleged incompetence lasted until June 1, 2015 – the timeframe in which his June 1, 2016 PCR application would still be considered timely. *Ferguson* instructs that incompetence only permits equitable tolling until such time as competence is restored. Even if Applicant was rendered incompetent for the first few years of his sentence due to depression, he has failed to show that his incompetence

persisted so as to satisfy *Ferguson*. Consequently, his claim for equitable tolling must fail and his Application must be dismissed as untimely under S.C. Code Ann. § 17-27-45(A).

CONCLUSION

For the above stated reasons, and in consideration of all the circumstances presented, this Court finds that Applicant failed to satisfy his burden under *Ferguson*. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

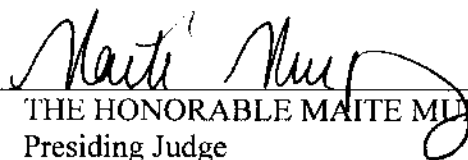
This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. *See* Rule 203, SCACR, Rule 71.1(g) SCRPC; *see also Bray v. State*, 366 S.C. 137, 620 S.E.2d 743 (2005) (“counsel is required to advise an applicant of the right to appellate review of denial of PCR”). Applicant’s attention is also directed to South Carolina Appellate Court Rules 203 and 243 for appropriate procedures for filing and serving the notice, and required actions after notice of intent to appeal has been filed.

IT IS THEREFORE ORDERED:

1. Applicant’s application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant is remanded to the custody of Respondent for completion of his presently existing sentence.

AND IT IS SO ORDERED this 11 day of Oct, 2022.

St. George, South Carolina



THE HONORABLE MAITE MURPHY
Presiding Judge