

STATE OF SOUTH CAROLINA )  
COUNTY OF SPARTANBURG )

IN THE COURT OF COMMON PLEAS  
IN THE SEVENTH JUDICIAL CIRCUIT

Genuine Truth Banner, #375165, )  
Applicant, )

Case No.: 2021-CP-42-00090

v. )

**CONDITIONAL ORDER OF DISMISSAL**

State of South Carolina, )  
Respondent. )

This matter comes before the Court by way of a post-conviction relief application filed by Applicant Genuine Truth Banner on January 10, 2022. Respondent made its return, requesting the application be summarily dismissed.

**I. 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. During the October 2016 term, the Spartanburg County Grand Jury indicted Applicant for armed robbery (count one) and bank robbery (count two) (2016-GS-42-05451), armed robbery (count one) and possession of a weapon during commission of a violent crime (count two) (2016-GS-42-5452), and five counts of kidnapping (2016-GS-42-5453, -5454). William J. Nowicki, Esquire represented Applicant. Solicitor Barry J. Barnette, Esquire prosecuted the case. On January 22-23, 2018, Applicant pleaded guilty as indicted to all charges before the Honorable J. Mark Hayes, II, circuit court judge. The only request from the State was that the armed robbery and bank robbery sentences run concurrent. On January 23, 2018, Judge Hayes sentenced Applicant to twenty years' imprisonment for kidnapping, armed robbery, and bank robbery, and five years' imprisonment for possession of a weapon during commission of a violent crime, sentences running concurrently.

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Applicant filed a timely notice of appeal on March 27, 2018. The South Carolina Court of Appeals issued an order dismissing the appeal because the notice of appeal was not timely served and the motion to reconsider the sentence was withdrawn. The remittitur was issued on May 14, 2018.

***First PCR Action: (2018-CP-42-1206)***

Applicant subsequently filed his first PCR application on April 10, 2018, alleging:

1. "Ineffective Assistance of Counsel"
  - a. "My motion of discovery was never viewed in its entirety by myself because I was not afforded the opportunity by my counselor."
  - b. "During the motion to suppress evidence, Mr. Nowicki never subpoenaed my witnesses to court so that the judge could evaluate their input into my argument that the arresting officer committed an illegal search prior to obtaining a search warrant."
2. "Illegal search and seizure"
  - a. "This was an illegal search as verified by court transcripts, even the judge admitted there was a violation but called it minimal."
3. "Miranda rights violation by arresting officer"

Applicant, through Counsel, filed an amended application on September 11, 2018. In the amended application, Applicant alleged the following (excerpts verbatim):

1. Ineffective assistance of trial counsel for"
  - a. "Failure to investigate and prepare for trial."
  - b. "Advising him to plea under *Alford* without a proper inducement or benefit."
  - c. "Failing to request a continuance to wait for ruling on *Collins v. Virginia*, which had oral argument on January 9, 2018; 584 U.S. \_\_\_\_ (May 29, 2018)."
  - d. "Failing to challenge jurisdiction as Applicant was enlisted in the U.S. Navy at the time of plea."
  - e. "Failure to advise Applicant that his right to appeal the ruling on his pretrial motion to suppress would be waived he pled guilty."
  - f. "Failure to appeal plea and sentence on behalf of the Applicant"
2. Involuntary Plea:

- a. "Due Process violations because the plea was not knowingly and voluntarily made because the Applicant was not advised that the guilty plea would waive his right to appellate review of the court's ruling on his pretrial motion to suppress."

Respondent made its return on July 30, 2018. An evidentiary hearing into the matter was convened on October 11, 2019, at the Spartanburg County Courthouse. Applicant was present at the hearing and was represented by Susannah C. Ross, Esquire. Jacob A. Isenberg, Esquire, of the South Carolina Attorney General's Office, represented Respondent. On May 4, 2020, the Honorable G. Thomas Cooper, Jr., issued the order of dismissal denying Applicant's PCR application.

Applicant filed a notice of appeal on May 14, 2020. On November 6, 2020, Sarah E. Shipe, Esquire filed a petition for writ of certiorari in the Supreme Court of South Carolina on behalf of Applicant, raising the following issue:

Did the PCR court err in ruling Petitioner's *Alford* plea was knowingly, intelligently, and voluntarily entered where trial counsel was ineffective for failing to advise Petitioner of the appellate consequences of his *Alford* plea and petitioner was from a state that allowed conditional guilty pleas and therefore it was reasonable for petitioner to believe that he could appeal the trial court's denial of his motion to suppress?

Respondent made its return on December 7, 2020. The Supreme Court of South Carolina transferred the case to the South Carolina Court of Appeals. This matter remains pending.

## II. Statement of Facts

On October 29, 2016, Applicant, armed with a shotgun, robbed Spartan Federal Credit Union. (Plea Tr. 91). Applicant held bank customers, including a minor, hostage while the bank tellers collected money out of registers. (Plea Tr. 91-92). Applicant took one of the tellers by the arm and led her around the room, forcing her to open the drawers. (Plea Tr. 92). Thereafter, he ordered her to go faster and, emphasizing his point, fired a shotgun into the roof. (Plea Tr. 92)

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The other teller came around to help empty the drawers. (Plea Tr. 92). Seed money was dropped on the floor by one of the tellers, which had serial numbers specifically marked for armed robbery cases totaled over \$15,000. (Plea Tr. 92-93). Applicant took part of the seed money, went around the room, and fired another round in the floor of the breakroom. (Plea Tr. 93). He then put the money in his backpack, loaded it on his back, and left through the back door. (Plea Tr. 93). Applicant stole a victim's truck to flee the crime scene in. (Plea Tr. 93).

An officer arrived when Applicant was driving away. (Plea Tr. 93-94). When another detective arrived on scene, he ran the license plate number on the BMW parked in the parking lot, thinking it was connected to drug activity. (Plea Tr. 93-94). After collecting the plate number, the detective received a call about the armed robbery. (Plea Tr. 95).

Officers discovered the victim's truck was taken to the same location the BMW was. (Plea Tr. 96). An officer went to the location, approached the BMW parked within the curtilage of the home, to make sure the VIN number was the same. (Plea Tr. 96). Officers then secured the area, called investigators, and obtained a search warrant. (Plea Tr. 96).

In the vehicle, officers found ammunition shells that matched the gun used during the robbery, and clothing that matched what the robber wore during the armed robbery. (Plea Tr. 97-98). A shotgun was found under the deck of Applicant's house. (Plea Tr. 97). Additionally, when the officers entered the house they found a bag containing the money, including the seed money that was traced back to the money stolen from the bank. (Plea Tr. 98). This money was taken into evidence. (Plea Tr. 98). In the bottom of the bag was Applicant's photo identification card, containing his name and social security number. (Plea Tr. 98-99). Based off of these facts, Applicant was arrested for and charged with the crimes listed above.

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### III. Current Action before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully on the following grounds:

1. "No legal indictments existed at the time of the plea."
2. "PCR and Trial Attorneys ineffective for failing to realize lack of indictments."
3. "PCR attorney ineffective for failure to file 59(e)."
4. "14<sup>th</sup> Amendment Due Process violation by trial judge."

Applicant filed an amendment on February 1, 2022, alleging:

1. "The State lacked subject matter jurisdiction to try the case or accept an 'as indicted' plea where no indictments existed at the time of the plea."

Also in this amendment, Applicant requested he represent himself *pro se* and that the Court not appoint him an attorney. Before this Court are the Spartanburg County Clerk of Court records, Applicant's South Carolina Department of Corrections records, prior direct appeal, PCR, and PCR appeals records, and the records for this PCR action.

### IV. Findings of Fact and Conclusions of Law

This Court has reviewed the pleadings, the records submitted to it by the parties, and the applicable law. Pursuant to South Carolina Code Annotated Sections 17-27-70 and -80, this Court informs the parties of its intent to dismiss the application based upon the following findings:

#### *Ineffective Assistance of PCR Counsel*

Applicant's claim he is entitled to relief on grounds that his prior PCR counsel was ineffective is not cognizable in a PCR action. There is no constitutional right to appointed counsel for collateral review of a conviction. *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state PCR actions. *Coleman v. Thompson*, 501 U.S. 722 (1991). Once a PCR applicant obtains a complete

adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of PCR counsel. *Aice v. State*, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991).

The only recognized exception to the rule barring claims of ineffective assistance of PCR counsel is found in *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). *Austin* recognizes a general exception to this rule where prior PCR counsel fails to appeal the denial of the application. *Id.* *Austin* “is limited to its particular factual situation” and is only applicable in limited circumstances to correct procedural defects where an applicant is denied his “one full bite at the apple.” *Id.*; *Aice*, 305 S.C. at 452, 409 S.E.2d at 394; *see also Odom v. State*, 337 S.C. 256, 523 S.E.2d 753 (1999).

Here, Applicant received a hearing in his first PCR action and is currently enjoying his appeal therefrom. It is clear Applicant enjoyed, and is still currently enjoying on appeal, his “one full bite at the apple.” Therefore, Applicant’s allegations of ineffective assistance of PCR counsel do not fall within any exception to the rule barring such claims, and the allegations should be dismissed for failing to state a claim cognizable under the Uniform Post-Conviction Procedure Act.

### *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).

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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, South Carolina Code Annotated Section 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 pled guilty to all charges on January 23, 2018 and the remittitur from his direct appeal was issued on May 14, 2018. The application was therefore due on May 15, 2019. This application was filed on January 10, 2022, well beyond the statutory filing period. Therefore, the application should be summarily dismissed for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

### *Successiveness*

The application shall 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

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for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Under this statute, successive PCR 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, 409 S.E.2d at 394. 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 PCR application; thus, the current application is successive and barred under South Carolina Code Annotated Section 17-27-90. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous PCR application. Therefore, he has failed to meet the burden imposed upon him, and the application shall be dismissed as successive to Applicant’s previous PCR application.

#### V. Conclusion

Pursuant to South Carolina Code Annotated Section 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 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 Spartanburg County Clerk of Court and shall serve opposing counsel at the following address:

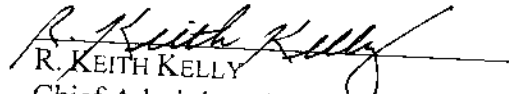
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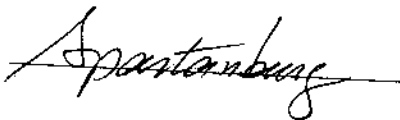
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Office of the Attorney General  
Attn: Chelsey F. Marto, Esquire  
PCR Division – Seventh Circuit  
P.O. Box 11549  
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Spartanburg County Clerk of Court and opposing counsel within twenty 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 28<sup>th</sup> day of July, 2022.

  
R. KEITH KELLY  
Chief Administrative Judge  
Seventh Judicial Circuit

, South Carolina

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