



STATE OF SOUTH CAROLINA )  
COUNTY OF WILLIAMSBURG )

IN THE COURT OF COMMON PLEAS  
FOR THE THIRD JUDICIAL CIRCUIT

Michael D. McFadden, #126806, )

Case No. 2012-CP-45-0197

Applicant, )

v. )

**CONDITIONAL ORDER OF DISMISSAL**

State of South Carolina, )

Respondent. )

This matter comes before this Court by way of an application for post-conviction relief filed April 9, 2012. In its return, the Respondent requested the application be summarily dismissed.

**PROCEDURAL HISTORY**

Before this Court are the records of the Williamsburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and records from Applicant's previous applications for post-conviction relief. The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Williamsburg County. The Applicant was indicted at the February 1992 term of the Williamsburg County Grand Jury for armed robbery, possession of a weapon during a violent crime, and kidnapping (1996-GS-31-255). He was represented on the charges by Legrand Carraway, Esquire. On April 6-7, 1992, Applicant proceeded to trial by jury, where he was convicted as indicted on all three charges. The Honorable M. Duane Shuler sentenced applicant to confinement for thirty years for kidnapping, twenty five years consecutive for armed robbery, and five years consecutive for possession of a weapon during a violent crime.

A timely notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Supreme Court affirmed Applicant's conviction and sentence. State v. McFadden,

Op. No. 94-MO-21 (S.C. Sup. Ct. filed February 1, 1994).

Applicant filed his first application for post-conviction relief on February 14, 1994, alleging that he was being held in custody unlawfully based on ineffective assistance of counsel. The State filed its Return on September 6, 1994. An evidentiary hearing was convened on November 2, 1994, at which the Applicant was present and was represented by Charles Barr, Esquire. The Honorable Thomas W. Cooper, Jr. denied and dismissed Applicant's application by written Order dated January 20, 1995. Following the written order, a second evidentiary hearing was convened on March 28, 1995 with respect to the allegation of ineffective assistance of appellate counsel, which was not addressed at the November hearing. However, Applicant withdrew this allegation at the second hearing and the matter was dismissed. The Applicant did not appeal the denial of his first application for post-conviction relief.

The Applicant subsequently filed a second application for post-conviction relief on December 1, 1995. The Applicant raised the following issues in his second application:

1. Post-conviction relief counsel was ineffective for failing to seek appellate review of Applicant's first Post-conviction relief action;
2. Denial of due process of law in sentencing court not having jurisdiction to sentence consecutively;
3. Ineffective assistance of trial counsel; and
4. Ineffective assistance of appellate (direct appeal) counsel.

The State filed its Return and Motion to Dismiss on June 13, 1996. An evidentiary hearing was convened on February 6, 1997 at the Sumter County Courthouse. Applicant was present and was represented by Gordon B. Jenkinson, Esquire. By Order dated July 3, 1997, the Honorable Alexander S. Macaulay denied and dismissed Applicant's second application for post-conviction relief. The Applicant did not appeal the denial of his second application.

The Applicant subsequently filed a third application for post-conviction relief on September

29, 1997. The applicant raised the following issues in his third application:

1. Ineffective assistance of counsel;
2. After discovered evidence; and
3. Novel issues.

The State filed its Return and Motion to Dismiss on August 14, 1998. The Honorable Thomas W. Cooper, Jr. issued an Order of Dismissal denying and dismissing the Applicant's third application on February 20, 1999. The South Carolina Supreme Court denied Applicant's Petition for Writ of Certiorari by written Order dated January 10, 2001. The Remittitur was sent on January 26, 2001.

The Applicant subsequently filed a Petition for Writ of Habeas Corpus. The United States District Court denied relief pursuant to the recommendation of the magistrate judge. (McFadden v. Harrison, No. CA-00-3934-9-25BG, D.S.C filed August 29, 2002 and entered August 30, 2002).

On February 10, 2005, Applicant filed his fourth application for post-conviction relief, alleging that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel;
2. "Sentencing court not having jurisdiction to sentence applicant consecutively";
3. "Violation of Rule 501, SCACR, and Cannon III;"
4. "Invalid Indictment;"
5. "No warrant for possession of a weapon during the commission of a violent crime;"
6. "Fifth, Sixth, and Fourteenth Amendment violations;" and
7. "Revocation of parole (double jeopardy)."

The State filed its Return and Motion to Dismiss on January 7, 2006. The Honorable R. Ferrell Cothran, Jr. denied and dismissed the application by written Order dated November 19, 2009 and filed November 25, 2009.

II.

In his current and fifth Application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following:

1. Newly Discovered Evidence; and
  - a. “A witness for the state has come forward with new information that vindicated the applicant of the charges against him.”
2. Actual Innocence.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court finds that the current application for post-conviction relief must be summarily dismissed because the Applicant’s assertion that he is entitled to a new trial based upon after-discovered evidence is without merit. A defendant requesting a new trial based on after discovered evidence must show that the evidence:

(1) Is such as would probably change the result if a new trial was had; (2) Has been discovered since the trial; (3) Could not by the exercise of due diligence have been discovered before the trial; (4) Is material to the issue of guilt or innocence; and (5) Is not merely cumulative or impeaching. Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983).

The Applicant has not shown that the alleged evidence meets *any* of the requirements for after-discovered evidence. Accordingly, the Application is denied and dismissed.

This Court finds that the current application for post-conviction relief must also be summarily dismissed because it is successive to his prior applications 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).

This Court finds that the current allegations were or 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 four applications 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, 305 S.C. 448, 409 S.E.2d 392; Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834.

This Court finds, further, 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. 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 offenses he challenges in this Application on April 7, 1992. This Application was filed on April 9, 2012, nearly six years after the statutory filing period (July 1, 1996)


had expired.

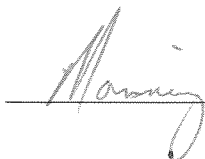
A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. §17-27-70(c) (1985) authorizes the Court to "grant a motion by either party for summary 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 and for being successive.

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, factual or legal, with the Williamsburg County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General  
Attn: Megan E. Harrigan, Esquire  
P.O. Box 11549  
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 17 day of Oct, 2012.

  
R. FERRELL COTHRAN, JR.  
Chief Judge for Administrative Purposes  
Third Judicial Circuit

  
\_\_\_\_\_, South Carolina.