

transported Applicant to the hospital to collect a sample of his blood. An analysis of the sample revealed Applicant had a blood alcohol content of 0.153 percent. (App. 193-209, 210-220, 223-308, 324-336).

As a result, the Beaufort County Grand Jury indicted Applicant for reckless homicide (2007-GS-07-1616); driving under suspension (DUS) – third (2007-GS-07-1617); child endangerment (2007-GS-07-1584); and felony driving under the influence (DUI) resulting in death (2008-GS-07-2690). Applicant was represented by Beaufort County Public Defender Gene Hood. Deputy Solicitor Angela McCall-Tanner of the Fourteenth Circuit Solicitor's Office prosecuted the case. The State called Applicant's case to trial on November 17, 2008, and a jury was selected but not sworn. The following day November 18th, Applicant made a motion to quash the felony DUI resulting in death indictment, arguing the indictment failed to specify the requisite act forbidden by law that the State asserted Applicant had committed. Following a hearing, the Honorable Perry M. Buckner, III, circuit court judge, granted Applicant's motion and quashed the indictment, concluding the State did not specify the act forbidden by law. Judge Buckner indicated the State would be permitted to re-submit an indictment to the grand jury, and he continued the trial with respect to the other three charges. Thereafter, on November 20, 2008, Applicant was re-indicted for felony DUI resulting in death, with the new indictment alleging Applicant violated the law by failing to drive on the right side of the roadway.

Applicant proceeded to trial on December 8, 2008, before the Honorable John C. Hayes, III, circuit court judge. The jury convicted Applicant as indicted. Judge Hayes sentenced Applicant to imprisonment for a term of twenty-five years for felony DUI resulting in death, a concurrent term of ten years for reckless homicide, a consecutive term of ten years for child endangerment, and a concurrent six month term for DUS.

A. Direct Appeal

Applicant appealed his convictions and sentences, arguing the trial court erred in denying his motions for directed verdict on the felony DUI and child endangerment indictments and for granting the State a continuance. The South Carolina Court of Appeals affirmed the convictions and sentences. State v. Galimore, 396 S.C. 471, 721 S.E.2d 475, 476 (Ct. App. 2012). Applicant sought rehearing *en banc*, and following the denial of rehearing, sought certiorari review from the South Carolina Supreme Court. The Supreme Court denied his certiorari petition. The remittitur was returned to the circuit court on November 14, 2013.

B. Initial Post-Conviction Relief Action (2013-CP-07-03163) and Subsequent Appeal

Applicant filed a timely application for post-conviction relief, alleging various claims of ineffective assistance of counsel. On August 28, 2018, an evidentiary hearing was convened before the Honorable R. Ferrell Cothran, Jr., circuit court judge. Applicant was present and represented by counsel Tristan Shaffer. Assistant Attorney General Christian Saville of the South Carolina Attorney General's Office appeared on behalf of Respondent. Applicant testified and presented accident reconstruction expert Martin Schussel. Prosecutor McCall-Tanner also testified. By order filed June 13, 2019, Judge Cothran denied and dismissed the application. Applicant filed a motion to reconsider, which was summarily denied by the court.

Applicant filed a timely notice of appeal from the denial of post-conviction relief on August 13, 2019, followed by a Petition for Writ of Certiorari on July 1, 2020. In the petition, Applicant's appellate counsel, Joanna Katherine Delany of the South Carolina Commission on Indigent Defense – Division of Appellate Defense, raised the following issue:

Whether the PCR court erred where it found counsel provided effective representation where the State alleged the fatal collision occurred because Petitioner was driving in the oncoming lane, and where the defense offered no expert testimony about the collision

even though Martin Schussel, an expert in accident reconstruction, had told counsel that the State's accident investigation and animation were unreliable and that Petitioner's car shifted to the left because of the collision, and where Petitioner was prejudiced because such evidence was not otherwise adduced?

Respondent filed its Return to the petition on November 16, 2020. On December 14, 2020, The Supreme Court of South Carolina transferred this post-conviction relief appeal matter to the South Carolina Court of Appeals.

This appeal remains pending before the South Carolina Court of Appeals as of the date of this return.

II. CURRENT POST-CONVICTION RELIEF APPLICATION BEFORE THE COURT

In his second and present application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following reasons:

1. Ineffective assistance of counsel and
2. Due process violations.

Applicant requests relief as follows:

“new trial or set aside”.

Before this Court are the Beaufort County Clerk of Court records regarding the subject convictions; Applicant's records from the South Carolina Department of Corrections; records from Applicant's first PCR and pending PCR appeal; and the records of the second and current PCR action. Respondent reserves the right to amend this return upon receipt of any relevant materials.

III. 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. This Court finds there is no genuine issue of material fact which would necessitate an evidentiary hearing. *See* S.C. Code Ann. § 17-27-70(b) (establishing procedure for summary

disposition of PCR applications); *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief). 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:

A. Summary Dismissal Based on the Statute of Limitations

This Court finds this application 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. Specifically, the Act requires as follows:

(A) 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.

(B) When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

(C) If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter 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.

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). Additionally, Section 17-27-70(c) authorizes this Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”.

The Applicant was convicted on December 10, 2008, and the remittitur from the subsequent direct appeal was issued November 14, 2013. Pursuant to Section 17-27-45(A), Applicant had until November 15, 2014, to timely file his application for post-conviction relief challenging his convictions. Applicant did not file his present application until January 26, 2021, more than six years beyond the statute of limitations. Applicant failed to comply with the filing requirements under Section 17-27-45(A).

Moreover, Applicant has not alleged any claims based on a change of law or statute or alleged any newly discovered evidence. Therefore, Applicant has failed to comply with the filing requirements under Section 17-27-45(B-C). Accordingly, this application is untimely pursuant to Section 17-27-45 and should be dismissed for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

B. Summary Dismissal Based on Successiveness

This Court further finds this action 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.

Section 17-27-90 is clear—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 or actions challenging these convictions. *See Aice v. State*, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991) (“[Applicant] has filed an original PCR application, and has been allowed to seek review of the ruling against him. We refuse to grant his request for a second chance, and again we do so in order to effectuate the purposes of the Act and rules.”). 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 should be dismissed as successive to Applicant’s previous PCR application.

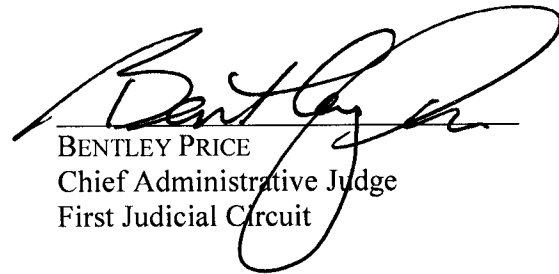
IV. CONCLUSION

Pursuant to S.C. Code Ann. § 17-27-70(b), this 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 Beaufort County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Samantha J. Weidauer
Post-Conviction Relief Division – 1st Circuit
Post Office Box 11549
Columbia, South Carolina 29211

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

AND IT IS SO ORDERED this 14 day of July, 2021.


BENTLEY PRICE
Chief Administrative Judge
First Judicial Circuit

Beaufort, South Carolina