

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
George M. McFadden, Jr., Circuit Court Judge

2020-CP-21-0880

Wilbert E. Brown, Jr., #378348,

Appellant,

v.

State of South Carolina,

Respondent.

RECEIVED

MAY 30 2023

S.C. SUPREME COURT

NOTICE OF APPEAL

Wilbert E. Brown, Jr., #378348, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed April 14, 2023, issued by The Honorable George M. McFadden, Jr., Presiding Judge of the Twelfth Judicial Circuit Court of Common Pleas. Appellant received written notice of this Order on April 28, 2023.



Joshua A. Bailey
Snow and Bailey Law Firm, P.A.
SC Bar No.: 76965
Post Office Box 555
Florence, South Carolina 29503
(843) 669-6481
jbailey@peedeelawyers.com
ATTORNEY FOR PETITIONER

May 25, 2023

Other Counsel of Record:

D. Russell Barlow, II, Esquire, Assistant Attorney General

Post Office Box 11549

Columbia, South Carolina 29211

(843) 734-3970

ATTORNEY FOR RESPONDENT

FILED

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF FLORENCE 2023 APR 14 PM 1 FOR THE TWELFTH JUDICIAL CIRCUIT

Wilbert E. Brown, Jr., #378348,)
BORIS POJLOS O'HARA)
CCCP & GS) Case No.: 2020-CP-21-0880
FLORENCE COUNTY, SC)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

ORDER OF DISMISSAL

RECEIVED

MAY 30 2023

S.C. SUPREME COURT

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by Wilbert E. Brown, Jr. (Applicant) on March 20, 2020. The State made its return and moved to dismiss all claims other than a belated appeal based on the statute of limitations. On December 16, 2022, a hearing convened before the Honorable George M McFaddin, Jr. At the start of the hearing, Respondent renewed its motion to dismiss. For the reasons set forth below, this Court GRANTS Respondent's motion to dismiss this application based on the statute of limitations.

Procedural History

Applicant is confined in the South Carolina Department of Corrections (SCDC) pursuant to orders of commitment of the Florence County Clerk of Court. Applicant was indicted at the November 2018 term of the Florence County Grand Jury for Felony DUI resulting in death and Felony DUI resulting in great bodily injury (2017-GS-21-0695). These charges arose from an automobile collision that occurred on February 7, 2017. One of the passengers in Applicant's vehicles was killed and another passenger was permanently injured. Applicant's blood-alcohol level was .17.



CERTIFIED: A TRUE COPY

Boris Pojlos O'Hara
2020-CP-21-0880 & G.S.
FLORENCE COUNTY, S.C.

On November 26, 2018, Applicant pled guilty as indicted before the Honorable Thomas A. Russo. Linward C. Edwards, Esquire, represented Applicant. Assistant Solicitor Kevin Michael Hope represented the State. Judge Russo sentenced Applicant to concurrent terms of fifteen years' imprisonment. Applicant did not appeal.

Current Application

Applicant *untimely* commenced this PCR action on March 20, 2020, alleging he is being held unlawfully for the following reasons:

1. Ineffective assistance of counsel
 - a. Counsel failed to investigate Applicant['s] mental health background PTSD before advise Applicant to ple[a]d guilty
 - b. Counsel failed to advise Applicant he has a right to appeal his guilty plea. *White v. State*, 208 S.E.2d 35.
2. Newly Discovered Evidence
 - a. No chain of custody report was listed in solicitor's files given to trial counsel and hospital report physician licensed nurse that draw blood alcohol from applicant

On December 1, 2022, Applicant amended his application to allege the following:

Ineffective assistance of counsel:

(a) Petitioner avers he did not learn of the State's failure to provide plea counsel with the necessary chain of custody documents prior to Petitioner's guilty plea until he received a copy of counsel's file for said guilty plea. Petitioner avers that plea counsel never discussed with him the right to challenge the chain of custody of the evidence collected by law enforcement.

(b) Petitioner avers that he was not advised by plea counsel that he could challenge the blood draw from the hospital nor did plea counsel review any documents regarding the blood draw with Petitioner.

(c) Petitioner avers that plea counsel failed to obtain and present to the plea court any information regarding his diagnosis of PTSD, treatment provided to Petitioner, and the need for future treatment in support of mitigation.

2 

2020-CP-21-0880

Before this Court were the Florence County Clerk of Court records regarding the underlying conviction; Applicant's records from the South Carolina Department of Corrections; the plea transcript; the records of this PCR action—including Respondent's return and motion to dismiss, and Respondents' motions to extend the time to file a return, filed on July 10, 2002, and July 20, 2020; and a Memorandum of Law submitted by the State on December 16, 2022, addressing an argument first raised by Applicant during the December 16, 2022 hearing.

PCR hearing

On December 16, 2022, this Court held a hearing on Applicant's PCR application. Applicant proceeded on the allegations raised in his amended application. At the start of the hearing, Respondent renewed its motion to dismiss. Respondent contended the issues raised in Applicant's amended application were all barred by the statute of limitations, as initially asserted in Respondent's return.¹

In response, Applicant contended Respondent did not file its return within thirty days, as required by section 17-27-70 of the South Carolina Code. Because Applicant raised this issue for the first time at the December 16, 2022 hearing, Respondent requested the Court hold the record open so Respondent could have time to address this issue. That same day, Respondent submitted to this Court a Memorandum of Law arguing (1) Applicant's Motion to strike Respondent's statute

¹ In its return, Respondent asserted all claims were barred by the statute of limitations other than an allegation related to whether Applicant was entitled to a belated appeal. In his amended application, Applicant did not raise any issue related to a belated appeal, and at the start of this hearing, Applicant did not indicate he intended to go forward on any issue related to a belated appeal. After hearing argument on Respondent's motion to dismiss, this Court took Respondent's motion to dismiss under advisement and proceeded with an evidentiary hearing. During the hearing, Applicant did not raise any issue concerning a belated appeal. Thus, this Court finds Applicant has waived any issue related to a belated appeal.

of limitations defense was untimely and (2) section 17-27-70 of the South Carolina Code does not mandate the Court strike the defense.

Motion to Strike Defense

This Court construes Applicant's argument opposing Respondent's statute of limitations defense as a motion to strike. This Court **DENIES** Applicant's motion to strike.

First, this Court finds Applicant's motion to strike is untimely. Rule 12(f), SCRPC, sets forth the procedure for a motion to strike:

Upon motion pointing out the defects complained of, and made by a party before responding to a pleading or, if no responsive pleading is required within thirty days after the service of pleading upon him or upon the court's own initiative, at any time the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

Pursuant to this Rule, a party is required to serve a motion to strike when no responsive pleading is required within thirty days after the service of pleading upon him. Here, Respondent served the Return and Partial Motion to Dismiss raising the statute of limitations defense on October 28, 2020. Applicant waited until the December 16, 2022 hearing—a period of more than two years—to raise this motion to strike. This Court thus finds this motion to strike is untimely.

Second, this Court finds section 17-27-70 of the South Carolina Code does not mandate it strike the defense. Section 17-27-70 provides, "Within thirty days after the docketing of the application, or within any further time the court may fix, the State shall respond by answer or by motion which may be supported by affidavits." Notably, the Supreme Court of South Carolina affixed additional time for the State to file a return to a PCR application when it promulgated Rule 12(a), SCRPC, which provides, "[T]he State of South Carolina shall answer or otherwise respond to an application for post-conviction relief within 60 days after service of the application, if it arises out of a guilty plea, and 90 days if it arises out of a trial."

 4

Importantly, the timeframe set forth in section 17-27-70 is not mandatory. See Guinyard v. State, 260 S.C. 220, 225, 195 S.E.2d 392, 394 (1973) (“Compliance with the thirty day time limit prescribed by the statute is, therefore, not mandatory, as contended by appellant, but discretionary with the trial court.”). In its exercise of discretion, this Court accepts Respondent’s return as timely filed and declines to strike Respondent’s statute of limitations defense.

Based on its review of the records in this PCR action, Respondent filed motions to extend the time to file a return on July 10, 2020, and July 20, 2020. These motions were based on the fact Respondent had not yet received the transcript of the guilty plea. See 17-27-70(a) (requiring responded to “file with its answer the record or portions thereof that are material to the questions raised in the application). Respondent filed this return on October 28, 2020. This Court notes that during this time, the Courts and attorneys were dealing with unprecedented issues raised by the COVID-19 pandemic. Overall, in its exercise of discretion, this Court finds Respondent’s return shall be accepted as timely file. Likewise, this Court denies Applicant’s motion to strike Respondent’s defense.

Motion to Dismiss

In its return, the State moved to dismiss Applicant’s allegations (other than any issue related to a belated appeal or newly discovered evidence) for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act² (the Act). The Act requires:

An application for relief filed pursuant to this chapter *must* be filed within *one year after the entry of a judgment . . . or within one year after the sending of the remittitur*

S.C. Code Ann. § 17-27-45(A) (emphasis added). The statute of limitations applies to all

² S.C. Code Ann. § 17-27-10 to -160.

applications filed after July 1, 1996. *Peloquin v. State*, 321 S.C. 468, 470, 469 S.E.2d 606, 607 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. *McDonnell v. Consol. Sch. Dist. of Aiken*, 315 S.C. 487, 489, 445 S.E.2d 638, 639 (1994). Further, 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 . . . 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 November 26, 2018, and did not pursue a direct appeal. The application was, therefore, due on or before November 27, 2019. This application was filed on March 20, 2020, well *after* the requisite filing period expired. Accordingly, Applicant’s claims are barred by the statute of limitations and dismissed.³⁴

³ As previously noted, Applicant waived any claim related to a belated appeal.

⁴ Applicant’s amended application did not raise any issue related to newly-discovered evidence, and Applicant did not pursue any such claim at his PCR hearing. To the extent any of the allegations in Applicant’s amended application can be construed as allegations of newly-discovered evidence, this Court finds Applicant did not make a prima facie showing of newly-discovered evidence. See *Welch v. MacDougall*, 246 S.C. 258, 143 S.E.2d 455 (1965) (providing a PCR applicant must make a prima facie showing he is entitled to relief before he is entitled to an evidentiary hearing); *Jamison v. State*, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014). (providing a PCR application seeking relief based on newly-discovered evidence following a plea must show “(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.”); *id.* (“In other words, a PCR applicant may successfully disavow his or her guilty plea only 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.”). In his original application, Applicant alleged there was no record of the chain of custody of a blood alcohol content report; however, Applicant’s discovery does not constitute newly discovered evidence. This evidence was discoverable prior to the entry of the guilty plea. By entering a guilty plea, Applicant waived his right to present any and all defenses that he may have had, and he certainly cannot raise them now in his current PCR application for under the guise of “newly discovered evidence.”

 6

Conclusion


Based on the foregoing, this Court denies Applicant's motion to strike Respondent's statute of limitations defense. Further, this Court grants Respondent's motion to dismiss this PCR action based on the statute of limitations. Thus, this application is denied and dismissed with prejudice.

Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty days of receipt by counsel of written notice of entry of judgment. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an applicant has the right to an appellate counsel's assistance in seeking review of the denial of PCR. Pursuant to Rule 71.1(g), SCRCP, if an applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on applicant's behalf. Attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for PCR is denied and dismissed with prejudice; and
2. Applicant must be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED THIS 4 day of April ²⁰²³/₂₀₂₂.



 GEORGE M. MCEADDIN, JR.
 Presiding Judge
 Twelfth Judicial Circuit

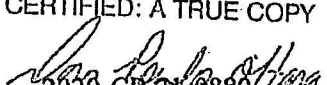
Sumter, South Carolina

RECEIVED

MAY 30 2023

S.C. SUPREME COURT

FILED
 2023 APR 14 PM 1:07
 DORIS POULOUS O'HARA
 CCCP & GS
 FLORENCE COUNTY, SC

CERTIFIED: A TRUE COPY

 2020-CP-21-0880
 CLERK OF COURT C.R. & G.S.
 FLORENCE COUNTY, S.C.

FILED

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2020CP2100880

Wilbert E Brown Jr 2023 APR 14 PM 5:42 South Carolina State Of
DORIS FOULOS O'HARA

PLAINTIFF(S) DEFENDANT(S)
C.C.P. & G.S. FLORENCE COUNTY, S.C.
Submitted by: Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge

Judge Code

4/14/2023

Date

For Clerk of Court Office Use Only

This judgment was entered on April 14th, 2023, and a copy mailed first class or placed in the appropriate attorney's box on April 17th, 2023, to attorneys of record or to parties (when appearing pro se) as follows:

CPFORM4Cm
SCCA SCRPC Form 4C (Revised 2/17)

CERTIFIED: A TRUE COPY

Doris Foullos O'Hara
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

Joshua A. Bailey PO Box 555 Florence, SC 29503

D Russell Barlow II PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Doris P O'Hara

Court Reporter

Doris Poulos O'Hara - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
