

STATE OF SOUTH CAROLINA)
 COUNTY OF CHARLESTON)
)
)
 James Ivan Aiken, #294853)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 IN THE NINTH JUDICIAL CIRCUIT

Case No.: 2019-CP-10-01873

**CONDITIONAL ORDER OF
 DISMISSAL**

FILED
 2020 AUG 24 PM 1:11
 JULIE J. ARHISTRICT
 CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by James Aiken (Applicant) on April 12, 2019. 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 Charleston County Clerk of Court. In May 2010, the Charleston County Grand Jury indicted Applicant for first degree burglary (2010-GS-10-3117). Mary Beth Mullaney and Lori Proctor, Esquires represented Applicant. Assistant Solicitors Michael Nelson and Chad Simpson, Esquires prosecuted the case. On January 18-19, 2011, Applicant proceeded to trial before the Honorable R. Markley Dennis, Jr. The jury found Applicant guilty as indicted. Judge Dennis sentenced Applicant to imprisonment for twenty years for first degree burglary.

Applicant filed a timely notice of appeal. Breen Richard Stevens, Esquire, of the Office of Appellate Defense perfected the appeal. The Applicant signed an affidavit dated August 11, 2011 indicating that he wished to withdraw the appeal. The Court of Appeals issued an Order of Dismissal on September 2, 2011 and a Remittitur on September 22, 2011.

Bm/1

The Applicant subsequently filed an application for PCR on October 13, 2011, in which he alleged the following grounds for relief:

1. Counsel failed to adequately investigate the facts and circumstances surrounding the 911 call to applicant's mother's residence on, 1/9/10. Counsel's failure to conduct such an investigation deprived the jury of critical information relevant to an accurate assessment of applicant's guilt-or-innocence. (See Trial Transcript Pg. 290 | 20-25) 291 | 1-18);
2. Counsel failed to investigate, develop, and present all available, relevant, and admissible exculpatory and/or mitigating evidence. As a result of Counsel's failure to uncover and present this evidence, Applicant's 20 yr. sentence for burglary 1st is unreliable;
3. Counsel was ineffective for failing to interview and call witnesses who were not called during trial because Counsel "believed the witnesses would not add much to Applicant's defense." The defense witnesses Applicant sought during trial "would have added significantly to the credibility of Applicant's case." Counsel's conduct was also deficient for making harmful statements in closing arguments (Trial Trans. Pg. 35 | 11-13) Pg. 253 | 13-14);
4. Trial counsel failed to investigate, discover, and present evidence that Applicant suffered mentally from impaired judgment. Counsel's failure to discover and present the evidence and the Applicant's 20 yr. sentence violates *Atkins v. Virginia*, 536 U.S. 304 (2002), and the 8th Amendment to the United States Constitution because the Applicant was mentally impaired. (17-24-10, SEQ.);
5. Counsel was ineffective for failing to object to the solicitor's closing arguments. The solicitor's closing arguments were highly damaging to Applicant by unreasonably failing to preserve the issue for direct review and that this failure prejudiced the outcome of the case (Trial Trans. 246 2-11).

The state filed its return on February 13, 2012. (Attachment 1, PCR App. p. 314-317). Justin Bamberg, Esq., represented Petition in the action. PCR counsel filed an amendment to the application and a memorandum of law in support of the application on November 16, 2012. (Attachment 1, PCR App. pp. 319-344). PCR counsel framed the ineffective assistance of counsel claims as follows:

1. Failure to move to exclude or object to testimony regarding Morrison's missing wallet and mention of the wallet during closing arguments;
2. Failure to object to certain testimony by Morrison and failure to properly cross-examine him;
3. Failure to reasonably investigate evidence that would rebut evidence of Applicant's criminal intent;
4. Failure to request the State to advance a reason as to why it refused to accept the stipulation to Applicant's priors;
5. Failure to request a bifurcated trial on the issue of prior convictions;
6. Making improper comments during closing arguments; and,

Bm/2

7. Appellate counsel was ineffective for failing to fully inform him of the consequences of abandoning his direct appeal.

An evidentiary hearing was convened on December 5, 2012, before the Honorable Roger M. Young, Sr. (Attachment 1, PCR App. p. 356). At the conclusion of the hearing, Judge Young took the matter under advisement and requested proposed orders for both parties. The judge noted the proposed orders would serve as counsel's closing argument. (Attachment 1, PCR App. p. 463). On December 31, 2012, Judge Young issued an order denying Petitioner's application and dismissing the action with prejudice. (Attachment 1, PCR App. pp. 512-27). Petitioner appealed the denial of relief.

Appellate Defender LaNelle Cantey Durant represented Petitioner on appeal. On July 26, 2013, PCR appellate counsel filed a Petition for Writ of Certiorari in the Supreme Court of South Carolina and raised the following issues:

1. The PCR court erred in failing to find trial counsel ineffective for not objecting to testimony by Morrison, whose home was allegedly burglarized by the petitioner, concerning his missing wallet. Petitioner was not charged with stealing the missing wallet so the testimony was prejudicial to petitioner because the state argued in his closing that the missing wallet was evidence that petitioner intended to rob Morrison.
2. The PCR court erred in failing to find trial counsel ineffective for making the improper comment in her closing argument that in a popularity contest, the jury would find Morrison more likeable than her client, Petitioner Aiken, and for telling the jury that Aiken returned the shoe expecting to receive a reward which painted Aiken in a bad light.

The State made its return to the Petition on December 12, 2013. The Supreme Court of South Carolina denied the petition on September 11, 2014, and issued the remittitur on September 20, 2014. The Clerk of Court for Charleston County filed the remittitur on October 2, 2014.

On August 19, 2015, Applicant filed a Section 2254 petition. On January 28, 2016, respondent filed a motion for summary judgment and a return and memorandum. By order filed the same date, pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), Applicant was advised of the summary judgment procedure and the possible consequences if he failed to

jm/3

adequately respond to the motion. After being granted three extensions of time, the petitioner failed to file a response. On June 8, 2016, Kevin F. McDonald, United States Magistrate Judge issued an order giving the petitioner through June 28, 2016 to file his response. On July 1, 2016, Applicant filed his response in opposition. Respondent filed a reply on July 11, 2016. On July 20, 2016, Applicant filed his affidavit stating that he put the response in opposition to the motion for summary judgment in the prison mailbox on June 27, 2016.

On July 26, 2016, the Honorable Kevin F. McDonald issued the Report and Recommendation that Respondent's motion for summary judgment be granted and Applicant's petition dismissed. Applicant filed his objection to the Report and Recommendation on September 21, 2016.

On September 29, 2016, the Honorable R. Bryan Hartwell, United States District Judge overruled all of Applicant's objections and accepted the Magistrate Judge's recommendation to grant Respondent's motion for summary judgment. The Court denied and dismissed Applicant's §2254 petition with prejudice and denied a certificate of appealability.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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).

Bm/4

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, 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.”

Applicant was convicted and sentenced on December 6, 1996. The remittitur from the direct appeal was issued on December 10, 1998. The application was therefore due on December 11, 1999. This application was filed on September 19, 2018, well beyond the statutory filing period. Therefore, the application shall be summarily dismissed for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

Successive Applications

The Court further finds the application 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

Bm/5

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.

Under this statute, 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. 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. 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 application for post-conviction relief; thus, the current application is successive and barred under S.C. Code Ann. § 17-27-90. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous applications for post-conviction relief. Therefore, he has failed to meet the burden imposed upon him, and the Court shall summarily dismiss the application as successive to Applicant’s previous PCR application.

CONCLUSION

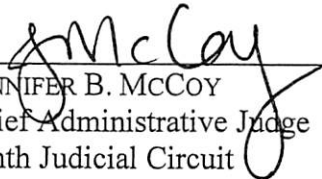
Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. Applicant shall file any reasons he may have with the Charleston County Clerk of Court and shall serve opposing counsel at the following address:

Bm/6

Office of the Attorney General
Attn: Benjamin Limbaugh, Esquire
PCR Division – 9th Circuit
P.O. Box 11549
Columbia, South Carolina 29211


Applicant is cautioned that his response to this order must be actually received by the Charleston County Clerk of Court and opposing counsel within twenty (20) 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 24 day of August, 2020.



JENNIFER B. MCCOY
Chief Administrative Judge
Ninth Judicial Circuit

Charleston, South Carolina

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., G.S. & F.C.
By 

DEPUTY CLERK

3m/7