

STATE OF SOUTH CAROLINA)
 COUNTY OF BERKELEY)
)
 Makandi L. Terry, #353344)
 Applicant,)
))
 v.)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 IN THE NINTH JUDICIAL CIRCUIT

Case No.: 2018-CP-08-244

**CONDITIONAL ORDER OF
 DISMISSAL**

DEAN GUERRY BURRICE
 CLERK OF COURT
 BERKELEY COUNTY, SC
 19 DEC -2 PM 3:13
FILED

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Makandi L. Terry (Applicant) on October 23, 2018. Respondent made its Return, requesting the application be summarily dismissed.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. The Applicant was indicted by the Berkeley County Grand Jury for murder (2009-GS-08-1912). Applicant was represented by William Thrower, Esquire. Bryan Alfaro, Esquire, prosecuted the case. On November 30, 2012, Applicant pled guilty to the lesser included offense of voluntary manslaughter. The Honorable R. Markley Dennis sentenced him to confinement for a period of eighteen years. Applicant did not appeal his conviction or sentence.

2013-CP-08-2228

In his first application for post-conviction relief Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
 - a. Induced and coerced Applicant to plead guilty.
 - b. Failed to put a defense at the sentencing stage.
 - c. Failed to challenge the prosecution's presentation of evidence.

- d. Failure to adequately develop and present evidence retrieved by prosecution.
 - e. Failed to make an independent investigation of the facts and circumstances of the case.
 - f. Failed to file an appeal.
 - g. Failed to call co-defendant's as eyewitnesses.
 - h. Counsel operated under a conflict of interest by working with an attorney that was discharged/fired from the same case and did not advise the Applicant that they were working with that attorney.
2. Involuntary guilty plea.
 - a. Would not have pled guilty if counsel had not misinformed him that the Judge would give less time due to the facts of the case.

An evidentiary hearing into the matter was convened on July 12, 2015 at the Charleston County Courthouse. Applicant was present and represented by Rodney Davis, Esquire. Respondent was represented by J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office. On August 28, 2015, by written Order, the Honorable Roger E. Henderson denied and dismissed the application with prejudice. Applicant subsequently filed a pro se Rule 59e Motion, the South Carolina Supreme Court refused to accept the motion because Applicant was represented by counsel.

On January 25, 2016, Benjamin John Tripp, Esquire, Appellate Defender for the South Carolina Commission on Indigent Defense, filed a Johnson Petition for Writ of Certiorari on Applicant's behalf. On December 16, 2016, the Supreme Court of South Carolina by written Order denied the petition and granted counsel's request to withdraw. The Remittitur was issued on January 4, 2017.

2016-CP-08-2607

The Applicant subsequently filed an application for PCR on November 1, 2016, in which he alleged the following grounds for relief:

1. "PCR Counsel failed to file a 59(e) to bring to the PCR Court's attention that it did not Rule on all issues presented."



The State filed a Return and Motion to Dismiss on August 25, 2017, requesting the circuit court summarily dismiss the action. This Court issued a Conditional Order of Dismissal provisionally dismissing the action on September 6, 2017. After receiving Applicant's *pro se* objections to summary dismissal, the Court issued a Final Order summarily dismissing the action with prejudice on December 13, 2017. Applicant's subsequent petition for writ of certiorari to the South Carolina Supreme Court for review of the PCR court's decision was denied on February 6, 2018. The remittitur was issued on April 17, 2018.

0:14-3870-JMC-PJG

Applicant filed a *pro se* Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 on March 10, 2016. Applicant set forth the following grounds for relief:

Ground One: Guilty Plea Not Knowingly, Voluntary And Intelligent

Supporting Facts: See memorandum attached

Ground Two: Counsel did not discuss the elements Ineffective Assistance of Counsel

Supporting Facts: See memorandum

Ground Three: Counsel Failed to move to withdraw Plea – Ineffective Assistance of Counsel

Supporting Facts: See memorandum

Respondent filed its Return and Motion for Summary Judgment on April 21, 2017. On August 18, 2017, the Honorable Thomas E. Rogers, III issued the Report and Recommendation that Respondent's motion for summary judgment be granted and Applicant's petition be denied. Applicant filed his objection to the Report and Recommendation on August 29, 2017.



On September 7, 2017, the Honorable David C. Norton, United States District Judge adopted the Magistrate's Report and Recommendation granting Respondent's Motion for Summary Judgment and dismissed Applicant's petition.

4:18-cv-00889-DCN

Applicant filed a *pro se* Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 on April 2, 2018. Applicant set forth the following grounds for relief:

1. "Petitioner Terry's case should be reversed and remanded based upon direct evidence of ineffective assistance of counsel in his failure to disclose any discovery to him under brady"
2. "Petitioner Terry's Fourteenth Amendment rights to due process and equal protection was violated by the failure of defense counsel and solicitor to provide him with pertinent discovery"
3. "The lower court lacked jurisdiction to convict petitioner Terry via a plea of guilt when petitioner never had possession of his discovery"

Respondent filed a Return and Motion for Summary Judgment. On April 11, 2018, the Honorable Thomas E. Rogers, III issued the Report and Recommendation that Respondent's motion for summary judgment be granted and Applicant's petition be denied. Applicant filed his objection to the Report and Recommendation on April 23, 2018.

On April 24, 2018, the Honorable David C Norton, United States District Judge adopted the Magistrate's Report and Recommendation granting Respondent's Motion for Summary Judgment and dismissed Applicant's petition.

CURRENT APPLICATION

In his third and current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully on the following grounds:

1. "Newly Discovered evidence"
 - a. "The following exhibits show that Applicant never had a full fair bite of the apple, as to his original PCR case. Plea counsel testified as witness for the state; in which state actually failed to prove he was effective under the United States Constitution and the State of South Carolina Law. This newly or after discovered



evidence shows plea counsel violated Applicant's fifth, sixth and fourteenth amendments to the United States Constitution to do coercion"

- b. "The showings also prove clearly that plea counsel gave inaccurate information to coerce Applicant into pleading guilty; also counsel testified to the courts the same inaccurate information on record which shows perjury on the face of the record; in which change the outcome of the case in original PCR hearing. With counsel actions is a violation of federal and state law"
- c. "Plea counsel testified on PCR record Applicant co-defendant would have testify against Applicant if case proceeding to trial, in which this perjury is shown under newly or after discovered evidence provided by co-defendant attorney (Andrew Savage letter dated January 17, 2018) Co-defendant did not meet with state, nor provided state with any statement or assistance in the case"

Before this Court are the Berkeley County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, Applicant's prior post-conviction relief action records, Applicant's federal habeas corpus action records, and the records for this post-conviction relief action.

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).

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 pled guilty on November 30, 2012. The application was therefore due on December 1, 2013. This application was filed on December 6, 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 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

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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.

Newly Discovered Evidence

Applicant’s assertion that he is being held in custody unlawfully as a result of newly-discovered evidence, such that he should be entitled to vacation of his sentence and immunity, is without merit. The Uniform Post-Conviction Relief Act states that a person may institute a post-conviction relief action if “there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.” S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of material fact not previously presented, the post-conviction relief application must be filed 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(C).

In South Carolina, a guilty plea is regarded as a waiver of non-jurisdictional defects and claims of violations of constitutional rights. State v. Rice, 401 S.C. 330, 331–32, 737 S.E.2d 485, 485–86 (2013) (citing Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). Therefore,

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an applicant requesting a new trial based on after-discovered evidence following a guilty plea must show that;

“(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. 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.”

Jamison v. State, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014).

Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing that he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Applicant has failed to make a showing that he is entitled to relief based on the information set forth and, therefore, he is not entitled to an evidentiary hearing in the matter. Accordingly, this matter must be summarily dismissed with prejudice.

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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 Berkeley County Clerk of Court and shall serve opposing counsel at the following address:

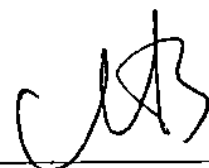
Office of the Attorney General
Attn: Benjamin Limbaugh, Esquire
PCR Division – 9th Circuit
P.O. Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Berkeley 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 _____ day of 11/22, 2019



Chief Administrative Judge
Ninth Judicial Circuit


_____, South Carolina



ALAN WILSON
ATTORNEY GENERAL

November 26, 2019

The Honorable Leah Guerry Dupree
Clerk of Court, Berkeley County
Post Office Box 219
Moncks Corner, South Carolina 29461-0219

Re: **Makandi Terry, #353344 v. State of South Carolina**
2018-CP-08-2440

Dear Ms. Dupree:

Enclosed please find the original **Conditional Order of Dismissal** signed by the Honorable Roger M. Young, Sr., in the above-captioned case, for filing in your office. In addition, please forward proof of service and a time stamped copy back to our office for our file.

Sincerely,

Benjamin H. Limbaugh
Assistant Attorney General

BHL/jj

cc: Makandi Terry, #353344 (without enclosure)