

STATE OF SOUTH CAROLINA  
COUNTY OF YORK

FILED-RECEIVED THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT  
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Willie J. Asbury, #200788,

2012-CP-46-2911

DAVID HAMILTON  
C.C.P. & G.S.  
YORK COUNTY, SC

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 August 13, 2012. The Respondent made its return and motion to dismiss on

February 20, 2013

**Procedural History**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Clerk of Court for York County. The Applicant was indicted at the April 1992 term of the York County Grand Jury for armed robbery (92-GS-46-1140), kidnapping (92-GS-46-1141), murder (92-GS-46-1142), and burglary 1st degree (92-GS-46-1143). He was represented by Gerald Smith and Harry Dest, Esquires. On September 7-9, 1993, the Applicant proceeded to trial and was convicted of murder and kidnapping. He was granted directed verdicts as to armed robbery and burglary. He was sentenced by the Honorable Don S. Rushing to confinement for life for murder.

A timely Notice of Appeal was filed on the Applicant's behalf and an appeal perfected. The South Carolina Supreme Court affirmed the Applicant's conviction and sentence by published

*John H. C.*

opinion on November 10, 1997. State v. Asbury, 328 S.C. 187, 493 S.E.2d 349 (1997). The Remittitur was issued on December 4, 1997.

**1998-CP-46-0710**

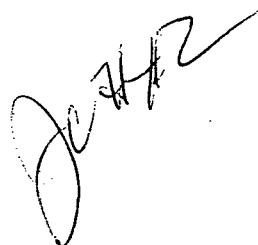
The Applicant subsequently filed an application for post-conviction relief (PCR) on April 3, 1998. The State made its Return on October 6, 1998. The Applicant alleged ineffective assistance of trial and appellate counsel and subject matter jurisdiction. An evidentiary hearing was convened on March 29, 1999. The Applicant was present at the hearing and represented by Allen Bullard, Esquire. The Honorable Dean Hall denied and dismissed with prejudice the Applicant's application by written Order dated March 6, 2000.

The Applicant then appealed this dismissal by filing a Petition for a Writ of Certiorari with the South Carolina Supreme Court. The Petition was denied by the South Carolina Court of Appeals on September 20, 2007. The Remittitur was sent on October 9, 2007.

**3:09-2557-DCN-JRM**

The Applicant then filed a Petition for Writ of Habeas Corpus in the Federal District Court for the District of South Carolina on September 28, 2009. [The Honorable Joseph R. McCrorey issued a Report and Recommendation on July 26, 2010, recommending that the action be dismissed. On September 23, 2010, the Honorable David C. Norton adopted the Report and Recommendation and granted the State's Motion for Summary Judgment, ~~denying the Applicant's Habeas Corpus claim.~~

The Applicant thereafter appealed to the Fourth Circuit Court of Appeals, who denied his certificate of appealability on February 23, 2011. The Fourth Circuit Court of Appeals also denied his Petition for Rehearing on April 5, 2011.

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In his current application for PCR, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"

- a. "counsels(sic) knowing and deliberately conspired with state prosecutor, by making crucial concessions at critical stages of pre-trial proceeding and trial to ensure Applicant(sic) conviction."
- b. "trial counsel(sic) failure to object to trial prosecutor failure to notify Applicant defense of the absence from the crime scene evidence inventory list..."
- c. "trial counsels(sic) deliberately failed to object to prosecutor knowingly use of perjury testimony."
- d. "trial counsels(sic) before and during trial failed to challenge or object to investigators knowing use of false information to establish probable cause to search his home and arrest him for this murder."

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court finds that the current application for post-conviction relief must be summarily dismissed because it is successive to his prior application 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 application 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 v. State, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 420 S.E.2d 834 (1992).

This Court additionally finds 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 judgement 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 offense(s) he challenges in this Application on September 9, 1993. The Remittitur was sent following the Applicant's unsuccessful appeal on December 4, 1997. Therefore, the Applicant had to file his application by December 5, 1998. This Application was filed on August 13, 2012, which was over thirteen (13) years after the statutory filing period 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

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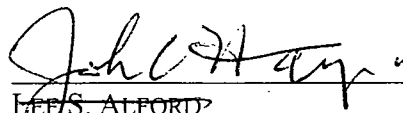
either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, this Court finds that the application for post-conviction relief is summarily dismissed for failure to file within the time mandated by statute and for being successive.

**CONCLUSION**

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

Office of the Attorney General  
Attn: J. Rutledge Johnson, Esquire  
P.O. Box 11549  
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 4<sup>th</sup> day of March, 2013.

  
LEE S. ALFORD  
Chief Administrative Judge #5  
Sixteenth Judicial Circuit

York, South Carolina