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JUL 09 2013

IN THE SUPREME COURT
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

COUNTY OF CHESTER

JOHN B. FENNEL, 244084
APPLICANT

NOTICE OF APPEAL

2012-CP-12-0077

V

THE STATE

RESPONDENT

NOW COMES THE APPLICANT IN THE ABOVE-CAPTIONED POST-CONVICTION MATTER GIVING NOTICE OF HIS INTENT TO APPEAL THE FINAL ORDER OF DISMISSAL DENYING HIS POST-CONVICTION RELIEF DATED MAY 24, 2013 AND RECEIVED BY THE APPLICANT ON JUNE 5, 2013, ISSUED BY THE HONORABLE J. ERNEST KINARD JR. THE ORDER OF DISMISSAL WAS FILED WITH THE CHESTER COUNTY CLERK OF COURT ON MAY 31, 2013. THE APPLICANT PRAYS THAT HE WILL BE ABLE TO PRESENT HIS CASE FOR THE FIRST TIME SO HE CAN GET A "FULL BITE OF THE APPLE."

John B. Fennell
PERRY CORRECTIONAL INSTITUTE
430 OAKLAWN RD
PELZER, SC 29669

THIS 3rd DAY OF JULY, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHESTER COUNTY
COURT OF COMMON PLEAS

J. ERNEST KILNARD JR., PRESIDING JUDGE.

2012 - CP - 12 - 0077

JOHN B. FENNELL

APPLICANT

THE STATE

RESPONDENT

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES THAT ONE COPY OF THE APPLICANT'S NOTICE OF APPEAL IN THE ABOVE-ENTITLED CASE HAS BEEN SERVED UPON OPPOSING COUNSEL SUZANNE H. WHITE, ASSISTANT ATTORNEY GENERAL, BY MAILING IN AN ENVELOPE PROPERLY ADDRESSED WITH POSTAGE PREPAID ON THIS 3rd DAY OF JULY, 2013.

SWORN TO BEFORE ME THIS
3rd DAY OF JULY, 2013.

Nancy S. Merchant
NOTARY PUBLIC FOR SOUTH CAROLINA
1-23-2023

MY COMMISSION EXPIRES

John B Fennell
JOHN B FENNELL
APPLICANT

COUNTY OF Chester

John Bennett Fennell #244804

Applicant

versus
State of South Carolina

6880

FILE NO: 2012CP1200077

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the Final Order
this action, dated May 24, 2013, on John Bennett Fennell (Document Served)
(Name of person served) #244804 by

- delivering it to him/her personally; or,
- mailing it to him/her, at his/her last known address, by depositing it in the U.S. mail, in an envelope with sufficient postage affixed, addressed as follows:

John Bennett Fennell
Perry Correctional Institution
439 Oak Lawn Road
Peizer, South Carolina or 29669

FILED
2013 MAY 31 2 1:40
CLERK OF COURT
CHESTER CO S.C.

Other: _____

[See Rule 5(b)(1), SCRCP]

5/31/2013

(Date)

Doug Johnson
(Signature)

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHESTER)
)
 John Bennett Fennell, #244084,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 SIXTH JUDICIAL CIRCUIT

2012-CP-12-0077

FINAL ORDER

FILED
 2013 MAY 31 A 9:45
 CLERK OF COURT
 CHESTER CO S.C.

This matter comes before this Court by way of an application for post-conviction relief filed February 2, 2012. Respondent made its Amended Return and Motion to Dismiss on or about June 29, 2012, requesting that the application be summarily dismissed.

Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal filed August 30, 2012, provisionally denying and dismissing this action, while giving Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. Attached to this Final Order and incorporated herein by reference is an Affidavit of Service dated September 24, 2012, serving the above-mentioned Conditional Order of Dismissal on the Applicant.

In letters received June 21, 2012, and July 21, 2012, Applicant requests that the Attorney General's Office appoint counsel and grant him an evidentiary hearing, so that he can "tell his side of the story."

In a document captioned "Response to Conditional Order of Dismissal," dated September 10, 2012, Applicant argues that his application should not be summarily dismissed based on the Statute of Limitations, the Doctrine of Successiveness, and his failure to state a cognizable claim.


Applicant claims that his post-conviction relief counsel was “ineffective for excluding all the points raised in his two merger PCR applications...this amounts to about nine points for relief that have never been presented or heard.” Applicant alleges that, as a result, he “feels he has never gotten ‘a full bite of the apple.’” Aice v. State, 409 S.E.2d 392 (S.C. 1991). Applicant also asserts that he was mentally incapable of “conform[ing] his actions to the requirement of the law” at the time of his crime

This Court has reviewed Applicant’s responses to the State’s Conditional Order of Dismissal in its entirety, in conjunction with the original pleadings, and finds that a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final. This Court finds that Applicant’s current Application is successive to Applicant’s two previously filed applications, was filed outside the statute of limitations, and failed to state a cognizable claim.

IT IS THEREFORE ORDERED that, for the reasons set forth in the Court’s Conditional Order of Dismissal, the Application for PCR is hereby denied and dismissed with prejudice.

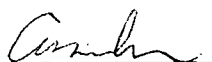
This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

AND IT IS SO ORDERED this 24 day of May, 2013.



J. Ernest Kinard, Jr.
Administrative Judge – Common Pleas
Sixth Judicial Circuit

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CLERK OF COURT
WINSTON CO. S.C.

, South Carolina.

6/30

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHESTER)
)
John Bennett Fennell #244084,)
)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

2012-CP-12-0077

CONDITIONAL ORDER OF DISMISSAL

FILED
2012 AUG 30 2 33 PM
CLERK OF COURT
CHESTER CO S.C.

This matter comes before this Court by way of an application for post-conviction relief filed February 2, 2012. Respondent made its Return and Motion to Dismiss on or about June 29, 2012.

I. PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Chester County. The Applicant was indicted at the October 1996 term of the Court of General Sessions for Chester County for assault and battery with intent to kill and possession of a weapon during the commission of a violent crime (96-GS-12-593). The Applicant was subsequently indicted during the January 1997 term of the Court of General Sessions for Chester County for murder (917-GS-12-32). He was represented by Tom Hall, Esquire. On September 17, 1997, the Applicant proceeded to trial and was found guilty but mentally ill of the indicted offenses. He was sentenced by the Honorable Paul E. Short, Jr. to confinement for life for murder, twenty (20) years for ABWIK, and five (5) years for possession of a weapon during the commission of a violent crime.

A timely Notice of Appeal was filed and a brief pursuant to Anders v. California, 386 U.S. 738 (1967) was filed on the Applicant's behalf. Subsequently, an amended brief was also submitted on

Applicant's behalf. The Court of Appeals dismissed the appeal by order refiled May 1, 2000 (State v. Fennell, Op. No. 25097). The Remittitur was issued on May 17, 2000.

2000-CP-12-218

The Applicant subsequently filed his first application for post-conviction relief (PCR) on August 7, 2000, and amended September 12, 2001. In that application, Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel; and
2. Lack of subject matter jurisdiction.

An evidentiary hearing was convened at the Fairfield County Courthouse on June 3, 2003. The Applicant was present and represented by Bruce Poore, Esquire. Allen Bullard of the South Carolina Attorney General's Office represented the Respondent. At the hearing, the Applicant elected to withdraw his PCR application. By written Order dated June 25, 2003, and filed July 3, 2003, this Court dismissed the application with prejudice. The Applicant subsequently filed a Motion to Alter or Amend Judgment pursuant to Rule 59(e), SCRCP, requesting to withdraw the dismissal of his application. By written Order dated April 27, 2004, and filed May 4, 2004, this Court vacated its order of Dismissal dated June 25, 2003, and restored the application.¹

Tara D. Shurling, Esquire, was substituted as counsel, and Mr. Poore was relieved on August 4, 2004. On August 2, 2005, Ms. Shurling filed an Amended PCR application on Applicant's behalf alleging ineffective assistance of trial counsel and appellate counsel. However, at the PCR evidentiary hearing, the Applicant waived the claims alleging ineffective assistance of appellate counsel.

¹ Prior to the restoration of the August 7, 2000 application (2000-CP-12-218), the Applicant filed another PCR application on these convictions on January 12, 2004 (2004-CP-12-004). By written Order dated July 27, 2004, and filed August 4, 2004, this Court merged the two actions. The latter application (2004-CP-12-004) was merged into the original application (2000-CP-12-218). Case 2000-CP-12-218 became the surviving file, and 2004-CP-12-004 was dismissed upon merger.

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FAIRFIELD COUNTY S.C.

An evidentiary hearing was held on August 9, 2005, before the Honorable Kenneth G. Goode. Applicant was present and represented by Tara D. Shurling, Esquire. Respondent was represented by Molly R. Crum of the South Carolina Attorney General's Office. Judge Goode denied the application by written Order dated November 21, 2005.

The Applicant filed a timely Notice of Appeal. Following the submission of a brief pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), the South Carolina Supreme Court denied certiorari and the Remittitur was issued on October 16, 2007.

2007-CP-12-382

The Applicant subsequently filed another PCR application on August 10, 2007. In this application, Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel.

The Respondent made its Return and Motion to Dismiss on January 24, 2008, and a hearing was convened on February 26, 2008. The Applicant was present at the hearing and was represented by Leah B. Moody, Esquire. The Respondent was represented by S. Prentiss Counts of the South Carolina Attorney General's Office. The Honorable Kenneth G. Goode denied the application by written Order filed May 5, 2008, ruling the application was successive and filed outside of the statute of limitations.

A timely Notice of Appeal was filed on behalf of the Applicant. In a letter dated May 5, Daniel E. Shearhouse, Clerk of Court, alerted Leah B. Moody, Esquire, to the requirements of Rule 227(c) of the South Carolina Appellate Court Rules. In a letter dated May 21, 2008, Ms. Moody provided a letter to the Court pursuant to Rule 227(c) asserting she was unable to set forth an arguable basis for asserting the determination by the PCR Judge was improper. The Supreme Court of South Carolina dismissed the Applicant's appeal pursuant to Rule 227(c) on June 24, 2008. The Remittitur was issued on July 10,

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2008.

Applicant's Current PCR Application

In his current application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel; in that,
 - a. "Counsel failed to argue that an arrest is the initial stage of a criminal prosecution,"
2. Ineffective assistance of appellate counsel.
3. Ineffective assistance of PCR counsel; in that,
 - a. "Applicant asked his attorney[] to amend his pro se application to include all supporting grounds of ineffective assistance of trial counsel which appear in the present application. However, PCR counsel[] failed to do so,"
4. Ineffective assistance of PCR appellate counsel; in that,
 - a. Counsel failed to argue ineffective assistance of PCR counsel on appeal.

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Before this Court are the records of the Chester County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, Applicant's PCR application, and Respondent's Return and Motion to Dismiss.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Statute of Limitations

This Court 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 (2003). 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 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.

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 offenses he challenges in this Application on September 17, 1997. The Applicant's appeal was denied and Remittitur was issued on May 17, 2000. The Applicant was therefore required to file the application before May 17, 2001. This Application was filed on February 2, 2012, which was more than eleven 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) (2003) 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."

Therefore, this Court finds that the current Application application for post-conviction relief is summarily dismissed for failure to file within the time mandated by statute.

Successive Application

This Court finds that the current Application is summarily dismissed because it is successive to the previous application for post-conviction relief. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90 (2003) 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.

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CHESTER CO. S.C.



Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to 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." [Emphasis in original]. Id., 305 S.C. 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. The Applicant bears the burden of showing that the allegations could not have been raised previously. Land, Id.

The Applicant could have raised the new grounds for relief in his prior post-conviction relief application. The Applicant has failed to present any reasons why he could not have raised the current allegations in his previous post-conviction relief applications. Accordingly, this Court finds it is summarily dismissed as successive.

Failure to State a Claim

This Court summarily dismisses the Applicant's current Application for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10, 19-160 (2003). Applicant may commence a post-conviction relief action on the following grounds:

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SOUTH CAROLINA

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy.... S.C. Code Ann. § 17-27-20 (1976).

Even if the facts alleged by the Applicant are true, these facts do not support a cognizable claim for post-conviction relief under any of the statutory grounds. The Applicant's contention that he received ineffective assistance of counsel on his prior post-conviction relief application is not a ground for relief. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Therefore, "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under §17-27-90." Aice, 305 S.C. at 451, 409 S.E.2d at 394. This Court therefore summarily dismisses this allegation pursuant to S.C. Code Ann. § 17-27-70(c) (2003).


Summary

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

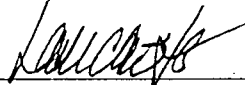
Suzanne H. White, Esquire
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

2015 AUG 20 3:23
CLERK OF COURT
CHESTER COUNTY
S.C.

AND IT IS SO ORDERED this 29 day of August, 2012.



Brooks P. Goldsmith
Administrative Judge – Common Pleas
Sixth Judicial Circuit

, South Carolina

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CLERK OF COURT
CHESTER CO S.C.

John B Fennell 244084
039124

Henry Amstrong Institute
430 Oakland Pl

Robert, Jr 29669

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The Supreme Court of South Carolina

P.O. Box 11330

Columbia, SC 29211

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JUL 05 2013

P.C.I. MAILROOM

LEGAL MAIL

"THE DEPARTMENT OF CORRECTIONS HAS NOT CENSORED THIS
ITEM. THEREFORE, THE DEPARTMENT DOES NOT ASSUME
RESPONSIBILITY FOR ITS WRITTEN CONTENTS - (R.C. DEPARTMENT
OF CORRECTIONS.)"

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