

RECEIVED

JUL 18 2013

SC Court of Appeals

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 Legare, Albert, # 191449,)
)
 Petitioner,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 2013-CP-10-425

FILED
 2013 JUN 14 AM 9:42
 JULIE J. ARMSTRONG
 CLERK OF COURT
 BY _____

ORDER DISMISSING PETITION FOR
 WRIT OF HABEAS CORPUS

This matter comes before the Court by way of a document filed February 6, 2013, and captioned "PETITION FOR WRIT OF HABEAS CORPUS." The Respondent submitted a Return and Motion to Dismiss. This Order follows.

I.

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. At the March 1992 term of the Court of General Sessions, the Charleston County Grand Jury indicted Petitioner for armed robbery (92-GS-10-1412), assault and battery with intent to kill (92-GS-10-1413), and attempted armed robbery (92-GS-10-1414).

At trial, Petitioner was represented by William Thrower, Esquire. On November 9, 1992, the Petitioner proceeded to trial and was found guilty as indicted. The Honorable Jackson V. Gregory sentenced the Petitioner to twenty-five (25) years for armed robbery; twenty (20) years for assault and battery with intent to kill; and ten (10) years for attempted armed robbery. All the sentences are to be served consecutively.

On November 17, 1992, Petitioner filed a timely Notice of Appeal. Robert Pachak, Esquire, was appointed to represent the Petitioner on appeal. The South Carolina Supreme Court denied the Petitioner's *pro se* motion to relieve Pachak and appoint new counsel.

On December 23, 1993, Attorney Pachak filed a Final Brief addressing the following issues:

Whether the trial court erred in overruling defense counsel's objections and motion for a mistrial to Detective Thornhill's hearsay testimony relating to how appellant came to be arrested.

The State filed a Final Brief and the South Carolina Supreme Court heard oral arguments on December 4, 1994. The Supreme Court affirmed the Petitioner's convictions and sentences in a memorandum opinion pursuant to Rule 220(b)(1), SCAR. See State v. Legare, Memo Op. No. 95-MO-020 (S.C. Sup. Ct. filed January 13, 1995) (citing State v. Pollard, 260 S.C. 457, 196 S.E.2d 839 (1973), and State v. Dennison, 305 S.C. 161, 406 S.E. 2d 383 (Ct. App. 1991)). The Remittitur was issued on January 31, 1995.

The Petitioner subsequently filed an Application for Post-Conviction Relief on February 27, 1995 (95-CP-10-777). In his Application, the Petitioner asserted:

4. Denial of effective assistance of counsel.
 - a. Failure to investigate.
 - b. Failure to interview witnesses.
 - c. Erroneous advice on the current law concerning preservation of his right to appeal based on exception.
 - d. Ineffective in his prosecution of his motion to exclude prior convictions.
 - e. Failure to object to consecutive sentencing.
5. Ineffective assistance of appellate counsel.
 - a. Court erred by denying motion to relieve appellate counsel.
6. Denial of due process of law.
 - a. Court erred by not allowing him to proceed *pro se*.

The State made its Return on April 17, 1995. On April 30, 1996, the Honorable Larry R. Patterson conducted an evidentiary hearing on Petitioner's PCR. Petitioner was represented by



Harry L. Devoe, Jr., Esquire. By written Order filed May 29, 1996, Judge Patterson granted the Petitioner's application for post-conviction relief and reversed and vacated his convictions and sentences.

On June 7, 1996, the State filed its Notice of Intent to Appeal from Judge Patterson's Order granting relief. On September 10, 1996, the State filed a Petition for Writ of Certiorari to the South Carolina Supreme Court. The South Carolina Supreme Court granted the State's Petition on May 27, 1997. After full briefing, the order granting post-conviction relief was reversed. Legare v. State, 333 S.C. 275, 509 S.E.2d 472 (1998). The Petitioner filed a Petition for Rehearing on December 23, 1998. On January 6, 1999, the Supreme Court denied the Petitioner's Petition for Rehearing and issued the Remittitur.

The Petitioner subsequently filed a Petition for Writ Habeas Corpus on February 10, 1999 in the U.S. District Court for the District of South Carolina. The original document was *pro se*. After later retaining previous counsel, the Petitioner filed his writ of habeas corpus on October 19, 1999. On August 25, 2001, the Honorable Margaret B. Seymour entered an Order granting the State's motion for summary judgment and dismissed the Habeas Corpus petition with prejudice. The Petitioner appealed to the Fourth Circuit Court of Appeals and his appeal was dismissed. Legare v. Rushton, et al, No. 99-7431 (4th Cir. April 24, 2001)(unpublished).

Petitioner filed a second Application for Post-Conviction Relief on September 6, 2001 (2001-CP-10-3435). The Petitioner alleged he was being held in custody unlawfully for the following reason:

2. The Charleston County Courthouse lacked subject matter jurisdiction.
 - a. The indictments were deficient because they failed to allege the time and place of the crime and were not filed.
 - b. Miranda rights were not provided.

Respondent made a Return and Motion to Dismiss on November 15, 2001. On June 6, 2002, a hearing was convened before the Honorable R. Markely Dennis. The Petitioner was present and represented by William B. Jung, Esquire. On July 11, 2002, Judge Dennis filed an Order signed July 3, 2001. By written Order, Judge Dennis denied and dismissed the Petitioner's Application for Post-Conviction Relief on the grounds it was successive, filed beyond the statute of limitations, and the claims respecting subject matter jurisdiction were without merit. The Petitioner did not appeal the denial of his application.

The Petitioner filed a third Application for Post-Conviction Relief on July 3, 2002 (02-CP-10-2854). The Petitioner alleged he was being held in custody unlawfully for the following reason:

3. Violation of S.C. Code § 17-27-80 in that the prior PCR order failed to make findings of fact and conclusions of law.
4. The Charleston County Courthouse lacked subject-matter jurisdiction because of double jeopardy, Rule 3 of the South Carolina Criminal Procedure was violated, and Miranda rights were not provided.

The State filed its Return on November 6, 2002. On March 13, 2003, an evidentiary hearing was held before the Honorable R. Markley Dennis, Jr., at which the Petitioner was present and voluntarily withdrew his Application. By Order dated March 13, 2003, Judge Dennis denied and dismissed the Petitioner's application with prejudice. The Petitioner did not appeal.

Petitioner filed his fourth Application for Post-Conviction Relief on February 16, 2005 (2005-CP-10-0645). The Petitioner alleged he was being held in custody unlawfully for the following reason:

3. Lack of subject matter jurisdiction.
4. Lack of subject matter jurisdiction in the Court of Appeals.



The State filed its Return and Motion to Dismiss on November 7, 2005. On January 18, 2006, an evidentiary hearing was held before the Honorable Daniel F. Pieper. By Order dated March 3, 2006, Judge Pieper denied and dismissed the Petitioner's application.

The Petitioner filed a Rule 59(e) motion and on September 26, 2006 Judge Piper stayed the case to determine if the Petitioner's amended application would affect the issue ordered on March 3, 2006. During the pendency of the stay, Petitioner filed a Notice of Appeal on February 13, 2006. On March 2, 2006, the premature appeal was dismissed without prejudice until the trial court issued a final order in the Petitioner's then pending post-conviction relief action. Judge Pieper issued an Order on October 25, 2007, which denied Petitioner's Application for Post-Conviction Relief.

Petitioner subsequently filed a Notice of Appeal *pro se*. On December 27, 2007, the Petitioner's appeal as dismissed on the grounds Petitioner failed to provide proof of service pursuant to Rule 221(b). The Remittitur was sent January 15, 2008.

On April 23, 2008 Petitioner filed a motion under 28 U.S.C. § 2244, order authorizing District Court to consider second or successive application for relief under 28 U.S.C. §§ 2254 or 2255, at the United States Court of Appeals for the Fourth Circuit. Judge King with the concurrence of Judge Niemeyer and Senior Judge Hamilton dismissed Petitioner's motion on May 28, 2008. In re: Albert Legare, No. 08-163 (4th Cir. May 28, 2008) (unpublished).

The Petitioner filed his current Petition for Writ of Habeas Corpus on February 6, 2013. In his Petition he alleges the following:

9. Writ of certiorari granted to State in 1997 PCR appeal based on the application of ex post facto violations and new rules of law.
10. Conviction obtained in violation of ex post law.
11. Conviction obtained by use of poisonous tree doctrine.
12. Conviction obtained by the use of inadmissible witness testimony from Walker.

13. Conviction obtained in violation of Rule of Evidence 609.
14. Certiorari and appeal of grant of PCR untimely.
15. Conviction obtained when the court lacked subject matter jurisdiction.
16. Continued incarceration after grant of PCR.

This Court has reviewed the Petitioner's indictments and sentencing sheets, prior applications for Post-Conviction Relief, prior orders of dismissal, appellate documents, and orders dismissing prior habeas petitions.

II.

"A habeas corpus petition must support the requested relief." Gibson v. State, 329 S.C. 37, 40, 495 S.E.2d 426, 427 (1998) (citations omitted). Although the allegations in the petition are to be treated as true, the Petitioner must make out a prima facie case showing he is entitled to relief and he must present sufficient factual allegations to support the petition before he is entitled to a hearing. Id. at 40, 495 S.E.2d at 427-28.

To warrant a hearing, the petition must include the two allegations described below. First, the petition must allege the petitioner has exhausted all available post-conviction relief (PCR) remedies. Simpson v. State, 329 S.C. 43, 46, 495 S.E.2d 429, 431 (1998); Gibson, 329 S.C. at 42, 495 S.E.2d at 428. "Exhaustion includes filing of an application, the rendering of an order adjudicating the issues, and petitioning for, or knowingly waiving, appellate review." Gibson, 329 S.C. at 42, 495 S.E.2d at 428. Second, the petition must allege sufficient facts to show why other remedies, such as PCR, are unavailable or inadequate. Id. PCR is not rendered "unavailable or inadequate" merely because the petitioner's application might be dismissed as procedurally barred.

In fact, any matter that is cognizable under the Uniform Post Conviction Procedure Act, S.C. Code Ann. §§ 17-27-10 to -120 (2003), "must be raised in PCR application, and may not be

raised by a petition for a writ of habeas corpus before the circuit or other lower courts.” Al-Shabazz v. State, 338 S.C. 354, 365, 527 S.E.2d 742, 748 (2000); Simpson v. State, 329 S.C. 43, 46, 495 S.E.2d 429, 431 (1998). The Uniform Post Conviction Procedure Act (the Act) is “broadly inclusive and will rarely be inadequate or unavailable to test the legality of the detention.” Gibson, 329 S.C. at 41, 495 S.E.2d at 428. A petitioner may even allege constitutional violations in PCR proceedings, unless the issue could have been raised by the petitioner on direct appeal. Id.

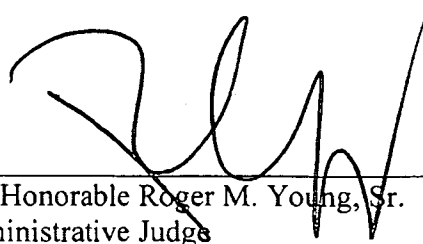
Thus, “[a] person is procedurally barred from petitioning the circuit court for a writ of habeas corpus where the matter alleged is one which could have been raised in a PCR application.” Keeler v. Mauney, 330 S.C. 568, 571, 500 S.E.2d 123, 124 (Ct. App. 1998). “Furthermore, if a person is procedurally barred, his only means of obtaining state habeas corpus relief is to file a petition in the original jurisdiction of the Supreme Court.” Id.

This Court agrees with the Respondent that the claims made in the Petition for Writ of Habeas Corpus could have been raised in a post-conviction relief application. Therefore, these claims cannot be raised in a Petition of Habeas Corpus in the Circuit Courts of South Carolina. Accordingly, the Petition should be summarily dismissed.

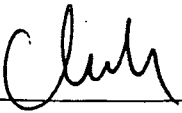
III.

IT IS THEREFORE ORDERED that the Petition for Writ of Habeas Corpus is hereby denied and dismissed with prejudice.

AND IT IS SO ORDERED this 12th day of June, 2013.
RS



The Honorable Roger M. Young, Sr.
Administrative Judge
Ninth Judicial Circuit

, South Carolina.