STATE OF SOUTH CAROLINA COUNTY OF YORK	IN THE COURT OF COMMON PLEAS FOR THE SIXTEENTH JUDICIAL CIRCUIT
Dwayne Housey, #328012, Applicant, v.	Case No.: 2018-CP-46-0933 **FINAL ORDER OF DISMISSAL**
State of South Carolina, Respondent.	

This matter comes before the Court by way of an application for post-conviction relief filed by Applicant Dwayne Housey on March 30, 2018. Respondent the State of South Carolina made its return and motion to summarily dismiss the action. The Court issued a conditional order of dismissal expressing its intention to summarily dismiss the PCR action as procedurally barred as improperly successive, untimely, and failing to establish newly discovered evidence pursuant to the Uniform Post-Conviction Procedures Act, S.C. Code Ann. § 17-27-10 et seq. The Court granted Applicant twenty days from the date of service of the order upon him to explain why the order should not become final.

The conditional order was served upon Applicant on September 22, 2022. On October 11, 2022, Applicant filed a Return to the Conditional Order of Dismissal. On September 26, 2023, Applicant submitted a Request for Hearing, asking that an evidentiary hearing be held in this matter. The Court finds that Applicant has failed to adequately explain why the Conditional Order of Dismissal should not become final. Accordingly, the Court grants the State's motion to summarily dismiss this PCR action with prejudice.

Findings of Fact and Conclusions of Law

The procedural history of Applicant's trial, appeal, habeas corpus petition, and two prior PCR applications can be found in this Court's Conditional Order of Dismissal. In addition, the

Court's findings that the present PCR application is improperly successive and untimely have not been challenged. Applicant contends, rather, that the Court misapplied the factors of Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983), regarding Applicant's newly-discovered evidence claim.

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).

A defendant requesting a new trial based on after-discovered evidence must show that the evidence:

1. Is such as would probably change the result if a new trial was held;
2. Has been discovered since the trial;
3. Could not, by the exercise of due diligence, have been discovered before the trial;
4. Is material to the issue of guilt or innocence; and
5. Is not merely cumulative or impeaching.

Hayden, 278 S.C. at 611-12, 299 S.E.2d at 855; Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993).

As "newly-discovered evidence," Applicant points to an unsigned, undated document[1] purportedly written by Jemyle Wilson, a co-defendant who testified against Applicant at trial. This

[1] Applicant uses the term "affidavit" for this document. However, the document is not signed, nor is there any indication that the author was under oath. See 3 Am. Jur. 2d Affidavits § 9 ("Generally, an affidavit must . . . have the affiant's signature attached. . . . A statement which does not show that the person who made it was under oath is not an affidavit.").

document states that Wilson never saw Applicant "deal, sell, or manufacture[] any drugs." Applicant characterizes this document as a "recantation" of Wilson's trial testimony, and he claims an evidentiary hearing is necessary to assess its credibility compared to the testimony given at trial, citing State v. Deese, 266 S.C. 534, 538, 225 S.E.2d 175, 176 (1976) ("When testimony is in conflict and depends on the credibility of the new evidence, it is the duty of the trial judge to assess the evidence.").

The Court disagrees. First of all, State v. Deese is easily distinguishable. In Deese, the "new evidence" was in the form of testimony by new witnesses, rather than *recantation* of testimony by a witness who had already testified. Recantation evidence is notoriously unreliable. See, e.g., State v. Porter, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1997) ("Recantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial."); U.S. v. Johnson, 487 F.2d 1278, 1279 (4th Cir. 1973) ("Where a motion for a new trial is based upon recantation of testimony given at the trial, such recantation is 'looked upon with the utmost suspicion.'"); State v. Parker, 249 S.C. 139, 141–42, 153 S.E.2d 183, 184 (1967) ("We have also held that recantation of testimony ordinarily is unreliable . . . To hold such affidavits sufficient to require the granting of a new trial would be to open the door to fraud and perjury, as well as to invite interminable delays in the disposition of causes."). See also Dobbert v. Wainwright, 468 U.S. 1231, 1233–34 (1984) (Brennan, J., dissenting) ("Recantation testimony is properly viewed with great suspicion. It upsets society's interest in the finality of convictions, is very often unreliable and given for suspect motives, and most often serves merely to impeach cumulative evidence rather than to undermine confidence in the accuracy of the conviction."). Moreover, the testimony in Deese was offered in a post-trial hearing, after Deese's conviction but before sentencing—not a PCR case. The State's interest in the finality of convictions is much

weaker in post-trial matters held immediately after the verdict than it is in successive post-conviction relief cases many years later. Contrary to Applicant's reading, nothing about the Deese case implies that a PCR court *must* hold an evidentiary hearing to determine credibility whenever a PCR applicant alleges that one of the witnesses at his trial has since recanted his testimony.

Second, as the Court found in the Conditional Order of Dismissal, the document's claim that Wilson had never "seen [Applicant] deal, sell, or manufacture[] any drugs" does not actually conflict with Wilson's testimony at trial. At trial, Wilson testified that Applicant gave him packages of cocaine to deliver to Applicant's co-conspirator, Alicia Ellis. Wilson never claimed that he personally saw Applicant dealing, selling, or manufacturing drugs.

Applicant now argues that Wilson's testimony that he acted as a courier carrying drugs from Applicant to Ellis necessarily implied that Applicant was engaged in the business of dealing drugs. While that is the obvious implication of Wilson's testimony, the "affidavit" attached to Applicant's PCR does not say Applicant *was not* dealing drugs. That document merely says Wilson did not *see* Applicant dealing drugs, which is consistent with Wilson's testimony at trial.[2]

In the Conditional Order of Dismissal, this Court found that the result of the trial was not likely to change even if Wilson recanted his testimony, because Wilson's testimony was cumulative to other inculpatory evidence in the record: the testimony of Ellis, the testimony of the investigating officers, and Applicant's own incriminating statements. Applicant has not demonstrated how any of this additional evidence would be impacted by Wilson's recantation. Therefore, he has failed to refute the Court's assessment of the first Hayden factor.

[2] The fact that the so-called "affidavit" is so equivocal on this point strongly suggests that it was not written as a good-faith attempt to correct false testimony, but as a "half-truth" deliberately chosen to obfuscate the facts of Wilson's involvement. If Wilson truly meant to say that he had never acted as a drug courier for Applicant, he could have said so. The circumlocution employed by the "affidavit" is telling.

Applicant then challenges the Court's finding that the purported recantation fails to satisfy the fifth Hayden factor because it is merely cumulative and impeaching. Applicant claims the document is not merely impeaching because it is "wholly different than the evidence presented at trial." On the contrary, the document is merely impeaching, because its only purpose is to discredit Wilson's trial testimony. In addition, as the Court pointed out in the Conditional Order of Dismissal, the document is merely cumulative to other evidence presented at trial tending to impeach Wilson's credibility, including defense counsel's cross-examination of Wilson about his hope for leniency in exchange for his testimony against Applicant. (ROA pp.158–59; pp.180–81).

Having considered Applicant's response to the Conditional Order of Dismissal, the Court can see no reason why that order should not become final. Because the purported "affidavit" does not satisfy all the Hayden factors, it cannot be considered "newly-discovered evidence" in order to excuse the filing of a successive and untimely PCR application. Because Applicant has not sufficiently explained why the Conditional Order of Dismissal should not become final, the Court now grants the State's motion to summarily dismiss Applicant's PCR action. See S.C. Code Ann. § 17-27-70(b) (establishing procedure for summary disposition of PCR applications); Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief).

CONCLUSION

IT IS THEREFORE ORDERED that, for the reasons set forth above and in the Court's Conditional Order of Dismissal, this application for post-conviction relief is hereby **DENIED AND DISMISSED WITH PREJUDICE.**

This Court hereby advises Applicant he must file and serve a notice of appeal within thirty days of the service of this Order to secure appellate review. *See* Rule 203, SCACR. Applicant' s attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 29th day of September, 2023.

DANIEL DEWITT HALL
Chief Administrative Judge
Sixteenth Judicial Circuit

York, South Carolina