THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM PICKENS COUNTY

Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2021-CP-39-0677

Demossio Valentine #242226.....Petitioner,

v.

State of South Carolina.....Respondent,

NOTICE OF APPEAL

Petitioner appeals the Honorable Grace Gilchrist Knie's Order of Dismissal dismissing petitioner's application for post-conviction relief. On December 18th, 2023, the court signed an order dismissing Petitioner's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on December 28th, 2023. A copy of the Order of Dismissal is attached.

January 3rd, 2024

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF PICKENS)

Demossio M. Valentine, #242226, Applicant, v. State of South Carolina, Respondent.	Case No.: 2021-CP-39-677 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Demossio M. Valentine. This is Applicant's second PCR action. The State moved to dismiss the application as untimely, improperly successive and barred under *res judicata*. A motion hearing was held at the Greenville County Courthouse on September 20, 2023. Applicant was present and represented by counsel, Sarah M. Henry, Esq., Senior Assistant Deputy Attorney General Melody J. Brown represented the State. At the conclusion of the hearing, this Court took the matter under advisement. After careful consideration of the records, arguments, and the controlling case law, this Court finds that the State's motion should be granted and that the action must be DISMISSED for the specific reasons set out in this order.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections in Tyger River Correctional Institution pursuant to orders of commitment from the Pickens County Clerk of Court. In December of 2011, a Pickens County Grand Jury indicted Applicant for second-degree criminal sexual conduct with a minor (2011-GS-39-2206). Then, in February 2012 term, the grand jury indicted him for distribution of cocaine base (2011-GS-39-2047), and distribution of cocaine

base within a half-mile of a school (2011-GS-39-2048). During its October 2013 term, the grand jury indicted Applicant for four counts of attempted murder (2013-GS-39-2713; -2716; -2715; and 2714), possession of a weapon during the commission of a violent crime (2013-GS-39-2728), two counts of distribution of cocaine base (2013-GS-39-2719; -2717), and two counts of distribution of cocaine base within a half-mile of a school (2013-GS-39-2720;-2718).

On September 15, 2014, Applicant appeared before the Honorable G. Edward Welmaker and pleaded guilty to distribution of cocaine base, third offense (2011-GS-39-2047). John W. DeJong, Esq., represented Applicant. The facts as presented by the State, which Applicant admitted were "substantially" true, reflected: "On November 23rd, 2010, in Pickens County within the city limits of Easley, [Applicant] sold .19 grams of crack cocaine to a confidential informant working under the supervision and direction of the Easley Police Department." (Return Attachment, App. at 6).[1] Judge Welmaker sentenced Applicant to imprisonment for 189 months. The State later dismissed, citing prosecutorial discretion, the charges for attempted murder (2013-GS-39-02713; 02714; 02715; 02716), two counts of distribution of cocaine base within a half-mile of a school (2013-GS-39-2718; 02720), two counts of distribution of cocaine base, third offense (2013-GS-39-02717; 02719), possession of a weapon during the commission of a violent crime (2013-GS-39-02728), and pointing a presenting a weapon (2014A3910400021). The State also dismissed the second-degree criminal sexual conduct with a minor (2011-GS-39-02206) and distribution of cocaine base within a half-mile of a school (2011-GS-39-2048) charges, citing insufficient evidence to prosecute. Applicant timely appealed.

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[1] Further, Applicant expressly admitted his guilt, "Like I'm guilty of the charge at hand." (Return Attachment, App. at 11).

Direct Appeal

Applicant submitted the required explanation pursuant to Rule 203(d)(1)(B)(iv), SCACR. However, he failed to provide a sufficient basis to allow the appeal and the Court of Appeals dismissed the notice. (Appellate Case No. 2014-001991, Order filed December 30, 2015).[2] The remittitur was issued on February 10, 2016.

First PCR Action: 2017-CP-39-0021

Applicant filed his first application for post-conviction relief on January 11, 2017, arguing that he was entitled to relief because: (1) his due process rights had been violated and (2) plea counsel was constitutionally ineffective for failing to help Applicant produce a defense. R. Mills Ariail, Jr., Esq., represented Applicant. The Honorable Letitia H. Verdin held an evidentiary hearing on October 25, 2017.

Notably, during that hearing, Applicant stated that counsel had advised him, *prior to the plea*,[3] but not earlier, that he "had an initial plea in 2012 that was for 10 years" for ABHAN and distribution, second. (Return Attachment, App. at 35-37).[4] His counsel, however, testified that he did not have any memory of Applicant's receiving a plea offer for ten years, and that he had not found any indication of such in his brief scan of his file. (Return Attachment, App. at 54-55). He

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[2] On February 2, 2015, Applicant also filed a motion for a new trial. He alleged counsel failed to convey a 2012 offer until "three days prior to trial date," when, so he asserted, the offer could not be accepted. (Appellate Case No. 2014-001991, Motion for New Trial filed February 2, 2015). The Court of Appeals denied the motion because the issues raised were not appropriate for direct appeal. (Appellate Case No. 2014-001991, Order filed March 31, 2015).

[3] Applicant expressed he was satisfied with counsel at the time of the plea. (Return Attachment, App. at 7).

[4] With the present application, Applicant presented a copy of an email from 2012. The offer largely tracks the one described in the 2017 testimony but differs in that the offer was for a third, not a second offense as indicated by Applicant.

testified that it was possible, though, that the Solicitor's Office had offered some sort of plea offer to Applicant in his criminal sexual conduct case, which plea counsel said he would have advised Applicant to reject since the State's case there was weak. (Return Attachment, App. at 55). Counsel noted that, regarding the distribution charge trial, Applicant was "very adamant" the CI would not appear in court. (Return Attachment, App. at 52).

On May 15, 2018, Judge Verdin issued an order denying the application with prejudice, and finding that Applicant's testimony was not credible, that plea counsel's testimony was credible, and that Applicant had failed to prove that plea counsel committed any errors or omissions in his representation of Applicant. (Return Attachment, App. at 77-79). Applicant timely appealed.

Appellate Defender Taylor D. Gilliam of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, represented Applicant. Appellate counsel filed a *Johnson* Petition for Writ of Certiorari. Applicant filed a *pro se* response, arguing, among other things, that plea counsel's failure to convey a plea offer to Applicant left Applicant with no choice but to plead guilty. (Appellate Case No. 2018-000996, June 7, 2019, *pro se* filing at 4). The Court of Appeals granted Gilliam's petition to be relieved and denied the petition for a writ of certiorari. (Appellate Case No. 2018-000996, Order filed November 1, 2019). The remittitur was issued on November 20, 2019.

Current Application

In this second application, filed on June 17, 2021, Applicant argues he is entitled to relief because counsel failed to convey a plea offer and he has obtained after-discovered evidence that proves that the Solicitor's Office and counsel communicated about a plea offer. He seeks to have the old plea offer re-extended.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds that Applicant has failed to file a timely application, and further, that the application is improperly successive and barred by *res judicata.*

Applicant asserts that he is relying on newly discovered evidence of material fact not previously presented, which became known to him after the plea and could not have been discovered prior to the plea. Specifically, Applicant submits an email that he contends supports that the Solicitor's Office communicated a plea offer to counsel on August 6, 2012, well before his September 15, 2014, plea, but counsel did not relay that offer until March 26, 2021.[5]

The Application is Not Timely

S.C. Code Ann. § 17-27-45(A) sets out a one-year statute of limitations. That statute provides, in relevant part, that an applicant may potentially file a timely action if "there exists evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence...." S.C. Code Ann. § 17-27-45 (C). However, the statute also provides that the one-year limitations period is calculated from *either* "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." Id (emphasis added). Though Applicant relies on an email from 2021, his prior PCR action confirms that he had notice of a plea offer in 2012 prior to the plea. Applicant cannot overcome this fact of record, which is based, in part, on his own testimony. Applicant has not shown the motion to be timely filed.

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[5] As noted above, Applicant previously testified he was aware of a 2012 plea offer prior to his trial. Moreover, this Court also notes that the four counts of attempted murder, possession of weapon, and additional drug charges were not indicted until 2013. The offer could not have addressed those, and certainly places Applicant in a different position by severity and number.

The Application is Impermissibly Successive

The application is also impermissibly successive. S.C. Code Ann. § 17-27-90 provides that where a ground was previously presented, or previously available for presentation, such ground "may not be the basis for a subsequent application, unless the court finds ... sufficient reason" as to why the ground was not asserted and litigated in the prior action. *See also Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991). 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).

Not only could Applicant have raised an issue regarding plea counsel's alleged failure to communicate all plea offers, he did. During the evidentiary hearing held on October 25, 2017, in the first PCR, Applicant testified at length about his belief that plea counsel did not timely communicate to him all plea offers extended to him. Counsel also testified and explained it was possible the Solicitor's Office had offered some sort of plea deal. Applicant even argued the claim in the appeal. Moreover, Applicant filed a motion for a new trial in the South Carolina Court of Appeals on February 2, 2015, based in part upon his claim that plea counsel was constitutionally ineffective for not communicating all plea offers. Again, Applicant cannot overcome these facts of record. The action is impermissibly successive and barred.

Res Judicata

Res judicata prohibits subsequent actions by the same parties on the same issues. *Bell v. Bennett*, 307 S.C. 286, 414 S.E.2d 786 (S.C. Ct. App. 1992). "Under the doctrine of *res judicata*, a final judgment on the merits in a prior action will conclude the parties and their privies in a second action based on the same claim as to the issues actually litigated and as to issues that might have been litigated in the first action." *Foran v. USAA Cas. Ins. Co.*, 311 S.C. 189, 190–91, 427 S.E.2d 918, 919 (Ct. App. 1993). *See also Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981)

(applying *res judicata* in a PCR action to bar claims that were raised or could have been raised in a prior federal habeas corpus). Again, Applicant presented this claim in his prior PCR action. The claim was litigated, ruled upon, and appealed. *Res judicate* prohibits the re-litigation of this claim.

CONCLUSION

For the above stated reasons, this Court must grant the State's motion and dismiss the application.

IT IS THEREFORE ORDERED:

1. The State's motion to dismiss is granted;
2. Applicant's action is dismissed;
3. Applicant is remanded to the custody of Respondent for completion of his sentence.

AND IT IS SO ORDERED this 18th day of December, 2023.

GRACE GILCHRIST KNIE
Presiding Judge