

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF YORK
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2018CP4600933

Dwayne Housey #328012

South Carolina State Of

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: The Court

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

Conditional Order Of Dismissal

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

s/Daniel D. Hall

2753

9/15/2022

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on **September 19, 2022**, and a copy mailed first class or placed in the appropriate attorney's box on **September 19, 2022**, to attorneys of record or to parties (when appearing pro se) as follows:

Tommy Arthur Thomas PO Box 88 Irmo, SC 29063

Zachary Jones, Office Of The Attorney General
PO Box 11549
Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

FILED-RECEIVED

STATE OF SOUTH CAROLINA)
COUNTY OF YORK 2022 SEP 19 AM 10:35)

IN THE COURT OF COMMON PLEAS
FOR THE SIXTEENTH JUDICIAL
CIRCUIT

Dwayne Housey, #328012,)
Applicant,)
v. DAVID HAMILTON)
C.C.P. & GS)
YORK COUNTY, SC)

Case No.: 2018-CP-46-0933

**CONDITIONAL 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 as procedurally barred as improperly successive, untimely, and barred by failure to meet the burden of proof requisite to newly discovered evidence pursuant to the Uniform Post-Conviction Procedures Act, S.C. Code Ann. § 17-27-10 et seq. After a review of the record and pleadings, the Court agrees this application should be summarily dismissed as untimely and successive and provisionally dismisses the action based on the following:

I. Procedural History

Dwayne Housey (Applicant) is presently confined in the South Carolina Department of Corrections pursuant to an order of commitment from the Clerk of Court of York County. Applicant was indicted during the November 2007 term of the York County Grand Jury for trafficking cocaine (2007-GS-46-02626). On April 21, 2008, Applicant proceeded to jury trial presided by the Honorable Lee S. Alford. John Delgado, Esquire represented Applicant at trial. Assistant Solicitor Jennifer Colton and Assistant Solicitor Ashley Anderson of the Sixteenth Circuit Solicitor's Office prosecuted the case. The jury found Applicant guilty of trafficking

cocaine in the amount of more than one hundred grams. Judge Alford sentenced Applicant to twenty-five years' imprisonment.

Applicant filed a notice of appeal on April 28, 2008. According to a letter from trial counsel to the Court of Appeals, dated November 19, 2008, there was a misunderstanding between Applicant and trial counsel as to who would represent Applicant on appeal. Delgado moved to be relieved as counsel on December 3, 2008. Delgado's motion was granted.

Wanda H. Carter, Appellate Defender with the South Carolina Commission on Indigent Defense, Division of Appellate Defense, represented Applicant on his direct appeal. On April 14, 2009, Applicant filed his brief. The single issue raised by appellate counsel was whether "the trial judge erred in allowing excessive conspiracy testimony into evidence in support of the trafficking charge because this was prejudicial character evidence which held no probative value." Assistant Attorney General Deborah R.J. Shupe filed the Brief of Respondent on behalf of the State.

In an unpublished opinion filed January 25, 2011, the South Carolina Court of Appeals affirmed Applicant's conviction. State v. Housey, 2011-UP-026 (S.C. Ct. App. filed Jan. 25, 2011). The court issued the remittitur on February 10, 2011.

First PCR Application (2011-CP-46-1261) and Subsequent Appeal

Applicant filed an application for post-conviction relief on April 4, 2011. Applicant outlined the substance of his post-conviction relief claims as follows:

- (1) "ineffective assistance of trial counsel"
- (2) "trial counsel failed to object to prosecutorial misconduct"

In the attachment to his application, Applicant further detailed his claims. On September 14, 2011, Respondent submitted its return. Applicant filed an amended application for post-conviction relief on May 3, 2012, in which he cited as grounds ineffective assistance of counsel "including but not limited to, failure to call a witness, failure to investigate, failure to object to

evidence, failure to move for mistrial.” Applicant also alleged “[t]rial counsel failed to object of [sic] prosecutorial misconduct.”

An evidentiary hearing was convened on May 7, 2012, before the Honorable John C. Hayes. Applicant was present and represented by Brian Murphy, Esquire, at the hearing. Assistant Attorney General J. Rutledge Johnson appeared on behalf of Respondent. By order dated May 8, 2012, and filed May 10, 2012, Judge Hayes found Applicant had not established any constitutional violations or deprivations and, accordingly, denied and dismissed the PCR application with prejudice.

Applicant filed a notice of appeal on May 22, 2012. On January 31, 2013, Susan B. Hackett, Appellate Defender with the South Carolina Commission on Indigent Defense, Division of Appellate Defense, filed a petition for writ of certiorari, arguing “Trial counsel’s failure to present two witnesses to impeach the credibility of the prosecution’s primary witness and to contradict the prosecution’s witnesses’ testimony concerning the facts surrounding the alleged drug conspiracy violated Applicant’s Sixth Amendment right to the effective assistance of counsel.”

On March 18, 2013, Respondent filed a return to the petition for writ of certiorari. In an order issued November 4, 2014, South Carolina Court of Appeals denied the petition for writ of certiorari from the dismissal of the first post-conviction relief application. The court issued a remittitur on November 20, 2014.

Writ of Habeas Corpus (5:16-CV-00019-RMG-KDW)

Applicant filed a *pro se* Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 on January 4, 2016. Applicant set forth the following grounds for relief:

- (1) “Ineffective Assistance of counsel”
- (2) “Prosecution [sic] misconduct”

(3) "False Indictment"

Respondent filed its Return and Motion for Summary Judgment on June 16, 2016. On August 23, 2016, the Honorable Kaymani D. West issued a Report and Recommendation suggesting Respondent's motion for summary judgment be granted and Applicant's petition be denied. Applicant filed his objection to the Report and Recommendation on September 6, 2016.

On September 13, 2016, the Honorable Richard Mark Gergel, United States District Judge adopted the Magistrate's Report and Recommendation granting Respondent's Motion for Summary Judgment and dismissed Applicant's petition.

Second PCR Application (2016-CP-46-2821)

On September 23, 2016, Applicant filed his second application for post-conviction relief. In his second application, Applicant asserted the following claims:

- (1) Ineffective Assistance of Trial Counsel
- (2) Ineffective Assistance of Appellate Counsel
- (3) Ineffective Assistance of PCR counsel

On April 7, 2017, Respondent submitted its return and motion to dismiss. On April 10, 2017, the Honorable Daniel Hall issued a conditional order, indicating that the Court intended to dismiss Applicant's second application for post-conviction relief as excessive and barred by the statute of limitations. On February 6, 2018, The Honorable Daniel Hall issued a final order of dismissal dismissing Applicant's second post-conviction relief application.

II. Current Action Before Court

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

1. "Newly Discovered Evidence"
 - a. "Co-Defendant has recently contacted Applicant regarding his testimony¹."

¹ In his Application, Applicant asserts that his co-defendant, Jemyle Wilson, retracts his testimony made against Applicant. Applicant attached a statement allegedly written by Wilson, stating that Wilson "never...seen [sic]

Applicant seeks the following relief:

1. "New trial."

Before the Court are the York County Clerk of Court records regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, Applicant's prior post-conviction relief records, and the records of the current PCR action, including Applicant's application and Respondent's return and motion to dismiss.

III. Findings of Fact and Conclusions of Law

The Court finds that this application must be summarily dismissed pursuant to § 17-27-70(b) of the South Carolina Code of Laws on the basis that the application is procedurally barred as successive and untimely and that no purpose would be served by any further proceedings pursuant to Welch v. MacDougall, 246 S.C. 258, 260, 143 S.E.2d 455, 456 (1965) (requiring a PCR applicant to make a prima facie showing he is entitled to relief before the court will hold an evidentiary hearing). Because there is no question of law or fact to necessitate a hearing, the Court issues this Conditional Order of Dismissal indicating the Court's intent to dismiss the application and its reasons for so doing pursuant to 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).

Summary Dismissal based on Statute of Limitations

The 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

Dwayne Housey deal, sell or manufactured [sic] any drugs." However, it appears that this statement was not signed by Wilson, and there is no date on it.

Procedure Act. S.C. Code Ann. § 17-27-10 to -160. S.C. Code Ann. § 17-27-45(A) requires 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). In the present case, Applicant was convicted and sentenced on April 24, 2008. Remittitur from the direct appeal was issued on February 10, 2011. Based on Section 17-27-45(A), Applicant needed to file an application for post-conviction relief within one year of his remittitur. The Applicant was therefore required to file his application on or before February 11, 2012. This Application was filed on March 30, 2018, *six years* after the expiration of the statutory filing period.

S.C. Code Ann. § 17-27-70(c) 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, the Court summarily dismisses the application for post-conviction relief for failure to file within the time mandated by the Post-Conviction Procedure Act.

Summary Dismissal based on Successiveness

The Court finds that the current Application should be summarily dismissed because it is successive to Applicant’s previous applications 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 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.

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." 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, 274 S.C. 243, 262 S.E.2d 735. The document attached to Applicant's current application, which Applicant contends is "newly discovered evidence," is not dated, nor is there any other evidence indicating that Applicant could not have raised this "newly discovered evidence" claim in an earlier application. Therefore, Applicant has failed to meet the burden imposed upon him, and the Court must summarily dismiss the application as successive to Applicant's previous PCR application.

Newly Discovered Evidence

The Court finds Applicant's assertion that he is being held in custody unlawfully as a result of newly discovered evidence, such that he should be entitled to vacation of his conviction and sentence, is without merit. 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 v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983); Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993).

Applicant alleges “newly discovered evidence” based on an unsigned, undated document purportedly written by Applicant’s co-defendant, Jemyle Wilson, claiming Wilson never saw Applicant deal, sell, or manufacture any drugs but was pressured into giving testimony against Applicant at trial. There is no indication that this document meets the Hayden factors. First of all, this document would probably *not* change the result if a new trial was held; at trial, Wilson testified that Applicant would give him packages of cocaine to deliver. (ROA pp.128–43). The State’s theory was that Wilson merely acted as a courier, delivering drugs from Applicant to Applicant’s co-conspirator Alicia Ellis. Therefore, the fact that Wilson claims he never personally observed Applicant “deal, sell or manufacture[] any drugs” is not inconsistent with his testimony at trial or with the State’s theory of the case. Nor is it “material to the issue of guilt or innocence”; the State’s position at trial was that Applicant participated in a conspiracy to traffic drugs, not that he personally dealt or manufactured drugs. In addition, the other evidence in the case—including the

testimony¹ of Ellis, the testimony of the investigating officers, and Applicant's own incriminating statements—would not be affected by any supposed defects in Wilson's testimony.

Finally, to the extent the document suggests Wilson's testimony was unreliable because he was pressured to testify against Applicant, the document is merely impeaching. Moreover, the document is cumulative to other impeachment evidence introduced at trial: Applicant's counsel, on cross-examination, elicited from Wilson that he hoped the charges against him would be reduced in exchange for his testimony against Applicant. (ROA pp.158–59; pp.180–81).

Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing that he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Applicant has failed to make a showing that he is entitled to relief based on the information set forth and, therefore, he is not entitled to an evidentiary hearing in the matter. Accordingly, the Court finds this matter must be summarily dismissed with prejudice.

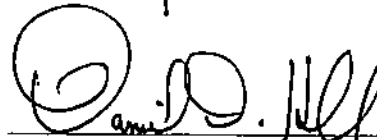
IV. Conclusion

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 his to show why this Order should not become final. The Applicant shall file any reasons he may have, factual or legal, with the York County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
PCR Division – Zachary W. Jones
P.O. Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the York County Clerk of Court and opposing counsel within twenty days, and the Court will not consider any issues raised in his response if not so timely filed and served.

AND IT IS SO ORDERED this 15th day of September, 2022.



DANIEL DEWITT HALL
Chief Administrative Judge
Sixteenth Judicial Circuit

York, South Carolina