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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Daniel M. Coble, Circuit Court Judge

Case No. 2021-CP-32-00579

Roberto L. Herrera, #353435, Petitioner,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Applicant, Roberto L. Herrera, appeals the order of the Honorable Daniel M. Coble on or about January 2, 2024, and received by the undersigned on January 11, 2024.

January 19, 2024

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STATE OF SOUTH CAROLINA)
 COUNTY OF LEXINGTON)

FILED

IN THE COURT OF COMMON PLEAS
 FOR THE ELEVENTH JUDICIAL CIRCUIT

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Roberto Lee Herrera, SCDC #353435)
 LISA M. COMER)
 CLERK OF COURT) Case No. 2021-CP-32-0579
 LEXINGTON SC)

Applicant,)

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

This matters comes before this Court by an application for post-conviction relief filed on February 16, 2021 and amended on September 1, 2022. The Respondent State of South Carolina made a Return and Motion to Dismiss dated July 30, 2021 asserting that the application was untimely filed under the statute of limitations for post-conviction relief matters in S.C. Code Ann. § 17-27-45(A). On June 30, 2021, Ashley A. McMahan was appointed counsel. On August 29, 2022, the Applicant, through counsel, filed an amended application.

On October 25, 2023, a hearing was convened before this Court. The Applicant was present and represented by appointed counsel Ashley A. McMahan, Esquire. The Respondent was represented by Deputy Attorney General Donald J. Zelenka. Testimony was received from the Applicant and Joseph Stines of the South Carolina Department of Corrections. At the conclusion of the hearing, this Court took the matter under advisement. The Court indicated on October 27, 2023, its intention to dismiss the application and requested a proposed order from Respondent's counsel.

This Court is denying the request of the Applicant to apply equitable tolling to allow the consideration of the merits on an untimely filed application for post-conviction relief.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Lexington County Clerk of Court. On July 24, 2019, Applicant entered a parked and running pickup truck with a three year-old child inside. He drove several miles before attempting to pass the child over to random, unknown males at the San Jose restaurant in Red Bank.

During its September 2019 term, the Lexington County Grand Jury indicted Applicant for kidnapping (2019-GS-32-3118); larceny valued over \$2,000 but less than \$10,000¹ (2019-GS-32-3117); and possession of a stolen vehicle valued over \$2,000 but less than \$10,000 (2019-GS-32-3116). Assistant Public Defender Jason S. Chehoski represented Applicant on these charges and Senior Assistant Solicitor Angela Martin prosecuted the case.

On November 21, 2019, Applicant appeared before the Honorable Frank R. Addy, Jr., and pleaded guilty as indicted to kidnapping. The State dropped the remaining charges and recommended a twenty-year cap in exchange for Applicant's plea. Following the State's recommendation, Judge Addy sentenced Applicant to fifteen years' imprisonment. Applicant did not appeal his plea or sentence.

PCR PROCEEDINGS

On February 16, 2021, the Applicant made a *pro se* application for post-conviction relief. The application was dated February 9, 2021. In his initial *pro se* application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following (excerpted verbatim):

1. "The public defender that represent[sic] me did not fully explain case to me nor did I receive a translator my legal

¹ This charge was enhanced pursuant to S.C. Code Ann. §16-1-57.

- representive[sic] did not help me nor helped during trail[sic]"
- a. "Legal rep did not explain full my rights"
 - b. "He did not respond or help while in court as D.A. reads out my history of past charges"
 - c. "I requested a[sic] interpreter he did not get me one"
 - d. "I request[sic] copy of my file he had did not receive[sic]"

Applicant requests relief as follows:

"I seek my case be heard clearly propley[sic] and sentence of 15 years reduced"

The State initially made a Return and Motion to dismiss on July 30, 2021. In particular, the State claimed this action was procedurally barred for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act² (Act). Specifically, the Act requires:

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.

S.C. Code Ann. § 17-27-45(A) (emphasis added). Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). Applicant pleaded guilty on November 21, 2019, and did not appeal. This application was filed on February 16, 2021 and signed February 9, 2021 - almost four months (16 months after sentencing) after the one-year statutory filing period expired on November 21, 2020. The Respondent urged the matter be dismissed.

On September 1, 2022, the Applicant, through counsel, made the following amended application asserting the following:

1. The statute of limitations should be equitably tolled. - The Applicant is entitled to equitable tolling of the statute of limitations because his ability to request documents and mailing of documents was hampered by the covid virus. He was prevented from timely filing due to circumstances beyond his control. See Mose v. State, 420 SC 500 (2017). The covid-19 shut down began sometime in March 2020. Applicant was incarcerated at Kirkland Correctional until August 8, 2020, when he

² S.C. Code Ann. § 17-27-10 to -160.

was moved to Ridgeland Correctional.

Since Kirkland is the initial institution all inmates are sent to, the ability to request access to the law library or to the post office within the facility is limited because all new admittees are essentially on lockdown. Once covid hit, inmates were afforded very little movement within the facility, hampering his ability to request the law library or the post office even further.

This continued once he got sent to Ridgeland until he was able to finally request the law library, the notary, and the post office. The statute of limitations should be equitably tolled when circumstances prevent an Applicant from making a timely filing when they are beyond the Applicant's control and unavoidable despite his due diligence. Ferguson v. State, 382 S.C. 615, 618 (2009.).

Amended Application, p. 1.

SUMMARY OF PCR TESTIMONY

Two witnesses were presented during the PCR proceeding before this Court; Applicant Roberto Herrera and South Carolina Department of Corrections Director of Special Projects Joseph Stines.

The Applicant testified he was sentenced November 21, 2019. He went to Reception and Evaluation and then was transferred to Ridgeland in August 18, 2020. Applicant did not have immediate access to law library when he got to prison. Applicant claimed he was refused access due to COVID-19 pandemic. He initially asserted the first he had access to the library was February 2021. He asserted the delay was caused because he did not have paperwork saying he had a deadline. Herrera claimed he was aware of PCR from his defense counsel and from papers he received when he was in court. He claimed he requested to file a PCR while he was at Kirkland and Ridgeland, but he was refused. He claimed it took over 90 days to get a response to his paperwork. He described the process in seeking library access and delays.

On cross-examination, Applicant stated that he wanted to file a PCR as soon as he left court to challenge his counsel's representation because he felt counsel was not representing him

proposedly and not answering his questions. He admitted that he received a sentence less than he could have been given, but decided he did not like the representation. He said he learned he had one year to file an application from his counsel as soon as he walked out of the courtroom after his guilty plea and sentence.

He claimed as soon as he got to prison he took steps to file a PCR. He stated he made a verbal request to an officer at Kirkland Reception and Evaluation, but was unsuccessful in getting assistance from the officers. After he was transferred to Ridgeland nine months later, he claimed to have requested assistance as soon as he got there, but was told from a woman that they were on COVID lockdown, although she eventually gave him papers after he kept asking. He claimed he was given access to the law library more than a month and a half later. He stated that right after Christmas, he wrote his application.³

Applicant stated he never wrote to the Attorney General's Office, the clerk of court or anywhere else. However, he claimed he sent a letter to the Lexington clerk at some point about wanting to file paperwork for a PCR and only had a limited time, claiming it was around the beginning of November 2020. He claimed he did not write anything before November 2020. On redirect, the Applicant noted there were two letters were filed at the clerk's office – one dated November 30, 2020 and a second dated December 2020.

Joseph Stines, the SCDCC Director of Special Projects testified. He indicated that when someone gets to Kirkland Reception and Evaluation, they do not have immediate access to the law library. He said they must submit paperwork that will be reviewed to determine if they have a pending deadline. He said that although some correctional officials do not understand PCR, if an inmate puts in a request, it should be accepted, but if there is a pending deadline, they should have

³ The time limit for filing was November 21, 2021. The application was dated February 9, 2022.

access first. He said Kirkland was on full quarantine in 2020, but Ridgeland was only on quarantine in certain units.⁴ Stines indicated that there were more problems in Kirkland because inmates were coming there from everywhere in the State. However, he did not see when Applicant's unit in Ridgeland was on quarantine. He also stated that Applicant got a personal tablet on August 28. This gave access to Westlaw, but not court forms. Stines stated inmates can make requests to staff through the tablet. His records showed that he made 2 requests for the law library, one was on November 11 and a second in November 16, 2020.⁵ He indicated an order to report was sent the next day. He said inmates can still request to go to the law library through staff and written requests.

On cross-examination, Stines stated there was a written request on August 17, 2021, but no complaints from the Applicant otherwise. After the November 11, 2020 request to go to the library, there is no evidence in Stines' records that Applicant went. The August 2020 data for the tablet indicates that it was not used as much as later.

Stines stated that once Applicant got to Ridgeland, there is not anything that prevented him from having access to the law library up to and including November 11, 2021. When he was at Kirkland, he would have had access to the library, if he submitted a written request, but there is no evidence he made a written request until November 11. He stated that he accessed his tablet 767 times between August 28, 2020 and November 30, 2020. Stines did admit that prior to another hearing he testified at in 2022, SCDC officers would only allow access to the law library for forms if the inmate could show that they have a deadline via a court document informing of the deadline.

The Applicant's counsel urged the Court to deny the dismissal. She asserted that she had

⁴ On March 13, 2020, Governor McMaster declared a state of emergency based upon the 2019 Novel Coronavirus outbreak (COVID-19).

⁵ These dates were prior to the deadline for filing an application on November 21, 2021.

shown the Kirkland did not allow access to the library unless the inmate has a deadline and a request. She acknowledged why an inmate wants a PCR is irrelevant. She stated even if SCDC had responded timely, it was still too late for the Applicant. She further claimed that it took forty-five days to get a notary. She claimed he attempted to file the PCR application on time, but was not allowed to do so.

The State responded that under Mose, the one year statute of limitation was not changed. Applicant indicated he knew as soon as he left the courtroom he wanted to file a PCR application and had one year to do it. The State questioned the argument he was entitled to equitable tolling based upon the testimony of SCDC Stines because he could have had access to the law library at Ridgeland if he made a written request in a timely manner. The State noted that he did make such a request in November 2020, which could have allowed for a timely application. Respondent urged Applicant had failed in his burden of proof due to the Applicant's lack of due diligence.

FINDING OF FACT AND CONCLUSIONS OF LAW

This Court, upon review of the record, the evidence presented, the SCSC Policy # GA-01.03: Inmate Access to the Courts, the testimony of Mr. Herrera and Mr. Stines, and the arguments of counsel, denied the relief requested to toll the statute of limitations and pursuant to Mose, *infra*, allow filing and consideration of the application for post-conviction relief. This Court concludes that the Applicant failed to timely file his application within one year from the entry of his guilty plea and sentence on November 21, 2019.

This Court finds as a fact that the application was signed on February 9, 2021, and filed on February 16, 2021. While the Applicant did attempt to explain the delay in filing, this Court denies the equitable tolling.

This Court found credible Mr. Stines testimony concerning Mr. Herrera's access to the law

library once he was transferred to Ridgeland Correctional Center on August 28, 2020. In fact, the records revealed that on that same date, Herrera also received a tablet that allowed access to Westlaw and the ability to make staff requests, including requests for access to the library. Further, this Court found credible, and as a fact that Applicant was able to make law library requests on November 11 and November 16, 2021, both prior to the statute of limitations date and he has failed to show why he could not have made a request earlier.

Applicant appears to assert that conditions of his confinement due to the COVID-19 pandemic prevented him from timely filing his PCR application. He failed to show how the circumstances of COVID-19 was the reason for the actual untimely filing of his application while at Ridgeland. Instead, this Court must conclude it was Herrera's own neglect and lack of due diligence in the handling of his matter that led to the untimely filing.

In Mose v. State, our Supreme Court reversed the PCR court's dismissal of Mose's untimely PCR application, finding the statute of limitations should have been equitably tolled because the application was untimely filed due to circumstances outside of his control. 420 S.C. 500, 511–12, 803 S.E.2d 718, 723 (2017); *but see id.* at 510, 803 S.E.2d at 723 (noting that “tolling the statute of limitations in circumstances in which an applicant demonstrates the failure to timely file for PCR was due to no fault of his own ‘does not create an exception by which incarcerated litigants may avoid time restrictions’ ” (quoting Lewis v. Richmond City Police Dep't, 947 F.2d 733, 736 (4th Cir. 1991)); *Hooper*, 386 S.C. at 116–17, 687 S.E.2d at 32–33 (explaining that equitable tolling “typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control” and that it “should be used sparingly and only when the interests of justice compel its use”); 54 C.J.S. *Limitations of Actions* § 115 (“The party who seeks to invoke equitable tolling bears the devoir of persuasion and must, therefore, establish

a compelling basis for awarding such relief.”). “Where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period to ensure fundamental practicality and fairness.” Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009).

Here, this Court must find the untimely filing on February 16, 2022, was caused by Mr. Herrera’s neglect. It was not caused by the restrictions caused by COVID-19 because Herrera was given the tools to accomplish a timely filing from August 18, 2020, forward when he entered Ridgeland Correctional Institution. He was aware since November 21, 2020, that he had to file his post-conviction relief application by November 21, 2021. The Applicant has failed to show this Court that since August 18, 2020, he was prevented by filing a timely application by either circumstances related to COVID-19 or a denial of access either to the courts, to a law library or to legal materials. He had access to a law library on request that he proved by having made at least two requests within the statutory time period. He had access to a tablet to make requests of staff for either access to the library or a complaint about staff who refused such a request. He was in an institution area that did not suffer from COVID-19 restrictions that other SCDC institutions may have suffered. He does not explain why he waited until after Christmas or February 2022 to begin writing and signing his application when he had access to the law library by his own request in November 2020 before the statute of limitations period ran. Unlike his experience at Kirkland, when he faced some restrictions, but not complete restrictions due to COVID-19, once he was at Ridgeland, it was only his own neglect in pursuing his relief that caused the application to not be filed timely. Here, equitable tolling has not been shown to be justified under Mose and S.C. Code Section 17-27-45.

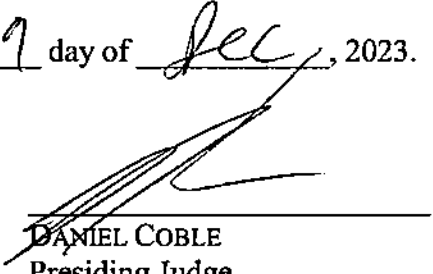
Accordingly, this action must be dismissed as untimely, particularly in light of the fact that

Applicant has failed to prove any known ground entitling him to equitable tolling. See Pelzer v. State, 378 S.C. 516, 521, 662 S.E.2d 618, 619–20 (Ct. App. 2008) (equitable tolling has been deemed available where (1) extraordinary circumstances prevented the plaintiff from filing despite his due diligence; (2) the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass; and (3) the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim).

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 19 day of Dec, 2023.


DANIEL COBLE
Presiding Judge
Eleventh Judicial Circuit

Richland, South Carolina.