

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

S.C. SUPREME COURT

J. Derham Cole, Circuit Court Judge


2020-CP-23-0222

Robert Moore, Appellant,
v.
The State, Respondent.

NOTICE OF APPEAL

Robert Moore appeals the Honorable J. Derham Cole's Order of Dismissal received January 31, 2024.

This 6 day of February, 2024.


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STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

Robert Moore, #320303,)
)
Applicant,)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Case No.: 2020-CP-23-0222

ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief filed by Applicant Robert Moore on January 14, 2020. A motions hearing was held on July 24, 2023, in the Greenville County Courthouse. Applicant was present and represented by counsel, Susannah C. Ross, Esq. Senior Assistant Deputy Attorney General Melody J. Brown represented Respondent, the State. At the close of the hearing, the undersigned took the matter under advisement. By a conditional Form 4 order issued on July 28, 2023, and filed August 8, 2023, this Court indicated it would grant the State’s motion to dismiss for failure to timely file the application and directed Respondent’s counsel to prepare and submit a proposed order.¹ This Court now issues the following order granting the state’s motion and DISMISSING the application WITH PREJUDICE for the specific reasons set out in this order.

General Procedural History

Applicant is presently confined in the South Carolina Department of Corrections in Lee Correctional Institution pursuant to orders of commitment of the Greenville County Clerk of Court.

¹ The proposed order was circulated among counsel prior to this Court’s acceptance of the order. *See Fishburne v. State*, 427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019) (“preparation and finalization of a PCR order is often a collaborative effort. ... A copy of the proposed order should be transmitted to opposing counsel. Opposing counsel should promptly review the proposed order and alert preparing counsel and the PCR court as to any deficiencies in the proposed order.”).

While serving a prison sentence for attempted murder,² Applicant killed a fellow inmate by bludgeoning him with a metal table leg and stabbing him with a sharp object. Applicant was charged with murder. (*See* Return Attachment, Indictment 2018-GS-23-9345).

Applicant was represented by Lucas Craig Marchant, Esq. On December 12, 2018, Applicant appeared before the Honorable Letitia H. Verdin, waived presentment of the indictment, and pleaded guilty to murder. At the plea, the State presented the following summary of facts:

... On October 19, 2017, the defendant and the victim, Rafael Robertson, were housed in the same dorm at Perry Correctional Institute. Both were in a large common area with numerous other inmates, between 25 and 35. The common area is surrounded in a U[] shape by individual cells, with a top tier and a bottom tier.

At approximately 5:29 p.m., video surveillance shows the victim in a verbal dispute with another inmate. From the video, it appears as though the victim is trying to get away from — from this inmate, but the inmate continues to stalk the victim. The victim is chased up the stairs to the second tier. On the stairs, he is punched by another inmate and chased around the second tier.

² Applicant was indicted in Spartanburg County for the attempted murder of Travis Hall. A jury subsequently convicted him as indicted, and the Honorable R. Keith Kelly sentenced Applicant to thirty years imprisonment. Applicant timely appealed. The Supreme Court of South Carolina affirmed the conviction in *State v. Moore*, 429 S.C. 465, 839 S.E.2d 882 (2020). The Supreme Court referenced the facts summarily as follows: “Hall was shot in the head and left for dead in a vehicle in a Taco Bell parking lot following a drug deal gone wrong.” *Id.*, at 470, 839 S.E.2d at 884. The public records available on the Spartanburg County Public Index show that Applicant’s PCR action on that conviction was dismissed after a merits review on March 21, 2023, <https://publicindex.sccourts.org/Spartanburg/PublicIndex/PIImageDisplay.aspx?ctagency=42002&doctype=C&docid=606630&HKey=11397525587817247109885477651158610285105119875588505774885198881037543118876967541176697885199>. Further, the index shows that PCR counsel served and filed a notice of appeal on or about April 10, 2023, seeking further review. <https://publicindex.sccourts.org/Spartanburg/PublicIndex/PIImageDisplay.aspx?ctagency=42002&doctype=C&docid=607002&HKey=10249868011211311512199665670538676109101991029812010411111737652115117110109491145610654665510772115122103>.

At this point, the video shows the defendant run from his cell, armed with a metal table leg on the bottom tier, up the stairs to the top tier. The victim jumps over the railing to the bottom tier where the defendant runs to him. The defendant strikes him with the weapon and again chases him around the common area.

The victim is backed into a corner and [f]alls down. At this point, the defendant repeated - - repeatedly struck him with the table leg. He then pulls out another smaller weapon and stabs the victim numerous times.

The medical examiner found several defensive wounds to the victim's hands and arms. He found two large life-threatening chop injuries to the right side of the victim's upper torso which penetrated the chest cavity causing the fatal injury to his right lung.

(Return Attachment, Tr. 8-10).

The State also placed the negotiated recommendation on the record: "The recommendation is 36 years backdated to October 19, 2017. I guess with no credit for time served, just backdated. And then, the state is dismissing the possession of a weapon charge." (Return Attachment, Tr. 10).

Applicant pled guilty without contesting or qualifying any of the facts as presented by the State, or the recommendation as expressly set out on the record. (*See* Return Attachment, Tr. 10). Defense counsel requested the court accept the recommendation noting: "The prosecutor and I have worked for an extensive amount of time trying to resolve this one." (Return Attachment, Tr. 12).

Judge Verdin followed the recommendation and sentenced Applicant to imprisonment for thirty-six years, with a start date of October 19, 2017, concurrent to the sentence he was serving at the time of the murder. (Return Attachment, Tr. 12). The State also dismissed the possession of a weapon charge on December 13, 2018. *See* Case Number 2017A2310200084. Applicant did not appeal.

Post Conviction Relief Allegation

Applicant alleges he received ineffective assistance because plea counsel failed to move to withdraw Applicant's guilty plea when the State reneged on its plea agreement by recommending Applicant's sentence begin on the date of the murder instead of the start date of the sentence he was then serving. (Application at 3 and attachment).³

The State's Motion to Dismiss and Applicant's Response

The State moved to dismiss the action for failure to file within the one-year statute of limitations. (See Return, pp. 2-3). At the hearing, Applicant requested equitable tolling be applied to excuse the late filing. Applicant's explanation for failing to timely file was that he was simply unaware of the procedure for filing an application.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Uniform Post-Conviction Procedure Act requires "an application for relief ... 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). Our Supreme Court has held 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 this case, Applicant was sentenced on December 12, 2018. Applicant did not appeal his conviction or sentence. Therefore, for an action to be timely filed under the cited statutory

³ The State moved to amend the return at the hearing. The State moved to strike the reference to a second claim that Applicant did not knowingly and voluntarily waive his right to a direct appeal. The application shows that is not a claim raised. Therefore, this Court granted the State's motion.

provision, Applicant should have filed his application with the Clerk of Court on or before December 12, 2019. Applicant's application was not filed until January 14, 2020, a date which occurred after the statutory filing period had already expired. Applicant does not dispute these facts. Therefore, under a straightforward application of the statute, Applicant has not timely filed this action. Again, Applicant does not dispute that is the case; rather, he alleges that equitable tolling should excuse the late filing. Therefore, the undersigned has considered whether application of the doctrine is warranted in these circumstances. *See Mose v. State*, 420 S.C. 500, 511, 803 S.E.2d 718, 723 (2017) (requiring the PCR court to "make the fact-specific determination of whether equitable tolling is justified" when the doctrine is asserted).

Initially, this Court notes that the doctrine of "[e]quitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it." *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009). As such, while "[e]quitable tolling may be applied where it is justified under all the circumstances," it remains "a doctrine that should be used sparingly and only when the interests of justice compel its use." *Id.*, at 117, 687 S.E.2d at 33. Generally, the doctrine will be applied, if at all, where a party "was prevented from filing suit because of an extraordinary event beyond his or her control." *Id.*, at 116, 687 S.E.2d at 32 (quoting *Ocana v. Am. Furniture Co.*, 91 P.3d 58, 66 (2004)).

Acknowledging the rare circumstances that warrant equitable tolling, our Supreme Court has approved the application of the doctrine in context of post-conviction relief actions where "circumstances preventing a petitioner from making a timely filing [are] both beyond the [applicant]'s control and unavoidable despite due diligence." *Ferguson v. State*, 382 S.C. 615, 618, 677 S.E.2d 600, 602 (2009) (quoting *Commonwealth v. Carneal*, 274 S.W.3d 420, 429 (Ky.

2008)). In *Ferguson*, the tolling request was based upon an allegation of mental incompetency. *Id.*, at 618, 677 S.E.2d at 601-602. The Court resolved that “in circumstances in which an applicant demonstrates the failure to timely file for PCR was due to mental incompetency, the statute should be tolled.” *Id.*, at 619, 677 S.E.2d 600, 602 (2009).

Additionally, our Supreme Court, in acknowledging “the unique conditions of incarceration,” has also allowed consideration of equitable tolling where the delay in timely filing may be attributed to processing the application for filing and not an inmate’s diligence in attempting to timely file. *Mose*, at 511, 803 S.E.2d at 723 (“if the circumstances warrant, the statute of limitations shall be tolled from receipt of the document by the prison until formally filed with the clerk’s office, provided that the applicant can verify by competent evidence the date prison authorities received the document for mailing”). Notably, our Court also warned that providing for the possible application of the doctrine in such circumstances was not a signal that a blanket exception would be allowed to simply avoid timelines. *Id.*, at 510, 803 S.E.2d at 723. This is in keeping with the long-standing caution that equitable tolling should be applied “sparingly.” *See Hooper, supra.*

In the present matter, Applicant has failed to show that the untimely filing was due to circumstances beyond his control and was unavoidable despite his acting with due diligence. He does not assert anything at all *prevented* him from complying with the one-year statute of limitations. His only offered basis for invoking the doctrine was that he did not know to file. This Court finds that the doctrine of equitable tolling is not justified under the circumstances of this case, and the Court denies Applicant’s request to apply equitable tolling.

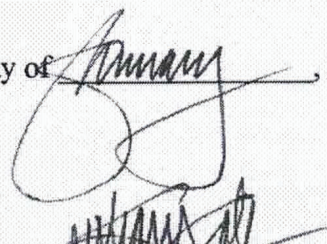
CONCLUSION

For the above stated reasons, this Court finds that Applicant's motion to toll the statute of limitations should be and is DENIED. The respondent's motion to dismiss the application as not timely filed is GRANTED. This action must be DISMISSED WITH PREJUDICE.

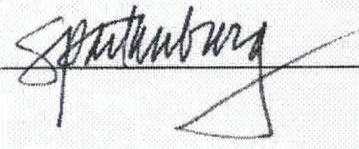
IT IS THEREFORE ORDERED:

1. Applicant's application for post-conviction relief is dismissed with prejudice; and
2. Applicant is remanded to the custody of Respondent for completion of his sentence.

AND IT IS SO ORDERED this 22nd day of January, 2024.



J. DERHAM COLE
Presiding Judge

 South Carolina.

Copy mailed to
Attorney general / Susannah Ross
on 1 / 31 / 2024.