

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

JUDGMENT IN A CIVIL CASE
CASE NO: 2012CP4500197

Michael D McFadden vs. State of South Carolina

RECEIVED

JUN 12 2013

S.C. Supreme Court

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.
- 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: _____
- 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; Statement of Judgment by the Court:

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JUN 12 2013

Dated at Kingstree, South Carolina, this .

S.C. SUPREME COURT

Court Reporter: _____

PRESIDING JUDGE -

This judgment was entered on the 26th day of April, 2013, and a copy mailed first class this 6th day of May, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Michael D McFadden ,

ATTORNEY(S) FOR THE PLAINTIFF(S)

Dave Spencer

ATTORNEY(S) FOR THE DEFENDANT(S)

Sharon W. Siggers
Clerk of Court

STATE OF SOUTH CAROLINA)
COUNTY OF WILLIAMSBURG)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

Michael D. McFadden, #126806,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

Case No.: 2012-CP-45-197

FINAL ORDER OF DISMISSAL

13 SEP 26 PM 1:25
FILED
CLERK OF COURT
WILLIAMSBURG, SOUTH CAROLINA

This matter comes before the Court pursuant to an application for post-conviction relief filed April 12, 2012. The State made its Return and Motion to Dismiss on September 6, 2012, requesting that the application be summarily dismissed as successive, barred by the one-year statute of limitations, and failure to allege that his newly discovered evidence meets any of the requirement for after-discovered evidence. Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal signed October 17, 2012 and filed October 24, 2012, provisionally denying and dismissing this action. This Court gave Applicant twenty days from the date of service of said Order in which to show why the dismissal should not become final. Attached to this Final Order and incorporated herein by reference is an Affidavit of Service dated November 13, 2012, serving the aforementioned Conditional Order of Dismissal on the Applicant.

Applicant responded to the Conditional Order of Dismissal in a document captioned "Applicant's Motion To Deny Respondents Motion to Dismiss Application" dated November 27, 2012. In his response, Applicant alleges that he has newly-discovered evidence in the form of an affidavit from "Keith Pressley." Mr. Pressley states that he was with Applicant over 20 years ago. Mr. Pressley further stated that he left the Applicant in a club and proceeded to call Officers

Graham and Kirby, who had recently “caught (Mr. Pressley) selling drugs out of the trunk” of his car. Mr. Pressley stated that the officers had questioned him about a robbery and stolen jewelry. Mr. Pressley stated that he “lied in order not to be prosecuted for the drugs that they took from me that afternoon.”

Applicant sent a second response to the Conditional Order of Dismissal in a letter dated March 25, 2013. In the letter the Applicant stated that his current post-conviction relief application 2012-CP-45-00197 “was misconstrued as a post-conviction relief application.”

~~Applicant further stated, he “never intended for this action to be a ‘PCR,’ and did not file any~~ paperwork necessary to file post-conviction.”¹ Applicant states that he is asking to be taken off the sex offender registry list as his kidnapping charge stemmed from an armed robbery and “there is no criminal sexual offense allegation at all.” PCR is not the proper avenue to pursue Applicant’s request to be removed from the sex offender registry list. However, this Court notes Applicant may seek removal from the sex offender registry list through a declaratory judgment. Hazel v. State, 377 S.C. 60, 659 S.E.2d 137 (2008).

This Court has reviewed the Applicant’s response to the Conditional Order of Dismissal in its entirety, in conjunction with the original pleadings, and finds that sufficient reason has not been shown why the Conditional Order of Dismissal should not become final. Accordingly, this Court finds no reason why the Conditional Order of Dismissal should not become final.

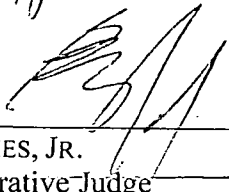
IT IS THEREFORE ORDERED that, for the reasons set forth in the Court’s Conditional Order of Dismissal and the reason set forth in this order, the application for post-conviction relief is hereby denied and dismissed with prejudice.

This Court hereby advises Applicant that 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.

¹ Applicant filed a post-conviction relief application April 9, 2012 alleging newly discovered evidence.

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 21 day of April, 2013.



GEORGE C. JAMES, JR.
Chief Administrative Judge
Third Judicial Circuit Court

Sumter, South Carolina.



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STATE OF SOUTH CAROLINA
COUNTY OF WILLIAMSBURG

Michael D. McFadden, #126806,

Applicant,

v.

State of South Carolina,

Respondent.

WILLIAMSBURG COUNTY
CLERK OF COURT
KING REE, S.C.

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

Case No. 2012-CP-45-0197

CONDITIONAL ORDER OF DISMISSAL

12 OCT 21 2012 PH 3:07
CAROL KING REE, S.C.
CLERK OF COURT
WILLIAMSBURG COUNTY

FILED

This matter comes before this Court by way of an application for post-conviction relief filed April 9, 2012. In its return, the Respondent requested the application be summarily dismissed.

PROCEDURAL HISTORY

Before this Court are the records of the Williamsburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and records from Applicant's previous applications for post-conviction relief. The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Williamsburg County. The Applicant was indicted at the February 1992 term of the Williamsburg County Grand Jury for armed robbery, possession of a weapon during a violent crime, and kidnapping (1996-GS-31-255). He was represented on the charges by Legrand Carraway, Esquire. On April 6-7, 1992, Applicant proceeded to trial by jury, where he was convicted as indicted on all three charges. The Honorable M. Duane Shuler sentenced applicant to confinement for thirty years for kidnapping, twenty five years consecutive for armed robbery, and five years consecutive for possession of a weapon during a violent crime.

A timely notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Supreme Court affirmed Applicant's conviction and sentence. State v. McFadden,

Op. No. 94-MO-21 (S.C. Sup. Ct. filed February 1, 1994).

Applicant filed his first application for post-conviction relief on February 14, 1994, alleging that he was being held in custody unlawfully based on ineffective assistance of counsel. The State filed its Return on September 6, 1994. An evidentiary hearing was convened on November 2, 1994, at which the Applicant was present and was represented by Charles Barr, Esquire. The Honorable Thomas W. Cooper, Jr. denied and dismissed Applicant's application by written Order dated January 20, 1995. Following the written order, a second evidentiary hearing was convened on March 28, 1995 with respect to the allegation of ineffective assistance of appellate counsel, which was not addressed at the November hearing. However, Applicant withdrew this allegation at the second hearing and the matter was dismissed. The Applicant did not appeal the denial of his first application for post-conviction relief.

The Applicant subsequently filed a second application for post-conviction relief on December 1, 1995. The Applicant raised the following issues in his second application:

1. Post-conviction relief counsel was ineffective for failing to seek appellate review of Applicant's first Post-conviction relief action;
2. Denial of due process of law in sentencing court not having jurisdiction to sentence consecutively;
3. Ineffective assistance of trial counsel; and
4. Ineffective assistance of appellate (direct appeal) counsel.

The State filed its Return and Motion to Dismiss on June 13, 1996. An evidentiary hearing was convened on February 6, 1997 at the Sumter County Courthouse. Applicant was present and was represented by Gordon B. Jenkinson, Esquire. By Order dated July 3, 1997, the Honorable Alexander S. Macaulay denied and dismissed Applicant's second application for post-conviction relief. The Applicant did not appeal the denial of his second application.

The Applicant subsequently filed a third application for post-conviction relief on September

29, 1997. The applicant raised the following issues in his third application:

1. Ineffective assistance of counsel;
2. After discovered evidence; and
3. Novel issues.

The State filed its Return and Motion to Dismiss on August 14, 1998. The Honorable Thomas W. Cooper, Jr. issued an Order of Dismissal denying and dismissing the Applicant's third application on February 20, 1999. The South Carolina Supreme Court denied Applicant's Petition for Writ of Certiorari by written Order dated January 10, 2001. The Remittitur was sent on January 26, 2001.

The Applicant subsequently filed a Petition for Writ of Habeas Corpus. The United States District Court denied relief pursuant to the recommendation of the magistrate judge. (McFadden v. Harrison, No. CA-00-3934-9-25BG, D.S.C filed August 29, 2002 and entered August 30, 2002).

On February 10, 2005, Applicant filed his fourth application for post-conviction relief, alleging that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel;
2. "Sentencing court not having jurisdiction to sentence applicant consecutively";
3. "Violation of Rule 501, SCACR, and Cannon III;"
4. "Invalid Indictment;"
5. "No warrant for possession of a weapon during the commission of a violent crime;"
6. "Fifth, Sixth, and Fourteenth Amendment violations;" and
7. "Revocation of parole (double jeopardy)."

The State filed its Return and Motion to Dismiss on January 7, 2006. The Honorable R. Ferrell Cothran, Jr. denied and dismissed the application by written Order dated November 19, 2009 and filed November 25, 2009.

II.

In his current and fifth Application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following:

1. Newly Discovered Evidence; and
 - a. "A witness for the state has come forward with new information that vindicated the applicant of the charges against him."
2. Actual Innocence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds that the current application for post-conviction relief must be summarily dismissed because the Applicant's assertion that he is entitled to a new trial based upon after-discovered evidence is without merit. 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 had; (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).

The Applicant has not shown that the alleged evidence meets *any* of the requirements for after-discovered evidence. Accordingly, the Application is denied and dismissed.

This Court finds that the current application for post-conviction relief must also be summarily dismissed because it is successive to his prior applications for post-conviction relief. S.C. Code Ann. §17-27-90 provides that:

All grounds for relief available to an application under this chapter must be raised in his original, supplemental or amended Application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding 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.

Successive applications are disfavored and the burden is on Applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).

This Court finds that the current allegations were or could have been raised in the proceedings based on Applicant's prior application for post-conviction relief and thus the current application is successive and barred under S.C. Code § 17-27-90. Applicant has failed to establish sufficient reason why he could not have raised his current allegations in his previous four applications for post-conviction relief; therefore, he has failed to meet the burden imposed upon him. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); Aice, 305 S.C. 448, 409 S.E.2d 392; Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834.

This Court finds, further, that this Application for Post-Conviction Relief should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. S.C. Code Ann. §17-27-45(a) reads 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). The Applicant was convicted of the offenses he challenges in this Application on April 7, 1992. This Application was filed on April 9, 2012, nearly six years after the statutory filing period (July 1, 1996)


had expired.

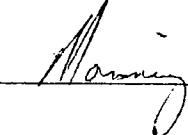
A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. §17-27-70(c) (1985) authorizes the Court to "grant a motion by either party for summary 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, this Court finds that the application for post-conviction relief is summarily dismissed for failure to file within the time mandated by statute and for being successive.

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

Office of the Attorney General
Attn: Megan E. Harrigan, Esquire
P.O. Box 11549
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 17 day of oct, 2012.


R. FERRELL COTHRAN, JR.
Chief Judge for Administrative Purposes
Third Judicial Circuit


_____, South Carolina.

STATE OF SOUTH CAROLINA

COUNTY OF WILLIAMSBURG

Michael D. McFadden, 126806,
 Plaintiff

v.

State Of South Carolina
 Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.
2012-CP-45-0197

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:
Michael D. Mcfadden, Bar No.
Address:
ACI Post Office Box 1151 Fairfax, SC 29827
phone: fax:
e-mail: other:

Defendant's Attorney:
Megan E. Harrigan, Bar No.
Address:
Post Office Box 11549 Columbia SC 29211-1549
phone: (803) 734-3737 fax: (803) 734-4113
e-mail: other:

- MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
- FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
- PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion:

Estimated Time Needed: Court Reporter Needed: YES / NO

SECTION II: Motion/Order Type

- Written motion attached
- Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for Plaintiff / Defendant

September 6, 2012
Date submitted

SECTION III: Motion Fee

- PAID - AMOUNT:
- EXEMPT: (check reason)
 - Rule to Show Cause in Child or Spousal Support
 - Domestic Abuse or Abuse and Neglect
 - Indigent Status State Agency v. Indigent Party
 - Sexually Violent Predator Act Post-Conviction Relief
 - Motion for Stay in Bankruptcy
 - Motion for Publication Motion for Execution (Rule 69, SCRPC)
 - Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
- Name of Court Reporter: _____
- Other: _____

JUDGE'S SECTION

- Motion Fee to be paid upon filing of the attached order.
- Other: _____

JUDGE _____

CODE: _____ Date: _____

CLERK'S VERIFICATION

Collected by: _____

Date Filed: _____

- MOTION FEE COLLECTED: _____
- CONTESTED - AMOUNT DUE: _____

FILED
 12 OCT 24 PM 3: 07
 CLERK OF COURT
 WILLIAMS
 KINGSTREE, S.C.

JUNE 7, 2013

HON. DANIEL E. SHEAROUSE, CLERK OF COURT
THE SUPREME COURT OF SOUTH CAROLINA
POST OFFICE BOX 11330
COLUMBIA, S.C. 29211

DEAR MR. SHEAROUSE:

ENCLOSED PLEASE FIND THE APPELLANT'S FINAL ORDER OF
DISMISSAL, AND APPELLANT'S CONDITIONAL ORDER OF DISMISSAL THAT
YOU REQUESTED.

RECEIVED

JUN 12 2013

S.C. SUPREME COURT

Sincerely yours,

SI Michael D. McFadden
MICHAEL D. McFADDEN #126806
ATTENDALE CORR. INST. - F58227
POST OFFICE BOX 1151
FAIRFAX, S.C. 29827

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