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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
FOR THE THIRTEENTH JUDICIAL CIRCUIT

Charles Earl Richey, #301029,

Applicant,

v.

State of South Carolina,

Respondent.

Case No.: 2019-CP-23-0812

2020 SEP -9 PM 2:51
FILED CLERK OF COURT
PAUL B. WICKENSIMER
ENTERED COMPUTER

CONDITIONAL ORDER OF DISMISSAL

This matter comes before this Court by way of an application for post-conviction relief filed by Donna Boyd (Applicant), on July 8, 2019. The State (Respondent) made its return on or about June 15, 2020, requesting therein that the application be dismissed summarily with prejudice.

PROCEDURAL HISTORY

Applicant is presently incarcerated in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenville County Clerk of Court. During its February of 2003 term, the Greenville County Clerk of Court indicted Applicant for armed robbery (2003-GS-23-001054), pointing and presenting a firearm (2003-GS-23-001057), kidnapping (2003-GS-23-001058), possession of a firearm by a person convicted of a crime of violence (2003-GS-23-001108), and resisting arrest (2003-Gs-23-001056). Applicant was represented by Daniel J. Farnsworth, Esquire (trial counsel), and Assistant Solicitor L. Mark Moyer of the Thirteenth Circuit Solicitor's Office prosecuted the case. On April 5. 2004, through April 6, 2004, Applicant proceeded to a jury trial with the Honorable Larry R. Patterson presiding. At the conclusion of trial, the jury found Applicant guilty as indicted. Judge Patterson sentenced Applicant to imprisonment for life without the possibility of parole for armed robbery and for kidnapping, for five years for possession of a weapon, for one year for resisting arrest, and for pointing and

presenting a firearm, with all sentences running concurrently.

Trial counsel filed a timely notice of appeal. Chief Appellate Defender Robert M. Dudek of the South Carolina Commission on Indigent defense represented Applicant on appeal. Dudek filed a motion to be relieved as counsel and a brief pursuant to Anders v. California, 386 U.S. 738 (1967), arguing therein that the trial court erred in admitting a witness's identification of Applicant after ruling that the "show-up" did not present a substantial chance of irreparable misidentification. Applicant filed a pro se brief, arguing that the trial court erred in admitting Applicant's statements to police without adequately determining their voluntariness. The South Carolina Court of Appeals dismissed the appeal. State v. Richey, Op. No. 2008-UP-686 (S.C. Ct. App. filed December 11, 2008) (per curiam). The remittitur was issued on December 31, 2008.

2009-CP-23-0702

Applicant filed his first application for post-conviction relief on January 28, 2009, claiming therein that he was entitled to post-conviction relief because he received the constitutionally ineffective assistance of counsel when trial counsel (1) failed to argue at the suppression hearing that Applicant asserted his right to remain silent during interrogation, (2) failed to cross-examine officers as to their conflicts assertions about whether Applicant asserted his right to remain silent, (3) failed to contest at the suppression hearing the voluntariness of Applicant's statement, (4) failed to impeach a witness regarding the State's "distortion of the evidence design to facilitate witness testimony involving identification of Applicant clothing," (5) failed to object to the trial court's decision to allow a potentially biased juror to remain on the jury panel, (6) failed to discover videotape evidence, (7) failed to preserve for appellate review the issue of the trial court's admission of a witness's in-court identification of Applicant, (8) failed to object to testimony regarding "money capscule allegedly taken off Applicant where evidence was never disclose or available for

inspection, and because Applicant was denied the equal protection of the law when (9) he was not prosecuted in the same manner as another similarly situated individual and (10) trial counsel represented the similarly situated individual. Respondent made its return on April 17, 2009. Applicant filed an amended application on November 10, 2009, alleging he was entitled to relief because he received the ineffective assistance of counsel when trial counsel (1) failed to argue that Applicant's right to remain silent was violated, (2) failed to impeach witnesses with regard to discrepancies in Applicant's clothing, (3) failed to argue that the trial court should have addressed juror bias on the record, (4) failed to adequately investigate the videotape of the incident, (5) failed to object to testimony about money capsules that were taken from the crime scene but never produced to the defense, (6) failed to object to the State's selective prosecution of Applicant under the "two-strikes" statute, (7) failed to argue that Applicant's right to the equal protection of the law had been violated, and (8) had a conflict of interest.

A PCR hearing was held at the Greenville County Courthouse on November 10, 2009, with the Honorable G. Edward Welmaker presiding. Applicant was present and represented by Carolina Horlbeck, Esquire, and Assistant Attorney General Karen C. Ratigan of the South Carolina Attorney General's Office represented Respondent. After the conclusion of the hearing, Judge Welmaker issued an order of dismissal on December 22, 2009, in which he denied the application and dismissed it with prejudice.

Horlbeck filed a timely notice of appeal. Appellate Defender Kathrine H. Hudgins of the South Carolina Commission on Indigent Defense represented Applicant on appeal. Assistant Attorney General Ratigan represented Respondent on appeal. Hudgins filed a petition for a writ of certiorari arguing (1) Judge Welmaker erred in refusing to find that trial counsel was constitutionally ineffective for failing to preserve for appellate review the trial court's admission of identification

testimony from the convenience store clerk because the identification resulted from an unduly suggestive "show-up" identification process and the State failed to prove that the identification was reliable despite the suggestiveness of the process and (2) Judge Welmaker erred in refusing to find that trial counsel was constitutionally ineffective for failing to argue that Applicant's second statement to police should have been suppressed because the questioning of Applicant continued after Applicant invoked his right to remain silent. The South Carolina Supreme Court transferred the appeal to the South Carolina Court of Appeals. The Court of Appeals denied Applicant's petition for a writ of certiorari. Richey v. State, S.C. Ct. App. Order filed January 25, 2013. The remittitur was issued on February 11, 2013.

5:13-cv-01329-MGL-KDW

On May 20, 2013, Applicant filed a petition for a writ of habeas corpus in the United States District Court for the District of South Carolina, claiming therein that he was entitled to relief because (1) Judge Welmaker erred in failing to properly determine whether trial counsel was constitutionally ineffective for failing to argue for the suppression of Applicant's second statement to police, because Applicant received the constitutionally ineffective assistance of counsel when trial counsel (2) failed to discover and argue for the suppression of Applicant's third statement to police on the basis that it was obtained of Applicant's Sixth Amendment right to counsel, (3) failed to preserve for appellate review the issue of the trial court's admission of the convenience store clerk's identification of Applicant, and (4) failed to conduct an adequate investigation into alternative lines of defense. Applicant amended his petition, with the court's leave, to include a fifth claim that he was entitled to relief because (5) Horlbeck failed to argue during Applicant's first PCR action in state court that trial counsel was constitutionally ineffective for failing to preserve for appellate review the trial court's admission of identification testimony that resulted from a

suggestive show-up procedure. Senior Assistant Attorney General Melody J. Brown of the South Carolina Attorney General's Office represented Respondent, and made Respondent's return and moved for summary judgment on or about September 13, 2013. Applicant filed a return to Respondent's motion for summary judgment on October 21, 2013.

On April 22, 2014, United States Magistrate Judge Kaymani D. West issued a report and recommendation, recommending that Respondent's motion for summary judgment be granted and that Applicant's petition be dismissed with prejudice. In an order issued on September 5, 2014, United States District Judge Mary G. Lewis adopted Judge West's report and recommendation despite Applicant's objection, granting Respondent's motion for summary judgment, denying Applicant's petition for a writ of habeas corpus and dismissing it with prejudice, and declining to issue a certificate of appealability.

Applicant filed a notice of appeal. In an order issued filed on July 28, 2015, the United States Court of Appeals for the Fourth Circuit granted Applicant a certificate of appealability regarding the issue of whether Judge Lewis erred in denying relief on Applicant's claims that he received the constitutionally ineffective assistance of counsel. Applicant was represented on appeal by Milligan J. G. Goldsmith, Esquire, and Matthew Allen Fitzgerald, Esquire; they argued that Judge Lewis erred in failing to grant relief to Applicant on his claims that trial counsel was constitutionally ineffective for failing to move to suppress Applicant's statements to police, and that Judge Lewis erred in failing to find Applicant was entitled to relief based upon his claim that his post-bond statement should have been suppressed due to his request for counsel and that the default in his not raising the issue should be excused due to the ineffective assistance of Applicant's PCR counsel. In an unpublished opinion filed on June 23, 2016, he Court of Appeals for the Fourth Circuit affirmed, finding Applicant failed to demonstrate he was prejudiced by trial counsel's performance, among

other things.

CURRENT APPLICATION

In his second and current application for post-conviction relief, filed on February 18, 2019, Applicant claims he is entitled to relief because (1) Judge Welmaker abused his discretion when he allowed trial counsel to testify as the first witness at Applicant's PCR hearing in order to accommodate counsel's work schedule, (2) Applicant's attorney in his first PCR action was constitutionally ineffective for failing to object when Judge Welmaker allowed trial counsel to testify first at Applicant's PCR hearing, and (3) trial counsel was constitutionally ineffective for having a conflict of interest in representing both Applicant and a similarly situated individual, which resulted in a miscarriage of justice. Applicant prays that the Court would grant post-conviction relief and award him a new trial or resentencing where he can be represented by an attorney who does not have a conflict of interest.

Before this Court are the records of the Greenville County Clerk of Court regarding Applicant's convictions and sentences, the records from Applicant's direct appeal, the records from Applicant's first application for post-conviction relief and its appeal, the records from Applicant's petition for a writ of habeas corpus in federal court and its appeal, Applicant's records from the South Carolina Department of Corrections, and this second and current application for post-conviction relief and Respondent's return thereto.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the pleadings and all relevant supporting documents. This Court finds the application shall be dismissed summarily for the reasons that follow.

Pursuant to S.C. Code Ann. § 17-27-70(c), the Court may summarily dispose of an application if there is no genuine issue of material fact in the "pleadings, depositions and admissions

and agreements of fact" and the movant is entitled to judgment as a matter of law. The summary dismissal of an application for post-conviction relief without a hearing is appropriate only when it is apparent on the fact of the application that a hearing is not needed for the development of a factual record and the applicant is not entitled to relief. Mose v. State, 420 S.C. 500, 505, 803 S.E.2d 718, 720 (2017) (citing Leamon v. State, 363 S.C. 432, 611 S.E.2d 494 (2005)). The Court, in considering the motion for summary dismissal without the holding of an evidentiary hearing, must assume the facts presented by Applicant as true and view then in the light most favorable to Applicant. Robertson v. State, 418 S.C. 505, 519, 795 S.E.2d 29, 36 (2016) (citing McCoy v. State, 401 S.C. 363, 737 S.E.2d 623 (2013)).

First, this present application for post-conviction relief shall be dismissed summarily for its non-compliance with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160 (the Act). 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).

The Act 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 offense or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A). The South Carolina 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) (per curiam). One who was convicted and sentenced prior to the effective date of the statute of limitations must file the application within one year of the effective date of the statute, which was July 1, 1995. Id. at 470, 469 S.E.2d at 607. Applicant was convicted and sentenced on April 6, 2004. The remittitur in Applicant's direct appeal was issued on December 31, 2008. The

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application was, therefore, due on or before January 1, 2010. This application was not filed until February 18, 2019, more than nine years after the statutory filling period expired. Therefore, the application shall be dismissed summarily for Applicant's failure to file within the time mandated by Act and by Peloquin.

Second, this present application for post-conviction relief shall be dismissed summarily because it is a successive application. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been raised in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code 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 indicate a "sufficient reason" that new grounds 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. at 450. If the applicant could have raised the allegations in a previous application, then the applicant may not raise those grounds in successive applications. Id. 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).

The claims raised by Applicant in this second and current application are essentially identical

to those raised in his first application. So, not only could Applicant have raised them in his first PCR action, but he did in fact do so. Therefore, Applicant has failed to meet the burden imposed upon him, and this Court shall dismiss the application summarily due to its being successive.

The third claim that Applicant presents in this second application is that he is entitled to relief because trial counsel had a conflict of interest. Applicant presented this claim in his first PCR action, and should not be allowed to argue the issue again in this successive application. The first claim applicant presents in this second application could have been raised before Judge Welmaker and the appellate courts on appeal in Applicant's first PCR action, and he should not be allowed to raise the issue for the first time in this successive application. The second claim that Applicant presents in this application, is subject to summary dismissal because the claim that PCR counsel was constitutionally ineffective is not recognized in this state. The Sixth Amendment right to the effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, (1991). Therefore, "the contention that prior PCR counsel was ineffective is not per se a 'sufficient reason' warranting a successive PCR application under [S.C. Code Ann.]§ 17-27-90." Aice, at 451, 409 S.E.2d at 394. Applicant has failed to meet the burden imposed upon him and this successive application shall be dismissed.

Third, this Court shall dismiss the application summarily because the claims raised are barred by the doctrine of 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). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (S.C. Ct. App. 1993). Res judicata also bars any issues that could have been raised in the former action. Id.; see also Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981) (approving of PCR court's finding that

claims raised or that could have been raised in a prior federal habeas corpus proceeding were barred by res judicata). As previously noted in this order, Applicant could have raised his first claim in his first PCR action and did raise his third claim in his first PCR action. Therefore, the doctrine of res judicata precludes Applicant from raising these two claims again.

CONCLUSION

Pursuant to S.C. Code Ann. § 17-27-70(b), this Court intends to dismiss this application for post-conviction relief with prejudice unless Applicant provides specific reasons, factual or legal, that the application should not be dismissed in its entirety. Applicant is granted twenty days from the date of service of this order upon him to show why this order should not become final. Applicant shall file any reasons he may have with the Greenville County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Taylor Zane Smith, Esquire
PCR Division – 13th Circuit
Post Office Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Greenville County Clerk of Court and opposing counsel within twenty (20) 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 2nd **day of** September **, 2020.**

Alex Kinlaw, Jr.
Chief Judge for Administrative Purposes
Thirteenth Judicial Circuit

Greer, South Carolina

Copy mailed to
Attorney General/Pro Se
on 9/9/2020