

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)
)
Dupree Evans, SCDC No. 322078)
)
Applicant,)
)
v.)
)
State of South Carolina)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No. 2019-CP-26-6317

CONDITIONAL ORDER OF DISMISSAL

FILED
2019 JAN -5 AM 9:17
CLERK OF COURT
HORRY COUNTY, SC

This matter comes before the Court by way of an application for post-conviction relief filed by Applicant Dupree Evans on October 7, 2019. Respondent made its Return, requesting the application be summarily dismissed.

PROCEDURAL HISTORY

The records before this Court establish that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted for Murder by the Horry County Grand Jury during its April, 2005 term. (2005-GS-26-1319). Applicant was represented by Orrie E. West, Esquire, and the case was prosecuted by Assistant Solicitor Heather S. Tolar, Esquire of the Fifteenth Circuit Solicitor's Office.¹ Applicant proceeded to trial before the Honorable Edward T. Cottingham on May 21, 2007. The jury convicted Applicant of murder and Judge Cottingham sentenced him to life imprisonment without the possibility of parole.

A notice of appeal was timely followed and an *Anders* brief was submitted on Applicant's behalf by Wanda H. Carter, Esquire. Applicant's counsel petitioned to be relieved as counsel and Applicant proceeded *pro se*. The South Carolina Court of Appeals affirmed the conviction on

¹ Now Heather S. Von Hermann

February 24, 2010. Applicant unsuccessfully petitioned for a rehearing on April 22, 2010, and the South Carolina Supreme Court denied certiorari on May 27, 2010. The case was remitted to the circuit court on June 1, 2010.

Applicant filed his first application for post-conviction relief on September 14, 2010. Applicant alleged that he was being held in custody unlawfully due to ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and Due Process violations. A scheduling conference was held to address outstanding discovery issues resulted from Applicant's dismissal of his appointed counsel and decision to proceed *pro se*. The scheduling order was entered on June 20, 2014 and Applicant filed a notice of appeal with the South Carolina Supreme Court on July 7, 2014. The notice was dismissed on July 9, 2014 because it was not a final appealable decision. The dispositional order stated:

Under Rule 243(a) of the South Carolina Appellate Court Rules (SCACR) and S.C. Code Ann. §17-27-100, only a final decision or judgment in a post-conviction relief case is subject to appellate review (citation omitted). Since the order under appeal is not the final decision or judgment in this matter, the notice of appeal is hereby dismissed without prejudice to petitioner's ability to timely serve and file a notice of appeal once a final decision or judgment is issued.

An evidentiary hearing was held on August 25, 2014, at the Horry County Courthouse, before the Honorable Kristi Lea Harrington. Applicant represented himself *pro se* at the hearing. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent. The Court found that Applicant failed to meet the requisite burden for relief on each allegation and dismissed his application with prejudice on November 19, 2014.

Petitioner did not appeal the dismissal of his PCR action. Instead, Applicant filed numerous motions and letters with the circuit court. Among these was a "Motion to Alter/Amend and Reconsideration Pursuant to Rules 52(b) and 59(e)", filed on December 16, 2014. The State filed its response to this motion on December 18, 2014. Judge Harrington issued a Form 4 order denying

Applicant's motion on March 30, 2015. Applicant was served with copies of Judge Harrington's Order and his attention was also directed to South Carolina Appellate Court Rules 203 and 243 for information about how to appeal his PCR action on July 28, 2015. On December 18, 2015, the South Carolina Supreme Court issued an order dismissing Petitioner's Notice of Appeal as untimely. The remittitur was sent on January 5, 2016.

On September 5, 2017, Applicant filed a *pro se* petition for writ of habeas corpus and a "Protective Petition," with the United States District Court for the District of South Carolina. In his petition Applicant asked the court to toll the statute of limitations while he exhausted state court remedies through the PCR process. The State moved for summary judgment on November 7, 2017, arguing that Applicant had exhausted his state court remedies, that his habeas action was untimely, and that he failed to state a cognizable claim for habeas relief. Applicant filed a response in opposition to the motion for summary judgment on March 29, 2018. The State filed a reply to Applicant's response in opposition to the motion for summary judgment on April 5, 2018, again reasserting that Applicant's petition was untimely and failed to properly raise cognizable claims. On July 20, 2018, the State's motion for summary judgment was granted. Applicant filed a Rule 59(e) motion to alter/amend and reconsider judgment on July 30, 2018. The State filed its response to this motion on August 15, 2018. The court denied Applicant's Rule 59(e) motion was denied on November 5, 2018, finding that he failed to cure the untimeliness of his petition to warrant equitable tolling of the statute of limitations and therefore did not present sufficient evidence of manifest injustice, extraordinary circumstances, or new evidence.

Applicant filed a notice of appeal on November 27, 2018, with the United States Court of Appeals. After informal opening briefs, Applicant's certificate of appealability was denied and dismissed in an unpublished Per Curiam opinion by the United States Court of Appeals for the

Fourth Circuit on June 11, 2019. (*Evans v. Warden Lieber Correctional Inst.*, No. 18-7444). Applicant filed a petition for rehearing and rehearing en banc on July 1, 2019. This motion was denied on August 12, 2019.

CURRENT APPLICATION

In his current application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Austin v. State, Corey v. State
 - a. Never appointed counsel to appeal PCR decision

Applicant requests the following relief:

- New evidentiary hearing/belated appeal

Before this Court are the Horry County Clerk of Court records, the records of the South Carolina Department of Corrections, records from the prior PCR application, direct appeal, and habeas corpus action, as well as records pertaining to the current PCR application.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the pleadings and all relevant supporting documents. Pursuant to S.C. Code Ann. § 17-27-70(b), the Court makes the following findings of fact and conclusions of law:

This Court also finds that this application must be summarily dismissed because it is successive to Applicant's previous PCR application and fails to raise any genuine issue of material fact necessitating an evidentiary hearing. 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 earlier 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" 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).

The right to seek appellate review of the denial of a PCR application is expressly authorized by South Carolina law. S.C. Code Ann. § 17-27-100 (1985). This right entitles applicants to assistance of appellate counsel. *See Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). A PCR applicant is entitled to a belated appeal if the PCR judge affirmatively finds either: (1) the applicant requested and was denied an opportunity to seek appellate review; or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived. *See King v. State*, 308 S.C. 348, 349, 417 S.E.2d 868-69 (1992). To effectuate a *pro se* applicant's right to appeal a PCR dismissal, PCR judges are required to advise *pro se* applicants of both their right to appeal, and also their right to appellate counsel when their PCR applications are summarily dismissed. *Odom v. State*, 337 S.C. 256, 262, 523 S.E.2d 753, 756 (1999).

Applicant's current allegations are that he was never appointed appellate counsel to assist him in appealing the dismissal of his prior PCR application. The record clearly demonstrates that Applicant chose to represent himself *pro se* during the initial PCR process after relieving previously appointed counsel over discovery disputes. Applicant was informed of his right to an

appeal multiple times during the proceedings. The record is bereft of evidence indicating Applicant's desire to either pursue a PCR appeal, either *pro se* or with an attorney's assistance. Instead, Applicant chose to pursue a petition for a writ of habeas corpus in the federal courts. Applicant's application offers no explanation as to why his right to an appeal should be preserved.

This Court finds sufficient to treat this as a waiver of Applicant's right to an appeal of his initial PCR application, as well as his right to assistance of counsel for said appeal. Applicant has failed to meet the burden imposed upon him, and therefore, this Court summarily dismisses the application for failure to present any genuine dispute of material fact warranting an evidentiary hearing.

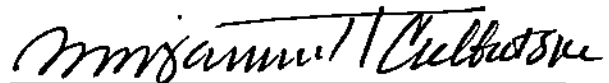
CONCLUSION

Pursuant to S.C. Code Ann. § 17-27-70(b), this Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. 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. Applicant shall file any reasons he may have with the Horry County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
PCR Division – 15th Circuit
P.O. Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Horry County Clerk of Court and opposing counsel within twenty (20) days, and that this Court will not consider any issues raised in his response if not so timely filed and served.

IT IS SO ORDERED this 11th day of December, 2020.



Judge Benjamin Culbertson
Chief Administrative Judge
Fifteenth Judicial Circuit