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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM UNION COUNTY

May 28 2024
S.C. SUPREME COURT

Court of Common Pleas
HONORABLE R. KEITH KELLY
2019-CP-44-100

Demarcus Darriell Simuel

APPELLANT,

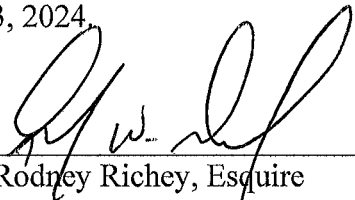
vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Demarcus Darriell Simuel appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable R. Keith Kelly, Circuit Judge on August 4, 2020 an Order issued on June 21, 2023 and filed on July 11, 2023. The Appellant received notice of the judgment on May 23, 2024.



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THE STATE OF SOUTH CAROLINA)
COUNTY OF UNION)

IN THE COURT OF COMMON PLEAS
FOR THE SIXTEENTH JUDICIAL CIRCUIT

Demarcus Darriell Simuel,)

Applicant,)

VS.)

The State of South Carolina,)

Respondent.)

ORDER OF DISMISSAL

Case No. 2019-CP-44-100

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This matter comes before this Court by way of Applicant's post-conviction relief application filed on April 4, 2019. Respondent made its return on December 10, 2019, requesting a hearing on the State's motion to dismiss be convened. A hearing on the State's motion to dismiss was held on August 4, 2020, virtually via WebEx. Rodney Richey, Esquire represented the Applicant. Janell H. Gregory, Esquire represented Respondent.

After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to equitable tolling of the statute of limitations. Accordingly, this Court summarily dismisses the application without a full evidentiary hearing. Findings of fact and conclusions of law are set forth below.

Procedural History

The Applicant is presently confined to the South Carolina Department of Corrections pursuant to orders of commitment from the Union County Clerk of Court. During the February 2017 term, the Union County Grand Jury indicted Applicant for possession of a firearm during the commission of a violent crime (2017-GS-44-0558), unlawful neglect of a child (2017-CP-44-0561), and trafficking in crack cocaine (2017-GS-44-0556). Applicant was represented by

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Michael Brown, Esquire, and Deputy Solicitor John Anthony of the Sixteenth Circuit Solicitor's Office, prosecuted the case.

On August 23, 2017, Applicant appeared before the Honorable Brian M. Gibbons and proceeded to a jury trial. On August 24, 2017, Applicant, through Counsel, indicated to Judge Gibbons that he did not feel it was in his best interest to continue with the trial and proceeded to enter a guilty plea. (Trial Tr. 142). At that time, the trial court took a recess and Applicant and the State negotiated a plea agreement. Pursuant to plea negotiations, Judge Gibbons sentenced Applicant to imprisonment for five years for the weapon offense, ten years for child neglect, and fifteen years for trafficking in crack cocaine, second offense. All sentences were set to run concurrently. Applicant did not pursue a direct appeal.

Current Action Before this Court

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

1. Ineffective assistance of counsel
 - a. Trial counsel failed to suppress search warrant.

This Court held a hearing on the State's motion to dismiss. The only issue before the Court at the hearing was whether Applicant was entitled to equitable tolling.

Finding of Fact and Conclusions of law

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. Before this Court are Applicant's Union County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, and the current PCR Application. Set forth below are the relevant findings of fact and conclusion

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of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

The Court finds that this application must be dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. sections 17-27-10-160. Specifically, 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 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 on appeal, whichever is later.

S.C. Code Ann section 17-27-45(A).

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin vs. State, 321 S.C.468, 469 S.E.2d 606 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell vs. Consolidated School District of Aiken, 315 S.C.487, 445 S.E.2d 638 (1994). In addition, South Carolina Code Annotated Section 17-27-70(c) 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."

Applicant entered a guilty plea on August 24, 2017. He did not file an appeal thereafter. Thus, the PCR Application was due on August 25, 2018. This application was filed on April 4, 2019, after the statutory filing period.

Further, Applicant failed to meet his burden of proof in establishing he is entitled to equitable tolling. In rare circumstances, the statute of limitations will be equitably tolled to allow a petitioner the opportunity to exercise his or her rights when they were denied the chance to do so. This doctrine has been specifically extended into the context of post-convict relief cases, as

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well, Equitable tolling has been deemed available when (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. *Pelzer v. State*, 378 S.C. 516, 521 662 S. E.2d 618, 619-20 (Ct. App. 2008). In the present case, Applicant submitted an affidavit explaining he filled out a post-conviction relief application and placed it in the prison mailbox on April 15, 2018. Applicant claims on April 16, 2018, the entire prison system in South Carolina was placed on lockdown because of the Lee County riots. Applicant claims his application was not received by Respondent due to the lockdown.

Based on Applicant's affidavit, the timely post-conviction relief application he claims to have mailed was placed in the mail before the lockdown so it is unclear how the lockdown would have prevented his application from being received by Respondent in a timely manner. Accordingly, this Court finds Applicant has failed to establish any grounds for equitable tolling the statute of limitations.

Conclusion

Based on all the foregoing, this Court finds that the matter is untimely and should be summarily dismissed. This Court notifies the Applicant that he must file and serve notice of appeal within thirty days of receipt by counsel of the judgment entry's written notice to secure appropriate appellate review. See Rule 203, SCACR. Pursuant to *Austin vs. State*, 305 S.C.453, 409 S.E.2d 395 (1991), an Applicant has the right to appellate counsel's assistance in seeking

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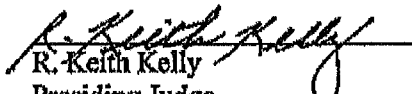
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review of the denial of PCR. Rule 71.1(g), SCRPC provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant's attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedure.

IT IS THEREFORE ORDERED;

1. The PCR application be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT SO ORDERED this 21 day of June, 2023


R. Keith Kelly
Presiding Judge
Sixteenth Judicial Circuit

_____, South Carolina

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