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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT
Jontez Myrelle Ward #320975, Applicant, v. State of South Carolina, Respondent.	Case No.: 2019-CP-10-4507 **ORDER OF DISMISSAL**

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by Jontez Myrelle Ward (Applicant) on August 27, 2018. On July 6, 2020, Respondent made its return and moved for a more definite statement. Thereafter, on June 16, 2023, Respondent filed an amended return and motion to dismiss. On March 12, 2024, a hearing on the State's motion to dismiss convened. Applicant was present and represented by Christopher L. Murphy, Esq. Assistant Attorney General Danielle Dixon represented Respondent. After reviewing the evidence and argument at the hearing and the records in this case, this Court grants Respondent's motion to dismiss, and dismisses this PCR action with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections serving a twenty-five-year sentence. In April 2016, the Charleston County Grand Jury indicted Applicant for possession with intent to distribute (PWID) a controlled substance within proximity of a park (2016-GS-10-00904) and possession of a weapon during the commission of a violent crime (2016-GS-10-00903). In July 2018, the Charleston County Grand Jury indicted Applicant for trafficking in heroin, 28G or more (2018-GS-10-04100).

On February 5-7, 2019, Applicant proceeded to a jury trial, *pro se*, before the Honorable

2018-GS-10-04100; 2016-GS-10-00903; 2016-GS-10-00904

Diane Goodstein. Assistant Solicitors Alexander Ziegler and Ashley Brown prosecuted the case. The jury found Applicant guilty as indicted. Judge Goodstein sentenced Applicant to concurrent terms of twenty-five years for trafficking heroin, ten years for the PWID-proximity charge, and five years for the weapon charge.

On February 22, 2019, Applicant filed an untimely notice of appeal. He was represented by Aimee Zmroczek, Esq. On February 27, 2019, the South Carolina Court of Appeals dismissed the appeal as untimely. Applicant filed a motion to reconsider, which was denied. The remittitur was sent June 19, 2019.

SUMMARY OF TRIAL

At trial, the State's evidence against Applicant consisted primarily of evidence recovered during the execution of a search warrant; probable cause for the warrant was developed through controlled purchases made by a confidential informant (CI). Prior to trial, Applicant (proceeding *pro se*) asked why he kept "receiving bits and pieces of discovery instead of the full discovery." He stated he had still still-shots from videos but had never seen the videos. The solicitor explained that law enforcement had made three controlled purchases from Applicant but had only charged him with two of those purchases. The solicitor asserted,

> The State believes he has received all of the discovery he is entitled to. There are videos from the controlled purchases that he has not seen. The State believes that we have the right to protect the identity of the confidential informant still.
>
> We're not—**we're not trying those cases. We're not trying the distributions. We are strictly limiting this to the search warrant case.** So we believe the Defendant himself doesn't have the right to view the videos that reveal the C.I.
>
> I have provided still shots from the buys to allow him to get the understanding of what's in those. But we're not introducing them into evidence. We're not going to be referring to them in the case-in-chief. And don't believe he has the right to view them.

(Tr. 49-50, emphasis added). However, the solicitor acknowledged one of the controlled purchases (for which Applicant had not been charged) furnished the probable cause for the search warrant. The prosecutor further stated he had previously provided everything—including the videos—to Applicant's attorney, who had been relieved prior to trial.

The Court questioned the solicitor about whether any of the videos contained exculpatory material; the solicitor relayed they did not. Thereafter, the Court ruled:

> [W]hile I understand that the State has an interest in nondisclosure of confidential informants, I am unaware of an opinion from the Supreme Court form the United States or the South Carolina Supreme Courts that allows discovery to be excluded for that reason.
>
> Having said that, if I set that aside, if the State maintains that there is no exculpatory evidence contained and there is no intention on behalf of the State to introduce that evidence, and that the one buy that was used for probable cause to obtain the search warrant that there have been still-photographs of relevant portions of that buy that was used to obtain the search warrants, then I think probable cause has been established and discovery has been shared.
>
> . . . .
>
> So, [Applicant], first of all, the tapes are not going to be shown to the jury. And secondly, the State certainly has an obligation to Brady to share in discovery any exculpatory evidence.
> The State has made a recommendation—or has made a representation on the record that there is no Brady material contained within the videos, that it does—the State does not intend to admit, and that the still photographs that were shared with you were shared for the purpose of establishing probable cause. So that's—that would be the explanation.

(Tr. 52-53). The Court clarified that the State's desire to protect a CI did not trump the requirements of *Brady* or Rule 5, and the State must disclose any exculpatory evidence to Applicant. However, it determined the State had shared all the discovery with the defense through Applicant's lawyer, and based on the State's representation that there was no exculpatory evidence,

it did not require the State to disclose the video to Applicant.

In addition to raising an issue with the videos, Applicant questioned why he had not had an opportunity to question the CI. The Court explained that he would have a right to cross-examine any witness called by the State, including the CI if the State called that person as a witness. The State, however, did not call the CI as a witness during trial.

CURRENT APPLICATION

In his PCR application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. *Brady* Violation: his due process rights were violated by the prosecutor's failure to disclose and produce a buy-bust audio and video that was used to support probable cause for his warrant;

2. Prosecutorial Misconduct: "the trial court abused its discretion in allowing the State to present altered and fabricated 'not authentic evidence' of pictures" from the buy-bust video rather than the actual video";

3. Due Process Violation: Applicant was unable to cross examine the confidential informant, which he objected to on the record.

At the PCR hearing, Applicant asserted he received still shots from a video of a controlled purchase but did not receive the video itself. He likewise asserted the CI did not testify at his trial or provide any additional information. Applicant did not raise any additional allegations at the hearing. Respondent asserted Applicant's application should be dismissed for failure to state a claim and on the basis of res judicata.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds this action should be dismissed based on Applicant's failure to set forth a cognizable claim. Specifically, this Court finds allegations one and three are barred by res judicata, and allegation two fails to set forth a cognizable claim.

The PCR Act provides:

> Any person who has been convicted of, or sentenced for, a crime and who claims:
>
> (1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
>
> (2) That the court was without jurisdiction to impose sentence;
>
> (3) That the sentence exceeds the maximum authorized by law;
>
> (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
>
> (5) That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
>
> (6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief. Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.

S.C. Code Ann. § 17-27-20. Importantly, PCR is not a substitute for an appeal. *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A PCR application cannot assert issues that could have been raised at trial or on appeal. *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). "[T]he post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal." *Id.*

"Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999). "Under the

doctrine of res judicata, '[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.'" *Id.* (*quoting Hilton Head Center of SC, Inc. v. Pub. Serv. Comm'n of SC*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)). "To establish res judicata, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit." *Id.*

a) Allegations one and three

This Court finds allegations one and three are barred by the doctrine of res judicata. In support of these allegations, Applicant contends (1) his due process rights were violated by the prosecutor's failure to disclose and produce a buy-bust audio and video that was used to support probable cause for his warrant, and (3) his due process rights were violated by his inability to cross examine the confidential informant, which he objected to on the record.[1] However, as Applicant himself acknowledges, these issues were before the trial court and decided by the trial court. Applicant cannot now ask this Court to redetermine an issue that has previously been determined. *See* § 17-27-20(A)(4) (providing the PCR Act permits an applicant to institute a PCR action if "there exists evidence or material facts, *not previously presented and heard*, that requires vacation of the conviction or sentence in the interest of justice" (emphasis added)); *Plum Creek*, 334 S.C. at 34, 512 S.E.2d at 109 ("Under the doctrine of res judicata, '[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.'" (*quoting Hilton Head Center*, 294 S.C. at 11, 362 S.E.2d at 177)); *see also Drayton*, 312 S.C. at 8, 430 S.E.2d at 520 (providing PCR "is not a substitute for appeal or a place

[1] Applicant's allegation that he was denied the right to cross-examine the CI is patently without merit here when the CI did not even testify at trial. Applicant's charges in this trial did not stem from a controlled purchase but rather from a search warrant executed by law enforcement.

for asserting errors for the first time which could have been reviewed on direct appeal").

Allegation one—a *Brady* violation—was raised at trial when Applicant questioned the Court about the videos he had not seen. Likewise, allegation three was also raised to the trial court. To the extent Applicant disagreed with the court's ruling, Applicant could have pursued that issue through a timely appeal.[2] Because these allegations could have been (and were) addressed at trial, they are not proper PCR claims. *See Drayton*, 312 S.C. at 8, 430 S.E.2d at 520 ("[T]he [PCR] procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal."). Further, because these allegations were previously raised to (and ruled upon by) the trial court, they are barred by res judicata. Finally, this Court lacks the authority to consider whether a different circuit court judge erred in its decisions. *Cf. Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986) ("One Circuit Court Judge does not have the authority to set aside the order of another."). Thus, these claims are denied and dismissed with prejudice.

b) Allegation Two

In allegation two, Applicant alleges "the trial court abused its discretion in allowing the State to present altered and fabricated 'not authentic evidence' of pictures" from the buy-bust video rather than the video. Although framed as an allegation of prosecutorial misconduct, this Court finds this is actually an allegation of trial court error that is not cognizable under the PCR Act.[3]

Here, although Applicant did not object to the admission of any photographs (and thus did not preserve any issue related to them for appeal), any evidentiary concerns about the pictures should have been raised to the trial court and are not a proper basis for PCR here where Applicant

[2] Applicant did not raise any claims related to his direct appeal in his PCR application or at the PCR hearing.
[3] To the extent this can be construed as a claim of prosecutorial misconduct based on fabricated evidence, Applicant did not present any credible evidence that the evidence was in fact fabricated.

proceeded pro se.[4] *see* S.C. Code Ann. § 17-27-20 (providing the PCR act "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court"); *Faretta v. California*, 422 U.S. 806, 834 n. 46 (1975) ("The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law). Although the Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel, Applicant waived that right when he elected to proceed pro se, and this Court finds he cannot now assert a Sixth Amendment Violation related to his own trial conduct. Because allegation two is not a cognizable PCR claim, this Court finds it should be dismissed.

CONCLUSION

Based on the foregoing, this Court finds Respondent's Motion to Dismiss allegations one, two, and three should be granted, and those allegations are denied and dismissed with prejudice. This Court further finds Applicant has not set forth any additional, cognizable allegations, either in his application, in an amended application, or at the PCR hearing; thus, this application is denied and dismissed with prejudice.

Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty days of receipt by counsel of written notice of entry of judgment. *See* Rule 203, SCACR. Applicant has the right to an appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). If Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Rule

[4] Applicant complains about the admission of still-shots from a buy-bust video. Notably, however, these were not introduced at trial. (Tr. 4-6). The photographs entered into evidence consisted of photographs of the home police searched pursuant to a warrant (Ex. 1-2, Tr. 128; Ex. 3-28, Tr. 144); photographs of the townhouse subdivision where the home was located (Ex. 40-41, Tr. 181); and a photograph of Applicant and his girlfriend recovered from the home (Ex. 39, Tr. 182).

71.1(g), SCRCP. Attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for PCR is dismissed with prejudice; and

2. Applicant shall be remanded to and remain in the custody of the State.

IT IS SO ORDERED.

WALTON J. MCLEOD, IV
Presiding Judge
Ninth Judicial Circuit

THIS 8 day of APRIL, 2024.

Lexington, South Carolina