June 7, 2024

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Dudley B. Mack, #366326, Applicant, v. State of South Carolina, Respondent.	)	CASE NO. 2017-CP-40-7110 **CONDITIONAL ORDER OF DISMISSAL**

This matter comes before this Court pursuant to Applicant Dudley B. Mack's application for post-conviction relief (PCR) commenced on November 22, 2017. Respondent, the State of South Carolina, made its Return and Motion to Dismiss on May 4, 2018. Applicant made his Return and Motion to Grant Relief on May 25, 2018. Respondent made its Amended Return and Motion to Dismiss on January 26, 2024. This Court grants Respondent's Motion to Dismiss and finds Applicant's application for post-conviction relief is untimely, barred by the statute of limitations, and fails to comply with the Uniform Post-Conviction Procedures Act, S.C. Code Ann. § 17-27-10 *et seq.* (2014).

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court for unrelated offenses not subject to this application. On April 27, 2014, Applicant was arrested for third-degree assault (Arrest Warrant No. 2014A4010203405) stemming from an incident on September 27, 2014, in which Applicant threw a planter at D'Andre Mack (D'Andre), striking him in the right arm and then later Applicant brandished a razor and threatened D'Andre, following verbal altercations.

On September 28, 2014, Applicant appeared before Magistrate Judge M. R. Metts for a

bond hearing. Applicant's bond was granted. On October 30, 2014, Applicant proceeded to a bench trial before Magistrate Judge Josef M. Robinson. Judge Robinson found Applicant guilty and issued a sentence of credit for time served.

Applicant did not appeal his conviction or sentence.

ACTION BEFORE THIS COURT

In Applicant's *untimely* application for post-conviction relief, Applicant alleges he is unlawfully held in custody based on the following:

1. "Applicant's conviction for assault and battery, 3rd S.C. Code 16-3-600(E)(1)(2)(3) was based on landlord/tenant violation S.C. Code 27-50-780(a)(b) in which violates S.C. Code 16-11-440(c) because Applicant had the right to be on the property"
2. "Applicant's conviction for assault and battery conform to the relevant statute was in violation of S.C. Code 16-11-440c in which conviction was based on applicant defending himself from being attacked at his place of residence and was not engaging in an unlawful activity"
3. "Applicant's transcript and incident report clearly shows that Applicant was trying to prevent his grandchildren from being hit by a speeding vehicle that could cause great bodily injury or death as conform to S.C Code 16-11-440c in which applicant did not make an unlawful entry nor did the tenant refuses to allow applicant to enter the residence as conform to S.C. Code 27-40-780 and there is no evidence to show that applicant violate S.C. Code 27-40-780(b)."
4. "Applicant's incident report clearly shows the factual basis provided to the judge. The applicant was at his place of residence and did not cause the altercation. The applicant was attacked and had the right to stand his ground and meet force with force and has no duty to retreat as conform in S.C. code ann. 16-11-440c"
5. "Trial judge gave applicant no warning of the dangers of self-representation"
6. "There is no evidence applicant was aware of the hazards of proceeding pro se"

On June 4, 2018, Respondent filed its Return and Motion to Dismiss asserting Applicant's action was procedurally barred by the statute of limitations.

On May 25, 2018, Applicant filed his "Return and Motion to Grant Relief." In this return, Applicant asserting various justifications under the guise of newly discovered evidence such as: 1. Landlord Tenant Law; 2. Protection of Persons and Property Act. Further, the Applicant asserts various caselaw to support why his application should not be summarily dismissed.

Applicant requests relief in the form of "this court finding in favor of Applicant and vacate his conviction and sentence."

Before this Court are the Eastover Magistrate Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, records from Richland County Sheriff's Department, and the current PCR application.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the pleadings, the records submitted by the parties, and the applicable law. Pursuant to South Carolina Code Annotated §§ 17-27-70 and -80, this Court informs the parties of its intent to dismiss the application as there is no genuine issue of material fact, which would necessitate an evidentiary hearing. See S.C. Code Ann. § 17-27-70(b) (establishing the procedure for summary disposition of PCR applications); Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief). Respondent moved for summary dismissal, and this Court finds summary dismissal is appropriate for the following reasons:

SUMMARY DISMISSAL BASED ON NEWLY-DISCOVERED EVIDENCE

Applicant's assertion of newly-discovered evidence, such that he should be entitled to PCR, is without merit. The Uniform Post-Conviction Procedure Act states that a person may 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." S.C. Code Ann. § 17-27-

20(A)(4). If the applicant contends there is evidence of a material fact not previously presented, under the discovery rule, the PCR application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C). Otherwise, a PCR must be filed within one year of sentencing or, if a direct appeal is filed, within one year of the remittitur. S.C. Code Ann. § 17-27-45(A).

In his current application, Applicant claims that he recently discovered landlord/tenant law. Specifically, he avers that the tenant did not seek injunctive relief nor was there evidence that Applicant was on the property unlawfully. Applicant further details that it was the victim in this case that came after him in a threatening manner.

Next, Applicant avers that the Protection of Persons and Property Act applied in his case. Specifically, Applicant claims that he went to the victim's house because he was protectivn his grandchildren from a speeding car in the roadway. Applicant asserts that he had a right to enter the dwelling of the victim and he had a right to defend himself from the victim. Further, Applicant asserts his "only concern was the safety of the children."

However, Applicant's assertions are refuted by the record. A party requesting a new trial based on newly-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.

Clark v. State, 315 S.C. 385, 387–88, 434 S.E.2d 266, 267 (1993); see Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (setting forth the five factors to be analyzed when considering a newly-discovered evidence claim) (citing State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979))). However, the granting of a new trial based on after-discovered evidence is disfavored. State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011); see also State v. David, 14 S.C. 428, 432 (1881) ("There can be no doubt that motions of this sort should be received with the utmost caution, because, as it is said by a learned judge, there are but few cases tried in which something new may not be hunted up . . .").

During Applicant's bench trial, Applicant had the right to assert these defenses. However, the record is not available because the proceedings were not recorded. See Respondent's Exhibit #1. Additionally, the record provides the arresting officer arrived and the victim and Applicant's wife provided sworn affidavits that refute Applicant's assertions.

Applicant has failed to present any evidence to the contrary other than his blind assertions that the arrest report supports his narrative, which it does not. The "Protection of Persons and Property Act" ("the Act") provides that "[a] person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force[.]" S.C. Code Ann. § 16-11-450. The Act further provides, in part, that:

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

S.C. Code Ann. § 16-11-440(C). "A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard[.]" State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013) (citing State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011)).

Where a defendant seeks treatment under § 16-11-440(c), it is not enough for a defendant to establish that he was "not engaged in an unlawful activity" and was in a "place where he has a right to be." Rather, "[c]onsistent with the Castle Doctrine and the text of the Act, *a valid case of self-defense must exist*, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity" save the duty to retreat. Id., 406 S.C. at 371, 752 S.E.2d at 266 (emphasis added). Notwithstanding the Act or other provisions of law, in order to establish self-defense, the defendant must show (1) he was without fault in bringing on the difficulty; (2) he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) a reasonably prudent person of ordinary firmness and courage would have entertained the same belief; and (4) he had no other probable means of avoiding the danger. State v. Long, 325 S.C. 59, 62, 480 S.E.2d 62, 63 (1997).

"Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense." Douglas v. State, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998) (citing State v. Long, 325 S.C. 59, 480 S.E.2d 62 (1997)).

That a defendant was engaged in unlawful activity at the time of the incident does not in-and-of-itself defeat a claim for immunity. Rather, where a defendant was engaged in unlawful activity at the time of the incident, the trial court must consider whether the unlawful activity was the proximate cause of the incident. A person who is otherwise acting lawfully is not deprived of the right to self-defense by merely incidental illegality. State v. Glenn, 429 S.C. 108, 120-21, 838

S.E.2d 491, 497-98 (2019) (citing State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999); State v. Goodson, 312 S.C. 278, 280 n.1, 440 S.E.2d 370, 372 n.1 (1994)).

Here, the record provides Applicant did not lawfully enter the residence, and because of his entry, the incident occurred. Applicant's actions were the proximate cause of the incident, and Applicant was not acting in defense where the record provides Applicant was the aggressor.

Turning to the Clark factors, Applicant also fails the test for newly-discovered evidence because, with due diligence, Applicant could have discovered his claim before his bench trial, after his bench trial, and before the one-year statute of limitations expired. See, e.g., United States v. Connolly, 504 F.3d 206, 212 (1st Cir. 2007) ("Every element of this test . . . is essential, and a failure to establish any one element will defeat the motion.").

Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Applicant has failed to make a *prima facie* showing of newly-discovered evidence. Because his claims do not meet the high threshold of newly-discovered evidence, they are barred by the one-year statute of limitations set forth in S.C. Code Ann. § 17-27-45(A). Thus, Applicant is not entitled to an evidentiary hearing, and this matter shall be summarily dismissed.

Summary Dismissal Based on Statute of Limitations

This Court finds the application shall be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act.[1] Specifically, the Act requires as follows:

> (A). An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of

[1] S.C. Code Ann. § 17-27-10 to -160.

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.

(B). When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

(C). If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

S.C. Code Ann. § 17-27-45.

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). A motion for summary judgment may properly be used to raise the defense of the statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). Additionally, S.C. Code Ann. § 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."

In the present case, Applicant is alleging he is entitled to post-conviction relief based on various allegations that his constitutional rights were violated. However, Applicant failed to comply with the filing requirements under S.C. Code Ann. § 17-27-45. Applicant proceeded to a

bench trial and was found guilty on October 30, 2014. Applicant did pursue a direct appeal. Pursuant to S.C. Code Ann. § 17-27-45(A), Applicant needed to file his application for post-conviction relief on or before October 31, 2015. Applicant did not file this PCR application until November 22, 2017, *two years and twenty-two days* beyond the statute of limitations.

Moreover, S.C. Code Ann. 17-27-45(C) is inapplicable to Applicant's PCR application as Applicant does not present newly discovered evidence as required by the statute. McCoy v. State, 401 S.C. 363, 371, 737 S.E.2d 623, 627 (2013).

Accordingly, this Court finds the application is *untimely* pursuant to S.C. Code Ann. § 17-27-45 and shall be dismissed for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act.

APPLICANT'S ALLEGATIONS REGARDING RIGHT TO COUNSEL

In his PCR application, Applicant avers that he was not afforded the right to representation and was not informed of the dangers of proceeding *pro se* at his bench trial. Respondent submits that Applicant's averment is without merit and fails as a matter of law, and this Court should summarily dismiss this application.

No person may be imprisoned for an offense unless represented by counsel, absent a knowing and intelligent waiver of the right to counsel. Glaze v. State, 366 S.C. 271, 621 S.E.2d 655 (2005), citing Argersinger v. Hamlin, 407 U.S. 25 (1972). However, an accused has the constitutional right to waive counsel and to proceed pro se as long as the waiver is knowing, voluntary, and intelligent. Farretta v. California, 422 U.S. 806 (1975). The decision made by the accused to waive the right to counsel must be honored as long as the waiver is knowing, voluntary, and intelligent. Id.; see also State v. Brewer, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997). The

trial judge must ensure the defendant is informed of the dangers and disadvantages of self-representation. Id.

In Scott v. Illinois, the United States Supreme Court held that "[t]he Sixth and Fourteenth Amendments require that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense, but do not require a state trial court to appoint counsel for a criminal defendant . . . who is charged with a statutory offense for which imprisonment upon conviction is authorized but not imposed. 440 U.S. 367, 369-374 (1979). See also Glaze *supra*.

Here, Applicant was arrested and charged with Assault and Battery—3rd Degree. Applicant was arraigned and released on bail the same day he was arrested. Notably, Magistrate Judge M. R. Metts informed Applicant of his right to representation before granting his bail. See Respondent's Exhibit #2 at 5(b). Applicant proceeded *pro se* in a bench trial in the Magistrate Court, and Magistrate Judge Josef M. Robinson sentenced Applicant to time served. Thus, Applicant cannot assert he was denied his right to counsel where the right was not and could not have been violated. See Glaze *supra*.

Accordingly, this application shall be dismissed because Applicant's allegations regarding violations of his right to counsel fail as a matter of law.

|CONCLUSION PAGE FOLLOWS|

CONCLUSION

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this application with prejudice unless Applicant provides specific factual or legal reasons why 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 Richland County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Post-Conviction Relief Division – 5th Circuit
Post Office Box 11549
Columbia, South Carolina 29211

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

AND IT IS SO ORDERED this 20th **day of** May **, 2024.**

THE HONORABLE JOCELYN NEWMAN
Chief Administrative Judge
Fifth Judicial Circuit

Columbia, South Carolina