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STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

Bobby Joe Barton, #163629,)
)
Applicant,)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Case No.: 2021-CP-23-03093

CONDITIONAL ORDER OF DISMISSAL

ENTERED COMPUTER

Applicant filed the captioned application for post-conviction relief on June 29, 2021. Respondent has moved for summary dismissal alleging the records attached to the return and motion conclusively show that the application is barred as improperly successive, untimely, and by *res judicata*. Having reviewed the application, and the return and motion, this Court makes the following findings:

Procedural History

A Greenville County grand jury indicted Applicant in February 2010 for armed robbery and possession of a weapon during the commission of a violent crime. Susannah C. Ross, Esq., represented Applicant on the charges. A jury trial was held August 9-10, 2010. The jury convicted of armed robbery but acquitted on the weapon charge. (Return Attachment 1, Tr. p. 267). The Honorable Edward W. Miller sentenced Applicant to 25-years imprisonment. (Return Attachment 1, Tr. p. 275). Applicant appealed.

Assistant Appellate Defender LaNelle C. DuRant, of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, represented Applicant on appeal. Appellate counsel raised these issues on appeal:

1. Did the trial court err in denying Barton's motion to suppress the identification via the photo lineup when the lineup was not reliable because the alleged victim was inebriated at the

time of the incident, and had seen Barton's photo in a "mug shot" magazine prior to the photo lineup?

2. Did the trial court err in refusing to give Barton's complete Request to Charge #7 on the accuracy of identification?

3. Did the trial court err in giving the jury a second charge on armed robbery at the request of the state just to include the words "or representation of a weapon" when neither the victim nor the co-defendant witness saw the knife allegedly used?

4. Did the trial court err in refusing to relieve Barton's trial attorney and appoint another attorney after Barton argued that his attorney breached his confidentiality by bringing to light at the preliminary hearing that the co-defendant witness, Patricia Rice, had lived with Barton previously?

(FBOA at 4, Appellate Case No. 2010-169826).

On January 30, 2013, the South Carolina Court of Appeals affirmed. (Return Attachment 2). On July 11, 2014, the Supreme Court of South Carolina denied the subsequent petition for writ of certiorari on the same issues. (Return Attachment 3). On July 25, 2014, the Court of Appeals issued the remittitur.

Applicant filed his first PCR application on September 12, 2014, C/A 2014-CP-23-5047. Caroline Horlbeck, Esq., represented him in the action. An evidentiary hearing was held February 18, 2016, before the Honorable Daniel D. Hall. On March 14, 2016, Judge Hall issued a written order of dismissal. (Return Attachment 4). Applicant appealed.

Representing himself on appeal, Applicant raised the following questions presented:

1. Whether P.C.R. court erred in denying relief to Petitioner when the court erroneously found counsel was not ineffective for failing to adequately convey a formal plea offer; failing to keep Petitioner reasonably informed of case and to explain offer for Applicant to make an informed decision.

2. Whether P.C.R. court erred in denying relief to Petitioner when the court erroneously found counsel was not ineffective for failing to object to inadmissible evidence through testimony

attacking the defendants' character bring out prior incarcerations.

3. Whether the P.C.R. court erred in denying relief to Petitioner when the court erroneously found the prosecution did not commit misconduct by knowingly use of perjured testimony given by State's witness Patricia Rice in order to obtain a conviction, prosecution knew or should have known her testimony was perjury.

4. Whether P.C.R. court erred in denying relief to Petitioner when the court erroneously found the prosecution did not commit misconduct by failing to communicate to investigators' that they must not use the defendant's arrest mug-shot in its' photo array lay out.

(Return Attachment 5 at 2).

By Order dated February 15, 2018, the Supreme Court of South Carolina denied the petition for review. (Return Attachment 6).

As noted above, Applicant filed this, his second application, on June 29, 2021.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to S.C. Code Ann. § 17-27-70(c), this 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. "Summary dismissal of a PCR application without a hearing is appropriate only when (1) it is apparent on the face of the application that there is no need for a hearing to develop any facts and (2) the applicant is not entitled to relief." *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005). This is such a case.

The Application is Improperly Successive

The application should be summarily dismissed because it is improperly successive to Applicant's previous application. The PCR Act provides in relevant part:

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.

S.C. Code Ann. § 17-27-90.

Under this statute, successive 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). 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 (emphasis added). If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. *Id.* Courts disfavor successive applications and place the burden on applicants to establish any new ground raised in a subsequent application could not have been raised in an earlier application, whether state or federal. *Land v. State*, 274 S.C. 243, 245, 262 S.E.2d 735, 737 (1980) (“applicant [has] the burden of proving that a new ground for relief could not have been raised in the previous application”); *Foxworth v. State*, 275 S.C. 615, 618 274 S.E.2d 415, 416 (1981) (“The language of Section 17-27-90 is not restricted to State proceedings but rather refers to ‘any other proceeding’”).

Applicant has already had the opportunity to seek post-conviction relief. He is due no more. See *Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999) (“All applicants are entitled to a full and fair *opportunity* to present claims in one PCR application.”) (emphasis added); *Aice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991) (“as long as it was possible

to raise the argument in his first PCR application, an applicant may not raise it in a successive application”). Applicant fails to show any cognizable basis for establishing “sufficient” reason to allow the successive action.

To the extent that Applicant alleges newly discovered evidence regarding the presentation of witnesses claim, this Court agrees with the State that Applicant fails to show “sufficient” reason to allow the successive action. Here, the claim goes to facts or witnesses that were known or discoverable at trial, and Applicant admits that some of the witnesses he claims are important were known during the first PCR. (*See* PCR App. at 2-4). The “newly discovered” description, though, is tied to whether the claim and supporting evidence was *available*, not when an applicant simply crafts a claim not included in the prior action. A contrary definition would read out both “available” and “not so raised” which are expressly in the statute. Our Supreme Court has declined to do so. *Aice*, 305 S.C. at 450, 409 S.E.2d at 394 (“as long as it was possible to raise the argument in his first PCR application, an applicant may not raise it in a successive application”); *see also Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999) (“All applicants are entitled to a full and fair *opportunity* to present claims in one PCR application.”) (emphasis added). Further, there is no discernible assertion of a basis to attempt to avoid the bar on the remaining claims, and none is readily apparent.¹ Consequently, the procedural bar should be applied without exception.

The Application was Not Timely Filed

S.C. Code § 17-27-45(A) provides:

¹ Applicant also generally alleges ineffective assistance of PCR counsel. (PCR App. Attachment at 1). However, it is well-settled that such a general allegation alone is not sufficient to avoid the procedural bar. *See Aice*, 305 S.C. at 451, 409 S.E.2d at 394 (1991) (“contention that prior PCR counsel was ineffective is not *per se* a ‘sufficient reason’ allowing for a successive PCR application under § 17-27-90”).

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 upon appeal, whichever is later.

Applicant's conviction became final at "the sending of the remittitur" from the direct appeal on July 25, 2014. This action filed in June 2021 is well-outside the one-year period.

To the extent Applicant generally relies on his assertion of "newly discovered" evidence regarding his witness claim, again, he is wrong to contend that assertion will allow him to avoid the procedural bar. To timely file a second application, S.C. Code Ann. § 17-27-45 (C) requires an applicant file within one year of "actual discovery" of new facts or within one year "after the date when the facts could have been ascertained by the exercise of reasonable diligence." The "facts" allegedly supporting the claim could have been discovered and presented in a timely manner – either at trial, or in his first PCR action. The provisions of (C) are not triggered.

The Application is Barred by Res Judicata

"Res judicata applies where there is identity of parties, identity of subject matter, and an adjudication of the issue in the former suit." *Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n of S.C.*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987) (citing *Lowe v. Clayton*, 264 S.C. 75, 212 S.E.2d 582 (1975)). "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.* (citing *Wold v. Funderburg*, 250 S.C. 205, 157 S.E.2d 180 (1967)).

Because any cognizable claims attempted here could have been raised in the first PCR action, the claims raised here are also barred by *res judicata*.

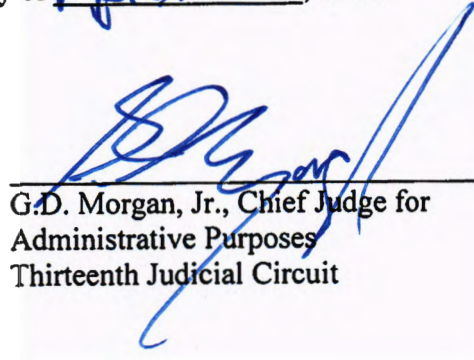
CONCLUSION

Pursuant to S.C. Code Ann. § 17-27-70(b), and for all the reasons set out above, this Court intends to dismiss this application for post-conviction relief with prejudice unless Applicant provides specific factual or legal reasons that the application should not be dismissed for those reasons. Applicant is granted twenty days from the date of service of this order upon him to provide reasons that 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: Melody J. Brown
Post Office Box 11549
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 9th day of April, 2024.

Greenville, South Carolina.



G.D. Morgan, Jr., Chief Judge for
Administrative Purposes
Thirteenth Judicial Circuit

Copy mailed to
Attorney general / Applicant
on 4 / 10 / 2024.