

The State of South Carolina
In Th Supreme Court

Appeal From Florence County
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2013-CP-21-904

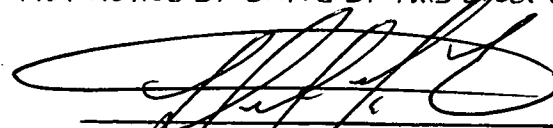
Herbert M.^cDowell #145167..... Appellant,

vs.

State of South Carolina..... Respondent.

Notice of Appeal

I, Herbert M.^cDowell appeals the order of the Honorable Michael G. Nettles dated August 16, 2013. Appellant received written notice of entry of this order on August 19, 2013.



Herbert M.^cDowell #145167
Lieber Corr. Inst.
Post Office Box 203
Ridgeville, S.C. 29472

Other Counsel of Record:

Joshua L. Thomas
Assistant Attorney General
Post Office Box 11549
Columbia, S.C. 29211-1549

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SEP 05 2013

S.C. SUPREME COURT

The State of South Carolina
In The Supreme Court

Appeal From Florence County's
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2013-CP-21-404

Herbert M^cDowell, Appellant,

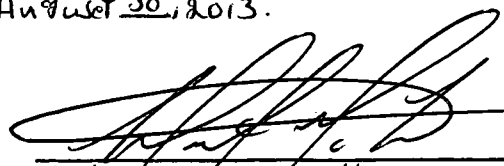
vs.

State of South Carolina, Respondent.

Proof of Service

I certify that I have served the Notice of Appeal on Daniel E. Shearouse, Clerk of the Supreme Court, by depositing a copy of it in the United States mail, postage prepaid, on August 30, 2013. I certify that I have also served a copy of the same on Joshua L. Thomas, Assistant Attorney General, Post Office Box 11549 Columbia, S.C. 29472, on August 30, 2013.

August 30, 2013



Herbert M^cDowell #145167
Lieber Corr. Inst.
Post Office Box 205
Ridgeville, S.C. 29472

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE)

IN THE COURT OF COMMON PLEAS)
FOR THE TWELFTH JUDICIAL CIRCUIT)

Herbert McDowell, #145167)

Case No. 2013-CP-21-4⁷⁰⁴

Applicant,)

FINAL ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

FILED
2013 AUG 16 PM 3:17
CONNIE REEL-SHARIN
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed March 13, 2013. The State made its Return and Motion to Dismiss on May 16, 2013, requesting that the Application be summarily dismissed as untimely and successive. Pursuant to this request, the Court reviewed the pleadings in this matter and all of the records attached thereto. This Court issued a Conditional Order of Dismissal, filed on May 21, 2013, provisionally denying and dismissing this action, while giving Applicant twenty (20) days from the date of service of said Order to show why the dismissal should not become final. Attached to this Final Order and incorporated herein by reference is the Affidavit of Personal Service, dated June 18, 2013, of the above-mentioned Conditional Order of Dismissal on Applicant.

Applicant filed a document captioned "Response to the State's Return and Conditional Order of Dismissal" on June 3, 2013. In this document, Applicant cites Martinez v. Ryan, ___ U.S. ___, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), as a new legal standard that would excuse his untimely and successive filing pursuant to S.C. Code Ann. § 17-27-45(B).¹ However, the

¹ Section 17-27-45(B) provides that : "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, [...] 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."

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Connie Reel Sharin
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

ruling in Martinez has no bearing on Applicant's ability to raise ineffective assistance of PCR counsel claims in a successive PCR application. Rather, Martinez addresses a narrow exception to the procedural default rules imposed on federal habeas corpus petitions. See Martinez, 132 S. Ct. at 1315 ("The precise question here is whether ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding."). Thus, the holding in Martinez is limited to federal habeas corpus review and is not applicable to state PCR actions. See Kelly v. State, Order No. 2013-06-20-01 (S.C. Sup. Ct. order dated June 20, 2013) ("Like other states, we hereby recognize that the holding in Martinez is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions.").


Therefore, Applicant's contention that Martinez allows him to bring this untimely and successive state PCR application alleging ineffective assistance of PCR counsel is incorrect. The South Carolina Supreme Court's opinion in Aice is still applicable to a claim raised in a subsequent state PCR action alleging ineffective assistance of prior collateral counsel. See Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991) ("The contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under 17-27-90."). Accordingly, this Court finds Applicant's claim regarding the application of Martinez to be without merit.

Having reviewed the original pleadings and Applicant's submissions, this Court finds that a sufficient reason has not been shown why the Application is not untimely and successive and why the Conditional Order of Dismissal should not become final.

IT IS THEREFORE ORDERED that, for the reasons set forth in the Court's Conditional Order of Dismissal, the Application for post-conviction relief is hereby denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCR, and Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to Rule 243, SCACR, for appropriate procedures after notice has been timely filed.

IT IS SO ORDERED.



THE HONORABLE MICHAEL G. NETTLES
Chief Administrative Judge
Twelfth Judicial Circuit Court

2013 AUG 16 PM 3:17
COMBIE REEL-SHEARIN
CCCP & GS
FLORENCE COUNTY, SC

FILED

8-16, 2013
Florence, South Carolina.

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CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

FILED
IN THE COURT OF COMMON PLEAS

2013 MAY 21 AM 11:44
TWELFTH JUDICIAL CIRCUIT

Herbert McDowell, #145167,
Applicant,

CONNIE REEL-SHEARIN
CCCP & GS 2012-CP-21-4
FLORENCE COUNTY, SC

v.

State of South Carolina,
Respondent.

CONDITIONAL ORDER OF DISMISSAL

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SEP 16 2013

S.C. SUPREME COURT

This matter comes before this Court by way of an application for post-conviction relief filed March 13, 2013. Respondent made its Return and Motion to Dismiss on or about May 16, 2013.

I. PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. The Applicant was indicted at the April 1988 term of the Florence County Grand Jury for murder and assault and battery with intent to kill (1988-GS-21-442). Flo L. Vinson, Esquire, represented the Applicant. On October 28, 1988, the Applicant was found guilty of murder and assault with a deadly weapon with intent to kill. The Honorable Sidney T. Floyd, sentenced the Applicant to an aggregate sentence of life imprisonment for murder, and twenty years for assault and battery with intent to kill.

A timely Notice of Appeal was filed on Applicant's behalf, and Joseph L. Savtiz, III, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The South Carolina Supreme Court affirmed the Applicant's convictions and sentences. State v. McDowell, Op. No. 90-MO-287 (filed November 20, 1990). However, the Remittitur was sent on December 14, 1990.

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FLORENCE COUNTY, S.C.

Applicant's Current PCR Application

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

1. Ineffective Assistance of Counsel.

Before this Court are the records of the Florence County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, Applicant's previous PCR records, Applicant's PCR application and Respondent's Return and Motion to Dismiss.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Successiveness

This Court finds that the current application for post-conviction relief must be summarily dismissed because it is successive to his prior application for post-conviction relief. S.C. Code Ann. §17-27-90 provides that:

All grounds for relief available to an application under this chapter must be raised in his original, supplemental or amended Application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding 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.

Successive applications are disfavored and the burden is on Applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).

This Court finds that the current allegations could have been raised in the proceedings based on Applicant's prior application for post-conviction relief and thus the current application is successive and

barred under S.C. Code § 17-27-90. Applicant has failed to establish sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief; therefore, he has failed to meet the burden imposed upon him. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); Aice v. State, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 420 S.E.2d 834 (1992).

Statute of Limitations

This Court further finds that this Application for Post-Conviction Relief should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160 (2003). S.C. Code Ann. §17-27-45(a) reads 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 upon an appeal, whichever is later.

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). The Applicant was convicted of the offense(s) he challenges in this Application on October 28, 1988. The Applicant was therefore required to file his application before July 1, 1997. This Application was filed on March 13, 2013, well after the statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. §17-27-70(c) (2003) 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." Therefore, this Court finds that the application for post-conviction relief is summarily dismissed for failure to file within the time mandated by statute, barred by the doctrine of *res judicata*, and because it

is successive to his previous applications.

Laches

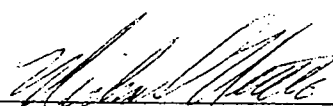
This Court further finds that this application should be summarily dismissed based on the doctrine of laches. The Applicant has filed this application almost three decades after he was convicted the charges. The doctrine of laches bars the Applicant from raising these allegations in a post-conviction relief application. Absent some explanation or justification for the delay in seeking post-conviction relief, laches will prevent an Applicant from seeking collateral review of his conviction, especially where the delay affects the availability of evidence to refute the applicant's claims. McElrath v. State, 276 S.C. 282, 277 S.E.2d 890 (1981); Honeycutt v. Ward, 612 F.2d 36 (2nd Cir. 1979). Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002).

Summary

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

Tyson Andrew Johnson, Esquire
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

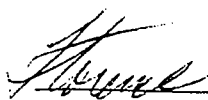
AND IT IS SO ORDERED this 20 day of May, 2013.


The Honorable Michael G. Nettles

FILED
2013 MAY 21 AM 11:41
CONNIE REEL-SHEARIN
CCCP & GS
FLORENCE COUNTY, SC

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Connie Reel Shearin
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

Administrative Judge – Common Pleas
Twelfth Judicial Circuit

 _____, South Carolina

Danial E. Shearouse, Clerk
So. Car. Supreme Court
Post Office Box #1549
Columbia, S.C. 29211-1549

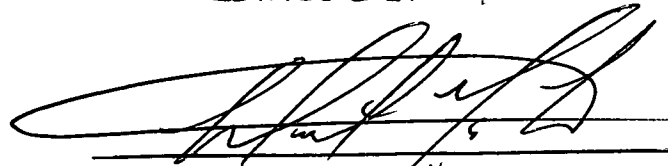
August 30, 2013

Re: Notice of Appeal

Dear Mr. Shearouse,

Enclosed is a copy of the Notice of appeal to be filed in your office. Thank you for your assistance, I am,

Sincerely,



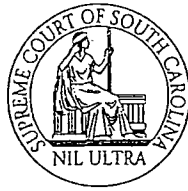
Herbert M. Dowell #145167
Lieber Corr. Inst.
Post Office Box 205
Ridgville, S.C. 29472

cc:
Joshua L. Thomas

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SEP 05 2013

S.C. SUPREME COURT



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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SEP 16 2013

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

S.C. SUPREME COURT

TO: Herbert McDowell SCDC# 145167

DATE: 9-6-13

We are in receipt of your notice of appeal. It will be necessary for you to provide this office with the following required documents within ten (10) days of the date of this notice. Failure to provide the requested documents may result in dismissal of this matter.

proof of service showing notice of appeal was served on opposing counsel, (Attorney General's Office)

a copy of the final order of dismissal

a copy of the conditional order of dismissal (if one was issued)

a copy of the conditional order of dismissal dated _____

Please return this sheet with the requested documents. Thank you!

Herbert M. Dowell #145167
Lieber Court, Just #AB36
Post Office Box 205
Ridgewill, S.C. 29972

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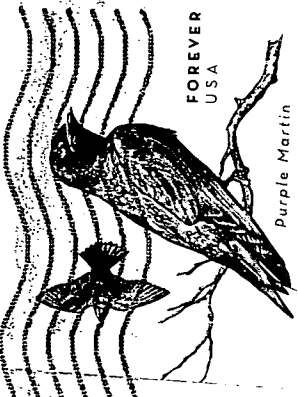
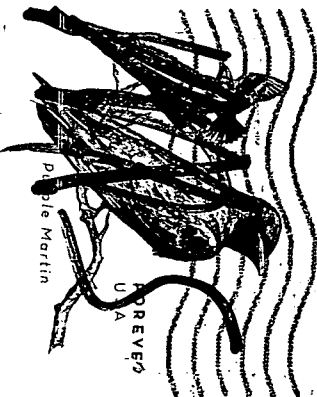
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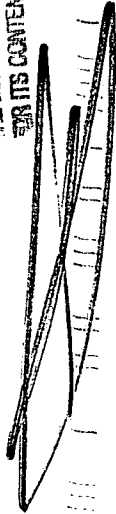
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