

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Darrell L. Goss, #305517,

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT

) CASE NO. 2023-CP-10-04698

) **CONDITIONAL ORDER OF DISMISSAL**

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CLERK OF COURT
1-3-20

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by Darrell L. Goss (Applicant) on September 25, 2023, and received by Respondent on December 8, 2023; and an amended PCR application filed on June 27, 2024.¹ Respondent made its return and moved to summarily dismiss Applications' claim related to a belated Austin appeal as premature and not ripe for consideration. Specifically, Respondent contended Applicant filed a Rule 59(e), SCRCF, motion to reconsider this Court's order of dismissal that had not yet been ruled upon, making Applicant's request for a belated appeal of that order premature. Respondent likewise made an amended return and moved to dismiss the additional allegation raised in the amended application, asserting it was untimely and successive. For the reasons set forth herein, Respondent's motion to dismiss is granted.²

¹ According to an email from the Charleston County Clerk of Court, this filing had to be approved by the Chief Administrative Judge because Applicant has filed more than three prior PCR applications.

² Respondent's return was due to be filed within ninety days of service. See Rule 12(a), SCRCF ("[T]he State of South Carolina shall answer or otherwise respond to an application for post-conviction relief within 60 days after service of the application, if it arises out of a guilty plea, and 90 days if it arises out of a trial."). Now, having completed the return, and in light of no demonstrable prejudice to Applicant, this Court accepts this return as timely filed. See S.C. Code Ann. § 17-27-70(a) (establishing the Court may fix the time in which the State must respond); Guinyard v. State, 260 S.C. 220, 195 S.E.2d 392 (1973) (holding the time limit prescribed by the statute is not mandatory but discretionary with the trial court).

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PROCEDURAL HISTORY (STATE COURT)³

Applicant is presently confined in the South Carolina Department of Corrections serving an aggregate twenty-year sentence. In September 2007, the Charleston County Grand Jury indicted Applicant for assault and battery with intent to kill, kidnapping, and armed robbery. These charges arose from an incident involving victim Aytekin Ayazgok on June 14, 2007.

On February 23-26, 2009, Applicant proceeded to a jury trial before the Honorable J.C. Nicholson. James Smiley, Esquire, represented Applicant, and Assistant Solicitors Trip Lawton and Kevin Hales prosecuted the case.⁴ The jury convicted Applicant as indicted, and Judge Nicholson sentenced him to concurrent sentences of twenty years for each charge.

Applicant filed a direct appeal, which was perfected by Appellate Defender Robert M. Pachak. On appeal, Applicant argued the trial court erred in (1) overruling defense counsel's objection to the solicitor's burden shifting in closing argument and (2) refusing to allow defense counsel to impeach the victim with a pending charge of counterfeiting goods. The Court of Appeals affirmed both issues on the merits. State v. Goss, Up. Op. No. 2011-UP-214 (filed May 17, 2011). The remittitur was sent June 9, 2011.

On May 27, 2011, Applicant filed his first PCR application alleging ineffective assistance of counsel (2011-CP-10-3782). Respondent filed a return requesting an evidentiary hearing. On September 11, 2011, an evidentiary hearing convened before the Honorable Deadra L. Jefferson. Applicant was present and represented by Charles Brooks, Esquire. Assistant Attorney General Matthew S. Friedman represented Respondent.

³ Applicant has filed four federal habeas corpus petitions related to these convictions; three have been dismissed due to failure to exhaust State remedies (2:18-cv-02938-BHH, mandate issued Nov. 10, 2021; 2:20-cv-04133-BHH, mandate issued Sept. 20, 2021; 2:23-cv-00722-BHH, dismissed June 6, 2024, mandate not yet issued). The fourth was dismissed based upon Applicant's motion to dismiss (21-200, dismissed September 1, 2021).

⁴ Applicant was tried with co-defendant Joy Mack, who was represented by Alex Apostolou, Esquire.

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On December 1, 2011, Judge Jefferson issued an order denying and dismissing with prejudice Applicant's PCR application. Applicant filed a petition for a writ of certiorari from the denial of his application (2011-204386), and the Court of Appeals granted certiorari. On July 27, 2016, the Court of Appeals issued an opinion affirming. State v. Goss, 2016-UP-382. Applicant filed a petition for a writ of certiorari in the Supreme Court of South Carolina, and the Supreme Court granted certiorari. On October 17, 2018, the Supreme Court issued an order remanding for a de novo PCR hearing.⁵ The remittitur was sent November 2, 2018.

On December 8, 2021, a de novo evidentiary hearing convened before the Honorable Jennifer B. McCoy.⁶ Applicant was present and initially represented by Christopher Murphy, Esquire.⁷ At the start of the hearing, Applicant moved to proceed pro se, and Judge McCoy granted his request. Assistant Attorney General Samantha Weidauer represented Respondent. At the hearing, Applicant testified on his behalf and called as a witness his cousin Sharon Goss. Respondent called as a witness, trial counsel James Smiley, Esquire.

On June 21, 2022—*after* the PCR evidentiary hearing, Applicant filed a 4th Motion to Amend PCR Application. On June 15, 2022, Judge McCoy issued an order denying and dismissing Applicant's PCR application.⁸

On June 27, 2022, Applicant filed a "Motion to Alter or Amend Judgement."⁹ That motion

⁵ Pertinently, the Court stated, "We emphasize the proceedings will be de novo, and neither party may rely upon testimony presented at the initial hearing which is the subject of this appeal."

⁶ On January 7, 2019, Applicant filed a pro se motion to stay his PCR proceedings pending the disposition of his federal habeas corpus petition; that motion was granted on January 21, 2019.

⁷ Mr. Murphy was initially appointed to represent Applicant on December 17, 2018. On January 15, 2019, Applicant filed a motion to proceed pro se, which was granted by the Honorable Roger M. Young, Sr. that same day. On July 26, 2021, Applicant filed a motion for appointment of counsel. Applicant's motion to appoint counsel was granted, and Mr. Murphy was reappointed on September 13, 2021.

⁸ Respondent served this Order on Applicant by mail on June 16, 2022.

⁹ Although not accompanied by a formal certificate of service, Applicant relayed in his cover letter, dated June 22, 2022, "By copy, I am also serving the State." On June 24, 2022, Applicant mailed Respondent a letter indicating he

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is currently pending before the Court.

On July 6, 2022, Application filed a notice of appeal from the Order denying and dismissing his PCR application. That same day, he filed a motion to proceed pro se. On September 19, 2022, the Supreme Court of South Carolina issued an order denying his motion to proceed pro se. That same day, the Court sent Applicant a letter instructing him to “submit the name of the attorney you have obtained to represent you or provide proof that you have filled out and submitted the enclosed affidavit of indigency to the Division of Appellate Defense” within twenty days. The Court cautioned, “Failure to timely respond may result in dismissal of this matter.” On October 24, 2022, the Court issued an order dismissing Applicant’s appeal for failure “to submit the name of an attorney or provide proof that he has filled out and submitted an affidavit of indignity with the Division or Appellate Defense.” Applicant did not file a petition for rehearing, and the remittitur was sent November 9, 2022.

CURRENT APPLICATION

On September 25, 2023, Applicant filed this PCR application alleging:

Ineffective assistance of counsel: PCR counsel failed to file appeal on Applicant’s behalf.

As relief, Respondent requests, “I want to appeal the denial of my first post conviction relief application (2011-CP-10-3782) pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).”¹⁰

had filed the motion but “Due to the prison’s policy, I was not able to receive copies of my handwritten legal documents in order to serve you a copy as required.” Respondent does not take issue with the service of this motion.

¹⁰ Respondent incorporates by reference herein the records that were filed with its original return, which include the Charleston County Clerk of Court records of the underlying convictions; Applicants records from the South Carolina Department of Corrections; and the records from Applicant’s direct appeal, his 2011 PCR action, and his federal habeas corpus petitions. Respondent reserves the right to amend this return upon receipt of any additional, relevant information.

On June 27, 2024, Respondent filed an Amended PCR application again raising the Austin issue and additionally requesting the following:

Pursuant to the S.C. Supreme Court's ruling in Hazel v. State, 377 S.C. 60, 659 S.E.2d 137 (2008), Applicant requests the Court to issue a declaratory judgment declaring that his kidnapping conviction did not include a criminal sexual offense or attempted criminal sexual offense and would not require him to register as a sex offender.

MOTION TO DISMISS

Respondent moved for summary dismissal pursuant to section 17-27-70 of the South Carolina Code because there are no genuine issues of material fact that would necessitate an evidentiary hearing. Because there are no questions of law or fact to necessitate a hearing, Respondent requested this Court NOT appoint counsel and instead issue a Conditional Order of Dismissal indicating the Court's intent to dismiss the application and its reasons for doing so.¹¹ See S.C. Code Ann. § 17-27-70(b) (establishing procedure for summary disposition of PCR applications); Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (finding summary disposition appropriate when no facts need to be developed and the applicant is not entitled to relief); Re: Appointment of Counsel in Post-Conviction Relief Cases Before the Circuit Court, S.C. Sup. Ct. Order filed Oct. 6, 2008 ("If the Attorney General asserts that the [PCR] application is barred as being successive or as being untimely under the statute of limitations, counsel will not be appointed except upon written order of the Chief Judge for Administrative Purposes for the Court of Common Pleas in the circuit. In these cases, the Chief Judge will insure that counsel is only appointed for an indigent applicant when the facts raise a material issue regarding the applicability of the rule forbidding successive applications or the statute of limitations."); Rule

¹¹ A proposed Conditional Order of Dismissal consistent with this return and motion to dismiss is being concurrently submitted for the Court's consideration.

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71.1(d), SCRCP (providing appointment of counsel is necessary only when a question of law or fact necessitates a hearing).

After consideration of the records before this Court, this Court grants Respondent's motion for summary dismissal for the following reasons:

Not Ripe

This Court finds Applicant's request for a belated appeal pursuant to Austin should be summarily dismissed as not yet ripe for consideration. Pertinently, Applicant has a Rule 59(e), SCRCP, motion pending before the circuit court that has not yet been ruled upon. Thus, the time for the filing of his appeal has not yet started running—making Applicant's request for a belated appeal of the 2022 order premature. See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004) (“A timely post-trial motion, including a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such motion.”). Because the time to appeal the 2022 order has not yet begun, this issue is premature and not ripe for consideration.¹²

¹² Assuming, *arguendo*, Applicant's filing of the Rule 59(e) motion did not stay the time for serving the notice of appeal, Respondent submits a review of the pleadings refute any allegation that Applicant is entitled to a belated appeal from the 2021 order denying his PCR application, and an evidentiary hearing is not needed to further resolve this issue. Pertinently, Applicant moved to proceed pro se at the PCR hearing, and that motion was granted. Thereafter, PCR counsel no longer owed Applicant any duty and thus could not have been ineffective. See Austin v. State, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991) (providing an “allegation that counsel failed to seek review [of a PCR order] sufficiently states a claim of ineffective assistance”).

Further, Applicant filed a timely pro se notice of appeal from the 2021 order, but his appeal was dismissed by the Supreme Court for failure to comply with its directive to submit proof that he had retained counsel or applied for counsel through the South Carolina Commission on Indigent Defense. The undisputed evidence does not show Applicant did not knowingly and intelligently waive his right to an appeal; rather, it shows he *did* appeal but failed to comply with the directives of the Supreme Court, resulting in the dismissal and subsequent remittitur of his appeal. See Odom v. State, 337 S.C. 256, 262, 523 S.E.2d 753, 756 (1999) (“A PCR applicant is entitled to an Austin appeal if the PCR judge affirmatively finds either: (1) the applicant requested and was denied an opportunity to seek appellate review; or (2) *the right to appellate review of a previous PCR order was not knowingly and intelligently waived.*” (emphasis added)). Thus, Respondent submits this allegation should be summarily dismissed.

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Statute of Limitations

This Court finds Applicant's allegation related to his request for declaratory judgment is barred by the statute of limitations.¹³ "An application for relief pursuant to this chapter must be filed within one year after the entry of judgment . . . or within one year after the sending of the remittitur . . ." § 17-27-45(a). A motion for summary judgment may be used to raise the defense of statute of limitations. McDonnell v. Consol. Sch. Dist. Of Aiken, 315 S.C. 487, 489, 445 S.E.2d 638, 639 (1994).

Here, Applicant was sentenced on February 26, 2009. He filed a direct appeal, and the remittitur was sent June 9, 2011. This PCR application was therefore due on or before June 10, 2012. Applicant filed this application on September 25, 2023—more than ten years after the statute of limitations expired. Further, Applicant raised the allegation related to the request for declaratory judgement for the first time on June 27, 2024—again, more than ten years after the statute of limitations expired. Accordingly, this application shall be summarily dismissed as untimely.

Successive

This Court finds Applicant's allegation related to his request for a declaratory judgement should be summarily dismissed as successive.¹⁴ Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a prior application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).

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,

¹³ Respondent conceded the statute of limitations does not apply to Applicant's claim related to a belated Austin appeal.

¹⁴ Respondent conceded the rule against successiveness does not apply to Applicant's request for a belated appeal pursuant to Austin.

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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.

§ 17-27-90. Successive PCR actions are barred unless an applicant can indicate a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Id. PCR rules "contemplate an adjudication on the merits of the original petition, one bite at the apple as it were." Aice v. State, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991). "Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice." Id. at 451, 409 S.E.2d at 394. Thus, 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, 409 S.E.2d at 394. Applicant bears the burden of showing the allegations could not have been previously raised. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

Here, Applicant's allegation related to a request for declaratory judgement could have been raised in his first PCR application. Applicant has failed to establish a sufficient reason why he could not have raised his current allegations in his prior applications and has thus failed to meet his burden of showing this allegation could not have been previously raised. Accordingly, this allegation shall be summarily dismissed as successive.

CONCLUSION

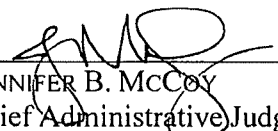
WHEREFORE, pursuant to section 17-27-70 of the South Carolina Code, this Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. Applicant is granted twenty days from the date of service of this Order upon him to show why this Order should not become final. Applicant shall file any reasons he may have, factual or legal, with the Charleston

County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Danielle Dixon, Esquire
PCR Division – Ninth Circuit
P.O. Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be received by the Charleston County Clerk of Court and opposing counsel within twenty days from the date of the service of this Order, and the Court will not consider any issues raised in his response if not so timely filed and served.

AND IT IS SO ORDERED this 5 day of August, 2024.



JENNIFER B. MCCOY
Chief Administrative Judge – Common Pleas
Ninth Judicial Circuit

Charleston, South Carolina



ALAN WILSON
ATTORNEY GENERAL

August 22, 2024

The Honorable Julie J. Armstrong
Clerk of Court - Charleston County
100 Broad Street, Suite 106
Charleston, South Carolina 29401

Re: Darrell L. Goss v. State of South Carolina
Case No.: 2023-CP-10-04698

Dear Ms. Armstrong:

Enclosed please find the original Conditional Order of Dismissal signed by The Honorable Jennifer B. McCoy, in the above-captioned case, for filing in your office. Please forward a time-stamped copy back to our office for our file.

Sincerely,

Danielle Dixon
Assistant Attorney General

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Enclosure

cc: Darrell L. Goss, Pro Se