STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS IN THE NINTH JUDICIAL CIRCUIT
James R. Rose, #293938, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2023-CP-10-03190 **FINAL ORDER OF DISMISSAL**

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by James R. Rose (Applicant) on June 30, 2023, and amended on April 29, 2024. Respondent filed a return and moved to summarily dismiss the application as untimely and successive. After review of the record and pleadings, this Court agreed this application should be summarily dismissed and provisionally dismissed the action by way of a Conditional Order of Dismissal filed August 26, 2024, giving Applicant twenty 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 is a Certificate of Service showing Applicant was served the Conditional Order of Dismissal on September 9, 2024.

Before this Court are several pro se filings by Applicant, which this Court construes as responses to the Conditional Order of Dismissal. After review, this Court finds Applicant has not set forth a basis for an evidentiary hearing. Set forth below are this Court's findings.

On July 19, 2024, Applicant filed ***"Supplemental Authority,"*** where he sought to appeal the dismissal of his first PCR application, arguing the "South Carolina Court of Appeals erred by withdrawing and dismissing my PCR appeal because I did not knowingly and intelligently waive my right to appeal." This Court finds the circuit court does not have the authority to review alleged errors by an appellate court. Further, this Court finds Applicant did, in fact, appeal the denial of

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his 2013 PCR application, but he chose to withdraw that appeal. Based on the fact he appealed that order (but later withdrew it), Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) is not applicable, and Applicant has failed to set forth any basis for an evidentiary hearing in this filing.

On July 19, 2024, Applicant filed a Motion for a New Trial based on After-Discovered Evidence, an Amended Application for Post-Conviction Relief, and an Affidavit. This Court finds these filings do not set forth any basis for an evidentiary hearing.

In his ***Motion for a New Trial based on After-Discovered Evidence***, he alleges "Trial counsel was ineffective under Chronic and failed to act as an adversary of the prosecution, but instead helped to reinforce the case against me." In support, he contends (1) the solicitor made improper opening statements and counsel failed to object; (2) the trial court erred in charging accomplice liability; (3) he was indicted based on Tawanna Alston's statement to law enforcement, but she testified at trial that those statements were not true; (4) the indictment was not sufficient to give him notice that the State would proceed on a theory of accomplice liability; (5) he asked counsel at trial "what is the 'hand of one is the hand of all' theory" and she said she didn't know; (6) counsel provided different excuses about why his alibi witnesses were not at trial to testify; (7) counsel did not show videos to the jury that he wanted her to show; (8) counsel did not subpoena Amber Wiley or Amber Wiley to testify even though they provided written statements to law enforcement that would have corroborated his alibi and/or exculpated him; (9) counsel did not subpoena detectives Mitchell Wilson and Christina Smith, who would have corroborated his alibi; (10) counsel did not mention accomplice liability when arguing the motion for a directed verdict; (11) the State's witnesses provided inconsistent statements; (12) counsel and the solicitor "engaged in a deliberately planned and carefully executed scheme to violate ethical rules and deny me my rights to due process . . . by illegally changing the State's theory of the case"; (13) counsel did not

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inform him of the State's alternate theory; (14) the solicitor knowingly presented perjured testimony from Tawanna Alston and Antione Aiken; and (15) due to the "total breakdown of the adversarial process," he does not need to establish prejudice.

The foregoing allegations all relate to the trial itself and could have been discovered with due diligence; thus, Applicant has not set forth a prima facie showing of newly-discovered evidence and is not entitled to a hearing on these claims. See Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) ("A party requesting a new trial based on after-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" (emphasis added)).

Further, many of these allegations were in fact raised at the first PCR hearing, and they are thus barred by res judicata. See 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) ("Res judicata applies where there is identity of parties, identity of subject matter, and an adjudication of the issue in the former suit."); id. ("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."). Specifically, Applicant's claim related to the variance between the State's theory of the case and the indictment, and his contention that the State improperly changed its theory of the case were raised at the first PCR hearing and addressed in the PCR court's final order. (PCR Or. 13-14). Likewise, his claims related to the solicitor allegedly using perjured testimony and counsel's alleged failure to call Amber Wiley, Sofia Wiley, and Everlina Brickman as witnesses; to present an alibi defense and request an alibi instruction; and to properly impeach Tawana Alston were also raised to and addressed by the first PCR court. (PCR

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Or. 15-18, 25-26). Applicant is effectively attempting to bring a successive PCR action to rehash claims that have already been denied.

Applicant also asserts he was incompetent "but regained competency by staying on mental health medication and [is] in remission after being diagnosed with cancer." To the extent Applicant contends he is entitled to a hearing on this successive application due to incompetency at his first PCR hearing, this Court finds the foregoing allegations would not have required his assistance at the PCR hearing, and thus his alleged incompetence is not a basis for a hearing. See Council v. Catoe, 359 S.C. 120, 129, 597 S.E.2d 782, 787 (2004) (holding a PCR applicant "cannot delay his collateral review of his trial proceedings due to his incompetency" but "[i]f, at a future date, the petitioner regains his competency and discovers that at his original PCR hearing, his incompetency prevented his ability to assist his counsel on a fact-based claim of ineffective assistance of counsel, he may then raise that claim in a subsequent proceeding").

Next, Applicant alleges the PCR court erred in its findings. This Court lacks jurisdiction or authority to review the findings of another circuit court judge. Finally, Applicant alleges trial counsel conspired with the solicitor to convict him. He contends he became aware of this when trial counsel testified at the PCR hearing that she spoke to the solicitor before trial, and the solicitor acknowledged "there was a total failure of competent evidence I killed and murdered Leland Shannon by shooting the victim as alleged in the grand jury's indictment." Counsel's testimony, which much be considered in context of its entirety and not in isolation, is not evidence of collusion. Specifically, counsel testified,

> Initially, after the prelim, I thought that the allegations were that he was the shooter. When I reviewed my notes for this hearing, I see the prosecutor called me in November of 2013. And I was able to document our conversation on the phone. And it says she acknowledged that the stories of some of the witnesses don't match up, particularly, Ms. Alston and a witness with the last name Aiken.

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> And what my notes indicate is that there were two to three more people with [Applicant]. This is her—these are her allegations. And [Applicant] comes into the house and he goes out the back door and then the others come in.
>
> So at that point, I didn't document that –she was not saying that he was the shooter, but that this was in concert with two to three more people.

(App. 719-20). The foregoing is counsel's testimony about how she became aware the State would proceed on a theory of accomplice liability; it is NOT evidence of collusion. Even if this somehow constituted evidence of collusion, Applicant's alleged mental incompetency is not a basis for a hearing on this successive application because Applicant's PCR attorney would not have required Applicant's assistance to further develop this claim. In other words, Applicant himself was not privy to this conversation and could not have offered additional testimony about it. To the extent this was a valid claim (which this Court does NOT find), PCR counsel could have developed it by questioning trial counsel and the solicitor and making legal argument—none of which required Applicant's assistance. Based on the foregoing, Applicant did not set forth a basis for a hearing in his Motion for a New Trial.

On July 19, 2024, Applicant filed an ***Amended Application*** asserting actual innocence. This is not a cognizable PCR claim. See S.C. Code Ann. § 17-27-20 ("[T]his section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction."). Applicant also reasserted many of the allegations related the alleged conspiracy between trial counsel and the solicitor that were raised in his Motion for a New Trial. For the reasons set forth above, Applicant is not entitled to a hearing on these claims.

Additionally, Applicant asserted PCR counsel did not file a Motion to Reconsider the PCR court's order. The order dismissing Applicant's first PCR was filed September 15, 2017, and the Notice of Appeal was filed October 5, 2017; however, Applicant did not raise this issue until July

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2024. This Court thus finds this claim is barred by the one-year statute of limitations. This Court further finds Applicant's late allegation that PCR counsel did not file a Motion to Reconsider (raised for the first time over six years after the timeframe for filing such a motion elapsed) does not set forth a sufficient reason for a hearing on this successive application. See Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991) ("[T]he contention that prior PCR counsel was ineffective is not per se a "sufficient reason" allowing for a successive PCR application.").

Finally, Applicant asserts appellate counsel in his PCR appeal was ineffective for not raising issues Applicant wanted him to raise. Initially, this appeal was dismissed August 5, 2020, and remitted August 26, 2020—almost four years before Applicant raised this claim. Thus, this allegation is barred by the one-year statute of limitations. More critically, based on the records before this Court, Applicant himself withdrew his appeal and apprised the Court he understood the consequences of doing so. This Court finds Applicant cannot show appellate counsel was ineffective when Applicant withdrew the appeal. Based on the foregoing, Applicant has not set forth a basis for a hearing.

On September 3, 2024, Applicant filed a ***Response to the Conditional Order of Dismissal*** alleging he was incompetent at the time of his PCR hearing, which prevented his ability to assist counsel on fact-based claims of ineffective assistance of counsel at the first PCR hearing. He further waived all claims except his actual innocence claim. As noted, actual innocence is not a cognizable PCR claim. See § 17-27-20 ("[T]his section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction."). Further, as set forth above, Applicant has not raised any fact-based claims that would have required his assistance at the PCR hearing. This filing thus does not set forth a valid basis for a hearing.

On ***October 22, 2024, Applicant mailed the undersigned a letter***, which the Court

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construes as a response to the Conditional Order of Dismissal. In the letter, he asserts appellate counsel did not raise on direct appeal the issue of whether the trial court erred in instructing the jury on accomplice liability; he raised this issue at the PCR hearing; and the PCR court found he did not prove deficiency or prejudice. He contends his incompetency at the PCR hearing prevented him from assisting counsel in this claim. This Court finds the issue of whether appellate counsel (on direct appeal) was ineffective is not an issue that required Applicant's assistance; thus, it is not a basis for a successive hearing under Council. This Court further finds this issue was in fact addressed by the first PCR court, and the circuit court lacks the authority or jurisdiction to review the findings of another circuit court judge. Applicant has not set forth a basis for an evidentiary hearing in this letter.

On January 6, 2025, Applicant filed a ***Motion for Default Judgement***, asserting Respondent did not file a return to his amended application.[1] The motion is denied. See Guinyard v. State, 260 S.C. 220, 195 S.E.2d 392 (1973) (holding the time limit prescribed by the statute is not mandatory, and the circuit court may exercise its discretion and extend the time for filing).

On January 6, 2025, Applicant filed another ***Amended Application***, which this Court construes as another response to the Conditional Order of Dismissal. Applicant again raised the issue of actual innocence, which is not a viable claim. See § 17-27-20 ("[T]his section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction."). Applicant further reasserted many of his prior arguments related to the State's theory of accomplice liability, ineffective assistance of counsel, and alleged collusion between the solicitor and trial counsel. This Court has found these allegations do not warrant a hearing on this untimely, successive application. Applicant also alleges trial court error (pg. 7-11) and PCR court

[1] Respondent filed a return to the original application on the same day Applicant filed his amended application.

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error (15-17), which are not viable PCR claims. Applicant alleges appellate counsel was ineffective on direct appeal for not raising the issue he wanted raised (pg. 12-14). As noted, this issue was considered by the first PCR court and is barred by res judicata. Further, this Court finds PCR counsel did not need Applicant's assistance to develop this claim. Finally, Applicant reasserts his claim that PCR counsel was ineffective for refusing to file a Motion to Reconsider; and appellate counsel was ineffective on his PCR appeal from the PCR order. For the reasons set forth above, these claims do not warrant an evidentiary hearing.

Viewed in the light most favorable to Applicant and for the reasons set forth herein, Applicant has not set forth a sufficient reason why the statute of limitations and bar against successiveness should not apply to this action. Thus, there is no basis for an evidentiary hearing.

IT IS THEREFORE ORDERED that for the reasons set forth in the Court's Conditional Order of Dismissal, this application for PCR is hereby **DENIED AND DISMISSED WITH PREJUDICE**. Should Applicant wish to procure appellate review, he must file and serve a notice of appeal within thirty days of this Order. See Rule 203, SCACR. Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 21 **day of** Feb. **, 2025.**

JENNIFER B. MCCOY
Chief Administrative Judge
Ninth Judicial Circuit

Charleston, South Carolina

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ALAN WILSON
ATTORNEY GENERAL

February 27, 2025

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

Re: **James R. Rose, #293938 v. State of South Carolina**
Case No.: 2023-CP-10-03190

Dear Ms. Armstrong:

Enclosed please find the original Final 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

DD/vh

cc: James R. Rose, #293938