

R. MILLS ARIAIL, JR.
ATTORNEY AT LAW

11 NORTH IRVINE STREET, SUITE 11 • GREENVILLE, SC 29601
PHONE 864.232.9390 • FAX 864.232.9392 • E-MAIL MILLS@RMALAWOFFICE.COM

November 13, 2013

RECEIVED

NOV 18 2013

S.C. SUPREME COURT

Via US Mail

Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Notice of Intent to Appeal from Elliott Hatton (SCDC #158373) v. State of South Carolina, C.A. No.: 2013-CP-23-1860

Dear Mr. Shearouse:

I was Court Appointed in the above referenced matter, and I expect that appellate defense will handle the appeal and petition for certiorari. On behalf of my client, enclosed for filing please find the Notice of Appeal and proof of service. I've enclosed a copy of Judge Miller's Order of Dismissal to be challenged on appeal. I must inform the Supreme Court that as an officer of this Court, I am unable to set forth an arguable basis for any appealable issue resulting from Judge Miller's Order of Dismissal. By copy of this letter, I am specifically advising Mr. Hatton that he should notify this Court, in writing, of any arguable basis for an appeal from the order dismissing his post-conviction relief action as required by Rule 243(c) of the South Carolina Appellate Court Rules. By copy of this letter, I am also serving counsel for the State of South Carolina, the Greenville County Solicitor's Office, the South Carolina Commission of Indigent Defense - Appellate Defense Division and the Greenville County Clerk's Office.

Thank you for your assistance in this matter and if you have any questions, please feel free to contact me.

Sincerely,

LAW OFFICE OF R. MILLS ARIAIL, JR.
Attorney at Law

R. Mills Ariail, Jr.

RMAjr/dcd
Enclosures (as stated)

cc:

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2013-CP-23-1860

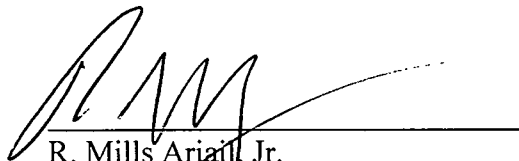
Elliott Hatton Appellant,
S.C.D.C. No. 344029

v.

State of South Carolina Respondent.

NOTICE OF APPEAL

Elliott Hatton appeals the Honorable Edward W. Miller's Order dismissing Hatton's application for post-conviction relief. On November 7, 2013, the Honorable Edward W. Miller signed an order dismissing Appellant's application for post-conviction relief with prejudice. This Order was filed with the Greenville County Clerk of Court on November 8, 2013. Appellant, through counsel, received written notice of entry of this order on November 12, 2013. A copy of Judge Miller's Order is attached.



R. Mills Arjail, Jr.
Attorney at Law
11 North Irvine St., Suite 11
Greenville, SC 29601
Telephone (864) 232-9390
Facsimile (864) 232-9392
Attorney for Elliott Hatton

Greenville, South Carolina
November 13, 2013

RECEIVED

NOV 18 2013

S.C. SUPREME COURT

Other Counsel of Record and Interested Parties:

Karen C. Ratigan, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211
803-734-3970
Attorney for the State of South Carolina

Greenville County Clerk's Office
Greenville County Courthouse
305 East North Street
Greenville, SC 29601

Greenville County Solicitor's Office
305 East North Street
Greenville, SC 29601

SC Commission of Indigent Defense
Division of Appellate Defense
1122 Lady Street
Columbia, SC 29201-3218

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2013-CP-23-1860

Elliott Hatton Appellant,
S.C.D.C. No. 344029

v.

State of South Carolina Respondent.

CERTIFICATE OF SERVICE

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this 13th day of NOV, 2013 I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

Karen C. Ratigan, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211
Attorney for the State of South Carolina

Greenville County Solicitor's Office
305 E. North Street
Greenville, SC 29601

SC Commission of Indigent Defense
Division of Appellate Defense
1122 Lady Street
Columbia, SC 29201-3218

Denise Tanner LaBeck
Denise Tanner LaBeck
Paralegal to R. Mills Ariail, Jr.
LAW OFFICE OF R. MILLS ARIAIL, JR.
Attorney at Law

November 13, 2013
Greenville, SC

Greenville County Solicitor's Office
305 East North Street
Greenville, SC 29601

Karen C. Ratigan
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211-11549

Elliott Hatton
SCDC #158373
Perry Correctional Institute
430 Oaklawn Road
Pelzer, SC 29669

Greenville County Clerk's Office
Greenville County Courthouse
305 East North Street
Greenville, SC 29601

SC Commission of Indigent Defense
Division of Appellate Defense
1122 Lady Street
Columbia, SC 29201-3218

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2013CP2301860

FILED-CLERK OF COURT
GREENVILLE CO.S.C.
PAUL B. WICKENSIMER
2013 NOV 8 AM 10 54

Elliot Hatton vs. South Carolina State Of

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this 8th day of November, 2013.

Court Reporter:

PRESIDING JUDGE - Edward W Miller

This judgment was entered on the 8th day of November, 2013, and a copy mailed first class this 8th day of November, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

R. Mills Ariail Jr. 11 North Irvine St., Ste., 11
Greenville, SC 29601

Karen Christine Ratigan PO Box 11549 Columbia,
SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Elliott Hatton,)
 S.C.D.C. No. 158373,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 2013-CP-23-1860

**ORDER OF DISMISSAL
 WITH PREJUDICE**

FILED - CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL B. WICKENSIMMER
 2013 NOV 8 AM 10 54

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed April 2, 2013. The Respondent made its return and motion to dismiss on September 19, 2013. A hearing was convened at the Greenville County Courthouse on October 24, 2013 at which time the Applicant was present in court and represented by R. Mills Ariail, Jr., Esquire. The Respondent was represented by Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General. At the hearing, the Respondent made a Motion to Dismiss on two grounds: (1) the expiration of the statute of limitations and (2) the presumption against successive PCR applications.

I. PROCEDURAL BACKGROUND

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Greenville County. The Applicant was indicted at the March 1997 term of the Greenville County Grand Jury for possession with intent to distribute (PWID) crack cocaine (1997-GS-23-1728, count 2), first-degree criminal sexual conduct (CSC) (1997-GS-23-1730), and first-degree burglary (1997-GS-23-1731). He was

#1
 227

represented by Clay Allen, Esquire and Daniel J. Farnsworth, Esquire.

After the State brought the case to trial, the Applicant was found guilty. On May 21, 1997, the Honorable Rodney A. Peebles sentenced the Applicant to concurrent terms of twenty-five years for PWID crack cocaine, second offense and thirty years for first-degree CSC. Judge Peebles then ordered the first-degree CSC sentence to be consecutive to a sentence of life imprisonment for first-degree burglary.

A notice of appeal was filed at the South Carolina Court of Appeals. Aileen P. Clare, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the form of an Anders¹ brief. The Court of Appeals dismissed the appeal. State v. Hatton, Op. No. 99-UP-342 (S.C. Ct. App. filed June 2, 1999). The remittitur was issued on June 18, 1999.

1999-CP-23-3410

The Applicant filed a PCR application on August 26, 1999 (1999-CP-23-3410). The Applicant raised the following issues:

1. Ineffective assistance of trial counsel.
 - a. Failed to object to "improper seizure and detention."
2. Trial court error.
 - a. "[T]he court did not have jurisdiction to sentence him under Section 17-25-45(H)."
 - b. The court should not have sentenced the Applicant as a second offense.

In a pro se document captioned "Amended Application for Post Conviction Relief" dated January 7, 2000, the Applicant made the following additional allegations:

1. Ineffective assistance of trial counsel.
 - a. Failed to argue the first-degree burglary indictment was defective and the court lacked subject matter jurisdiction.
 - b. Failed to "object to testimonies presented by the solicitor and the

¹ Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

#2
E

trial judge's jury instructions that constructively amended the indictment for 'burglary in the first degree' which broadened the basis for conviction on that offense."

- c. Failed to object to the sexual assault evidence kit (and a label with the Applicant's name) from being entered into evidence "because the chain of custody was not established."
 - d. Failed to object to "the 'hearsay' testimony of Special Agent Lilly Gallman of the South Carolina Law Enforcement Division" and argue the Applicant was "denied his confrontation right."
 - e. Failed to object to the trial judge's alibi instruction.
 - f. Failed to object to "improper comments made by the solicitor during closing arguments" and seek curative instructions.
2. The trial court lacked subject matter jurisdiction on the first-degree CSC indictment because the indictment "was unconstitutionally 'amended and broadened' through testimony and jury instructions by the trial judge."

An evidentiary hearing was convened on August 27, 2002 at the Greenville County Courthouse. David Gantt, Esquire represented the Applicant. The Honorable John W. Kittredge denied and dismissed the PCR application by order filed December 17, 2002.

The Applicant filed a notice of appeal. Wanda H. Haile, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The South Carolina Supreme Court denied the petition for writ of certiorari on November 4, 2004.

Federal Habeas Corpus

The Applicant filed a petition for writ of habeas corpus in the United States District Court for the District of South Carolina (0:05-2955-JFA-BM). The Respondent submitted a motion for summary judgment on January 25, 2006. The Honorable Bristow Marchant, United States Magistrate Judge, issued a report and recommendation to grant the motion for summary judgment dated August 23, 2006. On September 15, 2006, the Honorable Joseph F. Anderson, Jr., United States District Judge, issued an order granting the motion for summary judgment and dismissing the petition with prejudice.

II. ALLEGATIONS

In his current PCR application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of PCR counsel:
 - a. Failed to amend the PCR application to include an allegation of ineffective assistance of appellate counsel.
 - b. Failed "to put the State's indictments to adversarial testing."
 - c. Failed to subpoena SLED agents who analyzed the Applicant's DNA.
 - d. Failed to challenge the proficiency of the DNA test.
 - e. Failed to challenge that the indictments all arose from one incident and should have been "considered one charge under Title 17-25-50."

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the records of the Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the prior PCR orders and opinions, and the pleadings and makes the following findings of fact and conclusions of law:

A.

This Court finds the current PCR application should be dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §§ 17-27-10, et. seq. (2003). South Carolina 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 Applicant was convicted of the offenses he challenges in this application on May 21, 1997. The South Carolina Court of Appeals dismissed his appeal and issued the remittitur on

June 18, 1999. The Applicant was therefore required to file his application before June 18, 2000. This application was filed on April 2, 2013, which was more than twelve years after the statutory filing period had expired.

The statute of limitations contained in section 17-27-45(a) sets forth a bright-line test that must be followed by this Court in determining whether an application for PCR was filed in a timely manner. The Applicant has failed to set forth any cognizable reason that would justify disregarding this one-year statute of limitations. As such, all issues related to the Applicant's guilty plea hearing – except for that of a belated appeal – are summarily dismissed.

B.

This Court further finds the current application should be dismissed because it is successive to the previous application for PCR. Successive applications for post-conviction relief are disfavored. See Land v. State, 274 S.C. 243, 246, 262 S.E.2d 735, 737 (1980). South Carolina Code Ann. § 17-27-90 (2003) states:

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.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to 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, 450, 409 S.E.2d 392, 394 (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. (emphasis in original). If the

Applicant could have raised these allegations in a previous application, then the Applicant may not raise those grounds in successive applications. Id.

The Applicant has failed to present any reasons why he could not have raised the current allegations in his previous PCR application. Accordingly, the Applicant has failed to carry his burden of proof. See Aice, 305 S.C. at 450, 409 S.E.2d at 394 (holding the Applicant bears the burden of showing that the allegations could not have been raised previously).

C.

This Court finds the Applicant's allegation that his PCR attorney was ineffective is not a proper claim for post-conviction relief. While the Applicant cites Martinez v. Ryan, ___ U.S. ___, 132 S. Ct. 1309 (2012) to support his claim, the South Carolina Supreme Court has found that "the holding in Martinez is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions." Kelly v. State, ___ S.C. ___, 745 S.E.2d 377 (2013).

D.

To the extent the Applicant is arguing the existence of after-discovered evidence, this Court finds the Applicant failed to meet his burden of proof. The South Carolina Supreme Court has held that, for an applicant to be granted post-conviction relief based on after-discovered evidence, he must show the alleged 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.

Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983) (citation omitted) (emphasis added). This Court notes the Applicant has failed to articulate the exact nature of the "new evidence" and has not attached any documentation of such to the PCR application. The

Applicant has not shown that the alleged evidence meets any of the requirements for after-discovered evidence. This Court also notes the existence of after-discovered evidence may be raised in a Rule 29, SCRCrimP motion in the Court of General Sessions.

E.

This Court notes the Applicant is arguing for expenses for DNA testing in his case. This Court finds such an argument is not a proper argument for post-conviction relief. This finding does not limit the Applicant's ability to attempt to utilize the Access to Justice Post-Conviction DNA Testing Act in the Court of General Sessions. See S.C. Code Ann. §§ 17-28-10 – 120 (Supp. 2012).

IV. CONCLUSION

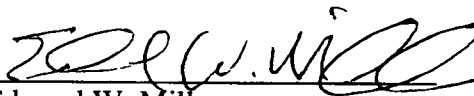
Based on the records, pleadings, the arguments of counsel, and evidence presented this Court finds (1) the Applicant failed to file his PCR application within the time mandated by the Uniform Post-Conviction Procedure Act and (2) the Applicant raised grounds for relief in this application that could have been raised in the prior PCR application. This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure the appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.


7
24

IT IS THEREFORE ORDERED THAT:

1. The Respondent's Motion to Dismiss is hereby **GRANTED** and the post-conviction relief application is **DENIED AND DISMISSED WITH PREJUDICE**.
2. The Applicant is remanded to the custody of the Respondent for the completion of his sentence.

AND IT IS SO ORDERED this ____ day of 11/14, 2013.

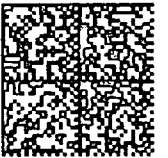

Edward W. Miller
Presiding Judge
Thirteenth Judicial Circuit


_____, South Carolina.

R. MILLS ARIAIL, JR.
ATTORNEY AT LAW

11 NORTH IRVINE STREET, SUITE 11
GREENVILLE, SC 29601

Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211



UNITED STATES POSTAGE
\$002.48⁰⁰
RITNEY BOWES
02 1P
0002868197 NOV 13 2013
MAILED FROM ZIP CODE 29601