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STATE OF SOUTH CAROLINA)
)
COUNTY OF CHESTER)

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

Theodore Harrison, Jr., #155651.)
)
Applicant,)

2010-CP-12-0394

v.)

CONDITIONAL ORDER OF DISMISSAL

State of South Carolina,)
)
Respondent.)

FILED
2011 OCT 26 12:12:19
CLERK OF COURT
CHESTER CO. S.C.

This matter comes before this Court by way of an application for post-conviction relief filed August 23, 2010, and an amended application filed February 9, 2011. Respondent made its Return and Motion to Dismiss on or about October 19, 2011.

I. PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Clerk of Court for Chester County. The Applicant was indicted at the January 1990 term of the Chester County Grand Jury for two counts of murder (90-GS-12-125, -126), two counts of kidnapping (90-GS-12-119, -120), and two counts of armed robbery (90-GS-12-121, -122). He was represented by Tyre D. Lee, Jr., Esquire, and Lamar Kelsey, Esquire. On November 12, 1990, the Applicant pled guilty as charged¹. He was sentenced by the Honorable Don S. Rushing to confinement for life for each charge of murder and consecutive terms of twenty-five years for each count of armed robbery; all sentences were ordered to run consecutive to all other sentences imposed upon Applicant².

Applicant timely filed notice of intent to appeal. However, the appeal was dismissed pursuant to

¹ Due to the murder charges and sentences, the kidnapping sentences were incorporated into the murder sentences.

the Applicant's request by Order dated March 28, 1991.

1995-CP-12-0186

The Applicant then filed an Application for Post-Conviction Relief dated June 23, 1995. In his first application, the Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
2. Denial of due process procedure and equal protection of the law.
3. Involuntary guilty plea.

The Respondent made its Return on January 5, 1995, requesting that an evidentiary hearing be held. A hearing into the matter was convened on April 3, 1996, in the Chester County Courthouse before the Honorable Jackson V. Gregory. The Applicant was present in court and represented by Yale Zamore, Esquire. The Respondent was represented by Barbara M. Tiffin, Esquire, of the Office of the South Carolina Attorney General. On July 2, 1996, Judge Gregory issued an order denying and dismissing the Application.

Applicant timely filed notice of intent to appeal and a petition for writ of certiorari was perfected on his behalf by the South Carolina Office of Appellate Defense. By Order dated January 22, 1998, the South Carolina Supreme Court denied certiorari. The Remittitur was returned on February 9, 1998.

1999-CP-12-0108

The Applicant then filed a second application for post-conviction relief on March 25, 1999~~7~~.
The Applicant alleged in the second application that he was being held in custody unlawfully for the following reasons:

² Applicant was already serving time for charges in Richland County.

³ Based upon the allegations, an application filed by Applicant in 1997 in Richland County (19Error! Main Document

1. Conviction obtained by plea of guilty which was not made with understanding of the consequences of the plea.
2. Ineffective assistance of trial counsel.

The State made its return and motion to dismiss on September 17, 1999. A hearing on the State's motion was convened at the Chester County Courthouse on April 24, 2002. Applicant was present and represented by James F. Wells, Esquire. The State was represented by Dave Spencer of the South Carolina Office of the Attorney General. The Honorable Paul E. Short, Jr. denied and dismissed the application as successive by written Order. Subsequently, the Applicant filed a premature notice of appeal. On June 7, 2002 the Supreme Court dismissed the Applicant's appeal without prejudice for failure to provide the Court with a copy of the Order of Dismissal. On February 18, 2003, the Order of dismissal was filed with the Chester County Clerk of Court. It was served on Counsel for the Applicant on February 24, 2003.

A notice of appeal was timely filed and a Petition for Writ of Certiorari was filed on Applicant's behalf. The South Carolina Supreme Court denied the Petition on October 21, 2004. The Remittitur was returned on November 9, 2004.

2002-CP-12-0341

The Applicant filed this application on September 6, 2002. A hearing was convened at the Chester County Courthouse on March 17, 2003, at which time the Applicant was not present in court but was represented by Todd W. Cline, Esquire. The Respondent was represented by Allen Bullard of the South Carolina Attorney General's Office. The sole allegation of this application was:

1. PCR counsel was ineffective for failing to file an appeal of Applicant's prior PCR, 1999-CP-12-108.

The Court found that the time limits for perfecting an appeal of the prior PCR had not yet run.

Therefore, the Applicant's claim was not yet ripe, so the application was denied and dismissed.

Applicant's Current PCR Application

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

1. "Conviction is based on the introduction of unlawfully obtained evidence Trial court error, in that;
 - a. Court erred when it failed to suppress the evidence of the Applicant's blood analysis obtained in violation of Miranda v. Arizona,
 - b. Court erred when it failed to dismiss DNA evidence, when the procedural chain of custody was breached.
 - c. Court erred when it failed to excuse an improper juror
2. Lack of subject matter jurisdiction, in that;
 - a. Court lacked subject matter jurisdiction to convict Applicant at trial because there was no presentment or proper waiver of presentment to the grand jury for the amended indictment
3. Ineffective assistance of counsel, in that;
 - a. Counsel failed to have excused or object to the seating of an improper juror

Before this Court are the records of the Spartanburg 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 applications 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 applications 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 pled guilty to the offense(s) he challenges in this Application on November 12, 1990. After a

voluntary request, the Applicant's appeal was dismissed on March 28, 1991. The Applicant was therefore required to file his application before July 1, 1997. This Application was filed on August 23, 2010, which was more than thirteen years after the statutory filing period had expired.

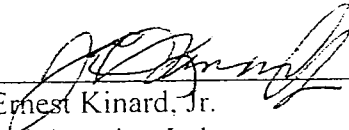
A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. §17-27-70(c) (2003) authorizes the Court to "grant a motion by either party for summary 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 and because it is successive to his previously filed applications.

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

Suzanne H. White, Esquire
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

AND IT IS SO ORDERED this 24 day of Oct, 2011.



J. Ernest Kinard, Jr.
Administrative Judge
Sixth Judicial Circuit

Lowndes South Carolina

FILED

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CLERK OF COURT
CHESTER CO S.C.