

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS)
FIRST JUDICIAL CIRCUIT)

Jamin Mazyck, # 238056,)

2012-CP-38-0250)

Applicant,)

v.)

CONDITIONAL ORDER OF DISMISSAL)

State of South Carolina,)

Respondent.)

FILED FOR RECORD
WINNIE S. CLARK
CLERK OF COURT
ORANGEBURG, SC

2012 OCT -3 PM 12

This matter comes before this Court by way of an application for post-conviction relief filed February 22, 2012. In its return, the Respondent requested the application be summarily dismissed.

PROCEDURAL HISTORY

Before this Court are the records of the Orangeburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections and records from Applicant's previous application for post-conviction relief. The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Orangeburg County. The Applicant was indicted at the March 2004 term of the Orangeburg County Grand Jury for Burglary -1st Degree (2004-GS-38-0345); Murder (2004-GS-38-0346); and Assault and Battery with Intent to Kill (2004-GS-38-0347). The Applicant was represented by Carl B. Grant, Esquire. On May 26, 2005, the Applicant pled guilty to Burglary, First Degree, Voluntary Manslaughter and Assault and Battery with Intent to Kill. The Honorable James C. Williams, Jr. sentenced the Applicant to confinement for a period of twenty-five years for Burglary – 1st Degree, twenty-five years for Voluntary Manslaughter and twenty years for Assault and Battery with Intent to Kill, with the sentences to be served concurrently. The Applicant did not

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Winnifred B. Clark
CLERK OF COURT
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appeal his convictions or sentences.

The Applicant subsequently filed an application for post-conviction relief on April 19, 2006 (C.A. No. 2006-CP-38-459). The Applicant raised the following issues in his first application:

1. Ineffective assistance of counsel.
2. Involuntary guilty plea.
3. Lack of subject matter jurisdiction.
4. Failure to file a direct appeal.

The State made its Return on or about February 16, 2007. An amended application was submitted on or about July 28, 2007 alleging ineffective assistance of counsel during pretrial and the plea colloquy. An evidentiary hearing was convened on June 28, 2007, before the Honorable Diane S. Goodstein. Applicant was present and represented by James Shadd, III, Esquire. Judge Goodstein denied the application by written order dated September 7, 2007 and filed September 12, 2007. A timely Notice of Appeal was filed. By Order dated October 7, 2009, the South Carolina Supreme Court denied Applicant's Petition for Writ of Certiorari. The remittitur was sent on November 4, 2009.

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

1. "New trial based on after-discovered evidence."
2. "Applicant was denied the right to effective assistance of trial counsel under the U.S. Constitution and S.C. Constitution when trial counsel affirmatively misadvised Applicant that there were no witnesses to substantiate Applicant's versions of prior difficulties with the deceased Terrell Higgins that would have mitigated Applicant's punishment or alleviated his criminal liability in Terrell Higgins death. This renders Applicant's guilty plea involuntary, unknowing and unintelligent."
3. "Applicant suffered ineffectiveness of counsel in violation of the U.S. Constitution and S.C. Constitution when trial counsel failed to investigate and interview any witnesses who have genuine material facts that impact applicant's innocence, genuine material facts that mitigates applicant's punishment, and genuine material facts that mitigates applicant's criminal

- liability in this case where such witnesses were readily available and identifiable to trial counsel”
4. “Applicant suffered ineffective assistance of counsel in violations of the U.S. Constitution and S.C. Constitution due to trial counsel lack of investigation trial counsel affirmatively misadvise applicant that the deceased did not have a weapon at all, when in fact a knife weapon was retrieved from the body of the deceased Terrell Higgins.”
 5. “Applicant suffered due process violations of the U.S. Constitution and S.C. Constitution when the state solicitor, the investigating law enforcement agencies, and other state officials unlawfully suppressed and withheld evidence of the knife weapon being recovered from the deceased Terrell Higgins.”
 6. “Applicant suffered ineffective assistance of counsel in violation of the U.S. Constitution and S.C. Constitution when trial counsel failed to investigate and review the toxicology and autopsy report of the deceased Terrell Higgins and failed to discover the mitigating evidence of high levels of drug hallucinogens in Terrell Higgins system at the time of his death.”
 7. “Applicant suffered due process violations of the U.S. Constitution and S.C. Constitution when the state solicitor, the investigating law enforcement agencies, and other state officials unlawfully suppressed and withheld evidence of the toxicology and autopsy reports of the deceased Terrell Higgins that reveals high levels of drug hallucinogens in his system at the time of his death.”
 8. “Applicant suffered due process violations of the U.S. Constitution and S.C. Constitution when the state solicitor, the investigating law enforcement agencies, and other state officials unlawfully suppressed and withheld evidence crucial material evidence from Applicant’s discovery, thus thrawing applicant ability to fully and fairly and adequately present his constitutional claims on his prior Post-Conviction Relief hearing, his prior Direct appeal, his prior writ of certiorari, his prior federal habeas corpus filing and each and every prior filing intermediate to these proceedings.”

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds that the Applicant’s allegations are without merit. The Applicant’s claim is an allegation that newly discovered or after discovered evidence exists. This allegation is not cognizable in the Applicant’s post-conviction relief action. The Applicant waived his right to a jury trial. If the Court determines that the Applicant knowingly and voluntarily pled guilty, the plea waives any non-jurisdictional defects and defenses, including challenges to the sufficiency of the

evidence. See Whetsell v. State, 276 S.C. 295, 277 S.E.2d 891 (1981); Rivers v. Strickland, 264 S.C. 121, 213 S.E.2d 97 (1975).

Furthermore, this contention is vague and general in its terms. There are no specific allegations of the nature of the evidence. A defendant 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. Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983).

The Applicant has not shown that the alleged evidence meets *any* of the requirements for after-discovered evidence. Most importantly, the "new evidence" offered by the Applicant is not "material to the issue of guilt or innocence," and probably would not "change the result if a new trial was had." Hayden, Id. Accordingly, the Application is denied and dismissed.

This Court finds that the current application for post-conviction relief must also 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 were or 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, 305 S.C. 448, 409 S.E.2d 392; Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834.

This Court finds, further, 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. 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 May 26, 2005. This Application was filed on February 22, 2012, which was almost six (6) after the statutory filing period had expired.

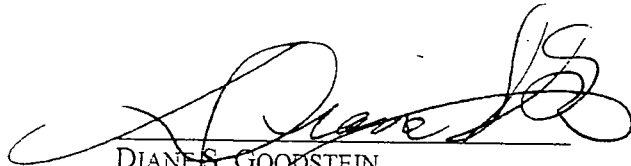
A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. §17-27-70(c) (1985) authorizes the Court to "grant a motion by

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 for being successive.

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, factual or legal, with the Orangeburg County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Megan E. Harrigan, Esquire
P.O. Box 11549
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 24th day of September, 2012.



DIANES S. GOODSTEIN
Chief Judge for Administrative Purposes
First Judicial Circuit

Summerville, South Carolina.