

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

RECORDED
2013 JAN 30 PM 12:50

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

Leroy Shaw, #301480,

JAMES D. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

2012-CP-43-1782

Applicant,

v.

**CONDITIONAL ORDER
OF DISMISSAL**

State of South Carolina,

Respondent.

This matter comes before this Court by way of an application for post-conviction relief filed September 10, 2012. In its Return, Respondent requests that the action be summarily dismissed.

PROCEDURAL HISTORY

Before this Court are the records of the Sumter County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, appellate records, and records from Applicant's previous application for post-conviction relief. The records before this Court reflect that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Sumter County. The Applicant was true bill indicted at the November 2003 term of the Sumter County Grand Jury for Burglary - 2nd Degree (2003-GS-43-0232). Joseph Spigner, Esquire, represented him. Applicant proceeded to a jury trial before the Honorable Reginald Lloyd. Applicant was found guilty, and on April 23, 2004, Applicant was sentenced to life imprisonment without parole.

A notice of appeal was filed and an appeal perfected. The South Carolina Court of Appeals dismissed the appeal. State v. Shaw, Op. No. 2007-UP-201 (S.C. Ct. App. filed May 4,

2007). A timely Petition for Rehearing was filed. On June 28, 2007, the South Carolina Court of Appeals denied the Petition for Rehearing. The Remittitur was issued on August 3, 2007.

Applicant filed a timely post-conviction relief application on August 1, 2007 (C.A. No. 2007-CP-43-1626), and amended application on July 24, 2009, in which he alleged he was being held in custody unlawfully for the following reasons:

1. "The State violated Applicant's rights guaranteed by the Sixth, Eighth, Fourteenth Amendment and South Carolina Law."
 - a. "Trial court violated the Rights of Defendant, Based on the State's violation of Rule 5, and Due Process."
2. "Ineffective Assistance of Trial Counsel."
 - a. "Trial counsel [failed] to do simple research in case, thereby Prejudice and Impeded the Defendant from presenting a proper defense. U.S.C.A. Const. Amends. 6, 14."
 - b. "Defendant clothes that were seize[d] as eviden[ce] [were] also 'exculpatory' material that was disclose[d] to the Defendant that were in the State's possession."
 - c. "Forensic reports on seized clothes."
 - d. "Store clerks could have been subpoena as witness as reference to gloves and surveillance cameras."
 - e. "Also surveillance cameras video tapes could have been subpoena, And maintenance records of surveillance cameras."
3. "Ineffective Assistance of Appell[ate] Counsel."
 - a. "The Petitioner was deprived of Effective Assistance of Appellate Counsel in Violation of the Sixth Amendment of the United States Constitution where Appellate Counsel failed to raise on appeal the violation of Appellant's rights under Rule 5, S.C. CrimP. And the Due Process Clause of the United States Constitution. U.S.C.A. Const. Amends. 6, 14."
 - b. "Appellate Counsel failed to raise on appeal that the State did not reach its burden of proof. U.S.C.A. Const. Amends. 6, 14."

An evidentiary hearing was convened into the matter on October 29, 2009, at the Sumter County Courthouse, where Applicant was present and represented by counsel, A. Paul Weissenstein, Jr., Esquire. By order dated January 25, 2010, and filed February 4, 2010, the Honorable R. Ferrell Cothran, Jr., denied and dismissed the application with prejudice. A timely notice of appeal was filed. In a written order, dated December 2, 2010, the South Carolina Supreme Court denied the petition for writ of certiorari and granted counsel's request to withdraw. The Remittitur was

issued on December 21, 2010.

Applicant filed a second application on September 22, 2011 (2011-CP-43-1766). In this application, Applicant set forth the following grounds for relief:

1. After-Discovered Evidence
2. Newly-Discovered Evidence
3. Due Process Violation

On November 15, 2011, the Respondent made its Return and Motion to Dismiss based on the statute of limitations and successiveness. A Conditional Order of Dismissal was dated November 18, 2011, provisionally denying and dismissing the application as successive and barred by the one-year statute of limitations. Applicant filed a response to the Conditional Order. After reviewing the response, the Honorable R. Ferrell Cothran, Jr., denied and dismissed the application with prejudice in a Final Order dated February 22, 2012, and filed February 29, 2012. Applicant appealed, and the appeal was dismissed. The Remittitur was sent on April 19, 2012.

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

1. Due Process Violation;
 - a. "P.C.R. counsel failed to file a 59(E) motion to preserve for Appellate review and denied the petitioner the rights to properly exhaust his available state remedies. Petitioner could not file a 59(E) motion pro-se, because P.C.R. counsel has file a timely appeal. All the actions in this matter undermined petitioner's due process rights."
2. Ineffective of Assistance of PCR Counsel; and
 - a. "P.C.R. counsel failed to raise issue that was on P.C.R. application "Appellate counsel failed to raise on appeal that the state did not react it's burden of proof," denied the petitioner the right to preserved for review for the South Carolina Supreme Court. See Exhibit - A."
3. Illegal Three Strikes.
 - a. "Petitioner was indicted for second degree Burglary non-violent on his second conviction, See Exhibit - B. Second degree burglary is not listed as a violent offense under statute 16-1-60 and there is a non-violent offense under statute 16-1-

70, and statute 21-21-610, which sets parole eligibility at $\frac{1}{4}$ for non-violent crime, was enacted after statute 16-11-312, not statute 16-11-312 (B.), Petitioner was eligible for parole on his second conviction. Petitioner first conviction offense happen when he was a juvenile. See Exhibit - C, D, and E."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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. Aice v. State, 409 S.E.2d 392 (1991); Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981).

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 applications for post-conviction relief; therefore, he has failed to meet the burden imposed upon him. Aice v. State, 409 S.E.2d 392 (1991); Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

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 (2007). 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 April 23, 2004. This application was filed on September 10, 2012, seven 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 for being successive.

Additionally, this Court finds that Applicant's contention that he received ineffective assistance of counsel on his prior post-conviction relief application is not a ground for relief. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The Sixth

Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Therefore, "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under '17-27-90.'" Aice, 305 S.C. at 451, 409 S.E.2d at 394.

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Austin recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. Id. Austin "is limited to its particular factual situation. . ." Aice, 305 S.C. at 452, 409 S.E.2d at 394. Pursuant to Austin, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application. Here, Applicant was afforded appellate review of his both his initial and subsequent post-conviction relief applications. Therefore, this Court finds this application should be summarily dismissed for failure to state a claim upon which relief can be granted.

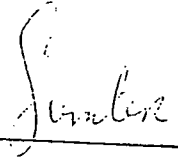
Pursuant to S.C. Code Ann. § 17-27-70(b), this Court intends to dismiss this Application with prejudice unless the Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. The Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. The Applicant shall file any reasons he may have with the Sumter 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

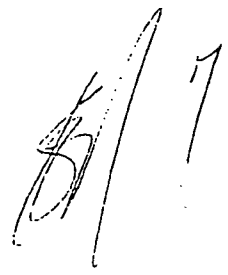
AND IT IS SO ORDERED this 17 day of January, 20 .



GEORGE C. JAMES, JR.
Chief Judge for Administrative Purposes
Third Judicial Circuit



, South Carolina



1626,' Appellate counsel failed to raise on appeal that the state did not reach it's burden of proof,' after applicant desire issue to be raise PCR Counsel denied the applicant issue to be heard and ruled on and denied the Applicant the right to preserved (sic) for review for the South Carolina Supreme Court." Applicant further asserts he "could not file a 59(e) motion pro-se because PCR counsel has file a timely appeal."

The Court interprets Applicants claim for ineffective assistance of PCR counsel to be based on the recent United State Supreme Court ruling Martinez v. Ryan, 132 S. Ct. 1309, 182 L.Ed.2d 272 (2012). However, this Court finds this contention to be without merit as the ruling in Martinez has no bearing on an Applicant's ability to raise ineffective assistance of collateral counsel claims in a subsequent, successive state PCR application. Rather, Martinez sets forth a narrow exception to the procedural default rules imposed on federal habeas corpus petitions when considered under the so-called "cause and prejudice" standard. See Coleman v. Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546, 2565 (1991) ("In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice."). The Martinez Court used this standard as the foundation for its decision, finding that attorney error amounting to ineffective assistance of counsel during an initial-review collateral proceeding may be sufficient "cause" to excuse a prisoner's procedural default in a federal habeas corpus proceeding. See Martinez, supra at 6 ("Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial.").

With this framework in mind, it is clear Martinez has no application to successive state PCR actions, as the fundamental “cause and prejudice” standard on which Martinez relies is exclusive to federal habeas corpus actions. Further, the Martinez Court specifically noted that their decision was **not** addressing ineffective assistance of counsel claims raised in subsequent state PCR actions, opining “[t]his is not the case, however, to resolve whether [an exception to the constitutional rule that there is no right to counsel in collateral proceedings] exists as a constitutional matter.” Id. Therefore, Applicant’s contention that Martinez allows him to bring this untimely and successive state PCR application is misguided and erroneous.

Additionally, Martinez’s interpretation of federal laws applicable to federal habeas corpus actions has no effect on South Carolina’s interpretation and application of its Post-Conviction Relief statute. S.C. Code Ann. § 17-27-10 to -160. Therefore, the South Carolina Supreme Court’s opinion in Aice v. State is still applicable to a claim raised in a subsequent state PCR action alleging ineffective assistance of prior collateral counsel. See Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991) (“The contention that prior PCR counsel was ineffective is not *per se* a ‘sufficient reason’ warranting a successive PCR application under 17-27-90.”). Aice went on to note that such a holding was in accord with the United State’s Supreme Court’s opinion in Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990 (1987) (there is no constitutional right to counsel for collateral review of a conviction). Accordingly, this Court finds Applicant’s claim regarding the application of Martinez to be without merit.

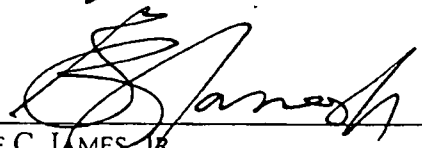
Finally, because Applicant has failed to set forth any reason he could not have raised the current allegations in his previous application other than to allege PCR counsel was ineffective in failing to raise them, the current application is in fact successive in nature. Accordingly, this application must be summarily dismissed for a failure to state a claim entitling Applicant to

relief, for being successive in nature and for failing to file the action within the statute of limitation as set forth in S.C. Code Ann. § 17-27-45(a).

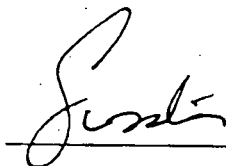
IT IS THEREFORE ORDERED that, for the reasons set forth in the Court's Conditional Order of Dismissal, the Application for post-conviction relief is hereby denied and dismissed with prejudice.

This Court hereby advises the Applicant that he must file and serve a Notice of Appeal within thirty days of the service of this Order to secure appellate review. See Rule 203, SCACR. The 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 18 day of June, 2013.



GEORGE C. JAMES, JR.
Chief Administrative Judge
Third Judicial Circuit Court


_____, South Carolina.

