

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
HONORABLE G. EDWARD WELMAKER

PC

Case No.: 2012-CP-23-1297

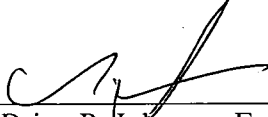
TERRANCE TERRY,)
)
PETITIONER,)
)
vs.)
)
STATE OF SOUTH CAROLINA)
)
RESPONDENT.)

NOTICE OF APPEAL

The Petitioner, Terrance Terry, hereby appeals the Honorable G. Edward Welmaker's January 31, 2014, order denying post-conviction relief to the Petitioner. A copy of the order on appeal is attached to this notice.

RECEIVED
MAY 02 2014
S.C. SUPREME COURT

Respectfully submitted,



Brian P. Johnson, Esq.
522 North Church Street
Greenville, SC 29601
Attorney for Petitioner

Date: April 30, 2014
Other counsel of record: Karen Ratigan
P.O. Box 11549/Columbia, SC 29211

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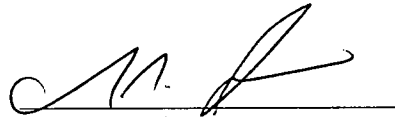
Case No.: 2012-CP-23-1297

TERRANCE TERRY,)
)
 PETITIONER,)
)
 vs.)
)
 STATE OF SOUTH CAROLINA)
)
 RESPONDENT.)
)

PROOF OF SERVICE

I, Brian P. Johnson, Esq., certify that I have today (April 30, 2014) served the within notice of appeal upon the Respondent by depositing a copy in the United States Mail, postage prepaid, addressed to the attorney of record, Karen Ratigan, at P.O. Box 11549/Columbia, SC 29211.

Respectfully submitted,



Brian P. Johnson, Esq.
522 North Church Street
Greenville, SC 29601
Attorney for Petitioner

RECEIVED

MAY 02 2014

S.C. SUPREME COURT

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

JUDGMENT IN A CIVIL CASE
CASE NO: 2012CP2301297

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2012 FEB 17 PM 11 34

Terrence Dimingo Terry 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 .

Court Reporter: _____

PRESIDING JUDGE - G Edward Welmaker

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

Brian P. Johnson 522 North Church Street
Greenville, SC 29601

ATTORNEY(S) FOR THE PLAINTIFF(S)

Karen Christine Ratigan PO Box 11549 Columbia,
SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

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

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
Terrence Dimingo Terry,)
S.C.D.C. No. 307935,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

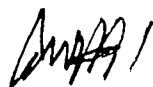
IN THE COURT OF COMMON PLEAS
C.A. No. 2012-CP-23-1297

ORDER OF DISMISSAL

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER
2014 FEB 17 AM 11 34

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed February 20, 2012. The Respondent submitted a return and partial motion to dismiss dated August 10, 2012. An evidentiary hearing into the matter was convened on December 17, 2013 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Brian P. Johnson, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent. The Court had before it the transcript of the guilty plea hearing, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, and the return and partial motion to dismiss, the prior PCR and PCR appeal records, records from the Applicant's petition for writ of habeas corpus pending in federal court,¹ and the Applicant's Exhibits 1-5.

¹ Specifically, this Court had before it the report and recommendation issued by Judge McDonald on June 16, 2011 and the order staying the matter issued by Judge Anderson on September 30, 2011.



PROCEDURAL HISTORY

The Greenville County Grand Jury indicted the Applicant at the February 2005 term of General Sessions for two counts of lewd act upon a child (2005-CP-23-1157, -1158) and first-degree criminal sexual conduct (CSC) with a minor (2005-GS-23-1274). Ernest Hamilton, Esquire represented the Applicant.

On March 8, 2005, the Applicant pled guilty. The Honorable Edward W. Miller sentenced the Applicant to concurrent terms of fifteen years for each count of lewd act upon a child and twenty years for first-degree CSC with a minor. The Applicant did not appeal.

First PCR Application

The Applicant filed a PCR application on November 11, 2005 (2005-CP-23-7327). The Applicant raised the following issues in his PCR application:²

1. Ineffective assistance of counsel:
 - a. Failed to advise of right to appeal.
 - b. Failed to investigate.
2. Prosecutorial misconduct:
 - a. "Solicitor prosecuted applicant without disclosure of a valid DNA analysis report or certified chain of custody."
3. Subject matter jurisdiction.

An evidentiary hearing was convened on March 1, 2007 at the Greenville County Courthouse. Susannah C. Ross, Esquire represented the Applicant. The Honorable Michael G. Nettles granted the Applicant a new trial on all charges in an order dated March 26, 2007.

The State filed a notice of appeal and subsequent petition for writ of certiorari at the South Carolina Supreme Court. The Supreme Court granted the petition and both parties

² In a subsequent amendment to the PCR application, counsel for the Applicant argued the Applicant was not made aware of the "nature and crucial elements of the charge [sic] against him."



submitted briefs. The Applicant was represented by Robert M. Pachak, Esquire of the South Carolina Office of Appellate Defense. By opinion dated July 13, 2009, the Supreme Court reversed Judge Nettles. Terry v. State, 383 S.C. 361, 680 S.E.2d 277 (2009).

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 (6:10-200-JFA-KFM). The Respondent submitted a motion for summary judgment on December 10, 2010. The Honorable Kevin F. McDonald, United States Magistrate Judge, issued a report and recommendation to grant the motion for summary judgment dated June 16, 2011. The Honorable Joseph F. Anderson, Jr., United States District Court Judge, issued an order to stay the matter dated September 30, 2011. Judge Anderson noted that, as the Applicant did not file a notice of appeal after the PCR order was issued in his case, he may have some unexhausted State remedies. Judge Anderson stayed the federal matter in order to allow the Applicant to exhaust this State remedy.

ALLEGATIONS

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

1. Prosecutorial misconduct:
 - a. Violation of Brady and Rule 5, SCRCrimP.
 - b. Failure to test and destruction of evidence.
 - c. Use of uncounseled admission not in discovery.
2. Ineffective assistance of plea counsel:
 - a. Failure to address mental health issues.
 - b. Failure to investigate.
 - c. Failure to present mitigating evidence.
 - d. Failure to effectively negotiate with the solicitor.
 - e. Failure to adequately advise the Applicant.
3. Ineffective assistance of PCR appellate counsel:
 - a. Failure to raise post-trial motions.

- b. Failure to petition for appeal bond.
- c. Failure to ensure adequate appellate record.
- 4. Due process violation.
- 5. Subject matter jurisdiction:
 - a. Invalid arrest warrants and indictments.
 - b. No preliminary hearing.

This Court notes that, in light of the pleadings and orders in the stayed federal court proceeding – as well as the Applicant’s notation in the caption of his PCR application that it was pursuant to Austin v. State³ – there is also an allegation that PCR counsel should have filed a notice of appeal of the order from the Applicant’s first PCR application.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Partial Motion to Dismiss

This Court finds that, as regards all issues except for that of a review of appeal issues from the first PCR application (pursuant to Austin), these issues must 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.

³ 305 S.C. 453, 409 S.E.2d 395 (1991).

The Applicant pled guilty to the offenses he challenges in this Application on March 8, 2005. The Applicant was therefore required to file his application before March 8, 2006. This Application was filed on February 20, 2012, which was more than five (5) 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. See McDonnell v. Consolidated Sch. Dist. of Aiken, 315 S.C. 487, 489, 445 S.E.2d 638, 639 (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, the all issues (except for the Austin claim) must be dismissed as untimely.

This Court finds these issues must also be dismissed because they are successive. 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 bears the burden of showing that the allegations could not have been raised previously. Id. As the Applicant has failed to present any reasons why he could not have raised the current allegations in his previous PCR application, this Court denies any such issues as improper and successive.

Austin Claim

The Applicant stated he filed a pro se Rule 59(e) motion in his first PCR case. The Applicant stated PCR counsel failed to assist him and that he felt “shunned.” The Applicant admitted he never asked PCR counsel to file a notice of appeal after he was successful in obtaining relief.

The Applicant’s attorney from his first PCR application testified the Applicant never asked her to file a Rule 59(e), SCRCF motion and that there would have been no merit to such a motion. PCR counsel noted she drafted the order pursuant to the judge’s instructions, so she did not believe a Rule 59(e) motion was necessary but that she would have filed one if it was necessary to preserve the record. PCR counsel testified she was aware the Applicant had filed a pro se Rule 59(e) motion. PCR counsel testified the Applicant did not ask her to file a notice of appeal. PCR counsel testified that, if the Applicant had asked her file a notice of appeal, she would have done so but advised the issues he could have raised on appeal would not have been meritorious.

This Court finds the Applicant has not met his burden of proving he is entitled to an Austin review of the issues denied in his first PCR application. The Applicant claims PCR

counsel was deficient in failing to file a notice of appeal following the March 2007 order granting his PCR application. Despite obtaining relief based upon plea counsel's failure to define sexual battery, the Applicant contends PCR counsel was deficient in failing to file a notice of appeal to contest the denial of relief based upon undisclosed plea offers, after-discovered evidence, and other grounds. The Applicant filed a pro se Rule 59(e) motion, and the PCR judge denied the Rule 59(e) motions submitted by both the Applicant and the State. At the PCR hearing, the Applicant admitted on cross-examination that he never asked PCR counsel to file an appeal. PCR counsel testified she generally files a Rule 59(e) motion if a legitimate issue should be preserved for appeal, and, in her professional opinion, no grounds existed for filing such a motion in this case. Further, PCR counsel testified the Supreme Court would be substantially more likely to affirm a grant of relief based upon plea counsel's failure to define sexual battery than on other grounds. Thus, PCR counsel made the strategic decision not to appeal as an attempt to minimize the chances of reversal of the Applicant's relief.

This Court finds that, as the Applicant never asked PCR counsel to file a notice of appeal, she is not deficient for not filing the notice. This Court further finds PCR counsel's decision not to file a notice of appeal without the Applicant's request was a legitimate strategic decision for his appeal, and the Applicant has failed to demonstrate this decision fell below prevailing professional norms. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); McLaughlin v. State, 352 S.C. 476, 483-84, 575 S.E.2d 841, 844-45 (2003) (holding that where counsel articulates a valid reason for employing a certain trial strategy, such conduct will not be deemed ineffective assistance of counsel).

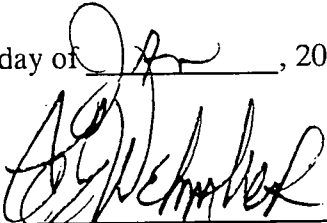
CONCLUSION

Based on all the foregoing, this Court finds and concludes this PCR application must be denied and dismissed with prejudice. This Court advises the Applicant that he must file a notice of intent to appeal within thirty days from the receipt of this Order if he wants to secure 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.

IT IS THEREFORE ORDERED:

1. That the Respondent's partial motion to dismiss all issues except for the Austin claim is granted.
2. That the Austin claim is denied and dismissed with prejudice.
3. That the Applicant be remanded to the custody of the Respondent.

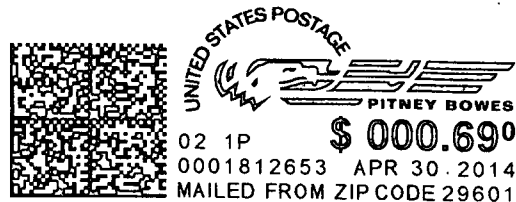
AND IT IS SO ORDERED this 31 day of Jan, 2014.



G. Edward Welmaker
Presiding Judge
Thirteenth Judicial Circuit

Pickens, South Carolina.

Law Office of Brian P. Johnson, LLC
522 North Church Street
Greenville, SC 29601



Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

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