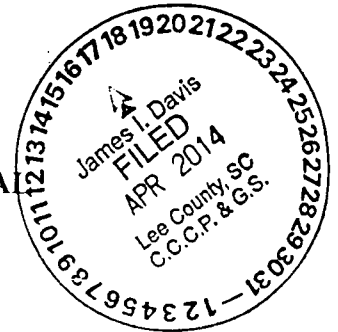


STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF LEE) THIRD JUDICIAL CIRCUIT
Unula Abebe, #285447,) 10-CP-31-0052
Applicant,)
vs)
State of South Carolina,)
Respondent,)

ORDER OF DISMISSAL



This matter comes before the Court by way of a post-conviction relief (PCR) application filed on March 4, 2010. Respondent made its return on February 25, 2011. An evidentiary hearing into the matter was convened on February 25, 2014, at the Sumter County Courthouse. Applicant was present at the hearing and proceeded *pro-se*. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

The records before this Court indicate the applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lee County Clerk of Court. The applicant was indicted at the March 2009 term of the Lee County Grand Jury for Assaulting a Correctional Officer (2009-GS-31-0023). Applicant proceeded *pro-se* at trial. Following a jury trial before the Honorable Howard P. King, applicant was found guilty. Judge King sentenced applicant to two years imprisonment, to be served consecutively to the sentence being served. The applicant did not appeal his guilty plea or sentence.

ALLEGATIONS

In his application for post-conviction relief, applicant alleges he is being held in custody unlawfully based on the following allegations:

1. Prosecutorial Misconduct
 - a. "Failure to disclose any required evidence."
 - b. "Selective Prosecution and selective enforcement."
2. Actual Innocence.

SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, applicant testified on his own behalf. The state presented testimony from Paul Fata, Esquire. This Court also had before it a copy of trial transcript, the Lee County Clerk of Court records, the applicant's South Carolina Department of Corrections records, the PCR application, and the return.

During the evidentiary hearing, applicant testified he was charged with assault on a correctional officer. Applicant stated the Paul Fata (Solicitor) failed to turn over any Brady or Rule 5 material. Applicant further stated he was the victim of selective prosecution because the correctional officer was choking him and applicant was defending himself by stabbing the correctional officer.

Following applicant's testimony, solicitor was called to testify by the State. The solicitor testified that applicant was charged with stabbing a correctional officer in the chest. The solicitor testified he tried the case on April 1, 2009 before the Honorable Howard P. King. The solicitor stated applicant proceeded *pro-se* and was found guilty. The solicitor stated Judge King sentenced applicant to two years. The solicitor could not recall any conversations with the applicant and tried to get applicant an attorney. The solicitor stated no discovery motion was ever made and he would have given him discovery material had he made a motion.

Subsequently, the court questioned the solicitor. The solicitor stated applicant made no paper motion. The solicitor further stated that he had no exculpatory or impeaching material.

At the conclusion of the hearing, the Court asked both sides to submit memoranda on the issue of whether Brady material must be turned over to a defendant even when there is no written Brady motion. The Court has reviewed the memoranda submitted by the parties.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Specifically, this Court finds that solicitor's testimony is very credible while applicant's testimony is less credible. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985). In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1 (e), SCRCP; Butler v State, 286 S.C. 441, 334 S.E. 2d 813 (1985).

PROSECUTORIAL MISCONDUCT

Failure to disclose any required evidence.

This Court finds applicant's allegation that the solicitor failed to turn over any required evidence is without merit. An individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's



guilt or innocence or was impeaching. Kyles v Whitley, 514 U.S. 419, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995). A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v State, 315 S.C. 385, 434 S.E. 2d 266 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., 434 S.E. 2d at 268.

This Court finds the solicitor's testimony credible, while the applicant's testimony less credible. This Court finds it clear that no Rule 5 motion was ever made by applicant. As a result, the State had no duty to respond to a nonexistent motion. This Court further finds that the State must turn over exculpatory evidence even without a written Brady motion. However, the solicitor credibly testified that there was nothing exculpatory to turn over to the applicant. As a result, this Court finds that applicant has failed to meet his burden of proof. Therefore, this allegation is denied and dismissed with prejudice.

Selective Prosecution

This Court finds applicant's allegation of prosecutorial misconduct in the form of selective prosecution is not a proper claim for post-conviction relief. Rather, this allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v State, 264 S.C. 417, 423, 215 S.E. 2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v Evatt, 312 S.C. 4, 8, 430 S.E. 2d 517, 520 (1993). The applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief. To



the extent that this allegation is proper for post-conviction relief, this Court finds that applicant presented no credible testimony in support of his claim. Therefore, this Court finds applicant's allegation is denied and dismissed with prejudice.

This Court further notes that applicant alleged a claim of "Actual Innocence" in his application for post-conviction relief. This Court finds that applicant present no credible testimony on this issue. Furthermore, this Court notes that post-conviction relief is not a proper avenue to challenge the sufficiency of the evidence supporting a jury's conviction. Simmons v State, 264 S.C. 417, 215 S.E. 2d 883 (1974). Therefore, this Court finds this allegation is denied and dismissed with prejudice.

ALL OTHER ALLEGATIONS

Except as discussed above, this Court finds that the applicant affirmatively waived the remaining allegations set forth in his applicant at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E. 2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v BMI, Inc., 292 S.C. 153, 158-59, 355 S.E. 2d 282 (Ct. App. 1987). The applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his rights to do so. Therefore, any and all remaining allegations are denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the applicant has not established any constitutional violations or deprivations that would require this Court


to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that the application must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v State, 305 S.C. 453 (1991), and applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the applicant for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The applicant must be remanded to the custody of the respondent.

AND IT IS SO ORDERED.



George C. James, Jr., Presiding Judge

April 15, 2014

