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STATE OF SOUTH CAROLINA) S.C. Supreme Court) IN THE COURT OF COMMON PLEAS
COUNTY OF DILLON)) FOR THE FOURTH JUDICIAL CIRCUIT

Gary S. Scott, #282106,) Case No. 2013-CP-17-054)

Applicant,

v.

State of South Carolina,

Respondent.

A CERTIFIED
TRUE COPY

CLERK OF COURT
DILLON COUNTY

CONDITIONAL ORDER
OF DISMISSAL

FILED
GWEN T. HYATT
2014 MAY 16 AM 11:12
CLERK OF COURT
DILLON COUNTY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed February 12, 2013. The Court finds as follows:

I. PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Dillon County Clerk of Court. In October 2000, the Dillon County Grand Jury indicted Applicant for armed robbery (2000-GS-17-0790) and grand larceny (2000-GS-17-0789). In December 2000, the Grand Jury indicted Applicant for murder (2000-GS-17-0927). Applicant was represented by A. Lafon Legette, Jr., Esquire, on all indictments. Applicant proceeded to trial before the Honorable James E. Lockemy and a jury. On February 14, 2002, the jury found Applicant guilty as indicted. Judge Lockemy sentenced Applicant to life imprisonment without parole for murder, a consecutive term of twenty (20) years for armed robbery, and a concurrent term of five (5) years for grand larceny.

Applicant filed a timely notice of appeal, and Joseph L. Savitz, III, Esquire, of the South

Carolina Office of Appellate Defense perfected the appeal in the form of an Anders¹ brief. The South Carolina Court of Appeals dismissed the appeal on March 31, 2004. State v. Scott, Op. No. 2004-UP-229 (S.C. Ct. App. filed March 31, 2004). Applicant then filed a *pro se* petition for writ of certiorari at the South Carolina Supreme Court. The Supreme Court denied the petition on June 15, 2005. The remittitur was returned to the circuit court on June 21, 2005.

Applicant filed his first PCR action on October 14, 2005 (2005-CP-17-0363). In that application, Applicant alleged the following grounds for relief:

1. Ineffective assistance of trial counsel:
 - a. Failed to address certain issues.
 - b. Failed to object to the "trial court's ruling that the Applicant initiated communication with the authorities."
 - c. Failed to request a continuance in order "to have the measurements of the wounds to the victims head compared to that of the alleged murder weapon."
 - d. Failed to argue that, one month prior to the murder, the victim's car was vandalized.
 - e. Failed to challenge "the veracity of the alleged confession."
 - f. Failed to properly argue against the amendment of the murder indictment.
 - g. Failed to "make a motion to conduct a pre-trial hearing."
2. Ineffective assistance of appellate counsel:
 - a. Failed to brief meritorious issues that were preserved for appeal.
 - b. Failed to argue trial court bias.
 - c. Failed to make a record sufficient for review.
3. Insufficiency of the evidence presented at trial.
4. Trial court error:
 - a. Failed to grant motion to quash murder indictment.
 - b. Failed to grant motion for directed verdict.
 - c. Abuse of discretion.
 - d. Error in qualifying expert witness.
 - e. Error in not charging an additional circumstantial evidence charge.
5. Subject matter jurisdiction.
6. "Multiple violations of Due Process."
7. "Violation of Miranda rights as well as 5th Amend."

¹ Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967).

The Court convened a hearing on the application on October 16, 2007, at the Darlington County Courthouse. The Applicant was present at the hearing and represented by R. Scott Joye, Esquire. The Court denied and dismissed the application by written order filed November 7, 2007. Mr. Joye filed a timely notice of appeal, and perfected the appeal with the filing of a Johnson² petition for writ of certiorari. The Court of Appeals denied the petition on March 2, 2010, and the remittitur was returned to the circuit court on March 18, 2010.

II. CURRENT APPLICATION

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

1. "Multiple Constitutional violations centered around Miranda and insufficiency of evidence"
2. "Ineffective assistance of trial and appellate counsel"
3. "Ineffective assistance of P.C.R. counsel"

Applicant alleges all of the allegations in his application "stem from ineffective assistance of P.C.R. counsel where he helped to establish issues but failed to file a 59(e) where the order was inadequate."

Respondent made a timely Return and Motion to Dismiss on or about April 1, 2013, asking this Court to dismiss the application as untimely, successive, and failing to state a claim upon which relief can be granted. The Dillon County Clerk of Court appointed counsel for Applicant on February 12, 2013. The Honorable J. Michael Baxley rescinded the appointment on April 9, 2013, and denied Applicant's motion to reconsider the rescindment on January 15, 2014.

² 294 S.C. 310, 364 S.E.2d 201 (1988).

III. FINDINGS OF FACT AND CONCLUSION OF LAW

S.C. Code Ann. § 17-27-70(c) 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.” The Court has reviewed the pleadings and all relevant supporting documents. Pursuant to S.C. Code Ann. § 17-27-70(b), the Court makes the following findings of fact and conclusions of law in ruling on Respondent’s motion to dismiss:

A. Failure to Timely File

The Court finds this Application should be dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-45(a) provides that:

“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.”

This statute of limitations applies to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 470, 469 S.E.2d 606, 607 (1996).

Applicant’s direct appeal from his conviction was concluded on June 21, 2005, with the issuance of a remittitur from the Court of Appeals. Applicant was therefore required to file his application before June 21, 2006. This application was filed on February 12, 2013, which was over six (6) years after the expiration of the statutory filing period. Therefore, the Court finds summary dismissal is appropriate.

B. Successive Application

The Court further finds this Application should be dismissed because it is successive to the previous application for post-conviction relief. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 246, 262 S.E.2d 735, 737 (1980). S.C. Code Ann. § 17-27-90 requires that:

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. 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.

Applicant could have raised the "new" grounds for relief in his prior post-conviction relief application. In fact, the allegations regarding ineffective assistance of counsel were raised in the prior application. Applicant has failed to present any reasons why he should be allowed to proceed with a successive application. Therefore, the Court finds summary dismissal is appropriate.

C. Failure to State a Claim under the Uniform Post-Conviction Procedures Act

The Court further finds this Application should be dismissed because Applicant fails to state a cognizable claim under the Post-Conviction Procedure Act. An applicant may commence a post-conviction relief action based on the following grounds:

- “(1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
- (2) That the court was without jurisdiction to impose sentence;
- (3) That the sentence exceeds the maximum authorized by law;
- (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
- (5) That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
- (6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy....”

S.C. Code Ann. § 17-27-20(a). Applicant alleges prior PCR counsel was ineffective. However, there is no constitutional right to effective assistance of collateral review counsel. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987). Thus, allegations of ineffective PCR counsel are not grounds for relief in a successive PCR application. Aice, 305 S.C. at 451, 409 S.E.2d at 394 (“The contention that prior PCR counsel was ineffective is not *per se* a ‘sufficient reason’ warranting a successive PCR application under 17-27-90.”). Therefore, the Court finds summary dismissal is appropriate.

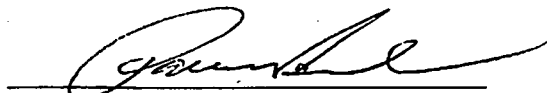
IV. CONCLUSION

The Court finds the record before it creates no genuine issue of material fact and Respondent is therefore entitled to judgment as a matter of law.

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. Applicant is granted twenty (20) days from the date of service of this order upon him to show why this ruling should not become final. Applicant shall file any reasons he may have with the Dillon County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Joshua L. Thomas, Esquire
Post Office Box 11549
Columbia, South Carolina 29211

IT IS SO ORDERED THIS 12th DAY OF May, 2014.



THE HONORABLE PAUL M. BURCH
Chief Judge for Administrative Purposes
Fourth Judicial Circuit

Chesterfield, South Carolina