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STATE OF SOUTH CAROLINA)
COUNTY OF SALUDA)

IN THE COURT OF COMMON PLEAS

2013-CP-41-0010

Montavis Gaines, #323168,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

CONDITIONAL ORDER OF
DISMISSAL

CLERK OF COURT
SALUDA CO. S.C.

2014 FEB -6 PM 1:00

FILED

This matter comes before this Court by way of an application for post-conviction relief filed January 16, 2013. In its Return, Respondent requests that the action be summarily dismissed.

Before this Court are the records of the Saluda 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 records before this Court reflect that the Applicant was indicted at the for Assault and Battery with Intent to Kill ("ABWIK") (2006-GS-41-0421), Criminal Conspiracy (2006-GS-41-0420), and Armed Robbery (2006-GS-41-0419). Michael Ray Ellisor, Esquire, represented him. Following a jury trial, Applicant was found guilty on all counts. The Honorable William P. Keesley sentenced him to a total term of twenty (20) years.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. A brief was filed on Applicant's behalf pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Applicant filed a pro se brief. The Court of Appeals dismissed the appeal. *State v. Gaines*, 2009-UP-

446 (S.C. Ct. App. filed October 2, 2009). The Remittitur was sent on October 21, 2009.

Applicant subsequently filed a PCR applications on November 6, 2009 (2009-CP-41-0176).

The Applicant raised the following allegations:

1. Ineffective assistance of trial counsel.

The Respondent made its Return dated March 2, 2010. An evidentiary hearing was convened on January 31, 2012, at the Lexington County Courthouse. The Applicant was present at the hearing and was represented by Richard R. Gleissner, Esquire. By Order dated April 5, 2012, and filed April 11, 2012, the Honorable Eugene C. Griffith, Jr., denied and dismissed the application with prejudice.

A timely Notice of Appeal was filed on Applicant's behalf and a PCR appeal is presently pending before the Supreme Court of South Carolina.

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

1. "Prosecutorial Misconduct, Brady's violation."
 - a. "Prosecutor failure to disclosed potentially exculpatory evidence related to the charged offenses."
2. Ineffective assistance of counsel.
 - a. "...for failure to objected or file motions against Applicant's illegal sentences."

This Court finds that the current application for post-conviction relief must be summarily dismissed because it is successive to his prior applications 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 v. State, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 420 S.E.2d 834 (1992).

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 judgement 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 he challenges in this application on July 26, 2007. The Remittitur from the direct appeal was issued on October 21, 2009. The Applicant was therefore required to file his application on or before October 22, 2010. This application was filed on January 16, 2013, which was well after the statutory filing period had expired.

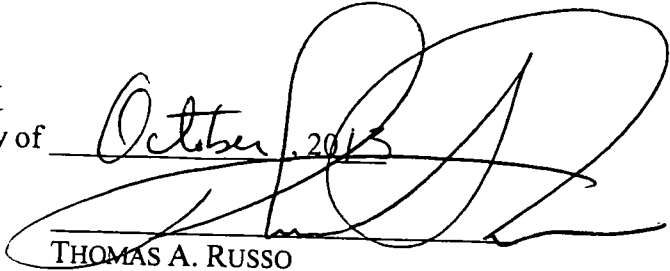
A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. §17-27-70(c) (2003) authorizes the Court to "grant a motion by either party for summary 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 should be 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 with the Saluda County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Mary S. Williams, Esquire
P.O. Box 11549
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 21st day of

October, 2015



THOMAS A. RUSSO
Chief Administrative Judge
Eleventh Judicial Circuit Court

Lexington, South Carolina