

is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”

I.

The Applicant maintains that Rule 15, SCRCF, allows a plaintiff to consolidate the current pleadings with those from a prior case or cases that ended long ago. He asserts that “he was not given the right for the alleged second PCR application to be considered as an amendment to his first PCR application. Instead, the court treated Applicant’s amended application as totally a second PCR application.” [See Applicant’s memorandum p.4.] Basically, Applicant’s argument is that Rule 15 allows an applicant in a PCR case to have an evidentiary hearing and merits review of all successive and untimely PCR applications.

Rule 15 does not provide a procedural mechanism to consolidate the present pleadings with his prior 1998 PCR action. That action reached final disposition over a decade ago. Instead, “Rule 15(c) is based on the concept that once litigation involving particular conduct or a given transaction or occurrence has been instituted, the parties are not entitled to the protection of the statute of limitations against the later assertion by amendment of defenses or claims that arise out of the same conduct, transaction, or occurrence as set forth in the original pleading.” Thomas v. Grayson, 318 S.C. 82, 88, 456 S.E.2d 377, 380 (1995) (emphasis added). The procedural rule governs amended pleadings in an active civil action.

Second, PCR is a statutory creature. See S.C. Code Ann. § 17-27-20; Williams v. State, 378 S.C. 511, 662 S.E.2d 615 (Ct. App. 2008) (“PCR is a proper avenue of relief only when the applicant mounts a collateral attack challenging validity of his convictions or sentence; the only exceptions are claims, specifically listed in the PCR Act.”). Importantly, S.C. Code Ann. § 17-27-90 explicitly states:

RECEIVED
DEC 01 2014

SC Court of Appeals

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.

Id. (emphasis added). Applicant's argument that Rule 15, SCRCP, provides an exemption to procedural bars would render the procedural bars against untimely and successive PCR litigation utterly meaningless.

Third, the substantive assignment of error on the Circuit Judge's denial and dismissal of Applicant's original 1998 PCR Application (Case No. 98-CP-41-161), if raised more than 10 days after notice of the order, required an appeal or a Rule 60(b)(1), SCRCP, post-judgment motion. [See Rule 60(b)(1), SCRCP, ("On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect.".)] Although Applicant could have pursued a post-judgment challenge after his 1998 PCR action through motion or PCR pursuant to S.C. Code Ann. § 17-27-45 (C).¹

WPK
#3

II.

This Court finds that the doctrine of *res judicata* procedurally bars further review of all allegations factually predicated upon a purported "defective indictment." The matter was raised and ruled upon in the Applicant's original PCR action. "The grand jury indicted [Applicant] for murder, and he has not identified any defects in that indictment." [See Case No. 98-CP-41-161 (Order of Dismissal p.20).] Similarly, Applicant is procedurally barred from alleging ineffective

¹Section 17-27-45(C). If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

RECEIVED
DEC 01 2014

assistance of counsel for counsel's failure to file a notice where the issue was raised, litigated, ruled upon, and presented on appeal. [See Case No. 98-CP-41-161 (Order of Dismissal pp.19-20).]

This Court also finds that the subject matter jurisdiction claim is not valid on its face. The Applicant alleges a purported defect in the issuance of his arrest warrant, and he claims that this defect deprived the trial judge of subject matter jurisdiction. "[S]ubject matter jurisdiction of the circuit court and the sufficiency of the indictment are two distinct concepts and the blending of these concepts serves only to confuse the issue. Circuit courts obviously have subject matter jurisdiction to try criminal matters." State v. Gentry, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005). "[A] defendant may for the first time on appeal raise the issue of the trial court's jurisdiction to try the class of case of which the defendant was convicted." Id. This Court finds that purported defect in the Magistrate's issuance of an arrest warrant does not, as a matter of law, deprive a circuit court of subject matter jurisdiction. Indictments were issued by the Grand Jury for charges, including murder. This Court notes that Applicant previously raised an allegation of ineffective assistance of counsel for counsel's purported failure to object to deficiencies in the issuance of the arrest warrant. [See Case No. 98-CP-41-161 (Order of Dismissal pp.10-11).]

Finally, this Court finds that the Applicant's allegation that "counsel was ineffective for failing to object to inconsistencies of the murder weapon to the bullet recovered from the deceased at the time of trial" is procedurally barred as successive and untimely. The allegation was improperly raised in successive PCR counsel's response to the conditional order and constituted a matter absent from the pleadings. Regardless of the procedural impropriety, the Applicant is procedurally barred from further collateral challenges to counsel's performance at trial.

RECEIVED
DEC 01 2014

SC Court of Appeals

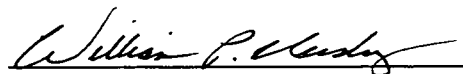
point 16 years after the original PCR action. In order to prove that a defense attorney's performance was objectively deficient, the matter must have reasonably been discoverable by the attorney at the time of the representation; a requirement that is per se immune to a potential newly discovered evidence allegation. Therefore, the allegation is summarily denied and dismissed as a matter of law where Applicant, by not pursuing this allegation in his 1998 PCR Application, waived his right to challenge counsel's performance here.

This Court has reviewed Applicant's response to the State's Conditional Order of Dismissal in its entirety, in conjunction with the original pleadings, and finds that a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final. This Court further finds that Applicant's current Application was filed outside the statute of limitations, is successive and is barred by the doctrine of *res judicata*.

#5
IT IS THEREFORE ORDERED that, for the reasons set forth in the Court's Conditional Order of Dismissal, the Application for PCR is hereby denied and dismissed with prejudice.

This Court cautions the Applicant that in order to preserve any appellate rights, he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment. [See for example Rule 203, SCACR.] Attention is directed to South Carolina Appellate Court Rule 243, as well, concerning procedures for appeal.

AND IT IS SO ORDERED this 28th day of October, 2014.



William P. Keesley
Chief Judge for Administrative Purposes,
11th Judicial Circuit, Common Pleas

RECEIVED

DEC 01 2014

SC Court of Appeals