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S.C. Supreme Court

STATE OF SOUTH CAROLINA
COUNTY OF SALUDA

James P. Robinson, #250720,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

2011-CP-41-0085

CONDITIONAL ORDER OF DISMISSAL

FILED
2011 JUL -9 AM 9:29
CLERK OF COURT
SALUDA CO. S.C.

This matter comes before this Court by way of an application for post-conviction relief filed April 21, 2011.

I. PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Saluda County. Applicant was indicted at the January 1997 term of the Saluda County Grand Jury for Murder (97-GS-41-0039) and Pointing a Firearm (97-GS-41-0040). He was also indicted at the September 1997 term for two (2) addition counts of Pointing a Firearm (97-GS-41-325 and -326) and for Possession of a Firearm or Knife During the Commission of or Attempt to Commit a Violent Crime (97-GS-41-323). Applicant was represented on the charges by Thomas D. Broadwater, Esquire. On June 16, 1998, Applicant proceeded to trial before the Honorable Edward B. Cottingham. The jury found Applicant guilty as indicted, and Judge Cottingham sentenced Applicant to thirty (30) years confinement for Murder and concurrent terms of five (5) years for each weapons conviction. Applicant did not appeal his plea or sentences.

ATTORNEY GENERAL'S OFFICE

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ADMINISTRATIVE INSTRUCTIONS

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1998-CP-41-0161

Applicant subsequently filed an application for post-conviction relief on November 9, 1998, where he alleged he was being held unlawfully for the following reasons:

1. Ineffective assistance of counsel;
2. Trial counsel never filed an appeal and never informed defendant of his right to appeal;
3. The court lacked jurisdiction to sentence the defendant for the offense of murder as the evidence failed to establish the essential element of intent;
4. Newly discovered evidence requires the vacation of defendant's conviction.

An evidentiary hearing was convened on November 14, 2000, at the Lexington County Courthouse, before the Honorable Rodney S. Peeples. Applicant was present at the hearing and was represented by Wayne Floyd, Esquire. The State was represented by Assistant Attorney General G. Robert DeLoach III. On February 20, 2001, Judge Peeples issued an Order of Dismissal finding that counsel was not ineffective, Applicant knowingly and voluntarily waived his right to appeal, trial court exercised proper jurisdiction, and that Applicant failed to present newly discovered evidence that would require the court to grant another trial.

Applicant appealed the decision made by the PCR court. Assistant Appellate Defender Aileen P. Clare, of the South Carolina Office of Appellate Defense, represented Applicant on his appeal. On February 6, 2002, Ms. Clare filed a Petition for Writ of Certiorari in which she raised the following issue on Applicant's behalf:

1. Was trial counsel ineffective for failing to initiate Applicant's appellate process and was Applicant thereby denied his right to direct appeal?
2. Was trial counsel ineffective for failing to move for a directed verdict?
3. Was trial counsel ineffective for failing to call an eyewitness who would have testified to the absence of malice?

Ms. Clare also filed an Anders brief pursuant to White v. State¹ in which Applicant asserted the following issue if the court granted a belated direct appeal:

1. Did the trial court err by not declaring a directed verdict of not guilty of murder?

The state filed its Return to the Petition for Writ of Certiorari on April 17, 2002. The South Carolina Supreme Court denied Applicant's Petition on May 30, 2002. Applicant filed a Petition for Rehearing which was subsequently denied on July 10, 2002. The remittitur was issued the same day.

2002-CP-41-5848

Applicant subsequently filed a Petition for Writ of Habeas Corpus in the court of common pleas in Richland County on December 3, 1998, where he raised the following issues:

1. Denial of effective assistance of counsel; and
2. Denial of right to appeal.

The State filed a Return and Motion to Dismiss on June 18, 2004. The Honorable G. Thomas Cooper issued an Order of Dismissal where he dismissed the habeas petition, finding, in part, that state law precludes one from bringing a state habeas action in circuit court based on allegations cognizable in PCR.

Applicant subsequently filed a *pro se* notice of appeal with the South Carolina Court of Appeals. Applicant then filed a motion to stay the appeal in order to file a new PCR application. This request was denied by the Court of Appeals by Order dated April 26, 2005. On June 24, 2005, the South Carolina Court of Appeals dismissed the appeal for the procedural violations of failing to provide information regarding the transcript and to in failing to file the initial brief. The remittitur was issued on July 27, 2005.

¹ White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

2005-CP-41-0048

Applicant subsequently filed a second application for post-conviction relief on March 24, 2005, where he raised the following issues:

1. Counsel did not inform Applicant of his right to appeal; and
2. Newly discovered evidence.

The State filed its Return and Motion to Dismiss on July 19, 2005, requesting that the application be summarily dismissed as successive and untimely filed. The State's motion came before the court for a hearing on January 17, 2007, at the Lexington County Courthouse. Applicant was present at the hearing and was represented by Barry Thompson, Esquire. Respondent was represented by Daniel E. Grigg of the South Carolina Attorney General's Office. The Honorable R. Knox McMahon signed an order on March 1, 2007, dismissing the case with prejudice and finding that the application was successive and untimely filed. The court also found that Applicant failed to make a *prima facie* showing of newly discovered evidence.

Applicant appealed the denial of his second PCR application. Applicant was represented in his appeal by Katherine Hudgins, Appellate Defender. Ms. Hudgins filed a Johnson² Petition for Writ of Certiorari, raising the following issue:

1. Did the PCR judge err in dismissing the second application for post-conviction relief as successive and filed outside the applicable statute of limitations without first hearing testimony in regard to after discovered evidence?

The South Carolina Court of Appeals denied Applicant's Petition and granted counsel's motion to be relieved as counsel on April 24, 2009. The remittitur was issued on May 14, 2009.

09-cv-1757-HFF-SVH

Applicant then filed a Petition for Writ of Habeas Corpus in federal district court on June 30, 2009. The State filed its Return and Motion for summary Judgment on December 23, 2009. In his Petition,

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

the Applicant asserted numerous allegations of ineffective assistance of counsel. United State Magistrate Judge Shiva V. Hodges issued a Report and Recommendation on July 19, 2010, finding that Applicant's petition was barred by the one-year statute of limitations and that Applicant was not entitled to equitable tolling. The United States District Court granted Respondent's motion for summary judgment by Order on August 11, 2010.

On September 15, 2010, Applicant filed an appeal and motion for certificate of appealability with the United States Court of Appeals for the Fourth Circuit (No. 10-7324). On March 25, 2011, Applicant's motion for certificate of appealability was denied and his appeal dismissed.

CURRENT APPLICATION

In his *fifth* collateral attack and current application for post-conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Counsel did not inform Applicant of his right to appeal
2. Lack of Subject Matter Jurisdiction
 - a. Defective indictment – did the indictment apprise the Applicant of the elements of the offense that is intended to be charged?
 - b. Did the trial court lack subject matter jurisdiction to try Applicant for murder, because murder indictment was defective for failing to allege the elements required?

Before this Court are the records of the Saluda County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, Applicant's previous PCR records, Applicant's PCR application and Respondent's Return and Motion to Dismiss.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Successiveness

The Court finds that the current application for post-conviction relief must be summarily dismissed because it is successive to the previous application for post-conviction relief. S.C. 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.

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 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).

Statute of Limitations

This Court further finds that this Application for post-conviction relief must also 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, et. seq. 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 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.

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 offenses he challenges on June 16, 1998. Applicant did not appeal his conviction, so he was therefore required to file his application on or before **June 17, 1999**. This Application was filed on April 21, 2011, which was over eleven (11) 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. 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 summarily dismisses the application for post-conviction relief for failure to file within the time mandated by the Post-Conviction Procedure Act.

Res Judicata

This Court further finds that the doctrine of *res judicata* bars the Applicant's claims of ineffective assistance of counsel. *Res judicata* prohibits subsequent actions by the same parties on the same issues. Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. Id. This application presents allegations that could have been and were raised in those prior proceedings.

Applicant continues to raise the same meritless claims by repeated collateral attacks on his conviction. The public interest in finality of judgments requires that litigation must eventually come to an end. Pursuant to Rule 12(b)(6), SCRCP, this Court finds that these claims are barred by *res judicata*.

Sufficiency of Indictment

In his second allegation the Applicant claims his indictment for Murder was defective. A defendant in a criminal case is entitled to be tried only upon the charges in the indictment against him. State v. Tabory, 262 S.C. 136, 202 S.E.2d 852 (1974). A defendant must be convicted, if at all, of the particular offense charged in the bill of indictment. State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (1996).

The well settled test for judging the sufficiency of criminal indictments is whether "the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he has called upon to answer, and acquittal or conviction may be pleaded in bar in bar to any subsequent prosecution." State v. Wade, 306 S.C. 79, 409 S.E.2d 780 (1991), quoting, State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981). The State is not required to plead its evidence in the indictment. State v. McIntire, 221 S.C. 504, 71 S.E.2d 410 (1952); State v. Thompson, 305 S.C. 496, 409 S.E.2d 420 (S.C. App. 1991).

When reviewing the sufficiency of indictments, the above cited test "must be viewed with a practical eye; all the surrounding circumstances must be weighed before an accurate determination of whether a defendant was or was not prejudiced can be reached. [citations omitted]." State v. Adams, 283 S.E.2d at 588. The indictment in question reads as follows:

That James Paul Robinson did in Saluda County on or about December 15, 1996, feloniously, willfully and with malice aforethought, kill one Deshon Dwayne Richardson by means of shooting him with a 357 pistol and that the said victim died as a proximate result thereof.

S.C. Code Ann. §16-3-10 (1996) provides:

“Murder” is the killing of any person with malice aforethought, either express or implied.

S.C. Code Ann. § 17-19-30 (1985) further provides:

Every indictment for murder shall be deemed and adjudged sufficient and good in law which, in addition to setting forth the time and place, together with a plain statement, divested of all useless phraseology, of the manner in which the death of the deceased was caused, charges that the defendant did feloniously, willfully and of his malice aforethought kill and murder the deceased.

This Court finds that the indictment contained all the elements of §16-3-10 and § 17-19-30; thereby, informing the court of what judgment to pronounce and the Applicant of the charge he was called upon to answer.

Furthermore, S.C. Code Ann. §17-19-90 (1985) requires that any "objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury is sworn and not afterward . . ." Thus, any nonjurisdictional defect in the indictment that is not raised prior to the swearing of the jury is waived. State v. Mitchum, 258 S.C. 52, 187 S.E.2d 240 (1972).

Subject Matter Jurisdiction

This Court further finds the Applicant has failed to prove any defect in the subject matter jurisdiction of his criminal case. An Applicant may challenge the subject matter jurisdiction of the trial court, and such a claim is one that may be raised at any time. See Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001), *overruled in part by Gentry, supra*. However, “[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters.” Gentry, supra, 610 S.E.2d at 499; *See also* S.C. Const. Art. V, § 7. This Court finds that the Applicant has failed to present

any evidence that his case is of some class over which the circuit court does not have the authority to preside.

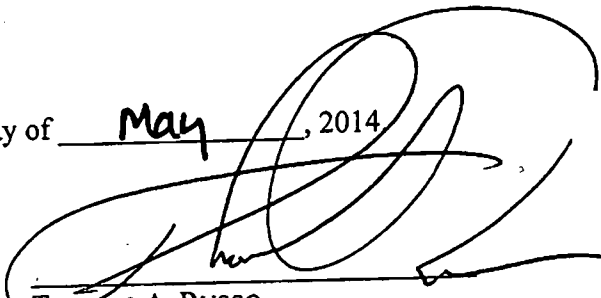
For the foregoing reasons, this Court finds that this allegation must be summarily dismissed pursuant to the cited authority and S.C. Code Ann. §17-27-70(c) (2010) because there is no genuine issue of material fact which would require a hearing on this matter.

III. CONCLUSION

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
J. Clayton Mitchell, Esquire
PCR Division – 11th Circuit
P.O. Box 11549
Columbia, SC 29211

AND IT IS SO ORDERED this 23rd day of May, 2014.



THOMAS A. RUSSO
Chief Judge for Administrative Purposes
Eleventh Judicial Circuit

Lexington, South Carolina