

J. FALKNER WILKES

Attorney at Law

114 Whitsett Street
Greenville, South Carolina 29601

Telephone: (864) 282-1292
Facsimile: (864) 271-6035

December 15, 2014

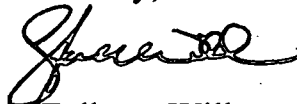
Daniel E. Shearouse, Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: Mark A. Carrisal, #276860 v. State, 2010-CP-42-0054

Dear Mr. Shearouse,

I represent Mark A. Carrisal who had a PCR hearing before the Hon. R. Keith Kelly on December 8, 2014. Mr. Carrisal is appealing from the decision of the court in this case. Enclosed please find a copy of the Notice of Appeal and Certificate of Service for same. Also enclosed you will find copies of the Order(s) under appeal. As this is a PCR case, I have not requested a transcript pending a review of the file by OID/Appellate Defense. Also, as this is a PCR case, no filing fee is enclosed.

Sincerely,



J. Falkner Wilkes

Suzanne White, Dep. Asst. Atty. Gen.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

M. Hope Blackley
Spartanburg County Family Court
Post Office Box 3483
Spartanburg, SC 29304

Robert M. Dudek
Chief Appellate Defender
1330 Lady Street, Suite 401
Columbia, SC 29201

RECEIVED

DEC 19 2014

S.C. SUPREME COURT

Mark A. Carrisal, #276860
Perry Correctional Institution
430 Oaklawn Road
Pelzer, SC 29669

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
COMMON PLEAS COURT
R. Keith Kelly, Circuit Court Judge

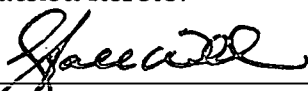
Case No. 2010-CP-42-0054

Mark A. Carrisal, 276860,, Appellant,
v.
State of South Carolina, Respondent.

NOTICE OF APPEAL

Mark A. Carrisal, hereby appeals from the Judgment in a Civil Case (Order of Dismiss in a Post Conviction Relief action) entered on December 8, 2014, having been signed by the Hon. R. Keith Kelly, Circuit Judge.

A copy of the Judgment and Order of Dismissal from which appeal is taken are provided herewith and incorporated as if attached hereto.



J. Falkner Wilkes (SC Bar #12893)
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292
(864) 271-6035 (facsimile)
Counsel for Appellant

Other counsel of record:

Suzanne White, Asst. Dep. Atty. Gen.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Counsel for Respondent

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DEC 19 2014

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
COMMON PLEAS COURT
R. Keith Kelly, Circuit Court Judge

Case No. 2010-CP-42-0054

Mark A. Carrisal, 276860, Appellant,
v.
State of South Carolina, Respondent.

CERTIFICATE

I certify that on December 15, 2014, I served the Appellant's Notice of Appeal on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, addressed to counsel of record and others as indicated below:

Suzanne White, Dep. Asst. Atty. Gen.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Daniel E. Shearouse, Clerk
South Carolina Supreme Court
P.O. Box 11330
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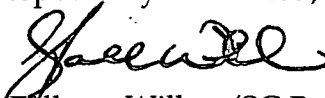
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Columbia, SC 29201

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S.C. SUPREME COURT

Respectfully submitted,



J. Falkner Wilkes (SC Bar #12893)

114 Whitsett Street

Greenville, SC 29601

(864) 282-1292

(864) 271-6035 (facsimile)

Counsel for Appellant

December 15, 2014.

12/11/14
R

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
Mark A. Carrisal, #276860,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2010-CP-42-0054

ORDER OF DISMISSAL

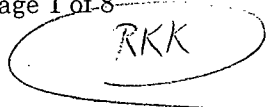
 **SCANNED**

This matter comes before this Court by way of an application for post-conviction relief filed January 6, 2010. Respondent made its Return and Motion to Dismiss on or about August 24, 2010, requesting that the application be summarily dismissed based on the statute of limitations, because the application was successive and because the evidence offered failed to meet the requirements of newly discovered evidence. Ultimately, an evidentiary hearing into the matter was convened on November 4, 2014, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by J. Falkner Wilkes, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, William Roberts and Clay Allen, Esquire, testified. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return and Motion to Dismiss, Applicant's response to the State's Return, the Appellate Court records, and the trial transcript and Applicant's Exhibits.

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PROCEDURAL HISTORY



The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted the Applicant at the June 2001 term of General Sessions for trafficking cocaine (01-GS-42-1346). Clay Allen, Esquire, represented the Applicant. On July 18, 2001, the Applicant proceeded to a jury trial, after which he was found guilty of trafficking cocaine more than 100 grams. The Honorable J. Derham Cole sentenced him to 25 years imprisonment.

A timely Notice of Appeal was filed on the Applicant's behalf. Aileen Clare of the South Carolina Office of Appellate Defense represented him on appeal. Following the submission of a brief filed pursuant to Anders v. California, 383 U.S. 738 (1967), the South Carolina Court of Appeals dismissed the appeal. State v. Carrisal, Op. No. 2002-UP-568 (filed September 16, 2002). The Remittitur was issued on October 22, 2002.

2003-CP-42-2461

The Applicant subsequently filed an application for post-conviction relief (PCR) on July 9, 2003. The State filed its Return on March 25, 2004. An evidentiary hearing was convened on May 19, 2005, at the Spartanburg County Courthouse, at which the Applicant was present and represented by H. Chase Harbin, Esquire. The Applicant raised the following issues in his first PCR:

1. Ineffective assistance of trial counsel;
2. Ineffective assistance appellate counsel; and
3. "Constitutional rights/amendments violated."

The Honorable Doyet A. Early III denied and dismissed Applicant's application by written Order on July 25, 2005. The Applicant did not appeal the denial of his PCR application.

Applicant then filed a second post-conviction relief application on January 6, 2010. Respondent made its Return and Motion to Dismiss on or about August 24, 2010, requesting that the application be summarily dismissed based on the statute of limitations, because the application was successive and because the evidence offered failed to meet the requirements of newly discovered evidence. A Conditional Order of Dismissal was signed on November 5, 2010, allowing Applicant twenty days to file a response.

Following a hearing on the State's Motion to Dismiss and Applicant request for limited discovery, the Honorable J. Mark Hayes II denied the State's Motion to dismiss and granted limited discovery by formal Order on February 3, 2012. An additional hearing was held in June 2012 with presentation of documents found as a result of the discovery Order. The Honorable Roger L. Couch found that the evidence was sufficient to proceed with a full evidentiary hearing on the Applicant's PCR claim of a possible Brady violation. An Order was signed and filed in May 2014.

ALLEGATIONS

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

1. "Violation of Brady v. Maryland and State rules of criminal procedure/due process and continuing duty on the part of the State to disclose certain information by the State to a criminal defendant including but not limited to exculpatory evidence."

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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant

findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Newly Discovered Evidence of Brady Violation

The Applicant alleged that the State withheld exculpatory information, which was only discovered post-trial and post-initial post-conviction relief. Applicant alleged in his pleadings that although he was arrested for trafficking in cocaine at the address of 824 Cooper Bridge Road in Woodruff, SC; Applicant was merely watching over the home for Juan Rodriguez. Following Applicant's trial in July 2001, Juan Rodriguez was arrested for trafficking in cocaine as a result of an undercover operation by the Spartanburg County Sheriff's office in November 2001. Rodriguez was also arrested in July 2003 for trafficking in methamphetamine. Ultimately, Rodriguez was tried and convicted in his absence of trafficking in cocaine as a result of the November 2001 arrest.

Applicant has argued that because Rodriguez was arrested for trafficking in cocaine in November 2001 and because he listed his home address as 824 Cooper Bridge Road at the time of his arrest in July 2003 on various documents, he should be granted a new trial based upon the newly discovered evidence of this information and the Brady violation, in that the State never turned over any of this information regarding Rodriguez to Applicant or his counsel.

William Roberts, investigator, testified that he was retained to assist in this matter and performed various searches for information on Juan Rodriguez and on the address where Applicant was arrested, 824 Cooper Bridge Road in Woodruff, SC, pursuant to the Order granting limited discovery. The following documents were introduced during his testimony:

- Exhibit #1 – Portions of Juan Rodriguez's trial transcript
- Exhibit #2 – Police report of arrest of Juan Rodriguez
- Exhibit #3 – Portion of Jennifer Cortez's testimony from Applicant's trial
- Exhibit #4 – Statement of Bo Leatherwood relating to Rodriguez's arrest
- Exhibit #5 – Arrest warrant for Rodriguez dated 2-26-02.
- Exhibit #6 – Incident report

- Exhibit #7 – Receipt for personal property at jail for Rodriguez
- Exhibit #8 – Undercover operation notes, permission to search, and pre-interrogation waiver for Juan Rodriguez dated 7-2-03.

Roberts testified that in those documents, at the time of his arrest in November 2001, Rodriguez listed his home address as 246 Cooper Bridge Road in Woodruff, SC. (Exhibit #2). Roberts also testified that the arrest warrant for Rodriguez dated February 26, 2002, lists Rodriguez's home address as 246 Cooper Bridge Road. (Exhibit #5). However, Roberts noted that in the documents relating to Rodriguez's arrest in July 2003, his home address is listed as 824 Cooper Bridge Road, which is the location where Applicant was arrested. (Exhibits #6, #7, and #8).

As an initial matter, this Court finds that the current application was filed outside of the statute of limitations. 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 offense(s) he challenges in this Application on July 28, 2001. The Remittitur was returned on October 22, 2002. The Applicant was therefore required to file his application before October 22, 2003. This Application was filed on January 6, 2010, which was well after the expiration of the statutory filing period.

Further, the application is successive to Applicant's prior post-conviction relief application. S.C. Code Ann. §17-27-90 (1985) 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.

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, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "**could not have been raised** . . . in the previous application." [Emphasis in original]. Id., 305 S.C. at 450, 409 S.E.2d at 394. 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. Land, Id.

The Applicant has argued that the evidence presented to this Court constitutes newly discovered evidence. A defendant requesting a new trial based on after discovered evidence must show that the evidence:

(1) Is such as would probably change the result if a new trial was had; (2) Has been discovered since the trial; (3) Could not by the exercise of due diligence have been discovered before the trial; (4) Is material to the issue of guilt or innocence; and (5) Is not merely cumulative or impeaching. Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983).

This Court finds here, the alleged newly discovered evidence is not newly discovered, but rather deals with an unrelated drug arrest. This Court also finds that the evidence is not "such as would probably change the result if a new trial was had." Id. As the record reflects, the issue of possessory control of mobile home was squarely before the jury on July 18, 2001. (Tr. p. 64). Further, the issue of constructive/actual possession of drugs was squarely before the jury. The

jury convicted the applicant and he was sentenced by the court. Trial counsel could not have known about any other individual dealing drugs out of that residence.

Additionally, in evaluating post-trial Brady claims, the Applicant must show that (1) the prosecution suppressed evidence, (2) the evidence would have been favorable to the accused, and (3) the suppressed evidence is material. United States v. Wolf, 839 F.2d 1387 (10th Cir. 1988). 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). This Court finds that the information offered by Applicant does not indicate that the State in any way withheld or suppressed exculpatory information relating to Applicant's trial. In this PCR matter, the evidence before the Court is dated four months after conviction of the defendant. Not only is the evidence unrelated to Applicant's arrest for trafficking, but it was clearly not suppressed by the prosecution.

Summary

This Court finds in regards to the allegation of newly discovered evidence of a Brady violation, the Applicant has failed to meet the burden of proof as to his claim. As a result, the application is dismissed as barred by the statute of limitations and as successive.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant's current Application is successive to Applicant's previously filed application, that Applicant's current application was filed outside the statute of limitations, and that the Applicant fails to meet the requirements of newly discovered evidence of a Brady violation. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court cautions Applicant that 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 to secure the

appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application 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 this 9 day of December, 2014.

Gaffney, SC

R. Keith Kelly

R. KEITH KELLY
Presiding Judge

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CLERK OF COURT
SPARTANBURG COUNTY
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J. Falkner Wilkes, Attorney-at-Law

114 Whitsett Street, Greenville, SC 29601

(864) 282-1292

Daniel E. Shearouse

Clerk of Court

Supreme Court

P.O. Box 11330

Columbia, SC 29211

