

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

Albert Charles Burgess, Jr.,

Applicant,

v.

State of South Carolina,

Respondent.

FILED
JUN 14 2012
IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

2011-CP-04-1329

CONDITIONAL ORDER OF DISMISSAL

A TRUE COPY

JUN 14 2012

Christy B. Smith
CLERK OF COURT

This matter comes before this Court by way of an application for post-conviction relief filed April 21, 2011. In its Return, Respondent requests that the action be summarily dismissed as the application is successive in nature and barred by the statute of limitations.

Before this Court are the records of the Anderson County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records and the records from Applicant's previous applications for post-conviction relief.

The records before this Court reflect that Applicant is currently incarcerated with the Federal Bureau of Prisons at the Butner Federal Correctional Complex ("FCI - Butner") pursuant to unrelated federal charges not challenged in this application. The Applicant was indicted at April 1985 term of the Court of General Session for Anderson County for one (1) count of Criminal Conspiracy to Commit Criminal Sexual Conduct on Minors, three (3) counts of Criminal Sexual Conduct in the Second Degree, one (1) count of Criminal Sexual Conduct in the First Degree, three (3) counts of Contributing to the Delinquency of a Minor and two (2) counts of Committing or

Attempting Lewd Acts Upon a Child Under Fourteen (1985-GS-04-424, 428 through 437). He was represented by Coming B. Gibbs, Esquire, and Robert Stoddard, Esquire, on the charges. On April 29, 1985, Applicant proceeded to jury trial before the Honorable William H. Ballenger. On April 30, 1985, Applicant changed his plea and entered a guilty but mentally ill plea to all counts except the three (3) Contributing to the Delinquency charges. Sentencing was postponed to a later date.

On August 20, 1985, the matter was reconvened for sentencing, at which time Applicant moved the court to withdraw his guilty plea. The motion was denied by Judge Ballenger and Applicant was sentenced to twenty-five (25) years imprisonment for CSC – First Degree, twenty (20) year terms of imprisonment for each of three (3) counts of CSC – Second Degree, ten (10) years imprisonment each for Lewd Act and the two counts of Attempt to Commit a Lewd Act, and five (5) years imprisonment for Criminal Conspiracy to Commit CSC on Minors. The sentences were all run concurrently. The remaining three indictments for Contributing to the Delinquency were *nolle prossed* as part of the plea.

A timely Notice of Appeal was filed and an appeal was perfected. The South Carolina Supreme Court affirmed the pleas and sentences. State v. Burgess, Op. No. 1987-MO-134 (S.C. filed March 16, 1987).

Applicant filed his first application for Post-Conviction Relief on March 31, 1987, and amended the application several times on April 9, May 26, and June 16, 1987. Respondent made its Return on May 4, 1987, and Amended Return on October 22, 1987. In his PCR application, Applicant set forth sixteen (16) allegations. Among them were the following attacks of the validity of the search warrant:

1. "Counsel was ineffective in attacking the Applicant's Fourth Amendment claims regarding the search warrant."
2. "The Petitioner was denied his Fourteenth Amendment rights by the State's use of his previously unconstitutionally obtained convictions to enhance ~~guilty in the search warrant and was coerced into pleading guilty because of~~ it."
3. "The State withheld information concerning informants used in obtaining a search warrant, thereby coercing the Applicant into pleading guilty."
4. "He received both denial of due process and ineffective assistance of counsel where the Appellate Courts of South Carolina have ruled the search warrant of his co-defendant, William N. Clinkscales, Jr., invalid, same warrant being identical to the petitioner's."

An evidentiary hearing was convened into the matter on October 18, 1987, at the Anderson County Courthouse before the Honorable Clyde A. Eltroth. Applicant was present and represented by Stephen J. Henry, Esquire. The matter was denied and dismissed with prejudice by Judge Eltzroth on November 15, 1987. Applicant filed a Notice of Appeal and an appeal was perfected by Stephen J. Henry, Esquire. The South Carolina Supreme Court denied the Petition for Writ of Certiorari by order dated October 19, 1988.

On October 24, 1988, Petitioner filed a Petition for Writ of Habeas Corpus. Respondent made its Return to the Petition and Motion for Summary Judgment on December 14, 1988. After receiving the U.S. Magistrate Judge's Report and Recommendation, the Honorable Karen L. Henderson, United States District Judge, entered an order granting the state's Motion for Summary Judgment on July 10, 1990. Applicant filed a Notice of Appeal to the U.S. Court of Appeals for the Fourth Circuit on July 18, 1990, which was later dismissed by unpublished opinion on April 3, 1991. The Petitioner filed a Petition for Rehearing and Suggestion for Rehearing En Banc, which was denied May 1, 1991. The mandate of the court was filed May 8, 1991.

Applicant next filed a Petition for Writ of Certiorari in the United States Supreme Court on June 11, 1991. The Petition was denied by the Court on October 7, 1991. Following the submission and disposition of a Rule 60(b) motion in federal court, Applicant filed another Petition for Habeas Corpus on August 8, 1994. Respondent filed its Return and Memorandum of Law in Support of Motion for Summary Judgment and Motion for Summary Judgment on October 18, 1994. On October 25, 1994, U.S. Magistrate Judge Bristow Marchant issued an Order advising Applicant of the Motion for Summary Judgment, and subsequently entered an Order dismissing the Petition on February 2, 1995. Applicant filed Rule 59, FRCP, Motions to Reconsider on February 13, 1995, and again on August 14, 1995, both of which were denied.

Applicant filed an additional Petition for Writ of Habeas Corpus on January 15, 1995. While that Petition was pending, Applicant filed another Petition for Writ of Habeas Corpus on June 15, 1995. The Respondent submitted Returns to the two Petitions on June 15, 1995, and they were dismissed by the Court on July 3, 1995.

Applicant has since filed three (3) more Petitions for Writ of Habeas Corpus (Case #: 0:96-3249-21BD; 0:97-3302-21BD; and 9:02-0311-19BG), all of which were ultimately denied and dismissed. Of specific note to the current PCR application is Applicant's 2002 Petition for Habeas Corpus filed February 7, 2002. (9:02-0311-19BG). In it, Applicant set forth the following allegation:

- "This is a matter concerning the state court convictions of the Petitioner, although the sentence is complete, he is still suffering collateral consequences...and said convictions were used to enhance the current federal sentence he is now serving...[Applicant demands] this Court convene an immediate hearing to determine the validity of the Petitioner's state

convictions and their subsequent enhancement of the Petitioner's current federal sentence and what relief is warranted under the decision in the South Carolina Supreme Court in State v. Clinkscales."

- In his "Answers to Court's Special Interrogatories", Applicant went on to say ~~"I did not file any PCR once I began my federal sentence. My state sentence, at that time, was moot and I did not have the benefit of Clinkscales decision."~~

Respondent submitted its Return and Motion for Summary Judgment on April 22, 2002. The Honorable George C. Kosko, United States Magistrate Judge, issued his Report and Recommendation on July 12, 2002, and on January 31, 2003, the Court followed the recommendation in granting Respondents Motion for Summary Judgment by written order finding the Petition was successive.

Applicant filed a "Petition for Writ of Corum Nobis" with the South Carolina Supreme Court on March 2, 2011. In it, he set forth the same allegation previously set forth in his habeas petitions, stating the search warrant executed by police was unconstitutional as decided by the South Carolina Supreme Court in its 2000 decision in State v. William Clinksales, and because of that decision, his 1985 conviction was unlawful and cannot be lawfully used to enhance his current federal sentence. The Petition was dismissed by the Court on March 16, 2011.

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

1. "The police lied in my search warrant. When I presented this allegation to this Court, it was denied... In 2000, the S.C. Supreme Court ruled in the case of State v. William N. Clinkscales, Jr., that [Danny] Durham [the acting solicitor] lied in the search warrant and released Clinkscales from his sentence and overturned that sentence... The lie was first used in MY search warrant... In August of 2010, the illegal Anderson County sentence was used to enhance a Federal sentence in the Western District of North

Carolina. This illegal conviction is now being challenged... This is the legal and appropriate time to challenge the convictions as I now suffer from the police misconduct of Danny Durham.”

~~After a thorough review of the records, 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(s) he challenges in this Application on April 30, 1985. The remittitur was issued from Applicant's unsuccessful direct appeal on March 16, 1987. This Application was filed on April 21, 2011, more than twenty-three (23) years beyond the time 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 judgement 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.

Further, this Court agrees with Respondent's contention that the application should be summarily dismissed because the Applicant's allegation is barred by the doctrine of *res judicata*.

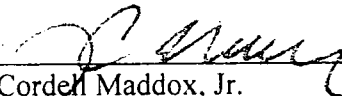
Res judicata prohibits subsequent actions by the same parties on the same issues. Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. Id.

The Applicant had a full opportunity to, and in fact did, litigate the current allegation in his numerous prior proceedings. Specifically, the issue of the Supreme Court's decision in the Clinkscales case and its effect of enhancement on Applicant's federal sentence was raised by Applicant in his 1987 PCR application, his 2002 Petition for Habeas Corpus and his 2011 Petition for Corum Nobis, all of which were reviewed by the courts and subsequently denied/dismissed. The Applicant continues to raise the same meritless claims by repeated collateral attacks on his convictions. The public interest in finality of judgments requires that litigation must eventually come to an end. Pursuant to Rule 12(b)(6), SCRPC, this Court agrees this application should be summarily dismissed as barred by *res judicata*.

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 Anderson County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Kaelon May, Esquire
P.O. Box 11549
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 8th day of June, 2012



J. Cordell Maddox, Jr.
Chief Administrative Judge
Tenth Judicial Circuit

Anderson, South Carolina

916 V 01112
JUN 15 2012

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ALBERT CHARLES BURGESS, JR.,

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STATE OF SOUTH CAROLINA,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Conditional Order of Dismissal has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

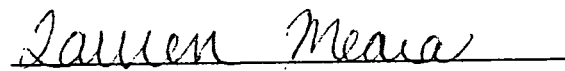
**Albert Charles Burgess, Jr.
88539-071 D/B
POB 999
Butner, SC 27509**

This 20th Day of June, 2012.



Lena Pelishenko
Legal Assistant for Respondent

SWORN to before me this 20th Day of June, 2012.


Notary Public for South Carolina.
My Commission Expires: 9/25/19