

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Timothy M. Jones, #294725,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2013-CP-42-3041

**CONDITIONAL
ORDER OF DISMISSAL**

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J. H. HARRIS, CLERK

This matter comes before this Court by way of an application for post conviction relief filed July 16, 2013.

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 Spartanburg County. The Applicant was indicted at the June 2002 term of the Spartanburg County Grand Jury for Trafficking in Crack Cocaine, more than 200 grams (2002-GS-42-2457). On July 16, 2003, the Applicant proceeded to trial. He was represented by Clay Allen, Esquire. The jury found the Applicant guilty as indicted. The Honorable Larry R. Patterson sentenced the Applicant to confinement for a period of twenty-five (25) years.

A timely notice of appeal was filed on Applicant's behalf and an appeal was perfected by Wanda P. Hagler of the South Carolina Office of Appellate Defense. On March 14, 2005, the court entered its opinion affirming the Applicant's conviction. State v. Cabrera-Pena, Op. No. 3961 (S.C. Ct. App. filed March 14, 2005). The remittitur was returned to the lower court on March 30, 2005.

The Applicant subsequently filed an application for post conviction relief (PCR) on April 5, 2006. The Applicant raised the following issues in his first PCR:

1. Ineffective assistance of trial counsel, in that counsel:
 - a. Failed to thoroughly explain constitutional rights to Applicant;
 - b. Failed to investigate mitigating evidence; and
 - c. Failed to file Motion in Limine to exclude testimony of codefendant.
2. Ineffective assistance of appellate counsel, in that counsel:
 - a. Failed to argue that directed verdict motion was erroneously denied.
3. False imprisonment, in that:
 - a. Applicant should not have been arrested for Codefendant's drugs;
 - b. Codefendant/witness for the State was a known drug dealer, therefore his testimony should have been deemed without merit; and
 - c. State and Codefendant conspired against Applicant.
4. Subject matter jurisdiction, in that:
 - a. Applicant was not properly indicted because he was ticketed for speeding, not trafficking crack cocaine;
 - b. Indictment failed to state amount of drugs; and
 - c. Warrants were not filed with Spartanburg County Clerk.

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An evidentiary hearing was convened on November 2, 2009 before the Honorable William H. Seals, Jr. Applicant was present and represented by Clarissa W. Joyner, Esquire. Julie M. Thames, Esquire of the South Carolina Attorney General's Office, represented the Respondent. Following the submission of all testimony, the Honorable William H. Seals, Jr. denied and dismissed the application with prejudice by order dated December 3, 2009. The court found that both trial and appellate counsel were not ineffective.

Applicant then filed a Petition for Writ of Certiorari challenging the post conviction relief court's decision. The South Carolina Supreme Court entered an order denying certiorari on June 19, 2013. The remittitur was sent down on July 9, 2013.

CURRENT APPLICATION

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

1. "Ineffective assistance of counsel pursuant to *Lafler v. Cooper*."
 - a. "Counsel made a recommendation to proceed to trial and not accept the terms of the plea."

Before this Court are the records of the Spartanburg 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 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

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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 should 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 found guilty of the offense(s) he challenges in this Application on July 16, 2003. The remittitur from the Applicant's direct appeal was issued on March 30, 2005. The Applicant was therefore required to file his application on or before March 30, 2006. This

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Application was filed on July 16, 2013 which is over **seven (7) 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.

Ineffective Assistance of Counsel – Lafler v. Cooper

Applicant argues the following United States Supreme Court companion cases are applicable to his appeal: Lafler v. Cooper, ___ U.S. ___, 132 S. Ct. 1376 (2012) and Missouri v. Frye, ___ U.S. ___, 132 S. Ct. 1399 (2012). As these opinions were issued on March 21, 2012, however, this Court finds they cannot be applied retroactively to this proceeding. The Supreme Court did not indicate that either of these opinions were new constitutional rules that were intended to be retroactive.

In order to conclude whether the holding announced in these cases constitutes an "old rule" or a "new rule" for the purposes of determining whether it can be applied retroactively, it must be examined under the framework set forth in Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060 (1989). In Teague, the United States Supreme Court found "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." Id. at 301, 109 S. Ct. at 1070. The Teague Court also noted the concern that

“[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system.” Id. at 309, 109 S. Ct. at 1074. The Teague Court held that – unless they fell into one of two (2) exceptions, the general rule applies: “new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.” Id. at 310, 109 S. Ct. at 1075.

The first exception that would allow a new rule to be applied retroactively is “if it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.” Id. at 311, 109 S. Ct. at 1075 (internal quotation and citation omitted). This exception has been subsequently defined as being a substantive (not procedural) new rule. See, e.g., Beard v. Banks, 542 U.S. 406, 411 n.2, 124 S. Ct. 2504, 2510 n.2 (2004) (“Rules that fall within what we have referred to as Teague’s first exception are more accurately characterized as substantive rules not subject to Teague’s bar.”) (internal quotation and citation omitted); see also Wharton v. Bockting, 549 U.S. 406, 416, 127 S. Ct. 1173, 1180 (2007):

The second exception that would allow a new rule to be applied retroactively is if it requires the observance of those procedures that are implicit in the concept of ordered liberty.” Teague, 489 U.S. at 311, 109 S. Ct. at 1076 (internal quotation and citation omitted). The Teague Court explained this second exception was “to be reserved for watershed rules of criminal procedure” and limited to “those new procedures without which the likelihood of an accurate conviction is seriously diminished.” Id. at 311, 313, 109 S. Ct. at 1076-77. To determine whether a new rule is a watershed rule, it must (1) “be necessary to prevent an impermissibly large risk of an inaccurate conviction” and (2) “alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.” See Wharton, 549 U.S. at

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418, 127 S. Ct. at 1182 (internal quotations and citations omitted).

This Court finds the holdings in the companion cases of Lafler v. Cooper and Missouri v. Frye do not set forth a new rule that should be applied retroactively. These cases did *not* enact a substantive new rule in criminal procedure. Further, nothing in these opinions indicates the United States Supreme Court intended their decisions to be a watershed rule retroactively applicable to all prior criminal convictions. In fact, nine of the eleven United States Courts of Appeal have addressed this issue and none have found these cases to be a new rule of constitutional law and retroactive. See Pagan-San Miguel v. United States, No. 13-1343 (1st Cir. filed Nov. 20, 2013); In re Liddell, 722 F.3d 737 (6th Cir. 2013); In re Graham, 714 F.3d 1181 (10th Cir. 2013); Gallagher v. United States, 711 F.3d 315 (2d Cir. 2013); Williams v. United States, 705 F.3d 298 (8th Cir. 2013); Buenrostro v. United States, 697 F.3d 1137 (9th Cir. 2012); In re King, 697 F.3d 1189 (5th Cir. 2012); Hare v. United States, 688 F.3d 878 (7th Cir. 2012); In re Perez, 682 F.2d 930 (11th Cir. 2012). While the Fourth Circuit Court of Appeals has not yet addressed whether Lafler v. Cooper and Missouri v. Frye are retroactive, it is highly doubtful that court would reach the conclusion that these cases set forth a new watershed rule of criminal procedure. See Berry v. United States, 884 F. Supp.2d 453 (2012), appeal dismissed 460 F. App'x. 583, 2012 WL 5914019 (4th Cir. November 27, 2012) (holding that Teague's procedural bar applied to Petitioner's claim of ineffective assistance of counsel relating to plea negotiations and that the claim was not cognizable on collateral review).

This Court finds that Applicant cannot sustain his claim that the holdings in these March 2012 cases should be retroactively applied to a conviction on July 16, 2003. Moreover, there is nothing in the record to suggest that Applicant ever intended to plead guilty to the offense with which he was charged. In fact, Applicant's trial counsel, Clay Allen, testified at the previous

PCR hearing that Applicant rejected plea offers to the lesser charges of Trafficking because he claimed he was innocent and did not commit the crime. Thus, this Court finds that even if it were to consider Applicant's Lafler claim on the merits, the claim would fail because Applicant has failed to make the necessary showing that, but for counsel's allegedly faulty advice, he would have pleaded guilty rather than go to trial.

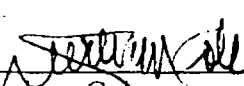
III. CONCLUSION

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

Office of the Attorney General
J. Clayton Mitchell, Esquire
PCR Division - 7th Circuit
P.O. Box 11549
Columbia, SC 29211

AND IT IS SO ORDERED this 12 day of March, 2014.

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M. HOWE R. HALEY



J. Derham Cole
Chief Judge for Administrative Purposes
Seventh Judicial Circuit

_____, South Carolina

Spartanburg County

Spartanburg County Court House
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M. Hope Blackley
Clerk of Court
March 13, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

7TH JUDICIAL CIRCUIT

Timothy M. Jones
Applicant #244725

CASE # 2013CP423041

VS
Steve
Respondent

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the Conditional ord. Dismissal
in this action dated March 12, 2014 on March 13, 2014

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Dee Miller
Steve White
Timothy Jones

3-13-14
(Date)

Corey Seuf
(Signature)