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JAN 13 2015

S.C. SUPREME COURT

January 8, 2015

The Honorable Dan Shearouse
Clerk of the SC Supreme Court
PO Box 11330
Columbia, SC 29211

RE: JOSEPH FRANKLIN KELLY V STATE OF SOUTH CAROLINA

Dear Mr. Shearouse:

Please find enclosed for filing and original and two (2) copies each of the Notice of Intent to Appeal and Explanation for Erroneous Determination of Untimeliness Under The PCR Statute of Limitation. I am serving a copy of the Notice and the Explanation directly upon counsel for the State, and I am enclosing an Original Proof of Service to this effect.

If I can be of further assistance please feel free to call me.

Sincerely yours,


Andrew J. Johnston

AJJ/lst

enclosure

cc: Suzanne H. White, Esquire

Andrew J. Johnston, Attorney-at-Law

184 N. Daniel Morgan Ave. | Spartanburg, SC 29306 | Mailing: PO Box 3252 | Spartanburg, SC 29304-3252
Phone: (864) 591-1093 | Telefax: (864) 591-1371 | www.spartanburglegal.com

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Derham Cole, Circuit Court Judge

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Case No.
(2012-CP-42-3230)

JAN 13 2015

S.C. SUPREME COURT

Joseph Franklin Kelly, Appellant

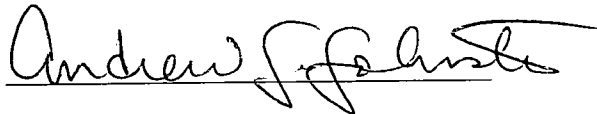
v.

State of South Carolina, Respondent.

NOTICE OF INTENT TO APPEAL

Appellant appeals the Order and decision of the Honorable J. Derham Cole, dated November 20, 2014 and filed November 20, 2014. Appellant received written notice of the entry of said Order on December 10, 2014.

January 8, 2015



Andrew J. Johnston, Attorney-at-Law

JOHNSTON LAW FIRM, LLC
184 N. Daniel Morgan Ave.
Spartanburg, South Carolina 29306
(864) 591-1093
ATTORNEY FOR PCR PETITIONER

Other Counsel of Record:
Suzanne H. White, Esq.
Assistant Deputy Attorney General
PCR Division
PO Box 11549
Columbia, SC 29211
803-734-4127

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Derham Cole, Circuit Court Judge

Case Nos. 2012-CP-42-3230

Joseph Franklin Kelly,.....Appellant


v.

The State of South Carolina,.....Respondent

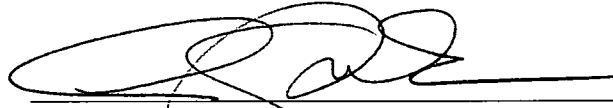
PROOF OF SERVICE

I hereby certify that a copy of the Appellant's Notice of Intent to Appeal and Explanation for Erroneous Determination of Untimeliness Under the PCR Statute of Limitation of Joseph Franklin Kelly was served upon the attorneys for the Respondents by mailing said documents on the 8th day of January 2015, to following:

Suzanne H. White, Esquire
Assistant Deputy Attorney General
PCR Division
PO Box 11549
Columbia, SC 29211


Linda S. Tschappat
Legal Assistant to Andrew J. Johnston

SWORN TO BEFORE ME THIS
8 DAY OF Jan, 2015.



NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: _____

received
8-29-13

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
Joseph Franklin Kelly,)
)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2012-CP-42-3230

CONDITIONAL ORDER OF DISMISSAL

This matter comes before this Court by way of an application for post-conviction relief filed August 3, 2012. Respondent made its Return and Motion to Dismiss on or about May 20, 2013.

I. PROCEDURAL HISTORY

The Applicant is not currently incarcerated. The Applicant was indicted at the October 2002 term of the Court of General Sessions for Spartanburg County for eavesdropping/peeping tom (2002-GS-42-4577). He was represented by R. Keith Kelly, Esquire. On December 17, 2002, the Applicant pled guilty as indicted. He was sentenced by the Honorable John C. Few to confinement for a period of one (1) year. The Applicant did not appeal his conviction or sentence.

Applicant's Current PCR Application

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

1. Ineffective Assistance of Counsel, in that;
 - a. Applicant was not informed that he would be required to register as a sex offender for life and did not learn of this until he received a letter dated 10/10/11; and
2. Involuntary Guilty Plea, in that;
 - a. Applicant was not informed that he would be required to register as a sex offender for life and did not learn of this until he received a letter dated

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Handwritten initials/signature

10/10/11.

Before this Court are the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's PCR application and Respondent's Return and Motion to Dismiss.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Statute of Limitations

This Court finds 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 (2003). 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 December 17, 2002. The Applicant was therefore required to file his application before December 17, 2003. This Application was filed on August 3, 2012; nearly 9 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 finds that the application for post-conviction relief is summarily dismissed for failure to file within the time mandated by statute.

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Laches

This Court also finds that this application should be summarily dismissed based on the doctrine of laches. The Applicant has filed this application nearly 10 years after he pled guilty to charge. The doctrine of laches bars the Applicant from raising these allegations in a post-conviction relief application. Absent some explanation or justification for the delay in seeking post-conviction relief, laches will prevent an Applicant from seeking collateral review of his conviction, especially where the delay affects the availability of evidence to refute the applicant's claims. McElrath v. State, 276 S.C. 282, 277 S.E.2d 890 (1981); Honeycutt v. Ward, 612 F.2d 36 (2nd Cir. 1979). Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002).

Newly Discovered Evidence

This Court further finds that the application should be summarily dismissed and the claims do not qualify as 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).

The Applicant has not shown that the alleged evidence meets *any* of the requirements for after-discovered evidence. Most importantly, the "new evidence" offered by the Applicant is not "material to the issue of guilt or innocence," and probably would not "change the result if a new trial was had."

Hayden, Id.

Additionally, this Court finds that registration on the sexual offender registry is a collateral consequence of a sentence and therefore counsel cannot be ineffective in failing to advise Applicant.

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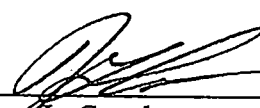
the requirement that he register on the sex offender registry. "The distinction between 'direct' and 'collateral' consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." Cuthrell v. Director, Patuxent Institution, 475 F.2d 1364, 1366 (4th Cir.), cert. denied, 414 U.S. 1005 (1973). The purpose of the sexual registry is that of community and police supervision. Registration on the sexual offender registry has no direct bearing on the range of the defendant's punishment as delineated in Cuthrell. Id. Therefore, this application is summarily dismissed.

Summary


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:

Suzanne H. White, Esquire
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

AND IT IS SO ORDERED this 20th day of August, 2013.



Roger L. Couch
Administrative Judge – Common Pleas
Seventh Judicial Circuit


_____, South Carolina

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M. HOPE BRACKLEY

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 Joseph Franklin Kelly,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2012-CP-42-3230

FINAL ORDER

This matter comes before this Court by way of an application for post-conviction relief filed August 3, 2012. Respondent made its Return and Motion to Dismiss on or about May 20, 2013, requesting that the application be summarily dismissed.

Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal dated August 20, 2013, provisionally denying and dismissing this action, while giving Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. The Applicant and retained counsel were served with the signed Conditional Order of Dismissal by mail on August 27, 2013.

In a document captioned "Reply to Conditional Order of Dismissal," dated September 17, 2013, Applicant argues that his application should not be summarily dismissed based on the reasons articulated in the signed Conditional Order of Dismissal.

First, Applicant incorrectly relies on the recent South Carolina Supreme Court case of McCoy v. State, 401 S.C. 363, 737 S.E.2d 623 (2013), to argue that it is inappropriate to summarily dismiss the application without a hearing. As Applicant notes, when allegations of newly discovered

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evidence of juror misconduct are made, the standard five-pronged newly discovered evidence standard "is not conducive for determining whether a PCR application is entitled to a hearing where intentional juror concealment is alleged." McCoy at 370-71, 627 (2013). Addressing the standard for determining newly discovered evidence claims, the Supreme Court distinguishes claims of newly discovered evidence of juror misconduct from all other claims of newly discovered evidence, finding those claims are governed by a separate standard. Id. However, the Court is clear that only in the context of PCR allegations involving juror misconduct does the standard five-pronged newly discovered evidence test have no application and should not be used as the basis for summary dismissal. McCoy at 372, 628 (2013).

Therefore, this Court is confident that the five-pronged newly discovered evidence analysis is appropriate in this matter, and as such, the Applicant fails to satisfy that standard. To obtain a new trial based on after discovered evidence, the party must show that the evidence: (1) would probably change the result if a new trial is had; (2) has been discovered since the trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 387-88, 434 S.E.2d 266, 267 (1993). First, this Court notes that the Applicant pled guilty to the crime. Applicant acknowledges that the allegation of newly discovered evidence is immaterial to guilt or innocence. (Reply No. 8).

Second, the Applicant was convicted of the offense(s) he challenges in this Application on December 17, 2002. The Applicant was therefore required to file his application before December 17, 2003. This Application was filed on August 3, 2012; nearly 9 years after the statutory period had expired. In addition to the fact that the application was filed outside of the statutory limitations, this Court finds that this claim is barred by the doctrine of laches. Absent some explanation or justification for the delay in seeking post-conviction relief, laches will prevent and

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Applicant from seeking collateral review of his conviction, especially where the delay affects the availability of evidence to refute the applicant's claims. McElrath v. State, 276 S.C. 282, 277 S.E.2d 890 (1981); Honeycutt v. Ward, 612 F.2d 36 (2nd Cir. 1979). Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002). Not only will the plea transcript be unavailable since it is more than five years following the guilty plea, but it is likely that plea counsel's files are no longer accessible or available in order to refute any claim. Rule 607, SCACR.

Third, Applicant argues that his claim of counsel's failure to advise Applicant of the requirement to register on the sex offender registry addresses a direct, not collateral consequence. "The distinction between 'direct' and 'collateral' consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." Cuthrell v. Director, Patuxent Institution, 475 F.2d 1364, 1366 (4th Cir.), cert. denied, 414 U.S. 1005 (1973). The purpose of the sexual registry is that of community and police supervision. Registration on the sexual offender registry has no direct bearing on the range of the defendant's punishment as delineated in Cuthrell. Id. Further, the South Carolina Court of Appeals has previously dealt with this issue and found that "registration on the sexual offender registry [was] a collateral consequence" of an applicant's sentencing. Williams v. State, 378 S.C. 511, 516, 662 S.E.2d 615, 618 (Ct. App. 2008). Therefore, as stated in the signed Conditional Order of Dismissal, counsel had no obligation to inform Applicant of the requirement to register on the sex offender registry because it is a collateral consequence of the plea and sentencing.

S.C. Code Ann. § 17-27-70(c) (1985) 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. This


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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 barred because of the doctrine of laches and fails to meet the requirements to overcome those as a claim of newly discovered evidence.

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 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. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

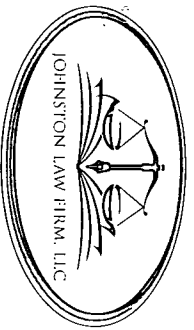
AND IT IS SO ORDERED this 20 day of November, 2014.



J. Derham Cole
Seventh Judicial Circuit

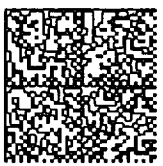
_____, South Carolina.

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PO Box 3252
Spartanburg, SC 29304-3252

The Honorable Dan Shearouse
Clerk of the SC Supreme Court
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