

STATE OF SOUTH CAROLINA)
COUNTY OF NEWBERRY)

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

Ernest Perry, #281290,)
Applicant,)

2014-CP-36-0091

v.)

CONDITIONAL ORDER
OF DISMISSAL

State of South Carolina,)

Respondent.)

FILED
NEWBERRY COUNTY
SEP 25 AM 10 33
JACKIE S. BOWERS
CLERK OF COURT

RECEIVED

FEB 12 2015

S.C. Supreme Court

This matter comes before this Court by way of an application for post-conviction relief filed February 21, 2014. The State made its Return and Motion to Dismiss on September 4, 2014.

PROCEDURAL HISTORY

In its Return, Respondent requests that the action be summarily dismissed. The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Newberry County Clerk of Court's orders of commitment. The Newberry County Grand Jury indicted the Applicant at the September 2000 term for resisting arrest and assaulting a police officer while resisting arrest (00-GS-36-0346), and at the January 2002 term for trafficking in marijuana, manufacturing marijuana, and manufacturing marijuana on the land of another (02-GS-36-062). William L. Pyatt, Esquire, represented him. On January 17, 2002, a jury found the Applicant guilty of resisting arrest, trafficking in marijuana, manufacturing marijuana, and manufacturing marijuana on the land of another. The Honorable James W. Johnson, Jr., sentenced the Applicant to confinement for twenty-

five years for trafficking in marijuana, third offense; to five years, concurrent, for each manufacturing charge; and to one year, consecutive, for resisting arrest.

Wanda P. Haile, Esquire, filed a timely Notice of Appeal on the Applicant's behalf and perfected an appeal. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Perry, 358 S.C. 633, 595 S.E.2d 883 (S.C. Ct. App. filed April 26, 2004). The Remittitur was issued on May 13, 2004.

2005-CP-36-0155

The Applicant subsequently filed an application for post-conviction relief (PCR) on April 21, 2005. The State filed its Return on or about August 15, 2005. An evidentiary hearing was convened on April 2, 2008, at the Newberry County Courthouse, at which the Applicant was present and represented by Gwendlyne Y. Smalls, Esquire. On August 19, 2008, the Honorable J. Ernest Kinard, Jr. denied and dismissed the Applicant's application.

A notice of appeal was filed on the Applicant's behalf and an appeal perfected pursuant to Johnson v. State, 292 S.C. 310, 364 S.E.2d 201 (1988). The South Carolina Supreme Court denied certiorari on August 19, 2010.

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The Applicant thereafter filed a Petition for Writ of Habeas Corpus in the United States District Court for the District of South Carolina on October 28, 2010. The Respondent filed its Return and Motion for Summary Judgment on March 30, 2011. This action was dismissed on February 1, 2012.

II.

In his current application for PCR, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Invalid Conviction and Sentence, Miscarriage of Justice"
2. "Ineffective Assistance of Counsels"

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds that the current application for post-conviction relief must be summarily dismissed because it is successive to his prior application 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 the 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 the Applicant's prior application for post-conviction relief and thus the current application is successive and barred under S.C. Code § 17-27-90. The 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 additionally 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. 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 January 17, 2002. The Remittitur after the Applicant's unsuccessful appeal was issued on May 13, 2004. The Applicant was therefore required to file his application by May 14, 2005. This Application was filed on February 21, 2014, which well after the statutory filing period had expired.

A motion for summary judgement 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."

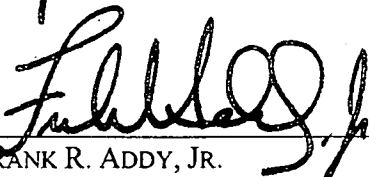
The Applicant's contention that he received ineffective assistance of counsel on his prior post-conviction relief application is not a ground for relief. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Therefore, "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under § 17-27-90." Aice, 305 S.C. at 451, 409 S.E.2d at 394.

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Austin recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. Id. Austin "is limited to its particular factual situation" Aice, 305 S.C. at 452, 409 S.E.2d at 394. The Applicant had an appeal from his first PCR and it was denied by the South Carolina Supreme Court. Therefore, Austin does not apply to Applicant's case and this case is, therefore, summarily dismissed.

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

Office of the Attorney General
Attn: J. Rutledge Johnson, Esquire
P.O. Box 11549
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 9th day of Sept., 2014.


FRANK R. ADDY, JR.
Chief Administrative Judge
Eighth Judicial Circuit

Greenwood, South Carolina