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S.C. Supreme Court

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Roger Dale Navy,)
 S.C.D.C. No. 251709,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
2014-CP-23-0125

CONDITIONAL ORDER OF DISMISSAL

FILED-CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL B. WICKENHISMER
 2014 SEP 25 PM 3 05

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 9, 2014. The Respondent made its Return, requesting the application be summarily dismissed.

I.

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Greenville County. The Applicant was indicted at the July 1998 term of the Greenville County Grand Jury for ten counts of armed robbery (1998-GS-23-7191, -7192, -7193, -7194, -7195, -7382, -7383, -7384, -7385, -7386). The Applicant was also indicted at the April 1998 term of the Pickens County Grand Jury for armed robbery (1998-GS-39-0743). He was represented by C. Timothy Sullivan, Esquire.

On August 5, 1998, the Applicant pled guilty to the charges as indicted. He was sentenced by the Honorable James R. Barber, III to concurrent sentences of twenty-seven years on each of the eleven counts of armed robbery. The Applicant did not file an appeal.

1999-CP-23-1482

The Applicant filed a PCR application on April 6, 1999 (1999-CP-23-1482). The Applicant raised the following issues:

1. Ineffective assistance of plea counsel:
 - a. Failed to file notice of appeal.
2. Involuntary guilty plea.

A hearing was held on May 1, 2001 at the Greenville County Courthouse. Franklin Henson, Esquire represented the Applicant. The Honorable Henry F. Floyd denied and dismissed the Applicant's PCR application by order dated October 1, 2001.

The Applicant filed a notice of appeal. Tara S. Taggart, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the nature of a Johnson¹ petition. The South Carolina Supreme Court denied the petition for writ of certiorari on August 8, 2002.


2003-CP-23-0887

The Applicant filed a PCR application on February 6, 2003 (2003-CP-23-0887). The Applicant raised the following issues:

1. Ineffective assistance of plea counsel.
2. Involuntary guilty plea.
3. Subject matter jurisdiction.
4. Violation of due process.

A hearing was held on October 24, 2003 at the Greenville County Courthouse. Scott Anderson, Esquire represented the Applicant. The Honorable Edward W. Miller denied and dismissed the Applicant's application by order dated November 19, 2003, finding it was barred by the statute of limitations and the presumption against successive PCR applications.

¹ Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988).



The Applicant filed a notice of appeal. Joseph L. Savitz, III, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the nature of a Johnson petition. The South Carolina Supreme Court denied the petition for writ of certiorari on August 17, 2005.

Federal Habeas Corpus

The Applicant filed a petition for writ of habeas corpus in the United States District Court for the District of South Carolina (9:05-2856-CMC-GCK). The Respondent submitted a motion for summary judgment on December 8, 2005. The Honorable George C. Kosko, United States Magistrate Judge, issued a report and recommendation to grant the motion for summary judgment dated January 19, 2006. On February 17, 2006, the Honorable Cameron M. Currie, United States District Judge, issued an order granting the motion for summary judgment.

2006-CP-23-4910

The Applicant filed a PCR application on August 2, 2006 (2006-CP-23-4910). The Applicant raised the following issues:

1. Ineffective assistance of plea counsel:
 - a. Failed to conduct pre-trial investigation.
 - b. Failed to object to indictments.
 - c. Failed to have the Applicant plead to lesser-included offense.
 - d. Failed to file notice of appeal.
 - e. Failed to adequately advise the Applicant of his constitutional rights.

The Honorable G. Edward Welmaker signed a conditional order of dismissal filed October 12, 2006, providing the Applicant opportunity to explain why his PCR application should not be summarily dismissed based upon the expiration of the statute of limitations and the presumption against successive PCR applications. On January 11, 2007, the Honorable D. Garrison Hill filed a final order of dismissal. The Applicant did not appeal.



2007-CP-23-7820

The Applicant filed a "Petition for Writ of Habeas Corpus: Const. Art. 1, 18; S.C. Code 17-27-10-17-27-120/17-17-10" on November 20, 2007 (2007-CP-23-7820).

The Honorable John C. Few issued a Conditional Order of Dismissal signed and filed January 29, 2008, providing the Applicant opportunity to explain why his action should not be summarily dismissed. On May 14, 2008, Judge Few filed a final order of dismissal.

The Applicant filed a notice of appeal at the South Carolina Supreme Court. By order dated August 4, 2008, the Supreme Court dismissed the appeal for failure to timely serve the notice of appeal on the Respondent.

2008-CP-23-5651

The Applicant filed a PCR application on July 28, 2008 (2008-CP-23-5651). The Applicant raised the following issues:

1. Ineffective assistance of counsel:
 - a. Failed to conduct an adequate pretrial investigation.
2. Denial of due process and fundamental fairness:
 - a. Denial of expert witnesses to prepare defense.
3. Lack of subject matter jurisdiction:
 - a. Indictments did not allege elements of offense charged.

The Honorable John C. Few signed a conditional order of dismissal filed September 11, 2008, providing the Applicant opportunity to explain why his PCR application should not be summarily dismissed based upon the expiration of the statute of limitations and the presumption against successive PCR applications. On January 14, 2009, Judge Few filed a final order of dismissal.

The Applicant filed a notice of appeal. The South Carolina Supreme Court required the



Applicant – pursuant to Rule 227(c), SCACR² – to show an arguable reason why the denial of his application was improper. In an order of dismissal dated March 24, 2009, the Supreme Court found the Applicant failed to meet his burden in this regard.

Federal Habeas Corpus

The Applicant filed a motion under 28 U.S.C. § 2244 in the United States Court of Appeals for the Fourth Circuit for an order authorizing the district court to consider a second or successive application for relief. By order filed June 29, 2011, the Court denied the motion.

II.

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

1. “Newly Discovered Sentence related Issues.”
2. “Ineffective Assistance of Plea, Appellate and PCR Counsel.”
 - a. Plea counsel did not confirm the Applicant would be parole eligible if he accepted the plea agreement.
 - b. Plea counsel induced the Applicant to plead guilty to the charges though the Applicant stated he was not guilty.
 - c. Plea counsel stated the Applicant was eligible for parole.
3. “Law of Procedural Default.”
 - a. “Applicant asserts he was procedurally barred in prior Proceeding’s from raising the ineffectiveness of Plea Counsel through and by PCR & Collateral Counsel.”

III.

This Court finds this matter should be summarily dismissed because the Applicant has failed to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §§ 17-27-10, et. seq. (2003). Specifically, South Carolina Code Ann. § 17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one

² This is now Rule 243(c), SCACR.



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 Applicant pled guilty to the offenses he challenges in this application on August 5, 1998. The Applicant was therefore required to file his application before August 5, 1999. This application was filed on January 9, 2014, which was more than fourteen 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. See McDonnell v. Consolidated Sch. Dist. Of Aiken, 315 S.C. 487, 489, 445 S.E.2d 638, 639 (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 that the moving party is entitled to judgment as a matter of law.”

IV.

This Court further finds the current application should also be dismissed because it is successive to the previous applications for post-conviction relief. Successive applications for post-conviction relief are disfavored. See Land v. State, 274 S.C. 243, 246, 262 S.E.2d 735, 737 (1980). South Carolina 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.

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

As the Applicant has failed to present any reasons why he could not have raised the current allegations in his previous post-conviction relief applications, the application is dismissed.

V.

This Court notes the Applicant has made an allegation of after-discovered evidence. The Applicant argues he has learned he is not eligible for parole but that plea counsel told him he would be parole-eligible if he pled guilty. This allegation is without merit. The South Carolina Supreme Court has held that, for an applicant to be granted post-conviction relief based on after-discovered evidence, he must show the alleged 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) (citation omitted) (emphasis added). This Court finds the Applicant has failed to meet any of the Hayden factors. Most importantly, this Court finds 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.



See id. Further, this Court has examined trial counsel's affidavit in this matter and finds it to be credible. See State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011) ("The credibility of newly-discovered evidence is for the trial court to determine."). This allegation is summarily dismissed.

VI.

Based upon its review of the pleadings in this matter, this Court expresses its intent to summarily dismiss this matter unless the Applicant advises this Court with specific reasons, factual or legal, why it should not dismiss the matter 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 by filing any reasons he may have with the Clerk of Court for Greenville County, South Carolina, and also by filing a copy of his reasons with the Office of the Attorney General, Attn: Karen C. Ratigan, Post Office Box 11549, Columbia, South Carolina, 29211.

AND IT IS SO ORDERED this 16 day of Sept, 2014.



Letitia H. Verdin
Chief Administrative Judge
Thirteenth Judicial Circuit

Greenville South Carolina.

