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S.C. Supreme Court

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

Herbert Palmer, #260961,)

2011-CP-10-4986

Applicant,)

v.)

CONDITIONAL ORDER OF
DISMISSAL

State of South Carolina,)

Respondent.)

FILED
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JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

In response to the post-conviction relief application filed July 14, 2011, the Respondent would show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Charleston County. The Applicant was indicted at the March 1998 term of the Charleston County Grand Jury for murder (1998-GS-10-1859). He was also indicted at the August 1999 term for pointing a firearm at a person (1999-GS-10-5258) and possession of a firearm during the commission of a violent crime (1999-GS-10-5259). Robert G. Howe, Esquire, represented the Applicant. The State took the case to trial, and on August 26, 1999, the Honorable Daniel F. Pieper sentenced the Applicant to life imprisonment for murder and concurrent terms of three (3) years for pointing a firearm and five (5) years for possession of a firearm during the commission of a violent crime.

The Applicant filed an appeal to the South Carolina Supreme Court, and it was perfected in

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the form of an Anders brief. On appeal he was represented by Joseph L. Savitz, Esquire of the South Carolina Office of Appellate Defense. By written Order, the South Carolina Court of Appeals denied Applicant's appeal, State v. Herbert Palmer Jr., No. 2002-UP-390 (May 30, 2002). The Remittitur was sent on July 9, 2002.

Applicant subsequently filed an application for post conviction relief (PCR). In his application for PCR, the Applicant requested relief on the following grounds:

1. Ineffective assistance of counsel.
2. Judicial misconduct.
3. Structural error in trial.

An evidentiary hearing was convened on June 14, 2004 at the Charleston County Courthouse, and Applicant was represented by Joshua Snow Kendrick, Esquire. By written order dated August 3, 2004 the Honorable Doyet A. Early denied and dismissed the application.

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

1. "Is petitioner's conviction unconstitutional under State v. Belcher, and the South Carolina constitutional prohibition that trial judges shall not charge with respect to matters of facts?"

II.

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 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 August 26, 1999. This Application was filed on July 14, 2011, which was almost twelve (12) 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 should be summarily dismissed for failure to file within the time mandated by statute and for being successive.

Additionally, this Court intends to summarily dismiss the application as 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.

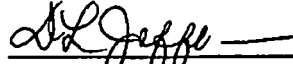
The Applicant had a full opportunity to litigate all current allegations in prior proceedings and did in fact make similar allegations (e.g. the victim was related to the sheriff) in his prior application for relief. The other grounds present allegations that could have been raised in those prior proceedings. The public interest in finality of judgments requires that litigation must eventually come to an end. Pursuant to Rule 12(b)(6), SCRPC, the Court will summarily dismiss these claims

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

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

AND IT IS SO ORDERED this 4th day of June, 2012.


DEADRA L. JEFFERSON
Chief Administrative Judge
Ninth Judicial Circuit Court

Charleston, South Carolina