SUPREME COURT OF SOUTH CAROLINA

APPEAL FROM MARLBORO COUNTY
In The Court of Common Pleas

Honorable Thomas A. Russo,
Common Pleas Judge of the Fourth Judicial Circuit

Case No.: 2013-CP-34-089

Alfonso Staton, #241380, Petitioner,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Petitioner appeals the Final Order of Dismissal of the Honorable Thomas A. Russo dated November 24, 2014, filed December 18, 2014 and received by Petitioner ~~on January 27, 2015~~.

February 23, 2015

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CERTIFICATE OF SERVICE

I, Deborah Evans, do hereby certify that I am an employee of Axelrod & Associates, P.A., in Myrtle Beach, South Carolina, and that I have this date served the Petitioner's Notice of Appeal upon the Respondent, by depositing a copy of same in the United States Mail, postage prepaid, addressed as follows:

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February 23, 2015
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF MARLBORO	)	IN THE COURT OF COMMON PLEAS FOR THE FOURTH JUDICIAL CIRCUIT
Alfonso Staton, #241380, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2013-CP-34-89 **FINAL ORDER OF DISMISSAL**

This post-conviction relief action came before the Court on July 24, 2014, at the Darlington County Courthouse, for a hearing on Applicant's motion to amend the pleadings and motion to set aside a conditional order of dismissal. Applicant was present and represented by Tristan M. Shaffer, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office represented Respondent. The Court had before it a copy of the trial transcript, the records of the Marlboro County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the records from Applicant's direct appeal, the records from Applicant's prior post-conviction relief action, the application for post-conviction relief, the return and motion to dismiss, the conditional order of dismissal, the transcript from Applicant's Rule 29, SCRCrimP, hearing, the orders regarding Applicant's Rule 29 hearing, a letter from Applicant's Rule 29 counsel, and a recorded interview with one of Applicant's co-defendants. After hearing arguments of counsel, and viewing the record in the light most favorable to Applicant, the Court finds as follows:

I. PROCEDURAL HISTORY

A. Underlying Conviction

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Marlboro County Clerk of Court. In December 1996, the Marlboro County Grand Jury indicted Applicant for kidnapping, murder, first-degree criminal sexual conduct,

and criminal conspiracy (1996-GS-34-0979). William B. Rogers, Jr., Esquire, represented Applicant. On March 10, 1997 Applicant, jointly with five (5) co-defendants, proceeded to trial before the Honorable Edward B. Cottingham and a jury. On March 19, 1997, the jury found Applicant guilty of kidnapping, murder, and criminal conspiracy. Judge Cottingham sentenced Applicant to life imprisonment for murder and a concurrent five (5) years for criminal conspiracy.[1]

Applicant filed a timely notice of appeal, and Joseph L. Savitz, III, Esquire, of the South Carolina Office of Appellate Defense, perfected the appeal. The Court of Appeals affirmed Applicant's convictions and sentences. State v. Staton, Op. No. 2001-UP-478 (S.C. Ct. App. filed Nov. 8, 2001). The South Carolina Supreme Court denied Applicant's subsequent petition for writ of certiorari on November 21, 2002. The remittitur was returned to the circuit court on November 25, 2002.

B. First Post-Conviction Relief Action

Applicant filed his first application for post-conviction relief action on June 10, 2003 (2003-CP-34-244). In his that application, Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel:
   a. Failed to object to indictment.
   b. Failed to object to improper evidence.
   c. Failed to subpoena alibi witnesses.
2. Subject matter jurisdiction.
3. Prosecutorial misconduct.

Respondent made a return to the application on November 3, 2003. Applicant filed an amendment to his application on August 26, 2004, in which he expanded upon his argument that a defective indictment deprived the trial court of subject matter jurisdiction. The Honorable John H. Milling convened an evidentiary hearing into the application on January 11, 2005, at the Darlington

[1] Applicant was not sentenced on the kidnapping conviction provision pursuant to S.C. Code Ann. §16-3-910.

County Courthouse. Applicant was present and represented by counsel. After the hearing, Judge Milling denied all of Applicant's claims in an order dated September 16, 2005.

Applicant timely appealed Judge Milling's order, and Wanda H. Carter, Esquire, of the South Carolina Office of Appellate Defense, perfected the appeal with the filing of a petition for writ of certiorari on June 18, 2007. The South Carolina Supreme Court partially granted certiorari on May 8, 2008. However, on February 23, 2009, the Supreme Court dismissed the writ as improvidently granted. The remittitur was returned to the circuit court on March 11, 2009.

C. Rule 29 Motion

On August 15, 2011, Applicant filed a motion for a new trial pursuant to Rule 29(b), SCRCrimP. The Honorable Howard P. King convened a hearing on the Motion on October 6, 2011, at the Marlboro County Courthouse. Applicant was present and represented by William E. Grove, Esquire. Judge King denied Applicant's motion by order dated October 19, 2011, and filed October 20, 2011. Judge King denied a motion for reconsideration by order filed January 19, 2012. On March 27, 2012, the Court of Appeals dismissed an appeal from Judge King's order for failure to timely serve the notice of appeal. The Court of Appeals denied a petition for rehearing on September 7, 2012. The Supreme Court denied Applicant's petition for writ of certiorari on April 3, 2014. The remittitur was returned to the circuit court on April 8, 2014.

II. CURRENT APPLICATION [2]

Applicant filed this application on April 26, 2013. In his current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. "Ineffective assistance of 29(b) counsel"
   a. "Mr. Grove the 29(b) counsel did not properly research of brief my issues. He did not notify me immediately when 29(b) motion was denied, and he did not file an appeal of the dismissing of 29(b)."

[2] Applicant also filed a federal habeas corpus action (5:12-2483-JFA-KDW), which is pending in the United States Federal Court for the District of South Carolina.

Respondent made a timely return and motion to dismiss on May 20, 2013, requesting the application be denied as successive, untimely, and failing to state a cognizable claim. The Honorable J. Michael Baxley issued a Conditional Order of Dismissal on October 22, 2013, provisionally dismissing the application. Judge Baxley subsequently directed the parties to schedule a hearing on Applicant's motion to amend the pleadings and motion to set aside the conditional order.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Motion to Amend

The Court finds Applicant has shown good cause to amend his application. Rule 15(a), SCRCP, provides that leave to amend a pleading "shall be freely given when justice so requires and does not prejudice any other party." Here, Applicant has presented sufficient grounds to include allegations of newly discovered evidence in the form of a conflict of interest and information from Applicant's co-defendant. The Court further finds Respondent is not prejudiced by the addition of these allegations. Accordingly, Applicant's motion to amend the pleadings is granted.

B. Motion to Set Aside the Conditional Order of Dismissal

As a result of the Court granting Applicant's motion to amend in Part III.A., supra, the following allegations are presently before the Court in support of Applicant's request to be allowed to proceed on a successive post-conviction relief application:

1. Mr. Grove was ineffective in failing to appeal Judge King's denial of Applicant's Rule 29 motion.
2. Applicant was denied due process based on trial counsel's conflict of interest.
3. Newly discovered evidence of information from co-defendant Ringo Pearson.

Applicant and Respondent fully argued the merits of each of these allegations at the hearing and presented relevant exhibits. Viewing the record before it in the light most favorable to Applicant, the Court makes the following findings of fact and conclusions of law pursuant to S.C. Code Ann. § 17-27-70(c):

1. Mr. Grove's Performance

The Court finds Applicant failed to demonstrate a sufficient reason to proceed on a successive application based on the performance of counsel at his Rule 29(b) hearing. The Sixth Amendment only guarantees effective assistance of counsel at critical stages of a prosecution. State v. Clinkscales, 318 S.C. 513, 515, 458 S.E.2d 548, 549 (1995). However, a post-trial motion is not a critical stage of criminal proceedings. Id. Because the Constitution does not guarantee Applicant effective assistance of counsel for his Rule 29(b) hearing, he has not demonstrated "[t]hat the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State[.]" S.C. Code Ann. § 17-27-20(a)(1).

Furthermore, the Court declines to adopt Applicant's expansive interpretation of Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), and impose upon post-trial motion counsel a duty to file appeals from the denial of Rule 29(b) motions. See Aice v. State, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991) ("Austin is limited to its particular factual situation"). The right to appeal outlined in Austin is derived from a statutory requirement that counsel be appointed in post-conviction relief actions. Austin, 305 S.C. at 454, 409 S.E.2d at 396 (citing S.C.Code Ann. § 17-27-100). However, no statutory or constitutional right to counsel attaches to a post-trial motion under Rule 29(b). Clinkscales, 318 S.C. at 515, 458 S.E.2d at 549. The mere fact the State appointed Mr. Grove to represent Applicant at the hearing does not convey such a right. Without a right to counsel, there can be no concomitant right to have that counsel file an appeal on Applicant's behalf. This maxim is especially true where, as will be discussed in Part III.B.2., infra, Applicant has not presented evidence to support his grounds for a new trial. Accordingly, the Court finds Applicant has not shown he is entitled to a successive post-conviction relief application.

2. Conflict of Interest

The Court finds Applicant failed to demonstrate a sufficient reason to proceed on a successive application based on a conflict of interest at his original trial. As a preliminary matter, the Court finds this allegation is procedurally barred in post-conviction relief because it was raised as a ground for a new trial in Applicant's Rule 29(b) motion. The doctrine of collateral estoppel "prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009) (citing Judy v. Judy, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009)). "The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." Id. (citing Beall v. Doe, 281 S.C. 363, 315 S.E.2d 186 (Ct. App. 1984). 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, 191 427 S.E.2d 918, 919 (Ct. App. 1993) (citing Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n of S.C., 294 S.C. 9, 362 S.E.2d 176 (1987); Beall, 281 S.C. 363, 315 S.E.2d 186).

Applicant raised the conflict of interest issue in his Rule 29(b) motion before Judge King, and Judge King denied Applicant's requested relief. The merits of his claim were directly addressed in Judge King's order. Applicant cannot now attempt to couch his argument in terms of a due process violation when he has already received an adjudication of this issue based on the same factual and legal circumstances. Accordingly, the Court finds the doctrine of collateral estoppel bars Applicant from pursuing this issue in post-conviction relief.

Furthermore, the Court agrees with Judge King's ruling that no conflict of interest existed in Applicant's case. "An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendants." State v. Gregory, 364 S.C. 150, 152, 612 S.E.2d 449,

450 (2005) (citing Fuller v. State, 347 S.C. 630, 557 S.E.2d 664 (2001)). Applicant's trial counsel began working for the Fourth Circuit Solicitor's Office shortly before trial. However, Applicant's case was prosecuted by Fifteenth Circuit Solicitor Ralph J. Wilson, Sr. Because Applicant's case was prosecuted by an agency other than the one for which trial counsel worked, no actual conflict existed in this case. See, e.g., Rule 1.11(d)(2)(i),RPC, Rule 407, SCACR (government lawyer only conflicted out of matters in which he "participated personally and substantially while in private practice"). The Court is not persuaded trial counsel abandoned his duty of zealous representation simply because he was to be employed by a separate prosecuting agency. Thus, Applicant has not demonstrated a conflict of interest denied him due process.

Finally, to the extent Applicant argues in this proceeding that this conflict of interest is newly discovered evidence, the Court agrees with and adopts Judge King's reasoning for denying a new trial on those grounds. Applicant should have known of this alleged conflict at the time of his trial. Applicant also had actual knowledge of this conflict in 2007 when he contacted trial counsel about it. Thus, his 2013 post-conviction relief application was untimely filed under the Uniform Post-Conviction Relief Act. S.C. Code Ann. §17-27-45(c) (providing for one year statute of limitation where "applicant contends that there is evidence of material facts not previously presented and heard"). The Court also agrees Applicant has not demonstrated this alleged conflict is material to his guilt or innocence, especially in light of the extensive trial record before the Court.

3. Ringo Pearson's Information

The Court finds Applicant has not demonstrated he is entitled to a new trial based on newly discovered evidence in the form of a statement by co-defendant Ringo Pearson. To obtain a new trial based on newly discovered evidence, Applicant must show 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. Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (citing State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979)). Pearson was one of Applicant's co-defendants, who pled guilty to his involvement in the crimes in 2006. In a recorded interview, Pearson avers his statements to police at the time of the murder were false. He further avers that two witnesses who identified Applicant as being involved in the crime had no prior knowledge of Applicant's involvement.

Pearson's statement does not qualify as newly discovered evidence. Initially, the Court finds Pearson's refusal to cooperate and provide this information until 2014 does not satisfy the requirement that the evidence "could not have been discovered before trial." Pearson was not called to testify at trial and did not invoke his Fifth Amendment right to silence. Thus, there is no evidence in the record Pearson's testimony was unavailable. See Com. v. Padillas, 997 A.2d 356, 363 (Pa. Super. Ct. 2010) ("For that testimony to be considered previously 'unavailable,' however, the witness must have actually invoked his right to remain silent; if the witness simply refused to testify or the defendant did not question the witness about the incriminating topic, then the defendant cannot claim a witness' later self-incriminating statement is 'after-discovered.'" (citing Stanley v. Shannon, 2007 WL 2345284, *4 n. 6 (E.D.Pa. Aug.16, 2007))). Applicant knew Pearson was a co-defendant, and had the opportunity to discover Pearson's statements prior to trial. His failure to interview Pearson at that time cannot be the basis for a newly discovered evidence claim at this juncture. See Jones v. Scurr, 316 N.W.2d 905, 908-10 (Iowa 1982) (analyzing cases on the subject of non-cooperating co-defendants, and finding "that the latter line of authority, holding that exculpatory evidence that was unavailable, but known, at the time of trial is not newly discovered evidence, represents the better resolution of this issue" (citations omitted)); see also Padillas, 997 A.2d at 363 n.4 ("A majority of federal circuits have concluded evidence known but unavailable at trial, including evidence unavailable due to a witness' invocation of the Fifth Amendment, does not constitute 'newly discovered evidence within the

meaning of [Fed R. Evid. 33]." (citations omitted)); State v. McDonough, 350 A.2d 556, 560 (Me. 1976) ("Evidence known to the accused at the time of trial cannot be considered newly discovered." (citing State v. Lund, 266 A.2d 869 (1970))). Accordingly, Applicant has not demonstrated Pearson's information was not available to him prior to the trial.

The Court also finds Pearson's information was merely cumulative and impeaching. In the interview, Pearson simply avers that two of the testifying co-defendants, Danny Davis and Robert Ransom, were not acquainted with Applicant at the time of the murder. While this information may have been excellent fodder for cross-examination, it would not have directly refuted any of these witnesses' testimony at trial. Davis and Ransom both testified in great detail about Applicant's involvement in the kidnapping and murder of the victim. However, both vacillated on cross-examination, with Davis even testifying he was merely reciting facts relayed to him by another individual. Both witnesses were rehabilitated by the State, and the Court cannot discern how further cross-examination about their relationship with Applicant would have been anything more than cumulative impeachment material.

Finally, the Court finds that, even if Pearson's information was provided to the jury, it would not have had a material effect on the outcome of the trial. Davis and Ransom were not the only persons to implicate Applicant in the victim's kidnapping and murder. All of the co-defendants on trial denied involvement in the crimes. However, the testifying co-defendants all implicated Applicant as an accomplice. In light of the unanimous testimony of the cooperating co-defendants that Applciant was somehow involved, the Court cannot discern how testimony from Pearson that "Davis and Ransom are lying" would have changed the outcome of Applicant's trial. Therefore, the Court finds Applicant has not demonstrated Pearson's information is material to the issue of Applicant's guilt or innocence.

IV. CONCLUSION

Based on the foregoing, the Court finds Applicant has not shown a sufficient reason why the application was not untimely, successive, and failed to state a cognizable claim. Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application, nor has he presented sufficient reasons why Judge Baxley's conditional order should not become final. Therefore, for the reasons set forth above and in the Conditional Order of Dismissal, the Court finds this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

FILED
2014 DEC 18 AM 10 53
WILLIAM B. ... CLERK OF COURT MARLBORO COUNTY, S...

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 24 day of Nov, 2014.

THE HONORABLE THOMAS A. RUSSO
Presiding Judge

A CERTIFIED TRUE COPY
William B. ...
CLERK OF COURT
MARLBORO COUNTY

Lexington, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF MARLBORO ALFONSO STATON, 341380 Applicant, vs STATE OF SOUTH CAROLINA, Respondent.	IN THE COURT OF COMMON PLEAS 2013-CP-34-0089 AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Conditional Order of Dismissal** of the Respondent in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

FILED
2013 DEC 18 AM 10 53
WILLIAM B. GARDNER
CLERK OF COURT
MARLBORO COUNTY, SC

Tristan M. Shaffer, Esquire
140 Gibson Road
Lexington SC 29072

DATED this 24th day of October, 2013.

Judy A. Carey, Legal Assistant
For Respondent

A CERTIFIED
TRUE COPY
William B. Gardner
CLERK OF COURT
MARLBORO COUNTY, SC

AXELROD & ASSOCIATES, P.A.

Attorneys and Counselors at Law

"Success is all that matters"

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February 23, 2015

Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: Alfonso Staton #241380 v. State of South Carolina
Case No.: 2013-CP-34-089

Dear Clerk of Court:

Enclosed please find an original and one copy of a Notice of Appeal in the above referenced matter. If you would, please file the Notice of Appeal and return a clocked copy to me in the envelope provided.

Please be advised that I have been court appointed to represent Mr. Staton in this matter.

Thank you for your assistance in this matter. If you have any questions or concerns, please feel free to contact my office.

With kind regards,

Tristan M. Shaffer

TMS/dke
cc: Joshua L Thomas, Esquire
Marlboro County Clerk of Court
Kimberly McCall
Alfonso Staton

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