

CC
AG
AT

AW
9

STATE OF SOUTH CAROLINA)
 COUNTY OF CHARLESTON)
)
)
 Herbert Smalls, #258624,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS

2013-CP-10-5276

CONDITIONAL ORDER OF
DISMISSAL

FILED
 2014 MAR 17 PM 4:39
 JULIA K. HARRIS
 CLERK OF COURT
 BY

This matter is before the Court by way of an application for post-conviction relief filed September 10, 2013. The Respondent filed its Return.

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the December 2007 term of the Charleston County Grand Jury for murder (2007-GS-10-3708. David Holton, Esquire, represented the Applicant. On August 2, 2010, the Applicant pled guilty to murder. The Honorable R. Markley Dennis sentenced him to confinement for forty (40) years.

The Applicant filed a timely Notice of Appeal. His appeal was perfected by plea counsel, David Holton. By Order dated October 14, 2010, the Applicant's appeal was dismissed. The Remittitur was issued on November 8, 2010.

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

1. Petitioner did not voluntarily and intelligently waive his right to direct appeal.

AW

This Court has before it the Clerk of Court records for Charleston County, the South Carolina Department of Corrections' records, and the Applicant's appellate records.

II.

This Court finds that this Application for Post-Conviction Relief should be summarily dismissed for failing 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 Remittitur was issued for the Applicant's appeal of the conviction he is challenging on November 8, 2010. This Application was filed on September 10, 2013, which was almost two 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.

III.

In this Application, the Applicant alleges he did not voluntarily and intelligently waive his right to direct appeal. Ordinarily, this allegation may be sufficient to warrant an evidentiary hearing. However, this Court concludes the Applicant received a direct appeal. The record reflects counsel for the Applicant filed a Notice of Appeal on August 12, 2010. Counsel also filed a written explanation pursuant to Rule 203(d)(1)(B) as to why he should be allowed to appeal from a guilty plea on August 28, 2012. By Order dated October 14, 2010, the appeal was dismissed. The Remittitur was issued on November 8, 2010. The record reflects counsel for the Applicant perfected the Applicant's appeal and the matter was subsequently dismissed after review by the Court of Appeals. This Court finds this allegation is wholly without merit. This Court finds the Applicant exercised his right to direct appeal and his guilty plea was appealed by counsel. This Court finds this allegation is without merit and does not warrant an evidentiary hearing.

IV.

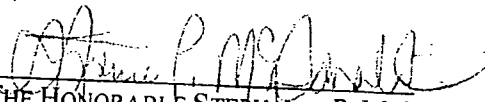
Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this Application with prejudice unless the Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. The Applicant is granted twenty (20) days from the date of service of this 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

[Signature on the following page.]

DPW
3

AND IT IS SO ORDERED this 13th day of March, 2014.


THE HONORABLE STEPHANIE P. McDONALD
Chief Administrative Judge
9th Judicial Circuit Court

Charleston, South Carolina