

STATE OF SOUTH CAROLINA)
COUNTY OF CHESTERFIELD)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTH JUDICIAL CIRCUIT

Kenyon D. Gaither,)
)
Applicant,)

Case No. 2013-CP-13-140

v.)

FINAL ORDER OF DISMISSAL

State of South Carolina,)
)
Respondent.)
_____)

A True Copy Attest

Jaye J. Sellato

CLERK OF COURT C.P. & G.S.
CHESTERFIELD COUNTY, SC

FILED
CLERK OF COURT
CHESTERFIELD COUNTY, SC
2015 JAN 8 AM 11 17

This matter comes before the Court pursuant to an Application for Post-Conviction Relief filed March 21, 2013. Respondent made a timely Return and Motion to Dismiss on or about May 14, 2013, requesting the Application be summarily dismissed as untimely. Pursuant to this motion, the Court reviewed the pleadings in this matter and all of the records attached thereto. The Honorable J. Michael Baxley issued a Conditional Order of Dismissal, filed on May 31, 2013, provisionally denying and dismissing this action, while giving Applicant twenty (20) days from the date of service of said order to show why the dismissal should not become final. Attached to this final order and incorporated herein by reference is the Certificate of Service, dated August 14, 2013, of the above-mentioned conditional order on Applicant.


Applicant filed a timely response to the conditional order. In that response, he raised three issues. First, he argued his plea counsel was ineffective for failing to file discovery motions. Second, he argued plea counsel was ineffective for failing to file a notice of appeal. Third, he argues plea counsel was ineffective for failing to investigate a confidential informant.

The Court has reviewed the original pleadings and all relevant documents. The Court finds Applicant has not shown a sufficient reason why the application was not untimely such that conditional order should not become final. The alleged errors Applicant attributes to plea counsel were easily discoverable at the time of his plea. The alleged failure to file discovery and investigate a confidential informant were easily discoverable prior the entry of Applicant's plea. See Jamison v. State, Op. No. 27454 (S.C. Sup. Ct. filed Oct. 22, 2014 (Shearouse Adv. Sh. No. 42 at 12), 2014 WL 5358729, at *7 (newly discovered evidence does not support an untimely application unless the evidence "in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea"). Furthermore, these allegations are challenges to the sufficiency of the evidence and are not cognizable in post-conviction relief. See Whetsell v. State, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981) (citing Rivers v. Strickland, 264 S.C. 121, 213 S.E.2d 97 (1975); State v. Fuller, 254 S.C. 260, 174 S.E.2d 774 (1970)). Regarding the allegation plea counsel failed to file an appeal, this alleged failure could have been discovered well before this application was filed. Applicant's delay of more than ten (10) years after his plea to raise this allegation indicates his lack of desire to pursue an appeal. Bonnette v. State, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981) (citing 92 C.J.S. Waiver, p. 1063 (1955)) ("Acts inconsistent with the continued assertion of a right, such as a failure to insist upon the right, may constitute waiver.").


IT IS THEREFORE ORDERED that, for the reasons set forth in the Court's Conditional Order of Dismissal, the Application for Post-Conviction Relief is hereby **denied and dismissed with prejudice.**

This Court notes Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this order to secure the appropriate appellate review. The Applicant's attention is also directed to Rule 243, SCACR, for appropriate procedures after notice has been timely filed.

IT IS SO ORDERED THIS 18 DAY OF December, 20 14.



THE HONORABLE WILLIAM H. SEALS, JR.
Twelfth Judicial Circuit


_____, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHESTERFIELD
IN THE COURT OF COMMON PLEAS

2015 JUN 8 AM 11 18
FAYE L. SELLERS
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.

KENYON D. GAITHER,
Applicant,

v.

STATE OF SOUTH CAROLINA,
Respondent.

A True Copy Attest

Faye L. Sellers


CLERK OF COURT C.P. & G.S.
CHESTERFIELD COUNTY, SC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Conditional Order has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

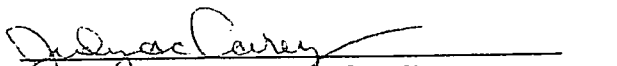
**Kenyon Dajuan Gaither, 15113-171
FCI Bennettsville
Post Office Box 52020
Bennettsville SC 29512**

This 14th day of August, 2013.



JOSHUA L. THOMAS
ATTORNEY FOR RESPONDENT

SWORN to before me this 14th day of August, 2013.



Notary Public for South Carolina.
My Commission Expires: May 11, 2014

STATE OF SOUTH CAROLINA
 COUNTY OF CHESTERFIELD

IN THE COURT OF COMMON PLEAS

Kenyon D. Gaither
 Plaintiff

v.

CASE NO.
 2013-CP-13-0140

State Of South Carolina
 Defendant.

MOTION AND ORDER INFORMATION
 FORM AND COVER SHEET

A True Copy Attest

 CLERK OF COURT C.P. & G.S.
 CHESTERFIELD COUNTY, SC

Plaintiff's Attorney: Kenyon D. Gaither, 15113-171, Bar No. Address: FCI Bennettsville Post Office Box 52020 Bennettsville SC 29512 phone: fax: e-mail: other:	Defendant's Attorney: Joshua L. Thomas, Bar No. 100777 Address: Post Office Box 11549 Columbia SC 29211-1549 phone: (803) 734-3737 fax: (803) 734-4113 e-mail: other:
--	--

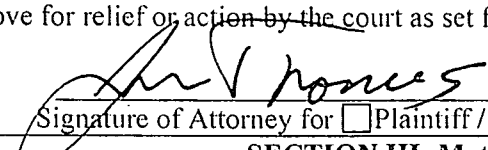
MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
 FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
 PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion:
 Estimated Time Needed: Court Reporter Needed: YES / NO

SECTION II: Motion/Order Type

Written motion attached
 Form Motion/Order
 I hereby move for relief or action by the court as set forth in the attached proposed order.


 Signature of Attorney for Plaintiff / Defendant

December 17, 2014
 Date submitted

SECTION III: Motion Fee

PAID - AMOUNT:
 EXEMPT:

(check reason)

Rule to Show Cause in Child or Spousal Support
 Domestic Abuse or Abuse and Neglect
 Indigent Status State Agency v. Indigent Party
 Sexually Violent Predator Act Post-Conviction Relief
 Motion for Stay in Bankruptcy
 Motion for Publication Motion for Execution (Rule 69, SCRPC)
 Proposed order submitted at request of the court; or,
 reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:
 Other:

JUDGE'S SECTION <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other:	JUDGE: _____ CODE: _____ Date: _____
--	---

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

MOTION FEE COLLECTED: _____

2015 JAN 8 AM 11 18
 FAMILY SERVICES
 CLERK OF COURT
 CHESTERFIELD COUNTY, S.C.

STATE OF SOUTH CAROLINA
COUNTY OF CHESTERFIELD
IN THE COURT OF COMMON PLEAS

KENYON D. GAITHER,

Applicant,

v.

STATE OF SOUTH CAROLINA,

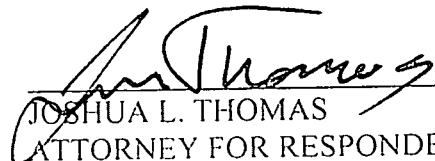
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Final Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

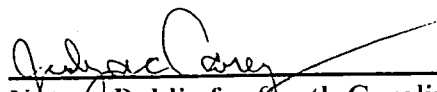
**Kenyon D. Gaither, 15113-171
FCI Bennettsville
Post Office Box 52020
Bennettsville SC 29512**

This 26th day of January, 2015.



JOSHUA L. THOMAS
ATTORNEY FOR RESPONDENT

SWORN to before me this 26th day of January, 2015.



Notary Public for South Carolina.
My Commission Expires: May 14, 2024

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHESTERFIELD)
)
)
Kenyon D. Gaither,)
)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS

2013-CP-13-0140

CONDITIONAL ORDER OF DISMISSAL

FAY L. SELLERS
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.

2013 MAR 31 AM 10 41

A True Copy Affidavit
Filed of
CLERK OF COURT C.P. & G.S.
CHESTERFIELD COUNTY, S.C.

PROCEDURAL HISTORY

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed March 21, 2013. Respondent made a timely Return, requesting summary dismissal of the matter. This Court also has before it the records of the Clerk of Court regarding the subject convictions.

Upon information and belief, Applicant is not currently incarcerated with the South Carolina Department of Corrections. Applicant was indicted at the January 2003 term of the Chesterfield County Grand Jury for possession with intent to distribute crack cocaine (2003-GS-13-0034). Patricia Rivers, Esquire, represented Applicant. On February 2, 2003, Applicant pled guilty to possession with intent to distribute powder cocaine before the Honorable Paul M. Burch who sentenced Applicant to five years imprisonment. Applicant did not appeal his conviction or sentence.

ALLEGATIONS

Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
 - a. "Counsel misinformed petitioner of the crime"
 - b. "Counsel did not ask petitioner, have police read his Miranda rights"
2. "Plea agreement not knowing or intelligent"
3. "Violation of Sixth Amendment and Fifth Amendment."


DISCUSSION

This Court finds that the Application should be dismissed with prejudice as it was filed beyond the statute of limitations.

Applicant has failed to comply with the filing procedures of the Act. S.C. Code Ann § 17-27-10 to -160 (1976 & Supp. 1997). The Act 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.

S.C. Code Ann. § 17-27-45(a) (Supp. 1998).

 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). Applicant's conviction was February 2, 2003. This application was filed beyond the time the statutory filing period 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) (1985) authorizes the PCR 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

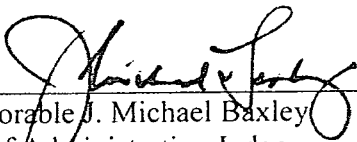
judgment as a matter of law." Therefore, the Court finds that it should summarily dismiss the Application for PCR for failure to file within the time mandated by statute.

CONCLUSION

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 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, and serving such reasons with the SC Office of the Attorney General: Attn. Assistant Attorney General Tyson A. Johnson, Sr., Post Office Box 11549, Columbia, SC 29211.

AND IT IS SO ORDERED this

23RD day of MAY, 2013.


Honorable J. Michael Baxley
Chief Administrative Judge
4th Circuit

DARLINGTON, South Carolina.

STATE OF SOUTH CAROLINA

COUNTY OF CHESTERFIELD

IN THE COURT OF COMMON PLEAS

Kenyon D. Gaither
 Plaintiff

CASE NO.
2013-CP-13-0140

v.

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

State Of South Carolina
 Defendant.

CLERK OF COURT
STATE OF SOUTH CAROLINA
CHESTERFIELD COUNTY, SC
True Copy
Filed 5/14/13

Plaintiff's Attorney: Kenyon D. Gaither, Bar No. Address: Chesterfield County Detention Center 319 Goodale Road Chesterfield SC 29709 phone: fax: e-mail: other:	Defendant's Attorney: Tyson Andrew Johnson, Sr., Bar No. 16230 Address: Post Office Box 11549 Columbia SC 29211-1549 phone: (803) 734-3737 fax: (803) 734-4113 e-mail: other:
--	---

MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
 FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
 PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: _____

Estimated Time Needed: _____ Court Reporter Needed: YES / NO

SECTION II: Motion/Order Type

Written motion attached
 Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

 Signature of Attorney for Plaintiff / Defendant

May 14, 2013
 Date submitted

SECTION III: Motion Fee

PAID - AMOUNT:
 EXEMPT:

(check reason)

Rule to Show Cause in Child or Spousal Support
 Domestic Abuse or Abuse and Neglect
 Indigent Status State Agency v. Indigent Party
 Sexually Violent Predator Act Post-Conviction Relief
 Motion for Stay in Bankruptcy
 Motion for Publication Motion for Execution (Rule 69, SCRCP)
 Proposed order submitted at request of the court; or,
 reduced to writing from motion made in open court per judge's instruction

Name of Court Reporter: _____

Other: _____

JUDGE'S SECTION <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____	JUDGE: _____ CODE: _____ Date: _____
--	---

CLERK'S VERIFICATION

Collected by: _____

Date Filed: _____

MOTION FEE COLLECTED: _____
 CONTESTED - AMOUNT DUE: _____

2013 MAY 31 AM 10 43
FAYE L. SELLERS
CLERK OF COURT
CHESTERFIELD COUNTY, SC

STATE OF SOUTH CAROLINA
COUNTY OF CHESTERFIELD
IN THE COURT OF COMMON PLEAS

KENYON D. GAITHER,
Applicant,

v.

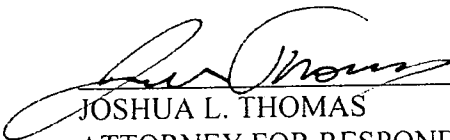
STATE OF SOUTH CAROLINA,
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Conditional Order has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:


**Kenyon Dajuan Gaither, 15113-171
FCI Bennettsville
Post Office Box 52020
Bennettsville SC 29512**

This 14th day of August, 2013.



JOSHUA L. THOMAS
ATTORNEY FOR RESPONDENT

SWORN to before me this 14th day of August, 2013.



Notary Public for South Carolina.
My Commission Expires: May 11, 2014