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LYNN W. LANCASTER

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF LAURENS ) EIGHTH JUDICIAL CIRCUIT

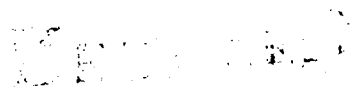
Tyrone Shumpert, #292828, ) 2015 JAN 22 A 10: 03 ) 2010-CP-30-0339

Applicant, )  
LAURENS COUNTY )  
CLERK OF COURT )  
v. )

**ORDER OF DISMISSAL**

State of South Carolina, )  
Respondent. )

This matter comes before the Court by way of an application for post-conviction relief filed March 11, 2010. The Respondent made its Return and Motion to Dismiss on October 13, 2010. The Honorable Eugene C. Griffith Jr. issued a Conditional Order of Dismissal on October 25, 2010. The Applicant filed a timely response on November 5, 2010. Judge Griffith then issued an "Order Vacating Order of Dismissal and Setting Case for Evidentiary Hearing" on December 9, 2011. Judge Griffith then issued an Amended Conditional Order of Dismissal on August 17, 2012. A hearing was held on June 3, 2013 before Judge Griffith, whereupon Judge Griffith appointed Josh Nasrollahi, Esquire as counsel for Applicant's co-defendant, Derek Mosley. Another hearing was scheduled for before the Honorable Donald B. Hocker on February 18, 2014. However, the case was continued. This case came before this Court on October 17, 2014; however, this case was continued because Mr. Mosely, incarcerated in the Federal Correction Institution McKean, located in Lewis Run, Pennsylvania, was unavailable for testimony. An evidentiary hearing into the matter was convened on December 5, 2014, at the Greenwood County Courthouse. The Applicant was present and represented by Elizabeth Wivoul, Esquire, Brian J. Ellsworth, Esquire who, by agreement of all



parties, appeared on behalf of Josh Nasrollahi. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

### **Procedural History**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment by the Laurens County Clerk of Court. The Applicant was indicted at the November 2002 term of the Laurens County Grand Jury for two (2) counts of Armed Robbery, one (1) count of Conspiracy, and one (1) count of Possession of a Firearm During Commission of a Violent Crime. The Applicant was represented by William G. Mayer, Esq. On April 28, 2003, the Applicant went to trial before the Honorable James W. Johnson, Jr., and was convicted by a jury of two counts of Armed Robbery and one count of Conspiracy. The jury found him not guilty of the possession of a weapon charge. The Honorable James W. Johnson, Jr. sentenced the Applicant to confinement for a period of twenty-two (22) years for each count of Armed Robbery, and five (5) years for Conspiracy, all sentences to be served concurrently with credit for time served.

The Applicant then appealed to the South Carolina Court of Appeals. He was represented by Appellate Defender Tara S. Taggart who filed an Anders brief on his behalf raising the following issue: "[w]hether the judge erred in failing to grant a directed verdict of acquittal where there was insufficient evidence of guilt.?" The Applicant filed a *pro se* brief on September 14, 2002 in which he alleged a Batson violation, prosecutorial misconduct based on a comment, bolstering of witnesses, improper seating of a juror, and ineffective counsel. The Court of Appeals dismissed his appeal by after review pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Shumpert, Op. No. 2005-UP-095 (S.C. Ct. App., filed February 8, 2005). The Remittitur was issued on March 15, 2005.



2005-CP-30-422

The Applicant subsequently filed his first application for post-conviction relief (PCR) on May 24, 2005. In this application the Applicant alleged that he was being held in custody illegally for the following reasons:

- 1.) "Counsel Failed to Object to an All White Jury";
- 2.) "Counsel Failed to Present a(sic) Alibi Defense"; and
- 3.) "Counsel Failed to Object to Prosecutor's Argument Alluding to the Defendant's Failure to Put up a Defense."

An evidentiary hearing was convened on January 18, 2005 at the Laurens County Courthouse before the Honorable Wyatt T. Saunders. The Applicant was present at the hearing and was represented by Rodney Richey, Esquire. The PCR court heard testimony from the Applicant, Candi Robertson, and William Mayer. On March 6, 2006, Judge Saunders entered an order denying the application.

On October 27, 2006, the Applicant filed a Petition for Writ of Certiorari in the Supreme Court of South Carolina raising the following issue, " Whether [Applicant]'s case should be remanded for consideration of an affidavit that was wrongly excluded?" The Respondent made its Return to the petition on January 7, 2007. On December 13, 2007, the South Carolina Supreme Court entered an order granting certiorari and setting a briefing schedule. The Brief of Petitioner was filed on January 9, 2008. The Respondent filed its Brief on February 8, 2008. <sup>On</sup> ~~On~~ May 12, 2008, the Supreme Court affirmed the judgment denying pos-conviction relief. Shumpert v. State, 378 S.C. 62,661 S.E.2d 369 (2008). The Remittitur was issued on May 29, 2008.

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The Applicant then filed a Petition for Habeas Corpus in the Federal Court for the District of South Carolina on September 9, 2008. Here Applicant alleged he was being held illegally and was entitled to relief for the following reasons:

1. "Trial counsel failed to move for a Batson violation: where all members of my race were struck from the jury;"
  - a. Supporting Facts: "During jury selection juror 53 David Jackson and juror 33 Gregory Fielder was (sic) struck from jury selection by prosecutor. Plus all jurors picked were Caucasian, over the age of 35 by 90%"
2. "Counsel fail (sic) to present an alibi defense;"
  - a. Supporting Facts: "At trial Kenya Robinson was present because I notified her by phone is the only reason. Oscar Taylor, Brandon William, Marcus Brown and Lomar Todd were never subpoena(sic) to trial after repeated request to councilman Mayo."
3. "Counsel failed to object to prosecutor's alluding to my failure to present a defense;"
  - a. Supporting Facts: "Prosecutor statement: 'there's been absolutely nothing presented for you not to believe Derrick Mosely' who was the state's only witness. This also influenced the jury to use the right to silence against me. [The extraneous influence!!]"
4. "Denial of Admissibility of Juror Affidavit;"
  - a. Supporting Facts: "Post-conviction relief judge did not allow the affidavit on record. Affidavit contained facts that my silence was prosecutor's extraneous influence outside deliberations."

The Respondent moved for summary judgment on December 17, 2008. On January 26, 2009, the Applicant filed a *pro se* response opposing Respondent's motion for summary judgment in which he moved for appointment of counsel, claimed actual innocence, and asserted the following claims:

1. Actual innocence
  - a. Co-defendant Derek Mosley will testify on Applicant's behalf that he lied under oath during Applicant's trial and that Applicant took no part in the crime and had no knowledge of it.



2. Brady violation
3. Ineffective assistance of trial counsel
  - a. For not subpoenaing witnesses and not providing him with a copy of his Rule 5/discovery materials
  - b. Failing to present a defense
  - c. Failing to object to solicitor's improper comments
4. Prosecution intimidated witnesses
5. Batson violation
6. Prosecutorial misconduct in comments made to jury and in bolstering of witnesses

On April 22, 2009 the Magistrate's Report and Recommendation was issued recommending the Respondent's Motion of Summary Dismissal be granted. By written order dated May 12, 2009 the Honorable Henry F. Floyd, United States District Judge for the District of South Carolina dismissed the Petition with prejudice.

#### **Current Application**

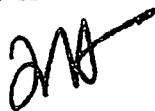
In his current application, Applicant is alleging that he is being held in custody unlawfully for the following reason:

1. 17-27-45(c) After/Newly discovered evidence: co-defendant's affidavit or recanted statement

#### **FINDINGS OF FACT AND CONCLUSION OF LAW**

S.C. Code § 17-27-45(c) states: If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

In addition, a party making a motion for a new trial or for relief from judgment based on

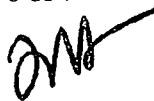


newly-discovered evidence must show that the evidence: (1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching. Lanier v. Lanier, 364 S.C. 211, 612 S.E.2d 456 (S.C. App. 2005).

At the hearing on December 5, 2014, Derek Mosley, who testified by telephone, testified that he was contacted in 2009 by Applicant's family to meet with them at my Laurens County Courthouse. Mr. Mosely then stated he met Applicant's family at the ~~Courthouse~~ <sup>past office</sup> and wrote a statement, essentially recanting the testimony he gave at Applicant's trial in 2003. This statement contradicts his testimony at trial by stating his testimony at trial was incorrect and Applicant was innocent of the charges. Mr. Mosley also testified Applicant's brother was standing beside Mr. Mosely and threatened Mr. Mosely if he did not sign the statement.

On cross-examination, Mr. Mosely stated his testimony during Applicant's 2003 trial was the truth and the statement signed in 2009 was not the truth, but a forced statement.

After a complete review of the record, consideration of the testimony presented at the hearing and a review of the applicable law, this Court finds the Applicant has failed to meet his burden of proof in this case and thus, his application for a new trial should be denied. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985) (In PCR, Applicant has the burden of proving the allegations in his application). The information that Applicant claims is "newly discovered evidence" was clearly available during his trial in 2003 and could have been discovered well prior to his application under S17-27-45(c) being filed. Thus, this Court finds Applicant's application for PCR is procedurally barred. More significantly, Mr., Mosley testified that the statement given in 2009 was not the truth and testified as to the coercion at the time he provided this statement. Accordingly, even if this



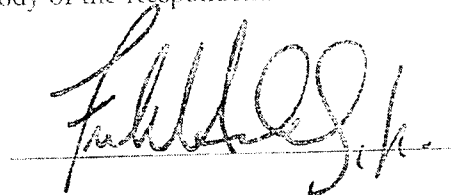
Court were to reach the merits, the Applicant had failed to show how this information would probably change the result of his trial, could not have been discovered before the trial or is material to the issue; thus, he fails the Lanier test. Therefore, even on the merits, this application must be denied.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel 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 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRPC, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED!



Frank R. Addy, Jr.  
Presiding Circuit Court Judge  
Eighth Judicial Circuit

January 16, 2015

Greenville, South Carolina

A TRUE COPY OF ORIGINAL

John W. Lancaster  
John W. Lancaster  
Circuit Court Judge