

STATE OF SOUTH CAROLINA)
)
 COUNTY OF YORK)
)
 Richard Keith Poe, #259297)
)
 Applicant,)
)
 vs.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 SIXTEENTH JUDICIAL CIRCUIT **RECEIVED**

C.A. No.: 2014-CP-46-2656 MAR 20 2015

S.C. Supreme Court

ORDER

FILED - RECEIVED
 2015 FEB 24 PM 3:08
 DAVID HAMILTON
 C.C.C.P. & GS
 YORK COUNTY, SC

The undersigned issued a Conditional Order of Dismissal in this matter on January 5, 2015, filed January 26, 2015. The undersigned received a package of material from Applicant on or about January 14, 2015. This material was returned to Applicant by letter which indicated the material had to be filed with the Clerk of Court, not a judge. Applicant did file an "Objection to the Motion to Dismiss" on February 6, 2015.

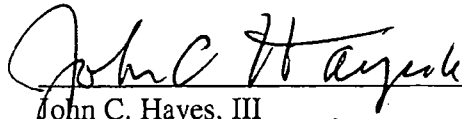
The Court will treat the "Objection" as Applicant's position on the Court's grant of a Conditional Order of Dismissal.

Having reviewed the file, Applicant's Application for Post-Conviction Relief, the Conditional Order of Dismissal and Applicant's "Objections," I find no merit to Applicant's "Objections."

Therefore, the Conditional Order dated January 5, 2015, is hereby made final and the Application of Post-Conviction Relief in this case (2014-CP-46-2656) is DISMISSED with prejudice.



IT IS SO ORDERED.


John C. Hayes, III
Presiding Judge #2

February 18, 2015
York, South Carolina

2013-CP-46-2033

The Applicant filed his first application for post-conviction relief on July 3, 2013. The Applicant raised the following issues in his first application:

1. "Ineffective Assistance of Counsel"
2. "Prejudice by 16th Circuit Solicitor also by Judge Hayes and Judge Alford"

Respondent made its Return on September 10, 2013. An evidentiary hearing was convened on January 22, 2014. The Applicant was represented by W. Michael Hemlepp, Jr., Esquire. The Honorable J. Michael Baxley, denied and dismissed the Applicant's application with prejudice by Order dated March 6, 2014.

A timely Notice of Appeal was filed and an appeal was perfected. This appeal is currently pending.

2014-CP-46-2424

The Applicant filed a second application for PCR on July 28, 2014. The Respondent filed its Return and Motion to Dismiss on September 26, 2014. This Court issued a Conditional Order of Dismissal on September 29, 2014. The Applicant responded to the Conditional Order of Dismissal on October 14, 2014 and filed amendments on October 23, 2014 and October 29, 2014. This action is currently pending.

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

1. "Ineffective Assistance of Counsel"
2. "Prejudice and Bias by Judge Baxley"
3. "Lack of jurisdiction to except(sic) plea"
4. "insufficient indictments"

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds that the current application for post-conviction relief must be summarily dismissed because it is successive to his prior application 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).

Jc H# 3

This Court additionally finds 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 judgement 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 June 4, 2013. Therefore, the Applicant was required to file his application by June 5, 2014. This Application was filed on August 13, 2014, which was well after the statutory filing period had expired.

Further, the Applicant contends he received Ineffective Assistance of PCR Counsel, thus initiating a claim under Martinez v. Ryan, 132 S.Ct. 1309 (2012). However, this Court finds the finds that pursuant to Kelly v. State, 745 S.E.2d 377 (2013), the South Carolina Supreme Court held "Martinez is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions." Therefore, this allegation must be summarily dismissed.

Moreover, the Applicant claims Judge Baxley, the original PCR judge, was prejudice and bias towards Applicant. This claim is one that must be raised on PCR appeal and not in a successive, untimely PCR action. Therefore, this allegation must be summarily dismissed.

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 Court to "grant a motion by

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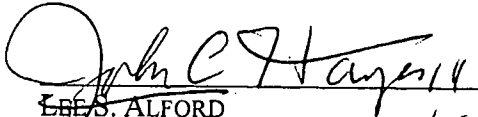
either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, this Court finds that the application for post-conviction relief is summarily dismissed for failure to file within the time mandated by statute and for being successive.

CONCLUSION

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

Office of the Attorney General
Attn: J. Rutledge Johnson, Esquire
P.O. Box 11549
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 5th day of January, 2015.


ERES. ALFORD
Chief Administrative Judge # 9
Sixteenth Judicial Circuit

York, South Carolina