

Original

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

MAR 23 2015

APPEAL FROM LAURENS COUNTY
COURT OF COMMON PLEAS

S.C. Supreme Court

FRANK R. ADDY, JR., CIRCUIT COURT JUDGE

CASE No.: 2014-CP-30-0228

DWIGHT SULLIVAN,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

DWIGHT SULLIVAN APPEALS THE CONDITIONAL ORDER OF DISMISSAL DATED SEPTEMBER 25, 2014 AND THE FINAL ORDER OF DISMISSAL DATED JANUARY 8, 2015 OF THE HONORABLE FRANK R. ADDY, JR.. PETITIONER RECEIVED WRITTEN NOTICE OF ENTRY OF THE FINAL ORDER OF DISMISSAL ON FEBRUARY 26, 2015.

MARCH 16, 2015

Dwight Sullivan
1st
DWIGHT SULLIVAN #309653
McCI F-3 218-B
386 REDEMPTION WAY
McCORMICK, SC 29899
PETITIONER, PRO-SE

OTHER COUNSEL OF RECORD:

ALAN M. WILSON
ATTORNEY GENERAL OF SOUTH CAROLINA
PO Box 11549
COLUMBIA, SC 29211-1549
ATTORNEY FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM LAURENS COUNTY
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CASE No.: 2014-CP-30-0228

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STATE OF SOUTH CAROLINA,

RESPONDENT.

AFFIDAVIT OF SERVICE

THE ABOVE NAMED PETITIONER CERTIFY THAT ON THIS DAY HE SERVED A COPY OF THE NOTICE OF APPEAL ON THE RESPONDENT BY DELIVERING A COPY OF SAME TO THE McCORMICK CORRECTIONAL INSTITUTION MAIL ROOM, WITH SUFFICIENT POSTAGE PREPAID AND ADDRESSED AS FOLLOWS:

ALAN M. WILSON
ATTORNEY GENERAL OF SOUTH CAROLINA
POST OFFICE BOX 11549
COLUMBIA, SC 29211-1549
ATTORNEY FOR RESPONDENT

THIS 16th DAY OF March, 2015

SWORN TO AND SUBSCRIBED BEFORE ME THIS

16 DAY OF March, 2015

J. Franklin
NOTARY PUBLIC OF SOUTH CAROLINA

MY COMMISSION EXPIRES 12-16-2019

Dwight Sullivan
DWIGHT SULLIVAN #309653
McCI F-3 218-B
386 REDEMPTION WAY
McCORMICK, SC 29899
PETITIONER, PRO-SE

A timely Notice of Appeal was filed on the Applicant's behalf and an appeal was perfected. A brief was filed on the Applicant's behalf pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed the appeal. State v. Sullivan, Op. No. 2007-UP-508 (S.C. Ct. App. filed October 30, 2007). The Remittitur was issued on November 15, 2007.

2008-CP-30-0330

The Applicant subsequently filed an application for post-conviction relief (PCR) on April 1, 2008. The State filed its Return on or about October 14, 2008. An evidentiary hearing was convened on March 30, 2009, at the Newberry County Courthouse, at which the Applicant was present and represented by M. Rita Metts, Esquire. On February 26, 2010, the Honorable Thomas A. Russo denied and dismissed the Applicant's application.

A notice of appeal was filed on the Applicant's behalf and an appeal perfected pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988). This appeal is currently pending.

8:13-876-TMC-JDA

The Applicant thereafter filed a Petition for Writ of Habeas Corpus in the United States District Court for the District of South Carolina on April 4, 2013. The Respondent filed its Return and Motion for Summary Judgment on May 28, 2013. On January 22, 2014, the Honorable Jacquelyn D. Austin issued a Report and Recommendation recommending that the State Motion for Summary Judgment be granted and Applicant Petition be Denied. On March 13, 2014, the Honorable Timothy M. Cain issued an Order adopting the Report and Recommendation and denied and dismissed Applicant's Federal Habeas Corpus Petition.

2013-CP-30-0380

Applicant then filed his second application for post-conviction relief on May 13, 2013. In his application, Applicant raised the following allegations:

- 1) Ineffective assistance of counsel
- 2) "Ineffective Assistance of counsel pursuant to Lafler v. Cooper"
 - a. "Pleas offer was rejected on the advice of counsel and I went to trial and got sentence to life consecutive."

Respondent filed its Return and Motion to Dismiss on July 23, 2013. This Court then issued a Conditional Order of Dismissal on August 16, 2013 provisionally denying and dismissing this action, while giving the Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. Applicant responded to the Conditional Order of Dismissal. After a careful review of Applicant response to the Conditional Order of Dismissal, this Court then issued a Final Order of Dismissal on October 3, 2013.

In his current application for PCR, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel at sentencing phase"
 - a. "counsel failed to object to the Judge's opinion that the Defendant was guilty and expressing opinion that the Defendant is guilty with bias and prejudice."

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} ~~her~~ 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. The Applicant has failed to establish sufficient reason why he could not have raised ^{his} her current allegations in ^{his} her previous application for post-conviction relief; therefore, he has failed to meet the burden imposed upon ^{him} her. 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).

This Court finds, further, 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 9, 2005. The Remittitur after the Applicant's unsuccessful appeal was issued on November 15, 2007. The Applicant was therefore required to file his application by November 16, 2008. This Application was filed on March 20, 2014, which well after the statutory filing period had expired.

A motion for summary judgement 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 judgement 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.

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 Laurens 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 9th day of Sept. 2014
Frank R. Addy, Jr.
FRANK R. ADDY, JR.
Chief Administrative Judge
Eighth Judicial Circuit

Lancaster, South Carolina

A TRUE COPY OF ORIGINAL

Lynn W. Lancaster
Lynn W. Lancaster
Laurens County CCCP & GS

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LYNN W. LANGASTER

STATE OF SOUTH CAROLINA)
COUNTY OF LAURENS)

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

2015 JAN -8 A 10-49

Dwight Sullivan #309653,)

2014-CP-30-0228

LAURENS COUNTY
CLERK OF COURT

v.)

FINAL ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed March 20, 2014. The Respondent (the State) made its Return and Motion to Dismiss on September 4, 2014, requesting that the Application be summarily dismissed. Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal dated September 9, 2014, provisionally denying and dismissing this action, while giving the Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. Attached to this Final Order and incorporated herein is an Affidavit of Service dated October 22, 2014, serving the above-mentioned Conditional Order of Dismissal on the Applicant.

In a document titled "Objection to Conditional Order of Dismissal" dated October 27, 2014, the Applicant argues he has newly discovered evidence that people in the courtroom during his trial on June 9, 2005 heard the Honorable William P. Keesley utter a "bias and impartial statement" which shows that he did not receive a fair trial. He also claims he discovered this information in

March of 2014. This Court has reviewed the Applicant's response to the State's motion to dismiss in its entirety, in conjunction with the original pleadings, and finds that a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final.

According to S.C. Code Ann. § 17-27-45(c), the Applicant must file "within one year after the date of actual discovery of the facts" or "after the date when the after the facts could have been ascertained by the exercise of reasonable diligence" to be within the statute of limitations. As the burden of proof is on the Applicant to prove he filed this application within the time prescribed by § 17-27-45(c), he has provided no credible evidence that this information could not have been discovered by the exercise of due diligence. Applicant's trial was conducted on June 6-9, 2005. This information would have been available by the end of his trial and therefore, Applicant must have filed this by June 10, 2006. Under § 17-27-45(c), Applicant could have discovered this information within one year of his trial by the exercise of due diligence and therefore, Applicant has failed to meet his burden of proof in this case.

Accordingly, this Court finds no reason why the Conditional Order of Dismissal should not become final.

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

This Court hereby notifies the Applicant that he must file and serve a Notice of Appeal within thirty (30) days of the service of this Order to secure appellate review. See Rule 203, SCACR. The Applicant's attention is directed to Rule 243, SCACR., for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 5th day of December 2014.

Frank R. Addy, Jr.

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

Blawie, South Carolina.

A TRUE COPY OF ORIGINAL
Lynn W. Lancaster
Lynn W. Lancaster
Laurens County, CCCLP & GS

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SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

Post Office Box 21787 - Columbia, South Carolina 29221

Pursuant to Rule 4(d)(2), SCRCP, the Director of the South Carolina Department of Corrections has designated LT McCune (Server) as his duly authorized agent for the purpose of making service of the signed Conditional Order of Dismissal on the below named individual.

STATE OF SOUTH CAROLINA)
COUNTY OF McCormick) AFFIDAVIT OF PERSONAL SERVICE

On this 22nd day of October, 2014, I served the signed Conditional Order of Dismissal on Inmate Dwight Sullivan No. 309653, by delivering personally and leaving a copy of the same at McCormick Correctional Institution, McCormick, South Carolina. Deponent is not a party to this action.

LT McCune
SCDC Server

SWORN TO AND SUBSCRIBED BEFORE ME

this 22 day of October, 2014
[Signature] (L.S.)
Notary Public for South Carolina

My Commission Expires 12-16-2019

ADMISSION OF SERVICE

Service of a copy of the signed Conditional Order of Dismissal is admitted at the S.C. Department of Corrections, McCormick Correctional Institution, McCormick

County, South Carolina, this 22nd day of October, 2014.
s/ Dwight Sullivan
Inmate Signature
SCDC No. 309653

original

DWIGHT SULLIVAN #309653

McCI F-3 218-B
386 REDEMPTION WAY
McCORMICK, SOUTH CAROLINA 29899

MARCH 16, 2015

THE HONORABLE DANIEL E. SHEAROUSE, CLERK
SOUTH CAROLINA SUPREME COURT
PO Box 11330
COLUMBIA, SC 29211

RE: DWIGHT SULLIVAN V. STATE OF SOUTH CAROLINA
NOTICE OF APPEAL
CASE No.: 2014-CP-30-0228

DEAR CLERK:

ENCLOSED FOR FILING ARE THE NOTICE OF APPEAL AND THE CERTIFICATE OF SERVICE, IN REFERENCE TO THE ABOVE ENTITLED MATTER.

PLEASE RETURN TO ME A CLOCK-STAMPED COPY OF THE ENCLOSED DOCUMENTS AT YOUR EARLIEST CONVENIENCE.

THANK YOU FOR ALL YOU DO TO ASSIST ME IN THIS VERY IMPORTANT MATTER.

SINCERELY,



ENCLOSURE(S)

CC: ATTORNEY GENERAL'S OFFICE
PERSONAL FILE

Dwight Sullivan # 309653

M.C. I F3-B-218

386 Redemption way

McCormick, S.C 29899

DANIEL E. STEAROUSE

Clerk South Carolina Supreme Court

P.O. Box 11330

Columbia, S.C 29211