

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 Ricky W. Lowery, #281915,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2011-CP-42-2178

FINAL ORDER

This matter comes before this Court by way of an application for post-conviction relief filed May 16, 2011, and amended on August 17, 2011. Respondent made its Return and Motion to Dismiss on or about May 24, 2012, requesting that the application be summarily dismissed¹.

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 filed January 18, 2013, provisionally denying and dismissing this action, while giving Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. The Applicant was personally served with the signed Conditional Order of Dismissal on January 22, 2013.

Applicant subsequently filed a Petition for Writ of Mandamus to the South Carolina Supreme Court. The Supreme Court gave the Applicant twenty days from the date of the Order dated July 10, 2014, to show cause why the conditional order signed by the Honorable J. Derham Cole, on January 18, 2013, and served on January 22, 2013, should not become final.

¹ Applicant continues to argue that Respondent is attempting to circumvent the court's jurisdiction by attempting to consolidate Applicant's Motion for New Trial, Rule 29(b), SCRCrimP, consolidated in the motion to summarily dismiss the post-conviction relief application. However, this Court notes that it appears the Motion for New Trial was filed in Applicant's General Sessions' matter and because the matter is not addressed in the Conditional Order of Dismissal, this

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Applicant filed a document, in response to the State's initial proposed conditional order of dismissal, captioned, "Motion to Opposing Conditional Order of Dismissal," and dated June 7, 2012. Applicant argues that his application should not be summarily dismissed because "he has shown evidence of material facts." Applicant addresses various facts from the investigation, resulting arrest warrants and indictments and argues that the court should not have accepted his plea to burglary – 1st degree because the State could not have proven its case against him at trial.

Applicant also argues that he should be allowed to proceed on the claim of ineffective assistance of post-conviction relief counsel because he withdrew the direct appeal of his guilty plea in order to file a post-conviction relief application, which makes the application his first initial review of a collateral proceeding. Applicant argues that the recent United States' Supreme Court ruling in Martinez v. Ryan, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), allows for a claim against prior post-conviction relief counsel. However, the Supreme Court of South Carolina recently "recognize[d] that the holding in Martinez is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions." Kelly v. State, 404 S.C. 365, 745 S.E.2d 377 (2013).

Applicant filed a document captioned, "Motion to Recuse," dated June 20, 2012, in which he asked that the Honorable Roger L. Couch be recused from presiding over this matter as Judge Couch was the presiding judge over the Applicant's prior post-conviction relief application.

In a document captioned "Motion Opposing Conditional Order of Dismissal," dated February 5, 2013, and filed February 11, 2013, Applicant argues that his application should not be summarily dismissed because "he has shown evidence of material facts." Applicant addresses various facts from the investigation, resulting arrest warrants and indictments and argues that the court should not have

Court makes no ruling on the Motion for New Trial.

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accepted his plea to burglary – 1st degree because the State could not have proven its case against him at trial. Applicant also again argues that he should be allowed to proceed on the claim of ineffective assistance of post-conviction relief counsel because he withdrew the direct appeal of his guilty plea in order to file a post-conviction relief application, which makes the application his first initial review of a collateral proceeding. Applicant also raises a question regarding the subject matter jurisdiction of this Court as it relates to the Motion for a New Trial filed by Applicant on September 26, 2011, while this post-conviction relief matter was pending.

The Applicant submitted a document captioned, “Amendment to Motion Opposing Conditional Order of Dismissal,” dated March 12, 2013. In this document, Applicant argues that the court had no subject matter jurisdiction to try Applicant because the State failed to establish the corpus delicti of the crime. Applicant also argues that the court lacked subject matter jurisdiction because there were no facts to support his conviction of burglary – 1st degree. Applicant argues that his prior record did not provide for the State to charge him as having two prior burglary convictions.

Applicant also submitted a document captioned “Motion for Modification and Reduction of Sentence,” on May 23, 2013, in which he stated he would be amicable to plead guilty to burglary – 2nd degree with a maximum sentence of fifteen years with credit for time served in place of his prior plea to burglary – 1st degree.

Applicant filed a document captioned “Motion to Compel,” filed May 29, 2013, asking the court to adjudicate his Motion for New Trial, Rule 29(b), SCRCrimP, which was filed on September 26, 2011, separately from the post-conviction relief matter and requesting an attorney to represent him on the Motion.

Applicant submitted a document captioned, “Motion for Summary Judgement (sic)” dated July 15, 2013. Applicant argues that his application should not be summarily dismissed as barred by

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the statute of limitations or successive because he has alleged newly discovered evidence. However, Applicant does not specify what the newly discovered evidence is. Instead, Applicant argues that he should be granted summary judgment against the Respondent because of the failure to address Applicant's motions or complaints in a timely fashion.

Applicant submitted a letter to Respondent on December 3, 2013, addressing the conditional order of dismissal, response times, and various motions filed previously. Applicant also filed a document captioned "Motion for Default," on December 3, 2013, asking this Court to issue a default judgment against the State in this matter because of a lack of response to his "Motion to Compel."

Applicant forwarded a letter with his new address and requesting a response to his prior "Motion for Modification and Reduction of Sentence," on or about January 27, 2014.

Following the filing of his Petition for Writ of Mandamus and the subsequent Order from the South Carolina Supreme Court regarding Judge Cole's authority to rule on this matter, Applicant submitted a letter to Judge Cole, which was received by Respondent on July 24, 2014, asking that Judge Cole review and consider all of Applicant's prior motions and responses in opposition to the conditional order of dismissal.

This Court has reviewed Applicant's motions and responses to the State's Conditional Order of Dismissal 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 served on January 22, 2013, should not become final. Although the Applicant alleges that he has newly discovered evidence, he appears to be attacking the sufficiency of the evidence that the State had against him at the time of his guilty plea. A plea waives any non-jurisdictional defects and defenses, including challenges to the sufficiency of the evidence. "Where a defendant voluntarily, intelligently, and understandingly enters a plea of guilt, this makes it unnecessary for the State to offer evidence to prove the offense

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charged in the warrant or indictment.” State v. Allen, 261 S.C. 448, 200 S.E.2d 684, 686 (1973). This is because the guilty plea “admits all matter of fact averments of the accusation.” Id. The defendant admits all circumstances described in the indictment, leaving only sufficiency of the indictment for review and waiving all other defenses. State v. Thomason, 341 S.C. 524, 534 S.E.2d 708, 709 (2000). Additionally, PCR is not a proper avenue to challenge the sufficiency of evidence. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974); S.C. Code Ann. § 17-27-20(a)(6). Therefore, this Court finds that the Applicant is barred from attacking the sufficiency of the evidence in his original general sessions matter.

As to any claims regarding the effectiveness of prior PCR counsel, this Court finds that the Supreme Court of South Carolina recently “recognize[d] that the holding in Martinez v. Ryan, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions.” Kelly v. State, 404 S.C. 365, 745 S.E.2d 377 (2013). Therefore, this Court finds that claims against prior PCR counsel are barred because this is not a cognizable claim in post-conviction relief.

This Court further finds that Applicant’s current Application is successive to Applicant’s previous application and that Applicant’s current application was filed outside the statute of limitations.

Motion to Recuse

As to the Applicant’s Motion to Recuse, this Court finds that the issue is moot as a result of the Order from the South Carolina Supreme Court vesting sole judicial authority in the Honorable J. Derham Cole, Chief Judge for Administrative Purposes of Common Pleas – Seventh Judicial Circuit.

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Motion to Compel

The Applicant filed a Motion to Compel, alleging that the Respondent consolidated his Motion for New Trial with his application. Applicant seeks an attorney to assist with his Motion for New Trial and seeks a separate adjudication for this Motion. This Court, after reviewing the files, finds that although the Motion for New Trial may have been incorrectly filed in conjunction with the post-conviction relief application initially, the Motion for New Trial was filed in the Applicant's general sessions matter. Therefore, this Court has no authority to review the Motion for New Trial and finds that the Motion to Compel is moot.

Motion for Default Judgment & Motion for Summary Judgment


The Applicant filed both a Motion for Default Judgment and Motion for Summary Judgment. Each Motion appears to seek a judgment against the State for failing to respond to Applicant's various motions and correspondence in a timely manner. For an applicant to be granted default judgment in post-conviction relief he must show prejudice from the State's delay in failing to timely answer his Application. *See Kneece v. State*, 269 S.C. 177, 236 S.E.2d 745 (1977); *Herring v. State*, 262 S.C. 597, 206 S.E.2d 885 (1974). To show prejudice, an Applicant must show that his application has merit. *Herring*. Furthermore, compliance with the statutory time limits is discretionary with the trial court. *Guinyard v. State*, 260 S.C. 220, 195 S.E.2d 392 (1973). This Court finds that the Applicant has failed to demonstrate the requisite prejudice or merit to his application. Therefore, the Motion for Default Judgment and Motion for Summary Judgment are both denied.

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

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This Court cautions 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. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

AND IT IS SO ORDERED this 20 day of November, 2014.



J. Derham Cole
Seventh Judicial Circuit

_____, South Carolina

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