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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

CONDITIONAL ORDER OF DISMISSAL

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 October 18, 2012.

I. PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. The Applicant was indicted at the October 2005 term of the Court of General Sessions for Spartanburg County for one count of grand larceny (2005-GS-42-4608) and one count of first degree burglary (2005-GS-42-4610). Applicant was indicted at the February 2006 term of the Court of General Sessions for Spartanburg County for one count of receiving stolen goods (2006-GS-42-0802) and one count of failure to stop when signaled by officer (2006-GS-42-0804). He was represented by E. Joshua Shultz, Esquire. On July 26, 2006, the Applicant pled guilty as indicted to all charges except first degree burglary, for which he pled guilty pursuant to Alford. He was sentenced by the Honorable J. Mark Hayes, II, to confinement for a period of five (5) years for grand larceny; twenty (20) years for first degree burglary; thirty (30) days for receiving stolen goods; and three (3) years for failure to stop. The sentences were to be served

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concurrently.

A timely Notice of Appeal was filed on Applicant's behalf. By affidavit dated May 29, 2007, the Applicant informed the Court of Appeals of his desire to end his appeal. On June 6, 2007, the appeal was dismissed.

2007-CP-42-2091

The Applicant subsequently filed an application for post-conviction relief (PCR) on June 15, 2007. In that application, Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Involuntary guilty plea,
2. Ineffective assistance of counsel, and
3. Lack of subject matter jurisdiction on the burglary charge.

The Respondent made its Return and Motion to Dismiss on August 28, 2007, and a hearing was convened on November 9, 2007. The Applicant was present and represented by Hattie D.E. Boyce, Esquire. The Respondent was represented by S. Prentiss Counts of the South Carolina Attorney General's Office. The Honorable Roger L. Couch denied the application by written Order filed on January 15, 2008.

The Applicant filed a timely Notice of Appeal. A Petition for Writ of Certiorari on October 20, 2008. The Supreme Court of South Carolina denied the Petition for Writ of Certiorari on June 10, 2009. The Remittitur was issued on June 29, 2009.

Applicant's Current PCR Application

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

1. Ineffective assistance of trial counsel; in that,

- a. Counsel failed to pursue a defense of third party guilt
 - b. Counsel failed to fully investigate, and
2. Ineffective assistance of prior PCR counsel; in that,
 - a. Counsel failed to amend the application to include all issues, and
 3. Denial of Due Process; in that,
 - a. Applicant was denied a meaningful opportunity to present a complete defense.

Before this Court are the records of the Cherokee County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, Applicant's guilty plea transcript, Applicant's PCR application and Respondent's Return and Motion to Dismiss.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Statute of Limitations

This Court 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 (2003). 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 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.

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 offenses he challenges in this Application on July 26, 2006. His appeal of the conviction was denied and dismissed on July 26, 2007. The Applicant was therefore required to file the application before July 26, 2008. This Application was filed on May 16, 2011, which was well beyond the time that the statutory filing period had 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) (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 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.

Successiveness

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 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).

Failure to State a Claim

This Court finds that the current application for post-conviction relief must be summarily dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160 (2003). An Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy.... S.C. Code Ann. § 17-27-20 (1976).

Even if the facts alleged by the Applicant are true, these facts do not support a cognizable claim for post-conviction relief under any of the statutory grounds. The Applicant's contention that he received ineffective assistance of counsel on his prior post-conviction relief application is not a ground for relief. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman

v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Therefore, "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under §17-27-90." Acc. 305 S.C. at 451, 409 S.E.2d at 394.

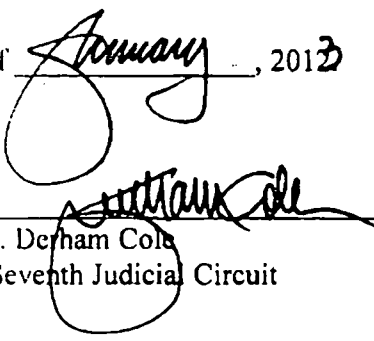
Therefore, this Court finds that the application for post-conviction relief is summarily dismissed for failure to state a claim, because it was filed outside of the statute of limitations, and is successive to his prior application.

Summary

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

Suzanne H. White, Esquire
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

AND IT IS SO ORDERED this 14 day of January, 2013


J. Derham Cole
Seventh Judicial Circuit

South Carolina

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CLERK OF COURT
SPARTANBURG COUNTY

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O. Box 3483
Spartanburg, SC 29304-3483



Phone (864) 596-2591
Fax (864) 596-2239

M. Hope Blackley
Clerk of Court

January 22, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

7TH JUDICIAL CIRCUIT

Ricky W. Conway

Applicant

281915

CASE # 001-CP-42-2178

VS

State

Respondent

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the

judicial Order of Dismissal

In this action dated

1-14

2013

on

1-22-13

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Ricky Conway

1-22-13

(Date)

Corie Gray

(Signature)



ALAN WILSON
ATTORNEY GENERAL

PCR DIVISION: 803.734.3737
PCR FACSIMILE: 803.734.4113

November 8, 2012

The Honorable J. Derham Cole
Presiding Judge
Post Office Box 1744
Spartanburg, South Carolina 29304

RE: **Ricky W. Lowery v. State of South Carolina**
2011-CP-42-2178

Dear Judge Cole:

Our office previously submitted a Return and Motion to Dismiss, along with a proposed Conditional Order of Dismissal in the above matter to Judge Hayes in May 2012. It appears that he forwarded the proposed Conditional Order of Dismissal to the Honorable Roger L. Couch to sign because of prior involvement in the Applicant's plea. However, after receiving a letter from the Applicant and reviewing the signed, clocked Conditional Order, it appears that Judge Couch initialed the pages, but did not sign the Order. The Applicant also filed a Motion to Recuse Judge Couch.

Therefore, I am re-submitting the proposed Conditional Order of Dismissal, along with a copy of my original Return and Motion to Dismiss and accompanying documents. In addition, I am enclosing my August 24, 2012, letter to the Applicant. Also, if it is possible, could you complete a Form 4 Order vacating the previous Conditional Order of Dismissal because of the confusion with the signature?

Please let me know if you have any questions or concerns about this matter, or if you need any additional materials.

Very truly yours,

Suzanne H. White
Assistant Attorney General

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CLERK OF COURT
SPARTANBURG, SC
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M. HOPE BELL

The Honorable J. Derham Cole
November 8, 2012
Page 2

SHW/am
Enclosures

cc: Mr. Ricky W. Lowery, #281915 (w/enclosures)
The Honorable J. Mark Hayes II
The Honorable Roger L. Couch

FILED
CLERK OF SUPERIOR COURT
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M. HOPE ADLER

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Ricky W. Lowery
 Plaintiff

State of South Carolina
 Defendant

IN THE COURT OF COMMON PLEAS

CASE NO.
2011-CP-42-2178

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:
Ricky W. Lowery, Bar No. SCDC No. 281915
Address:
McCormick Correctional Institution
386 Redemption Way
McCormick, South Carolina 29899
phone: fax:
e-mail: other:

Defendant's Attorney:
Suzanne H. White Bar No.
Address:
P.O. Box 11549
Columbia, SC 29211-11549
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 Conditional Order of Dismissal.

Signature of Attorney for Plaintiff / Defendant

November 8, 2012
Date submitted

SECTION III: Motion Fee

- PAID AMOUNT:
- EXEMPT: Rule to Show Cause in Child or Spousal Support
(check reason) 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 instructions

Name of Court Reporter:

Other:

JUDGE'S SECTION

- Motion Fee to be paid upon filing of the attached order.
- Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Date Filed:

Collected by:

- MOTION FEE COLLECTED:
- CONTESTED AMOUNT DUE:

CLERK OF DISTRICT COURT
SPARTANBURG COUNTY
2012 JAN 18 PM 1:59
M. DE BLASIELEY

The Supreme Court of South Carolina

Rick Lowery, Petitioner,

v.

State of South Carolina, Respondent.

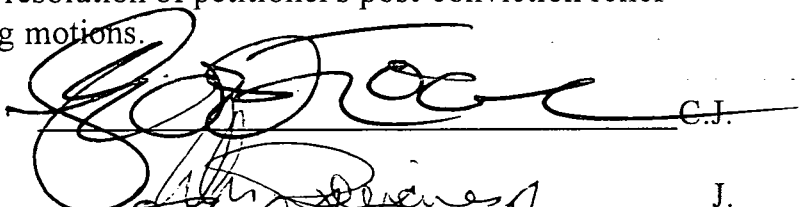
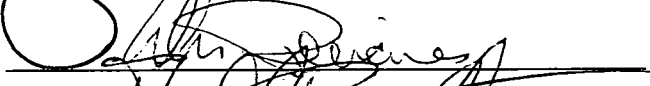

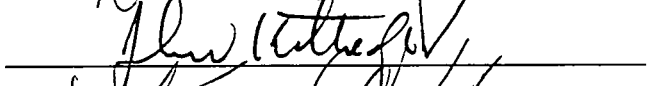
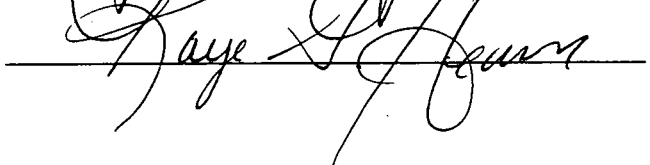
Appellate Case No. 2014-000744

Lower Court Case No. 2011-CP-42-2178

ORDER

Petitioner has filed a petition for a writ of mandamus in this Court's original jurisdiction requesting a "show cause order" for the immediate resolution of his post-conviction relief action. Two proposed conditional orders of dismissal have been filed in this case, one of which was left unsigned and was filed in error. Petitioner has filed timely motions opposing the conditional orders of dismissal. However, a final order has yet to be issued in petitioner's case.

Judge Couch's unsigned conditional order of dismissal filed on June 8, 2012 is hereby vacated. Petitioner shall have twenty days from the date of this order to show cause why the conditional order of dismissal signed by Judge Cole and filed January 18, 2013 should not become final. Judge Cole shall have sole judicial authority to ensure expeditious resolution of petitioner's post-conviction relief action, including all outstanding motions.


C.J.

J.

J.

J.

J.

Columbia, South Carolina

July 10, 2014

cc:

Suzanne H. White, Esquire

The Honorable Roger L. Couch

The Honorable J. Derham Cole

Ricky Willard Lowery, #281915

The Honorable M. Hope Blackley