

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
Michel A. Dukes, Sr., #311176,)	Case No. 2014-CP-26-1339
)	
Applicant,)	
)	
v.)	CONDITIONAL ORDER
)	OF DISMISSAL
State of South Carolina,)	
)	
Respondent.)	
_____)	

Horry County
 2015 JAN -6 PM 1:02
 MELANIE HUGHES-S-WARD
 CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief filed March 5, 2014. The Court finds as follows:

I. PROCEDURAL HISTORY

A. Underlying Conviction

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the November 2003 term of the Horry County Grand Jury for trafficking in crack cocaine, 10-28 Grams (2003-GS-26-3445). Paul Archer, Esquire represented Applicant. On August 8-9, 2005, Applicant proceeded to trial before the Honorable Edward B. Cottingham and a jury. The jury found Applicant guilty as indicted. Judge Cottingham sentenced Applicant as a third drug offender¹ to confinement for a period of eighteen (18) years.

Applicant filed a timely notice of appeal. Aileen P. Clare, Esquire, of the South Carolina Office of Appellate Defense perfected the appeal with the filing of an Anders² brief on October 18, 2006. The South Carolina Court of Appeals dismissed Applicant's appeal on October 8, 2007. Sate v. Dukes, Op. No. 2007-

¹ Applicant has prior convictions in 1996 for possession with intent to distribute marijuana and in 2000 for possession with intent to distribute cocaine.

² Anders v. California, 386 U.S. 738 (1967).

UP-423 (S.C. Ct. App. filed October 8, 2007). The remittitur was returned to the circuit court on December 21, 2007.

B. First Post-Conviction Relief Action (2008-CP-26-489)

Applicant filed his first application for post-conviction relief on January 18, 2008. In his first application, Applicant alleged the following grounds for relief:

1. "Directed Verdict"
 - a. "The judge should have directed a verdict due to the state not putting forth any evidence to show actual or constructive possession"
2. "Ineffective assistance of counsel"
 - a. "Not doing any investigation into whether or not applicants 4th amendment was violated by the officer searching his vehicle..."
 - b. "Proceeding with the picking of the jury in the absence of Applicant..."
 - c. "Court lacked subject matter jurisdiction to sentence applicant as second or subsequent offender for trafficking [because] applicant has never been convicted of trafficking first."
3. "Did judge err in his ruling of Brady violation?"

The Honorable Michael G. Nettles convened a hearing on the application on November 17, 2008. At the hearing, Applicant voluntarily withdrew all claims except the ineffective assistance of counsel claims. Judge Nettles denied relief by order filed December 12, 2008.

Applicant filed a timely notice of appeal. M. Celia Robinson, Esquire, of the Office of Appellate Defense perfected the appeal with the filing of a petition for writ of certiorari on December 11, 2009. The South Carolina Supreme Court denied the petition on January 7, 2011. The remittitur was returned to the circuit court on January 25, 2011. Applicant filed a subsequent notice of appeal, which the Supreme Court dismissed as successive on August 29, 2014. The remittitur was again returned to the circuit court on October 13, 2014.

C. Second Post-Conviction Relief Action (2012-CP-26-3026)

Applicant filed a second application for post-conviction relief on April 13, 2012. In the second application, Applicant alleged the following grounds for relief:

1. Fourth Amendment violations.
2. Trial judge error in selecting a jury outside Applicant's presence.
3. Ineffective assistance of counsel for allowing jury selection outside of Applicant's presence.

The Honorable Steven H. John entered a Conditional Order of Dismissal on June 13, 2012. The Honorable Thomas A. Russo convened a hearing on Applicant's response to the conditional order on August 27, 2012, in Horry County. David C. Hicks, Esquire, represented Applicant at this hearing. Judge Russo issued an order on September 11, 2013, dismissing the second application as untimely and successive.

Applicant filed a timely appeal from Judge Russo's order. On March 8, 2013, the South Carolina Supreme Court dismissed the appeal pursuant to Rule 243(c), SCACR, for failing to demonstrate an arguable basis of error. The remitter was returned to the circuit court on March 26, 2013.

D. Third Post-Conviction Relief Action (2013-CP-26-2686)

Applicant filed a third application for post-conviction relief on April 13, 2013. In this third application, Applicant alleged the following grounds for relief:

1. "Ineffective assistance of trial counsel for not requesting a suppression hearing due to an illegal arrest"
2. "Ineffective assistance of trial counsel by not protecting defendants' 4th and 14th amendment constitutional rights under due process due to an illegal arrest"
3. "Ineffective assistance of counsel by not raising a brady violation"
4. "Lack of subject matter jurisdiction"

Applicant filed an "Amendment and Supplementation" on June 11, 2013, alleging trial counsel failed to object to evidence and statements gathered during an illegal arrest. The Honorable Benjamin H. Culbertson issued a Conditional Order of Dismissal on September 13, 2013. Applicant filed a timely response to the conditional order. Judge Culbertson issued a Final Order of Dismissal on January 7, 2014.

Applicant filed a timely notice of appeal from Judge Culbertson's order. On July 29, 2014, the South Carolina Supreme Court dismissed the appeal pursuant to Rule 243(c), SCACR, for failing to show an arguable error. The remittitur was returned to the circuit court on August 14, 2014. Applicant filed a second

notice of appeal from Judge Culbertson's order. The Supreme Court dismissed that appeal on December 10, 2014, and returned the remittitur to the circuit court on the same day.

E. State and Federal Habeas Corpus Actions

Applicant filed a federal petition for habeas corpus on February 24, 2011 (Case number 0:11-cv-00819-JFA). The United States District Court for the District of South Carolina granted summary judgment against Applicant on January 4, 2012. The District Court denied Applicant's certificate of appealability on February 7, 2012.

On March 8, 2012, Applicant filed a motion to file a subsequent federal habeas corpus action with the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit denied the motion on March 28, 2012. Nevertheless, Applicant filed a second federal habeas corpus on December 19, 2012 (Case number 0:12-3445-JFA-PJG). The District Court dismissed the action on June 4, 2013.

Applicant filed a third federal habeas on February 28, 2013 (Case number 0:13-157-JFA-PJG). This action was dismissed on June 4, 2013 as well.

Applicant filed another motion with the United States Court of Appeals for the Fourth Circuit seeking permission to file a successive habeas corpus petition on March 26, 2014. The Fourth Circuit denied this motion on April 10, 2014. In re: Michel Andre Dukes, No. 14-183 (4th Cir. Apr. 10, 2014).

On July 19, 2013, Applicant attempted to file a document titled "Writ of Habeas Corpus" with the Horry County Clerk of Court. Judge Culbertson denied permission to file the document by letter dated August 8, 2013, because Applicant failed to comply with the filing requirements of the South Carolina Rules of Civil Procedure.

II. CURRENT APPLICATION

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

1. Ineffective assistance of counsel
 - a. Failure to raise Fourth Amendment claim.
 - b. Failure to object to evidence.
 - c. Lack of personal jurisdiction.
2. Parole has been unlawfully revoked.
3. The State failed to disclose immunity agreement with witness.
4. The State failed to disclose a chemical analysis report.
5. The solicitor appeared as sole witness before the grand jury.
6. Violation of right to confront his accusers.
7. Malicious prosecution.
8. Sentence was illegally enhanced.
9. State failed to prove chain of custody.

On March 31, 2014, Applicant filed a document titled "Amendment and Supplementation" re-alleging a Fourth Amendment violation. On June 25, 2014, Applicant filed a second "Amendment and Supplementation" alleging the trial court lacked subject matter jurisdiction. On August 5, 2014, Applicant filed a third "Amendment and Supplementation" alleging ineffective assistance of prior collateral counsel. Respondent made a timely Return and Motion to Dismiss on or about December 12, 2014, asking this Court to dismiss the application for as successive and untimely.

Applicant has also filed the following motions in connection with his application:

1. "Motion for Default and Failure to Respond to Application Within 30 Days" filed April 29, 2014.
2. "Motion for Default" filed May 29, 2014.
3. "Petitioner's Motion for Rule 62(b) Stay of Proceedings to Enforce a Judgment" filed June 25, 2014.
4. "Amendment for Motion for Default for Failure to Respond Within 30 Days as Required by § 17-27-70(a)" filed September 4, 2014.
5. "Motion for the Appointment of Counsel" filed November 18, 2014.
6. Motion for appointment of counsel filed December 9, 2014.

Respondent incorporated its return to these motions in its return and motion to dismiss.

III. FINDINGS OF FACT AND CONCLUSION OF LAW

S.C. Code Ann. § 17-27-70(c) 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.” The Court has reviewed the pleadings and all relevant supporting documents. Pursuant to S.C. Code Ann. § 17-27-70(b), the Court makes the following findings of fact and conclusions of law in ruling on Respondent’s motion to dismiss and Applicant’s other motions:

A. Respondent’s Motion to Dismiss

1. Successive Application

The Court finds this application should be dismissed because it is successive to Applicant’s previous applications for post-conviction relief and petitions for habeas corpus. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 246, 262 S.E.2d 735, 737 (1980). S.C. Code Ann. § 17-27-90 requires that:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the 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.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). Any new ground raised in a subsequent application is limited to those grounds that “could not have been raised . . . in the previous application.” Id. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. Id. The applicant bears the burden of showing that the allegations could not have been raised previously. Id.

The Court finds Applicant failed to present any reasons why these allegations are new and distinct from the allegations contained in his numerous prior collateral attacks on his conviction. The grounds

alleged in the current application are almost identical to the grounds raised Applicant's direct appeal, his three (3) prior post-conviction relief applications, his petition for state habeas corpus, and his four (4) federal habeas corpus actions. To the extent the application includes allegations not include in those collateral attacks, the Court finds Applicant failed to demonstrate any reason why these allegations could not have been previously raised. Therefore, the Court finds summary dismissal is appropriate.

2. Failure to Timely File

The Court further finds this Application should be dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-45(a) provides that:

“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.”

This statute of limitations applies to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 470, 469 S.E.2d 606, 607 (1996).

The remittitur from Applicant's direct appeal was sent on December 21, 2007. Applicant was therefore required to file his application before December 21, 2008. This application was filed on March 5, 2014, which was well beyond the expiration of the statutory filing period. Therefore, the Court finds summary dismissal is appropriate.

A. Applicant's Motions

1. Motion for Deafult

The Court finds Applicant's motions for default should be denied. As a general matter, the State cannot be held in default except in rare circumstances. See Rule 55 (e), SCRCPP (“No judgment by default shall be entered against the State of South Carolina or an officer or agency thereof [...] unless the claimant establishes his claim to relief by evidence satisfactory to the Court.”). In the specific context of post-

conviction relief actions, compliance with the filing deadlines in Rule 12(a), SCRCPP, and S.C. Code Ann. § 17-27-70(a) are not mandatory, but are left to the discretion of the court. Guinyard v. State, 260 S.C. 220, 225, 195 S.E.2d 392, 394 (1973). To be entitled to default relief, the applicant must show that he has been prejudiced by Respondent's delay in filing a return. Kneece v. State, 269 S.C. 177, 178, 236 S.E.2d 746, 747 (1977). An applicant cannot show prejudice where the application was without merit. Herring v. State, 262 S.C. 597, 598, 206 S.E.2d 885, 886 (1974).

The Court finds Applicant has not shown prejudice from Respondent's delay in filing a return. The appeal from Petitioner's prior post-conviction relief action did not conclude until the Supreme Court's issuance of a remittitur on December 10, 2014. Respondent's return is dated December 12, 2014, only two (2) days after the issuance of the remittitur. Furthermore, this date is only 282 days after the application was filed on March 5, 2014. See Guinyard, 260 S.C. at 225, 195 S.E.2d at 394 (no prejudice from 190 day delay); Herring, 262 S.C. at 598, 206 S.E.2d at 886 (no prejudice from eleven month delay).

Furthermore, as noted above, Applicant has not shown his claims are meritorious. His application merely re-alleges the same allegations raised in his numerous prior collateral attacks on his conviction. Because Applicant has had numerous prior occasions to litigate these issues, he has not demonstrated entitlement to relief in the current application. Therefore, Applicant's motions for default are hereby **DENIED**.

2. Rule 60(b) Motion

The Court finds Applicant's motion for relief from judgment should be denied. Rule 60(b)(4), SCRCPP, allows the Court may to relieve a party from a final judgment where the judgment "is void." However, this provision applies only in civil cases and is not applicable to Applicant's criminal conviction. Regardless, none of Applicant's grounds for relief are valid because his conviction is not void for lack of jurisdiction. The trial court had personal jurisdiction over Applicant because he appeared to defend his case.

State v. Adams, 354 S.C. 361, 374-75, 580 S.E.2d 785, 792 (Ct. App. 2003) (citations omitted). Likewise, the trial court had subject matter jurisdiction to convict Applicant because his trafficking trial involved a criminal charge in General Sessions Court. State v. Gentry, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005) (“Circuit courts obviously have subject matter jurisdiction to try criminal matters.”). Therefore, Applicant’s Rule 60(b)(4), SCRPC, motion is hereby **DENIED**.

3. Motions for Appointment of Counsel

The Court finds Applicant’s motions for appointment of counsel should be denied at this juncture. According to the directive of the Supreme Court, the Court should not appoint counsel for successive applications unless the application raises a question of material fact. Re: Appointment of Counsel in Post-Conviction Relief Cases Before the Circuit Court, Order No. 2008-10-06-01 (S.C. Sup. Ct. dated Oct. 6, 2008). Because the questions raised in Applicant’s application have been resolved in his direct appeal, his three prior post-conviction relief applications, his petition for state habeas corpus, and his four federal habeas corpus actions, the Court finds Applicant has not demonstrated a right to appointment of counsel at this time. Should Applicant present issues in his response to this order that warrant a hearing on his application, the Court will appoint counsel pursuant to the Supreme Court’s directive. However, at this time Applicant’s motions for appointment of counsel are **DENIED WITHOUT PREJUDICE**.

IV. CONCLUSION

The Court finds the record before it creates no genuine issue of material fact and Respondent is therefore entitled to judgment as a matter of law.

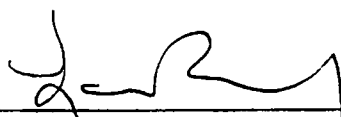
Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. Applicant is granted twenty (20) days from the date of service of this order upon

him to show why this ruling should not become final. Applicant shall file any reasons he may have with the Horry County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Joshua L. Thomas, Esquire
Post Office Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Horry County Clerk of Court within twenty (20) days, and his failure to timely file and serve this response will result in the Court not considering any issues raised therein.

IT IS SO ORDERED THIS 17 DAY OF DEC, 2014.



THE HONORABLE LARRY B. HYMAN, JR.
Chief Judge for Administrative Purposes
Fifteenth Judicial Circuit

Cowley, South Carolina

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JAN 23 2015

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

Post Office Box 21787 - Columbia, South Carolina 29221

GENERAL COUNSEL

Pursuant to Rule 4(d)(2), SCRCP, the Director of the South Carolina Department of Corrections has designated Diane Stubb (Server) as his duly authorized agent for the purpose of making service of the signed Conditional Order of Dismissal and Order Denying Applicant's Rule 60(b)(5) Motion on the below named individual.

STATE OF SOUTH CAROLINA) AFFIDAVIT OF PERSONAL SERVICE

COUNTY OF Marlboro) 000 -> 2014-CP-26-1339 &
ODAR -> 2008-CP-26-489

On this 21 day of January, 2015, I served the signed Conditional Order of Dismissal and Order Denying Applicant's Rule 60(b)(5) Motion on Inmate Michel A. Dukes, Sr., #311176, by delivering personally and leaving a copy of the same at Evans Correctional Institution, Bennettsville, South Carolina. Deponent is not a party to this action.

Diane Stubb
SCDC Server

SWORN TO AND SUBSCRIBED BEFORE ME

this 21 day of January, 2015
Doug Thomas (L.S.)
Notary Public for South Carolina

My Commission Expires Sept 22, 2019

ADMISSION OF SERVICE

Service of a copy of the signed Conditional Order of Dismissal and Order Denying Applicant's Rule 60(b)(5) Motion is admitted at the S.C. Department of Corrections, Evans Correctional Institution, Bennettsville, Marlboro County, South Carolina, this 21 day of January, 2015.

Michel A. Dukes Sr.
Inmate Signature
SCDC No. 311176

2008-CP-26-489
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