

STATE OF SOUTH CAROLINA)
COUNTY OF DARLINGTON)

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT

Russell Dawson.)
S.C.D.C. No. 161707,)
Applicant,)

2013-CP-16-1003

v.)

**CONDITIONAL ORDER OF
DISMISSAL**

State of South Carolina,)
Respondent.)

2015 MAY -7 PM 1:30
SCOTT B. SUGGS
CLERK OF COURT/R.D.D.
DARLINGTON COUNTY, S.C.

FILED

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by Russell Dawson (Applicant) on May 28, 2013. The State (Respondent) made its return, requesting the application be summarily dismissed.

I.

Applicant was indicted during the July 1989 term of the Darlington County Grand Jury for criminal sexual conduct in the first degree, two counts of kidnapping, and two counts of armed robbery. Applicant proceeded to trial, and Marshall Rogol, Esquire, represented him. The Honorable C. Anthony Harris directed verdicts of acquittal on the kidnapping charges. Judge Harris directed a mistrial on the criminal sexual conduct charge after the jury could not reach a verdict. The jury found Applicant guilty as indicted on the armed robbery charges. On February 7, 1990, Judge Harris sentenced him to consecutive terms of imprisonment of twenty-five years on both charges.

Applicant appealed, and the South Carolina Supreme Court affirmed his convictions and sentences. *State v. Dawson*, Op. No. 1991-MO-0198 (S.C. Sup. Ct. filed July 15, 1991).

First PCR Application: 1994-CP-16-0093

Applicant filed his first PCR application on January 18, 1994, alleging the following grounds for relief:

1. "I was falsely accused for crimes I did not commit."
2. "Inefficient counsel."

An evidentiary hearing was held on August 17, 1994, at the Darlington County Courthouse. Hugh Cannon, Esquire, represented Applicant. By order dated October 31, 1994, the Honorable James E. Lockemy denied and dismissed the application. Applicant appealed, and the South Carolina Supreme Court denied his petition for a writ of certiorari on October 5, 1995.

Second PCR Application: 1996-CP-16-0153

Applicant filed his second PCR application on March 19, 1996, alleging the following grounds for relief:

1. Ineffective assistance of counsel.
2. Denial of full and fair post-conviction relief proceeding.

The Honorable Edward B. Cottingham issued a conditional order of dismissal on October 28, 1996. The Honorable Gerald Smoak issued a final order of dismissal on January 21, 1997.

First Federal Habeas Corpus: 2:00-900-17AJ

Upon information and belief, Applicant filed a pro se federal petition for a writ of habeas corpus on March 28, 2000. Respondent made its return on May 9, 2000. Upon information and belief, a magistrate judge issued a report and recommendations on August 22, 2000, and the United States District Court of South Carolina dismissed Applicant's petition on October 2, 2000.

Third PCR Application: 2001-CP-16-0058

Applicant filed his third PCR application on February 7, 2001, alleging the following grounds for relief:

1. Ineffective assistance of counsel.
2. Illegal sentence and conviction.
3. Violation of constitutional rights.

An evidentiary hearing was held on September 9, 2002, at the Darlington County Courthouse. Eugene Warr, Esquire, represented Applicant. By order dated November 12, 2002, the Honorable John M. Milling denied and dismissed the application. Applicant appealed, and the South Carolina Supreme Court denied his petition for a writ of certiorari on August 4, 2004.

Fourth PCR Application: 2004-CP-16-0781

Applicant filed his fourth PCR application on September 14, 2004, alleging the following grounds for relief:

1. Subject matter jurisdiction.
2. Ineffective assistance of counsel.
 - i. Trial attorney failed to object to defective indictments that did not have the time, place, and element of the charges of armed robbery.
 - ii. Trial attorney failed to object to defective indictment that did not have the element of the charge of criminal sexual conduct.

The circuit court issued a conditional order of dismissal on February 23, 2005. On May 26, 2005, the Honorable J. Michael Baxley issued a final order of dismissal.

Fifth PCR Application: 2004-CP-16-1034

Applicant filed his fifth PCR application on December 14, 2004, alleging the following grounds for relief:

1. "The Court lacks subject matter jurisdiction."
2. "The Solicitor tried the Applicant without an arrest warrant or an indictment on the charge of criminal sexual conduct."
3. Violation of "Fifth Amendment Right to indictment by grand jury."

The circuit court issued a conditional order of dismissal on February 23, 2005. On May 26, 2005, the Honorable J. Michael Baxley issued a final order of dismissal.

Sixth PCR Application: 2007-CP-16-1000

Applicant filed his sixth PCR application on November 7, 2007, alleging the following grounds for relief:

1. Ineffective assistance of trial counsel.
2. Prosecutorial misconduct.
3. Denial of due process.
4. Newly discovered evidence:
 - i. The CSC charge "was never considered by a sitting grand jury."
 - ii. Was denied a preliminary hearing.

Respondent made its return on February 15, 2008. The circuit court issued a conditional order of dismissal on February 19, 2008. The Honorable James E. Lockemy issued a final order of dismissal on April 28, 2008.

II.

Applicant filed his *seventh* and current application on May 28, 2013, and amended application on November 6, 2014, alleging the following grounds for relief:

1. "Direct appeal counsel was ineffective when he failed to conduct a reasonable investigation of facts and circumstances surrounding the case. With it direct appeal counsel would have done the investigation turnout could have been different."
2. "Plus denied due process of law violated."
3. "Counsel was ineffective by going on with direct appeal when he failed to conduct a reasonable investigation of the facts and circumstances surrounding the case which prejudiced the Applicant and denied him due process of law."
4. "Significant and obvious issues with the charging indictment."

Before this Court are the Darlington County Clerk of Court's records regarding the subject convictions, South Carolina Department of Corrections records, and Applicant's previous and current PCR records.

III.

This Court must summarily dismiss Applicant's current PCR application because it is successive to his previous PCR applications. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981); *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code (2014) states:

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 prohibited unless an applicant can present 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.* at 450, 409 S.E.2d at 394. If Applicant could have raised these allegations in a previous application, then he may not raise those grounds in successive applications. *Id.* Applicant bears the burden of showing the allegations could not have been previously raised. *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980).

This Court finds Applicant failed to establish any sufficient reason why he did not raise his current grounds for relief in a previous application. This Court must summarily dismiss Applicant's current application because it is successive to his previous applications.

IV.

This Court finds this application must be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. *See* S.C. Code Ann. §§ 17-27-10 to -160 (2014). Section 17-27-45(a) states:

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 held the one-year 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). Applicant was convicted of the offenses he challenges on February 7, 1990. Therefore, Applicant was required to file his PCR application on or before July 1, 1996.¹ Applicant filed this application on May 28, 2013, **more than sixteen years** after the statutory filing period expired.

Summary dismissal of a PCR application is appropriate when the application is filed after the statutory filing period. *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2003). Section 17-27-70(c) authorizes this 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."

¹ Section 17-27-45(A) of the South Carolina Code was enacted on July 1, 1995. *Peloquin* held "all those convicted prior to the effective date of the statute should be allowed one year after its effective date to file an application." *Peloquin*, 321 S.C. at 470, 469 S.E.2d at 606. Therefore, under *Peloquin*, Applicant was required to file his PCR application by July 1, 1996.

Therefore, this Court must summarily dismiss this application for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act.

V.

This Court finds any claims regarding Applicant's convictions must be summarily dismissed based on the doctrine of laches. Absent some explanation or justification for the delay in seeking post-conviction relief, laches prohibits an applicant from seeking collateral review of his conviction, especially where the delay affects the availability of evidence to refute the applicant's claims. *McElrath v. State*, 276 S.C. 282, 277 S.E.2d 890 (1981); *Whitehead v. State*, 352 S.C. 215, 574 S.E.2d 200 (2002).

To ensure finality of litigation, our courts require reasonable diligence in pursuing collateral relief. This requirement "guards the state's legitimate expectation that it will not be called upon without due cause, to defend the integrity of convictions that occurred many years ago, where records and witnesses are no longer available." *McElrath*, 276 S.C. at 283. South Carolina law also imposes a one-year statute of limitations. *See* S.C. Code Ann. § 17-27-45(a) (2014).

Without offering any justification or explanation for his delay, Applicant filed this application **more than sixteen years** after the statutory filing period expired. Applicant's failure to seek post-conviction relief within a reasonable time after his conviction has unduly prejudiced Respondent. The memories of any necessary witnesses, including Applicant's trial counsel, are also no longer fresh. Therefore, this Court must summarily dismiss this application based on Applicant's failure to diligently pursue his claim for relief.

VI.

Pursuant to section 17-27-70(b) of the South Carolina Code, this 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 days from the date of service of this order upon him to show why this order should not become final. Applicant shall file any reasons he may have with the Darlington County Clerk of Court and shall serve opposing counsel at the following address:

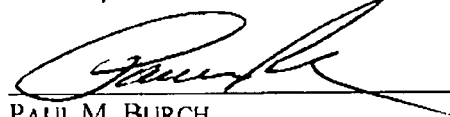
Office of the Attorney General
Elizabeth H. Neyle, Esquire
PCR Division
P.O. Box 11549
Columbia, SC 29211

SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

2015 MAY -7 PM 1:31

FILED

AND IT IS SO ORDERED this 24th day of April, 2015.



PAUL M. BURCH
Chief Judge for Administrative Purposes
Fourth Judicial Circuit

Chesterfield, South Carolina