

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 David Eugene Gregg #296199,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2011-CP-42-3521

CONDITIONAL ORDER OF DISMISSAL

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 SPARTANBURG COUNTY
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 M. HOPE BLANCHLEY

This matter comes before this Court by way of an application for post-conviction relief filed August 11, 2011, first amendment filed November 14, 2011, and second amendment filed July 31, 2012. Respondent made its Return and Motion to Dismiss on or about August 22, 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 June 2002 term of the Court of General Sessions for Spartanburg County for trafficking in cocaine and possession of a firearm during the commission of a violent crime (02-GS-42-2423). He was represented by Andrew J. Johnston, Esquire, and Gerald G. Wilson, Esquire. On September 10-11, 2003, the Applicant proceeded to trial after which he was found guilty as indicted. He was sentenced by the Honorable J. Derham Cole, to confinement for a period of five (5) years for possession of a firearm and twenty-five (25) years for trafficking in cocaine, 200 – 400 grams.

A timely Notice of Appeal was filed and an appeal was perfected pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Gregg, Op. No. 2005-UP-443 (S.C.Ct.App. filed July 14,

2005). Remittitur was issued August 3, 2005.

2005-CP-42-2319

The Applicant subsequently filed an application for post-conviction relief (PCR) on July 29, 2005, and amended on September 27, 2005. In that application, Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel; in that,
 - a. Counsel failed to object to the faulty chain of custody;
 - b. Counsel failed to file a motion to suppress evidence seized in violation of Applicant's due process rights;
 - c. Counsel failed to object to the introduction of the State's witness presented at the Grand Jury where witness acted as sole witness without actual knowledge of the events;
 - d. Counsel waived Applicant's preliminary hearing without consent of the Applicant;
 - e. Counsel failed to object to the introduction of evidence of a SKS assault rifle where such evidence was prejudicial and unconnected to the Applicant's conviction;
 - f. Counsel failed to object to the credibility of Jason T. Wall through impeachment purposes as a credible and reliable informant;
 - g. Counsel failed to remove himself due to a conflict of interest;
2. Prosecutorial misconduct in that the prosecutor introduced evidence which was suppressed at a pre-trial motion.

The Respondent made its Return and Motion to Dismiss on May 5, 2006, and a hearing was convened on September 21, 2006. The Applicant was present and represented by Michael Sarratt, Esquire. The Respondent was represented by S. Prentiss Counts of the South Carolina Attorney General's Office. The Honorable Doyet A. Early, III, denied the application by written Order filed on July 11, 2007.

The Applicant filed a timely Notice of Appeal. A Petition for Writ of Certiorari was filed on April 25, 2008. The Supreme Court of South Carolina denied the Petition for Writ of Certiorari on August 7, 2008. The Remittitur was issued August 25, 2008.

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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. Newly discovered evidence; in that,
 - a. "It is just now coming to light all the corruption in government and in law enforcement within Spartanburg. The Clerk of Court, Marcus Kitchens, along with Magistrate John Truman Poole have been stealing and or tampering with drug evidence from the drug evidence lockers, vaults and selling them. They were not the only ones. Now we find out that the Spartanburg County Lab has also been tampering with drug evidence. Millwood from the Spartanburg County Lab has testified to mishandling not only drugs but the paperwork as well. Applicant knows that the evidence in his case was mishandled; it's a matter of record.
 - b. Brady violation, in that a State's witness has now come forward indicating that she and her family were threatened with potential prosecution if her testimony was not presented in a certain light.
2. Ineffective assistance of PCR Counsel; in that.
 - a. PCR Counsel failed to meet with Applicant prior to the hearing
 - b. PCR Counsel did not have a complete copy of Applicant's PCR Application and its amendments,
 - c. PCR Counsel filed Applicant's PCR appeal before the 59(e) Motion, preventing the motion from being heard.
 - d. PCR Counsel failed to call Lt. Ashley Harris as a witness at the PCR hearing as requested by Applicant.

Before this Court are the records of the Spartanburg County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, Applicant's prior PCR records, Applicant's current 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.



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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 September 1, 2000. His appeal of the conviction was denied and the Remittitur was issued on August 3, 2005. The Applicant was therefore required to file the application before August 3, 2006. This Application was filed on August 11, 2011, which was well after the time that the statutory filing period had expired.

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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). Therefore, this Court finds that the application for post-conviction relief is summarily dismissed because it is successive.

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Failure to Meet Standard for Newly Discovered Evidence

This Court also finds that the Applicant fails to establish that newly discovered evidence exists that would allow his application to proceed. A defendant requesting a new trial based on after discovered evidence must show that the evidence:

- (1) Is such as would probably change the result if a new trial was had;
 - (2) Has been discovered since the trial;
 - (3) Could not by the exercise of due diligence have been discovered before the trial;
 - (4) Is material to the issue of guilt or innocence; and
 - (5) Is not merely cumulative or impeaching.
- Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983).

This Court finds that the Applicant cannot satisfy the requirements of Hayden. There is nothing to suggest that the misconduct of any named parties had any impact on the Applicant's case or that there were any threats or offers made to a State's witness. Further, this Court finds that the alleged newly-discovered evidence is not "material to the issue of guilt or innocence," and probably would not "change the result if a new trial was had." Hayden, Id. Accordingly, this Court finds that the current application is summarily dismissed.

Failure to State a Claim

This Court further 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).

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Even if the facts alleged by the Applicant are true regarding prior PCR Counsel, 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." Aice, 305 S.C. at 451, 409 S.E.2d at 394.

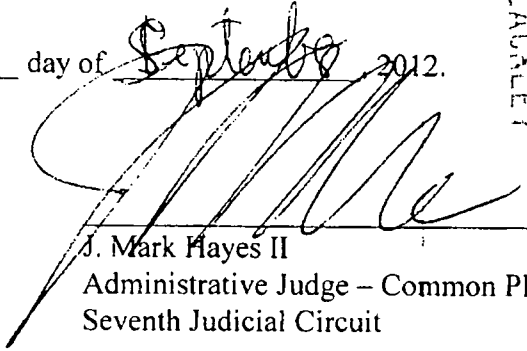
Therefore, this Court finds that the application for post-conviction relief is summarily dismissed for failure to state a claim, because it was filed outside of the statute of limitations, is successive to his prior application, and fails to meet the standard required for newly discovered evidence.

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 13 day of September, 2012.



J. Mark Hayes II
Administrative Judge – Common Pleas
Seventh Judicial Circuit

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