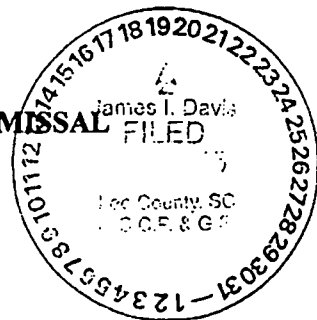


STATE OF SOUTH CAROLINA)
COUNTY OF LEE)
))
Thomas Lowery, #83240,)
))
Applicant,)
))
v.)
))
State of South Carolina,)
))
Respondent.)

IN THE COURT OF COMMON PLEAS

2015-CP-31-0068

CONDITIONAL ORDER OF DISMISSAL



This matter comes before this Court by way of an application for post-conviction relief filed March 19, 2015. In its Return, Respondent requested that the matter be summarily dismissed.

I. PROCEDURAL HISTORY

The records before this Court reflect that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Lee County. The Applicant was indicted at the September 1976 term of the Lee County Grand Jury for Armed Robbery, Robbery, Grand Larceny, and Murder (1976-GS-31-192 & 193).¹ Robert Jennings, Esquire represented him. On September 8, 1976, Applicant pled guilty and was sentenced by the Honorable Paul Moore to life imprisonment for Murder and a consecutive term of ten (10) years for robbery. Petitioner did not appeal his conviction and sentence.

Applicant filed applications for post-conviction relief ("PCR") on October 22, 1976, and amended applications on May 16, 1977, and June 29, 1977.² In his first PCR application, Applicant asserted the following grounds for relief:

¹ Applicant was indicted along with a co-defendant, Marion Geddis.
² No recorded case number is available for Applicant's 1976 PCR application.

1. That the court failed to advise him of his right to appeal.
2. That they are not guilty of the crime for which they were convicted.
3. That they did not receive a fair trial.
4. That they have proof that they did not commit the crimes for which they were convicted.
5. That they were denied the right to have counsel of their choice.
6. That there were no witnesses to state that they had witnessed the crime.
7. That the police had conducted an unlawful search and seizure by searching under the house of Marion Geddis without a warrant.
8. That no murder weapon had been found.
9. That they had no counsel present during interrogation.
10. That their pleas of guilty were not intelligently and voluntarily made in that they were coerced by the police.
11. Ineffective assistance of counsel.

The State made its Return and Motion to Dismiss in June of 1978. An evidentiary hearing was convened. The PCR application was denied and dismissed by order of the Honorable Dan F. Laney Jr., on November 10 1978. Applicant did not appeal.

1998-CP-31-0027

Applicant filed a second PCR application on February 23, 1998 (1998-CP-31-0027). In this application he alleged the following grounds for relief:

1. "Ineffective assistance of counsel."
2. "Prosecutorial Misconduct."
3. "Court never had subject matter jurisdiction."

The State made its Return and Motion to Dismiss on August 31, 1998. A Conditional Order of Dismissal was signed by the Honorable Howard P. King on September 15, 1998. Thereafter, an evidentiary hearing was convened on October 5, 1998.³ Applicant was present and represented by counsel. The application was dismissed by written order of the Honorable Thomas W. Cooper, Jr., dated January 4, 1999. In the order of dismissal, Judge Cooper found that all allegations, including the allegation that Applicant was entitled to an Austin appeal, were barred by the one-year statute of limitations.

Applicant filed a petition for writ of certiorari. The petition was granted, and the matter

³ Applicant's PCR case was heard along with his co-defendant's.

was reversed and remanded because the Austin claim was not barred by the one-year statute of limitations. Lowery v. State, 2000-MO-013 (S.C. Sup. Ct. filed Jan. 19, 2000). A petition for rehearing was denied, and the remittitur was sent on March 9, 2000.

Thereafter, the PCR application was amended on November 1, 2000, to include an allegation that the Applicant was under the influence of pills at the time of his plea. A hearing was then convened on November 15, 2000. Applicant was present and represented by counsel. The sole issue presented at hearing was whether PCR counsel failed to advise Applicant of his right to appeal. In a written order dated January 8, 2001, the Honorable J. Michael Baxley found that Applicant had failed to carry his burden, and the application was dismissed with prejudice.

A Johnson petition for writ of certiorari was submitted on Applicant's behalf, and Applicant submitted a *pro se* petition. The petition was denied by the South Carolina Supreme Court in an order dated February 21, 2002. The remittitur was sent on March 11, 2002.

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Applicant next filed a Petition for Writ of Habeas Corpus Under 28 USC §2254 for Writ of Habeas Corpus by a Person in State Custody in the United States District Court on September 26, 2002. In his petition, Applicant set forth the following grounds for relief:

1. "Petitioner's conviction was obtained by a plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of charges and consequences of the plea."
2. "Denial of effective assistance of counsel during plea (conflict of interest)."
3. "Denial of effective assistance of counsel during plea."
4. "Denial of effective assistance of counsel, and Fourth Amendment illegal arrest."
5. "Denial of effective assistance of counsel, and Fourth Amendment warrant lacked probable cause."
6. "Denial of effective assistance of counsel during before and during plea. (Fifth Amendment violation)."
7. "Denial of right to appeal."

Respondents moved for summary judgment. The Magistrate's Report and Recommendation

dated February 13, 2003, recommended that the motion for summary judgment be granted as the petition was not timely filed under the AEDPA. In an order dated September 4, 2003, the Honorable Terry L. Wooten accepted the Magistrate Judge's Report, overruled Petitioner's objections, granted the Respondents' motion for summary judgment and dismissed the application. Applicant filed a notice of appeal, but certificate of appealability was denied and the appeal dismissed.

2005-CP-31-0025

On January 27, 2005, Applicant filed a "Petition for Writ of Habeas Corpus" in the Circuit Court. (C.A. No. 2005-CP-31-0025). Respondent made its Return and Motion to Dismiss on May 2, 2006. A Conditional Order of Dismissal was signed on May 5, 2006. Applicant filed an appeal. While the appeal was pending, the case was dismissed without prejudice by order dated October 3, 2006.

2005-CP-31-0261

On November 17, 2005, Applicant filed a third application for post-conviction relief alleging that he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
2. "Plea was involuntary and unintelligently made."
3. "The law prevents a plea to both grand larceny and robbery."

The State made its Return and Motion to Dismiss, and a Conditional Order of Dismissal was signed by the Honorable Howard P. King on June 29, 2009. Applicant responded to the Conditional Order by way of a document captioned "Response to Respondent's Order of Summarily Dismissal for PCR" on August 10, 2009. Thereafter a Final Order of Dismissal was issued on October 19, 2009 dismissing Applicant's application with prejudice.

A timely Notice of Appeal was filed on Applicant's behalf. In an Order dated December

23, 2009, the South Carolina Supreme court dismissed Applicant's appeal for failure to show an arguable basis for asserting that the determination by the lower court was improper as required by Rule 243(c), SCACR. The Remittitur was issued on January 8, 2010.

Current Application

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

1. "I was not under sworn oath during the lawful guilty plea";
 - a. As a result, "the trial court lacked subject matter jurisdiction to accept a plea when there was no sworn testimony or statements pertaining to the facts or competent evidence [sic] of the commitment offenses."
2. "State witness(es) were not under sworn oath upon presenting testimony";
 - a. As a result, "[a]gain, the trial court lacked subject matter jurisdiction."
3. "I never had an Austin appeal from denial of previous [sic] PCR filings"; and
4. Favorable and exculpatory information and evidence was arbitrary or capriciously willfully and intentionally withheld at the plea proceedings."
 - a. Trial counsel and prosecutor withheld favorable information regarding competency in violation of Brady v. Maryland, 373 U.S. 83 (1963).

Before this Court are the records of the Lee County Clerk of Court regarding the subject guilty plea; Applicant's records from the South Carolina Department of Corrections; and Applicant's prior post-conviction relief records.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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 were or 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, 305 S.C. 448, 409 S.E.2d 392; Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834.

Statute of Limitations

This Court finds, further, 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. 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 8, 1976. The Applicant was therefore required to file his application before July 1, 1996. This Application was filed on March 19, 2015, which was over eighteen years after 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) (1985) 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 should be summarily dismissed for failure to file within the time mandated by statute.

Laches

This Court further find that Applicant's current claims for relief are barred by laches. Absent some explanation or justification for the delay in seeking post-conviction relief, laches will prevent 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); Honeycutt v. Ward, 612 F.2d 36 (2nd Cir. 1979). 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. Rule 9(a) of the Federal Habeas Corpus Act recognizes the doctrine of laches. The Rule states in pertinent part:

A petition may be dismissed if it appears that the state of which the Respondent is an officer has been prejudiced in its ability to respond to the Petition by delay in its filing unless the Petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

Furthermore the South Carolina legislature has recognized this problem and instituted a one year statute of limitations. See S.C. Code Ann. §17-27-45(a).

This Court finds that Applicant's unreasonably lengthy delay has greatly prejudiced Respondent. The Applicant has filed this application nearly thirty (30) years after he pled guilty. It is questionable whether the attorneys will remember this case and whether their files will be available. If the Applicant had raised these claims within a reasonable time after his plea, neither of these problems would exist. Therefore, the current application should be summarily based on Applicant's lack of diligence in processing his claim for relief.

Subject Matter Jurisdiction

This Court finds Applicant's claim of subject matter jurisdiction lacks merit and warrants summary dismissal. An applicant may challenge the subject matter jurisdiction of the trial at any time. *See State v. Gentry*, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005). However, "[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters." *Id.*, 363 S.C. at 101; *See also* S.C. Const. Art. V, § 11. Applicant must present evidence that his case is of some class over which the circuit court does not have the authority to preside. Applicant's conviction

involved criminal charges in General Sessions court; thus, the circuit court had subject matter jurisdiction.

Res Judicata

This Court further finds that the doctrine of *res judicata* bars Applicant's claims. *Res judicata* prohibits subsequent actions by the same parties on the same issues. Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that was or *could have* been raised in the former action. Id.

Applicant had a full opportunity to litigate his Austin claim in his previous PCR actions. Further, this claim was fully ruled upon in Applicant's second PCR application. Applicant continues to raise the same meritless claim by repeated collateral attacks on his convictions. The public interest in finality of judgments requires that litigation must eventually come to an end. Pursuant to Rule 12(b)(6), SCRPC, this Court finds that these claims are barred by *res judicata* and must be dismissed.

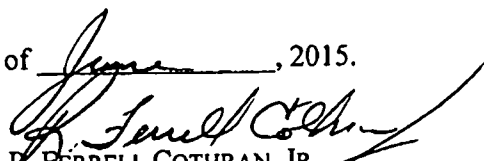
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Conclusion

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

Office of the Attorney General
Patrick L. Schmeckpeper, Esquire
PCR Division
P.O. Box 11549
Columbia, SC 29211

AND IT IS SO ORDERED this 3 day of June, 2015.


R. PERRELL COTHRAN, JR.
Chief Administrative Judge
Third Judicial Circuit

Manning, South Carolina.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
Post Office Box 21787 - Columbia, South Carolina 29221

Pursuant to Rule 4(d)(2) of the South Carolina Rules of Civil Procedure, the Director of the South Carolina Department of Corrections has designated Carolyn Sanders (*Server*) as his duly authorized agent for the purpose of making service of the process on the below named individual.

STATE OF SOUTH CAROLINA)
COUNTY OF Lancaster)

AFFIDAVIT OF PERSONAL SERVICE

On this 16 day of July, 2015, I served the Conditional Order of Dismissal, on Inmate Thomas Lowery, SCDC Inmate #83240, by delivering personally and leaving a copy of the same at Kershaw Correctional Institution. Deponent is not a party to this action.

s/ Carolyn Sanders

SCDC Server

SWORN TO AND SUBSCRIBED BEFORE ME

this 16th day of July, 2015

Catherine A. Amerson (L.S.)
Notary Public for South Carolina

My Commission Expires: December 22, 2018

ADMISSION OF SERVICE

Service of a copy of the within Conditional Order of Dismissal is admitted at the South Carolina Department of Corrections (Kershaw Correctional Institution), Lancaster County, SC this 16 day of July, 2015.

s/ Thomas Lowery
Inmate
SCDC Inmate #: 283240