

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
))
))
Hamid Demmirio, #115800,)
))
Applicant,)
))
v.)
))
State of South Carolina,)
))
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

2013-CP-40-4121

**CONDITIONAL ORDER
OF DISMISSAL**

2013 OCT 16 PM 4:17
JEANETTE M. MCENRINE
C.C.P. & G.S.
RICHLAND COUNTY
FILED

This matter comes before this Court by way of an application for post-conviction relief filed July 16, 2013. In its Return, Respondent requests that the action be summarily dismissed.

PROCEDURAL HISTORY

Before this Court are the records of the Richland County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, appellate records, and records from Applicant's previous application for post-conviction relief. 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 Richland County Clerk of Court. Applicant was true bill indicted at the September 1987 term of the Richland County Grand Jury for Armed Robbery (1987-GS-40-3393) and Murder (1987-GS-40-3393). He was represented by Jon P. Popowski and Joy Goodwin, Esquire. On July 18, 1988, Applicant pled guilty as indicted. He was sentenced by the Honorable Ralph King Anderson to confinement for life for Murder and twenty-five (25) years for Armed Robbery, to be served consecutively. Applicant did not appeal his conviction or sentence.

Applicant subsequently filed his first application for post-conviction relief on November 3, 2003 (2003-CP-40-5340). In his application, Applicant asserted:

1. Court lacked subject matter jurisdiction.

The State made its Return on or about June 5, 2004, and an amended return and motion to dismiss on January 24, 2006, requesting the application be summarily dismissed. The Honorable J. Ernest Kinard, Jr. dismissed the application with prejudice in an order dated May 13, 2006, and filed May 18, 2006.

Applicant filed his second application for post-conviction relief on November 13, 2007 (2007-CP-40-7566). In his application, Applicant asserted:

1. Ineffective assistance of counsel
2. Newly discovered evidence
3. Belated appeal

The State made its Return and Motion to Dismiss on May 28, 2008, requesting that the application be summarily dismissed. The Honorable L. Casey Manning dismissed the application with prejudice in an order dated July 10, 2008, and filed July 15, 2008.

Applicant then filed a Notice of Appeal. The appeal was dismissed by Order of the Supreme Court of South Carolina dated December 4, 2008. The case was returned to the lower court by Remittitur dated January 8, 2009.

Applicant filed his third application for post-conviction relief on April 14, 2009 (2009-CP-40-2685). In his application, Applicant asserted:

1. Newly discovered evidence
2. Subject Matter Jurisdiction
3. Ineffective assistance of counsel

In his attached memorandum, Applicant also alleged ineffective assistance of PCR counsel¹. The State made its Return and Motion to Dismiss on August 20, 2010, requesting that the application be summarily dismissed. The Honorable Alison Renee Lee dismissed the application with prejudiced in an order dated and filed November 10, 2010.

Additionally, Applicant filed a pro se Petition for Writ of Habeas Corpus with the United States District Court for the District of South Carolina on March 20, 2013. The Honorable Cameron McGowan Currie accepted the Report and Recommendation from the Honorable Bruce Howe Hendricks, and dismissed the Petition by written order on June 5, 2013.

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 counsel
2. "Trial counsel never advised me of my right to appeal."
 - a. "Trial judge failure to meet the (24) hours lapse. § 16-3-20(b)."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

¹ This Court finds Applicant's "Motion for Appointment of Counsel" is unnecessary and is therefore, denied.

ground raised in a subsequent application could not have been raised by him in a previous application. Aice v. State, 409 S.E.2d 392 (1991); Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981).

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 applications for post-conviction relief; therefore, he has failed to meet the burden imposed upon him. Aice v. State, 409 S.E.2d 392 (1991); Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

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 (2007). 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 offense(s) he challenges in this Application on September 2, 2003. The Court of Appeals' remittitur was issued, after the Applicant's unsuccessful appeal, on February 28, 2005. This application was filed on April 17, 2013; seven 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) (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 and for being successive.

Additionally, this Court finds that Applicant's contention that he received ineffective assistance of counsel on his prior post-conviction relief application is not a ground for relief. Applicant contends that under the United States Supreme Court's recent decision in Martinez v. Ryan, ___ U.S. ___, 132 S. Ct. 1309 (2012), he is able to file a successive state post-conviction relief action alleging ineffective assistance of previous collateral counsel. This Court finds this contention to be without merit as the ruling in Martinez has no bearing on an Applicant's ability to raise ineffective assistance of collateral counsel claims in a subsequent, successive state post-conviction relief application. Rather, Martinez sets forth a narrow exception to the procedural default rules imposed on federal habeas corpus petitions when considered under the so-called "cause and prejudice" standard. See Coleman v. Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546, 2565 (1991) ("In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice."). The Martinez Court used this standard as the foundation for its decision, finding that attorney error amounting to ineffective assistance of

counsel during an initial-review collateral proceeding may be sufficient “cause” to excuse a prisoner’s procedural default in a federal habeas corpus proceeding. See Martinez at ___, 132 S. Ct. at 1315. (“Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial.”).

With this framework in mind, it is clear Martinez has no application to successive state post-conviction relief actions, as the fundamental “cause and prejudice” standard on which Martinez relies is exclusive to federal habeas corpus actions. Further, the Martinez Court specifically noted that their decision was **not** addressing ineffective assistance of counsel claims raised in subsequent state post-conviction relief actions, opining “[t]his is not the case, however, to resolve whether [an exception to the constitutional rule that there is no right to counsel in collateral proceedings] exists as a constitutional matter.” Id. at ___, 132 S. Ct. at 1326. Therefore, Applicant’s contention that Martinez allows him to bring this untimely and successive state post-conviction relief application is misguided and erroneous.

Additionally, Martinez’s interpretation of federal laws applicable to federal habeas corpus actions has no effect on South Carolina’s interpretation and application of its Post-Conviction Relief statute. S.C. Code Ann. § 17-27-10 to -160. Therefore, the South Carolina Supreme Court’s opinion in Aice v. State is still applicable to a claim raised in a subsequent state post-conviction relief action alleging ineffective assistance of prior collateral counsel. See Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991) (“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 went on to note that such a holding was in accord with the United States Supreme Court’s opinion in Pennsylvania v. Finley, 481 U.S. 551, 107 S. Ct. 1990 (1987) (there

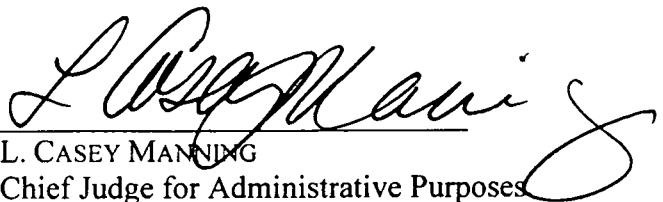
is no constitutional right to counsel for collateral review of a conviction). Accordingly, this Court finds Applicant's claim regarding the application of Martinez to be without merit.

Finally, because Applicant has failed to set forth any reason he could not have raised the current allegations in his previous application other than to allege post-conviction relief counsel was ineffective in failing to raise them, the current application is in fact successive in nature. Accordingly, this Court finds that this application must be summarily dismissed for a failure to state a claim entitling Applicant to relief, for being successive in nature and for failing to file the action within the statute of limitation as set forth in S.C. Code Ann. § 17-27-45(a).

Pursuant to S.C. Code Ann. § 17-27-70(b), this 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 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 Richland County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Megan E. Harrigan, Esquire
P.O. Box 11549
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 16 day of October, 2013.


L. CASEY MANNING
Chief Judge for Administrative Purposes
Fifth Judicial Circuit

Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2013CP4004121

Hamid #1115800 Demmirio

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (No Consult); Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** Affirmed; Reversed; Remanded; Other _____

RICHLAND COUNTY
 FILED
 OCT 21
 PM 3:27
 JENNIFER W. BRIDGES
 CLERK OF COURT

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the ____ day of _____, 20 ____ and a copy mailed first class or placed in the appropriate attorney's box on this 21 October 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Hamid #1115800 Demmirio

State of South Carolina

Hamid #1115800 Demmirio

State of South Carolina

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court _____

Jeanette W. Bridges