

STATE OF SOUTH CAROLINA
COUNTY OF LAURENS

LYNN W. LANCASTER

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

2014 SEP 25 P 4: 16

Kimmmie Shipes Heaton, #249607,

2014-CP-30-0071

Applicant LAURENS COUNTY
CLERK OF COURT

v.

CONDITIONAL ORDER OF DISMISSAL

State of South Carolina,

Respondent.

PROCEDURAL HISTORY

This matter comes before this Court by way of an application for post-conviction relief filed January 21, 2014. The State made its Return and Motion to Dismiss on September 4, 2014.

In its Return, Respondent requests that the action be summarily dismissed. The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Laurens County Clerk of Court. The Applicant was indicted at the July 1997 term of the Court of General Sessions for Laurens County for Murder and Possession of a Weapon during Commission of a Violent Crime (1997-GS-30-0678). She was represented by Claude Howe, Esquire. On March 20, 1998, the Applicant pled guilty to the above offenses. On May 6, 1998, the Honorable J. Ernest Kinard sentenced the Applicant to confinement for a period of fifty (50) years for Murder and five (5) years, concurrent, for Possession of a Weapon during the Commission of a Violent Crime. The Applicant did not appeal ^{her} his conviction or sentence.

1999-CP-30-0175

The Applicant subsequently filed an application for post-conviction relief (PCR) on March 29, 1999. The State filed its Return on August 2, 1999. An evidentiary hearing was convened on March 16, 2000, at the Laurens County Courthouse, at which the Applicant was present and represented by Richard Townsend, Esquire. The Applicant raised the following issues in his first PCR:

1. Ineffective Assistance of Counsel

The Honorable J. Derham Cole denied and dismissed Applicant's application by written Order on June 28, 2000.

A notice of appeal was filed on the Applicant's behalf. The Applicant then filed a Notice of Appeal. On November 4, 2009, the South Carolina Supreme Court dismissed ^{her} ~~his~~ appeal for failure to show an arguable basis that the lower court's decision was improper. The Remittitur was issued on November 23, 2009.

8:03-369-23BI

The Applicant subsequently filed a Writ of Habeas Corpus with the Federal District Court for the District of South Carolina on February 11, 2003. On September 29, 2003, the Honorable Bruce H. Hendricks issued a Report and Recommendation recommending that the Respondent's Motion for Summary Judgment be granted. On October 22, 2003, the Honorable Patrick Michael Duffy granted Summary Judgment for the Respondent.

2012-CP-30-0417

The Applicant then filed a second application for PCR on May 30, 2012. In her application for PCR, Applicant alleged that she is being held in custody unlawfully for the following reasons:

1. "Plea was illegal"

The State made its Return and Motion to Dismiss on or about July 19, 2012. This Court issued a Conditional Order of Dismissal on August 6, 2012. On October 2, 2012, after a complete review of the entire case including Applicant's response to the Conditional Order of Dismissal, this Court filed a Final Order of Dismissal.

In her current application for PCR, the Applicant alleges that she is being held in custody unlawfully for the following reasons:

1. "After discovered evidence which is material to the issue of guilt or innocence"
2. Violation of Constitutional Rights of the Fourteenth Amendment"

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 ground raised in a subsequent application could not have been raised by ~~him~~^{her} 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 she could not have raised her current allegations in her previous application for post-conviction relief; therefore, she has failed to meet the burden imposed upon her. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); Aice v. State, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 420 S.E.2d 834 (1992).

This Court also 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. 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 judgement 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) she challenges in this Application on May 6, 1998. The Applicant was therefore required to file her application by May 7, 1999. This Application was filed on January 21, 2014, which well after the statutory filing period had expired.

A motion for summary judgement 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 judgement as a matter of law."

This Court further finds the Applicant cannot satisfy the requirements of the Lanier test for newly discovered evidence. Lanier v. Lanier, 364 S.C. 211, 612 S.E.2d 456 (S.C. App. 2005). A party making a motion for a new trial or for relief from judgment based on newly-discovered evidence must show that the evidence: (1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching. This Court finds the Applicant cannot satisfy the requirements of the Lanier test. The Applicant claims her "after discovered evidence" is that at the time she pled guilty, she was under treatment for mental illness and that her attorney was unaware of this fact. This Court finds this information fails the Lanier test because it would not change the result of a trial as Applicant pled guilty to her crimes, because it could have been discovered on or before her plea and is not material to the issue. Under S.C. Code Ann. § 17-27-45(c):

If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

This information was discoverable by Applicant on May 5, 1998, when Dr. Harold Morgan sent Applicant's plea Counsel, Chip Howe, a copy of her mental evaluation (as provided in Applicant's application for PCR). Not only did she "actual[ly]" discover this in 1998, but even if she did not, she, by the exercise of reasonable diligence, certainly could have discovered this information within a year as she was clearly present during the mental evaluation. Thus, the Applicant has failed to prove newly discovered evidence under Lanier, and the Applicant is not entitled to a new hearing.

This Court lastly finds that the current application for post-conviction relief must be summarily dismissed because the doctrine of *res judicata* bars the 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 could have been raised in the former action. Id.

The Applicant had a full opportunity to litigate all allegations regarding ineffective assistance of counsel in her 1999 and 2012 PCR actions and in her Federal Habeas Corpus action. The public interest in finality of judgments requires that litigation must eventually come to an end. Pursuant to Rule 12(b)(6), SCRPC, the Court summarily dismisses these claims as barred by *res judicata*.

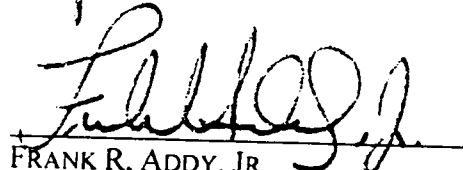
Therefore, this Court finds that the application for post-conviction relief is summarily dismissed for being successive, for failure to file within the time mandated by statute, for failing to properly allege newly discovered evidence, and for being barred by *res judicata*.

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 her to show why this Order should not become final. The Applicant shall file any reasons she may have with the Laurens County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: J. Rutledge Johnson, Esquire
P.O. Box 11549
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 9th day of September 2014.


FRANK R. ADDY, JR.
Chief Administrative Judge
Eighth Judicial Circuit

Greenwood, South Carolina

A TRUE COPY OF THIS ORDER IS FILED WITH THE CLERK OF COURT FOR THE COUNTY OF LAURENS, SOUTH CAROLINA, ON SEP 10 2014 AT 10:00 AM.

Clerk of Court