

STATE OF SOUTH CAROLINA)
 COUNTY OF HORRY)
 Michel A. Dukes Sr., #311176,)
)
 Petitioner,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No. 2013-CP-26-2686

**ORDER DISMISSING
 PETITION FOR
 HABEAS CORPUS**

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 HORRY COUNTY

This matter comes before the Court by way of a document filed June 4, 2015, and captioned "PETITION FOR WRIT OF HABEAS CORPUS." The Court finds as follows:

I. PROCEDURAL HISTORY

A. Underlying Conviction

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Petitioner was indicted at the November 2003 term of the Horry County Grand Jury for trafficking in crack cocaine, 10-28 Grams (2003-GS-26-3445). Paul Archer, Esquire represented Petitioner. On August 8-9, 2005, Petitioner proceeded to trial before the Honorable Edward B. Cottingham and a jury. The jury found Petitioner guilty as indicted. Judge Cottingham sentenced Petitioner as a third drug offender¹ to confinement for a period of eighteen (18) years.

Petitioner filed a timely notice of appeal. Aileen P. Clare, Esquire, of the South Carolina Office of Appellate Defense perfected the appeal with the filing of an Anders² brief on October 18, 2006. The South Carolina Court of Appeals dismissed Petitioner's appeal on October 8, 2007. Sate v.

¹ Applicant has prior convictions in 1996 for possession with intent to distribute marijuana and in 2000 for possession with intent to distribute cocaine.

² Anders v. California, 386 U.S. 738 (1967)

Dukes, Op. No. 2007-UP-423 (S.C. Ct. App. filed October 8, 2007). The remittitur was returned to the circuit court on December 21, 2007.

B. First Post-Conviction Relief Action (2008-CP-26-489)

Petitioner filed his first application for post-conviction relief on January 18, 2008. In his first application, Petitioner alleged the following grounds for relief:

1. "Directed Verdict"
 - a. "The judge should have directed a verdict due to the state not putting forth any evidence to show actual or constructive possession"
2. "Ineffective assistance of counsel"
 - a. "Not doing any investigation into whether or not Petitioners 4th amendment was violated by the officer searching his vehicle..."
 - b. "Proceeding with the picking of the jury in the absence of Petitioner..."
 - c. "Court lacked subject matter jurisdiction to sentence Petitioner as second or subsequent offender for trafficking [because] Petitioner has never been convicted of trafficking first."
3. "Did judge err in his ruling of Brady violation?"

The Honorable Michael G. Nettles convened a hearing on the application on November 17, 2008. At the hearing, Petitioner voluntarily withdrew all claims except the ineffective assistance of counsel claims. Judge Nettles issued an order, signed December 9, 2008, and filed December 12, 2008, denying and dismissing the application.

Petitioner filed a timely notice of appeal. M. Celia Robinson, Esquire, of the Office of Appellate Defense perfected the appeal with the filing of a petition for writ of certiorari on December 11, 2009. The South Carolina Supreme Court denied the petition on January 7, 2011. The remittitur was returned to the circuit court on January 25, 2011. Petitioner filed a subsequent notice of appeal, which the Supreme Court dismissed as successive on August 29, 2014. The remittitur was again returned to the circuit court on October 13, 2014.

C. Federal Habeas Corpus Actions

Petitioner filed a federal petition for habeas corpus on February 24, 2011 (Case number 0:11-cv-00819-JFA). The United States District Court for the District of South Carolina granted summary

judgment against Petitioner on January 4, 2012. The District Court denied Petitioner's certificate of appealability on February 7, 2012.

On March 8, 2012, Petitioner filed a motion to file a subsequent federal habeas corpus action with the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit denied the motion on March 28, 2012. Nevertheless, Petitioner filed a second federal habeas corpus on December 19, 2012 (Case number 0:12-3445-JFA-PJG). The District Court dismissed the action on June 4, 2013.

Petitioner also filed a third federal habeas on February 28, 2013 (Case number 0:13-157-JFA-PJG). This action was dismissed on June 4, 2013 as well.

Petitioner filed another motion with the United States Court of Appeals for the Fourth Circuit seeking permission to file a successive habeas corpus petition on March 26, 2014. The Fourth Circuit denied this motion on April 10, 2014. In re: Michel Andre Dukes, No. 14-183 (4th Cir. Apr. 10, 2014).

D. Second Post-Conviction Relief Action (2012-CP-26-3026)

Petitioner filed a second application for post-conviction relief on April 13, 2012. In the second application, Petitioner again alleged the following grounds for relief:

1. Fourth Amendment violations.
2. Trial judge error in selecting a jury outside Petitioner's presence.
3. Ineffective assistance of counsel for allowing jury selection outside of Petitioner's presence.

The Court entered a Conditional Order of Dismissal on June 13, 2012. The Honorable Thomas A. Russo convened a hearing on Petitioner's response to the conditional order on August 27, 2012, in Horry County. David C. Hicks, Esquire, represented Petitioner at this hearing. Judge Russo issued an order on September 11, 2013, dismissing the second application as untimely and successive.

On March 8, 2013, the South Carolina Supreme Court dismissed Petitioner's appeal from Judge Russo's order pursuant to Rule 243(c), SCACR, for failing to demonstrate an arguable basis of error.

The remitter was returned to the circuit court on March 26, 2013.

E. Third Post-Conviction Relief Action (2013-CP-26-2686)

Petitioner filed a third application for post-conviction relief on April 13, 2013. In this third application, Petitioner alleged the following grounds for relief:

1. "Ineffective assistance of trial counsel for not requesting a suppression hearing due to an illegal arrest"
2. "Ineffective assistance of trial counsel by not protecting defendants' 4th and 14th amendment constitutional rights under due process due to an illegal arrest"
3. "Ineffective assistance of counsel by not raising a brady violation"
4. "Lack of subject matter jurisdiction"

Petitioner filed an "Amendment and Supplementation" on June 11, 2013, alleging trial counsel failed to object to evidence and statements gathered during an illegal arrest. The Honorable Benjamin H. Culbertson issued a Conditional Order of Dismissal on September 13, 2013. Petitioner filed a timely response to the conditional order. Judge Culbertson issued a Final Order of Dismissal on January 7, 2014.

Petitioner filed a timely notice of appeal from Judge Culbertson's order. On July 29, 2014, the South Carolina Supreme Court dismissed the appeal pursuant to Rule 243(c), SCACR, for failing to show an arguable error. The remittitur was returned to the circuit court on August 14, 2014. Petitioner filed a second notice of appeal from Judge Culbertson's order. The Supreme Court dismissed that appeal on December 10, 2014, and returned the remittitur to the circuit court on the same day.

F. Fourth Post-Conviction Relief Action (2014-CP-26-1339)

Petitioner filed his fourth application for post-conviction relief on March 5, 2014. In this fourth application, Petitioner alleged the following grounds for relief:

1. Ineffective assistance of counsel
 - a. Failure to raise Fourth Amendment claim.
 - b. Failure to object to evidence.
 - c. Lack of personal jurisdiction.
2. Parole has been unlawfully revoked.
3. The State failed to disclose immunity agreement with witness.
4. The State failed to disclose a chemical analysis report.
5. The solicitor appeared as sole witness before the grand jury.
6. Violation of right to confront his accusers.

7. Malicious prosecution.
8. Sentence was illegally enhanced.
9. State failed to prove chain of custody.

Petitioner filed numerous other documents in relation to this application. The Honorable Larry B. Hyman Jr. issued a Conditional Order of Dismissal on January 6, 2015. Petitioner filed a timely response to the conditional order. The Court issued a Final Order of Dismissal on April 20, 2015.

Petitioner filed a timely notice of appeal from the Court's order. On June 5, 2015, the South Carolina Supreme Court dismissed the appeal pursuant to Rule 243(c), SCACR. In that same order, the Supreme Court prohibited Petitioner from filing any further collateral actions in circuit court without receiving permission from the Supreme Court.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Jurisdiction

The Court finds this matter must be dismissed as the Court is without jurisdiction to entertain the petition. Petitioner filed this document in relation to Case No. 2013-CP-26-2686. However, that action concluded with the issuance of Judge Culbertson's final order on January 7, 2014. Any further motions in that action must have been filed by January 17, 2014. See In re Beard, 359 S.C. 351, 358, 597 S.E.2d 835, 838 (Ct. App. 2004) ("The established case law is that a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed." (citing Pitman v. Republic Leasing Co., 351 S.C. 429, 570 S.E.2d 187 (Ct. App. 2002); Ness v. Eckerd Corp., 350 S.C. 399, 566 S.E.2d 193 (Ct. App. 2002))). Because this petition was filed over a year later on June 4, 2015, this Court is without jurisdiction to entertain any matters contained therein.

B. Habeas Corpus Relief Unavailable

"A *habeas corpus* petition must support the requested relief." Gibson v. State, 329 S.C. 37, 40, 495 S.E.2d 426, 427 (1998) (citations omitted). Although the allegations in the petition are to be treated as true, Petitioner must make out a *prima facie* case showing he is entitled to relief and he must

present sufficient factual allegations to support the petition before he is entitled to a hearing. Id. at 40, 495 S.E.2d at 427-28.

To warrant a hearing, the petition must include two allegations. First, the petition must allege the petitioner has exhausted all available post-conviction relief remedies. Simpson v. State, 329 S.C. 43, 46, 495 S.E.2d 429, 431 (1998); Gibson, 329 S.C. at 42, 495 S.E.2d at 428. "Exhaustion includes filing of an application, the rendering of an order adjudicating the issues, and petitioning for, or knowingly waiving, appellate review." Gibson, 329 S.C. at 42, 495 S.E.2d at 428. Second, the petition must allege sufficient facts to show why other remedies are unavailable or inadequate. Id. Post-conviction relief is not rendered "unavailable or inadequate" merely because Petitioner's application might be dismissed as successive. In fact, any matter which is cognizable under the Uniform Post-Conviction Procedure Act may not be raised by a petition for a writ of habeas corpus before the circuit or other lower courts of this State. Simpson, 329 S.C. at 46, 495 S.E.2d at 431 (citing Gibson, 329 S.C. at 37, 495 S.E.2d at 426). The act is broadly inclusive and will rarely be inadequate or unavailable to test the legality of the detention. Gibson, 329 S.C. at 41, 495 S.E.2d at 428. Thus, "[a] person is procedurally barred from petitioning the circuit court for a writ of habeas corpus where the matter alleged is one which could have been raised in a PCR application" Keeler v. Mauney, 330 S.C. 568, 571, 500 S.E.2d 123, 124 (Ct. App. 1998). "Furthermore, if a person is procedurally barred, his only means of obtaining state habeas corpus relief is to file a petition in the original jurisdiction of the Supreme Court." Id. (citing S.C. Const. Art. V, § 5).³

Petitioner's allegations fail to meet the standards required for the issuance of this extraordinary writ. His petition merely restates allegations that were or could have been raised in prior collateral

³ Before a petitioner may proceed in the original jurisdiction of the Supreme Court, the petition must set out a constitutional claim that meets the standard delineated in Butler v. State, 302 S.C. 466, 397 S.E.2d 87, cert. denied, 498 U.S. 972, 111 S.Ct. 442, 112 L.Ed.2d 425 (1990). In Butler, the South Carolina Supreme Court held that the writ of habeas corpus will only issue when there has been a constitutional violation "which, in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice." Butler, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990) (citing State v. Miller, 84 A.2d 459 (N.J. Super. Ct. App. Div. 1951)).

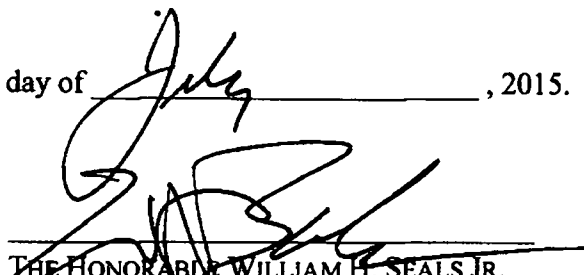
actions. Furthermore, Applicant has not shown these issues are not capable of being raised in an application for post-conviction relief.⁴ Thus, these claims cannot be raised in a Petition for Habeas Corpus in the Circuit Courts of South Carolina. Therefore, the Court finds the petition should be dismissed.

III. CONCLUSION


IT IS THEREFORE ORDERED that, for the reasons set forth herein, the Petition for Habeas Corpus is hereby **denied and dismissed with prejudice**.

Petitioner is hereby instructed this order constitutes the Court's final ruling on this Petition. This Court further advises Petitioner that he must file and serve a Notice of Appeal within thirty (30) days of the service of this order to secure appellate review. See Rule 203, SCACR. Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 17 day of July, 2015.



THE HONORABLE WILLIAM H. SEALS JR.
Chief Judge for Administrative Purposes
Fifteenth Judicial Circuit

 _____, South Carolina

⁴ The Court notes the Supreme Court issued an order restricting Petitioner's future filings one day after Petitioner filed his petition. However, that order does not eliminate Petitioner's ability to seek post-conviction relief; it merely requires him to obtain permission of the Supreme Court prior to filing a post-conviction relief application.