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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM WILLIAMSBURG COUNTY
COURT OF COMMON PLEAS

W. JEFFREY YOUNG, CIRCUIT COURT JUDGE

CASE NO# 2014-CP-45-189

Tony Lamar Cunningham #161005 Appellant,

v.

STATE OF SOUTH CAROLINA Respondent,

NOTICE OF APPEAL

Tony Lamar Cunningham, appeals the order of dismissal of the Honorable, W. Jeffrey Young dated Nov, 29, 2014. Appellant received written notice of entry of this order on or about, Jan, 19, 2016.
Date.

Daniel SHEARISE
CLERK OF COURT
POST OFFICE BOX 11330
COLUMBIA S.C. 29211

Tony Lamar Cunningham #161005
MCCF-4A165
386 REDEMPTION WAY
MECORMICK S.C. 29899

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THE STATE OF SOUTH CAROLINA

FEB. 0. 3. 2016

IN THE SUPREME COURT

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Appeal from WILLIAMSBURG COUNTY
court of common pleas

W. Jeffrey Young, circuit court judge

case no. 2014-CP-45-189

Tony Lamar Cunningham 161005 Appellant,
v.

STATE OF SOUTH CAROLINA, Respondent

PROOF OF SERVICE

I certify that I have served the notice of appeal on the state of south carolina by depositing a copy of it in the United States mail, postage prepaid on Jan 29, 2016 addressed to the attorney of record, as follows:

Danie SHEAROUSE
CLERK OF COURT
POST OFFICE BOX 11330
Columbia S.C. 29211

Tony Lamar Cunningham 161005
MCCI F-4A165
386 Redemption way
McCormick S.C. 29899

Daniel SHEAROUSE
CLERK OF COURT
POST OFFICE BOX 11330
COLUMBIA S.C. 29211

RE: Tony Lamar Cunningham 161005 South Carolina
2014-CP-45-189

Dear Daniel SHEAROUSE

Enclosed please find a copy of appellant's notice of appeal signed and filed, order in above mentioned post conviction relief case, therefore appellant include that he acknowledge, respondent final order of dismissal signed sept. 20, 2015 and receive it oct. 30, 2015. Appellant includes in his notice of appeal that he file and order to the courts a Rule 59(e) motion on this day NOV, 12 2015 asking the courts to specifically rule on appellant's issues which were argued in appellant's R.C.R application and belief. Appellant receive respondent return on his 59(e) motion on Jan, 19 2016, which were signed order and dismissed on NOV. 24 2015, Appellant therefore, file and order of answer and objection to respondent's return his 59(e) motion and the order on Jan 20, 2016

answering and objecting to the court's interpretation of appellant's 59(e) motion as a final order of dismissal requesting to alter and, or Amend, when appellant was requesting specifically that all his issues be Rule upon by way of required findings of fact and conclusion of law as Rule 59(e) requires. Appellant is choosing his notice of appeal in this matter

STATE OF SOUTH CAROLINA)
 COUNTY OF WILLIAMSBURG)
)
 Tony Cunningham, #161005)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 FOR THE THIRD JUDICIAL CIRCUIT

Case No. 2014-CP-45-189

FINAL ORDER OF DISMISSAL

FILED
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This matter comes before the Court by way of an application for post-conviction relief (PCR) filed April 9, 2014. The Respondent made its amended return on June 24, 2015, requesting the application be summarily dismissed based upon statute of limitations, doctrine of *laches*, and failure to state a cognizable claim for PCR.

Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal signed June 27, 2015 and filed July 9, 2015, provisionally denying and dismissing this action, while giving the Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. Attached to this Final Order and incorporated herein by reference is an Affidavit of Service dated July 30, 2015 serving the above mentioned Conditional Order of Dismissal on the Applicant.

In a document captioned "Applicants Responses to Conditional Order of Dismissal" and filed on August 10, 2015, the Applicant argues that his plea counsel was ineffective for failing to move for dismissal of his second degree burglary charges "on the grounds that the trial court lacked subject matter jurisdiction on enter a conviction or impose sentence for that offense

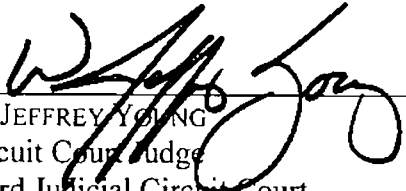
because the indictment charging the applicant with second degree burglary did not contain the essential elements to charge that offense.”

This Court has reviewed the Applicant’s response to the Conditional Order of Dismissal in its entirety, in conjunction with the original pleadings, and finds a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final.

This Court notes the Applicant was pled guilty on June 21, 1989. As this action was filed on April 9, 2014, it was clearly filed outside the expiration of the statute of limitations. See S.C. Code Ann. § 17-2745(a) (Supp.2003).

IT IS THEREFORE ORDERED that, for the reasons set forth in the Court’s Conditional Order of Dismissal, the Application for post-conviction relief is hereby denied and dismissed with prejudice.

AND IT IS SO ORDERED this 20 day of Sept, 2015.



W. JEFFREY YOUNG
Circuit Court Judge
Third Judicial Circuit Court

Sumter, South Carolina.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF WILLIAMSBURG)
)
 Tony Lamar Cunningham,)
 S.C.D.C. No. 161005,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 OF THE THIRD JUDICIAL CIRCUIT
 2014-CP-45-189

CONDITIONAL ORDER OF DISMISSAL

2015 JAN 23 PM 1:25
 FILED

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Tony Lamar Cunningham (Applicant) on April 9, 2014. Respondent made its Return, requesting the application be summarily dismissed

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Clarendon County.

Applicant was indicted at the June 1989 term of the Williamsburg County Grand Jury for three counts of Second Degree Burglary and Grand Larceny (89-GS-45-203, -204, -208) and two counts of First Degree Burglary and Grand Larceny (89-GS-45-206, -207). Applicant was represented by Gordon B. Jenkinson. On June 21, 1989, Applicant pled guilty as indicted before the Honorable Carol Connor. He was sentenced to fifteen years imprisonment on each indictment to run concurrently. Applicant did not appeal his guilty plea or sentence.

Subsequent Procedural History

Although Applicant only challenges his 1989 convictions, Applicant's subsequent procedural history is relevant to the issues raised. Applicant was indicted at the July 2005 term of

the Clarendon County Grand Jury for First Degree Burglary and Grand Larceny (05-GS-14-0188). He was represented by Harry DeVoe, Esquire. On September 1, 2005, the Applicant proceeded to trial after which he was found guilty of the charges. He was sentenced by the Honorable J. Derham Cole to confinement for a period of life without parole.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Supreme Court affirmed Applicant's conviction and sentence. State v. Cunningham, Op. No. 2007-MO-017 (S.C. Sup. Ct. filed March 12, 2007).

On November 18, 2007, Applicant filed an application for post-conviction relief alleging ineffective assistance of counsel. An evidentiary hearing was held on September 16, 2008 at the Sumter County Courthouse. Applicant was represented by William C. Land, Esquire. By Order dated November 6, 2008, the Honorable George C. James, Jr., denied and dismissed Applicant's application with prejudice.

Applicant timely filed a notice of appeal from his PCR dismissal. A Petition for Writ of Certiorari was filed and a Return was filed by the State. By Order dated January 19, 2011, the South Carolina Court of Appeals denied Applicant's petition. The Remittitur was sent February 4, 2011.

On May 3, 2011, Applicant filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 in the United States District Court, alleging ineffective assistance of counsel and insufficiency of evidence. On June 27, 2012, the Honorable Kaymani D. West issued a Report and Recommendation, recommending that Applicant's petition be dismissed with prejudice. On September 21, 2012, the Honorable J. Michelle Childs issued an Order and Opinion accepting the Report and Recommendation, granting Respondent's motion for summary judgment, and dismissing Applicant's petition.

On February 6, 2013, the Fourth Circuit Court of Appeals denied Applicant's request for a certificate of appeal ability and dismissing the appeal.

CURRENT APPLICATION

In his application for post-conviction relief, Applicant alleges he is being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. "My attorney failed to inform me that a jury could be impaneled to determine the propriety of a recommendation of mercy on the burglary charge pursuant to S.C. Code Ann. 16-11-310 (1976)."
2. Insufficiency of Indictment
 - a. "Indictment failed to state the aggravating circumstances 89-GS-45-208."
3. Violation of Due Process

Applicant included brief, wherein he makes the following allegations:

1. "The conviction and sentence is in violation of the United States Constitution and South Carolina Constitution."
2. "I am being held in custody unlawfully against constitutional and statutory law."
3. "Conviction obtained by guilty plea which was unconstitutional failure of trial counsel to inform of my right to request the impaneling of a jury to consider recommendation of mercy on burglary charge pursuant to S.C. Code Ann. 16-11-310 (1976)."
4. "That the court was without jurisdiction to use my prior conviction to enhance my current conviction under pursuant S.C. Code Ann. 17-25-45."
5. "That the court was without jurisdiction to accept my guilty plea pursuant S.C. Code Ann 17-19-100 (1985) where indictment did not specify any of the aggravating circumstances."
6. "Violation of Due Process."

Before this Court are the Williamsburg County Clerk of Court records regarding Applicant's convictions, the South Carolina Department of Corrections' records, Applicant's PCR application, and Respondent's Return and Motion to Dismiss.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Statute of Limitations

The Court further finds that this Application for post-conviction relief must also be summarily dismissed for failing to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160 (Supp. 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). Applicant pled guilty to the offenses he challenges in this application on June 21, 1989. Therefore, Applicant had to file his application by July 1, 1996.¹ This application was filed April 9, 2014, which was well after the statutory filing period had expired.

Summary dismissal of a PCR application is appropriate when the application is filed after the statutory filing period. Learnon v. State, 363 S.C. 432, 611 S.E.2d 494 (2003). 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, because Applicant failed to file within the time mandated by the Post-Conviction Procedure Act, Applicant's post-conviction relief application must be summarily dismissed.

¹ Section 17-27-45(A) of the South Carolina Code was enacted on July 1, 1995. Peloquin held "all those convicted prior to the effective date of the statute should be allowed one year after its effective date to file an application." Peloquin, 321 S.C. at 470, 469 S.E.2d at 606. Therefore, under Peloquin, Applicant was required to file his PCR application by July 1, 1996.

Failure to State a Claim

This Court finds the PCR application must be summarily dismissed for failure to state a claim cognizable under the Uniform Post-Conviction Procedure Act (the Act). S.C. Code Ann. §§ 17-27-10 et seq. (2003). Pursuant to the Act, 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 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; may institute, without paying a filing fee, a proceeding under this chapter to secure relief.

S.C. Code Ann. § 17-27-20(a) (2003).

In his application for post-conviction relief, Applicant has failed to set forth any allegations upon which relief may be granted under S.C. Code Ann. §17-27-10, et. seq. (2003). Several of Applicant's allegations contain the issue that his attorney failed to inform him that a jury could be impaneled to determine the propriety of a recommendation of mercy on the burglary charge. He cites several cases, however Applicant is in error by relying on South

Carolina's previous burglary statute, S.C. Code § 16-11-10 (1976).² In 1985, the South Carolina Legislature revised the Code by statutorily defining the degrees of burglary and eliminating the provision that mandated life imprisonment absent a recommendation of mercy by the jury. See S.C. Code Ann. §§ 16-11-310, -311. Applicant committed these crimes in 1989, he pled guilty to two counts of First Degree Burglary and was sentenced to the minimum of fifteen years using the proper statute.

Therefore, the current application must be summarily dismissed for failing to state a cognizable ground for relief.

Subject Matter Jurisdiction

This Court finds that Applicant's allegation that his plea under Indictment 89-GS-45-208 was defective because the indictment was for Second Degree Burglary and failed to state aggravating circumstances must be dismissed. This ground challenges the plea court's subject matter jurisdiction to accept his plea. Subject matter jurisdiction is the power of a court to hear a particular class of cases. State v. Gentry, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005). An applicant may challenge the subject matter jurisdiction of the trial court at any time. Id. However, "subject matter jurisdiction of the circuit court and the sufficiency of the indictment are two distinct concepts." Id. at 101, 610 S.E.2d at 499. An indictment is a notice document and any insufficiency in the indictment does not deprive the circuit court of jurisdiction. Id. at 102, 610 S.E.2d at 500. Rather, challenges to the indictment must be raised prior to the swearing

² The former burglary statute read:

"Any person who shall commit the crime of burglary at common law shall, upon conviction, be imprisoned in the State Penitentiary at hard labor, during the whole lifetime of the prisoner; *provided, however,* that when a prisoner is found guilty the jury may find a special verdict recommending him to the mercy of the court, whereupon the punishment shall be reduced to imprisonment in the Penitentiary at hard labor for a term of not less than five years."

S.C. Code § 16-11-310 (1976).

of the jury or they are waived. Id. (citing S.C. Code Ann. § 17-19-90).³ Thus, a PCR applicant may only raise challenges to the sufficiency of an indictment by alleging ineffective assistance of counsel for failing to properly move to quash the indictment in accordance with section 17-19-90. Because Applicant has failed to do so, this Court finds that this allegation should be dismissed pursuant to Rule 12(b)(6), SCRPC.

This Court also finds that this ground should also be dismissed as moot. Clearly, Applicant is no longer incarcerated on his conviction of second degree burglary and grand larceny from Indictment 89-GS-45-208. Indictment 89-GS-45-208 was not used to enhance Applicant's sentence to life without parole⁴ and Applicant does not face any persistent results or consequences of this conviction. Therefore, this Court finds that Applicant's ground alleging insufficiency of Indictment 89-GS-45-208 should be dismissed as moot as Applicant has already completed his sentence on the charge and faces no threat of incarceration stemming from that charge.

Laches

This Court also finds that this application must be summarily dismissed based on the doctrine of laches. Applicant pled guilty to the offenses he challenges in 1989. The doctrine of laches bars the Applicant from raising these allegations in a post-conviction relief application. 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

³ See State v. Philips, 215 S.C. 314, 54 S.E.2d 676 (1949) (referring to the predecessor to § 17-19-90 and stating the statute [Code 1962 § 17-409] "is no less applicable because the appellant waived a jury trial by his guilty plea").

⁴ The State sought life without parole based on Applicant's two prior convictions for First Degree Burglary (89-GS-45-206 and 89-GS-45-207)

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 283.⁵

Applicant's delay has greatly prejudiced Respondent. A transcript of Applicant's guilty plea is not available, and undertaking any sort of investigation at this point would be extremely difficult. Applicant could have sought post-conviction relief within a reasonable time after his conviction and had he done so, this problem would not exist. Therefore, the Court should summarily dismiss the Application based on Applicant's lack of diligence in processing his claim for relief.

⁵ 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.

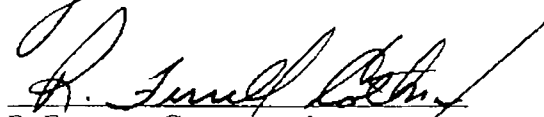
Furthermore the South Carolina legislature has recognized this problem and instituted a one year statute of limitations. See, S.C. Code Ann. §17-27-45(a).

CONCLUSION

Pursuant to S.C. Code Ann. §17-27-70(b), the 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 (20) 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 Williamsburg County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Justin J. Hunter, Esquire
PCR Division – 3rd Circuit
P.O. Box 11549
Columbia, SC 29211

AND IT IS SO ORDERED this 8 day of Jan, 2014.5


R. FERRELL COTHAN, JR.
Chief Judge for Administrative Purposes
Third Judicial Circuit

Manning, South Carolina

Long James Cummingsham 16185
MCCI E-44165

McCormick Correctional Institute
386 Redemption Way
McCormick, SC 29899

Supreme Court of South Carolina
Daniel Shearouse
Clerk of Court
Post Office Box 11330
Columbia SC 29211

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MCCORMICK CORRECTIONAL INST.
S.C. DEPARTMENT OF CORRECTIONS

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JAN 29 2016

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