

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Willie Junior Hines, #240466,

2013-CP-42-3931

Applicant,

v.

**CONDITIONAL
ORDER OF DISMISSAL**

State of South Carolina,

Respondent.

This matter comes before this Court by way of an application for post-conviction relief filed September 19, 2013.

I. PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. The Applicant was indicted at the July 1995 and May 1996 terms of the Spartanburg County Grand Jury for Armed Robbery (95-GS-42-3529), Murder and Possession of a Firearm During the Commission of a Violent Crime (95-GS-42-3530), and First Degree Burglary (96-GS-42-1974). He was represented on the charges by Thomas Dillard and Pamela McAvoy, Esquires. On January 28, 1997 and February 25, 1997, the Applicant pleaded guilty to the counts as indicted. He was sentenced by the Honorable Don S. Rushing to confinement for a period of life for Murder, life for First Degree Burglary, and thirty (30) years for Armed Robbery. The sentences were to run concurrently. The Applicant did not appeal his convictions or sentence.

1997-CP-42-1104

The Applicant subsequently filed an application for post conviction relief (PCR) on May 2, 1997. The Applicant raised the following issues in his first PCR:

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1. Ineffective assistance of counsel, in that counsel:
 - a. Failed to seek an independent mental evaluation,
 - b. Failed to file a motion to suppress the Applicant's statement to law enforcement; and
2. Involuntary guilty plea.

An evidentiary hearing was convened on March 29, 2000 before the Honorable Lee S. Alford. Applicant was present and represented by Phillip K. Sinclair, Esquire. Kevin P. Tierney, Esquire of the South Carolina Attorney General's Office, represented the respondent. Following the submission of all testimony, the Honorable Lee S. Alford denied and dismissed the application with prejudice by order dated May 30, 2001. The court found that the Applicant pleaded pursuant to a written plea agreement and was sentenced in accord with that plea agreement. The court also found trial counsel was not ineffective, Applicant failed to show he was prejudiced because of trial counsel's performance, and that there was strong evidence in the record that Applicant's guilty plea was made knowingly and voluntarily.

Applicant then subsequently filed a Petition for Writ of Certiorari challenging the post conviction relief court's decision. Assistant Appellate Defender Eleanor Duffy Cleary represented the Applicant. The South Carolina Supreme Court denied the Applicant's petition by order dated September 5, 2002. The remittitur was sent down on September 24, 2002. The Applicant then filed a Petition for Rehearing that the court found to be filed untimely by order dated November 21, 2002.

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The Applicant then filed a writ of habeas corpus *pro se* on January 24, 2003 where he alleged that counsel was ineffective in failing to request an independent evaluation of petitioner's competency. The respondents filed their return and memorandum in support of their motion for summary judgment on April 7, 2003. The Honorable G. Ross Anderson, Jr., United States

District Judge federal district court, granted summary judgment in favor of the respondent and dismissed the habeas petition with prejudice on June 25, 2003. The Applicant then appealed the district court's decision. The United States Court of Appeals for the Fourth Circuit dismissed the appeal, and the Supreme Court of the United States denied discretionary appellate review. Hines v. McLeod, 82 Fed.Appx. 86, 2003 WL 22879782 (4th Cir. December 5, 2003), *cert denied*, 542 U.S. 857, 160 L.Ed.2d 95, 125 S.Ct. 176, 73 USLW 3209 (October 4, 2004).

2004-CP-42-4076

The Applicant then filed his second application for post conviction relief (PCR) on December 2, 2004. The Applicant raised the following issues in his second PCR:

1. Newly discovered evidence, through an affidavit allegedly from one of his codefendants;
2. Lack of subject matter jurisdiction, in that the Grand Jury did not actually convene; and
3. Ineffective assistance of prior PCR counsel.

An evidentiary hearing was held on October 25, 2005 before the Honorable Roger L. Couch. Applicant was present and represented by David M. Collins, Jr., Esquire. Molly R. Hummer, Esquire of the South Carolina Attorney General's Office, represented the Respondent. Following the submission of all testimony, the Honorable Roger L. Couch denied and dismissed the application with prejudice by order dated January 4, 2006. The court found that the application was barred as a matter of law because it was successive to the Applicant's previous application and because it was filed outside the statute of limitations. The court further found the affidavit, allegedly from one of his codefendants, did not constitute after-discovered evidence, the trial court clearly had jurisdiction over the matter, and that applicants are not entitled to effective assistance of counsel in post conviction relief cases.

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Applicant filed a premature S.C.R.C.P. 59(e) motion seeking to amend the conditional order. Judge Couch dismissed that motion by order dated December 19, 2005. The Applicant then filed a Petition for Writ of Certiorari challenging the post conviction relief court's decision. The South Carolina Supreme Court denied the Applicant's petition by order dated April 13, 2006. The remittitur was returned to the lower court on June 7, 2006.

06-cv-01530-GPA

The Applicant then filed a second petition for writ of habeas corpus *pro se* on May 18, 2006, where he alleged (1) lack of subject matter jurisdiction by the trial court because the indictments were defective, (2) newly discovered evidence, (3) due process violation relating to lack of forensic evidence linking the petition to the crimes, (4) "Forgery and Based [sic] Plea agreement," (5) violation of the Double Jeopardy Clause because the petition was served the "same Indictments with different times of certification on them," and (6) "Brady violation." The federal district court granted summary judgment in favor of the respondents and summarily dismissed the habeas petition with prejudice on May 30, 2006. The court found that the petition was barred because it was successive to the applicant's prior federal habeas petition. The Applicant filed a notice of appeal on July 18, 2006 which the Fourth Circuit dismissed November 8, 2006.

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2009-CP-42-6457

The Applicant then filed a document captioned "Motion for Writ of Mandamus" on November 30, 2009. In the petition, the Applicant asked the court to:

- (1) accept jurisdiction over this case,
- (2) hold such evidentiary hearing as this court deems necessary or appropriate,
- (3) reverse sentence for new trial,
- (4) allow Petitioner to produce his proof in open court that he is being held illegally contain in prison,
- (5) require the Respondent to answer the questions presented one by one.

The Applicant included thirteen (13) questions, where he questioned if the post conviction relief judge and his attorney overlooked or misapprehended facts pertaining to his case. The respondent filed its return and motion to dismiss on June 11, 2010. The court found that this writ must be dismissed pursuant to Rule 12(b)(5), S.C.R.C.P. on the grounds that Applicant failed to accomplish proper service upon the respondent. The court also found that mandamus was not appropriate and that this was an attempt by the Applicant to circumvent the procedural bars to file successive applications for post conviction relief. The Honorable J. Derham Cole dismissed the "Motion for Writ of Mandamus" by order dated July 9, 2010.

The Applicant then filed a motion captioned "Motion to Alter or Amend Judgment" where he asked the court to reconsider its previous ruling on the "Motion for Writ of Mandamus." The court declined to alter or amend the judgment by order dated March 3, 2011 signed by the Honorable J. Derham Cole.

The Applicant subsequently appealed the decision of the court which dismissed the "Motion for Writ of Mandamus." The South Carolina Court of Appeals dismissed the appeal by order filed June 6, 2012 because the Applicant failed to timely serve and file an amended Record on Appeal.

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A notice of appeal was then filed with the South Carolina Supreme Court who dismissed the appeal by order dated July 3, 2012. The remitter was sent down on July 9, 2012.

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. "Ineffective Trial Counsel Assistance for not Investigating," in that
 - a. "The attorney advised applicant to plea bargain to an offense, which he never investigated see transcript of trial."
2. "Direct Appeal Violation," in that

- a. "Applicant was never notified by his counsel on a timely base [sic] to file a direct appeal and when he did ask his trial counsel about the appeal he was brushed off so direct appeal issues were reviewed on the merits on PCR appeal."
- 3. "Inadequate Advice on sentencing or collateral consequences and actual bias and judicial bias," in that
 - a. "Applicant was advised that he would be sentenced under old law if he plead [sic] guilty. Applicant was not informed that he could not plead to 30 years life under law."

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

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Successiveness

The Court finds that the current application for post conviction relief must be summarily dismissed because it is successive to the previous applications for post conviction relief. S.

Code Ann. § 17-27-90 (2003) states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the 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

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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 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 v. State, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 420 S.E.2d 834 (1992).

Statute of Limitations

This Court further finds that this Application for post conviction relief should also 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, et. seq. S.C. Code Ann. §17-27-45(6) 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 pleaded guilty to the offense he challenges in this Application on February 25, 1997. Applicant did not appeal his convictions or sentence. The Applicant was therefore required to file his application on or before February 25, 1998. This Application was filed on September 19, 2013 which was over fifteen (15) years after the statutory filing period had expired.

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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 summarily dismisses the application for post conviction relief for failure to file within the time mandated by the Post-Conviction Procedure Act.

Res Judicata

This Court further finds that the doctrine of *res judicata* bars the Applicant's claims of ineffective assistance of counsel. *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. 1992). *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, state and federal court where the issue was raised and dismissed in his previous post conviction and federal habeas corpus proceedings. The public interest in the 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*.

III. CONCLUSION

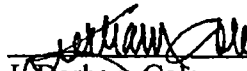
Pursuant to S.C. Code Ann. §17-27-70(b), the Court intends to dismiss this Application with prejudice unless the Applicant provides specific reasons, factual or legal, why the Application

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should not be dismissed in its entirety. The 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. The Applicant shall file any reasons he may have with the Spartanburg County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
J. Clayton Mitchell, Esquire
PCR Division - 7th Circuit
P.O. Box 11549
Columbia, SC 29211

AND IT IS SO ORDERED this 31st day of December, 2014.



J. Berham Cole
Chief Judge for Administrative Purposes
Seventh Judicial Circuit

_____, South Carolina

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M. Hope Blackley
Clerk of Court

December 5, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

Willie Hines
Applicant # 240466

7TH JUDICIAL CIRCUIT

CASE # 2013-CP-42-3931

Shree
VS
Respondent

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the Conditional req. of Dismissal
In this action dated 12-3 2014 on 12-5-14

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Suzanne White
Osby Hancock
Willie Hines

12-5-14
(Date)

Corie Scaf
(Signature)