

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

Levi Bing, Jr., #308051

2014-CP-38-01407

Applicant,

v.

State of South Carolina,

Respondent.

CONDITIONAL ORDER OF DISMISSAL

DIS MAY 11 11
CLERK OF COURT
ORANGEBURG COUNTY, SC

This matter comes before this Court by way of an application for post-conviction relief filed November 10, 2014. Respondent has submitted a Return and Motion to Dismiss of in the Alternative for Summary Judgment.

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 Orangeburg County. Applicant was indicted at the March 2004 term of the Orangeburg County Grand Jury for Murder (2003-GS-38-2411), Grand Larceny (2003-GS-38-2412), and Possession of a Weapon during the Commission of a Violent Crime (2003-GS-38-2413). Applicant was represented on the charges by John D. Delgado and Michael R. Culler, Esquires. On March 14, 2005, Applicant pleaded guilty to the charges as indicted. He was sentenced by the Honorable Deadra L. Jefferson to confinement for concurrent periods of forty (40) years for Murder, ten (10) years for Grand Larceny, and five (5) years for Possession of a Weapon. Applicant did not appeal his sentence of convictions.

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Applicant subsequently filed an application for post-conviction relief on March 7, 2006. Respondent filed its return on or about April 3, 2007, where he alleged he was being held unlawfully for the following reasons:

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1. Involuntary guilty plea;
2. Plea court lacked subject matter jurisdiction;
3. Counsel failed to file an appeal.

An evidentiary hearing was convened on June 25, 2007, at the Dorchester County Courthouse before the Honorable Diane S. Goodstein. Applicant was present and represented by Belinda Davis-Branch, Esquire. The Respondent was represented by then Assistant Attorney General Lance S. Boozer. Applicant testified on his own behalf. Counsels Delgado and Culler testified for the State. On September 7, 2007, Judge Goodstein issued an Order of Dismissal denying relief.

Applicant filed a timely notice of appeal. Applicant was represented by Wanda H. Carter of the South Carolina Commission on Indigent Defense. Counsel Carter filed a Petitioner for Writ of Certiorari pursuant to Johnson¹ on Applicant's behalf on January 5, 2009, where she submitted the appeal had no merit and requested to be relieved as counsel. Applicant filed a *pro se* brief on January 27, 2009. In an Order dated June 10, 2009, the Supreme Court of South Carolina denied certiorari and granted Counsel Carter's petition to be relieved as counsel. The remittitur was issued on June 29, 2009.

2009-cv-1759

Applicant then filed a *pro se* petition for writ of habeas corpus on July 1, 2009, in federal district court. Subsequently, Applicant retained Tara D. Shurling to represent him in that matter.

Applicant raised the following issues:

1. I received ineffective assistance of counsel prior to and during my guilty pleas in violation of my Sixth and Fourteenth Amendment rights. My plea was voluntary because of it.
 - a. My lawyer told me if I plead guilty to murder I would be eligible for parole. I never would have plead to my charges if he hadn't promised me I could have a chance to get parole. I would have gone to trial which is what I really wanted to begin with. He promised me and my family I would have a parole

¹ Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988).

date and I did not find out I don't till I got to SCDC. Lawyer admitted he thought I was parole eligible at my PCR hearing.

On October 8, 2009, Respondent filed a return and motion for summary judgment. The district court granted Respondent's Motion for Summary Judgment on June 1, 2010, and dismissed the petition. Applicant then filed a notice of appeal on July 2, 2010. The United States Fourth Circuit Court of Appeals issued an Order of Denial on January 13, 2011. Applicant filed a Petition for Rehearing which was denied on February 23, 2011.

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On February 13, 2012, Applicant, by and through newly retained counsel, Tricia A. Blanchette, Esquire, filed a Motion for Relief from Order of Dismissal with Prejudice Pursuant to Rule 60(b), SCRCP. In that motion, Applicant argued he was misadvised that he would be eligible for parole and that the Order of Dismissal issued in September 2007 failed to address that allegation. Applicant argued pursuant to Rule 60(b), SCRCP, that the court should reopen the case and properly rule on that issue. Respondent filed a Return to Rule 60(b) Motion for Relief from Order of Dismissal on May 22, 2012, opposing Applicant's motion. This Court issued an Order Denying Rule 60(b), SCRCP, Motion for Relief from Order of Dismissal with Prejudice on November 13, 2012. This Court ruled that Applicant's motion was untimely filed and that Applicant failed to clearly articulate his allegations. The Court went on to ruled that Applicant raised the parole eligibility issue for the first time in his *pro se* "Initial Pro Se Brief of Petitioner," appealing this Court's Order of Dismissal. The Court addressed the merits of Applicant's claims that he was incorrectly advised about whether he would be eligible for parole. The Court further ruled that any misadvice was cured by the plea court in the following exchange:

COURT: Sir, I want to explain to you that you may have discussed parole or parole eligibility with your lawyer or with other people, but until you're sentenced no one can tell you when, if ever, that you will be eligible for parole or under what conditions. You should assume that you will serve the entire time in jail that you're sentenced to. Do you understand that?

BING: Yes, sir.

Applicant then filed a "Motion for Rehearing Pursuant to Rule 59(a), SCRPC, and Motion to Alter or Amend Pursuant to Rule 59(e), SCRPC," on November 28, 2012. Respondent filed a return to that motion on January 3, 2013. This Court issued an Order dismissing the motion on February 27, 2013.

Applicant then filed a Notice of Appeal with the Supreme Court of South Carolina on March 28, 2013. Petitioner filed a Petitioner for Writ of Certiorari on November 6, 2013, where he raised the following issues:

1. Can an allegation of ineffective assistance of trial counsel be raised to the circuit court for the first time by a motion under Rule 60(b) of the South Carolina Rules of Civil Procedure, or must such an allegation be raised by filing a new application for Post-Conviction Relief?
2. Whether the lower court erred in finding that Petitioner's motion pursuant to Rule 60(b) of the South Carolina Rules of Procedure was improper, untimely and meritless.

Respondent filed a Return to Petition for Writ of Certiorari on February 11, 2014. The Supreme Court of South Carolina denied Applicant's Petition by Order dated August 21, 2014. The court stated, "Petitioner may seek relief by filing a second application for post-conviction relief alleging ineffective assistance of his first post-conviction relief counsel, and if the application is denied, he may file a notice of appeal from that decision." The remittitur was issued on September 8, 2014.

CURRENT APPLICATION

In his second and 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 post conviction relief counsel (Belinda Davis-Branch, Esquire). See attached Order of South Carolina Supreme Court.
 - a. Failure to properly address, obtain a ruling and file a post hearing motion (Rule 59, SCRPC) on the issue of plea counsel's ineffective assistance due to misadvising Applicant that he would be eligible for parole and would serve only 85% of his sentence. See Levi Bing, Jr. v. State, Appellate Case No. 2013-00637.

Before this Court are the records of the Orangeburg 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

Ineffective Assistance of Prior PCR Counsel

This Court finds that Applicant has failed to state facts sufficient to constitute a cause of action, requiring dismissal pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. This Court dismisses the allegation that prior PCR Counsel was ineffective for failing to file a 59(e) and thereby entitling him to file a belated 59(e) from his initial PCR action. This allegation is outside the purview of PCR and is not cognizable. The Sixth Amendment right to effective assistance of counsel does *not* extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 115 L.Ed.2d 640 (1991). The contention that prior PCR Counsel was ineffective for failing to file a 59(e) is nonjusticiable. Aice, 305 S.C. at 451, 409 S.E.2d at 394. This Court dismisses this application with prejudice pursuant to Rule 12(b)(6), SCRPC.

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Austin recognizes a general exception to this rule where prior post-conviction relief counsel fails

to appeal the denial of the application. Id. Austin "is limited to its particular factual situation . . ."
." Aice, 305 S.C. at 452, 409 S.E.2d at 394. Applicant asks this Court to create a new exception
to include a claim of ineffective assistance of PCR counsel for failing to file a motion to alter or
amend judgment pursuant to rule 59(e) SCRCP. Austin does not contemplate such reasoning and
this Court should decline to extend Austin's specific exception to ineffective assistance of post-
conviction relief counsel to include a claim of ineffective assistance of PCR counsel for failing to
file a rule 59(e) SCRCP. This Court dismisses this application with prejudice pursuant to Rule
12(b)(6), SCRCP.

Successiveness

The Court finds that the current application for post-conviction relief must be summarily
dismissed because it is successive to the previous application for post-conviction relief. S.C.
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
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 must 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(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 pleaded guilty to the offenses he challenges on March 14, 2005. Applicant did not appeal his sentence or conviction, so he was therefore required to file his application on or before March 15, 2006. This Application was filed on November 10, 2014, which was over eight (8) 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 summarily dismisses the application for post-conviction relief for failure to file within the time mandated by the Post-Conviction Procedure Act.

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 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 Orangeburg County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
J. Clayton Mitchell, Esquire
PCR Division – 1th Circuit
P.O. Box 11549
Columbia, SC 29211

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FILED
CLERK OF COURT
ORANGEBURG COUNTY

AND IT IS SO ORDERED this 4th day of May, 2015.

Maité Murphy
MAITÉ MURPHY
Chief Judge for Administrative Purposes
First Judicial Circuit

J. Gray, South Carolina

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CLERK OF COURT
ORANGEBURG COUNTY