

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BEAUFORT)
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)
 John Dykeman, #245443,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS FOR
 THE FOURTEENTH JUDICIAL CIRCUIT

2015-CP-07-1565

CONDITIONAL ORDER OF DISMISSAL

2015 SEP -8 PM 4:14
 CLERK OF COURT
 S.C.

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by John Dykeman (Applicant) on June 19, 2015. Respondent made its Return requesting that the application be summarily dismissed for failure to file within the time limits mandated by the applicable statute of limitations and because it is successive to Applicant's previous applications.

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. Applicant was indicted at the July 2004 term of the Beaufort County Grand Jury for murder (2004-GS-07-0835), kidnapping (2004-GS-07-0834), and armed robbery (2004-GS-07-0836). Gene Hood, Esquire, represented the Applicant. Applicant proceeded to trial and was found guilty as indicted. On April 18, 2007, the Honorable John Milling sentenced Applicant to confinement for life for murder, thirty (30) years for armed robbery, and thirty (30) years for kidnapping. The sentences were to run concurrently.

Applicant filed a timely Notice of Appeal. He was represented by Joseph Savitz, III, Esquire, of the South Carolina Office of Appellate Defense. The Court of Appeals affirmed Applicant's convictions and sentences by Order dated October 12, 2010. State v. Dykeman, 2010-UP-436 (Ct. App. October 12, 2010). The Remittitur was issued on October 28, 2010.

First PCR Application: 2010-CP-07-5697

Applicant subsequently filed his first application for post-conviction relief (PCR) on November 18, 2010. In his application for PCR, Applicant requested relief on the following grounds:

1. Ineffective assistance of trial counsel in that counsel
 - a. Failed to object to the court charging the jury with hand of on hand of all where defendant was indicted as a principal only and the charge of hand of one hand of all was insufficient, vague, misleading, and confusing.
 - b. Conceded defendant's guilt during trial.
2. Ineffective assistance of appellate counsel in that counsel
 - a. Failed to brief defense motion for a directed verdict.
 - b. Failed to brief defense motion as to the exclusion of evidence in respect to videotape clip of Brett Kinney.
 - c. Failed to brief defense motion to strike specific portions of State's witness Brandy Ross and/or denying defense motion for a mistrial pertaining to this witness testimony.
3. Trial judge committed reversible error by instructing the jury that Applicant would obtain a procedural advantage – "the final argument" – if he "offered no testimony whatsoever and does not appear and take the stand," as this procedural matter is irrelevant to the jury's determination of guilt or innocence and this instruction undermines the utility of having the final argument.

Respondent made its Return on March 17, 2011. An evidentiary hearing into the matter was convened on September 4, 2012 at the Beaufort County Courthouse. Applicant was present at the hearing and was represented by Samuel Kirkland, Esquire. Ashleigh Wilson, Esquire, of the South Carolina Attorney General's Office represented the Respondent. The Honorable Perry M. Buckner denied and dismissed the application with prejudice by written Order dated October 1, 2012. On November 5, 2012, Applicant filed a Motion to Alter and Amend which was denied by

Judge Buckner on November 9, 2012.

Applicant filed a timely Notice of Appeal of the denial of his application for post-conviction relief. He was represented by Robert Pachak, Esquire, of the South Carolina Office of Appellate Defense. The South Carolina Supreme Court denied Applicant's Petition for Writ of Certiorari by Order dated July 11, 2013. The Remittitur was issued on July 31, 2013.

Second PCR Application: 2013-CP-07-2285

Applicant filed his second PCR application on September 5, 2013, requesting relief on the following grounds:

1. Ineffective assistance of PCR counsel.
 - a. "PCR counsel advised Applicant to drop allegations on trial counsel."

Respondent made its Return and Motion to Dismiss on or about September 25, 2014. On October 3, 2014, the Honorable R. Markley Dennis, Jr., issued a Conditional Order of Dismissal provisionally denying and dismissing the application. Applicant made no response, and on May 13, 2015 the Honorable Carmen T. Mullen issued a Final Order denying dismissing the application with prejudice. Applicant did not appeal the dismissal of his application.

Federal Habeas Petition: 8:13-2933-MGL-JDA

Applicant subsequently filed a petition to the United States District Court seeking federal habeas relief under 28 U.S.C. § 2254. Applicant raised the following issues:

1. Ineffective assistance of appellate counsel;
 - a. Appellate counsel knowingly raised a [sic] unpreserved issues for appellate review where there were in fact meritorious issues which clearly had precedence; by appellate counsel's actions Applicant was denied due process of law which is guaranteed by the US Constitution Amend 6 and 14th.

On March 24, 2014, the Respondent made its Return and Memorandum of Law in Support of its Motion for Summary Judgment. The Honorable Jacquelyn D. Austin, United States Magistrate

Judge, issued a Report and Recommendation on January 5, 2015, recommending that Respondent's motion for summary judgment be granted and the petition be summarily dismissed without an evidentiary hearing. Applicant made objections to the Report and Recommendation, which were filed on February 18, 2015. On March 5, 2015, the Honorable Mary G. Lewis, United States District Judge, issued an Order adopting the Report and Recommendation, overruling Applicant's objections, granting Respondent's Motion for Summary Judgment, and denying a certificate of appealability.

Current PCR Application: 2015-CP-07-1565

In his current application, filed June 19, 2015, Applicant alleges he is being held unlawfully for the following reasons:

1. Juror misconduct;
 - a. Jurors intentionally concealed the fact that they were related to one another by marriage and were listed as living at the same residence on the jury roll call roster.
2. Violation of 6th and 14th Amendments U.S. Constitution

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Successiveness

This Court finds that the current application for post-conviction relief must be summarily dismissed because it is successive to his prior applications for post-conviction relief and raises a claim that is not proper for post-conviction relief. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). The relevant statute provides

[a]ll 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.

S.C. Code Ann. § 17-27-90 (1985). Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." Id. at 450, 409 S.E.2d at 394. If an allegation could have been raised in a previous application, then the applicant may not raise it in successive applications, and Courts "will not engage in an exploration of why the grounds were not raised." Id. ("[I]t is sufficient that they could have been raised, but were not."). The applicant bears the burden of showing that the allegations could not have been raised previously. Land, 274 S.C. 243, 262 S.E.2d 735 (1980).

Applicant could have raised each of the grounds for relief alleged in this application in his prior post-conviction relief applications. Applicant has failed to present any reasons why he could not have raised the current allegations in his previous post-conviction relief applications. Therefore, this Court finds the present application is barred as successive.

Statute of Limitations

This Court further 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. Section 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). After being convicted, the Remittitur on Applicant's appeal was issued on October 28, 2010. Therefore, Applicant was required to file this application on or before October 29, 2011. This application was filed on June 19, 2015, which was almost four (4) years 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. Leamon, 363 S.C. 432, 611 S.E.2d 494. In addition, Courts are authorized 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." § 17-27-70(c). Therefore, this Court finds that the application for post-conviction relief should be summarily dismissed for failure to file within the time mandated by statute and for being successive.


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

Office of the Attorney General
Attn: Patrick L. Schmeckpeper, Esquire
P.O. Box 11549
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 24 day of Aug, 2015



THE HONORABLE CARMEN T. MULLEN
Chief Administrative Judge
Fourteenth Judicial Circuit Court

Beaufort, South Carolina

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

Post Office Box 21787 - Columbia, South Carolina 29221

Pursuant to Rule 4(d)(2) of the South Carolina Rules of Civil Procedure, the Director of the South Carolina Department of Corrections has designated COL SHERRY LOPEZ (*Server*) as his duly authorized agent for the purpose of making service of the process on the below named individual.

STATE OF SOUTH CAROLINA)

AFFIDAVIT OF PERSONAL SERVICE

COUNTY OF DORCHESTER)

On this 25th day of SEPTEMBER 2015, I served the Conditional Order of Dismissal, on Inmate John Dykeman, SCDC Inmate #245443, by delivering personally and leaving a copy of the same at Lieber Correctional Institution. Deponent is not a party to this action.

s/ S. Lopez

SCDC Server

SWORN TO AND SUBSCRIBED BEFORE ME

this 25th day of September, 2015

Judieann Bryant (L.S.)
Notary Public for South Carolina

My Commission Expires: May 26, 2020

ADMISSION OF SERVICE

Service of a copy of the within Conditional Order of Dismissal is admitted at the South Carolina Department of Corrections LIEBER

DORCHESTER Correctional Institution), RIDGEVILLE, County, SC this 25th day of SEPTEMBER, 2015.

s/ John Dykeman
Inmate
SCDC Inmate #: 245443