

STATE OF South Carolina
IN THE Supreme Court

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S.C. SUPREME COURT

Certiorari to Spartanburg County
THE Honorable ROGER C. Couch and MARK HAYES II, Judges

Case NO: 2010-CP-42-4232

RODERICK TRACY 185123,

PETITIONER,

v. S

STATE of South Carolina

RESPONDENT.

Notice of Appeal

The petitioner (RODERICK TRACY) hereby Appeals from the order of the Honorable Roger C. Couch, Presiding Judge for the Seventh Circuit Administrative, dated November 22, 2016 and received by petitioner on November 29, 2016 in the matter of RODERICK TRACY vs. STATE of South Carolina, Case no: 2010-CP-42-4232.

Roderick Tracy

RODERICK TRACY, 185123
Allendale Corr. Inst.
1057 Revolutionary Trail
P.O. Box 1151
Fairfax, S.C. 29827

December 9, 2016

Fairfax, South Carolina

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 Roderick Tracy, #185123,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2010-CP-42-4232

CONDITIONAL ORDER OF DISMISSAL

2011 AUG 11 AM 10:05
 M. HOPKINS
 CLERK OF COURT
 SPARTANBURG COUNTY

This matter comes before this Court by way of an application for post-conviction relief filed August 11, 2010. Respondent made its Return and Motion to Dismiss on or about July 19, 2011.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Applicant was indicted at the October 2000 term of the Spartanburg County Grand Jury for trafficking in crack cocaine (2000-GS-42-5136). Thomas A. M. Boggs, Esquire, represented him on the charge. On August 15, 2001, Applicant pled guilty as indicted. The Honorable J. Derham Cole sentenced the Applicant to confinement for twenty (20) years, pursuant to a negotiated sentence.

The Applicant filed a *pro se* Notice of Appeal with the South Carolina Court of Appeals. However, the appeal was dismissed for failure to comply with Rule 203, SCACR.

[2002-CP-42-1952]

Applicant subsequently filed his first PCR application, alleging that he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of counsel; and

2. Involuntary guilty plea

An evidentiary hearing was convened on May 25, 2004. Applicant was present and represented by Richard H. Warder, Esquire. At the hearing, Applicant moved to amend his application to include a claim that the plea court lacked subject matter jurisdiction. The evidentiary hearing commenced and this Court allowed both parties to submit briefs on the lack of subject matter jurisdiction allegation. Following the submission of briefs, the Honorable Roger L. Couch concluded that the trial court lacked subject matter jurisdiction and granted a new trial.

Respondent filed a timely Notice of Appeal. In light of its subsequent decisions in State v. Smalls, 364 S.C. 343, 613 S.E. 25 (2005), Evans v. State, 363 S.C. 495, 611 S.E.25 510 (2005), and State v. Gentry, 363 S.C. 93, 610 S.E.2D 494(2005), the South Carolina Supreme Court vacated Judge Couch's order and remanded the matter for further proceedings not inconsistent with those cases on July 8, 2005.

On remand, a hearing was convened at the Spartanburg County Courthouse on October 27, 2005. Applicant was present and represented by N. Douglas Brannon, Esquire. The Honorable Roger L. Couch dismissed the application by order dated May 15, 2006.

The Applicant subsequently filed a Petition for Writ Certiorari. The South Carolina Supreme Court denied the petition on December 5, 2007, issuing the Remittitur on December 21, 2007.

[2008-CP-42-4033]

The Applicant then filed his second PCR on August 1, 2008. The State filed its return on or about May 6, 2009. The Applicant alleged that he was being held in custody unlawfully for the following reasons:



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1. Ineffective Assistance of Counsel;
2. Involuntary Guilty Plea; and
3. Indictment Violation

The Court issued a Conditional Order of Dismissal dated May 16, 2009, provisionally denying and dismissing this action. The Honorable J. Mark Hayes II then denied and dismissed Applicant's application by Final Order dated November 20, 2009. On December 3, 2009, Applicant filed a Motion for a Rule 59 (e) requesting the Court to issue a second order reflecting Applicant's response and objections to the Respondent's Motion to Dismiss. The Court denied and dismissed the Applicant's Motion to Alter or Amend Judgment on December 30, 2009.

APPLICANT'S CURRENT PCR APPLICATION

In his current Application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. After discovered evidence;
2. Brady violation;
3. Due Process violation; and
4. Prosecutorial misconduct
 - a. Applicant alleges that he has discovered by letter dated June 2010, from the Spartanburg County Clerk of Court's office, that his file does not contain an evidence sheet for chain of custody, or Rule 6 for chemical analysis regarding the drugs from his case. This information applies to each of the above listed allegations.

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For the purpose of this Return, the Respondent incorporates the Clerk of Court records, the South Carolina Department of Corrections' records and prior PCR records by reference. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Successive

The Court finds that the current Application should be summarily dismissed because it is successive to the previous applications for post-conviction relief. Successive applications for

[Handwritten Signature]

post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). 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.

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." [Emphasis in original]. Id., 305 S.C. at 450, 409 S.E.2d at 394. If the Applicant could have raised these allegations in a previous application, then the Applicant may not raise those grounds in successive applications. Id. The Applicant bears the burden of showing that the allegations could not have been raised previously. Land, Id.

This Court also finds that Applicant's claim of newly discovered evidence in regards to the lack of a chain of custody or Rule 6 form in his file at the Clerk of Court's office does not meet the established requirements. First, this Court finds that this allegation is not cognizable in the Applicant's post-conviction relief action. The Applicant waived his right to a jury trial. If the Court determines that the Applicant knowingly and voluntarily pled guilty, the plea waives any non-jurisdictional defects and defenses, including challenges to the sufficiency of the evidence. See Whetsell v. State, 276 S.C. 295, 277 S.E.2d 891 (1981); Rivers v. Strickland, 264 S.C. 121, 213 S.E.2d 97 (1975).]

Second, this Court finds that the Applicant has failed to meet the requirements for a new

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trial based on after discovered evidence. A defendant requesting a new trial based on after discovered evidence must show that the evidence:

(1) Is such as would probably change the result if a new trial was had; (2) Has been discovered since the trial; (3) Could not by the exercise of due diligence have been discovered before the trial; (4) Is material to the issue of guilt or innocence; and (5) Is not merely cumulative or impeaching. Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983).

The Applicant has not shown that the alleged evidence meets *any* of the requirements for after-discovered evidence. Most importantly, the "new evidence" offered by the Applicant is not "material to the issue of guilt or innocence," and probably would not "change the result if a new trial was had." Hayden, Id. The Applicant could have raised the new grounds for relief in his prior post-conviction relief application. The Applicant has failed to present any reasons why he could not have raised the current allegations in his previous post-conviction relief applications.

Statute of Limitations

This Court finds, further, 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 (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). The Applicant was convicted of the offense(s) he challenges in this Application on August 15, 2001. The Applicant was therefore required to file his application before August 15, 2002. This Application was filed on August 11, 2010, which was approximately eight years after the

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statutory filing period had expired.

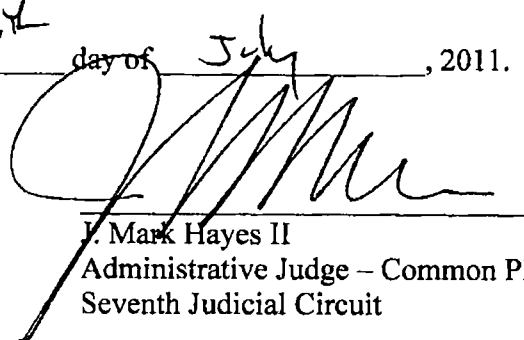
A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. §17-27-70(c) (2003) authorizes the Court to "grant a motion by either party for summary 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 finds that the application for post-conviction relief is summarily dismissed for failure to file within the time mandated by statute, because it is successive, and because it fails to meet the requirements for after discovered evidence.

Summary

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

Suzanne H. White, Esquire
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

AND IT IS SO ORDERED this 29th day of July, 2011.



J. Mark Hayes II
Administrative Judge – Common Pleas
Seventh Judicial Circuit

M. HOPE BLACKLEY

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CLERK OF COURT
SPARTANBURG COUNTY

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STATE OF SOUTH CAROLINA)
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 COUNTY OF SPARTANBURG)
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 Roderick Tracy, #185123,)
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 Applicant,)
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 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2010-CP-42-4232

FINAL ORDER

2013 SEP -11 AM 9:33
 CLERK OF COURT
 SPARTANBURG COUNTY

This matter comes before this Court by way of an application for post-conviction relief filed August 11, 2010. Respondent made its Return and Motion to Dismiss on or about July 26, 2011, requesting that the application be summarily dismissed.

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 filed August 1, 2011, provisionally denying and dismissing this action, while giving 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 September 22, 2012, serving the above-mentioned Conditional Order of Dismissal on the Applicant.

In multiple documents captioned "Applicant Objection To [sic] Respondent Conditional Order of Dismissal," dated August 3, 2011, and raising identical arguments, Applicant argues that his application should not be summarily dismissed based on the Statute of Limitations and the Doctrine of Successiveness. Applicant claims that his current application is not successive because he did not "acquire proof that this evidence was suppose [sic] to be submitted to the Applicant by way of Brady Motions." Applicant argues that a letter from the Clerk of Court indicating that there was no

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evidence sheet or Rule 6 form in his file, dated June 14, 2010, qualifies as newly discovered evidence.

Applicant further asserts that the Solicitor's Office, his attorney, and then-Clerk of Court Marc Kitchens committed acts of ethical and legal misconduct. These acts, Applicant claims, were intended to interfere with Applicant's ability to access evidence, thus depriving Applicant of his right to a fair trial. Applicant also contends that the withholding of material evidence led to Applicant pleading guilty; however, Applicant argues that this evidence of the lack of forms in his file is exculpatory and would have affected the outcome of his trial.

This Court has reviewed Applicant's responses to the State's Conditional Order of Dismissal in its entirety, in conjunction with the original pleadings, and finds that a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final. This Court finds that Applicant's current Application is successive to Applicant's previous two applications and Applicant's current application was filed outside the Statute of Limitations.

Furthermore, this Court finds that the discovery of the lack of an evidence sheet or Rule 6 form in his General Sessions file does not qualify as newly discovered evidence, as the information was discoverable with due diligence prior and is not material to guilt or innocence. Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983).

IT IS THEREFORE ORDERED that, for the reasons set forth in the Court's Conditional Order of Dismissal, the Application for PCR is hereby denied and dismissed with prejudice.


This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate

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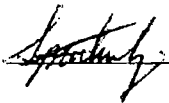
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appellate review. See Rule 203, SCACR. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

AND IT IS SO ORDERED this 30th day of August, 2013.



Roger L. Couch
Administrative Judge – Common Pleas
Seventh Judicial Circuit

 _____, South Carolina.

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M. ROBE...
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...

me



ALAN WILSON
ATTORNEY GENERAL

May 23, 2013

The Honorable Roger L. Couch
Po Box 2614
Spartanburg, SC 29304-2614

CLERK OF COURT
SPARTANBURG COUNTY
2013 SEP -5 AM 9:33
R. HOPE STANLEY

RE: Roderick Tracy, # 185123 v. State of South Carolina
2010-CP-42-4232

Dear Judge Couch:

Enclosed please find a proposed Final Order of Dismissal in the above-referenced case for your approval and signature. Also enclosed is a copy of the affidavit of service for the Conditional Order of Dismissal and his "Applicant Objection to Respondent Conditional Order of Dismissal." If this Order meets with your approval, please sign and forward it to the Spartanburg County Clerk of Court for filing. Thank you for your time and consideration in this matter.

Sincerely,

Suzanne H. White
Assistant Attorney General

SHW/arh

Enclosure: Applicant Objection to Respondent Conditional Order of Dismissal
cc: Roderick Tracy, #185123

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O. Box 3483
Spartanburg, SC 29304-3483



Phone (864) 596-2591
Fax (864) 596-2239

M. Hope Blackley

Clerk of Court

Sept. 9, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

Roderick Tracy #185123

Applicant

7TH JUDICIAL CIRCUIT

CASE # 2010-CP-424232

VS
Tracy
Respondent

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the

Final order

In this action dated 8-30, 2013 on

9-10-13

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:

Ann Muller

Suzanne White

Roderick Tracy

9-10-13

(Date)

Carrie Gray
(Signature)

Mr. ROBERT R. TERRY (185123)

F-4A10

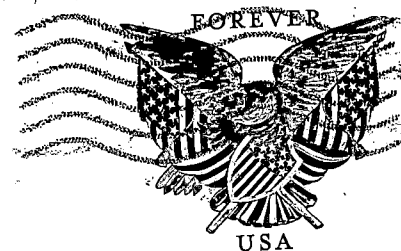
Allendale Corr. INST.
1037 Revolutionary Trail

P.O. BOX 1151

Fairfax S.C. 29827

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THE SUPREME Court of South
Carolina



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MAILROOM
ACI

SCDC
Christmas
Packet

Daniel E. SHEAROUSE

CLERK OF COURT

P.O. BOX 11330

Columbia S.C. 29211

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