

STATE OF SOUTH CAROLINA)
)
COUNTY OF MARLBORO)
)
Lee E. Ellerbee,)
S.C.D.C. No. 297877,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
OF THE FOURTH JUDICIAL CIRCUIT

2014-CP-34-0215

CONDITIONAL ORDER OF DISMISSAL

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by Lee Ellerbee (Applicant) on August 18, 2014. The State (Respondent) made its return, requesting the application be summarily dismissed.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Marlboro County Clerk of Court. In October 2003, the Marlboro County Grand Jury indicted Applicant for first-degree burglary (2003-GS-34-1129). Ralph J. Wilson, Esquire was initially appointed to the Applicant. After a September 2, 2003, hearing on the Applicant's motion to relieve counsel, the Honorable Alexander S. Macaulay granted the motion and informed the Applicant he would proceed *pro se* with Mr. Wilson present only as standby counsel. Applicant reaffirmed his desire to proceed *pro se* at a pretrial hearing before the Honorable James C. Williams, Jr., on October 6, 2003.

After the State called the case to trial, Applicant was found guilty. On November 13, 2003, Judge Williams sentenced Applicant to twenty-five (25) years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. Aileen P. Clare,

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Esquire, of the South Carolina Office of Appellate Defense perfected the appeal in the form of an Anders¹ brief. The Court of Appeals dismissed the appeal. State v. Ellerbe, Op. No. 2007-UP-287 (S.C. Ct. App. filed June 7, 2007).

First PCR Application: 2008-CP-24-0028

Applicant filed his first application for post-conviction relief on January 25, 2008. In this application, Applicant alleged he was being held in custody unlawfully for the following reasons:

1. “[D]id not knowingly, intelligently, or voluntarily waive his right to have counsel represent him.”
2. Ineffective assistance of appellate counsel.
3. Prosecutorial misconduct.
4. After-discovered evidence.
5. Trial court error:
 - a. Failure to suppress items obtained in violation of the Fourth Amendment from a vehicle search.
 - b. Failure to suppress information obtained from a private device in violation of the Fourth Amendment.
 - c. Allowed testimony of possible prior bad act evidence of Applicant to be presented in violation of the Fifth Amendment.
 - d. Allowed evidence of a separate crime to be introduced with no nexus to the Applicant.
 - e. Allowed evidence to be presented over objection of break within the chain of physical custody.

The Honorable William H. Seals, Jr., convened an evidentiary hearing into the matter on January 13, 2010 at the Darlington County Courthouse. Applicant was present at the hearing and represented by Jocelyn T. Newman, Esquire. Judge Seals dismissed the matter in a written order dated February 1, 2010, and filed February 9, 2010.

Applicant appealed the dismissal of his first PCR. Robert M. Pachek, Esquire, of the South Carolina Office of Appellate Defense perfected the appeal with the filing of a petition for writ of certiorari. The South Carolina Supreme Court denied the petition on March 9, 2012. The remittitur was issued on March 27, 2013.

¹ Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967).

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First Federal Habeas Corpus Petition: 6:12-1064-GRA-KFM)

Applicant also filed a federal *habeas corpus* action on May 11, 2012. The United States District Court for the District of South Carolina denied *habeas* relief on February 1, 2013. The United States Court of Appeals for the Fourth Circuit denied and dismissed Applicant's appeal on May 24, 2013.

Second PCR Application: 2013-CP-34-0120

Applicant filed his second application for post-conviction relief on June 11, 2013. In this application, Applicant alleged that he was being held in custody unlawfully for the following reasons:

- 1. Ineffective Assistance of Counsel
 - a. Applicant alleges that standby counsel was ineffective for allowing Applicant to proceed *pro se*
- 2. Fraudulent Indictment

The State made its Return and Motion to Dismiss on or about December 2, 2013. The Honorable J. Michael Baxley issued a Conditional Order of Dismissal dated December 23, 2013. The Honorable Paul M. Burch issued a Final Order dismissing the application with prejudice dated May 12, 2014.

Current PCR Application

In his *third and current* application for post-conviction relief, Applicant alleges that he is being unlawfully held in custody for the following reasons:

- 1. Lack of Subject Matter Jurisdiction

Before this Court are the Marlboro County Clerk of Court records regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, Applicants prior and current PCR applications, and Applicant's appellate record.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

Statute of Limitations

This Court finds this application must 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.

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). 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) (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.”

The Applicant was convicted of the offense he challenges on November 13, 2003, and the South Carolina Court of Appeals affirmed the conviction and sentence. The remittitur was issued in June of 2007, causing any subsequent application for post-conviction relief to be due no later than June 2008. However, the application for post-conviction relief was not filed until August 18, 2014, *over six (6) years* beyond the time allotted. Therefore, the Respondent requests that this Court summarily dismiss the application for post-conviction relief for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act.

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Successiveness

This Court finds the current PCR application must be summarily dismissed because it is successive to the Applicant's prior PCR application. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been raised earlier in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code (2014) states:

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

Respondent submits that the current allegations were or could have been raised in the proceedings based on Applicant's prior application for post-conviction relief; thus, the current application is successive and barred under S.C. Code § 17-27-90. Applicant has failed to establish any 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). Accordingly, this Court finds that this application is summarily dismissed for being successive.

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CONCLUSION

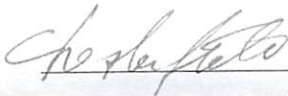
Pursuant to Section 17-27-70(b) of the South Carolina Code, this Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. Applicant is granted twenty days from the date of service of this Order upon him to show why this Order should not become final. Applicant shall file any reasons he may have with the Marlboro County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Caitlin Bazan Hastings, Esquire
PCR Division
P.O. Box 11549
Columbia, SC 29211

AND IT IS SO ORDERED this 30th day of September, 2016.



ROGER E. HENDERSON
Chief Administrative Judge
Fourth Judicial Circuit

, South Carolina

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