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AUG 08 2017

S.C. SUPREME COURT

The Supreme Court of South Carolina
Daniel Shearouse, Clerk
P.O. Box 11330
Columbia, S.C. 29221

RE: *Achie v. State*

2016-CP-04-2643

Dear Mr. Shearouse:

Enclosed please find a notice of appeal that is served upon
you.

Very truly yours

Leroy Archie

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

AUG 08 2017

S.C. SUPREME COURT

APPEAL FROM ANDERSON COUNTY

J. Corbell Maddox, Jr.
Chief Administrative Judge
Case No. 2016-CP-04-2643

THE STATE.....RESPONDENT

v.

LEROY ARCHIE.....APPELLATE

NOTICE OF APPEAL

The undersigned hereby appeals the final order of dismissal that was issued July 7, 2017 and received by me on July 12, 2017 from J. Cordell Maddox, Jr. Chief Administrative Judge.

Leroy Archie
Leroy Archie, # 317590
386 Redemption Way
McCormick, Sc 29899

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AUG 08 2017

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM ANDERSON COUNTY

J. CORDELL MADDOX, JR

CHIEF ADMINISTRATIVE JUDGE

CASE NO. 2016-CP-04-2643

RECEIVED

AUG 08 2017

S.C. SUPREME COURT

THE STATE.....RESPONDENT

v.

LEROY ARCHIE.....APPELLANT

PROOF OF SERVICE

The undersigned hereby certify that I mail Notice of Appeal to the Supreme Court of South Carolina, P.O. Box 11330, Columbia, SC 29221 and to the Attorney General office of South Carolina, Lindsey A. McCallister this 04 day of August 2017 by depositing same in the U.S. MAIL.

Sworn To And Subscribed Before Me

This 04 day of August 2017

JCF Ranklin
Notary Public of South Carolina

My Commission Expires 12-16-2019

Leroy Archie
Leroy Archie

sentence. State v. Archie, Op. No. 2008-UP-572 (S.C. Ct. App. 2008). The Remittitur was issued October 30, 2008.

2008-CP-04-04204

Applicant filed his first application for post-conviction relief on January 6, 2008 (2008-CP-04-04204). He alleged the following grounds for relief in his application:

1. Ineffective assistance of counsel:
 - a. Counsel failed to object to the prosecution use of an invalid prior conviction for enhancement purposes.
 - b. Counsel failed to properly preserve for appellate review the issue of whether the trial judge erred in allowing the state pathologist to give speculative testimony outside his field of expertise.
 - c. Counsel failed to request a lesser-included jury charge of manslaughter.
 - d. Counsel failed to adequately summarize the evidence during summation.
 - e. Counsel failed to object and request a new trial when the prosecution failed to completely disclose the autopsy report of the victim.
 - f. Counsel failed to object to judge's jury instruction charging the jury on intent.
2. Ineffective assistance of appellate counsel:
 - a. Appellate counsel failed to raise issue of whether the trial judge erred in denying defense motion for directed verdict based on states failure to establish the essential elements of first-degree murder beyond a reasonable doubt.
3. Trial judge erred in denying Applicant's request for substitution of counsel.

Respondent made its return on April 1, 2009, and an evidentiary hearing into the matter was convened on October 6, 2010, before the Honorable J. Cordell Maddox, Jr. Applicant was present at the hearing and represented by J. Chris Brown, Esquire. A. West Lee, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Applicant testified on his own behalf, and Andrew T. Potter, Esquire, also testified. By written order dated January 4, 2012, and filed January 5, 2012, Judge Maddox denied and dismissed the application.

Applicant filed a timely notice of appeal and a petition for writ of certiorari was perfected by Robert M. Pachak, Esquire, of the South Carolina Office of Appellate Defense filing a brief

pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988). The Supreme Court of South Carolina denied Applicant's petition and granted counsel's request to withdraw by order dated May 16, 2013. The Remittitur was issued June 4, 2013.

2:13-3052-RMG-WWD

Applicant subsequently filed a *pro se* Petition for Habeas Corpus under 28 U.S.C. § 2254 on October 29, 2013 (C.A. No. 2:13-3052-RMG-WWD). In his Petition, Applicant set forth the following grounds for relief:

1. Ineffective assistance of counsel
 - a. "Counsel failed to object to the prosecution's use of an invalid prior conviction for enhancement purposes."
 - b. "Counsel failed to properly preserve for appellate review the issue of whether the trial judge erred in allowing the state pathologist to give speculative testimony outside his field of expertise."
 - c. "Counsel failed to request a lesser-included jury charge of manslaughter."
 - d. "Counsel failed to adequately summarize the evidence during closing summation."
 - e. "Counsel failed to object and request a new trial when the prosecution failed to completely disclose the autopsy report of the victim."
 - f. "Counsel failed to object to the judge's jury instructions charging the jury on intent."
2. Ineffective assistance of appellate counsel
 - a. "Appellate counsel failed to raise issue of whether the trial judge erred in denying defense counsel's motion for a directed verdict based upon the State's failure to establish the essential element of first-degree murder beyond a reasonable doubt."
3. "Trial judge erred in denying applicant's request for the substitution of counsel."

Respondent filed its Return and Motion for Summary Judgment on March 7, 2014. On October 24, 2014, Jeremy A. Thompson, Esquire, was appointed to represent Applicant. After two telephonic conferences occurring on November 10 and 17, 2014, Applicant, through counsel, filed a Supplemental Response in Opposition to the Motion for Summary Judgment, a Motion to Expand the Record, and an Affidavit of Leroy Archie.

After a telephonic conference on December 5, 2014, the Honorable Wallace W. Dixon, United States Magistrate Judge, determined that an evidentiary hearing would be unnecessary. On December 16, 2014, Judge Dixon issued a Report and Recommendation that Applicant's motion to expand the record be granted "for the sole purpose of examining cause and prejudice to excuse the procedural default." Archie v. Cartledge, 2:13-3052-RMG-WWD, 2015 WL 1169917 (D.S.C. 2015) (incorporated in district court order). Judge Dixon also recommended that Respondent's motion for summary judgment be granted. Id. The Honorable Richard Mark Gergel, United States District Judge, denied Applicant's Petition on March 13, 2015, granted in part and denied in part Applicant's motion to expand the record, and accepted the Report and Recommendation for summary judgment. Id. Applicant gave notice of his appeal to the Fourth Circuit Court of Appeals on March 13, 2015. The Fourth Circuit Court of Appeals dismissed Applicant's appeal by order dated May 18, 2015, for failure to prosecute pursuant to Local Rule 45.

II. CURRENT APPLICATION

In his second and current post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:

1. "The Court lacked jurisdiction to convict for ABWIK"
 - a. "A circuit court has subject matter jurisdiction to convict a defendant of an offense if there is an indictment that sufficiently states the offense, the defendant waives presentment, or the offense is a lesser-included offense of the crime charged in the indictment. State v. Wilkes, 578 S.E.2d 717 (S.C. 2003)."
 - b. "Oral waiver of presentment was not sufficient to bestow subject matter jurisdiction on the trial court in the absence of an indictment, a written waiver was required. Odom v. State, 566 S.E.2d 528 (S.C. 2001)."
2. "The Court lacked jurisdiction to enhance with ABWIK"
3. "The Court lacked subject matter over ABWIK"

Applicant requests relief as follows:

- “Vacate sentence for ABWIK AND RESENTENCE FOR MURDER”

Attached to and incorporated herein are the Anderson County Clerk of Court records for the subject convictions, Applicant’s records from the South Carolina Department of Corrections, the final orders of Applicant’s previous PCR and federal habeas corpus actions, Applicant’s appellate records, and the records of this current PCR action.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Failure to State a Claim

This Court finds the application must be dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act. See S.C. Code Ann. §17-27-20. An applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy....

S.C. Code Ann. § 17-27-20(A).

Applicant alleges no grounds for relief pertaining to the conviction he challenges in response to questions 4 and 5 on the Form 5 application; all of his allegations pertain to the separate ABWIK conviction by which his sentence for murder was enhanced. Therefore, as to Applicant’s murder and possession of a weapon convictions (2005-GS-04-2826), this Court finds

Applicant has failed to raise any ground cognizable under the Uniform Post Conviction Relief Act, and the application shall be dismissed.

Subject-Matter Jurisdiction

As to Applicant's claims regarding his 1988 ABWIK conviction (1988-GS-04-00590), this Court finds Applicant's allegation that the circuit court lacked subject-matter jurisdiction to convict Applicant on that charge and that his sentence for murder is being improperly enhanced by that conviction to be wholly without merit and shall be dismissed as a matter of law.² Defects in the indictment do not affect subject-matter jurisdiction. See State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) (citing U.S. v. Cotton, 535 U.S. 625 (2002)). "[S]ubject-matter jurisdiction of the circuit court and the sufficiency of an indictment are two distinct concepts." Id. at 101, 610 S.E.2d at 499. Applicant may challenge the subject-matter jurisdiction of the trial court at any time. Gentry, 363 S.C. at 100, 610 S.E.2d at 498 (citing Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001)). However, "circuit courts obviously have subject-matter jurisdiction to try criminal matters." Id. at 101, 610 S.E.2d at 499. Therefore, Applicant must present evidence that his case is of some class over which the circuit court does not have the authority to preside. Further, this Court finds the records of Applicant's 1988 conviction indicate Applicant signed a written waiver of presentment at the time of his plea. This Court finds Applicant's conviction involved a criminal charge in General Sessions Court, and the circuit court had proper subject-matter jurisdiction. Accordingly, this Court finds there is no genuine issue of material fact which would necessitate an evidentiary hearing on this issue.

² This Court further finds any allegations regarding the 1988 conviction shall be similarly denied and dismissed as barred by the statute of limitations, the prohibition against successive applications, and the equitable doctrine of laches.

Statute of Limitations

The 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.

Specifically, the act requires 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 on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).

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) 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.”

Applicant was convicted on September 14, 2006, and the remittitur from his direct appeal issued on October 30, 2008. The current application was not filed until November 29, 2016—well after the one-year statutory filing period expired. Therefore, this Court finds the application should be summarily dismissed as barred by the statute of limitations.

Successive

The application should be summarily dismissed because it is successive to Applicant’s previous 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 earlier raised 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 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 indicate 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 the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. Id. Applicant bears the burden of showing the allegations could not have been previously raised. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

This Court finds Applicant's 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 Ann. § 17-27-90. This Court finds 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, and the Court shall summarily dismiss the application as successive to Applicant's previous PCR application.

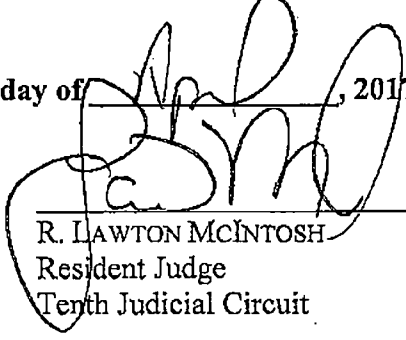
V. CONCLUSION

Pursuant to S.C. Code Ann. § 17-27-70(b), the 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 Anderson County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Lindsey A. McCallister, Esquire
PCR Division – 10th Circuit
P.O. Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Anderson County Clerk of Court and opposing counsel within twenty (20) days, and that the Court will not consider any issues raised in his response if not so timely filed and served.

AND IT IS SO ORDERED this 17 day of April, 2017.


R. LAWTON MCINTOSH
Resident Judge
Tenth Judicial Circuit

Anderson, South Carolina

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COMAION FILEAS AND
GENERAL SESSIONS



ALAN WILSON
ATTORNEY GENERAL

April 21, 2017

The Honorable Richard A. Shirley
Clerk of Court, Anderson County
PO Box 8002
Anderson, SC 29622-8002

FILED-CLERKS OFFICE
ANDERSON SC
2017 APR 25 AM 11:18
COMMON PLEAS AND
GENERAL SESSIONS

Re: Leroy Archie, #317590 v. State of South Carolina
2016-CP-04-2643

Dear Mr. Shirley:

Enclosed please find the original **Order of Dismissal** signed by the Honorable R. Lawton McIntosh in the above-captioned case, for filing in your office.

Pursuant to Rule 71.1(f), of the South Carolina Rules of Civil Procedure, please "provide notice of entry of judgment and serve a copy of the order or judgment to the parties as provided in Rule 77(d), SCRPC."

In addition, please forward **proof of service** and a **time stamped copy** back to our office for our file.

Should you have any questions, please call me at (803) 734-3737.

Sincerely,

Lindsey A. McCallister
Assistant Attorney General

LAM/dgr
Enclosure

also requests that the Court denies the Conditional Order of Dismissal and schedule an evidentiary hearing into the matter.

As an initial matter, this Court notes Applicant's ABWIK conviction is from 1988, and is not the subject of this current post-conviction relief action. Regardless, this Court finds the records from Applicant's ABWIK conviction show Applicant did in fact sign a waiver of presentment. This Court also notes that this application for post-conviction relief is untimely, even for Applicant's murder conviction. Applicant was convicted on September 14, 2006. The Remittitur from his direct appeal was issued on October 30, 2008. Therefore, this application should have been filed on or before October 30, 2009. However, the application was not filed until November 29, 2016, well after the statutory filing period expired.

This Court has reviewed Applicant's responses to the Conditional Order of Dismissal in their entirety, in conjunction with the original pleadings, and finds a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final.

IT IS THEREFORE ORDERED that, for the reasons set forth here and in this Court's Conditional Order of Dismissal, the PCR application is hereby **DENIED AND DISMISSED WITH PREJUDICE**.

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This Court hereby advises the Applicant that he must file and serve a Notice of Appeal within thirty days of the service of this Order to secure appellate review. See Rule 203, SCACR. Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 7 day of July, 2017.



J. CORBELL MADDOX JR.
Chief Administrative Judge
Tenth Judicial Circuit

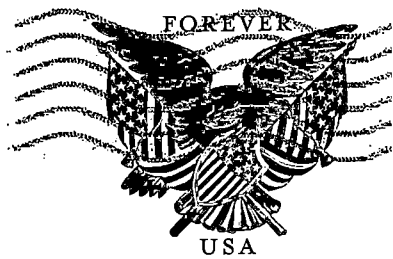
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386 Redemption Way
Mc Cormick SC 29899

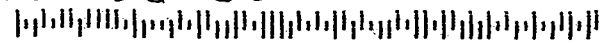
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Supreme Court of South Carolina
Daniel Shearouse, Clerk
P.O. Box 11336
Columbia SC 29221

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AUG 04 2017

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MAIL ROOM

THIS DEPARTMENT OF CORRECTIONS HAS NOT
INSPECTED OR CENSORED THIS ITEM; THEREFORE,
THE DEPARTMENT DOES NOT ASSUME RESPONSIBILITY
FOR ITS CONTENTS.
SOUTH CAROLINA DEPARTMENT OF CORRECTIONS