

The State of South Carolina
In the Supreme Court

RECEIVED

AUG 25 2017

S.C. SUPREME COURT

Appeal from Spartanburg County
Court of Common Pleas

J. Derham Cole Circuit Court Judge

Case No: 2015-CP-42-4338

The State Respondent

✓

Tyrone Perry Applicant

Notice of Appeal

Tyrone Perry appeals the order of the Honorable J. Derham Cole dated August 15, 2017. The Applicant received written notice of this order on August 22, 2017

This 23rd day of August 2017

s/ Tyrone Perry
Tyrone Perry
4344 Broad River Rd
Columbia S.C. 29210

The state of South Carolina
In the Supreme Court

Appeal from Spartanburg County
Court of Common Pleas
J. Derham Cole Circuit Court Judge

Case No: 2015-CP-42-4338

The state Respondent
v
Tyrone Perry Applicant

Proof of Service

I certify that I have served the Notice of Appeal by depositing
a copy of it in the U.S. mail postage prepaid to the following:

The Supreme Court of South Carolina
Daniel Shearouse Clerk
P.O. Box 11330
Columbia S.C. 29211

office of the Attorney General
P.O. Box 11549
Columbia S.C. 29211

This 23rd day of August 2017

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) FOR THE SEVENTH JUDICIAL CIRCUIT
Tyrone Perry,) Case No.: 2015-CP-42-04338
S.C.D.C. No. 307793,)
Applicant,)
v.) **CONDITIONAL ORDER OF DISMISSAL**
State of South Carolina)
Respondent.)

2017 APR -3 PM 4: 19
M. HOPE LACKEY

This matter comes before the Court by way of an application for post-conviction relief (“PCR”) filed by Tyrone Perry (“Applicant”) on October 19, 2015 (“the Application”). 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 of the Spartanburg County Clerk of Court. Applicant was indicted at the February 2005 term of the Spartanburg County Grand Jury for murder (2005-GS-42-00836). James Edward Hatcher, Esquire, represented Applicant. On February 1, 2006, Applicant pleaded guilty as indicted. The Honorable J. Cordell Maddox, Jr. sentenced Applicant to imprisonment for a term of 50 years.

Applicant filed a timely notice of appeal. Robert M. Dudek, Esquire, filed an Anders brief¹ on Applicant’s behalf and petitioned to be relieved as counsel. The South Carolina Court of Appeals dismissed Applicant’s appeal by unpublished opinion. State v. Perry, Op. No. 2008-UP-217 (S.C. Ct. App. Order filed April 7, 2008). The Remittitur was returned to the circuit court on April 24, 2008.

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

First PCR Application: 2008-CP-42-00898

Applicant filed his first application for post-conviction relief on February 19, 2008 (2008-CP-42-00898). He alleged the following grounds for relief in his application:

1. Ineffective assistance of counsel
 - a. Failure to investigate witnesses
 - b. Failure to investigate medical records
 - c. Failure to suppress coerced statements
2. Involuntary Guilty Plea

Respondent made its return on May 13, 2008, and an evidentiary hearing into the matter was convened on July 28, 2009, before the Honorable J. Mark Hayes, II. Applicant was present at the hearing and represented by Kenneth P. Shabel, Esquire. Matthew J. Friedman, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Applicant testified on his own behalf, and James E. Hatcher, Esquire, also testified. Applicant's mother, Sara Dunn, and aunt, Brenda Miller, also testified at the PCR hearing. By written Order dated and filed October 13, 2009, Judge Hayes denied and dismissed the application.

Applicant filed a timely notice of appeal. Wanda H. Carter, Esquire, filed a Petition for Writ of Certiorari pursuant to Johnson v. State² on Applicant's behalf. The South Carolina Supreme Court denied Applicant's petition by unpublished opinion. Perry v. State, S.C. Sup. Ct. Order dated July 21, 2011. The Remittitur was sent to the circuit court on August 8, 2011.

First Petition for Habeas Corpus: 1:11-2334-MBS-SVH

Applicant subsequently filed a *pro se* Petition for Habeas Corpus under 28 U.S.C. § 2254 on August 25, 2011 (C.A. No. 1:11-2334-MBS-SVH). In his Petition, Applicant set forth the following grounds for relief:

1. Failure to call witnesses (investigate).

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

2011 APR -3 PM 19
M. HOPE BACHMEYER

- a. Crime scene witnesses, alibi witnesses. Failure to investigate witnesses before advising to plea.
2. Failure to investigate medical records
 - a. Ineffective for failing to investigate medical records (mental health records) and psychiatrists of petitioner.
3. Failure to suppress statements.
 - a. Failed to file motion to suppress coerced statements made by police.
4. Government breached plea agreement.
 - a. Plea counsel coerced petitioner by telling him he would receive 25 years with two witnesses present. Petitioner actually got 50 years.

Respondent filed its Return and Motion for Summary Judgment on December 19, 2011. On May 17, 2012, the Honorable Shiva V. Hodges, United States Magistrate Judge, issued a Report and Recommendation ordering that Respondent's motion for summary judgment be granted. Perry v. McCall, 1:11-2334-MBS-SVH, 2012 WL 3749484 (D.S.C. 2012). The Honorable Margaret B. Seymour, United States District Judge, accepted the Report and Recommendation for summary judgment and denied Applicant's petition on August 28, 2012. Perry v. McCall, 1:11-2334-MBS-SVH, 2012 WL 3751568 (D.S.C. 2012).

Applicant gave notice of his appeal to the Fourth Circuit Court of Appeals on September 12, 2012. The Fourth Circuit Court of Appeals dismissed Applicant's appeal on March 12, 2013 for want of a certificate of appealability. Perry v. McCall, 513 Fed.Appx. 363 (4th Cir. 2013). Applicant thereafter filed a petition for writ of certiorari to the United States Supreme Court on July 16, 2013. Respondent made its brief in opposition on January 21, 2014. The Supreme Court denied the petition on February 24, 2014. Perry v. McCall, 134 S.Ct. 1276 (2014).

Second PCR Application: 2014-CP-42-2164

Applicant filed his second application for post-conviction relief on May 30, 2014 (2014-CP-42-02164). He alleged the following grounds for relief in his application:

1. "Austin violation pursuant to Austin v. State 409 S.E.2d 395 (1992)"
2. "Unkept plea agreement"

3. "Marlar violation pursuant to Marlar v. State 653 SE2d 266 (S.C. 2007)"

Respondent made its return and motion to dismiss on April 9, 2015, arguing the application was successive, untimely filed, and barred by the doctrine of *res judicata*. On April 16, 2015, the Honorable R. Keith Kelly issued a Conditional Order of Dismissal, and then a Final Order on January 29, 2016 dismissing the matter with prejudice. Applicant did not appeal.

Current PCR Application

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

1. Involuntary guilty plea; in that:
 - a. Applicant was incompetent at the time of the guilty plea
2. Ineffective assistance of counsel; in that:
 - a. Counsel failed to get a second opinion as to Applicant's mental health

Also before this Court are the Spartanburg County Clerk of Court records regarding the Subject convictions, Applicant's appellate records, Applicant's prior PCR and federal habeas corpus records, and the records of this current PCR action.

2017 APR -3 11:4:19
H. HOPE PLANKET

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Statute of Limitations

This Court finds 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. Section §17-27-45(A) provides:

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). Applicant pleaded guilty to the challenges in this application on February 1, 2006. The Remittitur was returned April 24, 2008. Therefore, Applicant was required to file this PCR application no later than April 24, 2009. This application was filed on October 19, 2015, which was *more than six years beyond* the expiration of the statutory filing period.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consol. Sch. Dist. 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.” Therefore, the Court shall summarily dismiss the application for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act.

2017 APR -3 PM 4:19
HOPE BLANCHETT

Successiveness

This Court finds it must also summarily dismiss the current application because it is successive to the previous application 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). S.C. Code Ann. § 17-27-90 (1985) 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.” Id. at 450, 409 S.E.2d at 394. If Applicant could have raised these allegations in a previous application, then he may not raise those grounds in successive applications. Id. Applicant bears the burden of showing the allegations could not have been raised previously. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

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. Accordingly, the Court shall summarily dismiss the application because it is successive.

The Doctrine of Res Judicata

The doctrine of *res judicata* also bars Applicant’s claims of ineffective assistance of counsel and involuntary guilty plea. *Res judicata* prohibits subsequent actions by the same parties on the same issues. Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. Id.; Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981).

Applicant had a full opportunity to litigate all his allegations in his previous post-conviction relief applications. The public interest in finality of judgments requires that litigation

2017 APR -3 PM 4:19
AL HOPE BLANCHARD
CLERK

must eventually come to an end. Pursuant to Rule 12(b)(6), SCRPC, the Court shall also dismiss these claims as barred by the doctrine of *res judicata*.

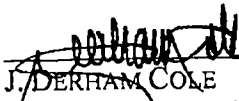
CONCLUSION

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

Office of the Attorney General
Johnny E. James, Jr., Esquire
Post-Conviction Relief Division
P.O. Box 11549
Columbia, SC 29211

Applicant is cautioned that his response to this order must be actually received by the Spartanburg 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 30 day of March, 2017.



J. DERHAM COLE
Chief Administrative Judge
Seventh Judicial Circuit

_____, South Carolina

2017 APR -3 PM 4:13
M. HOPE BLACKLEY

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
April 4, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

Tyhone Perry
Applicant # 201793

7TH JUDICIAL CIRCUIT

CASE # 2015-CP-42-4338

VS
Stille
Respondent

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the Conditional Dismissal
In this action dated 3-30, 2017 on 4-4-17

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:

Orley Hawthorth
Alicia Delee
Tyhone Perry

4-4-17
(Date)

Carrie Steg
(Signature)

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG)	
)	
Tyrone Perry,)	Case No.: 2015-CP-42-04338
S.C.D.C. No. 307793,)	
)	
Applicant,)	
)	FINAL ORDER OF DISMISSAL
v.)	
)	
State of South Carolina)	
)	
Respondent.)	

FILED
 CLERK OF COURT
 SPARTANBURG COUNTY
 2017 AUG 15 PM 4:15
 M. HOPE BLANKLEY

This matter comes before the Court by way of an application for post-conviction relief filed on October 19, 2015. Respondent made its Return on or about March 23, 2017, requesting the application be summarily dismissed as untimely, successive, and barred by the doctrine of *res judicata*.

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 signed March 30, 2017 and filed April 3, 2017, provisionally denying and dismissing this action, while giving the 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, April 19, 2017, serving the above-mentioned Conditional Order of Dismissal on Applicant.

Applicant filed a document captioned "Objection to Respondent's Motion to Dismiss" on April 7, 2017, in which Applicant argues that he was incompetent at the time of the crime and his plea counsel was ineffective for failing to properly investigate an insanity defense. Applicant

further alleges that plea counsel was ineffective for failing to get a second opinion on his mental health which violated his constitutional rights.

Applicant subsequently filed a document captioned "Motion to Alter or Amend Judgment" on April 28, 2017, in which Applicant makes the same argument that not only is he legally incompetent, but that counsel was ineffective for failing to "provide an adequate competency determination that could have clarified [his] state of mind." Applicant further contends a breach of contract because he was told he would receive 25 years "for his cooperation" but received a 50 year sentence, instead. Applicant claims the trial court did not provide an adequate competency determination and as such, his due process rights to a fair trial were violated.

This Court notes Applicant received his "full bite at the apple" in the action based on his first application for post-conviction relief, and in his *pro se* federal habeas action. This current application is Applicant's third post-conviction relief 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). Applicant's current allegations were made and ruled upon in Applicant's prior application for post-conviction relief. Not only is this application successive to his prior application, but it also barred by the doctrine of *res judicata*.

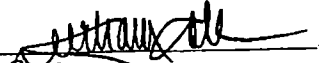
This Court also notes that counsel requested a mental health evaluation of Applicant prior to his plea to determine his competency to stand trial and his criminal responsibility. That evaluation was made part of the record in Applicant's criminal case during the plea hearing.

CLERK OF COURT
PARTIAL
2017 AUG 15 PM 4:48
M. HOPE JACKLEY

This Court 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 in the Court's Conditional Order of Dismissal, the Application for post-conviction relief is hereby **DENIED AND DISMISSED WITH PREJUDICE**.

AND IT IS SO ORDERED this 13 day of August, 2017.



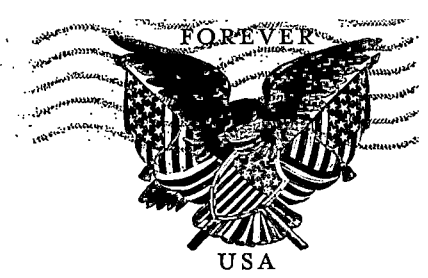
J. DERHAM COLE
Chief Administrative Judge
Seventh Judicial Circuit

_____, South Carolina.

CLERK OF COURT
SPARTANBURG COUNTY
2017 AUG 15 PM 4:46
M. HOPE BLACKLEY

Lyrene Terry # 307793
Kirkland Corr. Institute
4344 BroadRiver Rd
Columbia S.C. 29210

COLUMBIA SC 290
24 AUG 2017 5:14 1



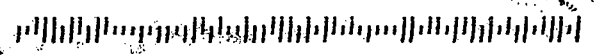
~~DO NOT
MAIL
INLV~~

RECEIVED

AUG 24 2017

KIRKLAND R&E CENTER
MAILROOM

The Supreme Court of South Carolina
Daniel Shearouse Clerk
P.O. Box 11330
Columbia S.C. 29211
29211-133030



4
LEGAL MAIL