



RECORDED

2017 AUG -2 AM 9:43

JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

ALAN WILSON
ATTORNEY GENERAL

July 28, 2017

The Honorable James C. Campbell
Clerk of Court, Sumter County
215 North Harvin St.
Sumter, SC 29150-4974

Re: David E. Rhodes, Sr., v. State of South Carolina
2016-CP-43-1233

Dear Mr. Campbell:

Enclosed please find an original and a copy of a Conditional Order of Dismissal in connection with the above referenced case. Please file the original and return a certified copy to me in the self-addressed envelope provided for your convenience.

Sincerely,

Julie A. Coleman
Assistant Attorney General

JAC:ccey
Enclosures

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

) IN THE COURT OF COMMON PLEAS
) FOR THE THIRD JUDICIAL CIRCUIT
)
)

David Elijah Rhodes Sr., #189498,

) Case No.: 2016-CP-43-01233
)
)

Applicant,

v.

) **CONDITIONAL ORDER OF DISMISSAL**
)
)

State of South Carolina,

Respondent.

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JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by David Elijah Rhodes Sr. (Applicant) on June 28, 2016. 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 Sumter County Clerk of Court. Applicant was indicted at the February 2007 term of the Sumter County Grand Jury for murder and possession of a firearm during the commission of a violent crime (2007-GS-43-0222). Applicant was represented by Timothy Murphy, Esquire. W. Harry Conner, Esquire, prosecuted the case. On March 3, 2008, Applicant proceeded to a jury trial before Honorable R. Ferrell Cothran Jr. Applicant pled to the lesser included offense of voluntary manslaughter, and was sentenced to eighteen years' imprisonment. Applicant was to be given credit for time served. Applicant did not appeal his plea or sentence.

2008-CP-43-2781

Applicant filed his first application for post-conviction relief on December 8, 2008, alleging that he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
 - a. "Court appointed counsel made no independent investigation of case."
2. "Not exercising second and third post-trial remedy."
 - a. "I ask counsel to allow me to negotiate a better plea with the judge and was denied that right."

Respondent made its Return on April 10, 2009. An evidentiary hearing into the matter convened on October 29, 2010, at the Sumter County Courthouse. Applicant was present and represented by Charles T. Brooks, III Esquire. Respondent was represented by Mary S. Williams, Esquire, of the South Carolina Attorney General's Office. At the hearing, Applicant testified on his own behalf. Applicant's trial counsel Timothy Murphy, Esquire also testified. On January 25, 2011, the Honorable W. Jeffrey Young, denied and dismissed the application with prejudice.

A timely notice of appeal was filed on February 4, 2011. On October 21, 2011, Breen Richard Stevens, Esquire, of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, filed a Johnson¹ Petition for Writ of Certiorari. The issue on appeal was "whether Counsel's performance was constitutionally deficient for failing to make an independent investigation of Petitioner's murder case prior to Petitioner's trial date and subsequent plea on the day of trial?" By written order dated January 23, 2014, the South Carolina Court of Appeals denied the petition. The Remittitur was issued on February 11, 2014.

0:14-428-MGL-PJG

Subsequently, Applicant filed a *pro se* Petition for Writ of Habeas Corpus on February 10, 2014. Respondent filed its Return and Motion for Summary Judgement on June 11, 2014 (C/A No. 0:14-428-MGL-PJG). In his Petition, Applicant set forth the following grounds:

¹ Johnson v. State, 294 S.C. 310, 310, 364 S.E.2d 201, 201 (1988).

1. Ineffective Assistance of Counsel.
2. Fabrication of Evidence.
3. Necropsy Report/Autopsy based on Hearsay.
4. Invalid Murder Indictment

The Honorable Paige J. Gossett, United States Magistrate Judge, issued on January 9, 2015 a Report and Recommendation that Respondent's motion for summary judgment be granted. Applicant timely filed objections. The Honorable Mary G. Lewis, United States District Judge, denied Applicant's Petition on February 12, 2015, and accepted the Report and Recommendation for summary judgment.

Applicant gave notice of his appeal to the Fourth Circuit Court of Appeals. Applicant preceded pro se. The Court of Appeals dismissed the appeal by unpublished opinion on May 27, 2015. Following the dismissal of his appeal, Applicant filed a Petition for Rehearing and Petition for Rehearing *En Banc* on June 15, 2015. On April 25, 2016, the Supreme Court of the United States denied the petition.

CURRENT APPLICATION

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

1. Ineffective Assistance of PCR Counsel.
 - a. "Denied right to review first PCR application."

Also, before this Court are the records of the Sumter County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the final orders from Applicant's prior post-conviction relief action, Applicant's appellate records, and the records from this post-conviction relief action.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Statute of limitations

The application 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 (“the Act”). 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 offense 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 was convicted and sentenced on March 3, 2008. Accordingly, Applicant was required to file this Application on or before March 3, 2009. Applicant did not file this Application until March 8, 2016, which was well beyond the statutory filing period.

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.” Therefore, this application is dismissed for failure to file within the time mandated by the Act.

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 offense 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. § 17-27-70.

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).

Respondent submits Applicant's contention that he received ineffective assistance of counsel on his prior post-conviction relief application is not a ground for relief and not a sufficient claim to warrant a successive application. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction

relief actions. Coleman v. Thompson, 501 U.S. 722 (1991). Once a PCR applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of PCR counsel. Aice, 305 S.C. at 452, 409 S.E.2d at 395.

The South Carolina Supreme Court held the PCR rules “contemplate an adjudication on the merits of the original petition, one bite at the apple as it were.” Aice, 305 S.C. at 452, 409 S.E.2d at 395 (citing Gamble v. State, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989)). The court also noted, “Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice.” Id. at 451, 409 S.E.2d at 395. Aice further held that “the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' allowing for a successive PCR application under § 17-27-90.” Id. at 452, 409 S.E.2d at 394.

Applicant's contention that prior PCR counsel was ineffective is not a sufficient reason warranting a successive PCR application. Applicant received a hearing in his first post-conviction relief action and timely appealed therefrom. It is clear that Applicant enjoyed a complete adjudication on the merits of his original petition. Therefore, the current application is successive and barred under S.C. Code Ann. § 17-27-90.

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

Office of the Attorney General
Attn: Julie A. Coleman, Esquire
Rasheeda Cleveland, Esquire
PCR Division – 3rd Circuit
P.O. Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Sumter 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 18th day of July, 2017.



EDGAR W. DICKSON
Chief Administrative Judge
First Judicial Circuit

Orangeburg, South Carolina

