THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY

COURT OF COMMON PLEAS

KRISTI LEE HARRINGTON

CIRCUIT COURT JUDGE

CASE NO: 2016-CP-10-5452

Shamar Lee Macon..Petitioner,

v.

South Carolina ....Respondent.

NOTICE OF APPEAL

The above captioned Appellant appeals the November 19, 2017 Conditional Order of Dismissal of the Honorable Kristi Lee Harrington. Appellant received a copy of said order on December 7, 2017. This Notice of Appeal and accompanying Motion follows.

December 6, 2017
Ridgeland, South Carolina

Shamar L. Macon, Appellant
R.C.I., P.O. Box 2039
Ridgeland, SC 29936

Attorney for Respondent:
Office of the Atty. General
Rasheeda Cleveland
PCR Division
Post Office Box 11549
Columbia, S.C. 29211

CERTIFICATE OF SERVICE

I, Shamar Lee Macon, have served Ms. Rasheeda Cleveland of the Office of the Attorney General with Notice of Appeal and Motion to Relax Rule 243 (C), SCACR, and for an Enlargement of Time, by placing a copy of same in the United States Postal Mail, with proper postage affixed thereto, addressed to said party at Post Office Box 11549, Columbia, South Carolina 29211.

December 7, 2017
Ridgeland, South Carolina

[signature]

Shamar L. Macon, Appellant
Ridgeland Corr. Inst.
Post Office Box 2039
Ridgeland, SC 29936

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Shamar Lee Macon, #238502,
Applicant,

v.

State of South Carolina,

Respondent.

2016-CP-10-5452

CONDITIONAL ORDER OF DISMISSAL

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DEC 12 2017
SC Court of Appeals

FILED
2017 OCT 25 PM 2:53
JULIE J. ARMSTRONG
CLERK OF COURT
BY

This matter comes before the Court by way of the application for post-conviction relief (PCR) filed on October 13, 2016 by Shamar Lee Macon (Applicant). 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 Charleston County Clerk of Court. Applicant was indicted at the February 2003 term of the Charleston County Grand Jury for armed robbery (2003-GS-10-0875) and kidnapping (2003-GS-10-0876). On September 18, 2003, Applicant pled guilty before the Honorable Deadra L. Jefferson and was sentenced to confinement for period of twenty-five (25) years for each offense. Applicant was represented by Robert G. Howe, Esquire. The sentences were to run concurrently. Applicant did not appeal his plea or sentence.

2004-CP-10-3382

On August 12, 2004, Applicant filed his first application for post-conviction relief in which he raised the following grounds for relief:

1. Lack of subject-matter jurisdiction.
2. Ineffective assistance of counsel.
3. Involuntary guilty plea.

Respondent made its Return on or about October 1, 2004. An evidentiary hearing into the matter was convened on April 31, 2006 before the Honorable William P. Keesley. Applicant was present and represented by H. Stanley Feldman, Esquire. Matthew Friedman, Esquire of the South Carolina Attorney General's Office, represented Respondent. By written order dated April 31, 2006, Judge Keesley dismissed the application with prejudice.

2008-CP-10-4909

Applicant then filed his second application for post-conviction relief on August 26, 2008, in which he raised the following grounds for relief:

1. Ineffective assistance of plea counsel.
2. Ineffective assistance of PCR counsel.

On June 14, 2009, Judge Jefferson dismissed the application with prejudice. Applicant appealed. On July 21, 2009, the South Carolina Supreme Court issued the Order dismissing Applicant's appeal. The Remittitur was issued on August 11, 2009.

2010-CP-10-4675

Following the dismissal of Applicant's PCR appeal, he filed a third application for post-conviction relief. In his application he alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of PCR counsel.
2. Involuntary guilty plea.

On November 3, 2010, the Honorable R. Markley Dennis Jr., dismissed the application with prejudice.

CURRENT APPLICATION

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

1. "Recent discovery."[1]
    a. "Applicant recently discovered that the state is requiring him to serve two (2) years community supervision (CSP) under section 24-21-560 after his max out date for his active twenty-five (25) year sentence, which imposed by the Honorable Deadra L. Jefferson on September 18, 2003.
    b. "The transcript of record of the September 18, 2003 sentencing proceeding evinces that the Applicant was not sentenced to, nor was there a conditional plea for community supervision. Therefore, it is not, nor can it be a collateral consequence of the Applicant's plea."

2. "Administrative enhancement of Court's sentence."
    a. "The September 18, 2003 written orders of commitment do not indicate that the Applicant was sentenced to two (2) years community supervision. Therefore, the Applicant's sentence may not be increased thereafter by an administrative order."
    b. "Applicant was not sentenced to a suspended sentence for which community supervision can be applied, where his current sentence is a straight twenty-five year cap. Considering this and earned work credit pursuant to S.C. Code § 24-13-230, once the Applicant completes his sentence it will be the entire functional equivalent of twenty-five years."
    c. "The imposition and liberty constraint of community supervision after the Applicant's max out will obviously deny him substantive and procedural due process where his sentence would be enhanced, and it would also constitute double jeopardy in violation of both the fifth and fourteenth amendments of the United States Constitution."
    d. "The imposition and liberty constraint of community supervision would be contrary to state and federal Supreme Court precedent, and would also be deprivation of equal protection of the law."

Also, before the Court are the records of the Charleston County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, records from Applicant's prior PCR actions, Applicant's appellate records, and the records from this PCR action.

[1] Respondent interpreted this as a claim of newly-discovered evidence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the pleadings and all relevant supporting documents. Pursuant to S.C. Code Ann. § 17-27-70(b), the Court makes the following findings of fact and conclusions of law:

Statute of Limitations

The Court finds that this 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 pled guilty to the offenses he now challenges on September 18, 2003. Accordingly, Applicant was required to file this Application on or before September 18, 2004. Applicant did not file this Application until October 13, 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). Summary dismissal of a PCR application is appropriate when the application is filed after the statutory filing period. Leamon v. State, 363 S.C. 432, 611 S.E.2d 494 (2003). 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." Therefore, this application is dismissed for failure to file within the time mandated by the Act.

Successive

Similarly, this application for post-conviction relief is summarily dismissed because it is successive to the previous application for post-conviction relief and fails to state a claim upon which relief can be granted. 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 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). "All applicants are entitled to a full and fair opportunity to present claims in one PCR application." Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). "Successive PCR applications and appeals are generally disfavored because they allow an applicant to receive more than 'one bite at the apple' as it were." Id. The "burden is on the applicant to establish that any new ground raised in a subsequent application could not have been raised in a previous application." Id.

Applicant's current allegations could have been raised in the proceedings based on Applicant's prior application for post-conviction relief. 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 summarily dismisses the application as successive to Applicant's previous PCR application.

Newly-Discovered Evidence

Lastly, The Uniform Post-Conviction Relief Act states that a person may institute a post-conviction relief action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of material facts not previously presented, the post-conviction relief application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C). A defendant requesting a new trial based on after-discovered evidence after a guilty plea must show:

> (1) The newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the 'interest of justice' requires the applicant's guilty plea to be vacated.

Jamison v. State, 410 S.C. 456, 765 S.E.2d 123 (2014).

Here Applicant alleges that he recently discovered he is required to participate in community supervision following the completion of his sentence. Applicant's claim of alleged "newly-discovered evidence" fails to meet the burden required to be granted a new trial. While under S.C. Code § 17-27-45(c), a newly-discovered evidence claim can be timely raised within one year of actual discovery or within one year of when, by the exercise of due diligence, such evidence *could have been* ascertained, Applicant has failed to set forth why such alleged evidence was not readily discoverable at the time of trial. Before the Court will hold an evidentiary hearing, Applicant must make a prima facie showing that he is entitled to relief.

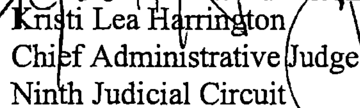
Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Applicant has entirely failed to make a showing that he is entitled to relief based on the information set forth and, therefore, he is not entitled to an evidentiary hearing in the matter. Accordingly, this matter must be summarily dismissed with prejudice.

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

Office of the Attorney General
Attn: Rasheeda Cleveland, Esquire
PCR Division – 9th Circuit
P.O. Box 11549
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 19th **day of** October **, 2017.**



Kristi Lea Harrington
Chief Administrative Judge
Ninth Judicial Circuit

Moncks Corner, South Carolina