THE STATE OF SOUTH CAROLINA
In The Supreme Court

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JUN 20 2018
S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Honorable J. Cordell Maddox, Jr., Circuit Court Judge

Case No.: 2015-CP-32-3935

Rico Hickman, 297987,.....Petitioner,

vs.

State of South Carolina,.....Respondent.

NOTICE OF APPEAL

Rico Hickman, Petitioner, appeals the Order of Dismissal issued by the Honorable J. Cordell Maddox, Jr. on March 30, 2018, which was filed on April 9, 2018. Petitioner also appeals the Order Denying Applicant Rico Hickman's Motion to Reconsider issued by the Honorable J. Cordell Maddox, Jr. on May 21, 2018, which was filed on May 21, 2018. Undersigned counsel received a copy of the Order on May 25, 2018.

Respectfully submitted,

Tricia A. Blanchette
S.C. Bar No. 74904
PO Box 2147
Leesville, SC 29070
(803) 908-3266

June 18, 2018

THE STATE OF SOUTH CAROLINA
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APPEAL FROM LEXINGTON COUNTY
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Rico Hickman, 297987,.....Petitioner,

vs.

State of South Carolina,.....Respondent.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney at Law, hereby certify that I hand delivered this 20th day of June 2018 a Notice of Appeal and Explanation to Kelly Oppenheimer, of the Attorney General's Office, at:

Office of the Attorney General
Att: Kelly Oppenheimer, Assistant Attorney General
1000 Assembly Street, 5th Floor
Columbia, SC 29201

Tricia A. Blanchette
PO Box 2147
Leesville, SC 29070
(803) 908-3266

June 18, 2018

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS
DOCKET NO.: 2015-CP-32-3935

Rico Hickman, 297987,
Applicant,
v.
State of South Carolina,
Respondent,

MOTION PURSUANT TO RULE 59, SCRCP

Pursuant to Rule 59(a) and (e) of the South Carolina Rules of Civil Procedure, Applicant would move before this Court for reconsideration of the Order of Dismissal signed on March 30, 2018 and filed on April 9, 2018. Applicant, through counsel, received notice of the entry of this Order on April 16, 2018, from which this Motion timely follows.

This matter comes before the Court by way of an Application for Post Conviction Relief filed on November 9, 2015. Respondent filed a Return and Motion to Dismiss on March 2, 2017. On August 7, 2017, Applicant appeared *pro-se* at a motion hearing held in front of the Honorable Alison Renee Lee in Lexington County. Respondent was represented by Melody J. Brown, Senior Assistant Deputy Attorney General. The matter was continued to allow Applicant to retain counsel. Thereafter, Tricia A. Blanchette, Esquire, entered her appearance.

On December 15, 2017, a motion hearing was conducted at the Lexington County Courthouse in front of the Honorable J. Cordell Maddox, Jr. Respondent was represented by Melody J. Brown, Senior Assistant Deputy Attorney General. Applicant was present and represented by Tricia A. Blanchette, Esquire.

At the motion hearing, counsel addressed her retainer as Mr. Hickman's attorney and adopted his previous *pro-se* filings. She clarified that the issue before the court was whether Elizabeth Fullwood, Esquire, and Bennet Casto, Esquire were ineffective for advising Mr. Hickman that his prior convictions were properly being used for the basis of the notice of life

without parole (LWOP) and possible LWOP sentence, which induced an involuntary guilty plea. Counsel explained that the benefit of the bargain, as testified to by counsel at the prior evidentiary hearing, was that LWOP came off the table.

As addressed in the standing Order, Applicant proceeded to trial on January 27, 2009 in Lexington County in front of the Honorable R. Knox McMahon. Applicant had been indicted for assault/battery with intent to kill (2008-GS-32-2864), kidnapping (2008-GS-32-2865), and armed robbery (2008-GS-32-2867). Applicant was represented by Elizabeth Fullwood, Esquire, and Bennett Casto, Esquire. Following a Batson Motion, a Motion for Continuance regarding discovery, and a Motion for Recusal, Applicant proceeded with a plea on January 28, 2009.

The negotiations were put on the record, and the State explained that Applicant had two prior convictions with two separate plea dates. App. pp. 87, 96. Counsel for Applicant agreed with the State regarding the prior convictions. App. p. 103. Applicant was sentenced to two concurrent terms of twenty years and a term of twenty five years. App. p. 109. Applicant did not appeal his convictions or sentence.

As is also addressed in the standing Order, Applicant sought PCR relief (2009-CP-32-4560). By way of his Application, it was alleged that the LWOP was improper since Applicant had three of the same drug charge. App. p. 126. An evidentiary hearing was conducted on February 3, 2011 in front of the Honorable R. Lawton McIntosh.

At the outset of the hearing, Applicant's request for a continuance was denied. App. 141. When called to the stand, Applicant testified that he was told by his attorney he would get a life sentence if he proceeded with his trial. App. pp. 142, 152.

While on the stand, Elizabeth Fullwood, Esquire, testified that she was successful in getting the Solicitor to take LWOP off the table and allow Applicant to plea to something less

than life. App. p. 160. She testified that Applicant decided he would rather plea than get LWOP. App. p. 170. She recalled the LWOP notice being served on Applicant and advising him that he would get life. App. p. 173. She made it clear that the benefit of the plea was that the State withdrew their intention to seek LWOP. App. p. 173.

From the bench, Judge McIntosh noted that counsel was successful in getting LWOP off the table. App. p. 215. By way of the written Order, he found that Applicant would have received LWOP and that counsel's advice regarding LWOP did not amount to coercion. App. pp. 225-226.

As is detailed in the standing Order, Applicant sought appellate review and certiorari was denied on September 5, 2013. As is further detailed in the standing Order, Applicant sought review in a federal habeas action. At the motion hearing, counsel directed this Court's attention to the habeas Order issued on September 15, 2015, whereby the Court addressed whether Applicant's two prior convictions were two separate and distinct drug convictions and properly considered strikes. Order pp. 10-11.

At the brief motion hearing, this Court declined to hear testimony from Applicant, or any other parties, on his assertion that he did not enter his pleas on his two prior convictions on separate dates. This Court did accept a copy of the sentencing sheets that reflect that the pleas were entered October 5, 2005 and October 7, 2005 by the same Judge during the same term of court. Counsel also noted several indicators from the sentencing sheets that could amount to an inference that the pleas were taken on the same date as Applicant contends.

Applicant would ask this Court to reconsider the summary dismissal as the Application is not ripe for summary dismissal. Applicant would submit that his Application raises issues of fact and law that require an evidentiary hearing.

As was also argued at the motion hearing, Applicant has raised the issue of underlying convictions being considered separate and distinct offenses in this subsequent PCR Application since this issue was not known to Applicant at the time of his prior PCR Application, as is supported by the above summarized record. It was not until the habeas ruling that Applicant discovered that this matter needed to be further investigated and addressed. Thus, Applicant filed the instant Application.

Applicant would ask this Court to reconsider the standing Order based upon the reasoning set forth by the South Carolina Supreme Court in Mangal v. State, Op. No. 27726 (S.C. Sup. Ct. filed October 4, 2017).[1] As was argued at the evidentiary hearing, Applicant is

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[1] We have often considered the tension between the rights at stake in PCR proceedings and the application of traditional procedural requirements for the presentation and preservation of issues. See, e.g., Robertson v. State, 418 S.C. 505, 795 S.E.2d 29 (2016); Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999). The Supreme Court of the United States recently addressed this tension in Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012). The issue in Martinez was "whether a federal habeas court may excuse a procedural default of an ineffective-assistance claim when the claim was not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding." 566 U.S. at 5, 132 S. Ct. at 1313, 182 L. Ed. 2d at 280. After Martinez was convicted in the state court of Arizona of two counts of criminal sexual conduct with a minor, the state appointed new counsel for the direct appeal. 566 U.S. at 5-6, 132 S. Ct. at 1313-14, 182 L. Ed. 2d at 280.

While the direct appeal was pending, Martinez's newly-appointed counsel initiated a state PCR proceeding. 566 U.S. at 6, 132 S. Ct. at 1314, 182 L. Ed. 2d at 280. However, counsel made no claim of ineffective assistance of trial counsel, and later filed a statement asserting there were "no colorable claims at all." 566 U.S. at 6, 132 S. Ct. at 1314, 182 L. Ed. 2d at 280-81. The state court dismissed the PCR action. 566 U.S. at 6, 132 S. Ct. at 1314, 182 L. Ed. 2d at 281.

Later, Martinez filed a second PCR action in state court with new counsel, this time asserting trial counsel provided ineffective assistance. 566 U.S. at 6-7, 132 S.Ct. at 1314, 182 L. Ed. 2d at 281. The state court dismissed this PCR action, finding Martinez was procedurally barred from pursuing ineffective assistance claims that should have been asserted in his first PCR action. 566 U.S. at 7, 132 S. Ct. at 1314, 182 L. Ed. 2d at 281. Martinez subsequently filed a writ of habeas corpus in federal court, again raising the ineffective assistance of counsel claims. Id. The district court refused to address the claims on the ground they were barred by procedural default in state court, and "Martinez had not shown cause to excuse the procedural default." 566 U.S. at 7-8, 132 S. Ct. at 1315, 182 L. Ed. 2d at 281. After the Ninth Circuit affirmed, the Supreme Court granted certiorari. 566 U.S. at 8, 132 S. Ct. at 1315, 182 L. Ed. 2d at 282.

The Supreme Court held "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." 566 U.S. at 17, 132 S. Ct. at 1320, 182 L. Ed. 2d at 288. In doing so, the Court recognized the right to the effective assistance of trial counsel is a "bedrock principle in our justice system," and acknowledged applicants "confined to prison" and "unlearned in the law" often have difficulty complying with procedural rules in a PCR case. 566 U.S. at 12, 132 S. Ct. at 1317, 182 L. Ed. 2d at 284. The Court then stated,

simply seeking his "full bite of the apple" on this issue that would render the benefit of his plea completely void and needs to be fully and fairly addressed. See Poston v. State, 339 S.C. 37, 528 S.E.2d 422 (2000), Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582-83 (2002).

I so move,

Tricia A. Blanchette
PO Box 2147
Leesville, SC 29070
Attorney for Applicant

April 18, 2018

Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney's errors (or the absence of an attorney) caused a procedural default in an initial-review collateral proceeding acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim. 566 U.S. at 14, 132 S. Ct. at 1318, 182 L. Ed. 2d at 285-86.

We first considered Martinez in Kelly v. State, 404 S.C. 365, 745 S.E.2d 377 (2013). We held Martinez "is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions." 404 S.C. at 365, 745 S.E.2d at 377. We considered Martinez again in Robertson. Reaffirming Kelly, we held " Martinez does not afford Petitioner a right to file a successive PCR application by merely alleging ineffective assistance of prior PCR counsel." 418 S.C. at 516, 795 S.E.2d at 34. In Robertson, however, we permitted the PCR applicant to pursue successive application the PCR court found was procedurally barred. 418 S.C. at 516, 795 S.E.2d at 34.

The Supreme Court's decision in Martinez reminds us that the Sixth Amendment guarantee of effective assistance of counsel is a "bedrock principle in our justice system." Simmons and Martinez counsel us that there are situations where the interests of justice require PCR courts to be flexible with procedural requirements before PCR applicants suffer procedural default on substantial claims. Such flexibility is consistent with the purpose and spirit of our Rules of Civil Procedure. These considerations should guide PCR courts when struggling to balance procedural requirements against the importance of the issues at stake in PCR proceedings. We encourage trial courts in PCR cases to use the discretion we grant them on procedural matters to find reasonable ways—within the flexibility of our Rules—to reach the merits of substantial issues.

As we stated in Odom and repeated in Robertson, "All applicants are entitled to a full and fair opportunity to present claims in one PCR application." Robertson, 418 S.C. at 513, 795 S.E.2d at 33; Odom, 337 S.C. at 261, 523 S.E.2d at 755.

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS DOCKET NO.: 2015-CP-32-3935
Rico Hickman, 297987, Applicant, v. State of South Carolina, Respondent,	)	CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Applicant, hereby certify that placed in the United States mail this 18th day of April 2018 a Motion Pursuant to Rule 59, SCRCP, to Melody J. Brown, Esquire, of the Attorney General's Office, at:

Office of the Attorney General
Att: Melody J. Brown, Sr. Ast. Deputy AG
PO Box 11549
Columbia, SC 29211

Tricia A. Blanchette
PO Box 2147
Leesville, SC 29070
(803) 908-3266

April 18, 2018

ORIGINAL

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS ELEVENTH JUDICIAL CIRCUIT
Rico Amadeus Hickman, S.C.D.C. No. 297987, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2015-CP-32-03935 **ORDER OF DISMISSAL**

FILED
2018 APR -9 PM 3:14
LISA M. COMER
CLERK OF COURT
LEXINGTON SC

This matter comes before the Court by way of an application for post-conviction relief filed by Rico Amadeus Hickman (Applicant) on November 9, 2015. On March 2, 2017, the State filed a return and moved to dismiss the application for failure to raise a cognizable claim, as barred by the statute of limitations, as improperly successive, and on the basis of *res judicata*. On August 7, 2017, in a proceeding before the Honorable Alison Renee Lee, the State requested the matter be considered for summarily dismissed without appointment of counsel and without the necessity of an evidentiary hearing. Applicant appeared *pro se* and advised the Court at that time that he intended to retain counsel. The matter was continued to allow Applicant the time to retain counsel. Tricia A. Blanchette, Esq., thereafter appeared on behalf of Petitioner.

The matter was then presented to the undersigned on December 15, 2017. Ms. Blanchette represented Applicant. Senior Assistant Deputy Attorney General Melody J. Brown represented Respondent. After careful review of the application, return and motion, and arguments of counsel, I find the application should be summarily dismissed without necessity of an evidentiary hearing. The Court makes the following findings in support of its conclusion:

1. Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Applicant was indicted at the

August 2008 term of the Lexington County Grand Jury for assault and battery with intent to kill (2008-GS-32-02864), and armed robbery while armed with a deadly weapon (2008-GS-32-02867). Elizabeth C. Fullwood, Esquire, represented Applicant. On January 20, 2009, he pled guilty to the charges as indicted. The Honorable R. Knox McMahon sentenced Applicant to imprisonment for concurrent terms of 20 years for assault and battery with intent to kill, and 25 years for armed robbery while armed with a deadly weapon. Applicant did not appeal his conviction or sentence. However, Applicant previously sought post-conviction. See C/A 2009-CP-32-4560. After an evidentiary hearing on the merits, the Honorable R. Lawton McIntosh denied relief by written order dated December 22, 2011, filed December 28, 2011. Applicant appealed the denial of relief. The South Carolina Supreme Court denied Applicant's petition by order dated September 5, 2013, and issued the Remittitur on September 23, 2013.

2. In addition to his state remedies, Applicant also sought review in a federal habeas action. See C/A 9:13-2871-JMC-BM. Respondent moved for summary judgment on the basis of the state court record. On June 18, 2014, the Honorable Bristow Marchant, United States Magistrate Judge, issued a Report and Recommendation concluding Respondent's motion for summary judgment should be be granted. On September 15, 2014, the Honorable J. Michelle Childs, United States District Judge, accepted the Report and Recommendation, granted summary judgment in Respondent's favor, and denied the petition. *Hickman v. Warden of Lee Corr. Inst.*, 9:13-2871-JMC-BM, 2014 WL 4631969 (D.S.C. 2014). Applicant did not appeal.

3. In his current application filed November 9, 2015, Applicant alleges he is being held unlawfully for the following reasons:

1. Ineffective assistance of plea counsel, in that;
   a. Plea counsel misadvised Applicant as to the possibility of a sentence of life without parole; and
2. Ineffective assistance of PCR counsel, in that;

a. PCR counsel failed to raise and properly argue all grounds for relief; and
b. PCR counsel failed to file a motion pursuant to Rule 59(e), SCRCP.

4. At the proceeding on December 15, 2017, Applicant indicated he wished to pursue whether the advice given to him by plea counsel as to the possibility of a life without parole sentence was correct. His current PCR counsel argued there may be an error on the sentencing sheets for prior charges that indicate the pleas were on two separate days. Counsel argues whether the pleas were actually entered on the same day could have affected the advice given. Counsel introduced copies of two sentencing sheets from October 2005 – pleas that were, without question, entered prior to the January 2009 plea that applicant wishes to challenge. It was conceded the sentencing sheets show the pleas were on two separate days, one on October 5, 2005, and one on October 7, 2005.

Respondent relied upon the fact the records support the pleas were entered on separate days, and, further, when Applicant pled guilty would be in Applicant's own knowledge. Respondent maintained the action should be summarily dismissed.

This Court has also considered the following portion of the transcript from the January 2009 plea which reflects the solicitor's assertions regarding the prior guilty pleas:

> He has a prior record of a Y.O.A. sentence for distribution of crack cocaine from 2003. Then he has two proximity distributions of crack cocaine from 2005, both from West Columbia, both occurred on the 31st, but the pleas were taken on two separate dates.
>
> So we were counting those as two separate and distinct drug offenses. He dealt one on Brown Street and Ross Street in West Columbia on the same day but was convicted of those two.
> ...

(2009 Guilty Plea Tr. pp. 96-97).

5. This Court finds the application must be summarily dismissed for failure to timely pursuant to S.C. Code Ann. § 17-27-45(A). Applicant pled guilty on January 20, 2009. Applicant did not appeal the conviction or sentence. The current application was not filed until November 9, 2015. The action was not timely filed. Further, applicant has failed to show the applicability of Section (C) of the statutory provision which allows one year from "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" in which to file an action. Again, this Court finds the action was not timely filed.

6. This Court also finds the action must be summarily dismissed as improperly successive. S.C. Code Ann. § 17-27-90 provides:

> 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.

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). The claim(s) Applicant has indicated he wishes to pursue are based on information not only within Applicant's knowledge, but also claims that could have been investigated and raised in the prior PCR action. Further, "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." *Aice v. State*, 305 S.C. 448, 452, 409 S.E.2d 392, 394 (1991); *Robertson v. State*, 418 S.C. 505, 514, 795 S.E.2d 29, 33 (2016) (reaffirming

ineffective assistance of PCR counsel is not "*per se*" cause to allow a successive action citing *Aice*). Applicant has failed to show that a successive application is appropriate.

7. This Court also finds the application is similarly barred by the doctrine of *res judicata*. *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.; see also Foxworth v. State*, 275 S.C. 615, 617, 274 S.E.2d 415, 415-16 (1981) (agreeing with lower court that found "the claims raised and those that could have been raised in the prior federal habeas corpus proceeding were barred under the doctrine of res judicata"). Applicant had a full opportunity to litigate his claims regarding sentencing and/or sentencing advice in his prior action. Indeed, Applicant goes so far as to cite to testimony offered by plea counsel in his prior PCR action as evidence in support of his present ineffective assistance of counsel claim. (2015 PCR Application, attachment). The finality of the previous proceedings should be respected, and the Court shall dismiss the application as barred by the doctrine of *res judicata*.

8. Lastly, this Court finds the allegations of ineffective assistance of PCR counsel are not cognizable. The jurisdictional limitations of the Post-Conviction Relief Act acknowledge the right to raise constitutional claims, but counsel in collateral proceedings is not constitutionally required. See S.C. Code Ann. § 17-27-20; *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (Supreme Court finding convicted defendant hold no "constitutional right to counsel when mounting collateral attacks upon their convictions"). Pursuant to Rule 12(b)(6), SCRCP, the Court shall dismiss the application as to the freestanding claims of ineffective assistance of

PCR counsel for failing to state a cognizable claim for which relief can be granted under the Post-Conviction Relief Act.

THEREFORE, for all the foregoing reasons:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant is remanded to the custody of the Department of Corrections to complete service of his sentence.

IT IS SO ORDERED this 30 day of March, 2018.

The Honorable J. Cordell Maddox, Jr.
Presiding Circuit Court Judge

Anderson, South Carolina.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

FILED
2018 MAY 21 AM 11:46
LISA M. COMER
CLERK OF COURT
LEXINGTON SC

Civil Action No.: 2015-CP-32-3935

Rico Hickman,

Plaintiff,

vs.

State of South Carolina,

Defendants.

ORDER DENYING APPLICANT RICO HICKMAN'S MOTION TO RECONSIDER

This matter comes before the Court on Applicant Rico Hickman's Motion to Reconsider pursuant to Rule 59(a) & (e), South Carolina Rules of Civil Procedure. This Motion for Reconsideration is hereby denied.

The Honorable J. Cordell Maddox, Jr.
South Carolina Circuit Court Judge

This 17th day of May 2018