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July 20, 2018

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Honorable Clerk of Court
Barnwell County
P.O. Box 723
Barnwell, SC 29812

RECEIVED

JUL 25 2018

S.C. SUPREME COURT

**RE: Terry Davis, #197349, v. State of South Carolina
2016-CP-06-115**

Dear Mr. Shearouse and Ms. McElveen:

Enclosed for filing is a Notice of Appeal pursuant to Rule 243(c), SCACR, in the above-referenced case. Also enclosed are the following:

- (1) Proof of Service of the Notice of Appeal;
- (2) A copy of the Order which is to be challenged on appeal; and
- (3) Prior Order of Appointment of Counsel.

As I was appointed to represent Mr. Davis in his PCR proceeding, I anticipate that the Office of Appellate Defense will represent Mr. Davis in this appeal.

Yours very truly,



Lance S. Boozer

Enclosures

cc: Julie Coleman, AAG
Loriene French, OAD
Terry Davis, #197349

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JUL 25 2018

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Diane S. Goodstein Circuit Court Judge

Case No. 2016-CP-06-115

Terry Davis, #197349,Petitioner,

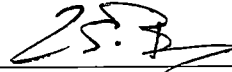
v.

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

NOTICE OF APPEAL

The Petitioner appeals the Honorable Diane S. Goodstein's Order dated July 10, 2018, denying post-conviction relief to the Petitioner. The Order was received by undersigned counsel on July 20, 2018, denying Applicant's PCR application and dismissing as otherwise untimely and successive. A copy of the Order on appeal is attached to this notice. Pursuant to Rule 243(c), SCACR, undersigned counsel is unable to provide an arguable basis for asserting the PCR court ruling was improper with regard to the finding the application was successive and untimely. Petitioner is advised that he has twenty (20) days from the date of this appeal to file a pro se explanation as to why he believes that this determination by the PCR court was improper. *Dennison v. State*, 371 S.C. 221, 639 S.E.2d 35 (2006).

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

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S.C. SUPREME COURT

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Case No. 2016-CP-06-115

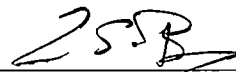
Terry Davis, #197349,Petitioner,

v.

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

PROOF OF SERVICE

I, Lance S. Boozer, appointed attorney for Petitioner, certify that I have today served within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to Assistant Attorney General Julie Coleman, P.O. Box 11549, Columbia, SC 29211 and Terry Davis, #197349, Livesay Correctional, P.O. Box 580 Una, SC 29378. I further certify that all parties required by Rule to be served have been served this 20th day of July, 2018.



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STATE OF SOUTH CAROLINA)
COUNTY OF BARNWELL)

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

Terry Davis, Jr., #197349,)

2016-CP-06-00115

Applicant,)

ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

RHONDA D. McELVEEN
CLERK OF COURT
BARNWELL COUNTY, S.C.

2018 JUL 16 AM 11:26

FILED FOR RECORD

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Terry Davis, Jr., (Applicant) on March 16, 2016, and the amendments filed July 25, 2016, February 8, 2017, and March 13, 2017. Respondent made its Return and Motion to Dismiss on March 31, 2017, requesting the application be summarily dismissed. This Court issued a Conditional Order of Dismissal signed April 17, 2017, and filed May 4, 2017, provisionally dismissing the action but providing Applicant twenty days to respond.

Applicant filed a Reply to the Conditional Order of Dismissal on April 10, 2017. A hearing was held over the State's motion to dismiss on April 25, 2018, at the Calhoun County Courthouse. Applicant was present and represented by Lance S. Boozer, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office. Both parties waived venue to appear outside of the Second Judicial Circuit for purposes of the motions hearing. At the outset of the hearing, Applicant informed this Court he wished to withdraw his amendment which included an allegation of being denied to appellate counsel in the appeal of his first PCR application. After hearing arguments from both parties, the Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Barnwell County Clerk of Court. Applicant was indicted at the October 2010 term of the Barnwell County Grand Jury for Possession of a Weapon During a Violent Crime (2010-GS-06-0383) and at the February 2010 term of the Barnwell County Grand Jury for Assault and Battery with Intent to Kill (2010-GS-06-0023). He was represented by Laura McCann, Esquire and Barry Thompson, Esquire. On October 5, 2010, a jury trial commenced. Following testimony from several witnesses, Applicant pled guilty before the Honorable Doyet A. Early, III. He was sentenced to imprisonment for thirteen (13) years for Assault and Battery with Intent to Kill and five (5) years for Possession of a Weapon During a Violent Crime to be served concurrently. Applicant did not appeal his guilty plea or sentence.

2011-CP-06-0018

On January 18, 2011, Applicant filed his first application for post-conviction relief, alleging that he was being held unlawfully for the following reasons:

1. Prosecutorial Misconduct.
 - a. "Coerce wife into testify against me."
 - b. "Deceived her into coming to court via jury duty subpoena."
 - c. "After she sign affidavit etc. waiver."
2. Judicial Misconduct.
 - a. "During the guilty plea on Dec. 3, 09 Judge Early made a prejudice statement against the defendant in front of court was goes against rules of professional conduct 407 SCACR. (He address the court said 'if you can hold him for me, and if he plea let him plea in front of me.')"
3. Ineffective Assistance of Counsel.
 - a. Counsel failed to withdraw guilty plea "before judge reject it and made it back to original charge.
 - b. Counsel told Respondent that if he did not plead guilty, the solicitor would force his wife to testify against him.
 - c. Counsel "refused to motion for a bond, violate 8th Amendment."

- d. "Failure to advise client of adverse spousal testimony privilege, failure to cross examine spouse on client's behalf during trial. He also never investigated to see that the judge and client had a conflict."

The State made its return on March 29, 2011. An evidentiary hearing was convened on January 25, 2012, at which Applicant was present and represented by Aimee Zmroczek, Esquire. In a written Order filed April 5, 2012, the Honorable Judge Edgar W. Dickson denied and dismissed the application with prejudice.

A timely notice of appeal was filed. In a written Order, dated December 23, 2013, the South Carolina Supreme Court denied Applicant's motion for leave to file motion under Rule 60(b). Furthermore, the court dismissed the appeal based on Applicant's failure to file a timely petition for a writ of certiorari and an appendix as required by Rule 234 of the South Carolina Appellate Court Rules and the court's order of November 6, 2013. The Remittitur was issued on January 9, 2014.

2014-CP-06-122

On March 27, 2014, Applicant filed his second application for post-conviction relief, alleging he was being held unlawfully for the following reasons:

1. Newly Discovered Evidence
2. Lack of Subject Matter Jurisdiction
3. Fraud Upon the Court

Applicant filed an amended application on April 10, 2014, alleging he is being held unlawfully based on the following allegations:

1. "Newly Discovered Evidence pursuant to 17-27-45(c)."
2. "Lack of Subject Matter Jurisdiction and Due Process x 2."
3. "Ineffective Assistance of PCR Counsel."
4. "Fraud/ Fraud Upon the Court."
5. "Alibi Witness."
6. "Prima Facie Evidence - Evidence that will establish a factor sustain a judgment unless contradictory evidence is produce statute 19-5-330 and 19-5 320."

7. "Involuntary guilty plea."

Applicant filed a second amended application on May 8, 2014, alleging that he is being held unlawfully based on the following allegations:

1. Newly Discovered Evidence
2. Lack of subject matter jurisdiction and due process
 - a. "trial court lack subject matter jurisdiction to convict a defendant for an offense when there is no indictment charging him with that offense at time jury sworn. There was no indictment to establish jurisdiction of the charge of (ABWIK) during the trial of October 5, 2010. State v. Kevin Jones. 342, S.C. 248, 536 S.E.2d 396."
 - b. "Like wise the State and Respondent further lack jurisdiction to punish the applicant due the repealing of the ABWIK statute 16-3-620 on the passage of the omnibus crime reduction act of 2010, June 3, 2000, IN the Interest of Terrence M 317 S.C. 212 214-215 457 S.E.2d 626. The Court held that the general rule is that the repeal of a statute operates retrospectively and have the effect of blotting out as completely as if had never existed and putting an end to all proceeding under it after a statute has been repealed the court has no jurisdiction over a prosecution for the violation of a repealed statute/offense and no jurisdiction to pronounce sentence."
 - c. "The record would reflect that the Applicant and the allege victim in the case at bar are common law husband and wife reside at the same address. Therefore the applicant was improperly charge and the court lacked subject matter jurisdiction. In that (ABWIK) Assaults and Battery With Intent to Kill is essentially the same as CV Criminal Domestic Violence. But there is a difference in the elements in that CDV requires a relationship in between the parties which ABWIK does not State v. Sutton 333 S.C. 192, S.E.2d 41 Ct. App 1998) as modified 340 S.C. 393, 532 S.E.2d 283 (2000)."
3. Counsel failed to investigate (alibi witness).
4. Involuntary guilty plea
5. Fraud upon the court/fraud.
6. Gross miscarriage of justice occurred.

The State made its return on August 7, 2014. Applicant filed an "Objection to Motion to Dismiss and Return" on August 14, 2014. A Conditional Order of Dismissal was signed by the Honorable Perry M. Buckner on August 7, 2014, and filed August 22, 2014. A Final Order of Dismissal was signed on February 11, 2015.

Applicant filed his third application for post-conviction relief on September 22, 2014, alleging that he was being held unlawfully for the following reasons:

1. Newly Discovered Evidence
 - a. "Trial transcript has testimony omitted from the witness Linda Glover and the defendant Terry Davis."
 - b. "The testimony of these two witness are redacted in a such a way that it manipulates the contents and context of these witness testimony, a different meaning is being conveyed which is contrary to what the witness testified. Additionally the indictment document 2010GS0600023 and 00383, which are listed on the trial transcript date October 5, 2010 were never read into nor introduce at my trial."
 - c. "The transcript was properly admitted in evidence without proof that the entries there in was made by the court reporter was genuine. There no way to establish guilt or innocent."

On November 4, 2014, Applicant filed an Amended Application for Post-Conviction Relief, alleging the following grounds for relief:

1. Newly Discovered Evidence
 - a. "Evidence to support there is a contradiction to what transpire and who transcribe the [guilty plea] proceeding heard on October 5, 2010, by Official Court Reporter Cheri L. Young, after the evidentiary [PCR] hearing held on January 25, 2012, is prima facie evidence of prejudice."
2. Fraud Upon the Court
 - a. "Attorney Aimee J. Zmorcek deceive the defendant Terry Davis and defraud the Court of Appeals by introducing fabricated evidence into the courtroom."

On January 15, 2015, Applicant filed an Amended Application for Post-Conviction Relief, alleging the following grounds for relief:

1. "Prima facie Case of Fraud"
 - a. The guilty plea transcript used during the PCR hearing on January 25, 2012, "was a fraudulent transcript where attorney Aimee J. Zmroczek was in a corrupt agreement with Court Official with the intent to deceive the defendant and defraud the Court..."
 - b. "...was prejudice from the state failure to disclose the actual trial transcript of record for the (PCR) evidentiary hearing."
 - c. Due process violation

2. "Involuntary Guilty Plea not knowingly and voluntarily or intelligently made."
 - a. "...There is not a adequate record of what transpire during the plea. Citing Boykin v. Alabama 89 S.Ct.1709."
3. Ineffective Assistance of Counsel
 - a. "Ineffective Assistance of Counsel. Counsel was ineffective for improperly advising defendant that he would be parole eligible."
4. Lack of Subject Matter Jurisdiction
 - a. "Lack of Subject Matter Jurisdiction. The Judge never had jurisdiction to accept the plea, when there is no true bill of indictment on the charge."
5. Fraud Upon the Court
 - a. "Fraud upon the Court is the introduce of fabricated evidence in the Courtroom, the Subordination of perjury and concealing of documents by an attorney during the course of litigation constitutes fraud upon the court."

The State filed its Return and Motion to Dismiss on February 25, 2015. A Conditional Order of Dismissal was signed by the Honorable Maite Murphy on March 13, 2015 and filed March 25, 2015. A Final Order of Dismissal was filed on June 29, 2015.

CURRENT APPLICATION

In his *fourth* and current application, Applicant alleges he is being held in custody unconstitutionally based on the following allegations:

1. Austin Claim
2. Ineffective Assistance of PCR Counsel
 - a. "PCR Counsel was ineffective for depriving the defendant a right to one bite at the and, The right to a meaningful appellate review. Denied due process of the U.S.C.A. Const. 14 Amend, Fraud upon the court."
 - b. Evidence shows that the transcript of record heard on October 5, 2010 was a fraudulent transcript.
3. Lack of Subject Matter Jurisdiction
 - a. "The State lacks jurisdiction to punish the defendant due to the repealing of the ABWIK statue 16-3-620..."

On July 25, 2016, Applicant filed an amended application alleging lack of subject matter jurisdiction. On February 8, 2017, Applicant filed an amended application alleging Ineffective Assistance of PCR Counsel.

Before this Court are the records of the Barnwell County Clerk of Court regarding Applicant's convictions, Applicant's records from the South Carolina Department of Corrections, Applicant's prior PCR records, Applicant's current PCR Application and Respondent's Return and Motion to Dismiss.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Statute of Limitations

The Court finds that this Application for post-conviction relief must be summarily dismissed for failing to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160 (Supp. 2003). S.C. Code Ann. §17-27-45(a) reads 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 upon an appeal, whichever is later.

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 challenges in this Application on **October 5, 2010**. This Application was filed on **March 16, 2016** which was well after the statutory filing period had expired.

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) (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, Applicant failed to file within the time mandated by

the Post-Conviction Procedure Act and Applicant's post-conviction relief application must be summarily dismissed.

Successiveness

The Court finds that the current Application for post-conviction relief must be summarily dismissed because it is successive to the previous application for post-conviction relief. 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.

Successive applications are disfavored and the burden is on Applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).

This Court finds that the current allegations could have been raised in prior proceedings based on Applicant's prior application for post-conviction relief, and thus the current application is successive and barred under S.C. Code § 17-27-90. Applicant has failed to establish 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. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); Aice v. State, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 420 S.E.2d 834 (1992).

Subject Matter Jurisdiction

This Court finds that Applicant's allegation that the court lacked subject matter jurisdiction must be denied. Applicant has claimed that the trial court lacked subject matter jurisdiction due to a subsequent appeal of the statute under which he was convicted. This allegation is meritless.

In post-conviction relief, an applicant wishing to raise challenges to the sufficiency of an indictment must do so in the context of ineffective assistance of counsel, basically alleging that his trial counsel failed to properly move to quash the indictment in accordance with S.C. Code Ann. § 17-19-90. A claim of this nature is subject to the procedural bars in the Uniform Post-Conviction Procedure Act – notably the statute of limitations and successiveness. See S.C. Code §§ 17-27-45 and -90.

An applicant may still challenge the subject matter jurisdiction of the trial court, and such a claim is one that may be raised at any time. See Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001), overruled in part by Gentry, 610 S.E.2d 494. However, “[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters.” Gentry, 610 S.E.2d 494; See also S.C. Const. Art. V, § 7. Therefore, the applicant must present evidence that his case is of some class over which the circuit court does not have the authority to preside. This Court finds that Applicant's conviction involved a criminal charge in General Sessions Court. Thus, this Court finds that the circuit court had subject matter jurisdiction.

Res Judicata

This Court further finds that the doctrine of res judicata bars Applicant's claims. 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.

Applicant had a full opportunity to litigate all claims regarding ineffective assistance of counsel, fraud, newly discovered evidence, lack of subject matter jurisdiction, and involuntary guilty plea in his prior PCR actions. Applicant continues to raise the same meritless claims by repeated collateral attacks on his convictions. The public interest in finality of judgments requires that litigation must eventually come to an end. Pursuant to Rule 12(b)(6), SCRCP, this Court finds that these claims are barred by res judicata and must be dismissed.

Ineffective Assistance of PCR Counsel

Applicant's contention that he received ineffective assistance of counsel on his prior post-conviction relief application is not a ground for relief and is 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).

The South Carolina Supreme Court in Aice v. State held that the PCR rules “contemplate an adjudication on the merits of the original petition, one bite at the apple as it were.” 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991) (citing Gamble v. State, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989)). 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. The Court in 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 *per se* a sufficient reason warranting a successive PCR application under section 17-27-90. Therefore, this allegation must be denied and dismissed with prejudice.

Austin Relief

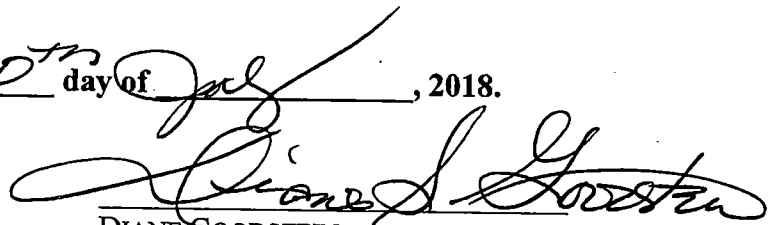
Applicant withdrew his allegation that he was entitled to Austin relief at the outset of the motions hearing on April 25, 2018. Therefore, this allegation is deemed abandoned and is denied and dismissed.

CONCLUSION

IT IS THEREFORE ORDERED that for the reasons set forth above, the Application for post-conviction relief is hereby **DENIED AND DISMISSED WITH PREJUDICE**. Applicant has failed to provide a valid reason why his application for post-conviction relief should not be dismissed as successive, untimely, barred by res judicata, and for failure to state a claim cognizable to post-conviction relief. Accordingly, Respondent's Motion to Dismiss is granted, and this matter is denied and dismissed with prejudice.

This Court hereby advises Applicant that he must file and serve a Notice of Appeal within 30 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 10th day of July, 2018.

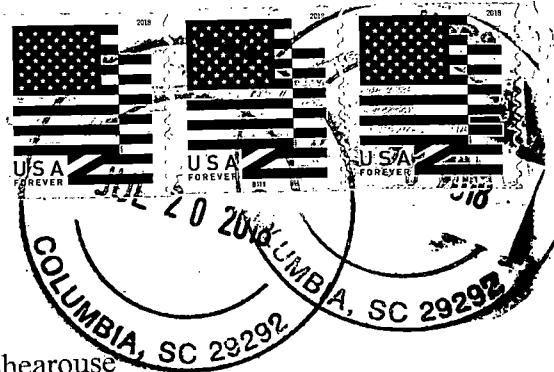


DIANE GOODSTEIN
Chief Administrative Judge
First Judicial Circuit Court

 South Carolina

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