

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT

Frank Green, Jr., #116977,
Applicant,

2016-CP-02-02833

v.

CONDITIONAL ORDER OF DISMISSAL

State of South Carolina,
Respondent.

This matter comes before the Court by way of the application for post-conviction relief (PCR) filed by Frank Green (Applicant) on December 22, 2016. Respondent made its Return requesting the application be summarily dismissed.

PROCEDURAL HISTORY

Applicant is currently incarcerated with the South Carolina Department of Corrections pursuant to the Aiken County Clerk of Court's orders of commitment. The Applicant was true bill indicted at the June 2010 term of the Aiken County Grand Jury for armed robbery (2010-GS-02-0989) and possession of a weapon during the commission of a violent crime (2010-GS-02-0990). The weapons charge was *nolle prossed*. Applicant was represented by Kelley Perkins-Brown, Esquire. Stephen P. Kodman, Esquire, prosecuted the case. On June 29, 2010, Applicant pled guilty as indicted before the Honorable Doyet A. Early, III. Applicant negotiated a twenty-five (25) year cap sentence with the State as part of the plea, and Applicant was sentenced to twenty (20) years imprisonment by Judge Early pursuant to those negotiations. Applicant did not appeal his plea or sentence.

RJC/

2011-CP-02-1294

In his first application for post-conviction relief Applicant alleged he was being held in custody unlawfully for the following reason:

1. Denial of Sixth Amendment Right to Competent Legal Counsel
 - a. "Legal counsel for [Applicant] proceeded to allow her client to plea to a crime without having provided [him] with all evidence, material, and critical documentation from the Aiken County Solicitor's Office that would have mitigated punishment and drastically changed the outcome of the proceeding."
 - b. "Counsel also grossly violated [Applicant's] Sixth Amendment rights by allowing the Court to deny her client's repeated request for change of legal counsel."
 - c. "The legal record will prove that plea counsel was woefully unprepared to represent [Applicant] in plea court challenged with such serious criminal matters when plea counsel herself will testify that she does not have now nor has ever had everything crucial to her client's 'best' defense allowed to the [Applicant] under Brady v. Maryland."

Respondent made its Return on or about October 18, 2011. An evidentiary hearing into the matter was convened at the Aiken County Courthouse on January 24, 2012 before the Honorable Edgar W. Dickson. Applicant was present and represented by Morris Rudnick, Esquire. Judge Dickson granted Applicant a direct appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). By written Order issued on August 13, 2012, Judge Dickson dismissed the post-conviction relief application. Applicant appealed.

The South Carolina Court of Appeals dismissed Applicant's appeal in an unpublished opinion filed on January 14, 2015. The Remittitur was issued on February 2, 2015.

C/A No. 5: 15-cv-00488-JFA-KDW

Following the dismissal of his appeal, Applicant filed a pro se Petition for Writ of Habeas Corpus alleging the following grounds for relief:

Ground One: Ineffective Assistance of Counsel

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Supporting Facts: I was charge[d] with the wrong indictment armed robbery. Indictment was attempt[ted] robbery. Did not look for witness did not bring any evidence. Allowed me to plea to a charge I was never indicted for! Failed to do any investigations or attempt to contact my witness.

Ground Two: Denied Direct Appeal

Supporting Facts: Trial Counsel failed to file for a Direct Appeal or to advise me of my rights to a Direct Appeal as required by law.

Ground Three: Court erred in allowing Petitioner to Plea to a Charge he was never indicted for.

Supporting Facts: Aiken County Grand Jury indicted Petitioner for attempted robbery at the Plea Hearing Petitioner Pled guilty to Armed Robbery Although Petitioner objected to the Court at the time of the Sentencing (on the record).

On December 11, 2015, the Honorable Kaymani D. West, United States Magistrate Judge issued the Report and Recommendation recommending that the Petition be dismissed with prejudice and Respondent's Motion for Summary Judgement be granted. On March 28, 2016, the Honorable Joseph F. Anderson, Jr., United States District Judge issued the Order adopting the Magistrate Judge's recommendation. Applicant appealed. On October 14, 2016, the United States Court of Appeals for the Fourth Circuit dismissed the appeal.

CURRENT APPLICATION

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

1. Subject matter jurisdiction.
 - a. The trial court lacked jurisdiction to amend the indictment.
2. Due Process violation.

Also, before the Court are the records of the Aiken County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, the records from Applicant's Federal Habeas action, and the records from this post-conviction relief action.

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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 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 was convicted of the offense he currently challenges on June 29, 2010. The Remittitur from Applicant’s belated direct appeal was issued on February 2, 2015. Accordingly, Applicant was required to file this Application on or before February 2, 2016. Applicant did not file this Application until December 22, 2016; 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). 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

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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, the Court finds this application for post-conviction relief should 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.*

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; thus, the current application is successive and barred under S.C. Code Ann. § 17-27-90. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous application for post-

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conviction relief. Therefore, he has failed to meet the burden imposed upon him, and the Court dismisses the application as successive to Applicant's previous PCR application.

Subject-matter Jurisdiction

Lastly, Applicant's claim that the circuit court lacked subject matter jurisdiction is meritless. A circuit court has subject matter jurisdiction to convict a defendant of an offense if there is an indictment that sufficiently states the offense, the defendant waives presentment, or the offense is a lesser-included offense of the crime charged in the indictment. State v. Wilkes, 353 S.C. 462, 464-465, 578 S.E.2d 717, 719 (2003) (citing Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001)). In this case, the indictment at issue was amended at the beginning of Applicant's trial pursuant to the State's granted motion and §17-19-100 of the South Carolina Code of Laws. The first amendment corrected a scrivener's error which added the word "attempt" in a sentence where it should not have been. The second amendment added the name of the second victim where it had previously been left out. The amendments did not change the nature of the offense charged.

Furthermore, Applicant was indicted by the ^{Aiken} ~~Barnwell~~ County grand jury. That indictment was true-billed and signed by the foreman of the grand jury. The said indictment contains all the necessary elements of the offense, and further cites the applicable statute. A presumption of regularity attaches to all proceedings in the courts of this State, and it is incumbent upon one who challenges a proceeding to prove his claims. See, e.g., Tate v. State, 345 S.C. 577, 549 S.E.2d 601 (2001); Pringle v. State, 287 S.C. 409, 339 S.E.2d 127 (1986). Defects in the language of an indictment do not divest an otherwise proper court of subject matter jurisdiction over a case. U.S. v. Cotton, 535 U.S. 625, 122 S.Ct. 1781 (2002).

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This Court finds Applicant cannot show any irregularity because the indictments in question are sufficient on their face. Therefore, pursuant to S.C. Code Ann. § 17-27-70 (2003), because there is no issue of material fact relating to this allegation and it is dismissed as a matter of law.

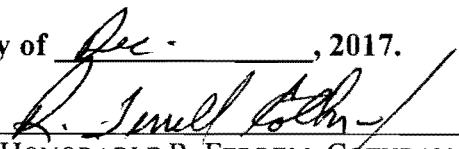
CONCLUSION


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 Aiken 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 – 2nd Circuit
P.O. Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Aiken 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 20 day of Dec., 2017.


HONORABLE R. FERRELL COTHRAN JR.
Chief Administrative Judge
Third Judicial Circuit


_____, South Carolina

