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JAN 24 2019
S.C. SUPREME COURT

State of South Carolina
In the Supreme Court of S.C
Certiorari to Saluda County
Alison R. Lee Circuit Court Judge

Montavis K. Gaines

Appellant

VS

State of South Carolina

Respondent

Case No: 2017-CP-41-86

Notice of Appeal

Appellant files this Notice of Appeal in regard to the attached order of Dismissal filed January 7, 2018 and received on the Undersigned On January 15, 2019. The attached order appears to be a finalized ruling of the Honorable Alison R. Lee, denying post-Conviction relief to the Appellant

Date: Jan 16, 2019

Montavis K. Gaines

State of South Carolina
In the Supreme Court of S.C

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PRoof of Service

I, Montavis Gaines, do hereby certify that a true Copy of the Notice of Appeal was served on Kelly Oppenheimer at P.O. BoX 11549 Columbia S.C 29211-1549.

Date: Jan 16, 2019

[signature]
Montavis K. Gaines

2019 JAN 10 AM 9:54
Filed: Clerk of Court, Saluda, SC

STATE OF SOUTH CAROLINA COUNTY OF SALUDA	)	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT
Montavis K. Gaines, #323168, Applicant,	)	2017-CP-41-86
v.	)	**FINAL ORDER OF DISMISSAL**
State of South Carolina, Respondent.	)	

This matter comes before this Court pursuant to an application for post-conviction relief filed by Montavis K. Gaines (Applicant) on April 3, 2017, and an amendment thereto filed April 17, 2017. Respondent made its return and motion to dismiss on July 18 2017, requesting the application be summarily dismissed as time barred, successive, and for failing to state a cognizable claim.

Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a conditional order of dismissal filed November 5, 2018, provisionally denying and dismissing this action, while giving Applicant twenty days from the date of service of said order in which to show why the dismissal should not become final. Attached to this final order and incorporated herein by reference is an affidavit of service dated November 27, 2018, serving the above-mentioned conditional order of dismissal on Applicant. Applicant filed two responses to the conditional order of dismissal entitled "Objection to Order of Dismissal" and "Objection to Conditional Order of Dismissal" on November 27, 2017, and November 21, 2018, respectively. Both responses are incorporated herein.

In his November 2017 reply, Applicant contends his current application for post-

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conviction relief is not successive as he filed it "within the one year statute of limitations, that prior p.c.r. counsel were [sic] not qualified under the uniform." He further contends his case warrants review of his prior post-conviction relief counsel's representation. Applicant asserts his post-conviction relief counsel was not qualified to represent him, as his prior counsel "admitted himself he have [sic] no familiarity with this area of law, and have never done a post-conviction relief matter." he alleges he "didn't have a full and fair bite at the apple when he was denied a State – created right to qualified Counsel."

Similarly, in his November 2018 reply, Applicant alleges he "showed of a satisfactory case to reject and discharge his court – appointed counsel." He elaborates his prior post-conviction relief counsel admitted he had no familiarity with this area of law and had never handled a post-conviction relief action before. Applicant further alleges "he did not have a full and fair complete bite at the apple during his hearing. . .[w]hen the lower court filed [sic] to promptly appoint a qualified counsel to promptly assist [A]pplicant." He elaborates his prior post-conviction relief counsel withdrew alleged meritorious claims at the hearing, which should have been presented. Applicant contends the law "should be re-evaluated based on the language in *Robertson v. State*[1]" and his reliance on *Robertson*, which was filed in 2016, allows him to file this current application, as he filed it within one year of the *Robertson* decision.

This Court has reviewed Applicant's responses to Respondent's motion to dismiss and the conditional order of dismissal in its entirety, in conjunction with the original pleadings, and finds a sufficient reason has not been shown why the conditional order of dismissal should not become final.

[1] 418 S.C. 505, 795 S.E.2d 29 (2016) (finding an allegation by a defendant his prior post-conviction relief counsel was not statutorily qualified, under the South Carolina Effective Death Penalty Act, for representation of a death-sentenced inmate was sufficient to permit a successive post-conviction relief application).

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Failure to State a Claim

Applicant alleges he is entitled to relief on grounds his prior post-conviction relief counsel was unqualified to represent him. This Court finds ineffective assistance of post-conviction relief counsel is not a ground for relief. 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 post-conviction relief 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 post-conviction relief counsel. *Aice v. State*, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991).

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). *Austin* recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. *Id. Austin* "is limited to its particular factual situation" and is only applicable in limited circumstances to correct procedural defects where an applicant is denied his "one full bite at the apple." *Id.*; *Aice*, 305 S.C. at 452, 409 S.E.2d at 394; *see also Odom v. State*, 337 S.C. 256, 523 S.E.2d 753 (1999). The Court has also noted, "[f]inality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice." *Aice*, at 451, 409 S.E.2d at 395. Aice further held "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.

Here, Applicant received a hearing in his first post-conviction relief action and timely

appealed to the South Carolina Supreme Court therefrom. On appeal, Applicant raised the following issue: "Trial counsel erred in failing to object to portions of the police officers' identification testimony that included references to their familiarity with [Applicant] based on past encounters with him because this constituted prejudicial prior bad act evidence that should not have been admitted into evidence at trial." Following the filing of Respondent's return to the petition for a writ of certiorari, the Supreme Court carefully considered the record as required by law. The Court, upon review of the decision of a lower court in a post-conviction relief action, has the power to set aside procedural bars based on issue preservation and remand for further proceedings where dismissal would be fundamentally contrary to the interests of justice. *See, e.g.*, *Simmons v. State*, 416 S.C. 584, 788 S.E.2d 220 (2016).

It is clear Applicant enjoyed a complete adjudication on the merits of his original application—"one full bite at the apple." Therefore, Applicant's allegations of ineffective assistance of post-conviction relief counsel do not fall within any exception to the rule barring such claims, and this Court shall dismiss the application for failing to state a cognizable claim upon which relief can be based.

Successive

This Court further finds the application must also be summarily dismissed because it is successive to Applicant's previous post-conviction relief applications. Applicant claims his newly raised, but defaulted, claims are attributable to ineffective assistance of post-conviction relief counsel. Applicant cites *Robertson v. State* to excuse the default of his newly raised claims of ineffective assistance of post-conviction relief counsel.

Courts disfavor successive applications and place the burden on applicants to establish

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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 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. at 450, 409 S.E.2d at 394. Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." *Id.* 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).

Ineffective assistance of post-conviction relief counsel 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. *Finley*, 481 U.S. at 555. The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. *Coleman*, 501 U.S. at 752. Once a post-conviction relief applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make

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successive applications based on ineffective assistance of post-conviction relief counsel. *Aice*, 305 S.C. at 452, 409 S.E.2d at 395.

The South Carolina Supreme Court held the post-conviction relief rules "contemplate an adjudication on the merits of the original petition, one bite at the apple as it were." *Id.* (citing *Gamble v. State*, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989)). The Court also noted, "[f]inality 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 "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.

Moreover, *Kelly v. State*, 404 S.C. 365, 365, 745 S.E.2d 377, 377 (2013), is controlling for non-capital successive post-conviction relief applications. The *Robertson* court merely extended *Kelly* to **capital cases**. In *Kelly*, the South Carolina Supreme Court specifically addressed the limitations on successive post-conviction relief applications following *Martinez*:

> In *Martinez*, the "precise question" addressed by the United States Supreme Court is "whether ineffective assistance in an initial review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default *in a federal habeas proceeding*." *Martinez*, 132 S.Ct. at 1315. (Emphasis added). The Court held that "[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, 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." *Martinez*, 132 S.Ct. at 1320. (Emphasis added). The Court went on to set forth the requirements that must be met to overcome the procedural default in a federal habeas action. *Martinez*, 132 S.Ct. at 1318–19.
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> **Like other states, we hereby recognize that the holding in *Martinez* is limited to federal habeas corpus review and is**

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not applicable to state post-conviction relief actions.

Kelly v. State, 404 S.C. 365, 365, 745 S.E.2d 377, 377 (2013) (Emphasis added).

Applicant's contention prior post-conviction relief counsel was ineffective is not a sufficient reason to warrant a successive post-conviction relief application. Moreover, his reliance on *Robertson* is misplaced, as Applicant was never facing the death penalty and, in fact, was only sentenced to an aggregate term of twenty years imprisonment. Thus, Applicant has failed to show a successive application is appropriate, and this Court shall dismiss the matter as successive to Applicant's previous post-conviction relief application.

Statute of Limitations

This Court further finds the application must be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act ("the Act"). S.C. Code Ann. § 17-27-10 to -160. 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 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 on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).

The South Carolina Supreme Court has held 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). 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, section 17-27-70(c) of the South Carolina Code 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

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matter of law."

Applicant contends his application for post-conviction relief is timely with respect to ineffective assistance of post-conviction relief counsel. As aforementioned, an allegation for ineffective assistance of post-conviction relief counsel is not a claim upon which a new application for post-conviction relief can be based. Applicant proceeded to trial and was convicted on July 26, 2007, and the remittitur from his direct appeal was issued on October 21, 2009. Applicant, therefore, was required to file this current action on or before October 22, 2010. The current application was not filed until April 3, 2017—nearly **seven years** after the requisite statutory filing period expired. Therefore, this Court shall summarily dismiss the application as barred by the statute of limitations.

Before this Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing 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 failed to make such a *prima facie* showing based on the information set forth in his responses, and, therefore, he is not entitled to an evidentiary hearing in this matter. Accordingly, this Court finds no reason why the conditional order of dismissal should not become final.

IT IS THEREFORE ORDERED that, for the reasons set forth in this Court's conditional order of dismissal and above, the application for post-conviction relief is hereby denied and dismissed with prejudice.

This Court hereby advises Applicant he must file and serve a notice of appeal within thirty days of the service of this order to secure appellate review. *See* Rule 203, SCACR.

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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 7th day of January, 2019

Al Lee

ALISON R. LEE
Chief Administrative Judge
Eleventh Judicial Circuit

Columbia, South Carolina.

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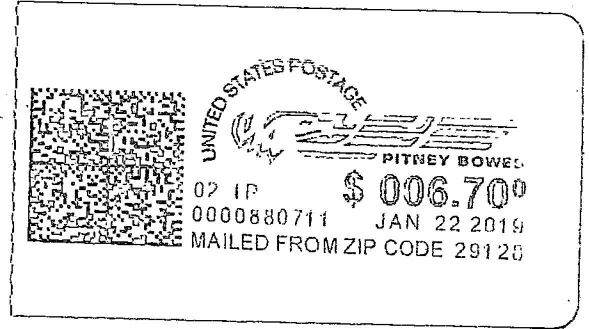

The supreme Court of South Carolina
P.O. BoX 11330
Columbia, S.C 29211