

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

C/A No. 2017-CP-23-4462

Appeal from Greenville County
Court of Common Pleas, Perry H. Gravely, Presiding

William Phillips -- Appellant,

-vs-

State of South Carolina -- Respondent,

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FEB 01 2019

S.C. SUPREME COURT

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN, above captioned Appellant, William Phillips, pro-se appeals the Order of dismissal that was entered in case no. 2017-CP-23-4462, by the Honorable Perry H. Gravely, January 9, 2019.

A copy of the Order is attached hereto.

Respectfully Submitted,

/s/ William Phillips

William Phillips

Appellant, pro-se

STATE OF SOUTH CAROLINA

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S.C. SUPREME COURT

William Phillips -- Appellant,

-vs-

State of South Carolina -- Respondent,

CERTIFICATE OF SERVICE

The undersigned hereby certifies he has served a true and correct copy of the enclosed Notice of Appeal on the Attorney for Respondent, Kelly Oppenheimer, P.O. Box 11549, Columbia, SC. 29211.

The Original was served on the South Carolina Supreme Court Clerk, Daniel Shearouse, P.O. Box 11330, Columbia, SC. 29211.

This was done via U.S. Mail, properly addressed, first-class postage affixed, this ___ day of January 2019.

Sworn to and Subscribed Before me

This 28 day of January 2019.

Tamara Conwell
NOTARY PUBLIC

MY COMM. Expires

My Commission Expires
September 25, 2023

Respectfully Submitted,

/s/ William Phillips

William Phillips,
Appellant, pro-se

asserts his prior post-conviction relief counsel, Rodney W. Richey, Esquire, was ineffective. He specifically alleges he “did not knowingly, intelligently or willfully abandon or waive any of his available claims to which he was and is entitled to have heard and adjudicated on the merits in his one PCR application.” He further alleges prior post-conviction relief counsel was ineffective for filing a “cursory blanket PCR amendment,” in which counsel Richey raised thirty-one (31) allegations “without ever speaking to Applicant.” Applicant contends at his first evidentiary hearing counsel Richey informed the court, after speaking with the Attorney General, he would only be going forward on ineffective assistance of counsel as an allegation “because of Applicant’s educational level.” Applicant further contends “the trial procedures were not properly presented for review on post-conviction relief and were either overlooked, neglected or thrown-by-the-wayside by PCR counsel, not Applicant.”

In his “Post Conviction Relief Amendment Pursuant to Rule 15(c), SCRCiv.P.,” Applicant raises the following additional grounds:

1. Trial Counsel rendered ineffective assistance when counsel failed to object when the trial court failed to instruct the jury on the essential element of “criminal intent” and this failure resulted in a structural error in the constitution of the trial and as a result of counsel’s failure the Court of Appeals concluded the issue was not preserved for appellate review;
2. Trial Counsel rendered ineffective assistance when counsel failed to request a prior jury instruction on the element of “criminal intent” and as a result the Court of Appeals found the issue was not preserved for appellate review;
3. Trial counsel rendered ineffective assistance when counsel failed to introduce the first and second statements of the State’s star witness Jerry Allen once the State introduced his third statement into evidence as substantive evidence;
4. Trial Counsel rendered ineffective assistance when counsel failed to object to the Solicitor’s numerous improper egregious statements during closing summation that in essence “vouched” for and improperly “bolstered” the State’s case and

- denied Applicant his right to a fair trial; [and]
5. Trial counsel was ineffective for failing to object to the trial court's malice instructions that were, incomplete, confusing and misleading that shifted the burden of proof in violation of due process.

Applicant wholly fails to provide this Court with any reason why these allegations could not have been raised in his prior application for post-conviction relief.

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.

Successive

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 no reason why Applicant could not have raised these claims in his previous state post-conviction relief action and/or federal habeas actions – and indeed it appears Applicant has raised many, if not all, of these allegations in prior actions.

In his amendment to the application for post-conviction relief, Applicant wholly fails to provide this Court with any reason why these allegations could not have been raised in his prior application for post-conviction relief. Indeed, it is entirely possible Applicant could have raised these allegations in his first application for post-conviction relief.

Moreover, Applicant's contention his successive application should be permitted due to



his prior post-conviction relief counsel's failure to argue each and every single allegation at his first evidentiary hearing does not give rise to the level of proof required to permit this successive application. 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).

Here, Applicant received a hearing in his first post-conviction relief action and timely appealed therefrom. 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. This Court, therefore, finds this application for post-conviction relief must be denied and dismissed as successive.

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).

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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 matter of law.”

Applicant was convicted on June 12, 2013, and the remittitur from his direct appeal was issued on March 24, 2015. Applicant, therefore, was required to file this current action on or before March 25, 2016. The current application was not filed until July 20, 2017—well 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. 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 AC day of January ~~2018~~ ²⁰¹⁹

Perry H. Gravely

PERRY H. GRAVELY
Chief Administrative Judge
Thirteenth Judicial Circuit

Greenville, South Carolina.

William Phillips # 355787
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EIZER, S.C 29669

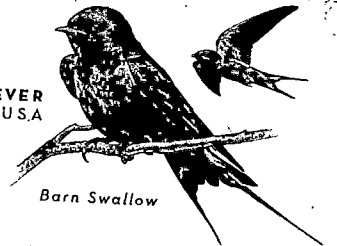
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JAN 28 2019

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