

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOR THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG)

Rico Washington,) Case No.: 2017-CP-42-02156
S.C.D.C. No. 331437,)
)

Applicant,)

CONDITIONAL ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

This matter comes before the Court by way of an application for post-conviction relief filed by Rico Washington (Applicant) on June 19, 2017. Respondent made its Return, requesting the application be summarily dismissed.

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was indicted at the March 2008 term of the Spartanburg County Grand Jury for lynching, first degree (2008-GS-42-02063). Michael D. Brown, Esq. represented Applicant, and Trey W. Gowdy, III, Esq., Seventh Circuit Solicitor, prosecuted the case. On September 22, 2008, Applicant pled guilty as indicted. The Honorable Paul M. Burch sentenced Applicant to imprisonment for term of 27 years. Applicant did not appeal his plea or sentence.

II. CURRENT APPLICATION

In his first and current post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:

1. "Ineffective Assistance / White v. State 208 S.E.2d 35 (1974)"
 - a. "Counsel did not file for direct appeal"

2019 SEP 11 AM 8:32

2. "Ineffective Assistance / Hill v. Lockhart 474 U.S. 52-56"
 - a. "Counsel ill advised me to plea did not disclose Brady material"
3. "Ineffective Assistance / Failed to provide Brady Material"
 - a. "Counsel failed evaluation of mentally capability"

Applicant requests relief as follows:

- "New Trial"

Before this Court are the Spartanburg County Clerk of Court records regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the records of this current PCR action.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the pleadings, the records submitted to it by the parties, and the applicable law. Pursuant to S.C. Code Ann. §§ 17-27-70 and -80, this Court informs the parties of its intent to dismiss the application based upon the following findings:

Meritless White Claim

The Court finds that Applicant's allegation that counsel failed to inform him of his right to appeal from his guilty plea, and that he should therefore be permitted an appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), is without merit as a matter of law. Though counsel is required to make certain that a defendant is made fully aware of his or her right to appeal after a *trial*, a different standard applies to a guilty plea:

Absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal) or when the defendant reasonably demonstrated an interest in appealing, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea.

Turner v. State, 380 S.C. 223, 224-25, 670 S.E.2d 373, 374 (2008) (citations omitted); see also Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000) (imposing the duty to consult when there is reason to think either that a rational defendant would want to appeal or that the particular

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 SPARTANBURG COUNTY

defendant reasonably demonstrated interest in doing so); contra Frazer v. South Carolina, 430 F.3d 696 (4th Cir. 2005) (reading Flores-Ortega to mean counsel generally has a duty to consult with his client regarding whether to pursue an appeal). Therefore, in a collateral action attacking a guilty plea, the “bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief.” Jones v. State, 382 S.C. 589, 598, 677 S.E.2d 20, 23-24 (2009) (quoting Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995)).

Applicant does not claim that he asked counsel to file an appeal, nor does he offer any other extraordinary circumstances that would entitle him to relief pursuant to White. To the contrary, Applicant explicitly asserts in response to Question 9 on the application that Counsel “failed to inform me of my rights to appeal or file the appeal.” Therefore, even if taken as true, Applicant’s claim does not entitle him to relief, and the Court shall dismiss the allegation

Statute of Limitations

Notwithstanding the White claim, the Court finds the application must 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. 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 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 on September 22, 2008, and did not appeal. The current application was not filed until June 19, 2017—well after the one-year statutory filing period expired. Therefore, the Court shall dismiss the application as barred by the statute of limitations.

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Laches

The Court finds the application must also be dismissed as barred by the equitable doctrine of laches. To ensure finality of litigation, our courts require reasonable diligence in pursuing collateral relief. McElrath v. State, 276 S.C. 282, 283, 277 S.E.2d 890 (1981). Requiring reasonable diligence “guards the state’s legitimate expectation that it will not be called upon without due cause, to defend the integrity of convictions that occurred many years ago, where records and witnesses are no longer available.” Id. (quoting Honeycutt v. Ward, 612 F.2d 36, 42 (2nd Cir. 1979)). Where an applicant for post-conviction relief fails to exercise reasonable diligence, the State may seek the summary dismissal through the equitable doctrine of laches, which is defined as “neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.” Bray v. State, 366 S.C. 137, 140, 620 S.E.2d 743, 745 (2005) (quoting Whitehead v. State, 352 S.C. 215, 219, 574 S.E.2d 200, 202 (2002)). “Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party; delay alone in assertion of right does not constitute laches.” Id.

Applicant seeks post-conviction relief nearly **nine** years after his conviction. Absent some explanation or justification for the delay in seeking post-conviction relief, laches will prevent an applicant from seeking collateral review of his conviction, especially where the delay affects the availability of evidence to review the applicant’s claims. McElrath, 276 S.C. at 283, 277 S.E.2d at 890. Applicant has offered no justification for the delay. Because of the delay, witness memories and physical evidence will have naturally faded and degraded. See, e.g., Bray, 366 S.C. at 140, 620 S.E.2d at 745 (affirming PCR judge's ruling that laches barred belated

review of denial of PCR seven years after PCR hearing was held); State v. Serrette, 375 S.C. 650, 654 S.E.2d 554 (Ct. App. 2007) (declining to remand for reconstruction of record noting such remedy “would undoubtedly be futile considering the passage of over ten years' time” when the delay was caused by appellant).

Additionally, because of Applicant's delay, the State has never had reason to order production of a transcript of Applicant's proceedings, such that presumably no transcript exists, foreclosing the possibility of meaningful appellate or collateral review. See Rule 607, SCACR (“[A] court reporter shall retain the primary and backup tapes of a proceeding for a period of at least five (5) years after the date of the proceeding, and the court reporter may reuse or destroy the tapes after the expiration of that period.”); cf. State v. Carlson, 363 S.C. 586, 608, 611 S.E.2d 283, 294 (Ct. App. 2005) (“The burden is on the appellant to provide a sufficient record for review.”). As a result, Applicant's delay in bringing this action has affected the availability of evidence for this Court to review his claims. Therefore, the Court shall dismiss the application as barred by the equitable doctrine of laches.

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[Conclusion and signature on following page]

IV. 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 Spartanburg County Clerk of Court and shall serve opposing counsel at the following address:

2019 MAY 17 AM 8:32

Office of the Attorney General
Johnny E. James, Jr., Esquire
PCR Division – 7th Circuit
P.O. Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Spartanburg County Clerk of Court and opposing counsel within twenty (20) days from the date of the service of this Order, 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 14th day of May, 2019.

GRACE GILCHRIST KNIE
GRACE GILCHRIST KNIE
Chief Judge for Common Pleas
Seventh Judicial Circuit

Spartanburg, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

) IN THE COURT OF COMMON PLEAS
) FOR THE SEVENTH JUDICIAL CIRCUIT
)

Rico Washington,
S.C.D.C. No. 331437,

) Case No.: 2017-CP-42-02156
)

Applicant,

)

) **FINAL ORDER OF DISMISSAL**
)

v.

State of South Carolina

)

Respondent.

)

This matter comes before the Court by way of an application for post-conviction relief filed June 19, 2017. Respondent made its return on or about March 14, 2019, requesting the application be summarily dismissed as untimely, successive, and without merit as a matter of law.

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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 signed May 14, 2019, and filed May 17, 2019, provisionally denying and dismissing this action, while giving the Applicant 20 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 June 11, 2019, serving the above-mentioned Conditional Order of Dismissal on Applicant.¹

Applicant filed response on April 4, 2019.² This Court has reviewed Applicant's response to the Conditional Order of Dismissal in its entirety, in conjunction with the original

¹ Applicant himself separately filed on June 24, 2019, an affidavit indicating receipt "on or about the 3rd or 4th day of June, 2019."

² Applicant filed an affidavit on April 15, 2019, asking the Court to accept his objections to the Conditional Order after the deadline. Court finds the deadline was July 11, 2019, and the objections were timely filed.

pleadings, and finds a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final.

First, Applicant claims that he is hearing-impaired, and that he was not properly provided enough qualified interpreters as required by law during his plea proceeding. The Court notes that it cannot review the factual accuracy of Applicant's claim without a record of the proceeding challenged, which no longer exists due to Applicant's own delay in challenging his September 22, 2008, plea. The Court also observes Applicant's curious demand for interpreters—plural—implying that a sign-language interpreter was provided for his plea. The Court infers that Applicant was indeed provided an interpreter. Applicant does not assert his disability is the cause of his delay in filing. The Court finds that Applicant's hearing disability does not justify his dilatory conduct in failing to seek relief for a decade, and further finds that Applicant's delay resulted in the loss of evidence necessary to review the merits of his claims. As such, the Court's conclusions regarding the procedural bars in the Conditional Order remain valid.

Second, Applicant claims that Counsel failed to subject him to a mental health evaluation. This allegation was raised in the original application and addressed by the Conditional Order of Dismissal. Applicant does not assert that any aspect of this allegation is the cause of his decade long delay in filing. As such, the Court's conclusions regarding the procedural bars in the Conditional Order remain valid.

Applicant thereafter raises allegations that Counsel was ineffective for failing to provide discovery material, failing to discuss the case with him, and coerced him into pleading guilty. Applicant asserts Counsel failed to investigate whether his Miranda rights were violated, whether Applicant knowingly and voluntarily waived his right to a preliminary hearing or to a jury trial. Applicant claims Counsel failed to explain to him his right to a direct appeal, or to a jury trial.

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Applicant finally claims that he is entitled to relief based upon the cumulative prejudice of Counsel's alleged errors. The Court addressed the White claim in the Conditional Order. None of the remaining allegations provide an excuse for Applicant's *extraordinary* delay in filing for post-conviction relief so as to render this Court's ruling on laches inappropriate, nor do they fall within any exception to the statute of limitations.

IT IS THEREFORE ORDERED that for the reasons set forth in the Court's Conditional Order of Dismissal, as supplemented by the findings above, the Application for post-conviction relief is hereby **DENIED AND DISMISSED WITH PREJUDICE**.

This Court hereby advises the 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 16th day of July, 2019.

Grace G. Knie
GRACE G. KNIE
Chief Judge for Common Pleas
Seventh Judicial Circuit

Spencer, South Carolina.

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SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
Post Office Box 21787 - Columbia, South Carolina 29221

Pursuant to Rule 4(d)(2) of the South Carolina Rules of Civil Procedure, the Director of the South Carolina Department of Corrections has designated H. J. Cook (Server) as his duly authorized agent for the purpose of making service of the process on the below named individual.

STATE OF SOUTH CAROLINA)
COUNTY OF Richland)

AFFIDAVIT OF PERSONAL SERVICE

On this 11 day of JUNE, 2019, I served the Conditional Order of Dismissal, on Inmate Rico Washington, SCDC Inmate #331437 by delivering personally and leaving a copy of the same at Broad River Correctional Institution. Deponent is not a party to this action.

s/ H. J. Cook
SCDC Server

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SWORN TO AND SUBSCRIBED BEFORE ME

this 11th day of June, 2019

Lisa Brown-Alston (L.S.)
Notary Public for South Carolina

LISA BROWN-ALSTON
Notary Public, State of South Carolina
My Commission Expires 2/5/2023

My Commission Expires: 2/5/2023

ADMISSION OF SERVICE

Service of a copy of the within Conditional Order of Dismissal is admitted at the South Carolina Department of Corrections Broad River Correctional Institution), Richland County, SC this 11th day of JUNE, 2019.

s/ Rico Washington
Inmate
SCDC Inmate #: 331437