

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 James A. Brown, #282981,)
)
 Plaintiff,)
)
 v.)
)
 State of South Carolina,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2018-CP-42-0968

ORDER DISMISSING CASE

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 SPARTANBURG COUNTY
 AMY W. COOK

This matter was before the Court on Monday, December 16, 2019, at p. 4 in Spartanburg County, SC, the Seventh Judicial Circuit, Court of Common Pleas upon Defendant's Motion to Dismiss this action pursuant to Rule 12(b) (4), (5), and (6) of the SCRCF, filed with the Court on May 14, 2018. Plaintiff was present and representing himself *Pro Se*. Attorney Harley Littleton Kirkland and Attorney T. Parkin C. Hunter of the South Carolina Attorney General's Office were present representing the interests of the Defendant. The Court Reporter was Sandy Satterwhite. After consideration of the record, memoranda, arguments presented, and the applicable law, the Court finds and concludes that Defendant's Motion to Dismiss pursuant to Rule 12(b) (4), (5), and (6) of the SCRCF, filed with the Court on May 14, 2018, should be and is therefore granted.

CASE HISTORY

The Defendant, Mr. Brown, filed this request for a writ of mandamus against the State of South Carolina alleging that the criminal court lacked subject matter jurisdiction to convict him because the grand jury was not properly convened during a week of General Sessions in Spartanburg. This matter was commenced with the filing of a summons and Complaint on

March 5th, 2018, and a request for issuance of a Writ of mandamus filed on March 19th, 2018. A Motion and Affidavit to Proceed in Forma Pauperis was filed on March 14th, 2018. On April 9th, 2018, the Deputy Clerk of Court sent a letter to Plaintiff indicating that the Honorable Judge R. Keith Kelly granted the Plaintiff's leave to proceed in Forma Pauperis and leave to proceed without payment of service cost. Plaintiff filed a Reply on June 11, 2018, requesting a dismissal of his underlying convictions. A Certificate of Service filed Jun 11, 2018, certified that the Plaintiff served a copy of his Motion for the issuance of writ of mandamus and Motion to Dismiss the State of South Carolina for lack of personal jurisdiction. On September 3rd, 2019, Plaintiff filed a letter with the Clerk of Court's Office asking for an update on the status of his case. On September 3, 2019, the Deputy Clerk of Court responded, informing the Plaintiff that the S. C. Attorney General's Office handles Mandamus cases and that a copy of his letter had been forwarded to their office. Defendant filed on May 14th, 2018, a motion to Dismiss pursuant to Rule 12(b)(4),(5), and (6) of the SCRCP. The parties were served with notice of the hearing for the Motion to Dismiss on October 31, 2019. Defendant filed a Memorandum in Support of the Defendant's Motion to Dismiss on December 4, 2019. Plaintiff filed a Response to the Defendant's Memorandum in Support of the motion to Dismiss on December 11, 2019.

PROCEDURAL HISTORY

Mr. Brown was indicted at the February 2001 term of the Spartanburg County Grand Jury for murder (01-GS-42-296). He was represented by J. Michael Bartosh, Esquire. On March 25 - 27, 2002, Mr. Brown proceeded to trial after which he was found guilty as indicted. The Honorable Donald W. Beatty sentenced him to confinement for life.

A timely Notice of Appeal was filed on Mr. Brown's behalf, and an appeal was perfected. The South Carolina Court of Appeals affirmed Mr. Brown's conviction pursuant to *Anders v.*

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California, 386 U.S. 738 (1967). *State v. Brown*, Op. No. 2003-UP-516 (S.C. Ct. App. filed August 27, 2003). The Remittitur was issued on September 30, 2003.

2003-CP-42-0296

Mr. Brown subsequently filed a Post-Conviction Relief Application on or about September 23, 2003, in which he alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel; and
2. Subject matter jurisdiction.

An evidentiary hearing was convened at the Spartanburg County Courthouse on April 5, 2005. Mr. Brown was present and represented by David M. Collins, Jr., Esquire. Molly R. Crum, Assistant Attorney General, represented Respondent. By written order dated May 9, 2005, the Honorable John M. Milling denied and dismissed the application with prejudice.

A timely Notice of Appeal was filed on Mr. Brown's behalf and a *Johnson* Petition for Writ of Certiorari was submitted by the South Carolina Office of Appellate Defense. On February 14, 2007, the South Carolina Supreme Court denied the Petition. The Remittitur was issued on March 5, 2007.

2007-CP-42-1238

Mr. Brown then filed another Application for Post-Conviction Relief on April 4, 2007. In his application, Mr. Brown alleged he was being held in custody unlawfully for the following reasons:

1. Lack of subject matter jurisdiction.

The State made its Return and Motion to Dismiss on or about August 15, 2007. An evidentiary hearing into the matter was convened on November 5 & 6, 2007, at the Spartanburg

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County Courthouse. Mr. Brown was present at the hearing and was represented by Kenneth P. Shabel, Esquire. S. Prentiss Counts, Esquire, of the South Carolina Attorney General's Office, represented the State.

Mr. Brown's "claim of lack of subject matter jurisdiction rested on the belief that the grand jury was not properly convened during a week of General Sessions in Spartanburg. . . . The Court upon review of the documents presented, found that the week of [Mr. Brown]'s indictment was a designated week for Court." *Brown, #282981 v. State of South Carolina*, 2010-CP-42-1238 at 3 (S.C.Com.Pl. Aug. 16, 2010). By written order dated August 2010, Judge Couch denied and dismissed the Application with prejudice.

2014-CP-42-1662

In Mr. Brown's third Application for Post-Conviction Relief, filed on April 21, 2014, he alleged that that he was being held unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel:
 - a. Failure to quash the indictment
 - b. "Failure to motion for a directed verdict that Brown acted in self-defense..."
2. Newly Discovered Evidence.

The State made its Return and Motion to Dismiss on or about October 14, 2015. The Court issued a conditional Order of Dismissal on January 20, 2016, provisionally denying and dismissing the action, while giving Mr. Brown twenty days to show why the dismissal should not become final. Mr. Brown subsequently filed a Memorandum of Law in Opposition to Conditional Order of Dismissal on February 15, 2016, claiming the case should not be dismissed due to newly discovered evidence.

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The Court ruled that this action was filed well outside of the expiration of the statute of limitations. The court also held that Mr. Brown had the opportunity to litigate all issues related to his case at the evidentiary hearing for his first Post-Conviction Relief Application on April 5, 2005. Therefore, the Court ruled that Mr. Brown did not show sufficient reason why the Conditional Order of Dismissal should not become final. By written order dated December 29, 2016, the Honorable J. Mark Hayes, II, denied and dismissed the 2014 Application for Post-Conviction Relief with prejudice. On February 9, 2017, Mr. Brown's petition was denied by the Supreme Court of South Carolina.

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ANALYSIS

I. 12(b)(4) – Insufficiency of Process

Mr. Brown served the State of South Carolina with a summons that did not include a case number. This is in violation of Rule 4(b), SCRPC, which states that a summons must contain the file number of the action. The failure to satisfy the requirements of Rule 4 enables dismissal under Rule 12(b)(4), SCRPC; thus the Court hereby dismisses this action for insufficiency of process.

II. 12(b)(5) – Insufficient Service of Process

Additionally, Mr. Brown did not properly serve the State of South Carolina. Rule 4(d)(4), SCRPC, describes the method of service that a plaintiff must follow when he is seeking to commence an action against the State of South Carolina: if the State is a party, service is complete by delivering a copy of the summons and complaint to the Attorney General. In this case, Mr. Brown attempted to initiate his action against the State of South Carolina by sending a copy of his writ of mandamus via regular mail. As Mr. Brown utilized an improper form of service upon the State of south Carolina, the Court hereby dismiss his complaint against the State

for insufficiency of service of process pursuant to Rule 12(b)(5), SCRPC.

III. 12(b)(6) – Failure to State a Claim

a. This Action is Barred by *Res Judicata*

This action is barred by the doctrine of *res judicata*, which bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. Under the doctrine of *res judicata*, “[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.” *Judy v. Judy*, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011), quoting *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 34, 512 S.E.2d 109 (1999). The elements of *res judicata* are: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. *Judy v. Judy*, 393 S.C. 160, 167, 712 S.E.2d 408, 412 (2011), citing *Riedman Corp. v. Greenville Steel Structures, Inc.*, 308 S.C. 467, 419 S.E.2d 217 (1992). “[F]or purposes of *res judicata*, ‘cause of action’ is not the form of action in which a claim is asserted but, rather the ‘cause for action, meaning the underlying facts combined with the law giving the party a right to a remedy of one form or another based thereon.’” *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 36, 512 S.E.2d 110 (1999) (quoting 50 C.J.S. Judgment § 749 (1997)).

The issues Mr. Brown raises in this complaint and mandamus have been raised and ruled upon in a previous Application for Post-Conviction Relief, specifically in his 2007 PCR. Mr. Brown’s “claim of lack of subject matter jurisdiction rested on the belief that the grand jury was not properly convened during a week of General Sessions in Spartanburg. . . . The Court upon review of the documents presented, found that the week of [Mr. Brown]’s indictment was a designated week for Court.” *Brown, #282981 v. State of South Carolina*, 2007-CP-42-1238 at 3

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(S.C.Com.Pl. Aug. 16, 2010). Accordingly, this case is dismissed under Rule 12(b)(6).

b. Mr. Brown must challenge the validity of his conviction in a Post-Conviction Relief action

Through this writ of mandamus, Mr. Brown is attempting to challenge the validity of his murder conviction, by arguing that the court did not have subject matter jurisdiction. To do that, however, he must institute a Post-Conviction Relief action. S.C. Code Ann. §17-27-20(A)(1). Post-Conviction Relief actions take the place of all other remedies. S.C. Code Ann. §17-27-20(B) (" Except as otherwise provided in this chapter, it comprehends and takes the place of all other common law, statutory or other remedies heretofore available for challenging the validity of the conviction or sentence. It shall be used exclusively in place of them."). **FILED** **2020 JAN 2 4:52** **CLERK OF COURT** **SPARTANBURG COUNTY** **SOUTH CAROLINA** by failing to challenge the validity of his conviction and sentence in a Post-Conviction Relief action, he has failed to state facts sufficient to constitute a cause of action. Consequently, the court dismisses this case under Rule 12(b)(6).

c. When a grand jury convenes outside of an established timeframe, the action, though incorrect, will not implicate the legality of the grand jury

Mr. Brown is claiming that the grand jury that returned true bill indictments against him was not legally constituted because they did not meet during a term of general sessions court. Again, any challenge to the constitutional validity of his conviction and sentence must occur in a Post-Conviction Relief action, and this issue has already been ruled upon. *Supra*. Regardless, although "an indictment or 'notice document' issued by a grand jury which is established or constituted illegally is deemed a nullity," a minor irregularity, such as convening a grand jury during a time other than the time specified within the governing statute, "does not implicate the legality of the grand jury or constitute a lesser irregularity which rises to the level of a

constitutional violation.” *State v. Evans*, 363 S.C. 495, 513, 611 S.E.2d 510, 519-20 (2005) (citing among other cases *State v. Jeffcoat*, 26 S.C. 114, 1 S.E. 440 (1887) (“statute which changed the time of holding court did not make illegal a grand jury which had been drawn under previous statute”). In addition, the Chief Judges for Administrative purposes have been encouraged, at least in the past, to “convene the grand jury when the court of general session is not in session.” *Brown v. State*, 316 S.C. 258, 260, 449 S.E.2d 494, 495 (1994). Therefore, Mr. Brown has failed to state a claim and this case is accordingly dismissed.

d. A mandamus cannot issue when there is another adequate remedy.

A court will only issue a mandamus to compel a public official to perform a mandatory legal duty. *City of Rock Hill v. Thompson*, 349 S.C. 197, 200, 563 S.E.2d 101, 107 (2002) (citing *Redmond v. Lexington County School Dist. No. Four*, 314 S.C. 431, 445 S.E.2d 441 (1994)) “When the legal right is doubtful, or the performance of duty rests in discretion, or when there is another adequate remedy, a writ of mandamus cannot rightfully be issued.” *Id.* (citing *In the Interest of Lyde*, 284 S.C. 419, 327 S.E.2d 70 (1985)). In this case, Mr. Brown has another adequate and more appropriate remedy, which is to file a Post-Conviction Relief Application, so this case is dismissed.

e. A mandamus cannot issue against the State of South Carolina

The State is not the proper party for a court to mandamus. Generally, a party requests a mandamus to compel inferior tribunals, public officials, or administrative agencies to perform a legal duty, which the party applying has a clear legal right to receive. Francis C. Amendola, et. al., 55 C.J.S. *Mandamus* §60 (Purpose of Writ) (April 11, 2017 Update). Therefore, a mandamus against the State is not appropriate because it is not an inferior tribunal, public official, or administrative agency, and the Court dismisses this case under Rule 12(b)(6).

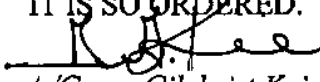
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CONCLUSION:

Mr. Brown served the State with a deficient summons in violation of Rule 4(b), SCRPC, and did not correctly serve the State of South Carolina according to Rule 4(d)(4), SCRPC, which allows for dismissal under Rule 12(b)(4) and Rule 12(b)(5).

Aside from the procedural defects, Mr. Brown's claims are barred by *judicata*, because a court has already ruled that there were no issues with the validity of his murder indictment. Additionally, any challenge to the validity of his conviction and sentence must be brought in an action for Post-Conviction Relief. Even if the grand jury met outside of the prescribed timeframe, that would not implicate the legality of the grand jury. Finally, Mr. Brown does not meet the requirements for receiving a mandamus, and a mandamus cannot issue against the State of South Carolina. Therefore, the Court dismisses this case under Rule 12(b)(4), (5), and (6), with prejudice.

IT IS SO ORDERED.



/s/Grace Gilchrist Knie

Honorable Grace Gilchrist Knie
Presiding Judge, Seventh Judicial Circuit

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