

The State of South Carolina  
IN THE SUPREME COURT

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APPEAL FROM ANDERSON COUNTY S.C. SUPREME COURT

COURT OF COMMON PLEAS

HON. EUGENE C. GRIFFITH, PRESIDING JUDGE

CASE No: 2010-CP-04-0678

HERMAN BELTON, 256396  
APPELLANT

v.

State of South Carolina  
RESPONDENT

### NOTICE OF APPEAL

HERMAN BELTON, APPEALS THE ORDER DENYING HIS MOTION FOR RELIEF FROM JUDGEMENT. THIS APPEAL IS TAKEN FROM THE ORDER OF THE HONORABLE EUGENE C. GRIFFITH DATED OCTOBER 26, 2020, FILED WITH THE ANDERSON COUNTY CLERK OF COURT ON NOVEMBER 16, 2020.

THE APPELLANT RECEIVED WRITTEN NOTICE  
OF ENTRY OF THIS ORDER ON DECEMBER 2, 2020.

DECEMBER 10, 2020

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STATE OF SOUTH CAROLINA )  
COUNTY OF ANDERSON )

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

Herman Belton, #256396, )

Case No. 2010-CP-04-0678 )

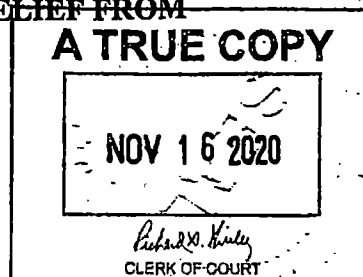
Applicant, )

v. )

ORDER DENYING APPLICANT'S )  
MOTION FOR RELIEF FROM )  
JUDGMENT )

State of South Carolina, )

Respondent. )



This matter comes before this Court by way of a motion for relief from judgment, pursuant to Rule 60(b), SCRCF, filed by Herman Belton ("Applicant") on February 5, 2019. The State ("Respondent") filed its return to the motion on September 5, 2019. A hearing on the motion was held before the undersigned over Webex on October 21, 2020. Applicant was present as a pro se litigant, and Assistant Attorney General Taylor Zane Smith of the South Carolina Attorney General's Office represented Respondent. For the reasons set forth below, this Court denies Applicant's motion.

### I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. During its June of 2006 term, the Anderson County Grand Jury indicted Applicant for trafficking in crack cocaine (2006-GS-04-1844). Applicant was represented in the case by Kurt Tavernier, Esquire, and then-Assistant Solicitor Michael Scott McElhannon of the Tenth Circuit Solicitor's Office prosecuted the case. On February 5, 2007, Applicant proceeded to a jury trial, with the Honorable Thomas W. Cooper presiding. The jury found Applicant guilty as indicted, and Judge Cooper sentenced Applicant to imprisonment for twenty-five years.

Tavernier filed a timely notice of appeal. Appellate Defender LaNelle Cantey Durant of the South Carolina Commission on Indigent Defense represented Applicant on appeal. Durant filed a motion to be relieved as counsel and a brief pursuant to Anders v. California, 386 U.S. 738 (1967), arguing Judge Cooper erred in denying Tavernier's motion to suppress the crack cocaine admitted into evidence at trial. The South Carolina Court of Appeals granted Durant's motion to be relieved and dismissed the appeal. State v. Belton, Op. No. 2009-UP-526 (Ct. App. filed November 19, 2009) (per curiam).

Applicant filed an application for post-conviction relief on February 24, 2010. Respondent made its return on or around June 30, 2010. J. Chris Brown, Esquire, represented Applicant in the PCR action. On or around June 8, 2011, the parties appeared before the Honorable Alexander S. Macaulay for an evidentiary hearing. Applicant was personally present at that hearing and represented by J. Chris Brown, Esquire. Respondent was represented by Assistant Deputy Attorney General Salley W. Elliot and Assistant Attorney General Kaelon Elizabeth May, both of the South Carolina Attorney General's Office. On November 7, 2011, Judge Macaulay issued an order of dismissal, denying Applicant's application for post-conviction relief and dismissing it with prejudice.

Brown filed a timely notice of appeal. Durant again represented Applicant on appeal, and filed a petition for a writ of certiorari arguing Judge Macaulay erred in finding Tavernier was not constitutionally ineffective for not making a contemporaneous objection to the admission of the crack cocaine at trial and in finding Tavernier was not constitutionally ineffective for not objecting to the indictment on the basis that it was true-billed when there was no General Sessions term of court. Assistant Attorney General John W. Whitmire of the South Carolina Attorney General's Office represented Respondent on appeal. The South Carolina Supreme Court transferred the

appeal to the South Carolina Court of Appeals, which then denied Applicant's petition for a writ of certiorari. Belton v. State, S.C. Ct. App. Order filed July 3, 2014. The remittitur was issued on July 23, 2014. Applicant then filed his pro se motion for relief from judgment on February 4, 2019.

## II. FINDINGS OF FACT & CONCLUSIONS OF LAW

Before this Court is the record in its entirety, including the records of the Anderson County Clerk of Court regarding Applicant's indictment and conviction; the transcript from Applicant's trial; the records from Applicant's direct appeal; the records from this present action, including the pleadings, motions and returns thereto; and the records from Applicant's PCR appeal, including the petition and appendix, the return to the petition, the dispositive opinion, and the remittitur. This Court's findings of fact and conclusions of law are set forth as follows.

Applicant makes his motion pursuant to Rule 60(b), SCRPC, alleging this Court should grant relief to Applicant from Judge Macaulay's order denying his Application for post-conviction relief. At the hearing before this Court, Applicant clarified that he was moving for relief under Rule 60(b)(4) and (5). Applicant argued Judge Macaulay failed to make findings of fact and conclusions of law addressing all claims for relief presented in the application for post-conviction relief and argued Brown was ineffective for not ensuring that the claims were preserved for appellate review by moving to alter or amend Judge Macaulay's order, pursuant to Rule 59(e), SCRPC, when Judge Macaulay's order failed to address all of Applicant's claims.

Rule 60(b), SCRPC, provides that:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud, misrepresentation, or other misconduct of an adverse party;
- (4) the judgment is void;

- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

In a motion seeking relief pursuant to Rule 60(b), SCRPC, the movant has the burden of presenting evidence, usually provided by affidavits, proving the facts essential to entitle him to relief. Bowers v. Bowers, 304 S.C. 65, 67-68, 403 S.E.2d 127, 129 (S.C. Ct. App. 1991). "Mere allegations, denied by the other party, are not evidence." Id. at 68, 403 S.E.2d at 129 (citing Griffin v. Van Norman, 302 S.C. 520, 397 S.E.2d 378 (S.C. Ct. App. 1990)).

In Hendricks v. State, 387 S.C. 221, 221, 692 S.E.2d 892, 893 (2010), the South Carolina Supreme Court addressed for the first time the "interplay" between the Uniform Post-Conviction Procedure Act and Rule 60(b), SCRPC. Hendricks moved for relief from the final order in his post-conviction relief action, pursuant to Rule 60(b), arguing a particular decision the Supreme Court of the United States established a new substantive constitutional standard that should have been applied retroactively so as to change the outcome of his PCR action. Id. The Supreme Court held Hendricks was not entitled to seek such relief by filing a motion under Rule 60(b) because:

Where, as here, the General Assembly has provided a specific procedure to be followed in PCR cases, and that method is inconsistent with the more general procedure of the [South Carolina Rules of Civil Procedure], the statutory procedure must be followed.

Id. at 223, 692 S.E.2d at 893. The Supreme Court remanded the case to the circuit court and instruction the circuit court, essentially, to consider Hendricks' motion a successive application for post-conviction relief. Id.

Applicant made it clear at the hearing before this Court that he feels he had meritorious post-conviction relief claims for which Judge Macaulay did not make findings of fact and conclusions of law in the order issued on November 7, 2011. Applicant stated he explicitly asked his attorney at the time to file a motion to alter or amend the judgment if those claims were not



addressed in Judge Macaulay's order to ensure that the claims were preserved for appellate review. Implicit in Applicant's argument is a claim that his PCR attorney was ineffective for not preserving all claims for appellate review. That claim is one that was not presented during the pendency of this litigation; indeed, it is one that could not have arisen until the PCR action concluded. By making the arguments Applicant has through a Rule 60(b) motion, Applicant is trying to have a two-for-one PCR action in which he rehashes trial issues, PCR issues he believes should have been addressed by Judge Macaulay and the appellate courts, and a new, overarching PCR issue that concerns his PCR attorney's performance.

The Uniform Post-Conviction Procedure Act ("the Act") requires that an applicant for post-conviction relief file his application within one year of the entry of judgment against him or the conclusion of his direct appeal. S.C. Code Ann. § 17-27-45(A). If an applicant alleges there is evidence of some material fact not previously presented and heard that requires his conviction or sentence be vacated, the applicant must file his application within one year of the date of his actual discovery of that evidence or after the date when he could have ascertained the fact through the exercise of reasonable diligence. S.C. Code Ann. § 17-27-45(B). A motion under Rule 60(b), on the other hand, must be filed "within a reasonable time. There is a conflict between the time requirement for filing a successive application and the time requirement for filing a Rule 60(b) motion. Hendricks therefore requires this Court to view Applicant's motion as if it were a successive application.

However, the use of Rule 60(b) to advance the arguments Applicant put forth in his motion and before this Court are inconsistent with the Act. The Act requires an applicant to raise all grounds for relief in an application, an amended application, or a supplemental application, lest the applicant waive his ability to raise in a subsequent application any ground not finally



adjudicated or raised in the first PCR action. S.C. Code Ann. § 17-27-90. As already mentioned, the Act sets forth requirement that an applicant file his application within a certain period of time. Respondent typically moves for the dismissal of successive applications for post-conviction relief, and applications filed more than one year after applicants are convicted and sentenced or the remittitur is issued in their direct appeals. To entertain Applicant's motion now, even if it is viewing it as a quasi-successive application, would be to deprive Respondent of the ability to make the aforementioned arguments, which potentially could prove dispositive if raised in the context of a successive application. Therefore, this Court denies Applicant's motion. If Applicant desires to rehash the events of his trial before Judge Cooper and his PCR hearing before Judge Macaulay and advance new claims regarding his PCR attorney, he must do so by filing another application for post-conviction relief. Of course, Respondent may move to dismiss such an application based upon the successiveness and timing of the application, but that is a more appropriate avenue for Applicant to raise those claims than is Rule 60(b).


If Applicant chooses to file a successive application for post-conviction relief in order to litigate the claims he has identified, the Anderson County Clerk of Court shall appoint an attorney to represent him so that he may make use of counsel's aid in presenting his arguments there.

**IT IS THEREFORE ORDERED** that Applicant's motion, pursuant to Rule 60(b), SCRPC, for relief from Judge Macaulay's order denying Applicant's application for post-conviction relief is denied; if Applicant chooses to file a successive application for post-conviction relief challenging the underlying conviction, the Anderson County Clerk of Court shall appoint an



attorney to represent Applicant.

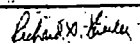
AND IT IS SO ORDERED this 26<sup>th</sup> day of October, 2020.

  
\_\_\_\_\_  
Eugene C. Griffith, Jr.  
Residing Judge

Newberry, South Carolina

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