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JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

ALAN WILSON
ATTORNEY GENERAL

December 3, 2020

The Honorable James C. Campbell
Clerk of Court, Sumter County
215 North Harvin Street
Sumter, South Carolina 29150

Re: Herbert Lee Bell, #315885 v. State of South Carolina
2006-CP-43-1241

Dear Mr. Campbell:

Enclosed please find the original **Final Order of Dismissal**, signed by the Honorable Kristi F. Curtis, in the above-captioned case for filing in your office. Please forward a **time stamped copy** back to our office for our file.

Sincerely,

s/ Brianna L. Schill

Brianna L. Schill
Assistant Attorney General

BL.S/ks
Enclosure(s)

cc: Herbert Lee Bell, #315885

v. State, 337 S.C. 256, 523 S.E.2d 753 (S.C. 1999), and S.C. Code Ann § 17-27-70(a). Applicant further asserted “the current application cannot be barred based on Res Judicata because the state itself is procedurally barred from raising any of the defenses raised in this application because it itself lacks procedural [or subject matter] jurisdiction,” and cites to State v. Funderburk, 259 S.C. 256, 191 S.E.2d 520 (1972) in support of his argument. Therefore, according to Applicant, he is entitled to an Austin² hearing and review to determine “whether he knowingly and intelligently waived his right to seek appellate review of his first and/ or second application.”

PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections. During its February 2004 term, the Sumter County Grand Jury indicted Applicant for Trafficking in Crack Cocaine (2004-GS-43-0180). Charles T. Brooks, III, Esquire, represented Applicant. The case was prosecuted by Assistant Solicitor W. Jason Corbett of the Third Circuit Solicitor’s Office. On March 7–8, 2006, Applicant’s case was called to trial before the Honorable Clifton Newman; Applicant was not present and was tried *in absentia*. The jury found him guilty as indicted, and Judge Newman entered a sealed sentence. Applicant was subsequently arrested, and on June 7, 2006, the Honorable Steven H. John held a sentencing proceeding. Judge John unsealed the sentence and sentenced Applicant to twenty-five years’ imprisonment and a \$100,000.00 fine.

Applicant timely served and filed a notice of appeal. Assistant Appellate Defender Lanelle C. Durant represented him on direct appeal before the South Carolina Court of Appeals. On November 13, 2007, Applicant filed his Final Brief of Appellant, in which he presented the following issues for review:

1. Did the trial court err in proceeding with Appellant’s trial in his absence when the State failed to prove that appellant had notice that his trial would proceed in his absence?

² Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

2. Did the trial court err in not granting a mistrial when the state failed to provide their expert's fingerprint report?

The State filed a Final Brief of Respondent on October 2, 2007. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence on May 7, 2008. State v. Bell, Op. No. 2008-UP-249 (S.C. Ct. App. filed May 7, 2008). The Remittitur was sent on May 23, 2008.

Post-Conviction Relief Action (2006-CP-43-1902)³ And Subsequent Appeal

Applicant filed a *pro se* application for post-conviction relief on November 9, 2006, alleging the following grounds for relief in his Application:

1. Sixth Amendment Violation;
2. "Federal government dismissed the same case for lack of probabl[e] cause;" and
3. Ineffective assistance of trial counsel.

Respondent filed its Return on September 12, 2008, and requested an evidentiary hearing be held. An evidentiary hearing into the matter convened on October 26, 2009, at the Sumter County Courthouse before the Honorable R. Ferrell Cothran, Jr. Applicant was present at the hearing and was represented Edgar R. Donald, Jr., Esquire. Assistant Attorney General Mary S. Williams represented Respondent. Applicant testified on his own behalf and he presented the testimony of trial counsel, Mr. Brooks. On December 30, 2009, Judge Cothran filed an Order of Dismissal, in which he denied relief and dismissed the application with prejudice. The Order of Dismissal addressed Applicant's claims that trial counsel was ineffective because he failed to conduct an independent investigation and additional investigation could have led to a finding the search warrants were not valid.

³ As mentioned previously, the current application was filed on August 2, 2006, approximately three months prior to the application numbered 2006-CP-43-1902. However, as the application numbered 2006-CP-43-1902 was the first application to be received by Respondent and was fully adjudicated on the merits, Respondent considered 2006-CP-43-1902 to be Applicant's "first" post-conviction relief action.

Applicant timely served and filed a notice of appeal. After the notice of appeal had been filed, Applicant, through counsel, filed a Motion for Reconsideration on January 21, 2010. In this motion, collateral counsel alleged Judge Cothran's order of dismissal failed to address the following grounds:

1. "Violation of applicant's U.S. Constitution fourth (4th) amendment [rights]."
2. "Violation of applicant's U.S. Constitution fourteenth (14th) amendment [rights]."
3. "Trial counsel was ineffective for failing to change (sic) during pretrial applicant[']s invalid arrest."
4. "Trial counsel was ineffective for failing to introduce during pretrial witnesses exculpatory testimony to reinforce the fact there was no probable cause established [to] arrest applicant."
5. "Trial counsel was ineffective for failing to make an independent investigation of the facts and circumstances specifically regarding applicant[']s invalid arrest."
6. "Trial counsel was ineffective for failing to quash indictment during pretrial because of violation of applicant's fourth and fourteenth amendments."
7. "Trial counsel was ineffective for failing to file a motion "with prejudice" during pretrial due to the violation[] of applicant[']s fourth and fourteenth amendments."

However, a copy of this motion was not served upon Judge Cothran, but instead, was sent in error to another judge, the Honorable George C. James, Jr. Respondent was also not served with this motion. Judge James, upon whom the motion was served, denied and dismissed the motion.

PCR counsel then filed a "Notice of Motion and Motion for Reconsideration," pursuant to Rules 59(e) and 60(b), SCRCP, on September 13, 2010, including the January 21, 2010, Motion as an exhibit. Respondent filed a Return, taking the position that Applicant's motion was untimely and should be summarily dismissed. The PCR judge denied the Motion in an Order filed on November 30, 2010, in which he found that there was no basis for altering or amending the court's prior ruling.

Applicant then filed a timely notice of appeal challenging the denial of post-conviction

relief. On July 14, 2011, Elizabeth A. Franklin-Best, Esquire, filed a Johnson Petition for Writ of Certiorari on Applicant's behalf and petitioned to be relieved as counsel. The only question presented in the Johnson Petition was stated as follows:

1. Did the PCR judge err when he found that trial counsel rendered effective assistance of counsel when counsel did not perform additional investigation regarding the validity of the search warrant which, had it been performed, would have resulted in a successful motion to suppress the drugs which petitioner was charged with trafficking?

On September 1, 2011, Applicant filed a *pro se* response, alleging the following additional issues:

1. Did the pcr judge err in denying relief despite trial counsel's ineffectively failed to make an objection to petitioner's invalid arrest, during pre trial?
2. Did the pcr judge err in denying relief despite trial counsel['s] ineffectively fail[ing] to introduce pretrial witness testimony to support petitioner's invalid arrest?
3. Did the pcr judge err in denying relief despite trial counsel['s] ineffectively fail[ing] to make an independent investigation of the facts and circumstances surrounding petitioner's invalid arrest?
4. Did the pcr judge err in denying relief despite trial counsel['s] ineffectively fail[ing] to file a motion with prejudice against the state to dismiss all charges due to petitioners invalid arrest?
5. Did the pcr judge err in denying relief despite trial counsel['s] ineffectively fail[ing] to file during pretrial a motion to quash indictments due to petitioner's invalid arrest?

The South Carolina Supreme Court filed an Order denying certiorari and granting counsel's motion to be relieved on July 30, 2012. It sent the Remittitur to the Sumter County Clerk of Court on August 17, 2012.

Federal Habeas Corpus Petition (4:07-4115-RBH)

On December 27, 2007, Applicant filed a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, raising the following ground for relief verbatim:

Ground One: Six Amendment violation Ineffective Counsel.

Supporting Facts: Charles T. Brooks, III did not file any pre-trial motions to dismiss this case “with prejudice” on the grounds that Law Enforcement violated my fourth and fourteenth Amendments when they didn’t have probable cause to arrest me or restrained me from my freedom of liberty. Also after the U.S. court dismissed this case with-out prejudice file a motion with prejudice to stop the Double Jeopardy. Showing what the state had used the probable cause to entrap me to the case was suppressed.

Respondent filed a motion for summary judgment on March 26, 2008. On February 25, 2008, the Honorable Thomas E. Rogers, III, issued a Roseboro order. On March 26, 2008, Applicant filed a document entitled Motion for Summary Judgment, which appeared to be a response to Respondent’s motion for summary judgment. Further, on June 4, 2008, Applicant filed a document entitled “Motion to Vacate the States Case with Prejudice.”

On June 17, 2008, United States Magistrate Judge Rogers issued a Report and Recommendation, recommending that Applicant’s petition be dismissed without prejudice as Applicant’s PCR application raising similar grounds was still pending. On June 20, 2008, the Honorable R. Bryan Harwell, District Court Judge, issued an order adopting the Report and Recommendation, granting Respondent’s motion for summary judgment, and dismissing the case without prejudice. Applicant subsequently filed a Motion to Alter or Amend which was denied by the court in an Order dated March 5, 2009.

Second Federal Habeas Corpus Petition (4:12-2555-RBH-TER)

On September 5, 2012, Applicant, appearing *pro se*, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, raising the following grounds for relief:

Ground One: Trial counsel was ineffective for failing to challenge/object during pretrial to applicant’s invalid arrest.

Ground Two: Trial counsel was ineffective for failing to introduce during pretrial witnesses exculpatory testimony to reinforce there was no probable

cause to arrest.

Ground Three: Trial counsel was ineffective for failing to make an independent investigation of the facts and circumstances of the invalid arrest.

Ground Four: Trial counsel was ineffective for failing to file a motion with prejudice during pretrial due to the violations of applicant's 4th and 14th amendments.

Ground Five: Trial counsel was ineffective for failing to move during pretrial for the court to "Quash" Petitioner's indictment due to the arresting officers violating his Fourth (4th) and Fourteenth (14th) United States constitution[al] rights.

Ground Six: Violation of Petitioner's Sixth (6th) Amendment United States Constitution[al] right to effective assistance of counsel, and his Fourth (4th) AND Fourteenth (14th) amendments.

Respondent filed a motion for summary judgment on February 6, 2013. On February 7, 2013, Respondent filed an amended return and memorandum. On February 25, 2008, Magistrate Judge Rogers issued a Roseboro order. On March 5, 2013, Applicant filed a response in opposition.

On May 14, 2013, Judge Rogers issued a Report and Recommendation, recommending that Applicant's petition be denied, Applicant's default motion be denied, and Respondent's motion for summary judgment be granted. On August 20, 2013, District Court Judge Harwell issued an order adopting the Report and Recommendation, granting Respondent's motion for summary judgment, denying Applicant's motion for default judgment, dismissing Applicant's petition, and denying a certificate of appealability.

On September 9, 2013, Applicant filed a Notice of Appeal with the Fourth Circuit Court of Appeals. On October 1, 2013, Applicant filed his "Informal Opening Brief/Request for Certificate of Appealability." On January 27, 2014, the Fourth Circuit Court of Appeals submitted a per curiam opinion dismissing the appeal. On February 7, 2014, Applicant filed a Petition for Panel Rehearing. On March 11, 2014, the Fourth Circuit Court of Appeals denied the petition for

rehearing.

On May 21, 2014, Applicant filed a Petition for Writ of Certiorari Review with the United States Supreme Court, arguing that “lower courts has repeatedly overlooked, misapprehended, or disregarded the basis of the claim he raised.” On October 6, 2014, the United States Supreme Court entered an order denying a petition for writ of certiorari.

PCR Action (2014-CP-43-2350) and Subsequent Appeal

On November 5, 2014, Applicant filed a subsequent application for post-conviction relief, alleging he is being held unlawfully for the following reasons:

1. “Strickland vs. Washington.”
2. “Mapps vs. Ohio.”
3. “State vs. Moore, 404 S.C. 634-44, 746 S.E.2d 357 (2013).”

On November 26, 2014, Applicant filed an Amended Application, asserting the following additional grounds for relief:

1. “Trial counsel as well as PCR counsel were both ineffective for not properly preparing and raising a Fourth Amendment and Fourteenth Amendment claim with the relevant law of *Mapp v. Ohio*, 367 U.S. 643, 648 (1961). Any evidence standard that if properly raised would have resulted in suppression of the drug evidence and dismissal of applicant’s case as ‘fruit’ of the poisonous tree.”

On February 24, 2015, Respondent made its return to the application, requesting summary dismissal of the application as successive, untimely, and barred by the doctrine of *res judicata*. On February 26, 2014, the Honorable W. Jeffrey Young, acting in his capacity as Chief Administrative Judge for the Third Circuit, signed a conditional order of dismissal, provisionally dismissing the application but allowing Applicant twenty days to provide sufficient reasons why the dismissal should not become final. Applicant responded to the conditional order of dismissal. On July 24, 2015, the Honorable George C. James, Jr., acting in his capacity as Chief Administrative Judge for the Third Judicial Circuit, issued a final order of dismissal, finding Applicant had failed to establish why his action should not be summarily dismissed.

Applicant filed a notice of appeal on September 21, 2015. On November 2, 2015, the South Carolina Supreme Court dismissed Applicant's appeal, finding Applicant failed to establish the notice of appeal had been served on the State in a timely manner. The Remittitur was issued on November 19, 2015. On November 20, 2015, Applicant filed a motion to reinstate, which was denied by the Court. Applicant then filed a petition for a writ of certiorari on December 18, 2015. As the remittitur had already been sent, the Court took no action on Applicant's petition.

II. CURRENT APPLICATION

In the application currently before this Court, filed on August 2, 2006, but not received by Respondent until June 9, 2017, Applicant raises the following grounds for relief:

1. "Entrapment"
2. "Unlawful Arrest"
3. "Violation of my 4th Amendment Rights to Privacy"
4. "Constructive Denial of Ineffective Assistance of Counsel"

As requested relief, Applicant states he is seeking full vacation of his sentence and immediate release from incarceration.

Before this Court are the records from the Sumter County Clerk of Court, the records from the South Carolina Department of Corrections, Applicant's appellate records, the records from Applicant's previous collateral actions, and Respondent's Return and Motion to Dismiss.

FINDINGS OF FACT AND CONCLUSION OF LAW

This Court finds Applicant's allegations in his response to the Conditional Order of Dismissal do not show this Court why the findings contained in that Order should not become final, and therefore, this Court denies relief and dismisses Applicant's application with prejudice.

As discussed above, Applicant first asserts that pursuant to Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (S.C. 1999), his due process rights were violated because his first-filed PCR application was not adjudicated on the merits. To the extent Applicant asserts Odom supports his assertions, his argument is misplaced. Id.

As Odom notes, “[a]ll applicants are entitled to a full and fair opportunity to present claims in one PCR application.” Id. at 261, 523 S.E.2d at 756. Applicant received such an opportunity in this case. Applicant originally filed the current application on August 2, 2006, and then filed a subsequent application (2006-CP-43-1902) three months later on November 9, 2006⁴. The State did not receive the first-filed application until nearly eleven years after its filing. However, Applicant received a full evidentiary hearing on the merits of his second-filed November 9, 2006, application, at which time he was represented by PCR counsel. Applicant could have brought the claims he listed in his first-filed PCR application at the evidentiary hearing in the 2006-CP-43-1902 action by simply amending that application or calling the court’s attention to the first-filed action. Therefore, this Court finds Applicant has not established a sufficient reason why the Conditional Order of Dismissal should not become final, and this Court denies relief and dismisses Applicant’s application with prejudice.

This Court also finds Applicant’s “procedural and subject matter jurisdiction” allegation is without merit. It appears Applicant alleges his current application cannot be barred by *res judicata* as the State lacks “procedural jurisdiction” to “raise[] any of the defenses raised in this application,” and relies on State v. Funderburk, 259 S.C. 256, 191 S.E.2d 520 (1972), in support of his claim. Applicant’s reliance on Funderburk, is misplaced. In that case, the Court determined

⁴ As discussed above, Applicant also filed a third PCR application on November 5, 2014, which was the second of the three PCR applications received by Respondent.

the lower court lacked jurisdiction regarding Funderburk's criminal charges because the defendant was tried and convicted upon a null indictment. Applicant fails to demonstrate that he was tried and conviction upon an indictment which was a nullity. Even if Applicant was convicted upon a null indictment, it does not support his assertion that Respondent was "without procedural jurisdiction" to raise defenses to his PCR application. Respondent has the authority to raise defenses to PCR applications pursuant to S.C. Code Ann. § 17-27-10, *et. seq.* Thus, Applicant has failed to show this Court why the Conditional Order of Dismissal should not become final, and therefore, this Court denies relief and dismisses Applicant's current application with prejudice.

This Court has reviewed Applicant's response to the State's Conditional Order of Dismissal in its entirety, in conjunction with the original pleadings, and finds that a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final. This Court further finds Applicant's current application is successive to Applicant's previous applications.

IT IS THEREFORE ORDERED that, for the reasons set forth above and in the Court's Conditional Order of Dismissal, the application for PCR is hereby denied and dismissed with prejudice.

This Court hereby advises the Applicant that 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 23rd day of November, 2020.

Kristi F. Curtis

KRISTI F. CURTIS
Chief Judge for Administrative Purposes
Third Judicial Circuit

Sumter

, South Carolina