

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)
))
Barney Bernard Wilson, #307418,)
))
Applicant,)
))
v.)
))
State of South Carolina,)
))
Respondent.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-22-00424

**CONDITIONAL ORDER
OF DISMISSAL**

FILED
GEORGETOWN COUNTY COURT
2021 MAR 11 AM 11:52
ALMA Y. WHITE
CLERK OF COURT

This matter comes before the Court by way of Applicant Barney Bernard Wilson's May 6, 2019 application for post-conviction relief. Respondent made its return and moved to dismiss. The Court has reviewed the record and finds as follows:

I. PROCEDURAL HISTORY

The records before this Court show that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Georgetown County Clerk of Court. Applicant was indicted at the July 2015 term of the Georgetown County Grand Jury for attempted murder (2015-GS-22-00728) and discharging a firearm into a dwelling (2015-GS-22-00729). Margaret Ann Kneece, Esquire, represented Applicant. Richard D. Todd, Jr., Esquire, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On March 29, 2016, Applicant pleaded guilty to the lesser-included offense of assault and battery of a high and aggravated nature. The indictment for discharging a firearm into a dwelling was dismissed *nolle prosequi* as part of the plea. On March 29, 2016, the Honorable J. Derham Cole accepted a negotiated term and sentenced Applicant to imprisonment for a term of eight years. Applicant did not appeal his plea or sentence.

First PCR Application: 2016-CP-22-01041

The Applicant subsequently filed an application for PCR on December 19, 2016, in which he alleged the following grounds for relief:

1. Ineffective Assistance of Counsel

Respondent made its return and motion for more definite statement on August 10, 2017. Subsequently, Applicant withdrew his application. By written order, dated February 21, 2018, the Honorable Steven H. John dismissed the application with prejudice.

II. FACTUAL HISTORY

The following facts were recited at Applicant's plea hearing:

March 29th, 2015, officers responded to the Andrews section of Georgetown County. They actually responded out to meet with Ms. Chakana Brown who is present in the courtroom, Your Honor. She had stated that Mr. Barney Wilson had come running at her at a fast pace, pulled a weapon on her and began firing shots. She then fled into the residence of Mr. Wilbur Burroughs, who is also here, to get away from Mr. Wilson. Her grandmother actually lives just a few houses down who was also present and saw Mr. Wilson running through the neighborhood with the gun and heard the shots fired.

Your Honor, the interesting part about this case, it is somewhat of a companion to a case I tried about two months ago where this individual was involved but was not a party to the action. However, his best friend shot another individual, Ms. Chakana was one of the witnesses there and we believe this was a trying to get her to not testify in my last trial, Your Honor.

III. CURRENT APPLICATION

In his second and current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully on the following grounds:

1. Newly Discovered Evidence

- a. When evidence is discover while PCR Proceeding are pending the claims should typically be included in the PCR application. See *Simpson v. Moore*, 627 S.E.2d 701, 708 (S.C. 2006) holding that applicant was entitled to amend his PCR application to include this claims.

First. Applicant submits that his current application for PCR should not be

summarily dismissed because it is not successive to his Prior PCR Application. See S.C. Code Ann §17-27-45(c) New Discovery Evidence. Therefore Applicant has file within the time mandated by the Post Conviction Procedure Act. Applicant Discover his newly discovery evidence in January 10, 2019. Applicant file within one (1) year after the date of actual discover or after the date when the facts could have been ascertained by the exercise of reasonable diligence as there was no Grand Jury in Georgetown on that date. July 22, 2015 county of court of General Sessions. See Exhibit (A) Indictment.

2. Subject Matter Jurisdiction

- a. Applicant contends his application for Post Conviction Relief is timely with respect to Subject Matter Jurisdiction as there is no statute of limitations regarding this issue, which could be raised at any time. Specifically see title 14-5-810(2) Georgetown Court of General Sessions "was not" in Sessions July 22 term 2015. According to title 14-5-810 (2). When Applicant were indicted July 22, 2015. Applicant Asserted that there was no order sent down by the S.C. Supreme Court to authorize the solicitor to indicted applicant.

Applicant asserts that his indictment is void when been indicted ill-legal by the solicitor office would fall within the extrinsic fraud and prosecutorial misconduct. *Brady v. Maryland*, 373 U.S. 83 (1963); *Mooney v. Holohan*, 294 U.S. 103 (1935).

Applicant asserts that this could should hold an evidentiary hearing when applicant has establish a prima facies newly discovery evidence allegation to overcome the procedural bars regarding successive and untimely PCR action based on the information set forth in his application, and therefore, he is entitled to an evidentiary hearing in this matter. See *Welch v. MacDougall*, 246 S.C. 258, 143 S.E.2d 455 (1965). Applicant asserts that upon review of the decision of a lower court in a PCR action, has the power to set aside procedural bars based on issue preservation and remand for further proceeding where dismissal would be fundamentally contrary to the interest of Justice. See *Simmons v. State*, 416 S.C. 554, 788 S.E.2d 220 (2016).

3. Prosecution Misconduct

Applicant requests relief as follows:

- Vacated sentence and conviction

Before the Court are the Georgetown County Clerk of Court's records regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, Applicant's prior PCR records, the plea transcript, and the current application for post-conviction relief.

IV. FINDINGS OF FACT AND CONCLUSIONS

This Court has reviewed the pleadings and all relevant supporting documents. Pursuant to S.C. Code Ann. §17-27-70(b), the Court makes the following findings of fact and conclusions of law:

Statute of Limitations

This Court finds that 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). 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, S.C. Code Ann. § 17-27-70(c) 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 pled guilty to the lesser-included offense of assault and battery of a high and aggravated nature on March 29, 2016. This application was filed on May 6, 2019, well beyond the statutory filing period. Applicant has presented no reasons for equitable tolling of the statute of limitations. Therefore, the application shall be summarily dismissed for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

Successiveness

The application should be summarily dismissed because it is successive to Applicant's previous PCR application. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981); *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can indicate a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised ... in the previous application." *Id.* at 450. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. *Id.* Applicant bears the burden of showing the allegations could not have been previously raised. *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980).

Applicant's current allegations could have been raised in the proceedings based on Applicant's prior application for post-conviction relief; thus, the current application is successive and barred under S.C. Code Ann. § 17-27-90. Applicant has failed to establish any sufficient

reason why he could not have raised his current allegations of newly discovered evidence and lack of subject matter jurisdiction in his previous application for post-conviction relief. Therefore, he has failed to meet the burden imposed upon him, and the application shall be summarily dismissed as it is successive to Applicant's previous PCR application.

Newly Discovered Evidence

Applicant's assertion that he is being held in custody unlawfully as a result of newly-discovered evidence, such that he should be entitled to vacation of his sentence and conviction, is without merit. The Uniform Post-Conviction Relief Act states that a person may institute a post-conviction relief action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of material fact not previously presented, the post-conviction relief application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C).

In South Carolina, a guilty plea is regarded as a waiver of non-jurisdictional defects and claims of violations of constitutional rights. *State v. Rice*, 401 S.C. 330, 331–32, 737 S.E.2d 485, 485–86 (2013) (citing *Hyman v. State*, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). Therefore, an applicant requesting a new trial based on after-discovered evidence following a guilty plea must show that;

"(1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the "interest of justice" requires the applicant's guilty plea to be vacated. In other words, a PCR applicant may successfully disavow his or her guilty plea only where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a plea

of guilty and the compelling interests in maintaining the finality of guilty-plea convictions.”

Jamison v. State, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014).

Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing that 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 allege any facts sufficient to support his claim of newly discovered evidence. By entering a guilty plea, Applicant waived his right to present any and all defenses that he may have had, and he cannot raise them now in his current application for post-conviction relief under the guise of “newly discovered evidence”. Applicant has failed to make a showing that he is entitled to relief based on the information set forth and, therefore, he is not entitled to an evidentiary hearing in the matter. Accordingly, the application shall be summarily dismissed with prejudice.

Subject Matter Jurisdiction

Applicant’s allegation that the trial court lacked subject matter jurisdiction because his indictments were insufficient should be summarily dismissed. “[S]ubject matter jurisdiction of the circuit court and the sufficiency of the indictment are two distinct concepts and the blending of these concepts serves only to confuse the issue.” *State v. Gentry*, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005). With respect to Applicant’s claims concerning the sufficiency of the indictment, Applicant was required to raise such a challenge prior to the swearing of the jury. S.C. Code Ann. §17-19-90 (2003). Regardless, “[a]n indictment is merely a notice document.” *State v. Baker*, 390 S.C. 56, 62, 700 S.E.2d 440, 442 (Ct. App. 2010) (citing *Gentry*, 363 S.C. at 102-103, 610 S.E.2d at 500. Whether or not the indictment could be made more definite and certain is irrelevant. *Baker*, 390 S.C. at 62, 700 S.E.2d at 442. The court in *Baker* noted the following:

[T]he court must look at “the indictment with a practical eye in view of all the surrounding circumstances. The sufficiency of the indictment is determined by whether: (1) the offense charged is stated with sufficient certainty and particularity to enable a court to know what judgment to pronounce, and the defendant to know what he or she is called upon to answer and whether he or she may plead an acquittal or conviction thereon, and (2) whether it apprises the defendant of the elements of the offense that are intended to be charged.

Id. (citing *Gentry*, 363 S.C. at 102-103, 610 S.E.2d at 500).

Moreover, “an indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood.” *Id.* 390 S.C. at 63, 700 S.E.2d at 443 (citing *State v. Tumbleston*, 376 S.C. 90, 98, 654 S.E.2d 849, 853 (Ct. App. 2007)); S.C. Code Ann. § 17-19-20. When the indictment references the statute, the elements of the charge are thereby incorporated into the indictment. See *State v. Owens*, 346 S.C. 637, 649, 552 S.E.2d 745, 751 (2001) (murder statute) (overruled on other grounds by *Gentry*, 363 S.C. 93, 610 S.E.2d 494); see also *State v. Beam*, 336 S.C. 45, 50-51, 518 S.E.2d 297, 300 (Ct. App. 1999) (video piracy statute); *State v. Crenshaw*, 274 S.C. 475, 477, 266 S.E.2d 61, 62 (1980) (bribery statute).

Applicant’s indictment allegation is not proper for PCR. Applicant’s failure to raise this challenge before entering a plea of guilty prevents him from raising this allegation in this action. Additionally, the indictments charged Applicant substantially in the language of the statute prohibiting the crime, and thus pass legal muster. Furthermore, Applicant did not plead guilty as indicted, but instead pleaded guilty to the lesser-included offense of assault and battery of a high and aggravated nature, thus any deficiency in the indictment was not prejudicial to Applicant. As such, Applicant’s allegation as it pertains to the indictments should be dismissed.

Applicant has presented no facts whatsoever to support his claim that the trial court lacked subject matter jurisdiction. An Applicant may challenge the subject matter jurisdiction of the trial

court and such a claim is one that may be raised at any time. *Brown v. State*, 343 S.C. 342, 346, 540 S.E.2d 846, 848-49 (2001), overruled in part by *Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). However, “[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters.” *Gentry*, 363 S.C. at 101, 610 S.E.2d at 499. See also S.C. Const. Art. V, § 11. Thus, the Applicant must present evidence that his case is of some class over which the circuit court does not have the authority to preside. The Applicant’s conviction involved a criminal charge in the Court of General Sessions. Accordingly, the circuit court had subject matter jurisdiction. Applicant has failed to present any facts or evidence that the convictions he challenges in this application are in a class over which the circuit court does not have the authority to provide. Therefore, this Court shall summarily dismiss Applicant’s allegation as it pertains to subject-matter jurisdiction.

V. CONCLUSION

Pursuant to S.C. Code Ann. §17-27-70(b), this 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 Horry County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
PCR Division – 15th Circuit
P.O. Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Georgetown County Clerk of Court and opposing counsel within twenty (20) days, and that this Court will not consider any issues raised in his response if not so timely filed and served.

IT IS SO ORDERED this 11th day of March, 2021.

Benjamin H. Culbertson
Benjamin H. Culbertson
Chief Administrative Judge
Fifteenth Judicial Circuit

Georgetown, South Carolina