

STATE OF SOUTH CAROLINA)
COUNTY OF SALUDA)

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Frank Tolen, Jr., SCDC #246966,)
Applicant,)

Case No. 2019-CP-41-0156

v.)

FINAL ORDER OF DISMISSAL

State of South Carolina,)
Respondent.)

This matter comes before the Court by way of a post-conviction relief (PCR) action commenced by Frank Tolen, Jr. (Applicant) on July 15, 2019.¹ The State made its return on March 23, 2020, requesting the application be summarily dismissed because it was filed after the statute of limitations had expired; it is successive to Applicant's prior PCR actions; it is barred by the doctrine of res judicata; and Applicant's claims are otherwise without merit.

Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, the Court issued a Conditional Order of Dismissal filed July 22, 2020, provisionally denying and dismissing this action, while giving Applicant twenty days from the date of service of said order in which to show why the dismissal should not become final. Attached

¹ This Court would note that Applicant filed a "Petition for Original Jurisdiction" with our Supreme Court on February 5, 2020, asserting the Court should exercise its original jurisdiction and grant him injunctive relief in the form of a PCR hearing pursuant to Rule 245, SCACR, and Section 14-3-310 of the South Carolina Code. Specifically, Applicant argued he was deprived of his right to access this Court regarding the instant PCR action. The State filed its return to the petition on April 8, 2020. On August 24, 2020, the Court issued an order declining to entertain the matter pursuant to Rule 245, SCACR, and *Key v. Currie*, 305 S.C. 115, 406 S.E.2d 356, (1991).

to this Final Order of Dismissal, is an Affidavit of Service dated October 5, 2020, serving the above-mentioned Conditional Order of Dismissal on Applicant.

On August 10, 2020, Applicant filed a document titled "Objection and Reply to Respondent Second Conditional Order of Dismissal." This Court has reviewed Applicant's response in its entirety, in conjunction with the original pleadings, and after reviewing such response finds a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final.

Applicant first alleges this application is not untimely because the Fourth Circuit Court of Appeals dismissed his *federal habeas* appeal on August 3, 2018—eleven months prior to filing this action. As discussed in the Conditional Order, the one-year statute of limitations delineated in section 17-27-45(A) of the South Carolina Code begins to run on the date Applicant is convicted or the date the remittitur is issued on direct appeal, whichever is later. The remittitur from Applicant's direct appeal issued on May 26, 2009. The dismissal of Applicant's *federal habeas* action litigated in *federal court* action has no effect on the timeliness of this action.

Applicant next argues—as he did in the application and extensively addressed in this Court's Conditional Order—that the circuit court lacked subject matter jurisdiction to impose a second YOA sentence for his April 20, 1990, conviction for armed robbery in Lexington. At the time of the Lexington conviction, Applicant was already serving a YOA sentence for an armed robbery conviction in Aiken. The Lexington judge sentenced Applicant to a concurrent six-year YOA sentence pursuant to section 24-19-50 of the South Carolina Code. Both of these prior convictions were used as predicate offenses to sentence Applicant to life without parole under section 17-25-45.

Applicant again bases this allegation on the **current** version of the statute, which only allows a person to be sentenced as a youthful offender once. At the time Applicant was sentenced, in 1990, the statute stated that “[n]o youthful offender shall be sentenced more than *twice* under the provisions of this chapter.” S.C. Code Ann. § 24-19-50(c) (amended 1996) (emphasis added). Applicant even cites the South Carolina General Assembly session in 1995–1996 wherein the old statute was amended to reflect the **current** version of section 24-19-50, which states that, “[i]n the event of a conviction of a youthful offender the court may. . . not sentence a youthful offender more than once under this chapter.” The statute was amended six years after Applicant received his second YOA sentence, and did not apply retroactively. Therefore, it is clear that the circuit court was within its discretion to sentence Applicant to a second YOA sentence.


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 make such a showing based on the information set forth in his response, and, therefore, he is not entitled to an evidentiary hearing in this matter. Accordingly, this Court finds no reason why the Conditional Order of Dismissal should not become final.

This Court reasserts its finding in the Conditional Order of Dismissal that the current PCR application must be dismissed based upon filing after the statute of limitation had expired; successiveness of the application; being barred by the doctrine of *res judicata*; and because the pursuit of this current application frustrates the need for finality of litigation.

IT IS THEREFORE ORDERED that for the reasons set forth in this Court’s Conditional Order of Dismissal and above, this post-conviction relief action is hereby **DENIED AND DISMISSED WITH PREJUDICE**.

This Court hereby advises Applicant 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 227, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 1 day of DECEMBER, 2020.


WALTON J. MCLEOD, IV
Chief Administrative Judge
Eleventh Judicial Circuit

Lexington, South Carolina