

STATE OF SOUTH CAROLINA)
 COUNTY OF GREENVILLE)
)
 Jaques Jamar Sullivan, #335849,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE THIRTEENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-23-7165

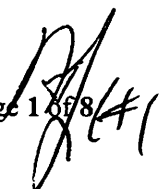
CONDITIONAL ORDER OF DISMISSAL

FILED-CLERK OF COURT
 PAUL B. MICKENHILL
 GREENVILLE, SC
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This matter comes before this Court by way of an application for post-conviction relief filed by Jaques Jamar Sullivan (Applicant) on December 11, 2019. The State (Respondent) made its return on or about April 22, 2020, requesting therein that the application be dismissed summarily with prejudice because it is barred by the statute of limitations and is a successive application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenville County Clerk of Court. During its March of 2009 term, the Greenville County Grand Jury indicted Applicant for trafficking in cocaine (2008-GS-23-7026), the possession of a weapon during the commission of a violent crime (-7026), and the possession of marijuana (2008-GS-23-7027). Applicant was represented by Daniel Farnsworth, Esquire (trial counsel), and Assistant Solicitor Allen O. Fretwell of the Thirteenth Circuit Solicitor’s Office prosecuted the case. On January, 14, 2009, Applicant proceeded to a jury trial with the Honorable Edward W. Miller presiding. At the conclusion of trial, the jury found Applicant guilty as indicted. Judge Miller sentenced him to imprisonment for twenty-five years with a \$50,000 fine for trafficking, imprisonment for five years on possession of a weapon, and time served for possession of marijuana. Judge Miller also found Applicant in contempt of court and imposed a six-month

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sentence consecutive to the weapons offense.

Trial counsel filed a timely notice of appeal. J. Falkner Wilkes, Esquire (appellate counsel), perfected the appeal on Applicant's behalf. Assistant Attorney General Christina J. Catoe of the South Carolina Attorney General's Office represented the State. Appellate counsel argued on appeal that the trial court erred in admitting evidence obtained by a defective search warrant. The South Carolina Court of Appeals affirmed in an unpublished opinion. State v. Sullivan, Op. No. 2011-UP-446 (S.C. Ct. App. filed October 11, 2011) (per curiam). The remittitur was issued on October 27, 2011.

2012-CP-23-6281

Applicant filed an application for post-conviction relief on October 1, 2012, arguing therein that he was entitled to post-conviction relief based upon the following grounds:

1. Ineffective assistance of trial counsel:
 - a. "Trial counsel had a conflict of interest, that was not disclosed to me until after my conviction";
 - b. "Trial counsel was unprepared for trial";
 - c. "Trial counsel failed to investigate, obtain and review the discovery/evidence in my case prior to trial";
 - d. "Trial counsel failed to review the discovery/evidence with me prior to trial";
 - e. "Trial counsel failed to make appropriate and necessary objections to inadmissible evidence at trial";
 - f. "Trial counsel failed to call necessary witnesses at trial";
 - g. "Trial counsel failed to file necessary and appropriate motion(s) to challenge any wire-tap(s)/recordings in this matter";
 - h. "Trial counsel failed to challenge an illegal search and seizure in my case";
 - i. "Trial counsel failed to appropriately represent me at the forfeiture hearing following my conviction";
 - j. "I was denied the right to a fair trial when the trial court denied my motion for a continuance to enable me to retain alternate trial counsel"; and
2. Ineffective assistance of appellate counsel:
 - a. "Appellate counsel failed to raise appropriate and/or reviewable issues on appeal."

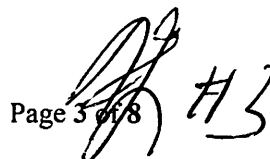
Respondent filed its return on May 15, 2013, requesting that the PCR court convene a hearing regarding the issues raised in the application.

An evidentiary hearing was convened on April 22, 2014, at the Greenville County Courthouse, with the Honorable D. Garrison Hill presiding. Applicant was present and represented by J. Bradley Bennett, Esquire (PCR counsel). Respondent was represented by Senior Assistant Deputy Attorney General Karen C. Ratigan of the South Carolina Attorney General's Office. At the conclusion of the hearing, Judge Hill denied the application and dismissed with prejudice.

Bennett filed a timely notice of appeal. Jeremy A. Thompson, Esquire, filed a petition for a writ of certiorari and appendix on Applicant's behalf, arguing Judge Hill erred in finding that trial counsel did not have an actual conflict of interest while representing Applicant. Ratigan represented Respondent on appeal. Thompson filed a reply to Respondent's return. The South Carolina Supreme Court denied Applicant's petition for a writ of certiorari. Sullivan v. State, S.C. Sup. Ct. Order filed December 16, 2016. The remittitur was issued on January 4, 2017.

2:17-cv-71-RBH-MGB

Applicant filed a petition for a writ of habeas corpus on January 11, 2017, alleging therein that his constitutional rights were violated when trial counsel had an actual conflict of interest during the representation. Respondent filed its return on March 7, 2017, and moved for summary judgment against Applicant. Applicant filed a response to the motion for summary judgment on May 22, 2017, arguing therein that Respondent's motion should be denied. On January 17, 2018, the Honorable Mary Gordon Baker, United States Magistrate Judge, issued a report and recommendation, wherein she recommended that Respondent's motion for summary judgment be granted, finding Applicant failed to establish trial counsel had an actual conflict of interest and that Applicant failed to show that any conflict adversely affected trial counsel's performance. On February 14, 2018, Applicant filed his objections to the Magistrate Judge's report and recommendation. On February 27, 2018, Respondent filed a reply to Applicant's objections. In an order issued on March 28, 2018, the

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Honorable R. Bryan Harwell granted Respondent's motion for summary judgment and dismissed the petition for a writ of habeas corpus with prejudice. Applicant filed a notice of appeal on April 30, 2018. The United States Court of Appeals for the Fourth Circuit dismissed the appeal. Sullivan v. Lewis, 740 F. App'x 347 (4th Cir. 2018), cert. denied, 139 S. Ct. 1459 (2019).

CURRENT APPLICATION

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

1. "Ineffective assistance of counsel for failure to discharge his duty of due diligence to investigate the evidence, facts, and witness(es) in the case":
 - a. "Counsel failed to properly and fully investigate the case";
 - b. Trial counsel did not properly investigate whether a law enforcement officer properly followed the application procedures for applying for a wiretap;
 - c. Trial counsel did not properly investigate whether a law enforcement officer properly obtained a court order authorizing a wiretap;
 - d. Trial counsel did not properly investigate whether an intercepted communication was disclosed illegally;
 - e. Trial counsel did not properly investigate whether a law enforcement officer furnished a copy of his application for a wiretap and/or the court order authorizing the wiretap;
 - f. Trial counsel did not ensure that the reporting of the wiretap to the federal government was done properly;
 - g. Trial counsel did not inform Applicant and the court that the wiretap did not conform to state law;
 - h. Trial counsel did not move to suppress evidence;
 - i. Trial counsel did not inform Applicant and the court that a law enforcement officer illegally gathered evidence; and
2. "Ineffective assistance of counsel for failure to provide a proper defense for physical evidence in this case";
3. "Fraud upon the court, pursuant to SCRPC 60(B)(3),(4)"; and
4. "After discovered evidence".

Before this Court are the records of the Greenville County Clerk of Court regarding Applicant's convictions; the records from Applicant's direct appeal, including the parties' briefs, record on appeal, and opinions; Applicant's records from the South Carolina Department of Corrections; the records from Applicant's prior post-conviction relief actions, including the parties' briefs, appendix, and order denying Applicant's petition for a writ of certiorari on appeal; the records

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from Applicant's petition for a writ of habeas corpus in federal court; and Applicant's current application for post-conviction relief.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Statute of Limitations

Pursuant to S.C. Code Ann. § 17-27-70(c), this Court may summarily dispose of an application if there is no genuine issue of material fact in the "pleadings, depositions and admissions and agreements of fact" and the movant is entitled to judgment as a matter of law. The summary dismissal of an application for post-conviction relief without a hearing is appropriate only when it is apparent on the fact of the application that a hearing is not needed for the development of a factual record and the applicant is not entitled to relief. Mose v. State, 420 S.C. 500, 505, 803 S.E.2d 718, 720 (2017) (citing Leamon v. State, 363 S.C. 432, 611 S.E.2d 494 (2005)). The Court, in considering the motion for summary dismissal without the holding of an evidentiary hearing, must assume the facts presented by Applicant as true and view them in the light most favorable to Applicant. Robertson v. State, 418 S.C. 505, 519, 795 S.E.2d 29, 36 (2016) (citing McCoy v. State, 401 S.C. 363, 737 S.E.2d 623 (2013)). 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).

This Court finds the application shall be summarily dismissed because it is barred by the statute of limitations. The Uniform Post-Conviction Procedure 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 offense or within one year after the sending of the

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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 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). The South Carolina Court of Appeals issued the remittitur on October 27, 2011. The application was, therefore, due on or before October 27, 2012. This application was not filed until December 11, 2019, more than seven years after the statutory filing period had expired. Therefore, all of Applicant's allegations shall be summarily dismissed for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

Successiveness

Courts disfavor successive applications and place the burden on applicants to establish any new ground raised in a subsequent application could not have been 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 allegations could have been raised in his earlier PCR action; indeed, many of the issues Applicant puts forth in this application concern trial counsel's alleged lack of preparation or failure to challenge evidence admitted at trial. Applicant did raise those or similar issues in his first application. As to those issues that were not raised in the first application, Applicant wholly fails to provide this Court with any reason he could not have raised them previously. Therefore, Applicant has failed to meet the burden imposed upon him, and this Court summarily dismisses the application as successive to Applicant's previous post-conviction relief application.

After-Discovered Evidence

The Uniform Post-Conviction Relief Act states 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 a 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). Applicant must make a prima facie showing that he is entitled to relief before the court will hold an evidentiary hearing. 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 a showing he is entitled to relief based on the information set forth in his application for post-conviction relief because he has provided no supporting facts and has not explained upon what basis he asserts that he has after-discovered evidence. As such, the

allegation alone does not entitle Applicant to a hearing and is summarily dismissed.

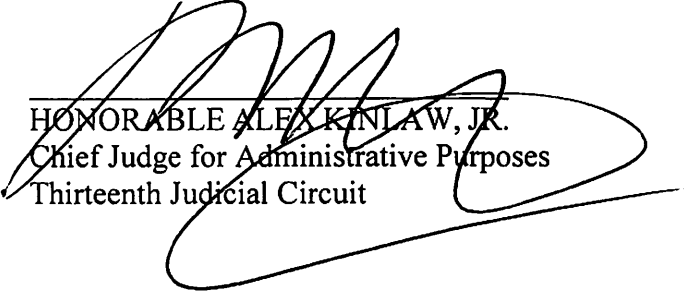
CONCLUSION

Pursuant to S.C. Code Ann. § 17-27-70(b), this Court intends to dismiss this application for post-conviction relief with prejudice unless Applicant provides specific reasons, factual or legal, that the application should not be dismissed in its entirety. Applicant is granted twenty 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 Greenville County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Taylor Zane Smith, Esquire
PCR Division – 13th Circuit
Post Office Box 11549
Columbia, South Carolina 29211

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

AND IT IS SO ORDERED this 3rd day of Apr, 2020.


HONORABLE ALEX KINLAW, JR.
Chief Judge for Administrative Purposes
Thirteenth Judicial Circuit

Celly, South Carolina