

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

IN THE COURT OF COMMON PLEAS
 IN THE THIRTEENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-23-7165

FINAL ORDER OF DISMISSAL

FILED
 CLERK OF COURT
 PALMER WIDENER
 GREENVILLE, SC
 2021 AUG 17 PM 2:31

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, and by way of the State’s (“Respondent”) return and motion to dismiss, which was filed on July 28, 2020.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. 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 (2008-GS-23-7026), and the possession of marijuana (2008-GS-23-7027). Applicant was represented by Daniel Farnsworth (“trial counsel”), Esquire. 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 Applicant 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 sentence consecutive to the weapons offense.

Trial counsel filed a timely notice of appeal. J. Falkner Wilkes (“appellate counsel”), Esquire, 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 The South Carolina Court of Appeals affirmed in an unpublished opinion.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”;
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. 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 on Applicant's behalf, arguing that 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 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 SCRCF 60(B)(3),(4)"; and
4. "After discovered evidence".

On March 19, 2020, Applicant filed a motion for judgment by default, pursuant to Rule 55, SCRCF.

On July 28, 2020, Respondent filed a return to the application, and moved to dismiss the application summarily due to the untimeliness of the application, the impermissible successiveness of the application, and Applicant's failure to make a prima facie showing that he is entitled to a

new trial based upon after-discovered evidence.

On August 3, 2020, the Honorable Alex Kinlaw, Jr., issued a conditional order of dismissal, conditionally granting Respondent's motion to dismiss.¹ Specifically, Judge Kinlaw found that the application was untimely, impermissibly successive, and failed to present a prima facie case that Applicant is entitled to a new trial based on after-discovered evidence. Judge Kinlaw gave Applicant twenty days after the service of the conditional order of dismissal upon him in which to file a response providing reasons, factual or legal, that the dismissal should not become final. That order was filed with the Greenville County Clerk of Court on August 7, 2020, and served on Applicant on September 16, 2020, as is shown by the attached affidavit of personal service, which is incorporated into this order.

On August 7, 2020, Applicant filed a response to Respondent's motion to dismiss. Respondent argued therein that: Respondent's delayed filing of a return and submission of a proposed conditional order of dismissal violated Applicant's due process rights and that Judge Kinlaw should not give any consideration to the arguments raised in Respondent's return.

On September 2, 2020, Applicant filed a response to Judge Kinlaw's conditional order of dismissal, arguing that his application raises genuine issues of material fact that have not

¹ Applicant has rightly pointed out in his filings in this matter that the proposed conditional order of dismissal that Respondent submitted for consideration to Judge Kinlaw incorrectly gave the date of service of Respondent's return to the application as April 22, 2020. As Respondent has explained in subsequent filings, Respondent's return was actually signed and served on July 24, 2020, and filed on July 28, 2020. Respondent's mistake in providing an incorrect date in the proposed conditional order of dismissal was an innocent one, caused by the fact that Respondent's counsel originally completed the return to the application on the date in April but was unable to serve and file it until July due to the remote work restrictions initiated due to the pandemic. When Respondent's counsel re-dated the return in July so that it could be served, counsel mistakenly did not update the corresponding date given in the proposed conditional order, as he should have done. Despite Applicant's assertions to the contrary, Respondent's mistake and later clarification show that the mistake was minor, did not constitute fraud upon the court, and caused Applicant to suffer no prejudice.

previously been raised or heard, fitting within the bounds of South Carolina Code Section 17-27-90.

On November 6, 2020, Respondent filed a return to Applicant's motion for default judgment.

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 from Applicant's petition for a writ of habeas corpus in federal court; and all filings in this matter.

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:

Applicant's motion for default judgment.

First, this Court denies Applicant's motion because Applicant has not established his claim to post-conviction relief by satisfactory evidence. Rule 55(e), SCRPC, provides that:

No judgment by default shall be entered against the State of South Carolina or an officer or an agency thereof . . . unless the claimant establishes his claim to relief by evidence satisfactory to the Court.

Judge Kinlaw issued a conditional order of dismissal, conditionally granting Respondent's motion for the summary dismissal of the application. Among Judge Kinlaw's findings were that the application was not filed within the time required by the Uniform Post-Conviction Procedure Act, was impermissibly successive and presents claims that could have been raised in Applicant's

earlier PCR action, and failed to make a prima facie case that Applicant has after-discovered evidence that entitles him to a new trial. The conditional findings that the application should be dismissed summarily refute Applicant's argument that he has established by satisfactory evidence that he is entitled to post-conviction relief, especially when Applicant's filed responses to Respondent's motion to dismiss and the conditional order of dismissal present no reasons that the dismissal should not become final; instead, they merely state conclusions that Applicant is entitled to a second post-conviction relief hearing.

Second, this Court denies Applicant's motion because Applicant has not proven that he suffered prejudice from the delay in Respondent's filing the return. An applicant for post-conviction relief who claims he is entitled to relief due to an untimely response from Respondent must prove that he suffered prejudice thereby. Kneece v. State, 269 S.C. 177, 236 S.E.2d 746 (1977) (per curiam); Herring v. State, 262 S.C. 597, 598, 206 S.E.2d 885, 886 (1974) (per curiam). Applicant, who according to the inmate search detail report published by the South Carolina Department of Corrections will likely not be eligible for release until 2030, and who had a post-conviction relief hearing during his first PCR action, has not shown he has suffered prejudice from the four-month delay in Respondent's filing a return to the application for post-conviction relief.

Third, this Court denies Applicant's motion because the entry of a default judgment is an extreme remedy that should be avoided in post-conviction relief cases. See, e.g., Bleitner v. Welborn, 15 F.3d 652, 653 (7th Cir. 1994) ("Releasing a properly convicted prisoner or imposing on the state the costs and uncertainties of retrying him, perhaps many years after the offense, is apt to be a disproportionate sanction for the wrong of failing to file a timely motion for an extension of time. This thinking informs the principle that default judgments are disfavored in habeas corpus cases."); Bermudez v. Reid, 733 F.2d 18, 21-22 (2nd Cir. 1984) (vacating the trial court's grant of

default judgment to petitioner because “default in habeas proceedings differs from default in other civil cases” due to “the potential cost to the public from a ‘windfall’ judgment”); Broussard v. Lippman, 643 F.2d 1131, 1134 (5th Cir. 1981) (agreeing with the government that the trial court “had no authority to grant a writ [of habeas corpus] nullifying a lawful conviction solely because the tardiness of the Parole Commission” in complying with the trial court’s order); Allen v. Perini, 424 F.2d 134, 138 (6th Cir. 1970) (holding that Rule 55 of the Federal Rules of Civil Procedure has no application in a habeas corpus case because the government’s return to a petition for a writ of habeas corpus is not an answer within the meaning of Rule 12 of the Rules of Civil Procedure).

Fourth, this Court denies Applicant’s motion because it is now moot. The South Carolina Supreme Court has held that “[a] justiciable controversy exists when there is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute that is contingent, hypothetical, or abstract.” Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 25-26, 630 S.E.2d 474, 477 (2006) (finding the litigation was moot when, among other things, Friends of Hunley, Inc., provided all documents requested by Sloan in accordance with the Freedom of Information Act) (citing Byrd v. Irmo High School, 321 S.C. 426, 468 S.E.2d 861 (1996)). The Supreme Court has also held that:

A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy. This is true when some event occurs making it impossible for reviewing Court to grant effectual relief.

Mathis v. South Carolina State Highway Department, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973) (finding the Department’s appeal from the trial court’s order directing the Department to revoke its suspension of Mathis’s driver’s license was moot when Mathis became entitled to the return of his driver’s license before the Supreme Court issued its opinion).

Respondent has filed its return to the application, Judge Kinlaw has issued a conditional order of dismissal, and Applicant has filed a response to the conditional order. Applicant has not

proven that he suffered any prejudice from the delay. Despite the delay, this Court accepts Respondent's return to the application as timely filed. See S.C. Code Ann. § 17-27-70(a) (establishing that the Court may fix the time in which the State must respond and that "respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application."); Guinyard v. State, 260 S.C. 220, 195 S.E.2d 392 (1973) (holding the trial court may extend the time for filing and that the time limit prescribed by the statute is not mandatory, but discretionary with the trial court.).

Summary Dismissal

Judge Kinlaw found that the application was untimely, impermissibly successive, and failed to present a prima facie case that Applicant is entitled to a new trial based on after-discovered evidence. Judge Kinlaw gave Applicant twenty days after the service of the conditional order of dismissal upon him in which to file a response providing reasons, factual or legal, that the dismissal should not become final.

Applicant filed one response on the same date on which the conditional order of dismissal was filed and a second within the time allowed by the conditional order. In those filings, Applicant, for the most part, asserts that the late filing and/or mistake in dating mentioned previously in this order should cause the Court not to take into consideration the arguments made in Respondent's return to the application. This Court has already ruled upon Applicant's motion for default judgment and concluded that that the mistake was unintentional and caused Applicant to suffer no harm. For that reason, Applicant's argument that this Court should not consider Respondent's arguments is rejected.

The only other argument raised by Applicant in his two filed responses are that his application raises genuine issues of material fact that have not previously been raised or heard,

fitting within the bounds of South Carolina Code Section 17-27-90. That statute provides as follows:


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.

S.C. Code Ann. § 17-27-90. Applicant admits on the third page of his response to the conditional order of dismissal that his successive application raises claims “which were never raised or considered by the court in his original application” Therefore, the claims cannot be raised now in this successive application “unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised” by Applicant during his first PCR action. S.C. Code Ann. § 17-27-90. In the conditional order of dismissal, Judge Kinlaw found that the application was not timely filed, was impermissibly successive, and failed to present a prima facie case that Applicant has after-discovered evidence. Though he cites the aforementioned statute, Applicant provides no reason that he is entitled to a second evidentiary hearing. Asserting that there are genuine issues of material facts is not the same as identifying such facts. Applicant has failed to provide any reason that he could not have raised the claims in this successive application in his first PCR action, making the summary dismissal of the application the appropriate result. See Gibson v. State, 329 S.C. 37, 40, 495 S.E.2d 426, 427 (1998) (instructing that it is incumbent upon one petitioning for a writ of habeas corpus to “make a prima facie case showing [that the] petitioner is entitled to relief.”) (citations omitted).

This Court finds that Applicant has failed to provide a reason, factual or legal, that the summary dismissal of this application should not become final. Respondent's motion to dismiss is granted and the application is denied and dismissed with prejudice.

IT IS THEREFORE ORDERED that the application for post-conviction relief is hereby denied and dismissed with prejudice. This Court advises Applicant that he must file and serve a notice of appeal within thirty days of the service of this order upon him to secure appellate review. 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 17th day of Aug, 2021.



Perry H. Gravely
Chief Judge for Administrative Purposes
Thirteenth Judicial Circuit

Greenville, South Carolina.

Copy mailed to
Attorney <u>General / JT Pro se</u>
on <u>8 / 17 / 2021</u>