

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
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)
 Shellra Mance, # 297248,)
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 Applicant,)
)
 v.)
)
)
 State of South Carolina,)
)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS FOR
 THE SEVENTH JUDICIAL CIRCUIT

2013-CP-42-1360

**FINAL
 ORDER OF DISMISSAL**

FILED
 CLERK OF COURT
 SPARTANBURG COUNTY
 2017 AUG 15 PM 4:48
 M. HOPE BLACKLEY

This matter is before the Court from an application for post-conviction relief filed March 18, 2013. The Respondent made its Return and requested the application be dismissed because it is successive and for failure to file within the time mandated by the statute of limitations. Applicant made a Reply to Respondent’s Return, requesting the matter be stayed pending the outcome of Robertson v. State, 418 S.C. 505 (2016). The Honorable R. Keith Kelly, while serving as seventh circuit Chief Administrative Judge for the Court of Common Pleas, issued a conditional order of dismissal filed August 31, 2015. Thereafter, Applicant filed a motion to reconsider the COD on the grounds submitted in Applicant’s previous reply. Judge Kelly granted the motion to stay and the case was stayed by order filed October 15, 2015, with an instruction to bring the matter to the attention of the Court after the decision in Robertson. Respondent brought the matter to this Court’s attention by letter dated July 17, 2017, requesting the stay be lifted and the conditional order of dismissal finalized.

This order follows.

PROCEDURAL HISTORY

Applicant is currently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was indicted at the February 2003 term of the Spartanburg County Grand Jury for homicide by child abuse, homicide by child neglect, unlawful neglect by legal custodian, assault and battery of a high and aggravated nature (ABHAN), and unlawful neglect by legal custodian (2003-GS-42-0548). She was represented by Clay Allen, Esquire. On October 20-22, 2002, Applicant proceeded to trial by jury and was convicted of homicide by child abuse, ABHAN, and unlawful neglect by legal custodian. She was sentenced by the Honorable J. Michael Baxley to confinement for a period of life for homicide by child abuse, ten (10) years for ABHAN, and ten (10) years for unlawful neglect by legal custodian. The sentences were set to run concurrently with one another.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal pursuant to Anders¹ was perfected by Joseph Savitz, Esquire. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences in a written opinion. State v. Mance, Op. No. 2006-UP-063 (S.C. Ct. App. filed January 26, 2006). The remittitur was issued on February 13, 2006.

First PCR Application: 2006-CP-42-1108

In her first application for post-conviction relief, filed March 30, 2006, Applicant alleged she was being held unlawfully for the following reasons:

1. Ineffective assistance of trial counsel;
2. Subject matter jurisdiction;
3. Doubt jeopardy;
4. Proximate cause of death; and
5. Constitutional violations which include trial judge error.

¹ Anders v. California, 286 U.S. 738 (1967).

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The State made its Return on or about September 12, 2006. An evidentiary hearing into the matter was convened on December 7, 2006, at the Spartanburg County Courthouse, before the Honorable J. Derham Cole. Applicant was present and represented by John G. Reckenbeil, Esquire. The State was represented by S. Prentiss Counts of the South Carolina Attorney General's Office. In a written Order, dated July 30, 2007, and filed July 31, 2007, Judge Cole denied Applicant's application and dismissed the matter with prejudice. Applicant did not appeal.

Current PCR Application

In her second and current application for post-conviction relief, filed March 18, 2013, Applicant alleges, through counsel, that she is being held in custody unlawfully for the following reasons:

1. Applicant was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I §§ 3 and 14 of the South Carolina Constitution.
 - a. Trial counsel did not investigate, develop, and present mitigation during Applicant's sentencing hearing. Applicant was prejudiced because, had trial counsel done so, then she would not have been sentenced to life imprisonment.
 - b. Trial counsel did not adequately advise Applicant about the strength of the State's case against her. She proceeded to trial without understanding the law or facts. Had she been properly advised, then she would have pled guilty and presented evidence to mitigate the sentence. Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012); Lafler v. Cooper, 132 S. Ct. 1376, 1391 (2012).
2. Applicant was entitled to effective assistance of counsel during her first opportunity for the court to review allegations of ineffective assistance of counsel. *See* Case Number 2006-CP-42-1108. This successive PCR affords the State an opportunity to allow applicant to present these claims. Martinez v. Ryan, 132 S. Ct. 1309, 182 L.Ed.2d 272 (2012). See also S.C. Code § 17-27-45(b) (extending the PCR statute of limitations by one year for binding constitutional decisions); Franklin v. Maynard, 356 S.C. 276, 588 S.E.2d 604 (2003) (holding S.C. Code § 17-27-45(b) is proper procedure for challenging death sentence imposed prior to Atkins v. Virginia, 536 U.S. 304 (2002)).
 - a. Applicant's PCR counsel did not conduct an investigation, advise Applicant about amending her PCR application, or file an amended PCR application. Applicant was prejudiced, because, had PCR counsel done so, then counsel

- would have discovered mitigating evidence, developed such evidence, amended the PCR application, and presented it during the evidentiary hearing.
- b. PCR counsel did not explain the strength of the State's case against Applicant and advise applicant that her trial counsel was ineffective for not advising her to plead guilty and present evidence to mitigate the punishment.

Before this Court are the Spartanburg County Clerk of Court records regarding the subject convictions, appellate records, Applicant's records from the South Carolina Department of Corrections, records from Applicant's prior PCR proceedings, the current PCR application, Respondent's Return and Motion to Dismiss, Applicant's Reply to the State's Return, the Conditional Order of Dismissal, Applicant's Motion to reconsider, and the order granting stay.

FINDINGS OF FACT AND CONCLUSION OF LAW

Successiveness

This Court finds this current PCR application must be summarily dismissed because it is successive to her 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 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.

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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, 409 S.E.2d at 394. 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).

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Applicant's contention that she received ineffective assistance of counsel on her prior post-conviction relief application is neither an independent ground for relief nor a sufficient reason to warrant a successive application. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722 (1991). Once a PCR applicant obtains a complete adjudication on the merits of her original application, including an appeal, she may not make successive applications based on ineffective assistance of PCR counsel. Aice, 305 S.C. at 452, 409 S.E.2d at 395.

The South Carolina Supreme Court held the PCR rules “contemplate an adjudication on the merits of the original petition, one bite at the apple as it were.” Aice, 305 S.C. at 452, 409 S.E.2d at 395 (citing Gamble v. State, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989)). The court also noted, “Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice.” Id. at 451, 409 S.E.2d at 395. Aice further held that “the

contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' allowing for a successive PCR application under § 17-27-90." *Id.* at 452, 409 S.E.2d at 394. Applicant's contention that prior PCR counsel was ineffective is not a sufficient reason warranting a successive PCR application. Accordingly, this Court finds that Applicant has failed to show that she is entitled to file a successive PCR application and this application must be dismissed.

Statute of Limitations

This Court finds, further, that this Application for Post-Conviction Relief 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. Under the applicable statute,

[a]n 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 upon an appeal, whichever is later.

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§ 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). Following Applicant's conviction and unsuccessful appeal, the Remittitur was issued on February 13, 2006. Therefore, Applicant was required to file this application on or before February 14, 2007. This Application was filed March 18, 2013, which was well after the statutory filing period had expired.

Summary dismissal of a PCR application is appropriate when the application is filed after the statutory filing period. Leamon, 363 S.C. 432, 611 S.E.2d 494. In addition, Courts are authorized 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." § 17-27-70(c). Therefore, this Court finds that the

application for post-conviction relief should be summarily dismissed for failure to file within the time mandated by statute.

Martinez v. Ryan and Robertson v. State

Applicant argues that Martinez v. Ryan², entitles him to have the Court examine her 1991 and 1993 convictions and her prior PCR counsel's conduct regarding her prior convictions. This Court finds that Martinez has no bearing on Applicant's ability to raise ineffective assistance of counsel claims in a subsequent, successive PCR application filed in the circuit courts of this state. Kelly v. State, 404 S.C. 365, 365, 745 S.E.2d 377 (2013). The Court in Kelly held that Martinez was not applicable to state PCR actions. Id.

Applicant contends that the rule announced in Kelly v. State, 404 S.C. 365, 745, S.E.2d 377, is not binding because the Court issued an order of dismissal and not a “binding opinion.” This argument overlooks two important points. First, *published* orders have the same precedential value as published opinions. Compare Rule 268(d)(1), SCACR, with Rule 268(d)(2), SCACR. Secondly, in Kelly, the Court necessarily dismissed the case pursuant to Rule 243(c), SCACR, because Kelly failed to provide a sufficient explanation as to why the determination by the lower court that his application for PCR was successive and untimely was improper. Therefore, no petition for writ of certiorari was ever filed and the appeal had to be dismissed for procedural reasons. However, the Court, instead of simply ordering the dismissal expressly articulated in its *published* order that the holding in Martinez v. Ryan is “limited to federal habeas corpus review and is not applicable to state post-conviction relief actions.” Kelly at 365.

² 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012) (held where, under state law, ineffective-assistance-of-trial-counsel claims must be raised in an initial-review collateral proceeding, a procedural default will not bar a **federal habeas court** from hearing those claims if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.) (Emphasis added).

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Additionally, the holding in Kelly has upheld by the Court in the very same case for which Applicant requested his case be stayed pending the outcome – Robertson v. State, 418 S.C. 505, 795 S.E.2d 29 (2016). The Court in Robertson declined to depart from the holding in Kelly and explicitly held Martinez did not afford a petitioner the right to file successive applications for PCR by merely alleging ineffective assistance of PCR counsel. Id. at 516. The Court also expressed that “because the PCR Act is a legislatively created scheme, any post-Martinez change to PCR proceedings must be instituted by the Legislature.” Ibid.

Despite Applicant’s anticipation that the outcome of Robertson would allow him to bring forth claims of ineffective assistance of PCR counsel in a successive and untimely application, Robertson’s applicability to the case at bar is none, at best; and unfavorable, at worst. Because Robertson reaffirmed its holding in Kelly that ineffective assistance of PCR counsel is not a recognized claim permitting a successive PCR application, Applicant’s PCR application must be dismissed as successive and untimely. Furthermore, Robertson’s holding was narrowly tailored to the facts in that case. Essentially, Robertson’s prior PCR counsel were not qualified to represent Robertson in his *capital* case post-conviction relief action, as required by § 160(B), S.C. Code Ann. (1976). Therefore, the Court found Robertson’s allegation that he was denied a state-created right to *qualified* counsel was sufficient reason to permit his successive PCR application. Ibid. (Emphasis added).

Consequently, Applicant's contention that she received ineffective assistance of prior PCR counsel is not a cognizable claim for relief, nor does it raise any genuine issue of material fact for this Court to consider in evaluating the application. See Id. Accordingly, this allegation must be summarily dismissed.

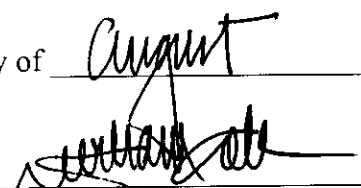
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CONCLUSION

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

This Court hereby advises Applicant that he must file and serve a Notice of Appeal within 30 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 15th day of August, 2017.



J. DERHAM COLE
Presiding Judge
Seventh Judicial Circuit

_____, South Carolina

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M. Hope Blackley
Clerk of Court

August 16, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

7TH JUDICIAL CIRCUIT

Sheila Mause

CASE # 2013CP42-1360

Applicant # 297248

CERTIFICATE OF SERVICE

State
VS
State

Respondent

I certify that, on this date, I served a copy of the Trial Ord. Dismissal
In this action dated 8-15 2017 on 8-16-17

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Valerie Ceibano

E. Charles

8-16-17

(Date)

Carrie Seuf
(Signature)