

STATE OF SOUTH CAROLINA )  
COUNTY OF AIKEN )

IN THE COURT OF COMMON PLEAS )  
FOR THE SECOND JUDICIAL CIRCUIT )

Rusty Dunbar, #294996, )

Case No.: 2019-CP-02-1819 )

Applicant, )

v. )

**CONDITIONAL ORDER OF DISMISSAL**

State of South Carolina, )

FILED 7-21 20 21:00 )  
SP

Respondent. )

Robert J. White  
C.C.P. & G.S.  
Shadell Parks  
Deputy Clerk

This matter is before the Court based on an application for post-conviction relief filed by Applicant Rusty Dunbar on July 18, 2019. In response, Respondent the State of South Carolina made its following return<sup>1</sup> and moved to summarily dismiss the action as procedurally barred as untimely and successive pursuant to the Uniform Post-Conviction Procedures Act, S.C. Code Ann. § 17-27-10 et seq. (2014). After a review of the record and pleadings, this Court agrees this application should be summarily dismissed as untimely and successive and provisionally dismisses the action based on the following:

**PROCEDURAL HISTORY**

The records before this Court establish Applicant is present confined in the South Carolina Department of Corrections following convictions in Aiken County.

<sup>1</sup> Respondent's return was due to be filed within ninety days of receipt. See Rule 12(a), SCRCPC ("[T]he State of South Carolina shall answer or otherwise respond to an application for post-conviction relief within 60 days after service of the application, if it arises out of a guilty plea, and 90 days if it arises out of a trial.") Having now filed its return and in light of no demonstrable prejudice to Applicant as a consequence of the delay, this Court to accept this return 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.).

In the early morning hours of October 7, 2008, Daniel Hynes was the victim of a violent home invasion. (App. pp. 47-61). Two assailants broke into his home, held a knife to his throat, ransacked his home, assaulted him, bound him, and then fled in Hynes' car. (App. pp. 51-61). Hynes did not see the face of either perpetrator, as the men physically restrained him with his head down throughout the ordeal. (App. p. 52-61). However, Hynes recognized the voice of one assailant, which he identified as his longtime acquaintance Chris Herndon. (App. pp. 56-57, 73-74, 205-06). After the men fled, Hynes called 911 for assistance. (App. pp. 61-62, 69, 74-77).

Later, law enforcement found Hynes' car abandoned and called a bloodhound tracking team to locate the attackers. (App. pp. 147-54, 155, 157, 171-72). Law enforcement found Herndon hiding in nearby woods. (App. pp. 172-73). Herndon surrendered and gave a confession implicating himself and Applicant in Hynes' home invasion. (App. pp. 173). Hynes' credit card and other personal items were also located nearby. (App. pp. 150-52, 156, 158).

Thereafter, in January 2009, the Aiken County Grand Jury indicted Applicant for kidnapping (2009-GS-02-0093), first-degree burglary (2009-GS-02-0092), armed robbery (2009-GS-02-0091), and possession of a knife during the commission of a violent crime (2009-GS-02-0090). M. Justin Mims, Esquire, represented Applicant. Assistant Solicitor Elizabeth "Beth Ann" Young of the Second Circuit Solicitor's Office prosecuted the case. On December 15-17, 2009, Applicant proceeded to a jury trial before the Honorable Doyet A. Early, III, circuit court judge.

At trial, Herndon testified that he spent the day of October 6, 2008, and the morning of October 7, 2008, with Applicant. He testified that he picked up Applicant and Applicant's pregnant girlfriend, Laura, around noon from Applicant's mother's home along with his cousin, Jerry Thornton. (App. pp. 179, 182). He testified that the group decided to sell a rented cement mixer so they could buy crack cocaine. (App. pp. 180-85). The group sold the cement mixer for \$250,

purchased alcohol, and then went to a building behind the Aiken County DSS to purchase crack. (App. pp. 185-86, 188). Applicant, Herndon, and Thornton smoked all of the crack purchased and decided they wanted to smoke more. (App. p. 187). The group traveled to Clearwater, where they purchased more crack and smoked it. (App. pp. 187-88).

After purchasing the second amount of crack, the foursome went to a convenience store and bought more alcohol. (App. pp. 188-89). The group then went to Smith's father's house, arriving at approximately ten p.m., where they drank alcohol. (App. p. 198). At some point before midnight, Applicant and Smith left briefly to purchase more alcohol and returned. (App. p. 190).

Around midnight, the group devised a plan to rob Hynes and left Smith's father's home. (App. pp. 190-91). Thornton was driving and Applicant, Herndon, and Smith were passengers. (App. p. 191). Herndon told Thornton to drop him and Applicant off down the road from Hynes' house. (App. p. 191). Thornton complied and Applicant and Herndon made their way to Hynes' house on foot. (App. p. 191-92). As the two approached, Herndon could see Hynes on the couch through a front window. (App. p. 192). Herndon told Applicant he did not want to continue with the plan and asked to call Thornton to pick them up. (App. pp. 192-93). Applicant urged Herndon to continue and the two entered the house. (App. p. 193).

Once inside Hynes' home, Applicant held Hynes in a headlock with a knife to his throat. (App. p. 193). Applicant dragged Hynes throughout the house, continually threatening him. (App. pp. 193-95). Herndon ransacked the house looking for drugs. (App. pp. 194-95). Applicant and Herndon brought Hynes into the bedroom and Applicant continued to hold Hynes in a headlock while threatening him. (App. pp. 195-96). Herndon demanded to know where drugs and money were located. (App. p. 196). Hynes pleaded for Applicant and Herndon not to kill him. (App. p. 196). Herndon then cut Hynes across the back with a knife. (App. pp. 196-97). Herndon then

demanded Hynes' wallet and car keys and Hynes complied. (App. p. 197). Herndon and Applicant then threw Hynes to the floor, tied him up with a lamp cord, kicked him repeatedly, and grabbed shoes and Hynes' cellphone before fleeing. (App. pp. 197-99). Applicant and Herndon got into Applicant's vehicle and Applicant stated he needed to kill Hynes. (App. p. 199). Herndon pleaded with him that it was not necessary to kill Hynes, but Applicant exited the car and went back into the house. (App. p.p. 199-200). Applicant emerged soon after and returned to the driver's seat. (App. p. 199). He told Herndon he had not killed Hynes and the two left the scene in Hynes' car. (App. p. 199-200).

Applicant sped towards Aiken on Wire Road. (App. pp. 200-01). Police cruisers began following the car and Herndon threw the shoes and several other items belonging to Hynes out of the window. (App. pp. 200-201). Applicant continued driving erratically and lost control of the vehicle several times before crashing the vehicle into a guardrail. (App. pp. 200-02). Herndon jumped out of the vehicle and hid in a wooded ravine. (App. pp. 201-02). Herndon did not see where Applicant went. (App. p. 202). He remained hidden in the ravine until he was located by the bloodhounds. (App. pp. 203-04). Herndon exited the wooded area and initially denied any involvement in the crime. (App. pp. 203-04). He eventually confessed and implicated Applicant and himself in the home invasion. (App. pp. 203-05).

Thornton also testified at Applicant's trial. He testified that Herndon and Applicant worked for him as laborers and he had known Applicant for more than twenty years. (App. pp. 995-96). He testified that on October 6, 2008, Applicant and Herndon came over to do work, along with Applicant's girlfriend. (App. p. 96-99). According to Thornton, no one felt like working and the three decided to sell various pieces of equipment in order to buy alcohol and crack. (App. pp. 97-104). The group stayed together for the remainder of the day, drinking and smoking crack, until

he eventually dropped Herndon and Applicant off near Hynes' house. (App. pp. 104-05). Thornton testified that he dropped the two off with the understanding that they were going to get drugs. (App. p. 105). He testified that he and Applicant's girlfriend then drove to a convenience store to wait for Applicant and Herndon to call to pick them up. (App. pp. 105-06). Applicant's girlfriend eventually received a call from Applicant asking to be picked up from a location in Aiken. (App. pp. 106-08). Thornton picked up Applicant from the side of the road; Applicant was alone. (App. p. 107-08). He dropped Applicant and his girlfriend off at a house and went home. (App. p. 109).

Applicant testified to a starkly different version of events. According to Applicant, he was at his mother's home with his pregnant girlfriend, Laura, when he received a call from Herndon on the morning of October 6, 2008, asking if he could sell a cement mixer they had been using on a job site. (App. pp. 392-93). Applicant made a few unsuccessful attempts to sell the mixer, which was ultimately sold by Thornton and Herndon. (App. p. 392-94). Applicant testified that he, Thornton, Herndon, and Smith, went to a convenience store when Applicant decided they should each contribute money to buy crack. (App. pp. 394-95). The foursome left the store and purchased three grams of crack for eighty dollars, which Applicant testified was a good deal. (App. p. 395). Applicant, Thornton, and Herndon smoked all three grams of crack and decided they needed more. (App. p. 396). The group then proceeded to Clearwater, where they purchased more crack. (App. p. 396).

After leaving Clearwater with the additional crack, the four went to Smith's father's house, arriving in the evening. (App. p. 386). The group stayed for a few hours, smoking marijuana and drinking alcohol. (App. pp. 396-97). Applicant testified that Thornton and Herndon left to get more crack and beer but eventually returned and continued drinking with him. (App. pp. 397-98). Applicant testified that the group left and went to Bull's Bar and Grill. (App. pp. 398-99). He

testified that they stayed shortly and Thornton then dropped Smith and him off at his brother's house before midnight. (App. pp. 399-402). He testified that Thornton and Herndon left to find more drugs and borrowed his phone but that he and Smith remained at his brother's house for the evening. (App. pp. 402-03, 405). He testified he and Smith watched television on the couch until Smith fell asleep. (App. p. 402-03). At approximately 1:30 a.m., Applicant then went outside to smoke crack and saw Thornton coming down the driveway to return his phone. (App. pp. 403-05). Applicant testified that Thornton asked him to provide an alibi for him for the evening. (App. p. 404-05). Applicant testified that he remained at his brother's house until the next morning. (App. p. 405). He testified that although he has been to Hynes' house before, he did not go to Hynes' house on October 6 or 7, 2008. (App. p. 407).

Applicant presented two witnesses at his trial to further his alibi defense. First, Applicant presented his older brother, Thomas Dunbar, who testified that Applicant and Smith arrived at his home around 11 p.m. on October 6, 2008. (App. p. 361-62). He testified that when he went to bed at approximately 1:30 a.m., Applicant was still at his house. (App. p. 362-63). Applicant also presented his girlfriend Laura Smith, with whom he shares a child who was ten months old at the time of his trial, as a witness. (App. pp. 365-66). Smith testified that she spent the day with Applicant, Thornton, and Herndon trying to sell the cement mixer, then using the proceeds to purchase alcohol and crack. (App. pp. 366-71). She testified that the group then went to her father's home, where they remained for a few hours until her dad asked them to leave. (App. pp. 371-72). She testified that the four left at 10:30 p.m. and went to Bull's Bar and Grill to get more crack. (App. p. 372-73). She testified that Thornton and Herndon then dropped her and Applicant off at Applicant's brother's house. (App. pp. 374-75).

The jury convicted Applicant as indicted for each offense. On December 17, 2009, Judge

Early sentenced Applicant to imprisonment for thirty years for kidnapping, thirty years for first-degree burglary, thirty years for armed robbery, and five years for possession of a weapon during the commission of a violent crime, with all sentences to be served concurrently.

### **Direct Appeal**

Applicant timely file a notice of appeal and was represented by Assistant Appellate Defender Robert M. Pachack of the South Carolina Commission on Indigent Defense-Office of Appellate Defense, wo submitted an Anders<sup>2</sup> brief and petition to be relieved as counsel. Applicant then submitted his own *pro se* brief. Following a review pursuant to Anders, the South Carolina Court of Appeals dismissed Applicant's appeal. State v. Dunbar, Op. No. 2012-UP-093 (S.C. Ct. App. filed Feb. 22, 2012). The Remittitur was issued on May 12, 2012.

### **Initial PCR Action and Subsequent Appeal**

Applicant filed an application for post-conviction relief (2012-CP-02-0795) on March 29, 2012. Respondent made its Return to the application on June 25, 2012, requesting an evidentiary hearing be held. Thereafter, Applicant, through his counsel, filed an amended application on June 28, 2013, alleging the following grounds for relief:

1. Ineffective Assistance of Counsel
  - a. "For counsel's elicitation of prior bad acts testimony from a State's witness after successfully objecting and receiving a curative instruction from the trial court which precluded the jury from considering the prior bad acts, thereby opening the door for the State to go into those bad acts.
  - b. "Failing to request an alibi instruction, where applicant' sole defense was that of alibi."
  - c. "Failing to turn over alibi witness statements to the State prior to trial."
  - d. "Failing to object to improper arguments made during the solicitor's closing arguments."
2. "*Brady* violations for failing to turn over statements that had been made by a state's witness to law enforcement concerning the crimes.

An evidentiary hearing on was held on July 10, 2013, at the Aiken County Courthouse before the

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<sup>2</sup> *Anders v. California*, 386 U.S. 738 (1967).

Honorable R. Ferrell Cothran, Jr., circuit court judge. Applicant was present at the hearing and represented by Brett H. Lancer, Esquire. Applicant testified on his own behalf. Respondent presented testimony from trial counsel Mims and prosecuting Assistant Solicitor Young. Following his review of all testimony, exhibits, and other materials presented, Judge Cothran issued an Order of Dismissal on March 7, 2014, denying and dismissing Petitioner's action in full. This Order was filed with the Aiken County Clerk of Court on March 12, 2014.

Applicant timely appealed the denial of relief. In his petition for certiorari pursuant to Rule 243, SCACR, he asserted the following claims:

1. Is there evidence of probative value to support the post-conviction relief court's ruling that trial counsel was not ineffective for failing to request a jury instruction on alibi?
2. Is there evidence of probative value to support the post-conviction relief court's finding that trial counsel was not ineffective for eliciting prior bad acts testimony from a State's witness, thereby opening the door for the State to elicit testimony regarding Applicant's use of crack cocaine?

Respondent filed its return, and thereafter, the South Carolina Supreme Court denied Applicant's petition by order dated September 3, 2015. Dunbar v. State, Appellate Case No. 2014-000565, Order (S.C.S.Ct. filed Sept. 3, 2015). The Remittitur was issued on September 21, 2015.

#### **Petition for Habeas Corpus in the United States District Court**

On March 24, 2016, Applicant filed a *pro se* § 2254 Petition for Writ of Habeas Corpus in the United States District Court (9:16-482-PMD-BM). In this petition, Applicant alleged the following grounds for relief:

Ground One: Counsel opened the door for the State to use crack cocaine as a motive to commit the crimes charged after successfully objecting to such. Counsel objected to the State's questioning of Jerry Thornton and one on the issue of irrelevance. Trial Court gave curative instructions and instructed the jury to disregard the testimony. However, during cross, counsel revisited the previously objected to testimony and the trial court, *sua sponte* through counsel's objection out the window. The State was unable to use a (1) one time, unrelated purchase of crack cocaine as motive to conduct the crimes charged. Tr.p. 104-113, ll. 1-25.

Ground Two: Counsel was ineffective for failing to request an alibi charge from the sole defense was that of an alibi. Applicant presented to (2) alibi witnesses whose testimony corroborated Applicant's testimony that he was at his brother's house at the time Mr. Hynes was robbed.

On July 14, 2016, Respondent made its return to the petition and moved for summary judgment.

On November 8, 2016, Senior United States District Judge Patrick Michael Duffy adopted the Magistrate Judge's Report and Recommendation to dismiss Applicant's petition with prejudice.

### **CURRENT ACTION BEFORE THE COURT**

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

1. Prosecutorial Misconduct
  - a. "Deputy Solicitor Beth Ann Young & the Honorable Doyet A. Early III grossly abused their position as administrators of justice by enacting a scheme meant to defraud the Courts."
2. Judicial Misconduct

Applicant requests the following forms of relief: "Sentence vacation with immediate release/ or remand for retrial."

Respondent made its return to the action and moved to dismiss the application as untimely and successive. Attached to Respondent's return and before this Court are the records from the Aiken County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the direct appeal records (including the record on appeal with all pertinent general sessions transcripts), the records from Applicant's initial post-conviction relief proceeding and the appeal of that proceeding, the records from his federal habeas corpus action, and the current application for relief.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has reviewed the pleadings, the records submitted to it by the parties, and the applicable law. Pursuant to South Carolina Code Annotated Sections 17-27-70 and -80, this Court

informs the parties of its intent to dismiss the application as there is no genuine issue of material fact or law which would necessitate an evidentiary hearing. See S.C. Code Ann. § 17-27-70(b) (establishing procedure for summary disposition of PCR applications); Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief); Welch v. MacDougall, 246 S.C. 258, 260, 143 S.E.2d 455, 456 (1965) (requiring a PCR applicant to make a *prima facie* showing he is entitled to relief before the court will hold an evidentiary hearing). Respondent moved for summary dismissal, and this Court finds summary dismissal is appropriate for the following reasons:

***Summary Dismissal Based On Successiveness***

Respondent moved to summarily dismiss the application because it is successive to Applicant's previous post-conviction relief application. Applicant previously filed an initial post-conviction relief action, for which he was appointed an attorney and had a full evidentiary hearing. Applicant cannot proceed forward on a successive application based on these grounds which could have and should have been raised in his initial action. This Court agrees summary dismissal is appropriate.

The Uniform Post-Conviction Procedures Act disfavors successive applications and places 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. S.C. Code Ann. § 17-27-90; Robertson v. State, 418 S.C. 505, 795 S.E.2d 29 (2016) (noting all defendants are entitled to a full and fair opportunity to present claims in one post-conviction relief application and successive PCR applications and appeals are generally disfavored because they allow a defendant to receive more than one bite at the apple); Council v. Catoe, 359 S.C. 120, 597 S.E.2d 782 (2004) (noting that state law generally procedurally prohibits a continuance of post-conviction proceedings and

submission of successive petitions for post-conviction relief); Tilley v. State, 334 S.C. 24, 511 S.E.2d 689 (1999) (noting successive post-conviction relief applications are disfavored and the applicant has the burden to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. Section 17-27-90 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.

Section 17-27-90 is clear—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).

The South Carolina Supreme Court held the South Carolina post-conviction relief processes “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, “[f]inality 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. Here, Applicant has failed to show that a successive application is appropriate or why he could not have raised these claims in his initial application.

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.” Accordingly, this Court finds the application should be dismissed as successive to Applicant’s previous PCR applications.

***Summary Dismissal Based on the Statute of Limitations***

Respondent also moved for summary dismissal of this application 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:

(A) 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 upon an appeal, whichever is later.

(B) When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

(C) If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter 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.

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). 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 the present case, Applicant alleges he is entitled to post-conviction relief based on allegations pertaining prosecutorial misconduct. However he has failed to explain why he could not have timely raised these claims within one year of the conclusion of his direct appeal. The remittitur concluding Applicant's direct appeal was issued in 2012. Accordingly, any claims regarding prosecutorial misconduct or his underlying trial must have been raised within one year of the issuance of the remittitur pursuant to Section 17-27-45(A).

This application was filed on July 18, 2019, well beyond the statutory filing period. Applicant failed to comply with the filing requirements under S.C. Code Ann. § 17-27-45. Therefore, this Court finds the application should be summarily dismissed for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

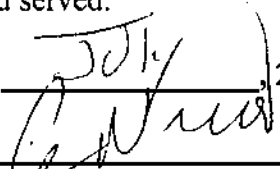
### **CONCLUSION**

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

Office of the Attorney General  
PCR Division – Megan Harrigan Jameson  
P.O. Box 11549  
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Aiken County Clerk of Court and opposing counsel within twenty 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 10<sup>th</sup> day of July 2021.

  
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CLIFTON NEWMAN  
Chief Administrative Judge  
Second Judicial Circuit

K. W. [Signature], South Carolina