

STATE OF SOUTH CAROLINA)

COUNTY OF LEE)

Freddie Lyndell Gardner, 178124,
 Plaintiff)

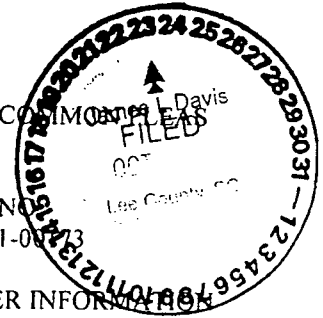
v.)

State Of South Carolina
 Defendant.)

IN THE COURT OF COMMON PLEAS)

CASE NO. 2012-CP-31-0073)

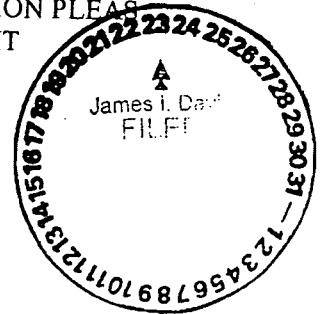
MOTION AND ORDER INFORMATION)
FORM AND COVER SHEET)



| | |
|--|--|
| Plaintiff's Attorney: Freddie Lyndell Gardner, Bar No. Address: PCI 430 Oaklawn Road Pelzer, SC 29669 phone: fax: e-mail: other: | Defendant's Attorney: Megan E. Harrigan, Bar No. Address: Post Office Box 11549 Columbia SC 29211-1549 phone: (803) 734-3737 fax: (803) 734-4113 e-mail: other: |
| <input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input checked="" type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III) | |
| SECTION I: Hearing Information | |
| Nature of Motion: Estimated Time Needed: Court Reporter Needed: <input type="checkbox"/> YES / <input type="checkbox"/> NO | |
| SECTION II: Motion/Order Type | |
| <input type="checkbox"/> Written motion attached <input checked="" type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. | |
| <i>Megan E. Harrigan</i> Signature of Attorney for <input type="checkbox"/> Plaintiff <input checked="" type="checkbox"/> Defendant | October 9, 2012 Date submitted |
| SECTION III: Motion Fee | |
| <input type="checkbox"/> PAID - AMOUNT: <input checked="" type="checkbox"/> EXEMPT: <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support (check reason) <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input checked="" type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: <input type="checkbox"/> Other: | |
| JUDGE'S SECTION | |
| <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: | _____ JUDGE CODE: _____ Date: _____ |
| CLERK'S VERIFICATION | |
| Collected by: _____ <input type="checkbox"/> MOTION FEE COLLECTED: _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: _____ | Date Filed: _____ |

STATE OF SOUTH CAROLINA
COUNTY OF LEE

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT



2012-CP-31-0173

) Freddie Lyndell Gardner, 178124,

) Applicant,

) v.

) State of South Carolina,

) Respondent.

CONDITIONAL ORDER OF DISMISSAL

This matter comes before the Court by way of an Application for Post-Conviction Relief filed July 9, 2012. In its Return, Respondent requested that the application be summarily dismissed.

PROCEDURAL HISTORY

This Court has before it records from Lee County Clerk of Court regarding the subject convictions and the Applicant's records from the South Carolina Department of Corrections. The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to commitment order from the Lee County Clerk of Court. Applicant was indicted at the May 1993 Term of the Lee Country Grand Jury for Murder and Possession of a Weapon During the Commission of a Violent Crime (1993-GS-31-136). Applicant was represented by Stephen Bryan Doby, Esquire. Applicant proceeded to jury trial before the Honorable Costa Pleicones on May 24, 1993, and on May 26, 1993, was found guilty of murder and possession of a weapon. Judge Pleicones sentenced Applicant to life

imprisonment for murder and five years imprisonment for the possession of a weapon during the commission of a violent crime.

A timely notice of appeal was filed on Applicant's behalf, which the Applicant later voluntarily withdrew. The South Carolina Supreme Court dismissed the direct appeal by order dated January 11, 1995. The Remittitur was sent on February 2, 1995.

Applicant filed a "Petition for Writ of Habeas Corpus" on November 9, 1998 (1998-CP-31-0189). The Respondent made its Return and Motion to Dismiss requesting the petition be summarily dismissed because it failed to support the requested relief. An Order of Dismissal was signed by Judge Howard P. King, on June 15, 2009. Applicant filed a notice of appeal with the South Carolina Supreme Court. In an Order, dated August 29, 1999, the Supreme Court dismissed the appeal for failure of the Applicant to provide proof of service on opposing counsel and the date the order on appeal was received. The remittitur was sent on September 13, 1999.

The Applicant filed a second application for post-conviction relief on January 20, 2000 (2000-CP-31-011). The Respondent filed a Return Motion to Dismiss on July 24, 2001. An evidentiary hearing was convened before the Honorable Howard P. King on January 14, 2003, at which Applicant was present and represented by Joshua Kendrick, Esquire. The application was denied and dismissed with prejudice by Judge King's order dated January 14, 2003. A timely notice of appeal was filed. In an order, dated and filed December 1, 2004, the South Carolina Supreme Court denied the Petition and granted counsel's request to withdraw. The remittitur was sent December 17, 2004.

A third Application for post-conviction relief was filed by Applicant on November 27, 2007 (2007-CP-31-0290). The Respondent made its Return and Motion to Dismiss on July 21, 2008 requesting the application be summarily dismissed as successive and barred by the statute

of limitations. A Conditional Order of Dismissal was signed by Judge George C. James, Jr., on July 25, 2008, giving Applicant twenty days from which to respond why the conditional order should not become final. In response to the Conditional Order, Applicant submitted a document captioned "Motion to Not Dismiss PCR Application in its Entirety and Order Should Not become Final", dated August 6, 2008. The Final Order of Dismissal was signed by the Honorable R. Ferrell Cothran Jr., on December 2, 2009 and filed on December 9, 2009. Applicant filed a Rule 60(b) Motion for Relief from the Order on August 3, 2011. The Honorable W. Jeffrey Young issued an Order, dated August 14, 2011 and filed August 24, 2011, denying the Motion. A notice of appeal was filed. The South Carolina Supreme Court affirmed the decision of the post conviction relief Court. Gardner v. State, Memorandum Op. No. 2011-MO-040 (S.C. Sup. Ct. filed December 19, 2011). The Remittitur was sent on January 4, 2012.

In his current application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for ineffective assistance of trial counsel, specifically alleging trial counsel violated Applicant's sixth and fourteenth amendment rights by admitting his client's guilt in closing argument.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

This Court finds that this matter should be summarily dismissed because it is successive to the previous application for post-conviction relief. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90 (1985) 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 point to 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., 305 S.C. 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. The Applicant bears the burden of showing that the allegations could not have been raised previously. Land, 274 S.C. 243, 262 S.E.2d 735 (1980).

This Court finds that the Applicant could have raised the ground of ineffective assistance of trial counsel for relief in his prior post-conviction relief application. The Applicant has failed to present any reasons why he could not have raised the current allegation in his previous post-conviction relief applications. Accordingly, this Court grants summary dismissal of the application because it is successive.

Further, this Court finds that this matter should be summarily dismissed because Applicant has failed to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. S.C. Code Ann. § 17-27-45(a) reads as follows:

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.

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). In the present case, the Applicant was sentenced on May 26, 1993. The Applicant was therefore required to file his application on or before May 27, 1994. This Application was filed on July 9, 2012, well after the expiration of the statutory filing period.

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 addition, S.C. Code Ann. § 17-27-70(c) (2003) authorizes the PCR 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."

CONCLUSION

S.C. Code Ann. § 17-27-70(b) states in pertinent part:

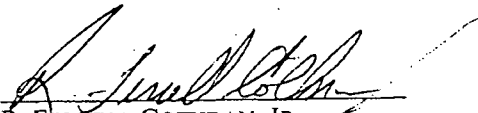
When a court is satisfied, on the basis of the application, the answer or motion, and on the record, that Applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and give its reasons for so doing. Applicant shall be given an opportunity to reply to the proposed dismissal.

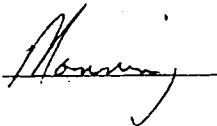
Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this Application with prejudice unless the Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. The Applicant is granted twenty (20) days

from the date of service of this Order upon him to show why this Order should not become final.
The Applicant shall file any reasons he may have with the Lee County Clerk of Court and shall
serve opposing counsel at the following address:

Office of the Attorney General
Attn: Megan E. Harrigan, Esquire
P.O. Box 11549
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 17 day of Oct, 2012


R. FERRELL COTHRAN, JR.
Chief Judge for Administrative Purposes
Third Judicial Circuit

, South Carolina.