STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Taurus Watts, #324820 Applicant v. State of South Carolina, Respondent	)	2019-CP-40-6500 **CONDITIONAL ORDER OF DISMISSAL**

This matter comes before the Court by way of Applicant, Taurus Watts's action for post-conviction relief (PCR) filed November 18, 2019. Respondent made its Return and motion to dismiss on September 30, 2021. The Court hereby grants Respondent's motion to dismiss because the action is untimely, successive to Applicant's prior PCR actions, and fails to make a *prima facie* showing of newly discovered evidence.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections (SCDC). During the August 2007 term, the Richland County Grand Jury indicted Applicant for murder (2007-GS-40-5913). Theresa N. Johns, Esquire, represented Applicant. Assistant Solicitors Vanessa Shipley and Joanna McDuffie of the Fifth Circuit Solicitor's Office prosecuted the case.

Applicant proceeded to trial October 5-15, 2009, before the Honorable J. Michelle Childs and a jury. The jury convicted Applicant as indicted and Judge Childs sentenced Applicant to thirty five years' imprisonment.

Applicant filed a timely Notice of Appeal and was represented by Appellate Defender Katherine H. Hudgins of the South Carolina Office of Appellate Defense. Applicant raised the following issues on Appeal:

> 1. Did the trial judge err in refusing to declare a mistrial when the prosecutor, through improper leading questions, insinuated that the witness was scared to talk with police and told an investigator that they were going to get her killed, implying that she was afraid of [Applicant] and his co-defendant?
>
> 2. Did the trial judge err in refusing to declare a mistrial when a State's witness testified that he saw the co-defendant and [Applicant] in the "holding tank" after he had been specifically instructed by the judge not to testify as to seeing [Applicant] in a holding cell?

On June 20, 2012, the South Carolina Court of Appeals affirmed Applicant's conviction. *State v. Watts*, Op. No. 2012-UP-381 (S.C. Ct. App. filed June 20, 2012). The Remittitur was issued on August 10, 2012.

i. First PCR Action and Subsequent Appeal (2013-CP-40-3226)

Applicant subsequently filed an application for PCR on May 30, 2013, in which he alleged the following grounds for relief:

1. "Ineffective assistance of Counsel"
    a. "Failing to present a defense on Applicant's behalf;"
        i. "Former Deputy Weldon Gregory;"
        ii. "Kamaleh Wilson;"
    b. "Failing to make a motion to sever;"
    c. "Failing to move to question members of the jury on their impartiality."

Respondent made its return on January 9, 2014. An evidentiary hearing into the matter was convened on December 10, 2015, at the Richland County Courthouse before the Honorable G. Thomas Cooper, Jr. Applicant was present at the hearing and was represented by Anna R. Good, Esquire. Applicant, trial counsel, and former Deputy Weldon Gregory, and Kamaleh Wilson

testified at the PCR hearing. On March 4, 2016, Judge Cooper, issued the Order of Dismissal denying Applicant's application for post-conviction relief with prejudice.

Applicant filed a timely notice of appeal and a petition for writ of certiorari was filed by Appellate Defender Katherine Hudgins on Applicant's behalf. However, on December 16, 2016, Applicant moved to relieve counsel and proceed *pro se*. Our Supreme Court granted Applicant's motion to proceed *pro se* on February 28, 2017. On March 30, 2017, Applicant, filed his *pro se* petitioner for a writ of certiorari. Respondent made its return to the petition for writ of certiorari on July 31, 2017. The Supreme Court thereafter transferred the case to the Court of Appeals pursuant to Rule 243(1), SCACR. On September 5, 2018, by written Order the Court of Appeals denied certiorari. The Remittitur was issued on September 26, 2018.

ii. Habeas Corpus Action (1:10-1317-CMC-SVH)

Applicant then filed a *pro se* Petition for Habeas Corpus under 28 U.S.C. § 2254. On June 19, 2019, the Honorable Shiva V. Hodges, United States Magistrate Judge, issued the Report and Recommendation, recommending Applicant's petition be dismissed for failure to prosecute or in the alternative as barred by the statute of limitations. On July 10, 2019, the Honorable Cameron McGowan Currie, United States District Judge, accepted the Report and Recommendation as to the statute of limitations, dismissing Applicant's petition as untimely. Judge Currie additionally declined to issue a certificate of appealability. *Watts v. Stephon*, No. CV 1:19-1317-CMC (D.S.C. July 10, 2019).

CURRENT APPLICATION

In his second and current application for PCR, Applicant alleges he is being held in custody unlawfully on the following grounds:

1. "New/After discovered evidence co-defendant Wray willing to testify to exculpate Applicant."

a. "Co-defendant Wray has executed attached affidavit and is willing to testify to exculpate applicant. Applicant could not call co-defendant at trial and he was not willing to testify at trial."

For purposes of this Conditional Order of Dismissal, the Court incorporates the Richland County Clerk of Court records, Applicant's SCDC records, Applicant's appellate records including the record on appeal, the records from Applicant's prior PCR action and subsequent appeal, the records from Applicant's prior federal habeas corpus action, and the records of this PCR action.

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 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). Respondent moved for summary dismissal, and this Court finds summary dismissal is appropriate for the following reasons:

Statute of Limitations

The Court finds that this PCR shall 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. 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). Additionally, 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."

In the present case, Applicant is alleging he is entitled to post-conviction relief based on allegations that his counsel was ineffective and his other constitutional rights were violated. However, Applicant failed to comply with the filing requirements under S.C. Code Ann. § 17-27-45. Applicant was convicted on October 15, 2009, and pursued a direct appeal. The Remittitur issued August 10, 2012. Pursuant to section 17-27-4(A), Applicant needed to file his application for post-conviction relief on or before August 11, 2013. Applicant did not file his application until November 18, 2019, well beyond the statute of limitations. Moreover, sections 17-27-45(B) and 17-27-45(C) are inapplicable to Applicant's current PCR application as he alleges no new rights

to be applied retroactively, and cannot make a *prima facie* showing of newly discovered evidence. Accordingly, this application is untimely pursuant to section 17-27-45 and shall be dismissed for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

Successive Applications

The Court further finds the application must be summarily dismissed because it is successive to Applicant's 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 earlier 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.

Pursuant to section 17-27-90, successive PCR actions are barred 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). 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." *Id.* 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. 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).

Here, Applicant's current allegations were or could have been raised in the proceedings based on Applicant's prior application for post-conviction relief; thus, the current application is successive and barred under section 17-27-90 of the South Carolina Code. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous applications for post-conviction relief. Accordingly, Applicant has failed to meet the burden imposed upon him, and the Court shall summarily dismiss the application as successive to Applicant's previous PCR application.

Newly Discovered Evidence

This Court finds Applicant's assertion he is being held in custody unlawfully as a result of newly-discovered evidence, such that he should be entitled to an evidentiary hearing is without merit. The Uniform Post-Conviction Procedure Act states a person may institute a PCR 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, under the discovery rule, the PCR 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). An applicant requesting a new trial based on after-discovered evidence following a conviction must show that the evidence:

(1) Is such as would probably change the result if a new trial was had;
(2) Has been discovered since the trial;
(3) Could not by the exercise of due diligence have been discovered before the trial;
(4) Is material to the issue of guilt or innocence; and,
(5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (citing *State v. Caskey*, 273 S.C. 325, 256 S.E.2d 737 (1979)).

Here, Applicant cannot satisfy the *Hayden* five-part test for newly discovered evidence. Applicant's alleged newly discovered evidence does not constitute newly discovered evidence because it fails the third prong of the *Hayden* test—whether the evidence could have been discovered before trial. Whether Applicant could have called Wray as a witness at trial is immaterial. The question is whether Applicant knew or should have known Wray's version of events before trial. The provided affidavit claims Applicant and Wray had a conversation about the shooting the day after it happened, and indicates both individuals discussed their roles. Thus, Applicant and his trial counsel would have known Wray's version of the facts, and Applicant's agreement with that version prior to trial starting as it correlates with Applicant's claim that he was less culpable in the offense. Where an applicant has prior knowledge of testimony that someone else committed the crime, the failure to exercise ordinary diligence to procure it for the trial precludes the confession from being after-discovered evidence. *State v. Fowler*, 264 S.C. 149, 155–56, 213 S.E.2d 447, 450–51 (1975). "[O]rdinarily [an] accused may not claim a new trial to produce evidence of such a confession where it was known to him prior to his conviction, or where he failed to exercise ordinarily diligence to procure the testimony of the alleged confessor." *Id.*

An essential element of a newly-discovered evidence claim is that the evidence could not have been discovered prior to trial. Ultimately, the affidavit from Wray alleging he discharged the

firearm does not constitute newly discovered evidence. That fact, and Applicant's relative presence at the time of the incident, was known and discussed by both parties immediately after the incident, which was well before trial. Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing he is entitled to relief. *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 such showing he is entitled to relief based on the information set forth above; therefore, he is not entitled to an evidentiary hearing in the matter. Accordingly, this matter shall be summarily dismissed with prejudice.

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 (20) 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 Richland County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Yasmeen E. Klein, Assistant Attorney General
PCR Division – Fifth Circuit
P.O. Box 11549
Columbia, South Carolina 29211

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

AND IT IS SO ORDERED this 4 day of October, 2021.

L. CASEY MANNING
Chief Administrative Judge
Fifth Judicial Circuit

Columbia, South Carolina