

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

Herbert Bell, #132646 )

2019-CP-40-6468

Applicant )

v. )

**CONDITIONAL ORDER OF DISMISSAL**

State of South Carolina, )

Respondent )

2021 OCT -6 AM 8:54  
RICHLAND COUNTY  
FILED

This matter comes before the Court by way of Applicant, Herbert Bell's action for post-conviction relief (PCR) filed November 15, 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 state a cognizable claim for relief.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections (SCDC). During the November 1985 term, the Richland County Grand Jury indicted Applicant for kidnapping (1985-GS-40-2361). Clay Allen and Christine Hooks, Esquires, represented Applicant. Applicant proceeded to trial on February 25, 1986, before the Honorable Marion H. Kinon and a jury. The jury found Applicant guilty as indicted and Judge Kinon sentenced Applicant to life imprisonment. Applicant filed a timely Notice of Appeal and was perfected by Tara D. Shurling, Esquire. On June 15, 1987, the South Carolina Supreme Court affirmed Applicant's conviction and sentence. *State v. Bell*, Op. No. 87-MO-292 (filed June 15, 1987).

i. First PCR Action and Subsequent Appeal (1995-CP-40-3738)

Applicant subsequently filed an application for PCR on November 1, 1995, in which he alleged the following grounds for relief:

1. "Ineffective assistance of counsel"
2. "Ineffective assistance of appellate counsel"
3. "Constitutional and statutory and rule violations.

Respondent made its return on February 9, 1996. An evidentiary hearing into the matter was convened on September 23, 1997, at the Richland County Courthouse before the Honorable L. Henry McKellar. Applicant was present at the hearing and was represented by John Hearn, Esquire. On December 19, 1997, Judge McKellar, issued the Order of Dismissal denying Applicant's application for post-conviction relief with prejudice.

Applicant's PCR counsel timely filed a Notice of Appeal. On September 23, 1998, Cameron B. Littlejohn, Jr., Esquire, petition for writ of certiorari in the Supreme Court of South Carolina on behalf of Applicant. On November 5, 1999, the South Carolina Supreme Court denied the petition. The Remittitur was issued on November 24, 1999.

ii. Second PCR Action (2005-CP-40-4490)

Applicant filed a second application for PCR on September 7, 2005, in which he alleged the following grounds for relief:

1. "Ineffective Assistance of Counsel"
2. "Constitutional and Statutory Violations"

Respondent made its Return and motion to dismiss on January 30, 2006. On March 31, 2006, a Conditional Order of Dismissal was issued, provisionally denying and dismissing the action, while giving Applicant twenty days to show why the dismissal should not become final. On June 26, 2007, the Honorable Alison Renee Lee, issued the Final Order of Dismissal denying and dismissing the PCR action with prejudice.

iii. Third PCR Action (2013-CP-40-1031)

Applicant filed his third application for PCR on February 19, 2013, in which he alleged the following grounds for relief:

1. "A statute of limitations defense cannot be raised by the respondent"
2. "trial counsel was ineffective for failing to object under 17-19-20 to challenge the indictment base on its sufficiency before the jury be swear in"
3. "there is evidence of material of fact that was not previously presented and heard that require a vacation of the conviction"
4. "ineffective assistance of trial and appellate counsel was inadequately raised in the petitioner previous application"
5. "Trial court did not have subject matter jurisdiction"

Respondent made its Return and motion to dismiss on August 28, 2013. On September 3, 2013, the Honorable L. Casey Manning issued a Conditional Order of Dismissal, provisionally denying and dismissing the action, while giving Applicant twenty days to show why the dismissal should not become final. Applicant submitted objections to the Conditional Order. On October 24, 2014, Judge Manning issued the Final Order of Dismissal denying and dismissing the PCR action with prejudice.

**CURRENT APPLICATION**

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

1. "17-27-20(5) Parole condition unlawfully and otherwise unlawfully held error of law under 24-21-10(F)"
2. "parole statutory"
  - a. "Petitioner will amend each ground after counsel is appointed such claims can not be successive or procedure bar."

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, the records from Applicant's prior PCR actions and subsequent appeal, 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 of unlawful parole procedures. However, Applicant failed to comply with the filing requirements under S.C. Code Ann. § 17-27-45. Applicant was convicted and sentenced on February 25, 1986, and pursued a direct appeal. Applicant’s convictions were affirmed June 15, 1987. Pursuant to section 17-27-4(A), Applicant needed to file his application for post-conviction relief on or before June 16, 1988. Applicant did not file his application until November 15, 2019, nearly thirty years 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 raised no allegations 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 applications. 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 applications 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 applications.

### **Failure to State a Claim**

This Court finds the application shall be summarily dismissed for failure to state a claim cognizable under the Uniform Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 to -160. Pursuant to the Act, an applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy....

S.C. Code Ann. § 17-27-20.

Applicant's current application alleges violations under section 17-27-20(5), and S.C. Code Ann § 24-21-10, which is titled "Department of Probation, Parole and Pardon Services; Board of Probation, Parole and Pardon Services; board members; term; appointment; filing vacancies." Specifically, Applicant alleges a violation of section 24-21-10(F) which outlines the

department's role in establishing risk assessment tools for parole decisions and evaluating recidivism. Applicant states in his current application that he is not attacking his conviction, rather he is merely filing a PCR action "attacking my parole procedure."

"[A]side from two non-collateral matters specifically listed in the PCR Act, PCR is a proper avenue of relief *only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence . . .*" *Al-Shabazz v. State*, 338 S.C. 354, 367, 527 S.E.2d 742, 749 (2000) (emphasis in original). As such, the only non-collateral matters that can be properly heard in a post-conviction relief setting pursuant to S.C. Code Ann. § 17-27-20(a)(5) are the specifically listed claims that an applicant's sentence has expired, and that an applicant's probation, parole, or conditional release has been unlawfully revoked. *Id.* at 369, 527 S.E.2d at 750; *Coats v. State*, 352 S.C. 500, 575 S.E.2d 557 (2003); *Williams v. State*, 378 S.C. 511, 662 S.E.2d 615 (2008).

The issue of parole eligibility or procedure is a matter vested by law within the authority of the South Carolina Probation, Parole and Pardon Board and "the question of parole eligibility is separate and independent from the court's authority to sentence an offender." *State v. McKay*, 300 S.C. 113 at 115, 386 S.E.2d 623 at 623 (1989). Applicant stated he only wants to challenge his parole procedure. However, this is not an issue cognizable for relief under the PCR statute. Applicant has failed to plead or articulate facts demonstrating grounds for relief under either of the specifically listed non-collateral matters listed in section 17-27-20(5). For these reasons and pursuant to Rule 12(b)(6), SCRPC, this Court shall dismiss the application for failing to state a cognizable claim for which relief can be granted under the Post-Conviction Relief 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 (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