

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
)
Samuel L. Whitner, #263066,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE THIRTEENTH JUDICIAL CIRCUIT

Case No.: 2017-CP-23-2111

FINAL ORDER OF DISMISSAL

ENTERED COMPUTER

FILED-CLERK OF COURT
PAUL B. WICKENSIMMER
GREENVILLE CO. SC

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This matter comes before the Court by way of an application for post-conviction relief filed by Samuel Whitner (“Applicant”), through counsel on April 4, 2017. The State (“Respondent”) filed its return on October 8, 2018, moving for the summary dismissal of the application with prejudice on the grounds that the application was untimely, was impermissibly successive, and barred by the doctrine of res judicata. For the reasons provided in this order, Respondent’s motion to dismiss is granted.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. In February of 2009, the Greenville County Grand Jury indicted Applicant for first-degree criminal sexual conduct with a minor (2009-GS-23-1072). Christopher D. Scalzo, Esquire, represented Applicant. Assistant Solicitor Christy K. Sustakovitch, Esquire, prosecuted the case. On March 11, 2009, the State brought the case to trial before the Honorable Victor Pyle, Jr. On that date, Judge Pyle granted Applicant’s motion to suppress an audio recording of a telephone conversation between Applicant and the victim.

The State filed a notice of appeal and a motion to vacate Judge Pyle’s order. On June 11, 2009, the South Carolina Court of Appeals issued an order vacating Judge Pyle’s order and finding

that Judge Pyle lacked subject matter jurisdiction. On July 22, 2009, a three-judge panel of the Court of Appeals presided over a suppression hearing pursuant to the procedure set forth in the South Carolina Homeland Security Act. See S.C. Code Ann. §§ 17-30-10 et seq. Scalzo represented Applicant at this hearing. By order issued July 27, 2009, the Court of Appeals denied Applicant's motion to suppress.

The State brought the case to trial a second time before the Honorable John C. Few and Applicant was found guilty. On November 9, 2009, Judge Few sentenced Applicant to thirty years' imprisonment.

A timely notice of appeal was filed at the South Carolina Court of Appeals and, upon Applicant's request, was certified to the South Carolina Supreme Court. Robert M. Dudek, Esquire, perfected the appeal. The Supreme Court affirmed Applicant's conviction and sentence on July 11, 2012. State v. Whitner, 399 S.C. 547, 732 S.E.2d 861 (2012). The remittitur was issued on July 27, 2012.

2013-CP-23-0765

In his first application, filed on February 8, 2013, Applicant alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel
 - a. "Trial counsel acted jointly in concert with the State and illegally gain jurisdiction of the South Carolina Court of Appeals/6 amendment violation."
2. Ineffective Assistance of Appellate Counsel
 - a. "Appellate Counsel failed to challenge this jurisdictional defect."

Respondent filed its return on October 23, 2013 and its amended return on June 16, 2014. An evidentiary hearing into the matter was convened on June 19, 2014, at the Greenville County Courthouse. Applicant was present at the hearing and was represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire, of the South Carolina Attorney General's Office, represented

Respondent. On August 12, 2014, the Honorable Robin B. Stilwell issued the order of dismissal denying the application for post-conviction relief.

On May 15, 2015, John H. Strom, Esquire, of the South Carolina Commission on Indigent Defense, filed a Johnson¹ petition for a writ of certiorari in the Supreme Court of South Carolina on behalf of Applicant. On February 16, 2016, the South Carolina Court of Appeals denied the petition. The remittitur was issued on March 3, 2016.

8:16-1392-CMC-JDA

Applicant filed a pro se petition for a writ of habeas corpus under 28 U.S.C. § 2254 on June 22, 2016. Applicant set forth the following grounds for relief:

1. “The Petitioner was denied due process of law under the fourteenth and fourth amendments to the U.S. Constitution when the prosecutor moved for an interlocutory appeal.”
 - a. “The Petitioner was without knowledge, had not consent to his private conversation with his daughter being recorded. The Petitioner’s daughter’s mother’s ‘husband’ had ‘secretly’ taped the Petitioner’s conversation without the Petitioner’s knowledge or consent. The Solicitor was well ‘aware of this crime,’ S.C. code ann § 17-30-20 Authorization had not been granted to the Solicitor per a judge of competent jurisdiction S.C. code ann § 17-30-15 (8) to disclose the contents of the Petitioner’s call in the trial proceeding with honorable Victor Pyle presiding 2009-GS-23-1072.”
2. “The Petitioner was den[ied] due process of law under the 14th amendment equal protection, due to the ‘obvolutional [sic] presence of an unlawful wiretap.”
 - a. “The Petitioner’s confindment [sic] violates the constitution laws and treaties of the United States. The oringin [sic] of a violation was apparent before the South Carolina Court of Appeal. It was unequivocally clear that the violation had risen to a fundamental defect, and inherently resulted in a complete miscarriage of justice. The d[e]mands of fair procedure was impossible to meet, upon the South Carolina Court of Appeal was apprised per the South Carolina Attorney General that no order authorizing the interception was involved in this case See App. p. 50”
3. “The Petitioner was denied his right to effective assistance of counsel under the 6 Amendment to the U.S.Const., by improperly perserving [sic] the record.”
 - a. “Trial counsel failed to apprise the Honorable C. Victor Pyle Jr, of the fact that the surreptitious taped conversation between the Petitioner and his

¹ Johnson v. State, 294 S.C. 310 (1988)

- daughter violates "S.C. Constitution Article 1 § 10," and "U.S. Constitution amendment 4." The Petitioner was not apprise that "his conversation," was going to be recorded by his daughter mother's husband. More so the state could not legally rely on the vicarious consent as expressed in Pollock v. Pollock, 154 F.3d 601, prior to an unlawful wiretap!!"
4. "Trial counsel ineffective upon not moving for a mistrial due to clear Prosecutorial misconduct; thus failing to admonish the court of double jeopardy."
 - a. "Trial counsel ineffective for not moving for a mistrial based on the Solicitor's willful misconduct in the Pre-trial proceeding, which constituted egregious misconduct, when the solicitor violated S.C. code ann § 17-30-10 as well as the 5th and 6 Amendments to U.S. Constitution; thus failing to preserve for the record on appeal the prosecutorial misconduct could be considered, thus seen as "intentional" for the purpose of goading, before both the presiding Judges (i.e. The Honorable C. Victor Pyle Jr. and The Honorable John C. Few. 2009-GS-23-1072."
 5. "Appellate counsel failed to challenge the jurisdictional defect."
 - a. "Appellate counsel ineffective by not challenging the Court of Appeal's jurisdiction thus to entertain the state's interlocutory appeal with respect to S.C. code § 17-30-110 (A), prior to the fact that the state could not and did not provide the required accompanying application under which said interception could have been or was authorized or approved, the Honorable C. Victor Pyle Jr., decree denying [sic] the state's attempts for admitting the surreptitious taped conversation did not provide an impeachment [sic] on the state's ability to prosecute..."
 6. "The Petitioner was deni[ed] due process of law under the 14th amendment equal protection, due to the Supreme Court Clerk of Court's endorsement is solely upon the February 16, 2016 order."
 - a. "The February 16, 2016 order of dismissal which is endorsed solely by the South Carolina Supreme Court Clerk of Court, can not stand as lawfull [sic] per the South Carolina Supreme Court, which is violative [sic] with respect to the South Carolina Constitution Art. V § 5, and obstruct a necessity, which is for a "Justice", to provide a declaration of law, also upon the fact that requirement regarding application were in compliance when the Petitioner had timely submitted the pro se response to the Appellate Counsel's Johnson Petition."

Respondent filed its return and motion for summary judgment on August 15, 2016. On January 30, 2017, the Honorable Jacquelyn D. Austin, United States Magistrate Judge, issued a report and recommendation that Respondent's motion for summary judgment be granted and Applicant's petition be denied. Whitner v. Cartledge, 8:16-1392-CMC-JDA. On March 21, 2017, the Honorable Cameron McGowan Currie, United States District Judge, adopted the Magistrate's

report and recommendation granting Respondent's motion for summary judgment and dismissed Applicant's petition. Whitner v. Cartledge, 8:16-1392-CMC-JDA. On April 25, 2017, Judge Currie vacated the order of summary judgment so that Applicant could file his objections. Applicant filed his objection to the report and recommendation on May 9, 2017. Respondent filed a reply to Applicant's objections on May 23, 2017. On July 5, 2017, Judge Currie granted Respondent's motion for summary judgment. Applicant then filed a notice of interlocutory appeal with the United States Court of Appeals for the Fourth Circuit on May 15, 2017. The Court of Appeals dismissed the appeal at Applicant's request on June 1, 2017. On May 18, 2018, the Fourth Circuit Court of Appeals denied Applicant's motion for a certificate of appealability and his appeal was dismissed.

CURRENT APPLICATION

In his second and current application for post-conviction relief, filed through counsel on April 4, 2017, Applicant alleges he is being held in custody unlawfully on the following grounds:

1. "Ineffective Assistance of Counsel"
 - a. "Trial counsel was ineffective in not objecting when the State, prior to the jury being sworn, stopped the trial and moved for an interlocutory appeal on a Motion to Suppress being granted to [Applicant]"; and
 - b. "Counsel failed to preserve the record by not objecting/appealing the South Carolina Court of Appeals' decision to grant the admission of a wire-tapped, private conversation between [Applicant] and his daughter without his knowledge, to the record."

On October 8, 2018, Respondent filed its return to the application, moving to dismiss the application as untimely, impermissibly successive, and barred by the doctrine of res judicata. On October 4, 2018, the Honorable Perry H. Gravely issued a conditional order of dismissal, conditionally granting Respondent's motion to dismiss and giving Applicant twenty days after the service of the order upon him to provide reasons, factual or legal, that the dismissal should not

become final. That order was filed with the Greenville County Clerk of Court on October 8, 2018, and served on Applicant's counsel by mail on June 22, 2020.

On July 13, 2020, Applicant, through counsel, filed a notice of appeal with the South Carolina Supreme Court. The Supreme Court dismiss the notice of appeal, finding that Applicant failed to provide with the notice of appeal a copy of the final order being challenged, and noting that the notice of appeal was accompanied by a copy of the conditional notice of appeal, which is not appealable. Whitner v. State, S.C. Sup. Ct. Order filed July 30, 2020. The Supreme Court issued the remittitur on August 17, 2020. On December 18, 2020, Applicant filed in the Supreme Court a pro se notice of appeal, upon which the Supreme Court took no action.

On September 2, 2020, counsel for Applicant filed a motion to be relieved as counsel, citing irreconcilable differences. On September 8, 2020, the Honorable Alex Kinlaw, Jr., issued an order denying counsel's motion to be relieved but left the motion open for reconsideration upon Applicant's consent. After a September 13, 2021, hearing on the motion, the Honorable R. Lawton McIntosh issued an order on September 17, 2021, granting it. The order reliving counsel was served on Applicant by mail on October 26, 2021.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before this Court are the records of the Greenville County Clerk of Court for Applicant's conviction and sentence, Applicant's records from the South Carolina Department of Corrections, the trial transcripts, Applicant's appellate and habeas corpus records, Applicant's previous PCR application, and the filings in this matter. Pursuant to S.C. Code Ann. § 17-27-70(b), this Court makes the following findings of fact and conclusions of law.

The Honorable Perry H. Gravely issued a conditional order of dismissal on October 4, 2018, conditionally granting Respondent's motion to dismiss on the grounds that the application is not

timely, that the application is impermissibly successive, and that the application is barred by the doctrine of res judicata, and giving Applicant twenty days upon the service of the order upon him in which to file a response providing reasons, factual or legal, that the dismissal should not become final. That conditional order was filed with the Greenville County Clerk of Court on October 8, 2018. The conditional order was served upon Applicant on June 22, 2020, as is shown by the attached certificate of service by mail, which indicates that the order was mailed to Applicant's counsel.

Applicant has failed to file a response to Judge Gravely's conditional order of dismissal. Applicant has failed to offer any reason that the conditional dismissal should not become final. Applicant has failed, therefore, to meet the burden imposed upon him. Respondent's motion for the summary dismissal of this application is granted, and the application is denied and dismissed with prejudice because the application is not timely, is impermissibly successive, and is barred by the doctrine of res judicata.

IT IS THEREFORE ORDERED that Respondent's motion for the summary dismissal of the application is granted and this application is denied and dismissed with prejudice. This Court hereby advises the Applicant that he must file and serve a notice of appeal within thirty days of the service of this order upon him to secure appellate review. Rule 203, SCACR. Applicant's attention

is directed to Rule 227, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 1 day of Feb, 2022.



Letitia H. Verdin
Chief Judge for Administrative Purposes
Thirteenth Judicial Circuit

Greenville, South Carolina.

Copy mailed to	Applicant
Attorney	general / <u>Billyabough</u>
on	<u>2</u> / <u>9</u> / <u>2022</u>