

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)
)
Terry L. Davis, SCDC No. 127037)
)
Applicant,)
)
v.)
)
State of South Carolina)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No. 2021-CP-22-01071

**CONDITIONAL ORDER
OF DISMISSAL**

FILED
GEORGETOWN COUNTY, S.C.
2022 JAN 31 PM 1:15
ALMA Y. WHITE
CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief filed by Applicant Terry L. Davis on December 30, 2021. Respondent made its return and requested the matter be dismissed. This Court has reviewed the record and the pleadings before it and finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently incarcerated in the South Carolina Department of Corrections. Applicant was indicted by the Georgetown County Grand Jury for armed robbery and grand larceny at its January 2003 term (2003-GS-22-28; 2003-GS-22-29). Applicant was represented by Attorney Rueben Goude. Applicant proceeded to a jury trial before the Honorable Steven H. John on July 16, 2006. Applicant was convicted, as indicted, and was sentenced to life imprisonment for the armed robbery, and five years' imprisonment for the grand larceny. The sentences were set to be served concurrently.

Applicant appealed and the appeal was perfected by Attorney Tara S. Taggart. Applicant, through counsel, filed an *Anders* brief.¹ The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. *State v. Davis*, Op. No. 2005-UP-418 (S.C. Ct. App. filed June 27, 2005).

¹ *Anders v. California*, 386 U.S. 738 (1967).

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First PCR Application: 2006-CP-22-166

Applicant filed his first application for post-conviction relief on February 24, 2006. In his application, Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial and appellate counsel
2. Subject matter jurisdiction
3. Violation of double jeopardy clause.

The State made its return and requested an evidentiary hearing on June 5, 2006. Applicant, through counsel, amended his application for post-conviction relief on March 30, 2007, and alleged the following:

1. Trial Counsel was ineffective in failing to object to the state's introduction of a videotape, purported to be a video of the crime taking place, when the state elicited testimony about the contents of the tape without it being introduced into evidence, and also when the state played the tape for the jury.
2. Because the videotape was not in evidence, trial counsel was deficient in failing to object to the solicitor's reference to the videotape in closing argument.
3. Trial counsel was deficient in failing to object to the solicitor's stating his personal opinion in closing argument.

An evidentiary hearing was convened on October 10, 2007 at the Horry County Courthouse in Conway, South Carolina. Applicant was represented by Attorney Elise F. Crosby and Assistant Attorney General Christina J. Catoe, of the South Carolina Attorney General's Office, represented Respondent. On December 7, 2007, the Honorable James E. Lockemy issued a written order denying relief and dismissing the application with prejudice.

Applicant appealed and the appeal was perfected by Attorney LaNelle C. DuRant. The South Carolina Court of Appeals dismissed the matter on November 25, 2009. The remittitur was sent on December 11, 2009.

Federal Habeas Corpus Petition: C/A No. 9:10-719-HFF-BM

Applicant filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 on March 17, 2010. Applicant presented the following issues:

1. Ineffective assistance of trial counsel
2. Ineffective assistance of appellate counsel
3. Subject matter jurisdiction
4. Violation of double jeopardy clause

Respondent moved for summary judgment on June 7, 2010. On December 15, 2010, United States Magistrate Judge Bristow Marchant issued a report and recommendation that Respondent's motion be granted, that Applicant's petition be denied, and that the petition be dismissed with prejudice. On March 31, 2011, United States District Judge Henry F. Floyd granted Respondent's motion for summary judgment, denied and dismissed Applicant's petition, and denied a certificate of appealability. Applicant filed an untimely appeal on June 8, 2011. The United States Fourth Circuit Court of Appeals dismissed the appeal, via per curiam opinion, on October 18, 2011.

II. CURRENT APPLICATION

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

1. The Courts did not have jurisdiction to convict and sentence the defendant.
2. Violation of 5, 6, and 14 Amend. of the U.S. Const. and S.C. Const.
3. Subject matter jurisdiction
 - a. Indictments that do not include the date when they were filed, were not marked "Filed" and were not dated and signed by the clerk of court are illegal, unconstitutionally defective and invalid.

Before the Court are Applicant's records from the Georgetown County Clerk of Court's Office, the South Carolina Department of Corrections, the previous PCR action, and the current application for post-conviction relief.

III. 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.² Pursuant to S.C. Code Ann. §§ 17-27-70 and -80, this Court informs the parties of its intent to dismiss the application based upon the following findings:

Statute of Limitations

The application 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:

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 on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A). 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).

Applicant was convicted on July 16, 2006, and the records before this Court show that his direct appeal was dismissed on June 27, 2005. The current application was not filed until December 30, 2021—well after the one-year statutory filing period expired. Therefore, the application shall be summarily dismissed as barred by the statute of limitations.

² This conditional order of dismissal has been presented to and signed by the Honorable Benjamin H. Culbertson, Chief Administrative Judge of the 15th Judicial Circuit Court of General Sessions, because the Honorable Steven H. John, Chief Administrative Judge of the 15th Judicial Circuit Court of Common Pleas, presided over the trial giving rise to Applicant's convictions.

Successiveness

The application shall also 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.

Under this statute, 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).

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 S.C. Code Ann. § 17-27-90. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous application for post-conviction

relief. Therefore, he has failed to meet the burden imposed upon him, and the application shall be dismissed as successive to Applicant's previous PCR application.

Res Judicata

The application is similarly barred by the doctrine of *res judicata*. "*Res judicata* applies where there is identify of parties, identity of subject matter, and adjudication of the issue in the former suit." *Bell v. Bennett*, 307 S.C. 286, 292, 414 S.E.2d 786, 789-90 (Ct. App. 1992). "Under the doctrine of *res judicata*, a final judgment on the merits in a prior action will conclude the parties and their privies in a second action based on the same claim as to the issues actually litigated and as to issues that might have been litigated in the first action." *Foran v. USAA Casualty Ins. Co.*, 311 S.C. 189, 190-91, 427 S.E.2d 918, 919 (Ct. App. 1993); *see also Foxworth v. State*, 275 S.C. 615, 617, 274 S.E.2d 415, 415-16 (1981) (agreeing with circuit court that post-conviction relief claims that were or could have been raised in prior petition for habeas corpus in federal court were barred by *res judicata*).

Applicant had a full opportunity to litigate all his allegations in his prior actions. Applicant's claims about subject matter jurisdiction were raised in his initial application for post-conviction relief, waived and abandoned at the hearing, and then raised again in his petition for habeas corpus. The finality of the previous Court rulings should be respected, and the application shall be summarily dismissed as barred by the doctrine of *res judicata*.

Laches

The application shall also be dismissed as barred by the equitable doctrine of laches. To ensure finality of litigation, our courts require reasonable diligence in pursuing collateral relief. *McElrath v. State*, 276 S.C. 282, 283, 277 S.E.2d 890 (1981). Requiring reasonable diligence "guards the state's legitimate expectation that it will not be called upon without due cause, to

defend the integrity of convictions that occurred many years ago, where records and witnesses are no longer available.” *Id.* (quoting *Honeycutt v. Ward*, 612 F.2d 36, 42 (2nd Cir. 1979)). Where an applicant for post-conviction relief fails to exercise reasonable diligence, the State may seek the summary dismissal through the equitable doctrine of laches, which is defined as “neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.” *Bray v. State*, 366 S.C. 137, 140, 620 S.E.2d 743, 745 (2005) (quoting *Whitehead v. State*, 352 S.C. 215, 219, 574 S.E.2d 200, 202 (2002)). “Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party; delay alone in assertion of right does not constitute laches.” *Id.*

Applicant seeks post-conviction relief nearly twenty-six years after his conviction. Absent some explanation or justification for the delay in seeking post-conviction relief, laches will prevent an applicant from seeking collateral review of his conviction, especially where the delay affects the availability of evidence to review the applicant’s claims. *McElrath*, 276 S.C. at 283, 277 S.E.2d at 890. Applicant has offered no justification for the delay. Because of the delay, witness memories and physical evidence will have naturally faded and degraded. *See, e.g., Bray*, 366 S.C. at 140, 620 S.E.2d at 745 (affirming PCR judge’s ruling that laches barred belated review of denial of PCR seven years after PCR hearing was held); *State v. Serrette*, 375 S.C. 650, 654 S.E.2d 554 (Ct. App. 2007) (declining to remand for reconstruction of record noting such remedy “would undoubtedly be futile considering the passage of over ten years’ time” when the delay was caused by appellant). As a result, Applicant’s delay in bringing this action has affected the availability of evidence for this Court to review his claims. Therefore, this application shall be summarily dismissed as barred by the equitable doctrine of laches.

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Subject Matter Jurisdiction

Even ignoring all the procedural bars precluding Applicant's application, his allegations are facially without merit and cannot warrant an evidentiary hearing. "Circuit courts obviously have subject matter jurisdiction to try criminal matters." *State v. Gentry*, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005). "Subject matter jurisdiction of the circuit court and the sufficiency of the indictment are two distinct concepts and the blending of these concepts serves only to confuse the issue." *Id.* Applicant's claims regarding the sufficiency of the indictments must have been brought prior to the jury being sworn. S.C. Code Ann. §17-19-90 (2003). Regardless, "[a]n indictment is merely a notice document." *State v. Baker*, 390 S.C. 56, 62, 700 S.E.2d 440, 442 (Ct. App. 2010) (citing *Gentry*, 363 S.C. at 102-103, 610 S.E.2d at 500). The Court in *Baker* noted the following:

[T]he court must look at "the indictment with a practical eye in view of all the surrounding circumstances. The sufficiency of the indictment is determined by whether: (1) the offense charged is stated with sufficient certainty and particularity to enable a court to know what judgment to pronounce, and the defendant to know what he or she is called upon to answer and whether he or she may plead an acquittal or conviction thereon, and (2) whether it apprises the defendant of the elements of the offense that are intended to be charged.

Id. (citing *Gentry*, 363 S.C. at 102-103, 610 S.E.2d at 500).

Moreover, "an indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood." *Id.* 390 S.C. at 63, 700 S.E.2d at 443 (citing *State v. Tumbleston*, 376 S.C. 90, 98, 654 S.E.2d 849, 853 (Ct. App. 2007)); S.C. Code Ann. § 17-19-20. When the indictment references the statute the elements of the charge are thereby incorporated into the indictment. *See State v. Owens*, 346 S.C. 637, 649, 552 S.E.2d 745, 751 (2001) (murder statute) *overruled on other grounds by Gentry*, 363 S.C. 93, 610 S.E.2d 494; *see also State v. Beam*, 336

S.C. 45, 50-51, 518 S.E.2d 297, 300 (Ct. App. 1999) (video piracy statute); *State v. Crenshaw*, 274 S.C. 475, 477, 266 S.E.2d 61, 62 (1980) (bribery statute).

Applicant's indictment allegation is not proper for PCR. Applicant's failure to raise this challenge before the jury was sworn prevents him from raising this allegation in this action. Additionally, the indictments charged Applicant substantially in the language of the statute prohibiting the crime, and thus pass legal muster. As such, Applicant's allegation as it pertains to the indictments shall be dismissed.

Furthermore, Applicant has presented no facts whatsoever to support his claim that the trial court lacked subject matter jurisdiction. The Applicant's conviction involved a criminal charge in the Court of General Sessions. Accordingly, the circuit court had subject matter jurisdiction. Applicant has failed to present any facts or evidence that the convictions he challenges in this application are in a class over which the circuit court does not have the authority to provide. Therefore, Applicant's allegation as it pertains to subject-matter jurisdiction shall be dismissed.

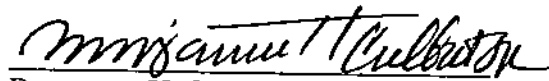
IV. CONCLUSION

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 Georgetown County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
PCR Division – Fifteenth Circuit
P.O. Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Georgetown 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 27th day of January, 2022.


BENJAMIN H. CULBERTSON
Chief Judge for General Sessions
Fifteenth Judicial Circuit

Georgetown, South Carolina