

PCR

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APR 22 2013

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

S.C. SUPREME COURT

J. Derham Cole, Circuit Court Judge

RECEIVED

APR 13 2013

Case No. 2010-CP-42-1458

Court of Appeals

Appellate Docket No. 2013-_____

Thomas Jerome Williams, 255549, Appellant,


v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Thomas Jerome Williams hereby appeals from the Order of Dismissal entered January 18, 2013, and received on January 21, 2013, and from the Order denying Rule 59 relief dated March 18, 2013. Copies of said Orders being provided herewith. (Appellant served a Rule 59 Motion timely on January 31, 2013, from which the Order of March 18, 2013 was issued.)

Respectfully submitted,



J. Falkner Wilkes
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292
(864) 271-6035 facsimile

Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2010-CP-42-1458

Appellate Docket No. 2013-_____

Thomas Jerome Williams, 255549,

Appellant,

v.

State of South Carolina,

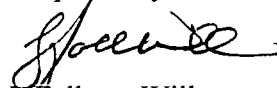
Respondent.

CERTIFICATE OF SERVICE

I certify that on the 15th day of April, 2013, I served a copy of the Notice of Appeal on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, addressed to counsel of record as indicated below:

Suzanne H. White, Asst. Atty. Gen.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Respectfully submitted,



J. Falkner Wilkes
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292
(864) 271-6035 facsimile
Attorney for Appellant

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 Thomas J. Williams, #233386,)
)
 Applicant,)
)
 vs.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

~~2011-CP-42-4770~~
 2010 1458

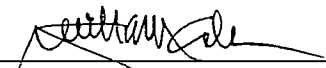
ORDER

This matter comes before the Court by way of Applicant's Motion, pursuant to Rules 59(a) and 59(e), SCRPC. The Respondent made its Return to this Motion on February 13, 2013.

This Court finds that the Order of Dismissal, dated January 14, 2013, contains the findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003), and Rule 52(a) SCRPC. See also, McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991).

This Court further finds that oral argument would not aid in the reconsideration of the original judgment. Therefore, this Court finds that the Order of Dismissal, which was filed on January 22, 2013, shall stand as it was written.

AND IT IS SO ORDERED this 18 day of March, 2013.


 J. Derham Cole
 Presiding Judge
 Seventh Judicial Circuit

FILED
 CLERK OF COURT
 SPARTANBURG COUNTY
 2013 MAR 18 AM 11:36
 M. HOPE BLACKLEY



BY

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
Thomas Jerome Williams, #255549,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2010-CP-42-1458

ORDER OF DISMISSAL

RECEIVED
APR 13 2013

This matter comes before the Court by way of an Application for Post-Conviction Relief filed March 17, 2010. The Respondent made its Return and Motion, to Dismiss on or about September 9, 2010. Ultimately, an evidentiary hearing into the matter was convened on April 2, 2012, at the Spartanburg County Courthouse. The Applicant was present and represented by J. Falkner Wilkes, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Investigator William Roberts and Thomas A.M. Boggs, Esquire, also testified. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, the trial transcript, Applicant's appellate records, and Applicant's prior PCR records.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. The Applicant was indicted at the November 1998 term of the Spartanburg County Grand Jury for attempted burglary - 1st degree and assault and battery with intent to kill (ABWIK) (98-GS-42-6479).

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2013 JAN 18 PM 00
HOPKINS ACADEMY

SCANNED

Page 1 of 11

COMPUTER

Thomas A.M. Boggs, Esquire, represented the Applicant. A jury trial was held on January 18, 1999, at the conclusion of which, the Applicant was found guilty of attempted burglary – 1st degree, but was acquitted on the ABWIK charge. He was sentenced by the Honorable Judge Henry F. Floyd to 25 years for attempted burglary – 1st degree (98-GS-42-6479)

The Applicant filed a timely notice of appeal to the South Carolina Court of Appeals. The Court affirmed the conviction by written Order. State v. Williams, Op. No. 2001-UP-171 (filed March 29, 2001). The Remittitur was sent on May 14, 2001.

2002-CP-42-0875

The Applicant subsequently filed an application for post-conviction relief (PCR) on March 8, 2002. The State filed its Return on December 9, 2002. An evidentiary hearing was convened on January 13, 2004, at the Spartanburg County Courthouse, at which the Applicant was present and represented by Rodney W. Richey, Esquire. In his first PCR application, the Applicant raised the following issues:

1. Ineffective assistance of counsel; in that,
 - a. Counsel failed to challenge the attempted burglary – 1st degree charge, knowing investigating officers could not place applicant on the scene of the crime;
 - b. Counsel failed to conscientiously discharge his professional responsibilities while he was handling my case;
 - c. Counsel neglected the necessary investigations and preparations of my case including, but not limited to, inadequate factual investigations and less than thorough legal research;
 - d. Counsel never properly ascertained whether or not I actually understood or comprehended all of the issues that were involved in my case;
 - e. Counsel failed to challenge the inconsistent statements and testimonies given at trial;
 - f. Counsel failed to move for a new trial after the jury found application not guilty of assault and battery with intent to kill and possession of a firearm, when the indictment for attempted burglary – 1st degree stated:

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2013 JAN 18 PM 2:00
M. HOPE

- while possessing a fire arm, when this was the aggravated circumstances used in the indictment of first degree burglary;
- g. Counsel never discussed with the applicant the nature and extent of the evidence which the state had against him;
- h. Counsel never discussed with the applicant the testimony that any of the State's witnesses could offer;
- i. Counsel failed to interview all relevant witnesses;
- 2. Ineffective assistance of appellate counsel;
- 3. Lack of subject matter jurisdiction of Spartanburg County Circuit Court; and
- 4. Lack of subject matter jurisdiction of South Carolina Court of Appeals.

Applicant also raised the following new issues in a *pro se* amendment he filed prior to his hearing:

- 1. Ineffective assistance of counsel; in that,
 - a. Counsel failed to object to the court's lack of jurisdiction regarding the burglary indictment because it was not filed with the Clerk of Court of General Sessions,
 - b. Counsel failed to object to the shoes being introduced into evidence at trial because:
 - i. Shoes were a result of an illegal search and seizure because the search warrant was not signed by a judicial officer,
 - ii. Counsel did not object to the fact that there was no established chain of custody,
 - iii. Counsel did not object to the fact that the shoes were black and white and the witness testified that the shoes he saw were blue and white,
 - c. Counsel failed to request a jury instruction that the Applicant could not be convicted of attempted burglary or burglary in the 1st degree if he was acquitted of ABWIK,
 - d. Counsel failed to file a motion for a speedy trial,
- 2. Ineffective assistance of appellate counsel, in that;
 - a. Appellate counsel failed to investigate, research, and prepare a defense for the Court of Appeals lacking subject matter jurisdiction because there was no written order granting or denying Applicant's post-trial motion,
 - b. Appellate counsel failed to investigate, research and prepare a defense based upon the circuit court's lack of

FILED
 CLERK OF COURT
 SPARTANBURG COUNTY
 2013 JAN 18 PM 2:00

- subject matter jurisdiction because the burglary indictment was not filed with the clerk of court,
- c. Appellate counsel failed to argue the denial of Applicant's motion for new trial,
 - d. Appellate counsel failed to come visit with Applicant to have a meaningful discussion with him regarding his case,

The Honorable J. Derham Cole denied and dismissed Applicant's application by written Order on March 12, 2004. A timely notice of appeal and a Johnson Petition for Writ of Certiorari were filed on Applicant's behalf. The Applicant also filed a pro se Brief asserting issues for appeal. The South Carolina Supreme Court denied Applicant's Petition by written Order on January 9, 2006. The Remittitur was sent on January 25, 2006.

2010-CP-42-1458

In the present case, following the submission of the State's Return and Motion to Dismiss and proposed Conditional Order of Dismissal to the Administrative Judge for the Seventh Judicial Circuit, the Conditional Order of Dismissal was signed by the Honorable J. Derham Cole on November 5, 2010. The Applicant filed a response to the signed Conditional Order of Dismissal and a hearing was held before the Honorable J. Mark Hayes II. Judge Hayes denied the State's Motion to Dismiss the application as successive and filed outside of the statute of limitations and instructed the State to schedule a hearing on the matter. The present hearing was subsequently scheduled.

ALLEGATIONS

In the current application, the Applicant alleged he was being held in custody unlawfully for the following reasons:

1. "Conviction is based on the introduction of unlawfully obtained evidence pursuant to State v. Covert;" in that
 - a. "The search warrant in the Applicant's case was not signed by the issuing Magistrate making the warrant invalid pursuant to

the court's ruling in State v. Covert. The resulting fruits of the search are therefore excludable."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Newly Discovered Evidence

The Applicant alleges that his application should not be dismissed as barred by the statute of limitations or because it is successive because it raises newly discovered evidence.

The Applicant testified that at his trial, a sneaker, which was discovered as a result of a search warrant, was introduced into evidence. Applicant testified that the search warrant was left at his house, but argues that the magistrate judge only signed the affidavit page of the search warrant, not the actual warrant or return. The three page copy of the search warrant was entered as Applicant's Exhibit #1. Applicant testified that he did have a prior post-conviction relief hearing and was represented by Counsel at the time. Applicant testified that he raised the issue of the unsigned search warrant in a *pro se* amendment and discussed the issue with his attorney, Rodney Richey, prior to his hearing. Applicant's *pro se* amendment was entered as Applicant's Exhibit #2 and the Order of Dismissal from the prior PCR was entered as Applicant's Exhibit #3. Applicant testified that he testified on the stand at his prior PCR hearing about the unsigned search warrant, but the issue was not ruled upon in the Order of Dismissal and no 59(e) Motion was filed to amend the Order. Upon further questioning and review of the transcript of the prior PCR hearing, Applicant could not point to any place in the transcript where that particular issue

CLERK OF COURT
SPRINGFIELD COUNTY
2011 JAN 8 AM 2:00
MADOP-BL
CRIM

was brought before the lower court. Applicant acknowledged that the issue was raised in the Johnson Petition for Writ of Certiorari that prior PCR counsel filed on his behalf and was denied by the South Carolina Supreme Court. The Johnson Petition was entered as Applicant's Exhibit #4 and another document was entered as Applicant's Exhibit #5. Additionally, Applicant entered into evidence the *pro se* Brief that he filed in response to the Johnson Petition as Exhibit #6 and the order from the Supreme Court was entered as Exhibit #7.

Counsel testified that Applicant's trial was in 1999, which was thirteen years ago, so he does not recall much about the trial other than the fact that the Applicant was charged with assault and battery with intent to kill and then directly indicted on a burglary – 1st degree charge. Counsel also testified that he previously testified at a PCR regarding the Applicant's case in 2004. Counsel testified that as it related to the search warrant, the only documents he had were the ones in his file that he had received from the State as a result of his discovery motion. Applicant introduced a page of the trial transcript as Applicant's Exhibit #8.

Investigator William Roberts also testified that he checked the Solicitor's office, the Spartanburg County Clerk of Court's office, the local Magistrate office, and law enforcement and never found a signed copy of the search warrant.

Following the presentation of the Applicant's case, including testimony and evidence, the State renewed its Motion to Dismiss based on the application being successive and because it was filed outside of the statute of limitations.

This Court finds that the Applicant has failed to meet his burden of proof as to any claims that would allow him to file a successive application or file outside of the statute of limitations. 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 (2003) states:

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2013 JUN 18 PM 2:00
M. HOPE BRADLEY

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." [Emphasis in original]. 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, Id.

This Court finds that the issue of whether or not Counsel was ineffective for failing to move to suppress the evidence obtained as a result of the unsigned search warrant was initially raised by the Applicant in an amendment to his first post-conviction relief application, although it was not pursued by the Applicant at the first post-conviction relief hearing. Because no testimony or evidence was ever presented to the lower court to review, there was no ruling about the unsigned search warrant in the Order of Dismissal, nor was a 59(e) motion filed. The Applicant was clearly aware of the claim prior to even 2004.

As to Applicant's allegation that the information discovered qualifies as newly discovered evidence, this Court finds that it does not. A defendant requesting a new trial based on after discovered evidence must show that the evidence:

CLERK OF COURT
SHERIFFS COURT
2013 JUN 18 PM 1:00
M. HOE BEACH BLVD

(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, 611-12, 299 S.E.2d 854, 855 (1983).

The Applicant failed to show that alleged evidence of the unsigned search warrant and the subsequent failure of a court to rule on the allegation of ineffective assistance for failing to move to suppress evidence found as a result of the search warrant meets *any* of the requirements for after-discovered evidence. Applicant made the same allegations in 2004, but elected not to pursue the allegation at the hearing. Most importantly, the "new evidence" offered by the Applicant is not "material to the issue of guilt or innocence." Hayden, Id. Therefore, this Court finds that the application is successive and should be summarily dismissed.

Additionally, this Court also finds that the Application for Post-Conviction Relief should 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.

S.C. Code Ann. §17-27-45(a) (2003) 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.

S.C. Code Ann. §17-27-45(c) (2003) reads as follows:

If the application contents 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 application or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

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).

The Applicant was convicted of the offense(s) he challenges in this Application on January 18,

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2013 JAN 18 PM 2:01
M. HOPE BLACKLEY

1999. The Remittitur was returned, following the Applicant's unsuccessful appeal, on May 14, 2001. The Applicant was therefore required to file his application before May 14, 2002. This Application was filed on March 17, 2010, which was almost nine years beyond the expiration of the statutory filing period.

Moreover, and to the extent the Applicant contends that newly discovered evidence should permit him to pursue this untimely post-conviction relief action, this Court finds that S.C. Code Ann. section 17-27-45 (c), requires that all newly discovered evidence claims be raised within one year after the actual date of discovery of the facts giving rise to the claim by the application of after the date when the facts could have been ascertained by the exercise of reasonable diligence. This Court finds that, based upon the record before it, Applicant was aware of and raised the acknowledged the fact that the search warrant was unsigned in *pro se* amendments to his 2002 application and the *pro se* brief he filed following submission of his Johnson Petition. The Applicant has failed to present any item of new evidence and this Court finds that newly discovered evidence has not been timely asserted in this current application for post-conviction relief.

New Substantive Law

The Applicant also argued alternatively, that the ruling of the South Carolina Supreme Court in State v. Covert, 382 S.C. 205, 675 S.E.2d 740, (2009), should be considered new substantive law, which would allow the Applicant one year from the ruling to file his application pertaining to the new law. The statute applicable to post-conviction relief requires an application to be filed not later than one year after the date of the filing of a case from either "a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State," when that case "holds that the Constitution of the United States or the Constitution of South

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2013 JAN 18 PM 2:01
M. HOPE BLANKLEY

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.” S.C. Code Ann. §17-27-45 (2003).

Covert clarified that under South Carolina law “an unsigned warrant is not a warrant and is not capable of being issued within the meaning of §17-13-140.” State v. Covert, 382 S.C. 205, 209-10, 675 S.E.2d 740, 743 (2009). However, it did not establish a new law or constitutional right. The law has long been that a search warrant must be issued by a magistrate. S.C. Code §17-13-140 (2003). This Court finds that the holding in Covert did not find that either the United States Constitution or the Constitution of South Carolina, or both, imposed upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of Applicant’s trial, which is the standard this Court uses to determine if an application can be filed outside of the standard statute of limitations when arguing a new substantive law. In Covert, the search warrant was ultimately signed by a magistrate, but was unsigned when it was served upon the defendant. The Court simply affirmed the Court of Appeals’ determination that the “absence of the magistrate’s signature at the time the warrant was served invalidates it.” Covert at 208.

Neither the Covert decision, nor Applicant’s claim of newly discovered evidence provides a basis to permit the Applicant to pursue the current action. Therefore, this Court finds that the State’s Motion should be granted and the application is dismissed as successive and filed outside of the statute of limitations.

CONCLUSION

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

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2013 JAN 18 PM 2:11
M. OPE BLANKLEY

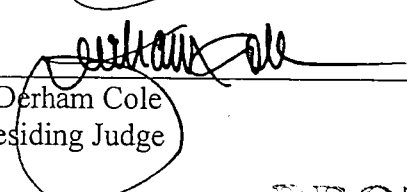
(1994). In addition, S.C. Code Ann. § 17-27-70(c) (1985) authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Based on the arguments and testimony presented at the hearing, case law before this Court, and subsequent analysis, this Court finds that this application should be summarily dismissed as successive and for failing to file within the statute of limitations.

This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel’s assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant’s behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief is summarily dismissed as successive and because it was filed outside of the statute of limitations.

AND IT IS SO ORDERED this 14 day of January, 2013



J. Derham Cole
Presiding Judge

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2013 JAN 18 PM 2:01
M. HOPE BLANCHLEY

RECEIVED

APR 18 2013

SC Court of Appeals

J. FALKNER WILKES

Attorney at Law

114 Whitsett Street
Greenville, South Carolina 29601

Telephone: (864) 282-1292
Facsimile: (864) 271-6035

April 15, 2013

Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211
(803) 734-1839

RECEIVED

APR 18 2013

SC Court of Appeals

Re: Thomas Jerome Williams v. State of South Carolina
Appellate Case No.:
C.A. No.: 2010-CP-42-1458

Dear Ms. Kitchings,

I am enclosing a Notice of Appeal and Certificate of Service along with copies of the Orders under appeal in the above case.

Respectfully,



J. Falkner Wilkes
Attorney for Appellant

c.
Suzanne H. White, Asst. Atty. Gen.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
via facsimile also to: (803) 253-6283