

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
))
John Wallace Hayward, #291763)
))
Applicant,)
))
v.)
))
State of South Carolina,)
))
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
IN THE FIFTH JUDICIAL CIRCUIT

2019-CP-40-0286

**CONDITIONAL ORDER OF
DISMISSAL**

RICHLAND COUNTY
CLERK OF COURT
2021 SEP 16 AM 9:20
FILED

This matter comes before the Court by way of Applicant John Wallace Hayward’s application for post-conviction relief (PCR) filed on January 15, 2019. Respondent made its return¹ and motion to dismiss on September 10, 2021. The Court grants Respondent’s motion to dismiss.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections (SCDC). Applicant was indicted during the April and November 2003 terms of the Richland County Grand Jury for armed robbery (2003-GS-40-0870; -0905). Applicant signed a waiver of his rights to have his Lexington County charges heard in Richland County and agreed to have the plea handled in Richland County. Applicant additionally waived the right to have the Clerk of Court for Lexington County sign the documents. At the guilty plea proceeding on December 1, 2003, in Richland

¹ Respondent’s return was originally due on March 18, 2019. Rule 12, SCRCF. However, having completed the return required in this matter, and in light of no demonstrable prejudice to Applicant as a consequence of the delay, this Court accepts the return as timely filed. *See* S.C. Code Ann. § 17-27-70(a) (establishing that the Court may fix the time in which the State must respond and that “respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application.”); *Guinyard v. State*, 260 S.C. 220, 195 S.E.2d 392 (1973) (holding the trial court may extend the time for filing and that the time limit prescribed by the statute is not mandatory, but discretionary with the trial court.).

County, Applicant waived venue and presentment of the Lexington County charges to the Lexington County grand jury for assault and battery with intent to kill (ABWIK) (2003-GS-32-4182), first-degree burglary (2003-GS-32-4185), criminal conspiracy (2003-GS-32-4191), two counts of armed robbery (2003-GS-32-4183; -4186) and five counts of kidnapping (2003-GS-32-4184; -4187; -4188; -4189; -4190). Applicant was represented by Samuel Mokeba, Esquire. Applicant pled guilty as indicted on December 1, 2003, and was sentenced by the Honorable Reginald I. Lloyd to confinement for a period of thirty years for each armed robbery charge, thirty years for each kidnapping charge, thirty years for first-degree burglary, twenty years for ABWIK, and five years for criminal conspiracy. All sentences were to run consecutively for an aggregate sentence of three hundred twenty-five years.

Applicant filed a timely Notice of Appeal and he was represented by Eleanor Duffy Cleary of the South Carolina Office of Appellate Defense. On July 5, 2005, Counsel Cleary filed a Final *Anders* Brief of Appellant and petitioned to be relieved as counsel and asserted as the sole arguable basis for relief:

1. Whether appellant's guilty plea failed to comply with the mandates set forth in *Boykin v. Alabama*?"

After reviewing the brief and record, counsel's motion to be relieved was granted and the South Carolina Court of Appeals dismissed the appeal. *State v. Hayward*, 05-UP-609 (S.C. Ct. App. Dec. 8, 2005). The Remittitur issued on January 3, 2006.

- i. First PCR Action and Subsequent Appeal (2006-CP-40-7301)

Applicant subsequently filed an application for post-conviction relief on December 8, 2006, where he alleged he was being held unlawfully for the following reasons:

1. Ineffective assistance of counsel, in that

- a. “counsel failed properly move/object to squash [sic] invalid indictments; and”
- b. “counsel failed to properly move/object to squash indictments for improper change of venue.”

Respondent filed its return and an evidentiary hearing was held on March 21, 2008, before the Honorable James R. Barber, III. Applicant was represented in the PCR action by Bryan S. Jeffries, Esquire. By written order, dated April 8, 2008, Judge Barber granted PCR relief on the Lexington and Richland County charges because counsel had not been appointed by the Clerk of Court for Lexington County on the Lexington charges. The PCR court concluded that counsel was ineffective by not investigating the Lexington County charges and therefore found that Applicant did not knowingly and intelligently plead guilty to the Lexington and Richland County charges.

Respondent appealed the PCR court’s decision and filed a timely notice of appeal. Respondent filed a Petition for Writ of Certiorari on October 6, 2008, raising the following question:

1. Whether sufficient evidence of probative value exists to support the PCR court’s findings that Respondent’s guilty plea was not knowingly and intelligently entered because appointed counsel, from Richland County, was either not appointed to handle Respondent’s Lexington County charges, and/or appointed counsel’s representation was ineffective regarding the Lexington County charges.

Applicant filed its return to the Petition for Writ of Certiorari on April 29, 2009, represented by Elizabeth Franklin-Best, Esquire. The Supreme Court of South Carolina granted certiorari on March 5, 2010, and set a briefing schedule. The Brief of Petitioner was filed on May 4, 2010, and the Brief of Respondent was filed July 27, 2010. On March 7, 2011, the South Carolina Supreme Court entered its opinion affirming in part and reversing in part. *Hayward v. State*, Memo. Op. No. 2011-MO-008 (SC. S. Ct. March 7, 2011) (unpublished). The Supreme Court reinstated the Richland County convictions and sentences, finding counsel was not ineffective to those charges.

ii. Habeas Corpus Action (1:11-644-RBH-SVH)

Applicant then filed a petition for writ of habeas corpus on March 18, 2011, in federal district court. Petitioner raised the following issues verbatim:

1. Ineffective Assistance of Counsel

- a. Counsel failed to properly move/object to squash invalid indictments for Richland County. My indictments clearly show that the grand jury convened when the Court of General Sessions were in session. Counsel failed to squash both indictments because the grand jury cannot convene when the Court of General Sessions is in session. I am denied U.S.C.A. Const. Amend. 5 because validity of indictment was not met.

2. Proportionality

- a. After pleading, I was given 12 consecutive sentences for charges in two counties (2 - Richland, 10 - Lexington). The consecutive sentences were purely based on the Lexington County issue. Currently Lexington charges and sentence have been vacated. Richland was not affected, so I am serving 60 years for the two Richland charges that I was offered 20 years for both charges by Lesley M. Coggiola before Lexington came into the fold. Lexington aggravated the Richland County charges. Sentence is not excessive if it is within the statutory limitations and there are no facts supporting allegation of prejudice against defendant. Lexington County and Richland County charges and sentence were vacated and Richland County charges and sentence were reinstated. The State made a decision that was based upon an unreasonable determination of facts in light of the evidence presented. 2254(d)(2).

On August 17, 2011, Respondent filed its return and motion for summary judgment. The federal district court granted Respondent's motion for summary judgment by Order dated January 4, 2012, finding Petitioner's claims were without merit. *Hayward v. McCabe*, No. CA 1:11-644-RBH-SVH, 2011 WL 6955886 (D.S.C. Dec. 8, 2011), *report and recommendation adopted*, No. 1:11-CV-00644-RBH, 2012 WL 28306 (D.S.C. Jan. 4, 2012), *adhered to*, No. 1:11-CV-00644-RBH, 2012 WL 1096101 (D.S.C. Mar. 30, 2012).

iii. Second PCR Action and Subsequent Appeal (2012-CP-40-2863)

In his second application for post-conviction relief, Applicant alleged he was held in

custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel/Inadequate and/or erroneous advice from counsel.
 - a. Counsel's inadequate and/or erroneous advice caused nonacceptance of plea bargain to applicant's Richland charges then advised applicant to plea to the Richland charges anyway but with additional Lexington charges, to avoid LWOP, that had convictions and sentence (ten) that were Constitutionally invalid and further proceedings led to a less favorable outcome to applicant's Richland convictions and sentences. Counsel advice fell below the standard of adequate assistance of counsel guaranteed by the Sixth Amendment applicable to the States through the Fourteenth Amendment.
 - b. The applicant should not have taken counsel's advice to plead guilty to the Richland and Lexington charges together and should have either taken the Richland 20 year plea offer or went to trial for the Richland charges. Either disposition, plea offer or trial, would have been lesser than what the Applicant received for his Richland charges after he still pled on counsel's inadequate and/or erroneous advice.

Applicant then filed a document captioned "ATTACHMENT 5(c) For Post-Conviction Relief Application Question 16(a)," on June 8, 2012, wherein he argued a closing letter from the South Carolina Attorney General's office to the Lexington County solicitor is newly discovered evidence. Applicant also cited *Lafler v. Cooper*, 566 U.S. at 163 (2012), in support of his arguments. Applicant then filed a document captioned "ATTACHMENT 5(d) For Post-Conviction Relief Application Question 16(a)," on December 27, 2012, wherein Applicant argued that the South Carolina Supreme Court ruled on an issue that was unpreserved for appellate review. Finally, Applicant filed a document captioned "ATTACHMENT 5(e) For Post-Conviction Relief Application Question 16(a)," on March 25, 2013. In that document Applicant cited *Martinez v. Rvan*, 566 U.S. 1 (2012) in support of his ineffective assistance of counsel argument.

On October 28, 2014, Judge L. Casey Manning issued a Conditional Order of Dismissal. The Final Order of Dismissal was filed on September 29, 2015. Applicant filed a notice of appeal

from the circuit court's order denying post-conviction relief on October 29, 2015. Applicant failed to show proof of service of the notice of appeal on the Respondent. Applicant was granted an extension until December 11, 2015, but failed to provide proof of timely service. By order dated December 18, 2015, the notice of appeal was dismissed. Applicant then filed a motion requesting the appeal be reinstated because he serviced the notice of appeal on Respondent on December 10, 2015. The motion to reinstate was denied and the Remittitur issued on January 7, 2016.

CURRENT APPLICATION

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

1. "PCR court lacked jurisdiction to rule on the above three charges without proper sending of remittitur to circuit court."
 - a. "Applicant appealed to 12 charges – 2 Rich[land] and 10 Lex[ington] but only 9 Lex[ington] charges listed on Direct Appeal Remittitur."
2. "Ineffective Assistance of Counsel."
 - a. "Failure to squash (sic) invalid indictment for improper change of venue"
 - b. "Nonacceptance (sic) of 20 year concurrent plea for Rich[land] charged and stopping a Rich[land] charges and receive 60 years (2 - 30 consecutive)"

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

Applicant pled guilty December 1, 2003, and pursued a direct appeal. The Remittitur issued January 3, 2006. Pursuant to section 17-27-4(A), Applicant needed to file his application for post-conviction relief on or before January 4, 2007. Applicant did not file his application until January 15, 2019, well beyond the statute of limitations. Applicant’s argument filed within one year of receipt of the 2018 corrected remittitur does not apply here because he was on notice of the claim prior to 2006. He properly filed within one year, but there were no new discovery of facts by the applicant that have been ascertained by the exercise of reasonable diligence because he knew of the claim in 2006. Therefore, there is no evidence of material facts previously presented and filing for relief must still be filed within one year after sending the remittitur to the lower court. 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).

This Court finds Applicant’s allegations of ineffective assistance of plea counsel could have been raised – and in fact *were* raised – in his prior post-conviction relief applications and his federal habeas action. In addition, his allegation regarding subject-matter jurisdiction could have been raised in any of these previous actions, as Applicant was on notice of the claim as early as January 3, 2006. Thus, the current application is successive and barred under section 17-27-90 of

the South Carolina Code of Laws. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations regarding subject-matter jurisdiction in his previous state and federal collateral actions or why the Court should overlook the fact that he has raised these exact claims of ineffective assistance in previous actions. Therefore, he has failed to meet the burden imposed upon him, and the Court shall summarily dismiss the application as successive to Applicant's previous collateral actions.

Subject Matter Jurisdiction

This Court additionally finds Applicant's allegations regarding jurisdiction to be without merit. "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). Applicant's claim that the post-conviction relief court was without subject matter jurisdiction because two of his Richland County charges and one of his Lexington County charges were not remitted to the circuit court until September 28, 2018, should be summarily dismissed. Notably, Applicant's allegations against the PCR court does not raise an issue of subject matter jurisdiction. PCR courts are clearly vested with jurisdiction to hear matters brought before it pursuant to the procedures of the Uniform Post-Conviction Relief Act. S.C. Code Ann. § 17-27-30. Applicant's first PCR action was brought pursuant to the Act, therefore the PCR court had jurisdiction over his claims. Instead, it appears Applicant is attempting to allege the PCR court did not have collateral or appellate jurisdiction over specific charges included in his previous action. This misapprehends the function of a remittitur.

This Court agrees the absence of the three charges from the January 3, 2006, remittitur following Applicant's direct appeal was nothing more than a scrivener's error as the exclusion of those indictments did not alter the nature of the denial of Applicant's direct appeal. "When the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and

no motion can be heard thereafter; the only exception to the rule is when the remittitur is sent down by mistake, error or inadvertence of the appellate court.” *Wise v. S.C. Dep’t of Corr.*, 372 S.C. 173, 174, 642 S.E.2d 551, 551 (2007). In assessing circumstances of mistake, error, or inadvertence, it is therefore important to review the purpose of the remittitur as a legal tool. It is well established that under South Carolina Court rules, the remittitur to the lower court is not sent down immediately, but it is retained in every case for fifteen days, unless the court direct otherwise, and shall not be sent pending disposition of a petition for rehearing, if filed. Rule 221, SCACR; *see Sullivan v. Speights*, 14 S.C. 358 (1880) (reviewing rules of issuing a remittitur). “The object of this is to reserve jurisdiction over the case, so that, should either of the parties desire to make any motion in reference thereto, they might have the opportunity to do so, and the court the power to hear it.” *Carpenter v. Lewis*, 65 S.C. 400, 43 S.E. 881 (1903). However, after the remittitur is sent down, the case passes beyond the reach of the court, its jurisdiction is lost, and no motion can be heard by this court on the matter thereafter. *Id.* at 882.

Accordingly, it is clear a remittitur serves a ministerial purpose of reserving jurisdiction only for the limited period of time to allow for further motions on the appellate action. Here, the remittitur was issued after full review and dismissal of Applicant’s allegations challenging the convictions of his twelve indictments on appeal. A clerical or scrivener’s error in the listed indictments on the remittitur is not demonstrative of an error or mistake in the decision of the Court to deny appellate relief. Further, the record is absent of any indication the appellate court purposely left out the indictments at issue, or intended they not be included in the denial and dismissal of the appeal. Additionally, the scrivener’s error did not prejudice Applicant when pursuing collateral review of all his charges as is evidenced by Applicant raising further challenges to his all convictions in various post-conviction relief and habeas corpus matters.

Ultimately, there is no jurisdictional requirement that the remittitur must list the indictments, nor are there other express requirements for the form imposed upon a remittitur. It is uncontroverted Applicant's appeal ended when the remittitur in question was issued and the appellate court relinquished jurisdiction, a scrivener's error does not alter that fact. Applicant's claim he should be permitted to proceed forward on a post-conviction relief action to challenge the three charges because he believes he was denied a "first bite of the apple" according to *Aice*² intentionally disregards the extensive procedural history of this matter. Specifically, Applicant already had full review of these charges. The presiding Courts from Applicant's previous post-conviction relief and collateral actions considered all of Applicant's charges as a part of his applications, not merely the ones listed on the remittitur. As such, Applicant received his bite at the apple, and arguing he is entitled to a second bite due to a clerical error is untenable. Therefore, Applicant's allegations regarding jurisdiction, and every part of the application based thereupon, shall be dismissed pursuant to Rule 12(b)(6), SCRCF.

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

²305 S.C. 448, 409 S.E.2d 392 (1991).

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 14 day of September, 2021.


L. CASEY MANNING
Chief Administrative Judge
Fifth Judicial Circuit

Columbia, South Carolina