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MAY 20 2013

S.C. SUPREME COURT

May 15, 2013 (10:43am)

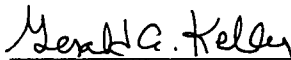
Honorable Daniel E. Shearouse  
Clerk of the South Carolina Supreme Court  
P.O. Box 11330  
Columbia, South Carolina  
29211

RE: Aljaquon R. Drake, #332148 v. State of South Carolina, 2012-CP-27-0007

Dear Sir:

Please accept for filing the enclosed documents to perfect appeal in the cited case.

Sincerely,



Gerald Alan Kelly, 3358  
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Varnville, South Carolina 29944  
803-943-0510, office and fax  
[geraldkelly@islc.net](mailto:geraldkelly@islc.net)

Enclosures:

1. Order of Dismissal
2. Notice of Appeal
3. Proof of Service

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM JASPER COUNTY  
Court of Common Pleas

Hon. Perry M. Buckner, Circuit Court Judge

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Case No. 2012-CP-27-0007

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Aljaquon R. Drake, #332148.....Petitioner

v.

State of South Carolina .....Respondent

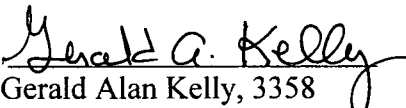
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NOTICE OF APPEAL

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Aljaquon R. Drake, 332148 appeals the order of Hon. Perry M. Buckner executed on April 30, 2013, and filed May 2, 2013. Petitioner received notice of filing of the Order of Dismissal on May 8, 2013, by receiving a filed copy of the Order from the Clerk of Court of Jasper County, South Carolina.

May 15, 2013

  
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Varnville, SC 29944  
803-943-0510, office and fax  
Attorney for Petitioner

Other Counsel of record:  
Ashleigh R. Wilson  
Assistant Attorney General  
P.O. Box 11549  
Columbia, SC 29211-1549  
803-734-3970  
Attorney for Respondent

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM JASPER COUNTY  
Court of Common Pleas

MAY 20 2013

Hon. Perry M. Buckner, Circuit Court Judge

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S.C. SUPREME COURT

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Aljaquon R. Drake ,#332148..... Petitioner

v.

State of South Carolina .....Respondent

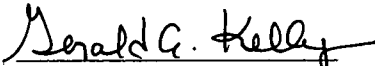
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PROOF OF SERVICE

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I certify that I have served the Notice of Appeal on Ashleigh R. Wilson Assistant Attorney General by depositing a copy of it in the United States Mail, postage prepaid, on May 15, 2013, addressed to her at Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211-15490.

May 15, 2013

  
Gerald Alan Kelly, 5538  
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geraldkelly@islc.net  
Attorney for Petitioner

STATE OF SOUTH CAROLINA  
COUNTY OF JASPER

Aljaquon R. Drake, #332148,  
Applicant,

v.

State of South Carolina,  
Respondent.

IN THE COURT OF COMMON PLEAS  
2012-CP-27-0007

**ORDER OF DISMISSAL**

JASPER COUNTY, SOUTH CAROLINA  
CLERK OF COURT  
MAY -2 AM 9:21

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 10, 2012. The Respondent made its return on February 21, 2013. An evidentiary hearing on the matter was convened on April 1, 2013 at the Beaufort County Courthouse. The Applicant was present at the hearing and represented by Gerald Kelly, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

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Also present and testifying was Stephen T. Plexico, Esquire. The Court had before it the trial transcript, the Jasper County Clerk of Court records, the Applicant's records from the South Carolina Department of Corrections, the Applicant's application, the Respondent's Return, and the appellate records.

**PROCEDURAL HISTORY**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Jasper County Clerk of Court. The Applicant was indicted at the September 2007 term of the Jasper County Grand Jury for two counts of burglary-first degree (2007-GS-27-0673, -0674). He was represented by Stephen T. Plexico, Esquire.

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On October 23, 2008, the State made a motion to join the trial of the two burglaries. The State's motion was granted and the Applicant proceeded to trial on both burglaries. The Applicant was found guilty as indicted. On December 2, 2008, the Honorable Carmen T. Mullen, sentenced the Applicant to concurrent terms of 16 years for each burglary.

A Notice of Appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. Katherine Hudgins, Esquire of the South Carolina Office of the Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed the Applicant's convictions and sentences. The Remittitur was sent August 31, 2011.

### **ALLEGATIONS**

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

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1. Ineffective assistance of counsel.
    - a. "Violation of a legal or moral obligation."
  2. Lack of subject matter jurisdiction.
    - a. "No grand jury hearing was held the date on indictment."
  3. Violation of the 4<sup>th</sup> amendment.

At the hearing, Applicant made a motion to amend his application to conform to the proof. The Applicant's motion was granted.

### **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. Sec. 17-27-80 (2003).

### Summary of Testimony

The Applicant was present and testified he was represented by Stephen T. Plexico from the Public Defender's Office. He testified he was not given a fair trial. The Applicant also testified he is mentally ill and unstable, therefore, he is innocent. The Applicant testified he mentioned his mental instability to counsel. The Applicant also testified he spoke with counsel about taking the stand, but chose not to take the stand. Lastly, the Applicant testified he did tell trial counsel about his alibi.

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Trial counsel, Stephen T. Plexico was also present to testify. Counsel testified he has been practicing law for 25 years. He testified he was appointed to represent the Applicant and met with him frequently prior to trial. Counsel testified he filed Brady and Rule 5 motions on the Applicant's behalf. Counsel also testified he reviewed the discovery materials he received with the Applicant. Counsel testified that prior to trial he discussed with the Applicant the elements of the charges against the Applicant and what the State was required to prove.

Counsel testified he tried to discuss the Applicant's version of the facts, but was never given anything by the Applicant to investigate. Counsel testified he had ample time to prepare for trial and his trial strategy was to highlight to the jury the State's lack of evidence. Counsel testified the Applicant never wanted to plead guilty and always wanted to proceed to trial.

Counsel testified that while the Applicant lacked intelligence, he understood the evidence against him or the lack thereof. Counsel testified he had no indication that the Applicant did not know that burglary was wrong. He testified the Applicant could communicate when he wanted to and had even previously communicated with one of the detectives on the case.

Counsel testified the Applicant had the ability to communicate an alibi if he had one. He testified further that since the Applicant never offered an alibi, he did not know where the

Applicant was during the burglaries and assumed the Applicant was guilty. Counsel testified the Applicant gave him no reason to believe he was somewhere else when the crimes were committed.

Counsel testified that at times it was frustrating to communicate with the Applicant because he did not want to address the issues he was facing. He testified he spoke with the Applicant about taking the stand at trial. Counsel testified he advised the Applicant not to testify because he could be impeached with his prior burglaries. Counsel also testified he did not know what the Applicant's testimony would be if he took the stand.

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Counsel testified he did not make a motion to bifurcate the Applicant's trial. Counsel testified that at the time he did not see the need to bifurcate the trial, but in hindsight he may have done it. Counsel testified the Applicant's prior burglary convictions were an element that had to be proven by the State for a burglary- first degree conviction. Counsel testified he has never heard of a motion for bifurcated trial being granted. He also testified he has never made a motion to bifurcate a burglary trial and it is not his standard practice to do so. Counsel testified it is unlikely a motion to bifurcate would have been granted as it would basically take away the statutory advantage of the State to prove past burglaries.

Lastly, counsel testified he did not recall evidence being presented about the Applicant's placing the binoculars on the porch. He testified he did not object to the State saying the Applicant left the binoculars on the porch in their closing argument. Counsel testified he did not make a motion about the Solicitor discussing facts not in evidence.

### Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "the burden of proof is on the applicant to prove his allegation by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For the Applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

This Court finds the Applicant's testimony was not credible, while also finding trial counsel's testimony was credible. This Court further finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

This Court finds the Applicant failed to carry his burden of proving counsel should have investigated the Applicant's alibi and presented an alibi witness at trial. In order to support a claim that trial counsel was ineffective for failing to interview or call a potential alibi witness, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. The applicant's mere

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speculation as to what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995).

This Court finds this allegation is without merit as both the Applicant and trial counsel testified the Applicant never told counsel about his alibi. This Court finds further the Applicant failed to present any alibi witness at the hearing and has not proven what would have been discovered had counsel investigated the Applicant's alleged alibi. This Court finds this allegation is without merit and counsel's performance was not deficient.

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This Court finds the Applicant failed to carry his burden of proving counsel should have advised the Applicant to take the stand. Counsel gave credible testimony that he discussed the right to testify with the Applicant and he advised the Applicant not to testify. This Court finds counsel's advice was justified because the Applicant could have been impeached with his prior burglaries and counsel gave credible testimony he would not have known the substance of the Applicant's testimony if he had taken the stand. This Court finds any misadvice by counsel with regard to taking the stand was cured when the trial court advised the Applicant of his right to testify. During this colloquy with the Court, the Applicant was told the following:

"sir, you also have the right to testify if you want to. But again, no one can make you testify. This is a personal right and only one that you can invoke...if you have convictions in your past, which I believe you do, within the last ten years, it would subject you to possible cross-examination, those would be brought out." (T. 137)

This Court finds this allegation is without merit and counsel's performance was not deficient.

This Court finds the Applicant failed to carry his burden of proving counsel should have looked into the Applicant's mental health prior to trial. A defendant must be mentally competent to stand trial to assist counsel in his defense. Drope v. Missouri, 420 U.S. 62 (1975). In determining if counsel is ineffective for failing to request a competency hearing, an applicant

must show that a reasonable probability exists that he would be found incompetent at the time of this trial or plea. Jeter v. State, 308 S.C.230, 417 S.E.2d 594 (1992). Counsel may reasonably rely on his own perceptions in deciding if a client is competent to stand trial. Id.

This Court finds counsel gave credible testimony that while the Applicant lacked intelligence, he was aware of right from wrong and was able to communicate and assist in his defense when he chose to. Further, this Court finds the Applicant has presented no evidence that the Applicant suffered from any mental illnesses that would have caused him to be found incompetent at the time of his trial. This Court finds this allegation is without merit and counsel's performance was not deficient.

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This Court finds the Applicant failed to carry his burden of proving <sup>AMB</sup> ~~but~~ <sup>that</sup> counsel should have made a motion for a bifurcated burglary trial. Counsel gave credible testimony that he has never requested that a burglary trial be bifurcated to separate the burglary elements and the Applicant's prior convictions. Counsel also gave credible testimony that he has never heard of the motion being successfully argued and it would probably have been denied. This Court finds counsel's perception of the motion is accurate and it is unlikely the trial court would have bifurcated the trial when a record of two or more prior burglary convictions is an element of burglary-first degree<sup>1</sup> which the State is required to prove beyond a reasonable doubt. This Court finds this allegation is without merit and counsel's performance was not deficient.

This Court finds the Applicant failed to carry his burden of proving counsel should have objected to the State closing statement. Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. State v. Mouzon, 321 S.C. 27, 31-32, 467

<sup>1</sup> S.C. Code Ann. §16-11-311(A) (1976) provides: A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and...(2) the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both.

S.E.2d 122, 124-25 (Ct. App. 1995) aff'd, 326 S.C. 199, 485 S.E.2d 918 (1997). After all the evidence is in, counsel for the parties are in the position to present their respective versions of the case as a whole. Id. Only then can they argue the inferences to be drawn from *all the testimony*, and point to weakness of their adversaries' positions. Id. This Court finds counsel was not ineffective for failing to object to the Solicitor's closing argument in which she argued that the Applicant left the stolen binoculars on the porch of a home he visited. (T.146:14-25). This Court finds the Solicitor's statements were a part of the State's version of the facts and not objectionable. This Court finds the State's argument did not deprive the Applicant of a fair trial. This Court finds this allegation is without merit and counsel's performance was not deficient.

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Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test, specifically that counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that counsel committed either errors or omissions in her representation of the Applicant. The Applicant failed to show that counsel's performance was deficient. Therefore, this Court need not address prejudice. Applicant's complaints concerning counsel's performance are without merit and are denied and dismissed.

#### All Other Allegations

As to any and all allegations that were raised in the application at the hearing in this matter and not specifically addressed in this Order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore they are hereby denied and dismissed.

**CONCLUSION**

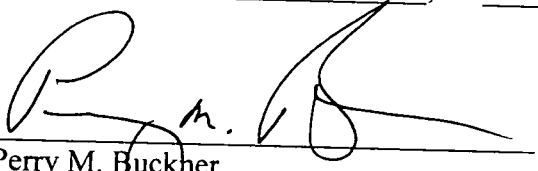
Based on all the forgoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

**IT IS THEREFORE ORDERED:**

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

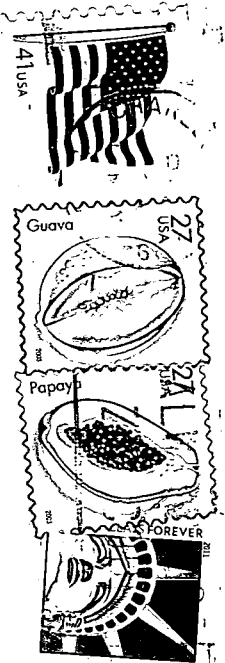
AND IT IS SO ORDERED this 30 day of April, 20 13

  
\_\_\_\_\_  
Perry M. Buckner  
Presiding Judge  
14th Judicial Circuit

Walterboro, South Carolina.

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