

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM BEAUFORT COUNTY
In The Court of Common Pleas

JUN 04 2013

Perry M. Buckner, Circuit Court Judge

S.C. Supreme Court

DOCKET NUMBER - 2011-CP-07-3808

Richard Simmons APPELLANT


-vs-

STATE OF SOUTH CAROLINA. RESPONDENTS

NOTICE OF APPEAL

Richard Simmons appeals the Order of the Honorable Perry M Buckner denial of Application for Post Conviction Relief for the Appellant, dated April 30, 2013. The Order was filed on May 15, 2013, and received by counsel on May 22, 2013.

June 3, 2013


Charlie Jay Johnson, Jr.
Post Office Box 11212
Columbia, SC 29211
(803) 673-4557
Attorney for Appellant

Other Counsel of Record:
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Assistant Attorney General
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Post Office Box 11549
Columbia, SC 29211-1549
Attorney for Respondent State of South Carolina

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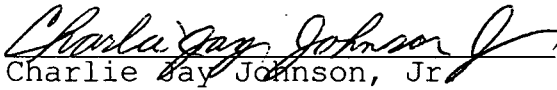
-vs-

STATE OF SOUTH CAROLINA. RESPONDENTS

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on The State Of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on June 3, 2013, addresses to the Attorney of record, Ashleigh Rayanna Wilson, Office of the Attorney General, Post Office Box 11549, Columbia, SC 29211-1549.

June 3, 2013


Charlie Ray Johnson, Jr.
Post Office Box 11212
Columbia, SC 29211
(803) 673-4557
Attorney for Appellant

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP0703808

Richard Simmons

South Carolina State Of

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRCP; Rule 41(a), SCRCP (Vol. Nonsuit);
 Rule 43(k), SCRCP (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON): Rule 40(j) SCRCP; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- See attached order; (formal order to follow)
- Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge	Judge Code	Date
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For Clerk of Court Office Use Only

This judgment was entered on the **15th day of May, 2013**, and a copy mailed first class or placed in the appropriate attorney's box on the **20th day of May, 2013**, to attorneys of record or to parties (when appearing pro se) as follows:

Richard Simmons #232156 136 Wilborn Ave Wd-270
Lieber Correctional Institute Po Box 205 Ridgeville, SC
29472
Charlie Jay Johnson Jr. PO Box 11212 Columbia, SC
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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Lynn Geren - Staff

Jerri Ann Roseneau - Clerk of Court

Court Reporter

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BEAUFORT)
)
)
 Richard Simmons, #232156,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 2011-CP-07-3808

13 MAY 15 PM 3:18
 BEAUFORT COUNTY, S.C.
 CLERK OF COURT

ORDER OF DISMISSAL

#1
 PmB
 This matter comes before the Court by way of an application for post-conviction relief (PCR) dated September 7, 2011. The Respondent made its return on February 10, 2012. 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 Charlie J. Johnson, Jr., Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

Also present and testifying was Gene Hood, Esquire. The Court had before it the trial transcript, the Beaufort 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 Beaufort County Clerk of Court. The Applicant was indicted at the October 2004 term of the Beaufort County Grand Jury for murder (2004-GS-07-

1654) and burglary- first degree (2004-GS-07-1667). He was represented by Gene Hood, Esquire.

The Applicant proceeded to trial and was found guilty. On November 17, 2006, the Applicant was sentenced by the Honorable Roger M. Young, Sr. to confinement for life without parole.

A Notice of Appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. Joseph L. Savitz, III, Esquire of the South Carolina Office of the Appellate Defense perfected the appeal pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals reviewed the entire record and affirmed the Applicant's convictions and sentences. State v. Simmons, Op. No. 2011-UP-279.

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ALLEGATIONS

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

1. Ineffective assistance of counsel.
 - a. "Numerous deficiencies"
 - b. Failure to file "Massiah motion"
 - c. Failure to object to jury instruction on malice.

At the hearing, Applicant proceeding solely on the allegation of ineffective assistance of counsel for failure to investigate the Applicant's alibi and request an alibi jury instruction.

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 the Testimony

The Applicant, Richard Simmons, was present and testified he was represented by Gene Hood, Esquire. He testified counsel met with him several times prior to trial and reviewed the facts of the case with him. The Applicant recalled reviewing discovery with his attorney and recalls discussing possible defenses with his attorney.

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The Applicant testified he was interviewed by police in 1995 who were investigating the murder. The Applicant testified he never admitted killing the victim and told police that at the time of the incident he was waiting at the Island Plaza to meet someone who was supposed to give him a job. The Applicant provided the police with the names of several people who saw him there that night and they were unable to find any alibi witnesses. The Applicant testified he told counsel about his alibi and where he was the night of the murder. He testified he gave counsel the names of his alibi witnesses, but did not give him the witnesses' phone numbers or contact information.

The Applicant testified further that in 2002 he met and befriended an undercover SLED agent. He testified the officer would give him money for alcohol and drugs. The Applicant testified ultimately the SLED officer arrested him for murder. Lastly, the Applicant testified counsel discussed with him his right to testify at trial and advised him not to testify at trial because of his prior convictions. The Applicant testified he agreed not to testify at trial.

Trial counsel, Gene Hood, was present and testified he has been practicing law for 40 years. Counsel testified he filed Brady and Rule 5 motions on the Applicant's behalf and met with the Applicant at least twice monthly before trial. Counsel testified he reviewed the

discovery material he received with the Applicant. Counsel testified further he discussed with the Applicant the elements of the charges and what the State was required to prove. Counsel testified he also discussed possible defenses with the Applicant.

Counsel testified he knew about and investigated the Applicant's alibi. He testified he was aware of the alibi, because police reports indicated the Applicant had given an alibi and the names of witnesses. Counsel testified since the murder occurred thirteen years prior, it was not much he could investigate. Counsel testified his investigation was based on the Applicant's memory, police reports, and old newspaper articles.

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Counsel testified further he was unable to find any witnesses to support the Applicant's alibi and even had he found the witnesses, their testimony, as he understood it, would not have been a complete alibi since it did not establish the Applicant's whereabouts ^{Abducing} the entire timeline created by the facts. Counsel testified the death was found to have occurred after 2:00 AM. He testified further he could not confirm the Applicant's alibi. Counsel testified that in hindsight, maybe he should have requested an alibi jury instruction, but he did not because prior to trial he only had an allegation and did not have any witness who could testify to support the alibi.

Counsel testified that other than the Applicant's statement, there was no physical evidence connecting the Applicant to the crime. He testified he highlighted to the jury, the police's poor investigation of both the Applicant's alibi and the crime. Counsel testified that at trial he also highlighted for the jury the Applicant's drug use during the time the statement was made to the undercover SLED officer. Lastly, counsel testified he made a motion to suppress the Applicant's statement which was denied.

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).

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This Court finds the Applicant’s testimony is not ^{PmB as} credible, while also finding trial counsel’s testimony is credible. This Court further finds counsel has extensive experience in the practice of criminal law and has been practicing law for 40 years. This Court finds counsel met with the Applicant numerous times prior to trial and fully investigated the Applicant’s case. This Court finds counsel filed Brady and Rule 5 motions on the Applicant’s behalf and reviewed the received discovery with the Applicant. This Court finds counsel discussed with the Applicant the elements of the charges against him and what the State was required to prove. This Court finds counsel discussed the Applicant’s version of the facts and possible defenses with the Applicant.

This Court finds that the Applicant failed to meet his burden of proving trial counsel should have investigated the Applicant's alibi witnesses and requested an alibi jury charge at trial. An alibi is "a defense that places the defendant at the relevant time of crime in a different place than the scene involved and so removed therefrom as to render it impossible for him to be the guilty party." United States v. Smoot, 172 F. App'x 496, 498 (4th Cir. 2006) (citing *Black's Law Dictionary* 71 (6th ed. 1990)). In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, 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. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). The applicant's mere speculation as to what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice. Id.

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This Court finds counsel fully investigated the Applicant's alleged alibi witnesses. Counsel gave credible testimony that he tried to locate the Applicant's alibi witnesses, but he was unable to locate the witnesses due to the large time gap between the murder and the Applicant's arrest. This Court also finds credible, counsel's testimony that he may not have presented any alibi witnesses at trial as the alleged alibi as reported to him by the Applicant would not have been a complete alibi. This Court finds further that since the Applicant has failed to produce the alleged alibi witnesses at the evidentiary hearing, the Applicant has failed to carry his burden of proving prejudice resulted from counsel's performance.

This Court finds counsel was not ineffective for failing to request an alibi jury instruction. Counsel's testimony reflects he did not have any witnesses or testimony to support the request for an alibi charge. This Court also finds the issue of whether the "trial court erred by failing to instruct the jury on the law of alibi" and the entire trial record were reviewed during the

Applicant's appeal pursuant to Anders v. California, 386 U.S. 738 (1967). The Court of Appeals dismissed the Applicant's appeal after review of this issue. State v. Simmons, Op. No. 2011-UP-279.

In support of the granting of post-conviction relief, the Applicant argued Riddle v. State, 308 S.C. 361, 418 S.E.2d 308 (1992) and Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994) are analogous to the facts of this case. In Riddle, counsel was held ineffective for failing to request an alibi instruction where both the defendant and his wife testified at trial about the defendant's alibi. In Ford, counsel's performance was held deficient because counsel rejected the Court's offer of an alibi charge where the defendant and two witnesses testified at trial about the defendant's alibi. This Court finds both cases can be distinguished from the facts of this case. In the present case, trial counsel was unable to locate any alibi witnesses to support the Applicant's testimony and testified that he had nothing to support an argument for an alibi jury instruction. Also, unlike in Ford and Riddle, the Applicant did not take the stand to testify or present any witnesses who would support his alleged alibi at trial. This Court finds the Court's rulings in Riddle and Ford are not applicable to the facts of this case.

Accordingly, this Court finds the Applicant failed to prove the first prong of the Strickland test- that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in their representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland- that he was prejudiced by trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

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.

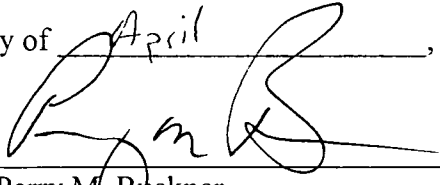
[Signature on the following page.]

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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.