RECEIVED
JUL 26 2023
S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

September 29, 2011

The Honorable Scarlett Wilson
Solicitor, Ninth Judicial Circuit
101 Meeting Street
Charleston, South Carolina 29401

RE: State v. James Ivan Aiken
2010-GS-10-3117

Dear Solicitor Wilson:

In its Order, filed September 2, 2011, the South Carolina Court of Appeals dismissed the above appeal due to the appellant's wishes to withdraw his appeal. The Remittitur has been sent to the Charleston County Clerk of Court. Therefore, with this letter, we are closing our direct appeal file in this matter.

This Office has verified through the South Carolina Department of Corrections' computer that Mr. Aiken is presently incarcerated.

Sincerely,

Salley W. Elliott
Assistant Deputy Attorney General

SWE/ab
Enclosure
cc: The Honorable Julie J. Armstrong
David M. Tatarsky, Esquire
Ms. Trisha Allen, Victim Services

REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, SC 29211-1549 • TELEPHONE 803-734-3970 • FACSIMILE 803-253-6283

512

CC
AG
AT
GS
SOL

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	2011-CP-10-7419
	)	
	)	
James Ivan Aiken, #294853,	)	
	)	
Applicant,	)	
	)	
v.	)	ORDER OF DISMISSAL
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

This matter comes before the Court by way of an application for post-conviction relief (PCR) dated October 13, 2011. The Respondent made its return on February 13, 2012. An evidentiary hearing on the matter was convened on December 5, 2012 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Justin Bamberg, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified at the hearing along with Mary Beth Mullaney, Esquire, Breen Stevens, Esquire, Leon Goodwin, and Cora Aiken. The Court had before it the trial transcript, the Charleston County Clerk of Court records, and the Applicant's records from the South Carolina Department of Corrections, the Applicant's original and amended applications, the Respondent's return, the appellate records, and the Applicant's exhibits.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Charleston County Clerk of Court. The Applicant

was indicted at the May 2010 term of the Charleston County Grand Jury for first degree burglary (2010-GS-10-3117). He was represented by Mary Beth Mullaney, Esquire, and Lori Proctor, Esquire.[1]

The State called the case to trial and the Applicant was found guilty. On January 19, 2011, the Applicant was sentenced by the Honorable R. Markley Dennis to confinement for 20 years.

A notice of appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. Breen Stevens, Esquire of the South Carolina Office of the Appellate Defense perfected the appeal. The Applicant signed an affidavit dated August 11, 2011 indicating that he wished to withdraw the appeal. The Court of Appeals issued an Order of Dismissal on September 2, 2011 and a Remittitur on September 22, 2011.

ALLEGATIONS

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

1. Ineffective Assistance of Counsel
   a. Failed to adequately investigate the facts and circumstances surrounding the 911 call to Applicant's mother's residence on 1/9/10.
   b. Failed to investigate, develop, and present all available, relevant, and admissible exculpatory and/or mitigating evidence. As a result of counsel's failure to uncover and present the evidence, Applicant's 20 year sentence for burglary 1st is unreliable.
   c. Failed to interview and call witnesses who were not called during trial because counsel "believed the witnesses would not add much to Applicant's defense." The defense witnesses Applicant sought during trial "would have added significantly to the credibility of Applicant's case." Counsel's conduct was also deficient for making harmful statements in closing arguments.
   d. Failed to investigate, discover, and present evidence that Applicant suffered mentally from impaired judgment. Counsel's failure to discover and present

[1] The Court notes that Ms. Proctor was present at the hearing, but did not testify.

evidence that Applicant's 20 year sentence violates Atkins v. Virginia, 536 U.S. 304 (2002), and the 8th Amendment to the U.S. Constitution because Applicant was mentally impaired.

e. Failed to object to the Solicitor's closing arguments. The Solicitor's closing arguments were highly damaging to Applicant by unreasonably failing to preserve the issue for direct review and that this failure prejudiced the outcome of the case.
f. Failed to properly cross-examine the victim.
g. Did not attempt to prepare Applicant to testify in his own defense and decided that she would not allow Applicant to testify.

The Applicant amended his PCR application on November 16, 2012. In his amended application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
   a. Trial counsel was ineffective for failing to move to exclude or object to testimony regarding Morrison's missing wallet and mention of the wallet during closing arguments.
   b. Trial counsel was ineffective for failing to object to certain testimony from Morrison and for failing to properly cross-examine him.
   c. Trial counsel was ineffective for failing to reasonably investigate the evidence that would rebut evidence of Applicant's criminal intent.
   d. Trial counsel was ineffective for failing to request the State to advance a reason as to why it refused to accept the stipulation to Applicant's priors.
   e. Trial counsel was ineffective for failing to request a bifurcated trial on the issue of prior convictions given the unique circumstances surrounding the Applicant's case.
   f. Trial counsel was ineffective for making improper comments during closing argument.
2. Ineffective Assistance of Appellate Counsel
   a. Appellate counsel was ineffective for failing to fully inform Applicant of the consequences of abandoning Applicant's direct appeal.

At the hearing, Applicant proceeding solely on the allegations presented in his amended application.

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 conclusion of law as required by S.C. Code Ann. Sec. 17-27-80 (2003).

Summary of Testimony

The Applicant called Leon Goodwin to testify on his behalf at the evidentiary hearing. Mr. Goodwin testified that in January 2010 he lived at in Charleston. He testified that on January 9, 2010, he found his neighbor's front door open. He testified that he knocked on the door and did not get an answer. He testified that he then called the police to check on the home. Lastly, he testified that he did not know the Applicant.

The Applicant also called his mother, Cora Aiken, to testify on his behalf at the evidentiary hearing. Aiken testified that on January 9, 2010, she went to the store with the Applicant and returned to see the police at the house next door to her home. She testified that the police had been called because her neighbor's door was left ajar. She testified that she told the Applicant that it was nice of their neighbor to call the police and that she hoped someone would do the same for her. Ms. Aiken testified that she did not recall trial counsel asking her about the January 9th incident and that she would have testified at trial had she been asked.

Trial counsel, Mary Beth Mullaney, Esquire, testified at the hearing that she has been practicing law since 1993 and that until recently all of her practice has been in criminal law. She testified that was appointed to represent the applicant on February 9, 2010, which gave her

approximately 10 months to prepare for trial. She testified that she was lead counsel and Ms. Proctor was second chair. Counsel testified that she met with the applicant numerous times prior to trial. She testified that she filed Brady and Rule 5 motions for the Applicant and reviewed all discovery material with the Applicant. She testified that she discussed with the Applicant the elements of the charges against him, what the State was required to prove, the Applicant's version of the facts, and possible defenses. Counsel testified that she fully investigated the case and was prepared for trial. She testified that she went to the scene of the burglary, took photos of the scene, spoke with the victim's roommate, and reviewed all discovery materials that she received.

Counsel testified that it was the victim's testimony that his wallet was missing and that she did not move to exclude or object to this testimony because there were no legal grounds to exclude the testimony. She testified that the wallet was not evidence, but testimony of what the victim recalled and any objection to the testimony would have been futile. She also testified that she was able to use the missing wallet to the Applicant's advantage at trial. She testified that the Applicant's defense was that the wallet was never found by police. She testified that she was able to argue to the jury that the wallet could have been misplaced the day before when the victim was digging through the trash.

Counsel testified further that she represented the Applicant at his preliminary hearing and that she reviewed the transcript of the preliminary hearing with the Applicant. She testified that the statements made at the preliminary hearing could have been used for impeachment purposes at trial. She testified that she recalled Officer Duren's testimony that the victim's wallet was not found on the Applicant at the time of arrest and that at trial she questioned Officer Duren about looking for the wallet after the Applicant was arrested. Counsel also testified that she recalled the

State mentioning the wallet during their closing, but that Applicant was not charged with stealing the missing wallet. She testified that she was able to argue to the jury that the wallet was not found and could have been lost by the victim. Counsel testified further that she thought the testimony of the missing wallet was helpful to the Applicant at trial.

Trial counsel testified that the victim's testimony at trial that "It's cold, so I had a lot of blankets and I think that he probably just didn't see me in there or something" (Tran. 102:9-11) was not objectionable. She testified that while the victim was speculating on whether the Applicant saw the victim in bed or not, she was able to use the testimony by victim regarding his missing wallet to the Applicant's advantage. She testified that her failure to object to this testimony did not prejudice the Applicant. She testified that on cross-examination of the victim she was able to get out the fact that defendant said he was only returning a shoe, that the victim never lost sight of the Applicant and never saw him throw away the wallet, and that the victim could have lost the wallet.

Counsel testified that she argued that mere entry was not burglary and that her defense at trial was that the Applicant did not have the criminal intent for burglary. She testified that the Applicant requested that she obtain an evidence log. She testified that she did not know what an evidence log was and that as far as she knew evidence logs did not exist for police. She testified that she spoke with the Applicant's mother prior to trial. She testified that she knew of the January 2010 incident at the mother's neighbor's home. Counsel testified further that she did not investigate the incident because it would have been prejudicial to the Applicant at trial. She testified that she discussed the incident with the Applicant and thought it would not have rebutted the State's evidence of criminal intent at trial. She testified that she did not speak to Leon Goodwin and would not have called Goodwin or the Applicant's mother to testify at trial

about the incident. She testified that it was a strategic decision not to investigate the incident further because in the January 2010 incident, the neighbor saw the door ajar and called the police. She testified that in the Applicant's case he never called the police and entered the home and went in the victim's bedroom. Counsel testified further that had she presented that evidence to the jury, the State would then have argued that the Applicant should have called the police and not gone into the victim's bedroom. Counsel testified that had the incident been helpful she would have pursued and introduced it at trial.

Trial counsel testified that she recalled trying to stipulate to the Applicant's burglary charge being burglary in the first degree to prevent the jury from hearing the Applicant's prior record. She testified that the State probably did not stipulate because they wanted the jury to hear about the prior burglaries they were allowed to present to prove the elements of burglary first degree. Counsel testified that the State did not advance a reason for why they would not stipulate and that it did not cross her mind to request that they do so. She testified that she did not press the issue because the trial judge was unhappy with her because of an argument she made regarding the sufficiency of the prior burglaries.

Counsel testified that she did not request a bifurcated trial and that maybe she should have requested one, but she did not want to further anger the Court. She testified that she did not think the trial judge would have granted the motion and she wanted to focus on more important issues that she thought would be successful. She testified that a bifurcated trial has never been done in Charleston County and that she had previously thought of a way to do a bifurcated trial.

Lastly counsel testified that her statements during closing argument were not prejudicial to the Applicant at trial. She testified that her statement that "[a]nd maybe, just maybe, they'll give me a dollar or two. Maybe I'll get a tip. So that's what I'll do. So he takes the shoe and he

goes up the stairs and he goes into the house, and he's looking for somebody, he's looking for somebody to give the shoe to." (Tran. 251:10-15) was her attempting to reconcile the evidence presented by the State that the Applicant may have been homeless. She testified that she felt the statement explained the circumstances and supported their argument that the Applicant did not have the criminal intent for first degree burglary. She testified further that her statement about the Applicant not being likeable was not prejudicial, but helpful to the Applicant.

Appellate counsel, Breen Stevens, Esquire, testified at the hearing that he represented the Applicant on appeal. He testified that he received a letter from the Applicant in July 2011 saying that he desired to withdraw his appeal. Counsel testified that he spoke with the Applicant by phone and that the Applicant was concerned about how long the appeal would take and thought that his issues were proper for PCR and not direct appeal. Counsel testified that he advised the Applicant of the risks associated with the waiver of his direct appeal rights and suggested that the Applicant give him a chance to review the trial transcript before he withdrew his appeal. He testified that he told the Applicant what type of issues could be presented on direct appeal and that once his direct appeal was withdrawn the only issues left were regarding trial counsel's performance.

Counsel testified further that the phone conversation with followed by a letter to the Applicant again urging him to wait until he could read the transcript before dropping his current appeal. Counsel testified that included with the letter was an affidavit that the Applicant could sign waiving his direct appeal if he still wanted to do so. He testified that the Applicant signed the affidavit waiving the direct appeal. Counsel testified that he did not feel that the Applicant had any competency issues. He testified that whether to continue to pursue a direct appeal is a decision solely left up to the client.

The Applicant testified that trial counsel should have presented a defense on his behalf because the jury needed to hear why he entered the home. He testified that trial counsel should have objected to the State's characterization of the Applicant as a person with two prior burglary convictions in their closing statement. The Applicant testified further that counsel should have requested a bifurcated trial. He testified that he did not tell trial counsel that he entered the residence to get a tip as she stated in her closing argument and the testimony presented him in a bad light to the jury. Lastly, the Applicant testified that had counsel investigated she would have been able to offer other evidence that he did not have the criminal intent required for burglary.

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 is not credible, while also finding trial counsel's testimony is credible. This Court further finds that counsel has extensive experience in the practice of criminal law and has been practicing law since 1993. This Court finds that counsel met with the Applicant numerous times prior to trial and fully investigated the Applicant's case. This Court finds that counsel filed Brady and Rule 5 motions on the Applicant's behalf and reviewed the received discovery with the Applicant. This Court finds that counsel discussed with the Applicant the elements of the charges against him and what the State was required to prove. This Court finds that counsel discussed the Applicant's version of the facts and possible defenses with the Applicant. Trial counsel was thoroughly competent in her representation of the Applicant.

This Court finds that the Applicant failed to meet his burden of proving trial counsel should have moved to exclude or object to testimony regarding the victim's missing wallet. This Court finds that trial counsel's performance was not deficient for failing to object to this testimony at trial. This Court finds further that there was no legal basis to object to or exclude the victim's testimony about the missing wallet. This Court also finds that no prejudice resulted from the jury being presented testimony about the missing wallet. Trial counsel gave credible testimony that she was able to use the testimony to the Applicant's benefit at trial. This Court finds that this allegation is without merit and trial counsel provided reasonably effective assistance under prevailing professional norms.

This Court finds that the Applicant failed to meet his burden of proving trial counsel should have objected to certain testimony from the victim. This Court finds that the Applicant failed to meet his burden of proving that trial counsel did not properly cross-examine the victim. This Court finds that trial counsel's performance was not deficient for failing to object to

testimony from the victim that he did not think the Applicant saw him in bed when he entered the bedroom. This Court finds further that there was no legal basis to object to or exclude this testimony at trial. This Court also finds that trial counsel thoroughly cross-examined the victim during trial. On cross-examination, trial counsel was able to show the jury that the victim never lost sight of the Applicant during the chase and that he did not see the Applicant discard his wallet. Further cross-examination of the victim on the missing wallet was unnecessary because trial counsel was able to further attack the testimony regarding the missing wallet on cross-examination of Officer Duren who testified that at the time of arrest the victim's wallet was not located. This Court finds that this allegation is without merit and trial counsel provided reasonably effective assistance under prevailing professional norms.

This Court finds that the Applicant failed to meet his burden of proving trial counsel should have investigated evidence that would rebut evidence of Applicant's criminal intent. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. Wiggins v. Smith, 539 U.S. 510, 521-22, 123 S. Ct. 2527, 2535, 156 L. Ed. 2d 471 (2003).

This Court finds that trial counsel investigated the January 2010 incident at the Applicant's mother's neighbor's home and made a strategic decision not to further investigate or present the incident at trial. Trial counsel gave credible testimony that she knew of the January 2010 incident and thought that if presented to the jury it would be more harmful than helpful to the Applicant. This Court finds that trial counsel's decision not to further investigate this matter was reasonable under the circumstances. The reasonableness of her decision is further supported by the fact that the facts of the January 2010 incident are substantially different than those of the burglary involving the Applicant and it is likely the State would have highlighted those differences to the jury at trial. This Court finds that this allegation is without merit and trial counsel provided reasonably effective assistance under prevailing professional norms.

This Court finds that the Applicant failed to meet his burden of proving trial counsel should have requested the State advance a reason as to why it refused to accept the stipulation to Applicant's priors. In State v. Hamilton[2], the Court of Appeals held because two prior burglary and/or housebreaking convictions are an element of first degree burglary under § 16–11–311(A)(2), the defendant cannot require the State to stipulate to the prior convictions in lieu of informing the jury about the prior convictions. State v. Benton, 338 S.C. 151, 155, 526 S.E.2d 228, 230 (2000).

This Court finds that trial counsel was not deficient and did not have a basis for requiring the State to advance a reason for not accepting a stipulation as allowed by established case law. This Court also finds that trial counsel argued zealously to limit the jury's exposure to the Applicant's criminal history at trial. This Court finds further that the State's rejection of the stipulation offered by trial counsel was not objectionable and would not have presented a

[2] 327 S.C. 440, 486 S.E.2d 512 (Ct. App. 1997).

reviewable issue for direct appeal. This Court finds that this allegation is without merit and trial counsel provided reasonably effective assistance under prevailing professional norms.

This Court finds that the Applicant failed to meet his burden of proving trial counsel should have requested a bifurcated trial on the issue of prior convictions given the unique circumstances surrounding the Applicant's case. This Court finds that trial counsel was not deficient for requesting a bifurcated trial. Trial counsel gave credible testimony that any request for a bifurcated trial would have been futile and that she chose to focus on issues that were more likely to be successful at trial. This Court also finds that trial counsel advanced a valid reason for not requesting a bifurcated trial. This Court finds that this allegation is without merit and trial counsel provided reasonably effective assistance under prevailing professional norms

This Court finds that the Applicant failed to meet his burden of proving trial counsel should not have made improper comments during closing arguments. This Court finds that trial counsel's closing argument was proper. This Court finds that trial counsel's closing argument supported the defense presented at trial that the Applicant did not have the criminal intent to commit burglary. This Court finds that this allegation is without merit and trial counsel provided reasonably effective assistance under prevailing professional norms

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.

Ineffective Assistance of Appellate Counsel

The Applicant alleges ineffective assistance of appellate counsel. A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy..." Jones, 463 U.S. at 754, 103 S.Ct. 3308.

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. *See* Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Respondent was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

This Court finds that the Applicant has failed to carry his burden of proving that appellate counsel did not fully inform the Applicant of the consequences of abandoning his direct appeal. This Court finds that appellate counsel fully advised the Applicant of the consequences of

waiving his direct appeal. Appellate counsel gave credible testimony that he discussed withdrawal of the appeal with the Applicant both by phone and in writing. In addition, the appellate counsel testified that he strongly discouraged the Applicant from waiving his direct appeal. This Court finds that ultimately the decision to pursue a direct appeal is that of the Applicant. This Court further finds that the Applicant knowingly, voluntarily, and intelligently withdrew his appeal as evidenced by his signing of the affidavit submitted to the Court of Appeals.

Accordingly, this Court finds the Applicant failed to prove the first prong of the Strickland test- that appellate counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that appellate 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 appellate 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 or 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 is 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 files.

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 21st day of [illegible], 20[illegible]

The Honorable Roger M Young, Sr.
Presiding Judge
9th Judicial Circuit

[illegible], South Carolina.

528

WTL20100100410

WITNESSES

DUREN
Charleston City Police Department

AGENCY CASE NUMBER

1000904

ARREST WARRANT NUMBER

K609743

DATE OF ARREST

January 16, 2010

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury *Date:* MAY 10 2010

VERDICT

Foreperson of Petit Jury *Date:*

INDICT

DOCKET NO. 2010GS1003117

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

May Term 2010

10 0291(01)

THE STATE

vs.

JAMES IVAN [illegible]
DOB:
B/M

Indictment for

Burglary 1st Degree

FILED
6/2/2010 5:18:13 PM
JULIE J. ARMSTRONG
CLERK OF COURT

ATT
GS
SOL
AG

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS IN THE NINTH JUDICIAL CIRCUIT
James Ivan Aiken, #294853 Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2019-CP-10-01873 **FINAL ORDER OF DISMISSAL**

FILED
2023 JUN 26 PM 2:07
JULIE J. ARMSTRONG
CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by James Aiken (Applicant) on April 12, 2019. Respondent made its Return and moved to summarily dismiss the action as procedurally barred pursuant to the Uniform Post-Conviction Procedures Act, located at section 17 27-10 to -160 of the South Carolina Code.

After review of the record and pleadings, this Court agreed this application should be summarily dismissed and provisionally dismissed the action by way of a Conditional Order of Dismissal filed on August 24, 2020, giving Applicant twenty days from the date of service of said Order to show why the dismissal should not become final. Attached to this Final Order and incorporated herein by reference is an Affidavit of Service indicating Applicant was served the Conditional Order of Dismissal on November 6, 2020.

On September 21, 2020, Applicant filed a Response to the Conditional Order of Dismissal asserting the statute of limitations should not apply because Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019), announced a new rule of law—that PCR counsel's failure to file a Rule 59(e), SCRCP, motion "cannot prevent the [state supreme court] from remanding claims of ineffective assistance of counsel when the PCR court's order does not comply with section 17-27-80" of the

South Carolina Code.[1] Applicant further asserts the PCR court did not make specific findings of fact or conclusions of law on at least one issue raised,[2] and he did not waive his right to appeal those issues. Finally, he contends this action is not successive because it is based on a new rule of law, and successive PCR applications are allowed when an applicant has been denied complete access to the appellate process.

Applicant misconstrues Fishburne. Contrary to his assertion, Fishburne did not announce a new rule of law. Rather, the Court in Fishburne reiterated what it has reiterated many times before—that section 17-27-80 requires the PCR court to make specific findings of fact and conclusions of law as to each allegation raised by a PCR applicant. See Fishburne, 427 S.C. at 512, 832 S.E.2d at 587 ("Over the years, we have issued numerous opinions addressing a PCR court's failure to make adequate findings of fact and conclusions of law regarding duly raised issues."). In issuing the remand, the Court rejected the State's preservation argument but found the argument was nevertheless valid. See id. at 515, 832 S.E.2d at 589 ("We acknowledge the validity of the State's preservation argument, and we acknowledge our prior decisions have been somewhat inconsistent as to whether a Rule 59(e) motion is required to preserve an applicant's request to remand to the PCR court for the consideration of particular issues in which the PCR court failed to make sufficient findings of fact and conclusions of law."). Ultimately, because Fishburne did not announce a new rule of law, it does not provide an adequate basis for setting aside the statute of limitations or the prohibition against successive applications.

Further, Applicant *did* appeal the denial of his first PCR application. Unlike Fishburne, however, Applicant did not raise to the state Supreme Court any issue that he contended was not

[1] Applicant previously raised this issue in his amended application, filed February 12, 2020.
[2] Applicant, however, does not set forth what that issue was.

adequately addressed by the PCR court. See James Ivan Aiken v. State, Appellate case number 2013-000083. In fact, Applicant did not set forth in his response to the Conditional Order of Dismissal any specific issue the PCR court allegedly failed to rule on. Thus, Applicant has not set forth a valid basis for an evidentiary hearing or shown why the Conditional Order of Dismissal should not become final.

IT IS THEREFORE ORDERED that for the reasons set forth in the Court's Conditional Order of Dismissal, this application for post-conviction relief is hereby **DENIED AND DISMISSED WITH PREJUDICE.**

Should Applicant wish to procure appellate review, he must file and serve a notice of appeal within thirty days of this Order. See Rule 203, SCACR. Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this _____ day of 6/12, 2023.

ROGER M. YOUNG, SR.
Chief Administrative Judge
Ninth Judicial Circuit

_____, South Carolina