



Thomas E. Hite, Jr.* | Heather Hite Stone | Thomas E. Hite, III

July 10, 2013

Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED

JUL 17 2013

RE: Antjuan Tobias Greene v. State of South Carolina
C/A No.: 2012-CP-01-093

S.C. SUPREME COURT

Dear Clerk:

Enclosed please find the original and one (1) copy of the Notice of Intent to Appeal along with Proof of Service with regards to the above referred to case. Please file the copy with your Court and return it to me in the envelope I've included for your convenience.

Should you have any questions, please feel free to contact Mr. Hite. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Ashley Quarles".

Ashley Quarles
Legal Assistant to Thomas E. Hite, III

Enclosures

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

Honorable Clifton Newman, Circuit Court Judge

Case No.: 2012-CP-01-093

Antjuan Tobias Greene, #311128.....Petitioner,

v.

State of South Carolina.....Respondent.

NOTICE OF INTENT TO APPEAL

The Petitioner, Antjuan Tobias Greene, appeals the Honorable Clifton Newman's June 28, 2013 order denying Post – Conviction Relief to the Petitioner. Undersigned counsel received notice of entry of the order on July 9, 2013. A copy of the order on appeal is attached to this notice.

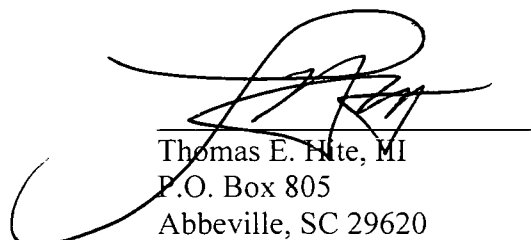
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JUL 17 2013

S.C. SUPREME COURT

July 16th, 2013

Respectfully submitted,



Thomas E. Hite, MI
P.O. Box 805
Abbeville, SC 29620
Attorney for Petitioner

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

Honorable Clifton Newman, Circuit Court Judge

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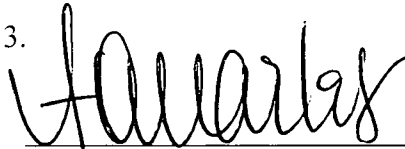
Antjuan Tobias Greene, #311128.....Petitioner,

v.

State of South Carolina.....Respondent.

PROOF OF SERVICE

I, Ashley C. Quarles, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to attorney of record, Rutledge Johnson of the South Carolina Attorney General's Office. I further certify that all parties required by Rule to be served have been served this 10th day of July, 2013.



Ashley Quarles
Legal Assistant to Thomas E. Hite, III
P.O. Box 805
Abbeville, SC 29620

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

2012-CP-01-0093

Applicant,

ORDER OF DISMISSAL

V.

State of South Carolina,

Respondent.

TRUE COPY
 BY *Shirley J. Johnson*
ABBEVILLE COUNTY CLERK OF COURT

EMILY Y MCMAHAN
CLERK OF COURT

2013 JUN 28 AM 8:47

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE

This matter comes before the Court by way of an Application for Post-Conviction Relief filed March 7, 2012. Respondent made its Return on June 18, 2012. An evidentiary hearing into the matter was convened on March 11, 2012, at the Greenwood County Courthouse. Thomas E. Hite, III, Esquire represented Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. Patricia Bolen, Esquire, and Alexis Bell, Esquire, also testified. This Court had before it a copy of the records of the Abbeville County Clerk of Court, records from the South Carolina Department of Corrections, the trial transcript, and the appellate records.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Abbeville County Clerk of Court. Applicant was indicted at the May 2009 term of the Abbeville County Grand Jury for one count of Malicious Injury to Real Property (2009-GS-01-0211), one count of Criminal/Domestic Violence of a High and

Aggravated Nature (2009-GS-01-0210), and one count of Burglary 1st Degree (2009-GS-01-0209).

Applicant was represented by Alexis Bell and Charles Grose, Esquire. On May 22, 2009 Applicant was tried by jury and convicted of one count of Malicious Injury to Real Property, one count of Criminal/Domestic of a High and Aggravated Nature (CDVHAN), and one count of Burglary 1st Degree. The Honorable Eugene C. Griffith, Jr. sentenced Applicant to thirty (30) days, concurrent, for Malicious Injury to Real Property, ten (10) years, concurrent, for CDVHAN, and twenty (20) years for Burglary 1st Degree.

A Notice of Appeal was timely filed on Applicant's behalf and an appeal was perfected. Applicant was represented by M. Celia Robinson, Esquire. The South Carolina Court of Appeals by written Order affirmed Applicant's conviction and sentence. State v. Greene, 2011-UP-001 (Ct. App. filed on January 4, 2012). The Remittitur was sent on January 25, 2012.

In his current Application, Applicant alleged he is being held unlawfully for the following reasons:

1. "Ineffective Assistance of Trial Counsel"
2. "Ineffective Assistance of Appellate Counsel"

At the hearing, Applicant proceeded on his claims of ineffective assistance of trial counsel. Although he raised ineffective assistance of appellate counsel, Applicant, through counsel, affirmatively waived this allegation at the PCR hearing.

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 at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their

testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRPC). Where ineffective assistance of counsel is alleged as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. at 442, 334 S.E.2d at 814, *citing* Strickland. Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

This Court finds Applicant's testimony regarding Counsel's ineffectiveness is not

credible while also finding Counsel's testimony credible.

Failure to call witnesses

Applicant alleges Counsel failed to call certain witnesses at trial. Applicant testified had Counsel interviewed witnesses, he would have had a better case. Counsel testified she spoke with Applicant's brother, although she did not realize it was Applicant's brother at the time. Counsel also stated she called Applicant's mother multiple times, but Applicant's mother did not return Counsel's phone calls.

Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). Applicant's mere speculation as to what a witness's testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness's failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

Applicant claims Counsel failed to call witnesses at trial that would have testified on his behalf. However, Applicant failed to present these witnesses at the PCR hearing, and therefore, no prejudice can be shown pursuant to Underwood. Furthermore, Counsel attempted to contact witnesses on Applicant's behalf, but at least one witness would not return Counsel's phone calls. This Court finds Applicant has failed to carry his burden of proving Counsel was ineffective for failing to call witnesses on Applicant's behalf at trial or any resulting prejudice. Thus, this allegation is denied.

Burglary, 1st degree and Victim's consent

Applicant alleges Counsel was ineffective for questioning Victim as to her consent to Applicant's entrance into the residence as a defense to the Burglary, 1st degree charge.

Applicant testified he did not consider the Burglary, 1st degree charge serious because he lived at Victim's residence. On cross-examination, Applicant admitted there was evidence presented at trial that he did not live at the residence or that Victim consented to his entrance that night.

Counsel testified she did not ask Victim directly whether Victim allowed Applicant in the residence. She could not remember whether she chose not to ask the question or whether she mistakenly did not ask Victim. She testified if Victim would have answered in the affirmative, there would be grounds for dismissal of the case. However, Counsel also testified there was evidence that Applicant did not possess a key to the residence.

Upon the Court's questioning, Counsel agreed that, according to Victim's testimony, Applicant came to the residence around midnight and was kicking on the door. She also agreed Victim stated Victim did not let Applicant into the house and attempted to slide a dryer in front of the door to prevent Applicant's entrance.

This Court finds Counsel was effective in her representation of Applicant in relation to her cross-examination of Victim. While an affirmative answer from Victim as to consent would have been grounds for dismissal of the Burglary charge, the opposite is also true. Had Counsel asked Victim whether she consented to Applicant's entrance and the answer was "no," there would have been more confirmatory evidence that Applicant did not have consent to be in Victim's residence. Further, the evidence at trial firmly establishes that Applicant did not have Victim's consent that night as he did not possess a key, approached the residence around

midnight, and kicked the door while Victim was attempting to place a dryer in front of the door to prevent Applicant's entrance. Moreover, Applicant failed to present Victim's testimony at the PCR hearing that she consented to Applicant's entrance of the residence that night. Therefore, Applicant can prove no resulting prejudice in Counsel's failure to question Victim directly about her consent pursuant to Bannister, *supra*. Thus, this allegation is denied.

Failure to advise to testify

Applicant also alleges Counsel was ineffective for failing to advise him about whether or not to testify at trial.

Applicant testified he was not advised concerning his right to testify at trial. He also asserted he wanted to testify, and his testimony would have changed the outcome of the trial.

Counsel testified she adequately conferred with Applicant and that she discussed Applicant's testimony with him after the close of the State's case. Counsel also stated Counsel Grose would have discussed the pros and cons of Applicant testifying with Applicant.

This Court finds Applicant's testimony not credible while finding Counsel's testimony credible. First, "[a]n on-the-record waiver of a constitutional or statutory right is but one method of determining whether the defendant knowingly and intelligently waived that right." Brown v. State, 317 S.C. 270, 272, 453 S.E.2d 251, 252 (1994). Second, this Court finds Counsel made Applicant fully aware of his right to testify or remain silent after the close of the State's case. Based on the aforementioned reasons, this Court finds Applicant knowingly and voluntarily waived his right to testify at his trial. Furthermore, Applicant, while alleging his testimony would have changed the outcome of the case, failed to state specific reasons why and how the trial would have been different had he testified. To say the trial's outcome would have been different without meeting his burden of proof is completely speculative. Accordingly, this

allegation is denied.

Failure to inform of plea offers

Applicant also claims Counsel was ineffective for not relaying plea offers from the State to him.

Solicitor Patricia Bolen testified the first offer from the State would have been for Applicant to plead straight up to CDVHAN with the Burglary and Malicious injury charges being dropped. She would have asked for a sentencing range of two and a half to three years. She also stated Victim wanted Applicant to serve more than three years. Solicitor Bolen testified while she did not officially revoke the offer, her office has a policy that on the day of trial, all offers are off of the table.

Applicant testified he met with Counsel six or seven times, and there was an offer from the State, but nothing in writing. He stated he thought Counsel could have gotten a more favorable offer. Applicant also testified he would have accepted the offer after he saw the evidence in the case: the medical report and pictures of Victim.

Counsel testified the offer from the State was the one about which Solicitor Bolen testified. She also stated she met with Solicitor Bolen and Judge Maddox, who said he would probably sentence Applicant to three years. However, Counsel testified Applicant would not plead to CDVHAN, but wanted to plead to just CDV, and in doing so, rejected the State offer. Counsel confirmed that all offers were verbal offers.

Next, Counsel testified she spoke with another judge about a plea to CDVHAN and wanted to speak with Solicitor Bolen about a plea for four years. She stated Solicitor Bolen said let the judge decide a sentence around two and a half years, plus probation. Counsel then testified Applicant did not want probation. Counsel stated Applicant rejected this offer and said

the most he was willing to serve was eighteen months.

Counsel testified she urged Applicant to accept the plea offers, but Applicant rejected the offers. Counsel also stated it was the Applicant's decision to reject the offers from the State.

This Court finds Applicant's testimony regarding Counsel's failure to relay plea offers from the State is not credible while also finding Counsel's testimony credible.

"Plea bargains rest on contractual principles." United States v. Ringling, 988 F.2d 504, 506 (4th Cir. 1993). "A plea agreement is only an "offer" until the defendant enters a court-approved guilty plea. A defendant accepts the "offer" by pleading guilty." Reed v. Becka, 333 S.C. 676, 688, 511 S.E.2d 396, 402 (Ct. App. 1999).

In this case, Solicitor Bolen offered Applicant a deal where Applicant would plead straight up to CDVHAN in exchange for dropping the Burglary and Malicious injury charges, however, Applicant rejected this offer. As plea offers are subject to contract principles, once Applicant rejected the offer, the offer is no longer available, and Solicitor Bolen was under no obligation to offer another plea bargain. However, as all parties indicate, the State offered Applicant another plea bargain for two and half years with probation following. As Counsel testified, Applicant decided to reject this offer as he did not want to serve a probationary period.

Based on the testimony presented at the PCR hearing, this Court finds Counsel was effective in relaying plea offers from the State to Applicant. It was Applicant's decision to reject these offers and take his chances at trial. This claim is one of buyer's remorse. Counsel rendered effective assistance of counsel, and Applicant can prove no resulting prejudice on this claim. Accordingly, this allegation is denied.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not

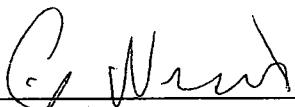
established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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

IT IS THEREFORE ORDERED:

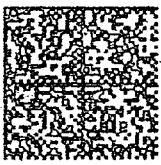
1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED.

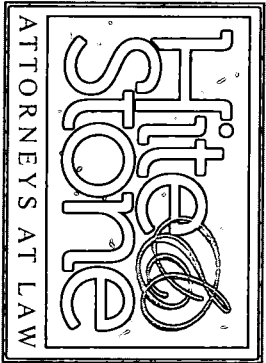


Clifton B. Newman
Presiding Circuit Court Judge
Eighth Judicial Circuit

June 14, 2013
Columbia, South Carolina



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