

PCR

The Brooks Law Office, LLC

CHARLES T. BROOKS, III, ATTORNEY AT LAW

IRMA R. BROOKS, ATTORNEY AT LAW

309 BROAD STREET ~ SUMTER, SOUTH CAROLINA 29150
POST OFFICE BOX 3512 ~ SUMTER, SOUTH CAROLINA 29151
(803) 418-5708

FAX: (803) 934-9618 TOLL FREE: (877) 770-8792

Email: cbrooks@ctbrooks.com

July 12, 2013

South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

RE: Terry Dunovant, 334019 v State of South Carolina
Case No. 2011-CP-46-3371

Dear Sir or Madam:

Enclosed herewith you will find the **Notice of Appeal, Order of Dismissal**, along with a **Proof of Service** in reference to the above named Applicant.

If you have any questions or concerns, please contact my office at the number stated above.

With kind regards, I am

Sincerely,



Charles T. Brooks, III
CTB/srw

Enclosed as stated

Cc: J. Rutledge Johnson, Office of Attorney's General
South Carolina Office of Appellate Defense
Terry Dunovant, 334019

RECEIVED
JUL 18 2013
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas
Honorable Edgar W. Dickson, Circuit Court Judge

Case No: 2011-CP-46-3371

Terry Dunovant.....Appellant
S.C.D.C. 334019
v.
The State.....Respondent

NOTICE OF APPEAL

Terry Dunovant, appeals his Denial for Post Conviction Relief in this case. The order of Dismissal was imposed and signed by the Honorable Edgar W. Dickson, June 27, 2013, which I, Charles T. Brooks, III, received on July 11, 2013.

RECEIVED

JUL 18 2013

S.C. SUPREME COURT



Charles T. Brooks, III
309 Broad Street
Post Office Box 3512
Sumter, South Carolina, 29151
(803) 418-5708
Attorney for Appellant

Other Counsel on Record:
J. Rutledge Johnson, Esquire
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3970

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas
Honorable Edgar W. Dickson, Circuit Court Judge

Case No: 2011-CP-46-3371

Terry Dunovant.....Appellant
S.C.D.C. 334019
v.
The State.....Respondent

PROOF OF SERVICE

I, the undersigned, do hereby certify that on this 15th day of July, 2013, I served the foregoing **Notice of Appeal, Order of Dismissal**, as well as **Proof of Service** in this matter by depositing a true copy of it in the United States Mail, postage prepaid, on July 15, 2013, addressed to the following as indicated below:

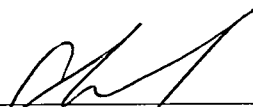
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

South Carolina Office of Appellate Defense
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29211-1589

Office of Attorney's General
Attn: J. Rutledge Johnson, Esquire
Post Office Box 11549
Columbia, South Carolina 29211-1549

Terry Dunovant, 334019
McCormick Correctional Institution
386 Redemption Way
McCormick, South Carolina, 29899

Dated: July 15, 2013



Charles T. Brooks, III
Attorney for the Appellant
309 Broad Street
Sumter, South Carolina 29150
(803) 418-5708

found guilty of all charges as indicted. The Honorable John C. Hayes, III sentenced the Applicant to confinement for thirty (30) years for Kidnapping and twenty (20) years, concurrent, for each count of Criminal Sexual Conduct, 1st Degree.

A notice of appeal was filed and an appeal perfected. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Dunovant, Op. No. 2010-UP-546 (S.C. Ct. App. filed December 16, 2010). The Remittitur was issued on January 5, 2011

In his application for post-conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel
 - a. "Counsel failure to investigate and interview witness constituted ineffective assistance"
 - b. "Counsel failed to challenge the chain of custody of the evidence"
 - c. "Counsel failed to request that applicant's statement be suppressed"
 - d. "Counsel ineffective for allowing the state to admit evidence of applicant's prior bad acts"
 - e. "Counsel ineffective for not objecting to judge prematurely telling the jury that they were free to talk about the case"
 - f. "Counsel ineffective for failure to subpoena 2 witnesses"
 - g. "Counsel failure to make an objection at the time of evidence ineffective"
2. Ineffective assistance of appellate counsel
 - a. "Appellate Counsel ineffective for failure to cite authority which would support his claim"
 - b. "Appellate Counsel ineffective for failure to request a complete trial transcript"
 - c. "Counsel's failure to raise an appeal issue of admissibility of nurse hearsay testimony in effective"

At the hearing, the Applicant proceeded on his claims of ineffective assistance of trial counsel.

SUMMARY OF TESTIMONY

The Applicant testified he believed Counsel was ineffective for failing to investigate and subpoena witnesses, failing to challenge the chain of custody of the forensic evidence, failing to



challenge the jury hearing of Applicant's prior bad acts, failing to object to the trial judge's instruction for the jury to prematurely deliberate, and failing to have the charges dismissed under the Interstate Detainer Agreement.

On cross-examination, the Applicant admitted no witnesses were present to testify on his behalf at the PCR hearing. He also admitted that he chose to testify and was able to relay to the jury his version of the facts. He further admitted the jury apparently believed Victim's version of the facts beyond a reasonable doubt as he was convicted of the kidnapping and sexual assault.

Counsel testified this case was one of a violent rape committed against Victim in a rural area. He stated the evidence the State presented at trial was a video from the gas station where Applicant picked Victim up in his car, along with testimony from Victim, witnesses, and Applicant. Counsel testified identification was never a factor, nor was the issue of penetration. The only factual issue in this case was whether Victim consented to the sexual encounter or was forced to have sexual relations with Applicant. Counsel then stated the case boiled down to Victim's credibility against Applicant's credibility. Counsel testified while he researched Victim's background, he wished he would have conducted more investigation into Victim's job history, friends she might have been with, and allegations of prostitution. He also stated he did not hire a private investigator.

On cross-examination, Counsel testified Victim had extensive physical injuries from the incident. He also admitted had he conducted more investigation into Victim's background and her version of the facts were confirmed, it would have been more damaging to Applicant's case at trial. Counsel also testified he extensively cross-examined the witnesses in the case based on his experience as a defense attorney in many prior criminal sexual conduct cases.

Counsel testified he did not challenge the chain of custody of the forensic evidence because it was not an issue in this case. Again, Counsel stated this case revolved around Victim's consent of the sexual encounter. Lastly, Counsel stated he did not move to have the charges dismissed under the Interstate Detainer Agreement because it was completely inapplicable to this case as Applicant was extradited back to South Carolina.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. The Court also has read the trial transcript, all of which assists the Court in judging the ~~the~~ ^{witnesses'} credibility. The Court finds the testimony of the Applicant concerning ineffective assistance of counsel not credible while finding the testimony of Gary Lemel, Applicant's trial counsel, very credible.

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

The 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), SCRCPP). Where ineffective assistance of counsel is alleged as a ground for relief, the 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, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the 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 the 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.

Failure to Interview/Call witnesses on the Applicant's behalf

The Applicant alleges Counsel was ineffective for failing to interview witnesses on his behalf.

At the PCR hearing, the Applicant testified Counsel failed to interview witnesses from the scene the night of his arrest.

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). The Applicant's mere speculation as to what a witnesses' 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' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

This Court finds Counsel was not ineffective for failing to interview or subpoena witnesses on the Applicant's behalf. The Applicant failed to produce any testimony or evidence at the PCR hearing to show what these witnesses would have testified to at trial or how their testimony would have altered the outcome of his trial. Additionally, the Applicant has failed to prove any resulting prejudice from Counsel's alleged shortcoming. Accordingly, this allegation is denied.

Victim's background

Additionally, the Applicant alleges Counsel was ineffective for not investigating Victim's background more thoroughly.

The Applicant testified Counsel failed to interview and subpoena witnesses to prove Victim was a prostitute and therefore, the sexual encounter was consensual.

Counsel testified while he would have liked to have more thoroughly investigated Victim's background and version of the facts, had he done so and confirmed the facts as presented at trial, it would have damaged Applicant's case.

This Court finds Counsel was not ineffective with regards to Victim's background. Counsel specifically cross-examined Victim in this case as to attempt to show she was a prostitute. His questions and argument were consistent with the defense theory of the case. E.g. Tr. p. 594 ("Q: So this was the second person that you were riding with that night that didn't take you home?"); Tr. 706 ("There were discussions before they ever get into the car. Each side knew what the other was doing,



what they were looking for.”) This Court finds any regret on the part of Counsel was due to hindsight and not ineffective assistance. Additionally, the Applicant failed to provide evidence or testimony of witnesses that would prove that Victim was a prostitute and that the sexual encounter was consensual. Further, this Court finds no resulting prejudice from Counsel’s representation. Accordingly, this allegation is denied.

Other allegations

While the Applicant alleged in his application and at the evidentiary hearing that Counsel was ineffective for failing to challenge the chain of custody of the forensic evidence, failing to challenge the jury hearing of Applicant’s prior bad acts, failing to object to the trial judge’s instruction for the jury to prematurely deliberate, and failing to have the charges dismissed under the Interstate Detainer Agreement, this Court finds Applicant failed to meet his burden of proving Counsel’s ineffectiveness. Specifically, Applicant failed to produce evidence sufficient to show how the trial’s outcome would have been different had Counsel objected or challenged the above issues. Applicant also failed to show how these alleged deficiencies prejudiced his trial. Therefore, these allegations are 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!



Edgar W. Dickson
Presiding Circuit Court Judge
Sixteenth Judicial Circuit

6/27, 2013

Beaufort, South Carolina

THE BROOKS LAW OFFICES, LLC
309 BROAD STREET
P.O. BOX 3512
SUMTER, S.C. 29151

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South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

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