

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Mark Hayes, Circuit Court Judge

Case No. 2011-CP-42-3860

Perry Keith Strickland, # 236435,

Plaintiff/Applicant

vs.

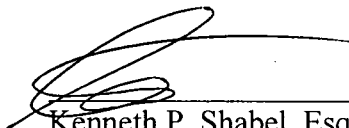
State of South Carolina,

Respondent

NOTICE OF APPEAL

Perry Keith Strickland, South Carolina Department of Corrections Number 236435, hereby appeals the order of the Honorable J. Mark Hayes, dated July 24, 2013 in Case Number 2011-CP-42-3860.

August 5, 2013


Kenneth P. Shabel, Esq.
Campbell & Shabel, LLC
104 N. Daniel Morgan Ave, Suite 201
Spartanburg, S.C. 29306
Telephone: 864-583-0001
FAX: 864-583-1199
Attorney for Applicant

Other Counsel of Record:

Suzanne H. White
SC Attorney General's Office
PO Box 11549
Columbia, SC 29211

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S.C. Supreme Court

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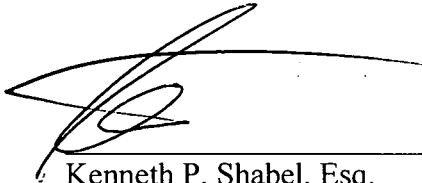
State of South Carolina,

Respondent

PROOF OF SERVICE

I certified that I have served the Notice of Appeal by depositing a copy of it in the United States Mail, postage prepaid, on the State of South Carolina, addressed to its attorney of Record, Suzanne H. White, Assistant Attorney General, Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549

August 5, 2013



Kenneth P. Shabel, Esq.
Campbell & Shabel, LLC
104 N. Daniel Morgan Ave, Suite 201
Spartanburg, S.C. 29306
Telephone: 864-583-0001
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S.C. Supreme Court

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STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS)

COUNTY OF SPARTANBURG)

SEVENTH JUDICIAL CIRCUIT)

Perry Keith Strickland, #236435)

2011-CP-42-3860)

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 filed September 6, 2011. The Respondent made its Return on or about July 17, 2012. An evidentiary hearing into the matter was convened on April 2, 2013, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Kenneth P. Shabel, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. John G. Reckeneil, Esquire, testified on behalf of Respondent. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, the Appellate Court records, and the trial transcript.

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PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Applicant was indicted at the May 2007 term of the Spartanburg County Grand Jury for murder (06-GS-42-

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1226) and assault and battery with intent to kill (06-GS-42-1225)¹. The Applicant was represented by John G. Reckenbeil, Esquire. On July 11, 2007, the Applicant proceeded to trial and was convicted by a jury of the lesser included charges of voluntary manslaughter and assault and battery of a high and aggravated nature. He was sentenced by the Honorable J. Derham Cole to concurrent sentences of twelve years for voluntary manslaughter and ten years for assault of a high and aggravated nature.

A timely Notice of Appeal was filed and an appeal perfected. The South Carolina Court of Appeals affirmed the conviction. State v. Strickland, Op. No. 4714 (filed July 21, 2010). A Petition for Rehearing was filed and subsequently denied by the Court on August 27, 2010. Applicant then filed a Petition for Writ of Certiorari to the South Carolina Supreme Court, which was denied on April 7, 2011. The Remittitur was returned on April 12, 2011.

ALLEGATIONS

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

1. Ineffective assistance of counsel, in that;
 - a. Counsel provided erroneous advice regarding testifying,
 - b. Counsel failed to ensure Applicant received a preliminary hearing,
 - c. Counsel failed to object to improper and invalid indictment,
 - d. Counsel failed to object to hearsay violations, prior inconsistent statements, going beyond a ten year period for prior bad acts, closing arguments by prosecutor,
 - e. Counsel conspired with State to select a biased jury,
 - f. Counsel failed to request special self-defense jury instructions,

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¹ The indictments were ultimately amended pursuant to the jury verdicts for the lesser included charge on each indictment.

- g. Counsel failed to call witnesses on Applicant's behalf,
 - h. Counsel failed to inform Applicant of evidence State planned on using against him,
2. Court error, in that;
 - a. Court denied Applicant right to have counsel of choice when termination of counsel was denied;
 - b. Court abused discretion by telling prosecutor how to use Applicant's prior record to impeach Applicant,
 - c. Court improperly denied directed verdict motion,
 3. Lack of subject matter jurisdiction,
 4. Due process violation.

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. § 17-27-80 (2003).

This Court notes that Applicant did not pursue the following allegations at the hearing: Counsel conspired with State to select a biased jury, Counsel failed to request special self-defense jury instructions, Counsel failed to call witnesses on Applicant's behalf, Counsel failed to inform Applicant of evidence State planned on using against him, and Counsel failed to object to improper and invalid indictment. Therefore, this Court finds that these issues were voluntarily abandoned by the Applicant.

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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), SCRCP). 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, 80 L.Ed.2d 674, 692 (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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 186, 188, 480 S.E.2d 733, 735 (1997) (citing Strickland).

Applicant testified that he met with Counsel approximately four times prior to the trial and requested a preliminary hearing, but never received one. Counsel testified that he was retained to represent the Applicant in late 2005 and met with Applicant four to five times prior to trial. Counsel testified that he often had trouble tracking the Applicant down for meetings. This Court finds no deficiency in Applicant's allegation that he was never given a preliminary hearing, as there is no constitutional right to a preliminary hearing. State v. McClure, 277 S.C.

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432, 289 S.E.2d 158 (1982); State v. Keenan, 278 S.C. 361, 296 S.E.2d 676 (1982). Therefore, this Court finds that this allegation lacks merit and is denied and dismissed.

Applicant testified that he was originally arrested for voluntary manslaughter, but was tried for murder and only told at the time of trial that the charge was murder. However, Applicant testified that he never saw an indictment for murder. Applicant testified that he does not believe that he caused the injuries that resulted in the victim's death. Counsel testified that he informed Applicant of the murder indictment and discussed the facts of the case, possible witnesses, and reviewed discovery materials. Counsel testified that the Applicant was aware of the fact that he was being tried for murder. To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). The "brevity of time and limited consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). When claims of ineffective assistance of counsel are based on lack of preparation time, an Applicant challenging his conviction must show specific prejudice resulting from counsel's alleged lack of time to prepare. United States v. Cronin, 466 U.S. 648, 104 S.Ct. 2039 (1984); U. S. v. LaRouche, 896 F.2d 815 (4th Cir. 1990). This Court finds that the Applicant has failed to meet his burden of proof as to this claim. The Applicant failed to provide any information that Counsel would have discovered or any defenses that could have been developed had there been additional work done on Counsel's behalf. Therefore, this allegation is dismissed.

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Applicant testified that he did not testify at trial because Counsel advised him that his prior record would be used against him. Applicant also testified that Counsel advised him that the testimony would support a charge of manslaughter, which he was charged with anyway. Counsel testified that he did advise Applicant that it would not be in his best interest to testify because of his prior record and attitude of animosity. Further, Counsel testified that he believed that the Applicant's testimony would have supported a charge for manslaughter even more.

This Court finds that the Applicant himself demonstrated one of the difficulties in his argument, being that the Applicant had a difficult time explaining how the altercation occurred before this Court. As the Applicant explains the altercation, this Court finds that he has difficulty overcoming the "heat of passion" element of voluntary manslaughter. Therefore, this Court cannot find that a different outcome would have occurred had the Applicant not been advised to not testify. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). This Court finds that Counsel articulated a valid strategy for advising the Applicant not to testify. Therefore, the claim is denied and dismissed.

Applicant testified that Counsel failed to properly impeach both Tony and Jennifer with inconsistencies in their statements. Counsel testified that he believed he effectively cross-examined both Jennifer and Tony on inconsistencies in their statements. The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the

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desired investigation and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995). The Applicant did not proffer any questions counsel allegedly failed to ask, and did not present any testimony showing the witnesses' answers at trial would have been different. Accordingly, the Applicant has not shown that a different approach to cross-examination would have been beneficial to the defense. This claim is denied and dismissed.

Applicant also alleged that the Solicitor intended to use convictions more than ten years old against him if he testified, and made improper comments during his closing argument, but Counsel failed to object to either. This Court finds that the Applicant has failed to meet his burden of proof as to these claims. This Court finds no merit in Applicant's claims and finds no deficiency on Counsel's behalf related to these issues.

Although the Applicant appeared sincere in his position of innocence, this Court finds the testimony of Counsel to be more credible than the testimony of the Applicant. This Court finds, after reviewing the documents and considering the testimony, that the Applicant has failed to meet his burden of proof in establishing that Counsel was ineffective. This Court finds a deficiency on Counsel's behalf and finds that the Applicant failed to show any prejudice that may have resulted from Counsel's alleged deficiencies. Further, this Court finds that Counsel's testimony regarding his strategy for the trial seemed appropriate and successful, as the Applicant was found guilty of two lesser-included offenses. Accordingly, this allegation is dismissed.

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Court Error

This Court finds that although raised in the application, the Applicant failed to pursue this allegation at the hearing. Therefore, this Court finds that the Applicant voluntarily abandoned this allegation.

Subject Matter Jurisdiction

This Court finds that although raised in the application, the Applicant failed to pursue this allegation at the hearing. Therefore, this Court finds that the Applicant voluntarily abandoned this allegation.

Due Process Violations

This Court finds that although raised in the application, the Applicant failed to pursue this allegation at the hearing. Therefore, this Court finds that the Applicant voluntarily abandoned this allegation.

Summary

This Court finds in regards to the allegations of ineffective assistance of counsel, Counsel's testimony is more credible than the Applicant's testimony. This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in his representation, and that Counsel's conduct does not fall below the objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of Strickland test – 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 his representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes the Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, this allegation is denied.

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CONCLUSION

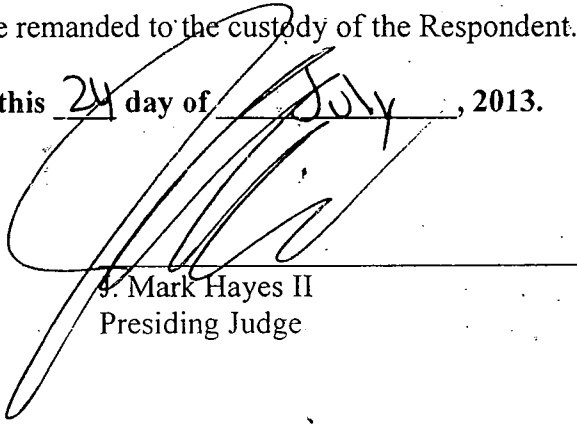
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court cautions 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), SCRPC, 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 this 24 day of JULY, 2013.



Mark Hayes II
Presiding Judge

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Shawn M. Campbell
Kenneth P. Shabel

Campbell & Shabel

ATTORNEYS AT LAW

OF COUNSEL:
Sean Giovannetti

Sender's Email: jmoss@gc-lawfirm.com

A

VIA CERTIFIED MAIL

The Honorable Daniel Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

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S.C. Supreme Court

**Re: Perry Strickland, # 236435 vs. State of South Carolina
2011-CP-42-3860**

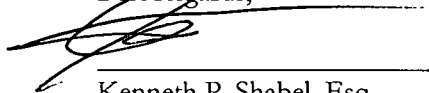
Dear Mr. Shearouse:

Enclosed for filing are an original and a copy of a notice of appeal in the above-referenced case. I have been appointed to serve as attorney for the PCR applicant, Perry Strickland, in this action. Also enclosed are the following:

- 1) Proof of service of the notice of appeal on the respondent.
- 2) A copy of the order which is to be challenged on appeal.

Insofar as this is an appeal from a Post-Conviction Relief case, I am not enclosing a filing fee, as I believe such fees are waived in these cases.

Best Regards,



Kenneth P. Shabel, Esq.
Campbell & Shabel, LLC
P.O. Box 1793
Spartanburg, S.C. 29304
Telephone: 864-583-0001
FAX: 864-583-1199
Attorney for Appellant

cc: client
Ms. Suzanne H. White, Assistant Attorney General

Campbell & Shabel, LLC
104 N. Daniel Morgan Ave.
Suite 201
Spartanburg, SC 29306

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