

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

HONORABLE J. MICHAEL BAXLEY, Circuit Court Judge

Case No. 2010-CP-16-0590

DANIEL McNEIL, JR

Petitioner,

v.

STATE OF SOUTH
CAROLINA,

Respondent.

2013 AUG -5 PM 12:03
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

FILED

NOTICE OF APPEAL

Daniel McNeil, Jr. appeals the Honorable J. Michael Baxley's February 23, 2012, Order denying post-conviction relief to the Petitioner. Undersigned counsel received notice of a copy of the Full Order on August 1, 2013, after a request for the same to the Darlington County Clerk of Court on July 30, 2013. A copy of the Order on appeal is attached to this notice.

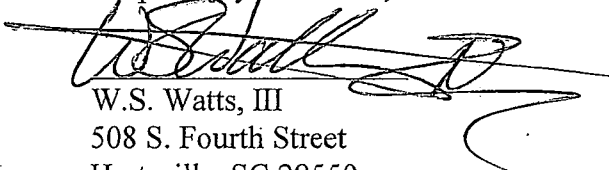
August 2, 2013

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S.C. SUPREME COURT

Respectfully submitted,



W.S. Watts, III
508 S. Fourth Street
Hartsville, SC 29550
Attorney for Appellant

Other Counsel of Record:
Karen C. Ratigan
PO Box 11549
Columbia, SC 29211-1549
Attorney for Respondent

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Scott B. Suggs
**CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.**

Appellate Defense
PO Box 11589
Columbia, SC 29201

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM DARLINGTON COUNTY
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HONORABLE J. MICHAEL BAXLEY, Circuit Court Judge

Case No. 2010-CP-16-0590

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v.

STATE OF SOUTH
CAROLINA,

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PROOF OF SERVICE

Daniel McNeil, Jr. appeals the Honorable J. Michael Baxley's February 23, 2012, Order denying post-conviction relief to the Petitioner. Undersigned counsel received notice of a copy of the Full Order on August 1, 2013, after a request for the same to the Darlington County Clerk of Court on July 30, 2013. A copy of the Order on appeal is attached to this notice.

August 7, 2013

Respectfully submitted,

W.S. Watts, III
508 S. Fourth Street
Hartsville, SC 29550
Attorney for Appellant

Other Counsel of Record:
Karen C. Ratigan
PO Box 11549
Columbia, SC 29211-1549
Attorney for Respondent

Appellate Defense
PO Box 11589
Columbia, SC 29201

STATE OF SOUTH CAROLINA)
)
COUNTY OF DARLINGTON)
)
Daniel McNeil, Jr.,)
S.C.D.C. 196118,)

IN THE COURT OF COMMON PLEAS
C.A. No. 2010-CP-16-0590

FILED
2012 MAR -6 AM 11:56
CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

**ORDER DENYING
POST-CONVICTION RELIEF**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed September 7, 2010. Respondent made its return on January 28, 2011. An evidentiary hearing into the matter was convened on January 10, 2012 at the Darlington County Courthouse. Applicant was present at the hearing and represented by W.S. "Trey" Watts, III, Esquire. Karen C. Ratigan, Esquire, of the South Carolina Office of the Attorney General represented Respondent.

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Applicant testified on his own behalf at the PCR hearing. Also testifying was Applicant's trial counsel, Tonya Copeland-Little, Esquire. The Court had before it the trial transcript, the records of the Darlington County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the Respondent's return, and the appellate records.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Darlington County Clerk of Court. Applicant was indicted at the March 2007 term of the Darlington County Grand Jury for first-degree burglary (2007-GS-

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16-0591) and assault and battery of a high and aggravated nature (ABHAN) (2007-GS-16-0592).

He was represented by Tonya Copeland-Little, Esquire.

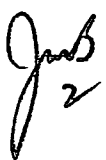
After the State called the case to trial, Applicant was found guilty. On January 23, 2008,

~~the Honorable John M. Milling sentenced Applicant to concurrent terms of fifteen (15) years for~~
first-degree burglary and eight (8) years for ABHAN.

A notice of appeal was filed at the South Carolina Court of Appeals. M. Celia Robinson, Esquire, of the South Carolina Office of Appellate Defense perfected the appeal. The Court of Appeals affirmed Applicant's convictions and sentences. State v. McNeil, Op. No. 2010-UP-325 (S.C. Ct. App. filed June 23, 2010).

ALLEGATIONS

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

- 
1. Ineffective assistance of trial counsel:
 - a. Failed to conduct a pre-trial investigation.
 - b. Failed to contact witnesses.
 - c. Failed to move for forensic evidence to be produced.
 - d. Failed to object to the State submitting inadmissible and irrelevant evidence and testimony.
 2. Trial court error:
 - a. Abuse of discretion in denying the motion for directed verdict.
 - b. Error in admitting evidence and testimony that was inadmissible and irrelevant.

At the PCR hearing, Applicant withdrew the allegations regarding purported trial court error and proceeded upon issues related to ineffective assistance of trial counsel.

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).~~

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).

For an 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, 117-18, 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).

Applicant stated he met with trial counsel three (3) times before trial and they discussed the existence of a restraining order that his ex-girlfriend (who was living at the scene of this incident) had taken out against him before this incident transpired. Applicant stated, however, that they did not discuss whether this restraining order would be used as part of his defense. Applicant stated trial counsel should not have allowed discussion of the restraining order to be

allowed at trial. Applicant stated the restraining order harmed his case at trial because the jury focused upon it and not the evidence. Applicant stated trial counsel should have further investigated his case. Applicant stated trial counsel should have found the names of people who ~~were in the area on the day in question and contacted them to be witness on his behalf.~~

Applicant stated trial counsel should have had the broken knife and brick used in the crime analyzed for DNA evidence.

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Trial counsel testified she was appointed on this case after the Public Defender had already filed motions for discovery. Trial counsel testified she reviewed those materials and discussed them with Applicant several times. Trial counsel testified she had five (5) meetings with Applicant prior to trial and her investigator met with him three (3) other times. Trial counsel testified that the State made a plea offer to dismiss the first-degree burglary charge and offer a four year sentence for ABHAN (essentially a time-served sentence), but Applicant rejected the offer and insisted on a trial. This was strictly against the advice of trial counsel, supervisory Public Defender Robert Kilgo, and the office investigator, all of whom attempted to get Applicant to take the offer. Unfortunately, Applicant insisted he wanted "the truth to come out" at a trial. Trial counsel stated she and Applicant discussed the restraining order several times (that had been taken out by his ex-girlfriend) and the potential impact it could have at trial. Trial counsel stated that, while the restraining order may have been inadmissible, Applicant was determined to introduce evidence about it at trial. Trial counsel stated Applicant was very involved in discussing trial strategy and insisted testimony about the restraining order would help his defense. Trial counsel testified Applicant believed that, as there was testimony that his ex-girlfriend still visited him after the order was issued in violation of that order, it would prove she was not afraid of him. Trial counsel testified that, while she and the investigator visited the

crime scene, canvassed the neighborhood, and spoke to several people, none would admit to being eyewitnesses. Trial counsel testified an independent forensic analysis of the knife would not have been helpful to the case because Applicant admitted to having the knife, and the victim ~~stated he was cut by this knife during the struggle. Applicant was also accused of hitting the~~ victim in the head with a brick during the attack, and inflicting substantial injury on the victim.

This Court finds Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court further finds trial counsel adequately conferred with Applicant, conducted a proper investigation, and was thoroughly competent in her representation.

This Court finds Applicant failed to meet his burden of proving trial counsel erred in not objecting to testimony about the restraining order. Trial counsel testified that, in her discussions with Applicant, he was very clear about wanting information about the restraining order to come into evidence. This Court finds trial counsel discussed the risks and advantages of this strategy with Applicant prior to trial and made a strategic decision not to object to testimony about the restraining order in order to present testimony from Applicant's employer about his ex-girlfriend's repeated attempts to contact him after issuance of the order. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel). This Court notes that, while Applicant intended to use the restraining order as both a shield and a sword against the two victims, instead the restraining order was used against him. This Court finds trial counsel advised him of this possibility. Regardless of the admission of the restraining order, overwhelming evidence of Applicant's guilt was presented at trial. Both Applicant's ex-girlfriend and her new boyfriend testified Applicant had a knife in his possession when he pushed his way into their residence and fought with the new boyfriend.

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Applicant testified he had a knife when he went to the victims' residence. Police testified there was damage to the screen door of the residence and the knife was found on a bed inside the residence. As such, this Court finds testimony about the restraining order did not affect the

~~outcome of Applicant's trial. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722~~
n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

This Court finds Applicant failed to meet his burden of proving trial counsel did not properly investigate his case. To the contrary, this Court finds trial counsel performed an adequate investigation. Trial counsel received and reviewed the discovery materials, visited the crime scene, and utilized an investigator. Neither trial counsel nor the investigator were able to locate individuals who were eyewitnesses on the night in question. Regardless, as these individuals did not testify at the PCR hearing, this Court cannot speculate as to what their trial testimony would have been. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme Court "has repeatedly held a PCR 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.") (emphasis in original). Further, this Court finds there was no reason for trial counsel to have ordered a forensic analysis of the knife or the brick in this case because Applicant admitted the knife was his and it was found in the victim's apartment. This Court notes Applicant failed to present any evidence that forensic testing of the knife or brick would have yielded advantageous results for the defense case. See Jackson v. State, 329 S.C. 345, 495

S.E.2d 768 (1998) (finding the failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result); see also Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) ~~(holding 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).~~

Accordingly, this Court finds Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in her representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel’s performance. This Court concludes 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. In fact, to the contrary, trial counsel’s success in procuring a favorable plea offer was proof of her capable representation, which Applicant rejected.

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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 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 foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing

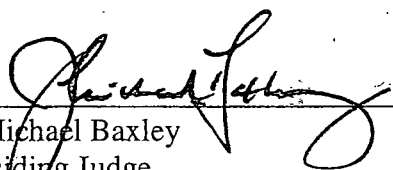
proceedings. Counsel was not deficient and Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises 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 also 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.

IT IS THEREFORE ORDERED:

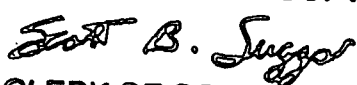
1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That Applicant must remain in the custody of Respondent for the completion of his sentence.

IT IS SO ORDERED this 23rd day of February, 2012.



J. Michael Baxley
Presiding Judge
Fourth Judicial Circuit

Darlington, South Carolina.

TRUE CERTIFIED COPY,

CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

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2012 MAR -6 AM 11:56
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CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

STATE OF SOUTH CAROLINA)
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COUNTY OF DARLINGTON)
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DANIEL MCNEIL, JR., 196118)

IN THE COURT OF COMMON PLEAS

2010-CP-16-0590

Applicant,

vs

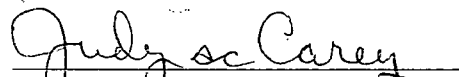
AFFIDAVIT OF SERVICE BY MAIL

STATE OF SOUTH CAROLINA,)
)
Respondent.)

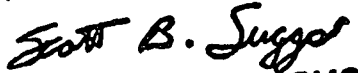
1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Order Denying Post Conviction Relief** of the Respondent in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

W. S. "Trey" Watts, III, Esquire
Post Office Box 3512
Sumter SC 29151

DATED this 5th day of March, 2012.


Judy A. C. Carey, Legal Assistant
For Respondent

TRUE CERTIFIED COPY,


CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

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CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

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CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

FILED



August 2, 2013

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

RE: DANIEL McNEIL, JR. , Petitioner v. State of South Carolina, Respondent
Case No. 210-CP-16-0590

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

- (1) Proof of service of the notice of appeal on the respondent.
- (2) A copy of the order of Dismissal which is to be challenged on appeal.
- (3) This appeal is being filed with the Supreme Court due to the denial of relief and dismissal of Petitioner's Post-Conviction Relief action.

Sincerely,

W.S. Watts, III
508 S. Fourth Street
Hartsville, SC 29550
Attorney for Petitioner

cc: Karen C. Ratigan
PO Box 11549
Columbia, SC 29211-1549
Attorney for Respondent

Appellate Defense
PO Box 11589
Columbia, SC 29201

RECEIVED

AUG 12 2013

S.C. SUPREME COURT

SMITH  WATTS
& ASSOCIATES

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The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
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