

Shawn M. Campbell
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ATTORNEYS AT LAW

OF COUNSEL:
Sean Giovannetti

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

August 5, 2013

VIA CERTIFIED MAIL

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

**Re: Carnell Bland, #294049 vs. State of South Carolina
2012-CP-42-0510**

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, Carnell Bland, 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.

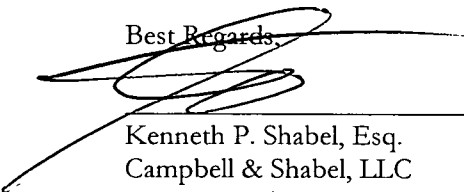
Insofar as this is an appeal from a Post-Conviction Relief case, I am not enclosing a filing fee, as I believe such fees are waived in these cases.

Best Regards,

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S.C. SUPREME COURT


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

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. 2012-CP-42-0510

Carnell Bland, # 294049,

Plaintiff/Applicant

vs.

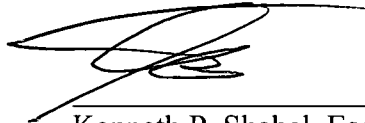
State of South Carolina,

Respondent

NOTICE OF APPEAL

Carnell Bland, South Carolina Department of Corrections Number 294049, hereby appeals the order of the Honorable J. Mark Hayes, dated July 24, 2013 in Case Number 2012-CP-42-0210.

August 5, 2013



Kenneth P. Shabel, Esq.
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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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THE STATE OF SOUTH CAROLINA
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APPEAL FROM SPARTANBURG COUNTY
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Carnell Bland, # 294049,

Plaintiff/Applicant

vs.

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



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Attorney for Applicant

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STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
Carnell Bland, #294049,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2012-CP-42-0510

ORDER OF DISMISSAL

This matter comes before the Court by way of an Application for Post-Conviction Relief filed January 31, 2012. The Respondent made its Return on or about September 27, 2012. An evidentiary hearing into the matter was convened on April 3, 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. William S. Bean, IV, Esquire also testified. 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, the plea transcript, and as Court's Exhibit #1, the transcript of Applicant's co-defendant Jeter's guilty plea.

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 February 2010 term of the Spartanburg County Grand Jury for armed robbery and

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possession of a weapon during the commission of a violent crime (10-GS-42-1158, counts 1 and 2). Applicant was represented by William S. Bean, IV, Esquire. On February 22, 2010, the Applicant pled guilty to armed robbery and the charge of possession of a weapon during the commission of a violent crime was dismissed. Applicant was sentenced by the Honorable J. Derham Cole for a period of fifteen (15) years. The Applicant did not appeal his conviction or sentence.

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 failed to file a direct appeal at Applicant's request
2. Prosecutor misconduct, in that;
 - a. "Codefendant was released, but the hands of one hands of all"
3. Judicial misconduct, in that;
 - a. The judge failed to inform Applicant of the nature of the offense

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 the Applicant voluntarily waived his allegation for prosecutorial misconduct at the beginning of the hearing. The Applicant informed this Court that he would be proceeding on the allegations of ineffective assistance of counsel and judicial misconduct based

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upon the theory Counsel failed to file an appeal following the plea and the trial judge failed to inform Applicant of the nature of the offense.

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 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. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland). With respect to guilty plea counsel, the

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Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

Applicant testified that he meet with Counsel to discuss the charges only once in the week prior to court. Applicant testified he met with Counsel about bond hearings, but was never released on bond. Applicant testified that he wanted Counsel to get a ten year plea deal, even though he testified that he told Counsel multiple times that he was not at the scene. Furthermore, Applicant testified he discussed possible evidence issues dealing with a lack of fingerprints or victim identification. On the day of the trial, Applicant testified that he informed Counsel that Tiffany Hughes could be an alibi witness. Applicant testified that he was not aware whether or not Counsel ever interviewed any witnesses. Applicant testified that Counsel only talked about him pleading to the charges. Applicant also testified that his co-defendant, Alonzo Jeter was prepared to testify to the fact that Applicant was not present at the scene of the robbery.

Counsel testified that he was retained to represent the Applicant a well over a year prior to the scheduled trial. Counsel testified that he met with the Applicant on numerous occasions and talked with him a number of times on the phone. Counsel testified that the Applicant and he talked about co-defendants and Applicant gave Counsel the name of an alibi witness on April 13, 2011. Counsel testified the alibi witness' name was Tiffany Hughes, who had a child with the co-defendant, Alonzo Jeter. However, Counsel testified he interviewed Ms. Hughes and she indicated that she did not recall if Applicant was at her home that night. Counsel felt that her statement did not support her being an alibi witness. Furthermore, Counsel testified that he and the Applicant discussed the possible defenses of the fact that no weapon was ever found and the fact that a fourth co-defendant's charges were dismissed.

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Counsel testified that the other two co-defendants made statements about the incident and were prepared to testify Applicant was at the scene with a gun. However, Counsel testified Applicant claimed he was there but the co-defendants were the ones who actually had the gun. Counsel testified he did not promise a lower sentence, but indicated that he would ask for a lower sentence. Counsel testified that he reviewed with the Applicant the elements of each charge, possible sentence, and evidence that the State had against him prior to the trial. Counsel testified that because this was a home invasion, the facts were disturbing and the Applicant faced a great deal of time. Counsel testified Applicant did not ask him to file an appeal.

This Court finds the testimony of Counsel to be more credible than the testimony of the Applicant. Although the Applicant appeared credible in appearance, his testimony conflicted with or was discredited with other more reliable evidence, including Applicant's own statements at his guilty plea. Although Applicant alleged that Counsel failed to pursue his alibi witness, not only did Counsel testify that he did speak with the witness, but the witness was not presented to testify at the PCR hearing. 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. 1991), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what a witness' 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).

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This Court also finds that the Applicant's allegation that Counsel failed to file an appeal is without merit. The Applicant has alleged that he is entitled to a review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). Counsel has a constitutionally-imposed duty to consult with a defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029 (2000). The Applicant faced significantly more time than he received following his plea to armed robbery. This Court finds Counsel's testimony that the Applicant never asked Counsel to file an appeal to be credible.

This Court finds no deficiency on Counsel's behalf and finds that the Applicant failed to show any prejudice that may have resulted from Counsel's alleged deficiencies. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985). This Court finds that the Applicant has failed to meet his burden of proof. Accordingly, this allegation is dismissed.

Judicial Misconduct

As it relates to the allegation of judicial misconduct, this Court finds that although it was raised in the application, the Applicant did not pursue this issue at his hearing. Therefore, this Court deems the claim of judicial misconduct to be voluntarily abandoned by the Applicant.

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

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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 the 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.

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 the application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

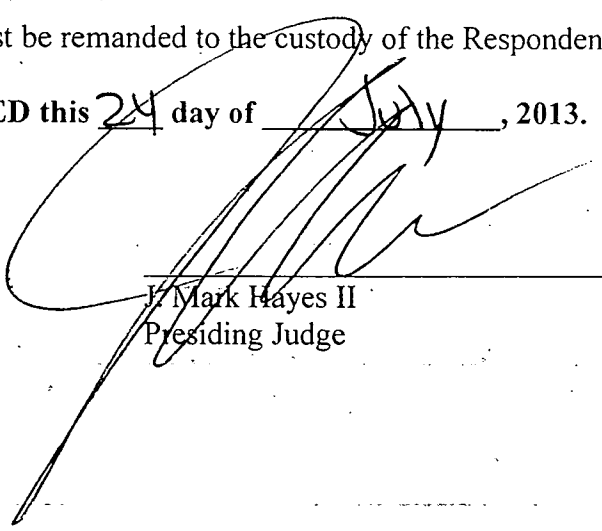
This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR, 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.

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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.



J. Mark Hayes II
Presiding Judge

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