

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2012CP3600203

Roy Johnson Jr

South Carolina State Of

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:
Order of Dismissal

ORDER INFORMATION

This order ends does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

S/ Eugene C. Griffith, Jr.
Circuit Court Judge

2154
Judge Code

7/22/2013
Date

For Clerk of Court Office Use Only

This judgment was entered on **July 22, 2013**, and a copy mailed first class or placed in the appropriate attorney's box on **July 22, 2013**, to attorneys of record or to parties (when appearing pro se) as follows:

Nicole Latonya Singletary 4511 N. Main St. Columbia, SC
29203

James Rutledge Johnson PO Box 11549 Columbia, SC
29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

S/ Jackie S. Bowers

Court Reporter

Jackie S Bowers - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON-PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

Roy Johnson, Jr., #335360,

2012-CP-36-0203

Applicant,

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

FILED
NEWBERRY COUNTY
2013 JUL 22 A 10:48

This matter comes before the Court by way of an Application for Post-Conviction Relief filed April 10, 2012. The Respondent made its Return on July 19, 2012. An evidentiary hearing into the matter was convened on June 4, 2013, at the Laurens County Courthouse. Nicole Singletary, Esquire represented the Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Chad Jenkins, Esquire also testified. This Court had before it a copy of the records of the Newberry County Clerk of Court, records from the South Carolina Department of Corrections, and the trial transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Newberry County Clerk of Court. The Applicant was indicted at the April 2008 term of the Newberry County Grand Jury for Burglary, 1st degree (2008-GS-36-0311), Armed Robbery (2008-GS-36-0312), Kidnapping (2008-GS-36-0313), Assault and Battery of a High and Aggravated Nature (ABHAN) (2008-GS-36-0314) and Possession of a

SEP 18

Weapon during the Commission of a Violent Crime (2008-GS-36-0315) The Applicant was represented by Chad Jenkins, Esquire. On June 15-17, 2009, the Applicant underwent trial by jury and was convicted of all charges as indicted. The Honorable D. Garrison Hill sentenced the Applicant to imprisonment for twenty-five (25) years for Burglary, 1st degree, twenty-five (25) years, concurrent, for Armed Robbery, twenty (20) years, concurrent, for Kidnapping, ten (10) years, concurrent, for ABHAN and five (5) years, concurrent, for the weapons charge.

A Notice of Appeal was timely filed on behalf of the Applicant and an appeal was perfected. The South Carolina Court of Appeals by written Order affirmed the Applicant's conviction and sentence. State v. Johnson, 2011-UP-465 (Ct. App. filed on October 21, 2011). The Remittitur was sent on November 8, 2011.

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

1. "Ineffective Assistance of Counsel"
2. "Insufficiency of Evidence"
3. "Conflict of Interest"

At the hearing, the Applicant proceeded on his claim of ineffective assistance of 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 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).

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This Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. This Court also has read the trial transcript, all of which assists the Court in judging the witnesses' credibility. This Court finds the Applicant's testimony regarding Counsel's ineffectiveness is not credible while also finding Counsel's testimony is very credible.

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), SCRPC). 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 and subpoena witnesses on his behalf.

At the PCR hearing, the Applicant testified Counsel failed to interview and/or subpoena witnesses on his behalf. Specifically, Applicant alleged Counsel failed to track down and interview "Bubba," who would have supposedly testified that he held Applicant at gunpoint and forced Applicant to enter the Victims' house. "Bubba's" testimony would have shown that Applicant was not guilty, but rather a victim of duress. Applicant also stated he gave Counsel information about Hastings Moore, who testified at his first trial, but not his second trial. Counsel testified Applicant gave him no contact information for either of these witnesses.

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. Further, Applicant was unable to give "Bubba's" real name and as such, it would have been impossible for Counsel to find this individual and interview or subpoena him. Additionally, the Applicant has failed to prove any resulting prejudice from Counsel's alleged shortcoming. Accordingly, this allegation is denied.

Failure to object to State's entering Applicant's testimony from first trial into evidence

The Applicant also asserted Counsel was ineffective for not objecting to the State introducing his testimony from his first trial, which resulted in a hung jury, into evidence at his second trial.

The Applicant testified his testimony from his first trial was read into the record by the solicitor at his second trial without objection from Counsel. He also stated Counsel advised him not to testify at his second trial. On cross-examination, Applicant admitted he was questioned by the trial judge concerning his right to testify in his own defense. He stated it was his decision not to testify.

Counsel testified he did not object to the State reading Applicant's testimony from his first trial into the record because Counsel wanted the testimony in evidence. Counsel stated had the State not read Applicant's testimony into evidence, he would have. Counsel testified, in his professional opinion, that Applicant testified about as well as he could have at the first trial. He also stated, by having the State read the testimony, he knew exactly what was being introduced into evidence. Additionally, Counsel testified that because the State read Applicant's testimony into the record, the State was not able to cross-examine Applicant again. Further, Counsel testified because he did not have to introduce Applicant's testimony in his case-in-chief, he was able to preserve last argument to the jury.

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). Counsel articulated valid strategic reasons for allowing the State to read Applicant's testimony from the first trial into the record at Applicant's second trial. Because in this case Applicant's defense was duress and other co-defendants testified that Applicant was a willing participant, Applicant's testimony was a necessity. Not only did Counsel get in the testimony that he wanted from Applicant concerning the defense of duress, but he also preserved last argument. Essentially, Counsel had his cake and ate it too. Had Applicant testified a second time, there is a very likely chance his testimony would have varied in some way, which would have allowed the State to cross-examine him about prior inconsistent statements and thus, allowed the State to attack Applicant's credibility. This Court finds Applicant has not shown that counsel was deficient in that choice of tactics or any resulting prejudice.

Additionally, where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); See also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001), Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (S.C. 1991). Even assuming *arguendo*, Counsel was deficient for not objecting to the State's reading of Applicant's testimony into the record, no resulting prejudice occurred because of the overwhelming evidence of Applicant's guilt in this case. First, Applicant admits he was at the scene and in the house on the night of the incident. (See Tr. p. 122 lines 9-16; p. 128 line 5- p. 129 line 7). His only claim was that he was forced into the house. However, his two co-defendants (Austin Partlow and Chauncey Partlow) both testified Applicant was not forced into committing these

crimes, but was a willing participant and planner of the robbery. (See Tr. p. 76 lines 15-25; p. 79 lines 4-10; p. 80 lines 14-16; p. 84 lines 8-13; p. 157 lines 13-19; p. 160 lines 7-10; p. 161 lines 18-22; p. 162 lines 9-16; p. 162 lines 13-16; p. 176 lines 17-22). At the PCR hearing, Counsel testified evidence of Wal-Mart receipts were discovered between the first and second trial, but were not used at the second trial. These receipts show that Applicant purchased bullets for the gun used in the robbery and ABHAN from Wal-mart, which proves Applicant helped plan and was a willing participant in these crimes. Therefore, based on the testimony at trial and the PCR hearing, there is overwhelming evidence of Applicant's participation in these crimes.

This Court finds the Applicant has failed to meet his burden of proving counsel's performance was deficient or that he was prejudiced thereby. 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.

Except as discussed above, this Court finds that the Applicant failed to meet his burden of proving any of the numerous allegations contained in his application. Therefore, any and all remaining allegations are denied and dismissed.

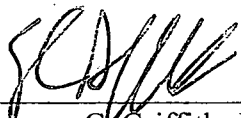
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has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

Rule 71.1(g), SCRCRCP, 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.

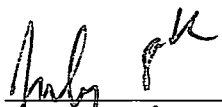
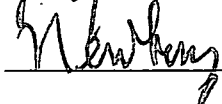
IT IS THEREFORE ORDERED:

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!



Eugene C. Griffith, Jr.
Presiding Circuit Court Judge
Eighth Judicial Circuit


_____, 2013

_____, South Carolina