



LAW OFFICE OF TRICIA A. BLANCHETTE

September 6, 2013
VIA HAND DELIVERY

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

RECEIVED

SEP - 6 2013

RE: James Gunnells v. State; Docket No.: 2010-CP-05-072

S.C. Supreme Court

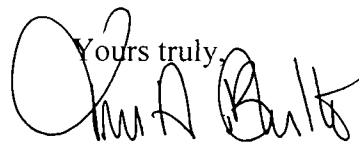
Dear Sir:

Enclosed for filing is a Notice of Appeal for the above PCR case. Also enclosed are the following:

- (1) Proof of service on the Respondent.
- (2) A copy of the Order of Dismissal.

By copy of this letter, I am sending Mr. Parker's completed Affidavit of Indigency to the Office of Appellate Defense.

Thank you for your assistance with this matter. Please contact my office with any questions.

Yours truly,


Tricia A. Blanchette
Attorney at Law

cc: David Spencer, Assistant Deputy Attorney General
Office of Appellate Defense
James Gunnells

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Edgar W. Dickson, Circuit Court Judge

Case No.: 2010-CP-05-072

RECEIVED

SEP - 6 2013

S.C. Supreme Court

James Gunnells,

Petitioner,

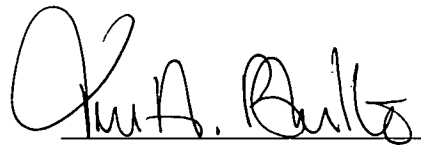
vs.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

James Gunnells, through counsel, appeals the Order of Dismissal issued by the Honorable Edgar W. Dickson August 8, 2013, which was filed on August 13, 2013. Petitioner, through counsel, received notice of the entry of the Order of Dismissal on August 20, 2013.



Tricia A. Blanchette
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(803) 988-0008
Attorney for Petitioner

Other Counsel of Record:

David Spencer
Assistant Deputy Attorney General
PO Box 11549
Columbia, SC 29211

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BAMBERG COUNTY
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S.C. Supreme Court

James Gunnells,

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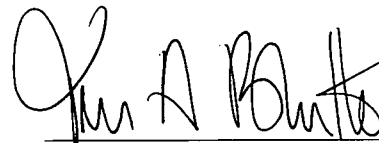
State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Petitioner, hereby certify that I placed in the United States Mail this 6th day of September 2013, a copy of a Notice of Appeal, to David Spencer of the Attorney General's Office, at:

Office of the Attorney General
Att: David Spencer, Ast. Deputy AG
P.O. Box 11549
Columbia, SC 29211-1549



Tricia A. Blanchette
PO Box 12725
Columbia, SC 29211
(803) 988-0008
Attorney for Petitioner

September 6, 2013

STATE OF SOUTH CAROLINA

COUNTY OF BAMBERG

James Gunnells, #305475

Applicant

VS

State of South Carolina,

Respondent.

FILED
BAMBERG COUNTY
2013 AUG 13 AM 9:47
JAMES H. WILSON
CLERK OF COURT
BAMBERG, SC

IN THE COURT OF COMMON PLEAS
C.A. NO. 2010-CP-05-72

ORDER OF DISMISSAL

This matter is before this Court by way of an application for post-conviction relief (PCR) filed April 5, 2010. The State made its return on October 20, 2010. A hearing into the matter was convened at the Aiken County Courthouse on January 27, 2012. Applicant was present and represented by Tricia A. Blanchette, Esquire. The State was represented by Assistant Attorney General Mary Williams of the Office of the South Carolina Attorney General.

Applicant testified on his own behalf, as did his co-defendant, Tivo Lee. Testifying for the State was Applicant's trial counsel, James Christopher Wilson, Esquire. This Court also had before it all the exhibits admitted at the PCR hearing, the pleadings of both parties, including Applicant's amendments and memorandum, the Clerk of Court's records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the appellate records, and the transcript of Applicant's trial.

PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Bamberg County Clerk of Court's orders of commitment. Applicant was indicted at the

March 2004 term of the Bamberg County Grand Jury for first degree burglary (2004-GS-05-19), assault and battery with intent to kill (2004-GS-05-20), possession of a weapon during a violent crime (2004-GS-05-21), armed robbery (2004-GS-05-23), conspiracy (2004-GS-05-29) two counts of grand larceny (2004-GS-05-24, 25), and three counts of kidnaping (2004-GS-05-26,27,28). As previously mentioned, James Christopher Wilson, Esquire, represented Applicant.

Applicant was tried by jury on October 12-15, 2004. The jury acquitted Applicant of ABWIK, both counts of larceny, and one count of kidnaping, but found Applicant guilty of the remaining counts. The Honorable J.C. Nicholson sentenced Applicant to life imprisonment for first degree burglary, and a consecutive term of thirty years imprisonment for armed robbery. Judge Nicholson sentenced Applicant to concurrent terms of thirty years imprisonment for each count of kidnaping, five years imprisonment for possession of a weapon during the commission of a violent crime, and five years imprisonment for conspiracy.

Counsel filed a motion to reconsider the sentence on October 15, 2004. A hearing was convened on January 17, 2007 and Judge Nicholson issued an order on February 13, 2007, which was filed April 20, 2007, in which he found Applicant knowingly and voluntarily withdrew the motion against advice of counsel.

Applicant appealed the conviction and sentence, which was affirmed by the South Carolina Court of Appeals. State v. Gunnells, Op. No. 2009-UP-35 (S.C. Ct. App., filed January 14, 2009). Applicant's petition for rehearing was denied and the South Carolina Supreme Court denied the petition for writ of certiorari on October 7, 2009. LaNelle C. Durant, Esquire, represented Applicant on appeal.

ALLEGATIONS

Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel;
2. Ineffective assistance of appellate counsel; and
3. After discovered-evidence.

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 presented 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).

Ineffective Assistance of Counsel

Applicant makes various allegations of ineffective assistance of counsel. The burden of proof is on the applicant in a PCR proceeding to prove the allegations in his application. Bell v. State, 321 S.C. 238, 467 S.E.2d 926 (1996); Rule 71.1(e), SCRPC.

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. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996). In order to prove prejudice, an applicant must show that but for counsel's errors, there is a reasonable probability the result at trial would have been different. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability

sufficient to undermine confidence in the outcome of the trial. Id. Where trial counsel articulates a valid reason for employing certain trial strategy, such conduct should not be deemed ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

This Court will now address each allegation of ineffective assistance of trial counsel below:

Failure to prepare and investigate prior to trial

Applicant alleges that trial counsel failed to investigate and prepare for trial. Applicant also alleges trial counsel failed to inform him of the State's evidence and witnesses that would be used against him at trial. Counsel's testimony contradicts these assertions. Counsel testified that he went through discovery and the evidence with Applicant and that counsel had multiple discussions with Applicant. Applicant gave different versions of his degree of involvement in the case, but never suggested he was not present during the crime or was not involved. Counsel testified that he sought assistance from a former SLED agent in assessing the forensic evidence. Counsel noted that Applicant gave a highly incriminating statement to law enforcement and thought that finding a viable defense to the charges would be difficult. This is why he suggested to Applicant that he consider cooperating with the State. However, Applicant did not want to cooperate.

This Court finds Applicant's testimony is not credible. On the other hand, this Court finds counsel's testimony highly credible and gives it great weight. This Court finds counsel was well-prepared for this case, made numerous motions in an attempt to keep out harmful evidence, and was put in a position of defending Applicant without a viable defense. This Court notes a

wide variance between Applicant's version of events surrounding the charges and the discussions Applicant had with Counsel. Based on the information Applicant provided to Counsel and the purported information that he did not provide to Counsel, this Court finds that Counsel's performance was not deficient.

Further, Applicant has not met his burden of proving prejudice. Aside from providing testimony from his co-defendant, which will be addressed below, Applicant failed to provide any evidence establishing prejudice from the alleged lack of investigation or preparation. Applicant also failed to show prejudice from counsel's alleged failure to inform Applicant of the State's evidence or witnesses. Accordingly, these allegations are denied. Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant is not entitled to relief where applicant failed to show how additional preparation would have any possible effect on trial).

Failure to investigate or utilize co-defendant Tivo Lee as a witness

Applicant alleges that counsel should have interviewed or called Tivo Lee as a witness. Applicant claims to not know Tivo Lee. Further, Applicant presented Lee as a witness, who claimed that Applicant had no involvement in the burglary. Lee testified that he has already pled guilty to the burglary charge, which is run concurrently with his conviction for voluntary manslaughter from Richland County that he is currently serving. Lee admitted at the PCR hearing that he no longer has pending charges from the incident and has nothing to lose from testifying.

Counsel testified that at the time of Applicant's trial, Lee's charges were still pending. Counsel testified that he contacted Lee's attorney and discussed the case with her. Lee's attorney never indicated that Lee would be willing or able to provide any helpful testimony in Applicant's

defense. Further, Applicant never indicated that he did not know who Lee was or that Applicant was not present at the burglary. Lee was identified as a suspect in the case based on Applicant's statement to law enforcement implicating Lee.

This Court is troubled by Lee's testimony and Applicant's decision to present this witness. This Court does not find Lee to be a credible witness and does not believe that his testimony at the PCR hearing is an accurate representation of what Lee would have been willing to testify to at trial, if he were to testify at all. Further, this Court finds Counsel's testimony on this issue to be highly credible and gives it great weight. This Court notes Counsel was in contact with Lee's attorney and that she never gave an indication that Lee could aid Applicant's defense. Finally, this Court notes that Counsel is not required to be clairvoyant and know that Lee, allegedly, would be a beneficial witness. Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993) (counsel not required to be clairvoyant and know that victim who gave a damaging statement to law enforcement would have provided beneficial testimony to his client).

This Court finds that Counsel was not deficient for failing to call Lee as a witness. Further, this Court finds that Lee's testimony would not have changed the outcome of trial, even if this Court were to believe that Lee would have provided this testimony at the time of trial. This Court does not believe Lee is a credible witness. This Court finds that Applicant has not met his burden of proving either prong of Strickland. Applicant's claim of after-discovered evidence concerning Lee's testimony will be discussed later.

Indictments

Applicant alleges that Counsel failed to discuss the indictments with Applicant and the possibility of a pre-trial motion concerning the indictments. Counsel testified that he did discuss

the indictments with Applicant, as well as the elements of the offense. Counsel moved to quash the armed robbery indictment based on the description of items stolen. Counsel did not consider there to be any defects in the indictments warranting an additional pre-trial motion. This Court agrees and finds that this claim is without merit. This Court finds that Applicant has not met his burden of proof regarding this allegation and has not met either prong of Strickland.

Failure to prepare Applicant to testify for Jackson v. Denno hearing

Applicant alleges Counsel failed to prepare him to testify during the Jackson v. Denno hearing. This allegation is without merit. Applicant alleges that law enforcement told him what to say and supplied the names of his co-defendants. Counsel testified that Applicant never told him that Applicant was coerced into making the statement or that law enforcement supplied him with the content. This Court finds Counsel's testimony credible and does not find Applicant's testimony credible. This Court finds that Applicant has failed to show Counsel's performance was deficient or that Applicant was prejudiced by an alleged deficiency. This Court denies this allegation.

Pawn receipt

Applicant alleges Counsel's performance was deficient for failing to move to suppress a pawn receipt. At trial, the testimony was that Applicant voluntarily provided law enforcement with a pawn receipt for items that were stolen from the residence. At the PCR hearing, Applicant claimed that he never gave law enforcement the pawn receipt. Counsel testified that Applicant never denied that he gave law enforcement the pawn receipt until the middle of trial, after the pretrial motions, when he handed Counsel a note.

Applicant's changing version of events and delayed disclosure of information were not

helpful to Counsel in presenting a defense. Further, this Court does not believe any suppression motion regarding the pawn receipt would likely be successful. Whether or not Applicant actually produced the pawn receipt or whether he was in possession of the pawn receipt was a question for the jury. Also, this Court simply finds Applicant's credibility too suspect to believe his exculpatory explanations as to the receipt. For Counsel and this Court, Applicant's version of events constitutes a moving target. Counsel's performance was not deficient, nor was Applicant prejudiced by any alleged deficiency. This allegation is denied.

Pre-trial motions

Applicant alleges that counsel failed to raise pre-trial motions on identification, seized evidence, and a statement made by Applicant to his aunt, Debra Meyers. These allegations are without merit. First, Counsel did move to suppress the in-court identifications and was unsuccessful. Applicant's argument is that Counsel should have argued this motion in more detail and utilized statements from victims to demonstrate that the identifications were tainted by law enforcement's conduct. Applicant also argues counsel's arguments on the identification were untimely. This Court disagrees with Applicant's assertion that rephrasing or augmenting the arguments counsel did present would have a reasonable probability of altering the result. This Court also would not that the Court of Appeals did review the identification and ruled on the merits, indicating a lack of prejudice from any possible preservation issues. Further, this Court finds counsel argued the motion to suppress the identification artfully and competently. See Yarborough v. Gentry, 540 U.S. 1, 6, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003) ("[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Counsel was not ineffective in this

regard and his performance in challenging the identifications did not fall below professional norms. Further, this Court finds that Applicant was not prejudiced by the alleged deficiencies of counsel.

Second, Applicant failed to show an argument not advanced by counsel in the suppression of evidence would have any likelihood of success at trial. Applicant failed to meet his burden of proof under Strickland as to this issue.

Finally, Counsel objected to Applicant's statement to Meyers on the grounds of hearsay, ~~and~~ ^{offered} ~~the~~ ^{the matter} ~~and~~ ^{but} ~~to~~ ^{and} the trial court found it was admissible, as it was not for the truth of asserted, and to show motive and knowledge. Meyers testified that Applicant, after having been given a ride by the victim, indicated that Applicant did not believe in banks and kept his money at home. This Court does not find counsel was ineffective in this regard. These allegations are all denied.

Failure to utilize inconsistent statements

Applicant alleges that Counsel was ineffective in utilizing inconsistent statements by the State's witnesses. This Court notes that Counsel conducted vigorous cross-examination of the State's witnesses and utilized written statements to this end. This Court finds that Counsel's performance was not deficient. Further, this Court finds that Applicant failed to prove any prejudice from the alleged deficiency that would be sufficient to alter the outcome of trial. This allegation is denied.

Failure to present a viable directed verdict argument

Applicant alleges counsel was ineffective for failing to offer a viable directed verdict argument. However, Applicant failed to offer a viable directed verdict argument in making this claim. Counsel testified that the evidence presented was sufficient for a judge to deny the motion

for directed verdict, but that he made a broadly based motion so the trial court could make the decision. This Court finds that Applicant failed to show that Counsel's performance was deficient and further finds that Counsel articulated valid trial strategy concerning this motion. Further, this Court finds that Applicant has completely failed to offer a viable alternative to Counsel's strategy that would have any likelihood of success. Accordingly, this Court finds that Applicant has failed to meet his burden of proving either prong of Strickland.


Inconsistent verdicts

Applicant alleges that Counsel was ineffective for failing to move for a new trial based on inconsistent verdicts. Counsel testified that he did not find the verdicts to be inconsistent. In particular, Counsel noted that Applicant was not present in the room when one of the victims was assaulted, which led to the ABWIK charge. And while the State's theory of the case included guilt under accomplice liability, Counsel noted that the jury was free not to accept this theory completely.

Further, the rule against inconsistent verdicts has been abolished. State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991). This Court finds counsel's performance is not deficient and that his professional judgment on this issue is sound. Additionally, as such a motion would not have any merit, this Court finds that Applicant was not prejudiced by the alleged deficiency. This allegation is denied.

Motion to reconsideration of sentence

Following the trial and sentencing hearing, Counsel filed a motion to reconsider the sentence. There was a significant delay in having this motion heard. However, Applicant indicated he wished to withdraw the motion and Counsel advised against him withdrawing the



motion. However, against Counsel's advice, Applicant withdrew the motion. Judge Nicholson found the withdrawal was freely and voluntarily made. This Court finds that Applicant failed to present any evidence that Counsel's performance was deficient. Counsel is not in control of the scheduling of motions and advised Applicant against withdrawal. Further, Applicant has failed to show prejudice in that he has failed to show any likelihood that he would have received a reduced sentence. Finally, Applicant waived the hearing against Counsel's advice. This Court finds that Applicant has failed to show that he did not freely and voluntarily waive his right to have the motion heard, as found by Judge Nicholson. This Court finds that Applicant has not met his burden of proving Counsel was ineffective.

Ineffective Assistance of Appellate Counsel

Applicant alleges he received ineffective assistance of appellate counsel. Applicant essentially argues that appellate counsel should have argued that the in-court identifications of Applicant by two of the victims should have been suppressed and that appellate counsel, who challenged the identification, should have framed the issue differently. This Court, in reviewing appellate counsel's brief, does not find that she rendered deficient performance. Appellate counsel advanced the theory that both victims' in court identification was made suggestive by law enforcement when law enforcement showed them clothes seized from Applicant. Applicant alleges that appellate counsel should have argued that the out-of-court identification of clothes was an identification of Applicant. This Court believes that framing this issue would not alter the result, since Applicant was not wearing the clothes when they were shown to the victims. This Court believes that notwithstanding Applicant's arguments, State v. Lewis, 354 S.C. 222, 580 S.E.2d 149 (2004) still controls the result, as Applicant was not identified by a suggestive

out-of-court procedure, but by a first-time in-court procedure. This Court finds appellate counsel's performance was within the range of professional norms and was not deficient. Additionally, this Court finds that Applicant was not prejudiced by the alleged deficiency. Accordingly, this Court denies this allegation.

Further, Applicant alleges that appellate counsel's performance was deficient for failing to raise the issue of whether the trial court erred in allowing the State to amend the indictment for armed robbery to include a description of items taken. At trial, counsel candidly admitted he was provided the SLED report that gave him notice of the items alleged to be taken, but did object to the amendment. Tr. pp. 148-150. However, the trial court properly granted the State's motion to amend the indictment. State v. Johnson, 314 S.C. 161, 165, 442 S.E.2d 191, 194 (Ct. App. 1994) (noting that the State is allowed to amend an indictment at trial so long as it does not alter the nature of the crime charged in the indictment). Since the issue is without merit, appellate counsel was not deficient nor was Applicant prejudiced by failure to raise this issue.

After-discovered evidence: Tivo's testimony

At the hearing, Applicant framed his co-defendant's testimony as after-discovered evidence. A defendant requesting a new trial based on after-discovered evidence must show that the evidence:

- (1) Is such as would probably change the result if a new trial was had;
- (2) Has been discovered since the trial;
- (3) Could not by the exercise of due diligence have been discovered before the trial;
- (4) Is material to the issue of guilt or innocence; and
- (5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983).

Granting a motion on after-discovered evidence is not favored. State v. Needs, 333 S.C.

134, 158, 508 S.E.2d 857, 869 (1998).

The credibility of newly discovered evidence is for the trial court to determine. State v. Porter, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977). “In this post-trial setting, our jurisprudence recognizes the gate-keeping role of the trial court in making a credibility assessment.” State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009). In the instant case, the PCR court fills the role of fact-finder when after-discovered evidence is raised as a collateral attack in a PCR application.

First, this Court does not believe that the co-defendant constitutes after-discovered evidence. Applicant was aware of the co-defendant’s existence and counsel was in contact with co-defendant’s counsel. Further, whether co-defendant would take the blame for the crime and concomitantly exonerate Applicant was information that was available at the time of trial. It is just doubtful, and unbelievable, that his co-defendant would have done so.

Further, as this Court noted above, this Court did not find the co-defendant’s testimony credible or an accurate representation of what he would have testified to at trial. This Court finds the co-defendant, identified as a participant in Applicant’s statement to law enforcement, would not have made a credible witness for the trial, even if he testified identically as he did at the PCR hearing. This Court does not find that his testimony would change the result if a new trial was held. Accordingly, this allegation is denied.

CONCLUSION

Based on 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 advises the parties that in order to secure the appropriate appellate review, notice of appeal must be served and filed within thirty (30) days after receipt by counsel of notice of entry of this order. See Rules 203 and 243 of the South Carolina Appellate Court Rules. This Court notes that post-conviction relief counsel must advise an applicant of the right to seek appellate review of a post-conviction relief order. State v. Bray, 366 S.C. 137, 620 S.E.2d 743 (2005). Also, pursuant to Austin v. State, 305 S.C. 453, 409 S.E. 2d 395 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on an applicant's behalf.

IT IS THEREFORE ORDERED:

1. The application for Post-Conviction Relief is denied with prejudice;
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 8th day of August, 2013.



Edgar W. Dickson
Presiding Judge
2nd Judicial Circuit

Orangeburg, South Carolina