

William L. Runyon, Jr.

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October 25, 2013

Honorable Daniel E. Shearouse
Clerk of South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211

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OCT 29 2013

S.C. SUPREME COURT

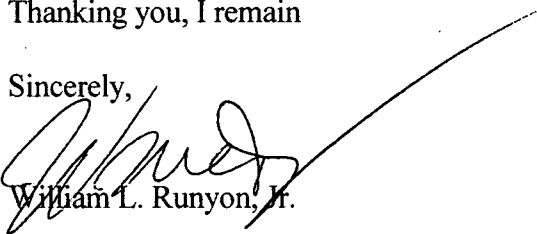
RE: Kaseem Stephens, #333714 v. State of South Carolina

Dear Mr. Shearouse:

Enclosed please find NOTICE OF INTENT TO APPEAL, together with CERTIFICATE OF MAILING in the above referenced matter. Please file originals and return certified copies to me in the stamped-self addressed envelope for your convenience.

Thanking you, I remain

Sincerely,



William L. Runyon, Jr.

WLR, JR. / bb

Enclosure

Cc: Honorable Clerk of Charleston County
Honorable Ashleigh Wilson
Mr. Kaseem Stephens
Office of Appellate Defense

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

KASEEM STEPHENS, 333714)

Applicant,)

vs.)

STATE OF SOUTH CAROLINA,)

Respondent.)
_____)

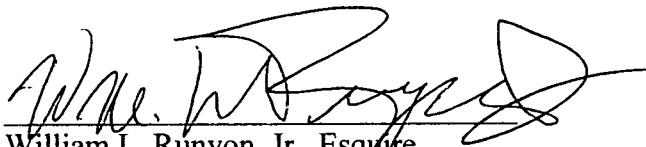
IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
Case No.: 2012-CP-10-7073

NOTICE OF INTENTION TO APPEAL

Trial Judge: Honorable Deadra L. Jefferson
Court Reporter: Ms. Deborah Garrison
P. O. Box 901
Johns Island, SC 29457

TO THE HONORABLE ATTORNEY GENERAL:

Now comes the Applicant above and serves Notice of his Intentions to Appeal the Order of the Honorable Deadra L. Jefferson herein from the Hearing of which the Order was entered on the 22nd day of October, 2013 and served on the Applicant the 25th day of October, 2013. The undersigned Counsel hereby certifies as to there being an issue or issues to be reviewed by the Honorable Supreme Court.



William L. Runyon, Jr., Esquire
#3 Gamecock Avenue, Suite 303
Charleston, SC 29407
(843)571-3515
SC Bar No.: 4838

Dated this 25th day of October, 2013
in Charleston, South Carolina.

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
Case No.: 2012-CP-10-7073

Kaseem Stephens, #333714)
Applicant,)

vs.)

State of South Carolina,)
Respondent.)

CERTIFICATE OF MAILING

I William L. Runyon, Jr., Esquire, do hereby certify that on the 25th day of October, 2013, I served a copy of the NOTICE OF INTENTION TO APPEAL on the Honorable Ashleigh Wilson, Assistant South Carolina Attorney General the in the within matter, by mailing copies to him by way of the United States Mail, with sufficient postage attached thereto and addressed as follows:

Honorable Ashleigh Wilson
SC Attorney General's Office
P. O. Box 11549
Columbia, SC 29211



William L. Runyon, Jr., Esquire
#3 Gamecock Avenue, Suite 303
Charleston, SC 29407
SC Bar No.: 4838
(843) 571-3515

Dated this 25th day of October, 2013
in Charleston, South Carolina.

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STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 Kaseem Stephens, #333714,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 2012-CP-10-7073

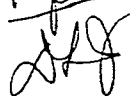
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 JULIE J. ARMSTRONG
 CLERK OF COURT

ORDER OF DISMISSAL

Presiding Judge:	The Honorable Deadra L. Jefferson
Applicant's Attorney:	William H. Runyon, Jr., Esquire
Respondent's Attorney:	Ashleigh R. Wilson, Esquire
Trial Counsel:	Jason T. King, Esquire
Date of Hearing:	May 22, 2013
Court Reporter:	Deborah Garrison

This matter comes before the Court by way of an application for post-conviction relief (PCR) dated October 30, 2012. The Respondent made its Return on April 15, 2013. An evidentiary hearing on the matter was convened on May 22, 2013 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by William H. Runyon, Jr. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

Also present and testifying was Jason T. King, Esquire. The Court had before it the trial transcript, the Charleston County Clerk of Court records, the Applicant's records from the South Carolina Department of Corrections, the Applicant's application, the Respondent's return, and the Applicant's appellate records.

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PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Charleston County Clerk of Court. The Applicant was indicted at the August 2008 term of the Charleston County Grand Jury for Murder (2008-GS-10-6300). He was represented by Jason T. King, Esquire (sitting 1st Chair) and Reese M. Stidham, Esquire (sitting 2d Chair).

The Applicant proceeded to trial and was found guilty. On March 17, 2009, the Applicant was sentenced by the Honorable R. Markley Dennis Jr. to confinement for forty (40) years.

A timely Notice of Appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. Robert M. Dudek, Esquire of the South Carolina Office of Appellate Defense, Commission on Indigent Defense perfected the appeal. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Stephens, 398 S.C. 314, 728 S.E.2d 68 (Ct. App. 2012). The Remittitur was sent July 13, 2012.

ALLEGATIONS

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

1. Ineffective Assistance of Counsel

- a. Counsel failed to request manslaughter rather than murder with mitigating evidence.

At the hearing, the Applicant proceeded on the allegation alleged in his application and amended his application to also allege counsel failed to investigate a potential alibi witness named "Light." At the conclusion of the evidentiary hearing, the Court took the matter under advisement at the Applicant's request, to allow the Applicant forty-five (45) days, a deadline of July 5, 2013, to locate this alleged alibi witness and supplement the record with testimony from

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this witness. The Applicant has not submitted any documentation or testimony to supplement the record in support of his alibi allegation. The Applicant's counsel advised the Court that after extensive efforts, the potential alibi witness "Light" could not be located.

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. Further, this Court has 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 conclusion of law as required by S.C. Code Ann. § 17-27-80 (2003).

Summary of the Testimony

The Applicant was present and testified at the evidentiary hearing. The Applicant testified he was represented by Jason King, Esquire, and met with him approximately three (3) times prior to trial. He testified he did not review discovery with his attorney. He testified that his attorney did discuss the defense of identity several times. He testified he briefly discussed possible defenses with his attorney. The Applicant did not recall giving his attorney any witness names prior to trial. He testified that he felt King thought he was guilty from the "giddy up." The Applicant testified it was his decision to proceed to trial.

The Applicant testified he did not testify on his behalf at trial and that it was not his choice. The Applicant testified his attorney's advice precluded him from testifying. He testified King advised him to not take the stand because of his prior record. The Applicant testified counsel presented a psychologist at trial to discuss the reliability of the witness' identification of him at the scene and the expert failed to examine him prior to trial.

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He testified further he did not recall giving his attorney any information about his alleged alibi witness. He testified King made no effort to bring "Light," the alleged alibi witness, to trial. He testified that "Light" could corroborate his street name was "Nitty." The Applicant testified that the gravamen of his alibi defense was that he was not in Charleston at the time of the shooting. He testified he was in New York to attend his mother's funeral and afterward to handle her estate. He testified counsel did not try to verify he was in New York at the time of the incident.

Jason King, Esquire, also testified at the evidentiary hearing. He testified he has been practicing law for thirteen (13) years. He testified that he had prepared for approximately twelve (12) trials prior to the Applicant's trial. Counsel testified the evidence against the Applicant included the victim's fiancé identifying the Applicant as the shooter, a second eyewitness identifying the Applicant as the shooter, and the Applicant being found in the suspected vehicle. Counsel testified his strategy at trial was to argue the victim's fiancé was mistaken and Jamal Greene was pinning the murder on the Applicant because he ran from the police. Counsel testified he also presented testimony from an identification expert to challenge the two eye witness identifications of the Applicant.

Counsel testified he filed Brady and Rule 5 motions on the Applicant's behalf. He testified he received all discovery from the State. Counsel testified he met with the Applicant approximately eight (8) times prior to trial. He testified he discussed with the Applicant the discovery material, the elements of the charges and what the State was required to prove, his constitutional rights, the range of penalty, the Applicant's version of the facts, and possible defenses. He further testified that he discussed any potential witnesses and leads, which he would have followed and investigated in preparation for trial. He further testified he was

prepared for trial. Counsel testified he was not aware of any deals between the State and the State's witnesses. Counsel also testified the Applicant was offered a plea to voluntary manslaughter with a twenty-five (25) year sentence, but the Applicant rejected the offer. (Tr. 6:5-14).

Counsel testified the Applicant told him he had an alibi. He testified the Applicant told him he was at his mother's funeral. Counsel testified he investigated the alibi but the funeral was ten (10) days prior to the shooting. He testified he spoke with several witnesses given to him by the Applicant. Counsel testified the Applicant was arrested in New York after the murder and that he did not assert the Applicant's alibi because after a full investigation, he had no witnesses to support the Applicant's alibi at trial. He further testified that witnesses placed the Applicant in South Carolina instead of New York. Counsel testified he checked the Applicant's bank statements to see if any transactions took place in New York during the time of the incident, but he did not find anything to support the alibi. Counsel testified he explained the alibi defense to the Applicant and told him that he did not have any witnesses to support his alibi.

Counsel testified further that "Light" is Bobby Moses. He testified he was aware of "Light" and that he tried to find him, but was unable to find him. Counsel testified that he did not want the State to find "Light" because his statement identified the Applicant as the shooter and said the Applicant often drove the car identified as being at the scene. He further testified that the Applicant gained an "advantage" when "Light" did not appear to testify at the trial.

Counsel testified the Applicant did not testify at trial. He testified he reviewed the Applicant's possible testimony and did not think the Applicant would be a good witness. He further testified that from his work with the Applicant, he would not make a credible witness. He further testified the only reason the Applicant would testify would be to establish an alibi

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and, since there was no testimony to corroborate an alibi, the Applicant's testimony would have served no useful purpose. Counsel testified the Applicant said his memory was not good because he smoked marijuana frequently. Counsel testified he did not think the Applicant's testimony would have helped the case and ultimately it was the Applicant's choice not to testify. He further testified he fully discussed this strategy with the Applicant and that the Applicant agreed with this strategy.

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 allegation 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), SCRCF)).

For the Applicant to be granted post-conviction relief 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 Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) (citing Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064-65 (1984)). 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, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). "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, 466 U.S. at 694, 104 S. Ct. at 2068). The courts presume that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional

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judgment.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The applicant must overcome this presumption in order to receive relief. *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

This Court finds the Applicant’s testimony is not credible and finds trial counsel’s testimony is credible. This Court further finds that counsel has extensive experience in the practice of criminal law and has been practicing law since 2000. This Court finds that counsel met with the Applicant numerous times prior to trial and fully investigated the Applicant’s case. This Court finds that counsel filed Brady and Rule 5 motions on the Applicant’s behalf and reviewed the received discovery with the Applicant. This Court finds that counsel discussed with the Applicant the elements of the charges against him, range of penalty, his constitutional rights and what the State was required to prove. This Court finds that counsel discussed the Applicant’s version of the facts and possible defenses with the Applicant.

This Court finds counsel was not ineffective for failing to request a voluntary manslaughter jury instruction. It is “well settled that jury instructions should be confined to the issues raised by the pleadings and supported by the evidence and where an issue is implicitly suggested by the pleadings and supported by the evidence, the trial judge is obligated to instruct the jury concerning it.” Ellison v. Parts Distributions, Inc., 302 S.C. 299, 301, 395 S.E.2d 740, 741 (1990) (citing Mouzon v. Moore & Stewart, Inc., 282 S.C. 233, 234, 317 S.E.2d 756, 757 (Ct. App. 1984)). This Court finds and the record reflects counsel requested a voluntary manslaughter instruction and, after argument from both the State and the Defense, the trial court denied his request. (Tr. 273:13–277:15). This Court finds counsel provided effective assistance of counsel by requesting a voluntarily manslaughter jury instruction during trial. This Court also finds no prejudice resulted from counsel’s performance.

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This Court finds counsel was not ineffective for failing to investigate Bobby Moses a.k.a. "Light" as a potential alibi witness prior to trial. "In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence." Glover v. State, 318 S.C. 496, 498–99, 458 S.E.2d 538, 540 (1995). The "applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." Id. at 499, 458 S.E.2d at 540. Trial counsel's failure to contact an alleged alibi witness does not prejudice the defendant; absent a showing the witness' testimony would have established an alibi defense. See id. Furthermore, "[t]here is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (citing Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel." Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (citing Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 403 (2002)); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992)).

This Court finds the Applicant has failed to carry his burden of proving ineffective assistance of counsel for failing to introduce testimony from Moses to support the Applicant's alleged alibi defense. Moses was not present during the Applicant's evidentiary hearing to testify to the Applicant's alleged alibi and PCR counsel was unable to locate Moses after the hearing to supplement the record with his testimony. This Court finds the Applicant's speculation as to

what Moses' testimony would have been at trial is not sufficient to carry his burden of proving the merits of this allegation.

This Court also finds counsel adequately investigated Bobby Moses a.k.a. "Light" as a potential witness prior to trial. Counsel provided credible testimony that he was aware of Moses' statement and that he tried to locate Moses prior to trial but was unable to. Counsel also provided credible testimony that the substance of Moses' statement was not beneficial to the defense, in fact, it was to the defense's benefit for Moses' whereabouts to be unknown. In light of counsel's testimony as to the substance of Moses' statement, this Court finds the Applicant was not prejudiced by counsel's failure to investigate or locate Moses as a potential alibi witness for the defense.

This Court further finds that counsel articulated a valid trial strategy for not pursuing an alibi defense at trial. Counsel provided credible testimony that after investigating the Applicant's alibi, he chose not to pursue the Applicant's alibi defense at trial because he had no witnesses to support the Applicant's version of events. This Court finds counsel's trial strategy was valid in light of counsel's investigation into the Applicant's alleged alibi.

This Court finds the Applicant's allegation that he did not freely and voluntarily waive his right to testify at trial is without merit. Under the United States and South Carolina Constitutions, a criminal defendant has a right to remain silent and to not testify during his trial. U.S. Const. amend. V; S.C. Const. art. I, § 12; State v. Weaver, 361 S.C. 73, 88, 602 S.E.2d 786, 794 (Ct. App. 2004). This Court finds and the record reflects the Applicant freely and voluntarily waived his right to testify at trial. The record reflects the Applicant was advised of his right to testify (Tr. 228:202-3) and that after reflection the Applicant decided not to testify at his trial (Tr. 228:6-229:15). The Applicant was advised by the trial court it was his constitutional right

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not to testify and that the jury would be advised not to use his silence against him. (Tr. 229:6–11). The record also reflects the Applicant was advised it was his decision whether or not to testify. (Tr. 229:12–15). Furthermore, the Applicant advised the Court that he was not under the influence of alcohol or medications that would affect his decision-making as to whether to testify, and the Applicant confirmed he was both comfortable with his decision not to testify and satisfied with his attorney’s advice on such matter. (Tr. 229:16–230:4). This Court finds the Applicant’s waiver allegation is without merit.

Accordingly, this Court finds the Applicant failed to prove the first prong of the Strickland test—that trial counsel failed to render reasonably effective assistance under prevailing professional norms. See Cherry, 303 S.C. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in their representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland—that he was prejudiced by trial counsel’s performance. 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.” See id. at 117–18, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson, 325 S.C. at 186, 480 S.E.2d at 735 (citing Strickland, 466 U.S. at 494, 104 S. Ct. at 2068). This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier, 351 S.C. at 389, 570 S.E.2d at 174 (citing Rule 71.1(e), SCRCP).

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All Other Allegations

As to any and all allegations that were raised in the application at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof. Therefore, all other allegations are hereby denied and dismissed.

CONCLUSION

Based on the forgoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations occurring before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order to secure appropriate appellate review. His attention is 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 served and filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

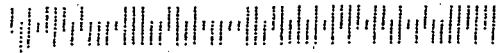
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AND IT IS SO ORDERED this 22nd day of October, 20 13

D. L. Jefferson
The Honorable Deadra L. Jefferson
Presiding Judge, Ninth Judicial Circuit

Charleston, South Carolina.

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