

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas
The Honorable r. Lawton McIntosh

Case No. 11-CP-11- 0324

Branson Jamal Thompson Appellant

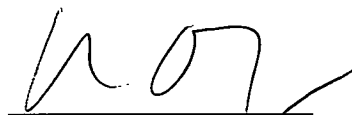
State of South Carolina Respondent

NOTICE OF APPEAL

The Appellant appeals the Order dated October 31, 2013 and recorded in the Clerk of Court Office November 4, 2013, and received November 8, 2013, denying Appellant's post-conviction relief.

Appellant requests waiver of any filing fee for this appeal.

November 15, 2013



David C. Alford, P.C.
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Other Counsel of Record:

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Reid 11/2/13A

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

JUDGMENT IN A CIVIL CASE
CASE NO: 2011CP1100324

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2013 NOV 4 PM 4:40
BRANDY W. MCBEE

Branson Jamal Thompson vs. State Of South Carolina

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.

- 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; Statement of Judgment by the Court:

Order of Dismissal

Dated at Gaffney, South Carolina, this the 4th day of November, 2013.

Court Reporter:

s/ R. Lawton McIntosh

PRESIDING JUDGE - R. Lawton McIntosh

This judgment was entered on the the 31st day of October, 2013, and a copy mailed first class this the 4th day of November, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

David Charles Alford PO Box 6326 Spartanburg, SC 29304-6326

Alan McCrory Wilson PO Box 11549 Columbia, SC 29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Brandy W. McBee

Brandy W. McBee - Clerk of Court

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHEROKEE)
)
 Branson Jamal Thompson; #326685,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2011-CP-11-0324

ORDER OF DISMISSAL

FILED IN OFFICE OF
 CLERK OF COURT
 CHEROKEE COUNTY, S.C.
 2013 NOV 4 PM 8 35
 BRANDY W. HARBEE

This matter comes before the Court by way of an Application for Post-Conviction Relief filed May 23, 2011, and amendments filed June 4, 2012, and February 13, 2013. The Respondent made its Return on or about May 2, 2012. An evidentiary hearing into the matter was convened on June 24, 2013, at the Spartanburg County Courthouse. The Applicant was present and represented by David S. Alford 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. Don A. Thompson, Esquire, also testified. This Court also had before it a copy of the records of the Cherokee County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, and the plea transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. The Applicant was indicted at the August 2010 term of the Cherokee County Grand Jury for burglary – 1st degree (10-GS-11-0136), criminal domestic violence of a high and aggravated nature (10-GS-11-0135), and two counts of pointing and presenting a firearm (10-GS-11-0137, -0138). He was repre-

sent by Don A. Thompson, Esquire. On December 6, 2010, the Applicant pled guilty as indicted. He was sentenced by the Honorable J. Mark Hayes to confinement for concurrent terms of twenty years on burglary – 1st degree, ten years for criminal domestic violence of a high and aggravated nature, and five years for each count of pointing and presenting a firearm, pursuant to a negotiated sentence. The Applicant did not appeal his conviction or sentence.

ALLEGATIONS

In the current application and amendments, the Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel, in that;
 - a. Counsel failed to advise as to right to appeal
 - b. Counsel failed to advise that a jury could have considered a lesser charge from burglary – 1st degree before pleading,
 - c. Counsel failed to explain elements of charges and not challenging State's duplicative reliance on same facts to prove different elements and charges,
 - d. Counsel failed to advise that the negotiated plea for twenty years also included community supervision requirements;
 - e. Counsel failed to review and explain discovery materials, failed to investigate potential witnesses, alternate defenses and elements of charges,
 - f. Counsel failed to raise defense of consent for entry or investigate witnesses,
 - g. Counsel failed to investigate whether any State's witness was subject to intimidation,
 - h. Counsel failed to conduct a mental evaluation as to Applicant's mental condition,
2. Violations relating to Grand Jury, in that;
 - a. Prosecutor misled the grand jury by misstating the crime was at night and as to prior convictions of Applicant,
 - b. African Americans are systematically excluded from the selection process.

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BRANDY W. COBBE

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

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), SCRCPP). 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 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. "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 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).

Failed to advise as to right to appeal

~~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 (U.S.).~~

This Court finds that the Applicant failed to meet his burden of proof as to this claim. The Applicant never presented any testimony that he asked Counsel to file an appeal on his behalf. Based upon the standard set forth in Roe v. Flores-Ortega, this Court finds that Counsel was not required to advise Applicant as to the right to appeal, in particular because the Applicant pled to an agreed upon negotiated sentence. This claim is denied and dismissed.

~~Failed to advise that a jury could have considered a lesser charge from burglary - 1st degree~~

This Court finds that the plea court reviewed all the necessary elements of a voluntary plea with Applicant, including giving up the right to present a defense to the charges.

Furthermore, Applicant's mother was prepared to testify and the Applicant acknowledged that the crime was committed at 4:00 am and that a shotgun was involved, which led to the burglary – 1st degree charge. Therefore, this Court finds that the Applicant failed to meet his burden of proof as to this claim and it is denied and dismissed.

Failed to explain elements of charges and failed to challenge State's duplicative reliance on same facts to prove different elements and charges

The only testimony presented in support of this claim was the assertion that Applicant would have proceeded to trial if Counsel had fully explained all of the elements of the charges. This Court does not find Applicant's testimony credible. As discussed previously, this Court finds that the plea colloquy was very thorough and the Applicant indicated that he understood his

charges and the consequences of pleading to each of them. This Court finds that the Applicant has failed to meet his burden of proof as to this claim. Therefore, this claim is denied and dismissed.

Failed to advise that the negotiated plea also included community supervision requirements

This Court also finds that this claim should be denied because it lacks merit. The Supreme Court has addressed the issue of whether counsel was under a duty to advise his client of a community supervision program, made a condition of release after serving eighty-five percent of a "no-parole offense." Jackson v. State, 349 S.C. 62, 562 S.E.2d 475 (2002). The Supreme Court found the program was the functional equivalent of parole for other inmates. Applying Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983) and Knox v. State, 340 S.C. 81, 530 S.E.2d 887 (2000), the Supreme Court found that counsel is under no duty to advise a defendant about the community supervision program. Id.

This Court finds that Counsel is not required to advise the Applicant as to the community supervision requirements. However, even in light of no requirement of advisement, this Court

also finds that the plea court gave a complete plea colloquy, where all potential sentences and consequences regarding violent and most-serious charges were discussed. Therefore, this claim is denied and dismissed.

Failed to review and explain discovery materials, failed to investigate potential witnesses, alternate defenses and elements of charges

This Court finds that the Applicant's testimony as to these allegations was not credible, while Counsel's testimony was credible. Applicant testified that he only met with Counsel two or three times in the week prior to trial. Applicant testified that Counsel brought him a copy of his discovery materials and Rule 5 materials, to which Applicant signed an acknowledgement of receipt, but claimed that Counsel never reviewed the materials with him. Applicant testified that he and Counsel never discussed any possible trial strategy.

Counsel testified that he represented the Applicant on these charges and on a probation violation charge. Counsel testified that he met with the Applicant to discuss the case, and then the Applicant was sent to SCDC for the probation revocation. Counsel testified that Applicant was brought back to Cherokee County in November based upon a speedy trial motion that Applicant filed. Counsel testified that he met with the Applicant at that time and discussed the case and charges, at which time he provided Applicant with a complete set of discovery materials. Counsel then testified that he went back to review discovery materials with the Applicant a couple of days later. Counsel testified that he attempted to talk with three witnesses and was able to locate two of the three. Counsel testified that one of the three was a third party, but that witness was not a witness to the events inside the apartment. Counsel also testified that he spoke with Applicant's mother, who provided the same story that she had given police.

Although Applicant's mother claimed to not have heard any gun shots, two empty shells were retrieved from the apartment.

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).

To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (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). The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). When claims of ineffective assistance of counsel are based on lack of preparation time, an Applicant challenging his conviction must show specific prejudice resulting from counsel's alleged lack of time to prepare. United States v. Cronie, 466 U.S. 648, 104 S.Ct. 2039 (1984); U. S. v. LaRouche, 896 F.2d 815 (4th Cir. 1990).

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BRANDY W. MCBEE

The Applicant failed to produce any witnesses or evidence that would support his claims. Applicant failed to demonstrate that there was anything that could have been discovered had Counsel done additional investigation. Applicant also failed to prove that there was any helpful testimony that could have been developed had Counsel spoken to all of the potential witnesses. Without any credible testimony or evidence to support his claims, this Court would have to engage in speculation to find that there was anything that Counsel failed to explain or investigate. Therefore, this Court finds that these claims are denied and dismissed.

Failed to raise defense of consent for entry or investigate witnesses

Again, as this Court noted earlier, the plea court reviewed with the Applicant all of his constitutional rights, including the right to a jury trial where Applicant could present a defense, and Applicant voluntarily waived all of those rights. Further, Applicant failed to offer any evidence to support a possible defense of consent, in light of the established facts of the case. Also, as indicated in the previous section, the Applicant failed to produce the testimony of any witnesses that he alleged Counsel failed to investigate to support that those witnesses would have offered any beneficial testimony. Therefore, these claims are denied and dismissed.

Failed to investigate whether any State's witness was subject to intimidation

As to this allegation, this Court finds that it lacks merit. There is absolutely no evidence in the record, or was there any evidence presented at the hearing to support any allegations of intimidation of witnesses. Therefore, this Court finds that this claim is denied and dismissed based on the Applicant's failure to meet his burden of proof.

Failed to have a mental evaluation of Applicant obtained

This Court also finds that the Applicant has failed to meet his burden of proof as to this claim. A criminal defendant is competent to enter his guilty plea if "the accused [has] sufficient

grand jury and a print out of the court terms. Applicant testified that his indictment for burglary – 1st degree did not specify what crime he intended to commit within.

A presumption of regularity attaches to all proceedings in the courts of this State, and it is incumbent upon one who challenges a proceeding to prove his claims. *See, e.g., Tate v. State*, 345 S.C. 577, 549 S.E.2d 601 (2001); *Pringle v. State*, 287 S.C. 409, 339 S.E.2d 127 (1986). The Applicant offered no credible evidence in support of this claim and no testimony which supported his claim. Therefore, this claim is denied and dismissed.

Summary

This Court finds that Counsel is an experienced attorney who was prepared for and effectively represented Applicant at his plea. This Court finds counsel adequately conferred with the Applicant, was 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. There is no evidence that the outcome of the trial would have changed based upon any of the allegations of deficiency. 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.

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BRANDY W. MCBEE

CONCLUSION

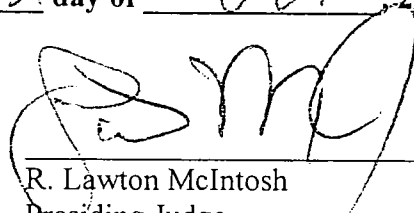
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

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), SCRCP, 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 this 31 day of Oct, 2013.



 R. Lawton McIntosh
 Presiding Judge
 Seventh Judicial Circuit

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas
The Honorable r. Lawton McIntosh

Case No. 11-CP-11- 0324


Branson Jamal Thompson.....Appellant

State of South Carolina.....Respondent

Certificate of Service

I certify that I have served the Notice of Appeal and Appellant Counsel's Motion to be Relieved upon the Respondent by depositing a copy of same in the United States Mail, postage prepaid, on June 16, 2011, addressed to its attorney of record, Suzanne H. White P.O. Box 11549 Columbia, South Carolina 29211; and upon the Appellant Branson Jamal Thompson-Lieber Correctional Institution #00326685 P.O. Box 205 Ridgeville, South Carolina 29472

November 15, 2013



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PCR

November 15, 2013

South Carolina Court of Appeals
Clerk of Court
P.O. Box 11330
Columbia, South Carolina 29211

Ref: Notice of Appeal
Branson Jamal Thompson Appellant-Petitioner v. State of South Carolina,
Respondent
Case No. 11-CP-11- 0324

Enclosed for filing is a Notice of Appeal, Motion to be Relieved, and
Certificate of Service upon the Respondent.

I respectfully request the filing and motion fees be waived in this appeal
from a PCR matter.

Respectfully,



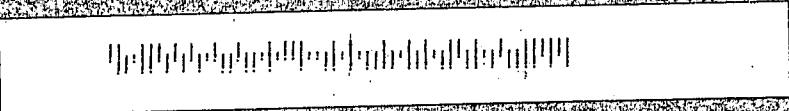
David C. Alford

Cc: Branson Jamal Thompson
Suzanne White

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S.C. SUPREME COURT



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CONSUMER
LAW