

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )  
Willie Gilmore, #281735, )  
Applicant, )  
v. )  
State of South Carolina, )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

2012-CP-40-00599

ORDER OF DISMISSAL

JEANETTE W. McBRIDE  
C.P. & C.S.

2013 OCT 21 AM 11:11

RICHLAND COUNTY  
CLERK OF COURT

**PROCEDURAL HISTORY**

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed January 23, 2012. An evidentiary hearing into the matter was convened on Thursday, September 13, 2012, at the Richland County Courthouse. The Applicant was present at the hearing with counsel, Mark E. Schnee, Esquire. The Respondent was represented by Robert D. Corney of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Also testifying was Applicant's former second-chair trial counsel, Mary LaFave, Esquire ("counsel"). This Court also had before it a copy of the transcript of the proceedings against Applicant, the records of the Richland County Clerk of Court, Applicant's direct appeal documents and Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was true bill indicted at the August 2006 term of the Richland County Grand Jury for Criminal Sexual Conduct – First Degree (2006-GS-40-02809)<sup>1</sup>. Richland County

<sup>1</sup> The indictment was amended thereafter on February 16, 2007.

Assistant Public Defenders Megan Lee, Esquire, and Mary LaFave, Esquire, represented Applicant on the charge. On June 16, 2008, Applicant proceeded to jury trial before the Honorable J. Michelle Childs. After a three day trial, Applicant was found guilty as indicted and sentenced to life imprisonment without the possibility of parole.

A notice of appeal was filed on Applicant's behalf and an appeal was perfected. Applicant was represented on the appeal by Assistant Appellate Defender M. Celia Robinson. After briefing, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences by order filed November 2, 2011. State v. Gilmore, 396 S.C. 72, 719 S.E.2d 688 (Ct. App. 2011). The remittitur was issued November 18, 2011.

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

(2) Counsel failed to attack the Grand jury empanelment for errors.

(3) Counsel failed to attack the indictment(s) where the Grand juror convened on August 16, 2006, and true Billed Aug 17, 2006. Although, on the very same charge - another indictment - where the Grand juror convened on August 16, 2006. But this indictment was not true Billed until Feb 16, 2007, although not the same elements of the first indictment.

(4) Counsel failed to investigate or subpoena witnesses on my behalf to attack Brian and Rose McCullough; Alberta Coins and "Dooley" Bruce Gene Hunter character and or credibility

Stevens prejudiced my appeal by arguing issues that was not preserved and or properly preserved for appeal review, even argued same issue upon oral argument. SEE: Appellant's brief; the Respondent's brief and the Court of Appeal ruling

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the arguments presented by both parties at the evidentiary hearing. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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, 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, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. 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.

#### *Advisement of Right to Testify*

The sole allegation raised to this Court at the PCR hearing was that counsel was ineffective for failing to adequately advise Applicant of his right to testify on his own behalf at trial to allow him to make a voluntary decision whether to do so.

Applicant testified he was aware he had the option to testify at trial as part of his defense, but said he did not do so because his main trial attorney, Megan Lee, advised him not to. Applicant stated Lee told him if he were to take the stand in his defense, the state would be able

to impeach his testimony by bringing out a prior conviction for Burglary –Second Degree. He noted the trial judge did rule on the admissibility of that prior conviction at trial and found it would be allowed in for impeachment purposes if Applicant took the stand in his defense, but alleged he and counsel never discussed the matter thereafter. Applicant stated he was unaware it was ultimately his decision whether to testify and only did not do so because of Lee's advice.

From there, Applicant proffered the testimony he would have allegedly given at trial had he taken the stand to testify. Applicant stated the sexual encounter with victim was consensual. And it was victim who initiated the physical contact with him after the two shared several drinks at her house. Applicant stated he never had a knife during the incident and that victim's testimony was simply not true.

Applicant then called Mary LaFave, Esquire, to testify to this Court. LaFave noted she served as second-chair counsel to Megan Lee in the matter.<sup>2</sup> She stated she came on as Lee's co-counsel early on in the case and said they knew it was a trial from the outset as Applicant maintained his innocence in their discussions. LaFave said she met with Applicant many times at the jail to discuss the case, in addition to Lee's numerous meetings with him as well. LaFave said she did not recall a specific discussion with Applicant about his right to testify, but that Lee may have done so in one of her many meetings where LaFave wasn't present. She noted Applicant had voiced a desire to testify at trial early on in the matter, but said the court's ruling on admission of the prior conviction for impeachment was a big factor in that decision. LaFave also stated it was customary for the attorneys of the public defender's office to do a thorough review of a defendant's constitutional rights with him/her early on in their representation, which would have included an advisement on the right to testify at trial. LaFave then noted that, in her

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<sup>2</sup> Since Applicant's trial, Megan Lee relocated overseas to England and has rendered herself incapable of being reached to provide testimony in the matter. Respondent made several attempts to contact Ms. Lee via e-mail via an address she had previously corresponded to, but never received any response from Lee.

experience, there are many times it is not in a defendant's best interest to testify because of the state's ability to do a thorough cross-examination and introduce prior convictions for impeachment purposes.

Based on a thorough review of the record, the relevant law and the testimony presented at the PCR hearing, this Court finds Applicant has failed to prove counsel was ineffective in this regard. Having heard the testimony Applicant *would have* presented to the jury had he taken the stand in his defense, this Court can find no reasonable probability the outcome of the case would have been different had Applicant testified. Applicant's testimony, including his rendition of the how the incident occurred, is wholly not credible and would have done nothing to persuade the jury to find him not guilty of the charges. Applicant's demeanor, delivery and substantive testimony firmly convince this Court that Applicant would have only further damaged his chances of acquittal had he taken the stand before the jury.

This finding is only further established when taken in conjuncture with the introduction of Applicant's prior Burglary conviction. Therefore, this Court can find no reasonable probability that, had counsel been adequately advised of his right to testify and chosen to exercise that right, the outcome of trial would have been different. Accordingly, this Court finds Applicant has failed to prove resulting prejudice. See Strickland v. Washington, 466 U.S. at 697, 104 S.Ct. at 2069 (“[T]here is no reason for a court deciding an ineffective assistance claim to...address both components of the inquiry if the defendant makes an insufficient showing of one; [i]n particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered...as a result of the alleged deficiencies.”).

Additionally, while unnecessary given the above finding, this Court notes Applicant has failed to sufficiently carry his burden in proving counsel's performance was deficient or

otherwise objectively unreasonable. The record before this Court clearly reflects the introduction of Applicant's prior conviction for impeachment purposes was a critical concern of counsel's as she made repeated, vigorous arguments against its introduction throughout the course of the trial. With those portions of the record in mind, this Court finds is highly unlikely Applicant's right to testify was never once discussed with him, and Applicant's testimony to that end are **not** credible to this Court. While the trial judge did not affirmatively advise Applicant of that right on the record, the case law is clear such an on record waiver of the right to testify is not always necessary. See Brown v. State, 340 S.C. 590, 533 S.E.2d 308 (2000). Further, it is not objectively unreasonable for trial counsel to await the trial court's ruling on the admissibility of a prior conviction at trial to advise a defendant whether to testify or not, and the record reflects counsel requested additional time after the state rested to discuss the right to testify with Applicant. (Trial Tr. p. 281). Accordingly, this Court finds no credible evidence to either confirm or deny Applicant was ever advised of that right and, therefore, Applicant has failed to carry his burden in proving such.

Regardless of the deficiency finding, this Court adheres to the above finding that Applicant would not have been a beneficial or credible witness at trial and, therefore, suffered no prejudice in failing to take the stand in his defense. Therefore, the current application for PCR 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 raise all additional allegations raised in his application at the hearing and has, thereby, waived them. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

This Court notes Applicant 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 8 day of Oct, 2013.

  
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J. ERNEST KINARD, JR.  
Presiding Judge  
Fifth Judicial Circuit

Camden, South Carolina.