

J. FALKNER WILKES
Attorney at Law

114 Whitsett Street
Greenville, South Carolina 29601

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December 9, 2013

RECEIVED

DEC 13 2013

S.C. Supreme Court

Robert M. Dudek
Chief Appellate Defender
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

Re: Marlon Rivera, 311864 v. State of South Carolina, 2011-CP-23-1209

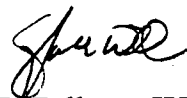
Dear Mr. Dudek,

I represented Reginald Miller who had a PCR hearing before the Hon. Robin B. Stilwell. Mr. Rivera has appealed from the decision of the court in this case. Enclosed please find a copy of the Mr. River's Notice of Appeal and Certificate of Service for same and other documentation you requested to consider representation in this case.

I was the third attorney appointed in the case. Mr. Rivera does not have funds to hire private counsel. You were involved in the direct appeal and therefore, may have a conflict in handling the Petition. I am hoping that your office has arrangements in such events. I have also included the letter from OID stating that they don't have any money for appointed counsel. I figure this is pretty much the standard so I did not even submit a request for payment for this appointment. As I have done this one pro bono it would be burdensome to have to continue on the petition. I will assume that you will have counsel available that can handle this case.

By copy of this letter I am informing the Clerk of the Supreme Court of the status of the case. Unless directed by the Clerk of the Supreme Court or your office, I will take no further action pending your decision as to Mr. Rivera's representation by your office.

Sincerely,



J. Falkner Wilkes

c. letter only to:

Clerk of Court
Paul B. Wickensimer
Courthouse
305 E North St
Greenville, SC 29601-2121

Karen Ratigan
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, S.C. 29201

Marlon Rivera, 311864
Perry Correctional Institution
430 Oaklawn Road
Pelzer, SC 29669

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

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Re: Marlon Rivera, 311864 v. State of South Carolina, 2011-CP-23-1209

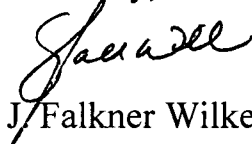
Dear Clerk,

Enclosed please find a Notice of Appeal and Certificate of service in the above captioned post conviction relief action. Also enclosed is a copy of the Order of Dismissal from which appeal is taken.

I was appointed in this case and have forwarded the appropriate information and documentation to the Office of Indigent Defense - Appellate Division for consideration.

I will not order the transcript or take further action unless directed to do so by this Court or the OID/AD.

Sincerely,



J. Falkner Wilkes

c.
Clerk of Court
Paul B. Wickensimer
Courthouse
305 E North St
Greenville, SC 29601-2121

Karen Ratigan
Rembert Dennis Building
1000 Assembly Street, Room 519
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Marlon Rivera, 311864
Perry Correctional Institution
430 Oaklawn Road
Pelzer, SC 29669z

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS
Hon. Robin B. Stilwell, Judge

RECEIVED

DEC 13 2013

Case No. 2011-CP-23-1209

S.C. Supreme Court

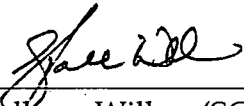
State of South Carolina, Respondent,

vs.

Marlon Rivera, 311864, Appellant.

NOTICE OF APPEAL

Marlon Rivera hereby appeals from the Judgment and Order of Dismissal signed by the Honorable Robin B. Stilwell, and entered November 8, 2013. The Judgment and Order under appeal were received by Appellant's counsel on December 11, 2013. A copy is enclosed herewith.



J. Falkner Wilkes (SC Bar #12893)
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Counsel for Appellant

Other counsel of record:
Office of the Attorney General
Karen Ratigan
PO Box 11549
Columbia, SC 29211
Counsel for Respondent

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS
Hon. Robin B. Stilwell, Judge

RECEIVED

DEC 13 2013

S.C. Supreme Court

Case No. 2011-CP-23-1209

State of South Carolina, Respondent,

vs.

Marlon Rivera, 311864, Appellant.

CERTIFICATE


I certify that on December 9, 2013, I served the Appellant's Notice of Appeal on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, addressed to counsel of record and others as indicated below:

Office of the Attorney General
Karen Ratigan
PO Box 11549
Columbia, SC 29211

Clerk of Court
Paul B. Wickensimer
Courthouse
305 E North St
Greenville, SC 29601-2121

Marlon Rivera, 311864
Perry Correctional Institution
430 Oaklawn Road
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Respectfully submitted,



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Counsel for Appellant

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
Marlon Rivera,)
S.C.D.C. No. 311864,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
C.A. No. 2011-CP-23-1209

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER
2013 NOV 8 AM 10 52

ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed February 17, 2011. The Respondent made its return on June 28, 2011. An evidentiary hearing into the matter was convened on August 27, 2013 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Jeffrey Falkner Wilkes, Esquire.¹ Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

Juan Carlos Macano and the Applicant's trial counsel Susannah C. Ross, Esquire, testified at the hearing. The Applicant's appellate counsel, Robert M. Dudek, Esquire, testified by telephone. The Court had before it the trial transcript, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, the return, the appellate records, and the Applicant's Exhibit 1.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted

¹ A Spanish language interpreter was also present.

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at the October 2004 term of the Greenville County Grand Jury for murder (2004-GS-23-7693).

He was represented by Susannah C. Ross, Esquire.

After the State brought the case to trial, the Applicant was found guilty. On October 13, 2005, the Honorable C. Victor Pyle, Jr. sentenced the Applicant to thirty years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Dudek, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The Court of Appeals reversed and remanded the conviction. State v. Rivera, Op. No. 2008-UP-187 (S.C. Ct. App. filed March 18, 2008). The Respondent filed a petition for writ of certiorari at the South Carolina Supreme Court. The Supreme Court granted the petition and the parties briefed the issues. On September 7, 2010, the Supreme Court reversed the Court of Appeals. State v. Rivera, 389 S.C. 399, 699 S.E.2d 157 (2010).

ALLEGATIONS

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

1. Ineffective assistance of counsel.

At the post-conviction relief hearing, the Applicant proceeded upon the following allegations for relief:

1. Ineffective assistance of trial counsel:
 - a. Failed to timely move to quash indictment.
 - b. Counsel's motion for sequestration resulted in two witnesses not being allowed to testify.
 - c. Failed to interview potential witness.
 - d. Failed to challenge the chain of custody of the gunshot residue evidence.
 - e. Failed to object during the State's closing argument.
2. Ineffective assistance of appellate 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 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 Trial 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).

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. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). 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, 117-18, 386 S.E.2d 624, 625 (1989). “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 v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

Juan Carlos Macano stated he was a bouncer at a bar called La Roomba at the time of the shooting. Macano stated he was an acquaintance of the Applicant’s at the time. Macano stated

he checked the Applicant at the door of the bar that night, felt an object, and told the Applicant to leave. Macano stated the Applicant did not have the item when he returned. Macano stated the Applicant fought with another man outside and the Applicant took out his gun. Macano stated the Applicant dropped his gun and a man picked it up and fired. Macano stated the Applicant never fired the gun. Macano admitted he did not contact the police or give a statement.

Trial counsel testified she filed discovery motions and then reviewed the discovery materials both independently and with the Applicant and an interpreter. Trial counsel testified the discovery materials included the incident reports, the Applicant's confession, witness statements, the autopsy report, and the gunshot residue test. Trial counsel testified she moved to quash the indictment. Trial counsel testified Macano's name was neither included in a potential list of witnesses nor uncovered by her investigator. Trial counsel testified that, in retrospect, she wished she had not moved to sequester witnesses because two witnesses (her investigator and Yamileth Corrales) could not testify. Trial counsel testified she could have objected to the chain of custody for the gunshot residue evidence. Trial counsel testified she did not object to a comment made about defense witnesses during the assistant solicitor's closing argument.

This Court trial counsel's testimony is credible. This Court further finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in her representation.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not make a proper motion to quash the indictment. This Court finds the Applicant has failed to demonstrate either error or prejudice because a motion to quash the indictment was not filed sooner. See State v. Culbreath, 282 S.C. 38, 40, 316 S.E.2d 681, 681 (1984) ("[T]he failure of the solicitor to act upon a warrant within ninety (90) days . . . does not within itself invalidate a

warrant or prevent subsequent prosecution.”). Further, this Court finds the Applicant failed to provide evidence of any prejudice that resulted from the delay. See, e.g., State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007) (noting one must prove prejudice in order to prevail on an allegation that one’s speedy trial rights were violated). This Court further notes the true test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet. State v. Gentry, 363 S.C. 93, 103, 610 S.E.2d 494, 500 (2005). Indictments are not evidentiary or jurisdictional documents – they are merely notice documents. Id. at 102, 610 S.E.2d at 500. This Court finds the Applicant has failed to present any evidence that the indictment in this case did not provide notice of the charge upon which he would be tried.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not interview a witness. Trial counsel testified that Juan Carlos Macano’s name never came up during her investigation of this case. This Court finds trial counsel’s testimony is credible. In contrast, this Court finds Macano’s testimony is not credible. Macano testified he worked at a bar called La Roomba and his boss’s name was Pepe. The trial transcript indicated the incident with the bouncer occurred at a bar called The Mexcali, which was operated by Carlos Estrado.² Further, Macano testified the Applicant never shot the gun; however, both the Applicant’s statement and trial testimony indicated he fired the gun. Macano was not a credible witness who would have positively impacted the defense case.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not properly handle the sequestration issue. Trial counsel moved to sequester witnesses at trial. This

² Estrado testified The Mexcali was two blocks away from La Roomba. (Trial transcript, p.68).

Court notes trial counsel's investigator and another witness (Corrales) were thus barred from testifying later in the trial. This Court finds the Applicant cannot prove he suffered any prejudice. The investigator's testimony was proffered to the trial judge. (Trial transcript, pp.382-99). This Court finds the investigator's testimony contained several instances of hearsay. The investigator's testimony was also cumulative to testimony given by Investigator Smith. In addition, as Corrales did not testify at the PCR hearing, this Court cannot speculate as to whether her testimony at trial would have affected the outcome of the case. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme Court "has repeatedly held a PCR 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.") (emphasis in original).

This Court finds the Applicant failed to meet his burden of proving trial counsel did not properly challenge the chain of custody of the gunshot residue evidence. Evidence is inadmissible only where there is a missing link in the chain of possession because the identity of those who handled the evidence was not established at least as far as practicable. See State v. Horton, 359 S.C. 555, 567, 598 S.E.2d 279, 286 (Cl. App. 2004). This Court finds the Applicant failed to present any evidence or testimony that there was a missing link in the chain of custody or any potential contamination of evidence in this case. Without such evince before this Court, the Applicant cannot prove he was prejudiced because trial counsel did not challenge the chain of custody.

This Court finds the Applicant has failed to meet his burden of proving trial counsel should have objected during the assistant solicitor's closing argument. At trial, the assistant solicitor stated "their eyewitnesses . . . there are two, there are only two that they presented."

(Trial transcript, p.522, lines 16-17). This Court finds there was no valid, sustainable objection that trial counsel could have made respecting this comment that would have changed the outcome of the Applicant's trial. See State v. Huggins, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997) (finding a solicitor's argument must stay within the record and its reasonable inferences); see also State v. Cooper, 334 S.C. 540, 553, 514 S.E.2d 584, 591 (1999) (noting a solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony).

This Court finds the Applicant has failed to demonstrate that any acts or omissions by trial counsel prejudiced his case. This Court finds the State presented overwhelming evidence of the Applicant's guilt. The bouncer at The Mexicali would not let the Applicant into the club because he had a weapon. The Applicant left and returned without a weapon but a weapon was found in a tree outside The Mexicali. Alvaro Fernandez identified the Applicant as the shooter. There was a lead particle on the Applicant's hand. The Applicant told his cousin (Nelson Castro) that he shot someone but did not say anyone else fired the gun. The Applicant's statement to Detective Rivera was that he was mad and shot the gun twice (without stating anyone else fired the gun). The Applicant testified at trial that he fired twice during a fight and was not in fear for his life. Based upon all of this evidence, the Applicant cannot demonstrate prejudice. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

Accordingly, this Court finds the Applicant has failed to prove the first prong of the

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Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in her 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. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

Ineffective Assistance of Appellate Counsel

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830 (1985). In analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009); Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999) (noting courts apply the Strickland test to determine if appellate counsel was deficient for failing to raise an issue and whether the defendant was prejudiced from the failure to raise the issue).

Appellate counsel stated he was successful on appeal to the Court of Appeals. Appellate counsel stated he raised five issues on appeal to the Court of Appeals but that the court only addressed one of these issues. Appellate counsel said the State appealed and the Supreme Court reversed the Court of Appeals. Appellate counsel stated that, in retrospect, he wished he had asked the Supreme Court to remand the case back to the Court of Appeals to address the four issues they did not address the first time. Appellate counsel stated he could recall a single instance in which such a request has been successful.

This Court finds the Applicant failed to meet his burden of proving appellate counsel was

ineffective. The Applicant argues appellate counsel should have filed a motion to remand the case to the Court of Appeals – after the Supreme Court opinion was issued – in order for several issues to be addressed. The Applicant, however, failed to point to any case law or precedent that would allow appellate counsel to pursue such action. Rather, appellate counsel merely testified he recalled such a motion was filed by another attorney in his office at some point in the past. This Court does not find appellate counsel was deficient or that the issues that were not ruled upon by the Court of Appeals were meritorious. This Court finds the issues not ruled upon by the Court of Appeals or Supreme Court were unlikely to have been resolved in favor of the Applicant. This Court finds the propositions of law at issue are dubious, and the Court of Appeals most probably decided to address issues that were of marginal merit. Instead the Court of Appeals and Supreme Court chose to discuss the issue of the charge on the law. That, ultimately, was the material issue that needed resolution by the appellate courts and that issue was properly preserved, presented, and ruled upon. This Court further finds the Applicant cannot prove any prejudice related to this issue since, as noted supra, the State presented overwhelming evidence of guilt.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial, sentencing,

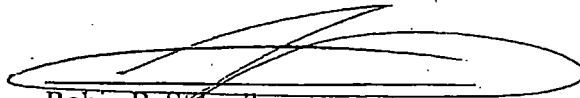
and appellate proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsels' representation. Therefore, this PCR application must be denied and dismissed with prejudice.

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 if he wants to secure appropriate appellate review. His attention is also 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 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.

AND IT IS SO ORDERED this 7 day of NOV, 2013.



Robin B. Stilwell
Presiding Judge
Thirteenth Judicial Circuit

GVILLE, South Carolina.

J. Falkner Wilkes

Attorney at Law

114 Whitsett Street

Greenville, SC 29601

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8840 # 01.320
4202 GREENVILLE, SC
P B 8773112
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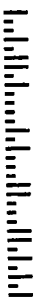


Daniel E. Shearouse, Clerk

South Carolina Supreme Court

P.O. Box 11330

Columbia, SC 29211



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