

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF PICKENS

CASE NO: 2012CP3901100

IN THE COURT OF COMMON PLEAS

Roger Eugene Shephard vs. South Carolina The State of

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: \_\_\_\_\_

2013 DEC 16 PM 12 49  
 CLERK OF COURT  
 PICKENS COUNTY  
 SOUTH CAROLINA

Dated at Pickens, South Carolina, this .

Court Reporter:

PRESIDING JUDGE -

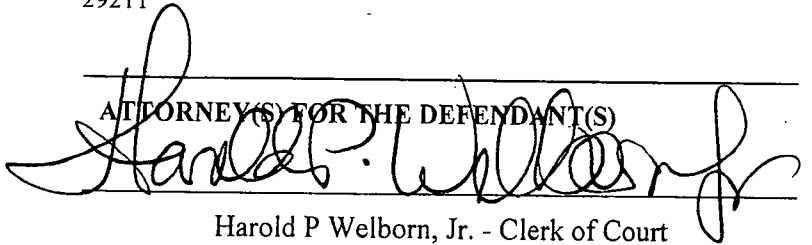
This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

Roger Eugene Shephard #338072 F2-A-169 386  
 Redemption Way McCormick, SC 29899  
 R. Mills Ariail Jr. 11 North Irvine St., Ste., 11  
 Greenville, SC 29601

Karen Christine Ratigan PO Box 11549 Columbia, SC  
 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

  
 Harold P Welborn, Jr. - Clerk of Court

RECEIVED  
 12-17-2013  
 DMK

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF PICKENS )  
 )  
 Roger Eugene Shepherd, )  
 S.C.D.C. No. 338072, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

---

IN THE COURT OF COMMON PLEAS  
 C.A. No. 2012-CP-39-1100

2013 DEC 16 PM 12:49  
 CLERK OF COURT  
 PICKENS COUNTY  
 SOUTH CAROLINA

**ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed August 1, 2012. The Respondent made its return on March 28, 2013. An evidentiary hearing into the matter was convened on October 21, 2013 at the Pickens County Courthouse. The Applicant was present and represented by R. Mills Ariail, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's trial counsel, John W. DeJong, Esquire. The Court had before it the trial transcript, the Pickens County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, the return, and the appellate records.

**PROCEDURAL HISTORY**

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Pickens County Clerk of Court. The Applicant was indicted at the July 2009 term of the Pickens County Grand Jury for murder (2009-GS-39-0941), assault with intent to kill (AWIK) (2009-GS-39-0942), armed robbery (2009-GS-39-0943), and

possession of a weapon during commission of a violent crime (2009-GS-39-0944). He was represented by John W. DeJong, Esquire.

After the State brought the case to trial, the Applicant was found guilty. On November 19, 2009, the Honorable G. Edward Welmaker sentenced the Applicant to consecutive terms of life without parole for murder and thirty years for armed robbery. Judge Welmaker levied concurrent sentences of ten years for AWIK and five years for possession of a weapon during commission of a violent crime.

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Pachak, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the form of an Anders<sup>1</sup> brief. The Court of Appeals dismissed the appeal. State v. Shepherd, Op. No. 2011-UP-337 (S.C. Ct. App. filed June 28, 2011).

### **ALLEGATIONS**

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

1. Lack of subject matter jurisdiction.
2. Ineffective assistance of counsel.
3. "Sentence was in violation of the SC constitution."
4. Prejudice.

At the PCR hearing, the Applicant proceeded upon allegations of ineffective assistance of trial counsel and lack of subject matter jurisdiction (due to issues with the Grand Jury). This Court finds the Applicant has abandoned all other issues.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has had the opportunity to review the record in its entirety and has heard the

---

<sup>1</sup> Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

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).

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).

The Applicant stated he and trial counsel reviewed all of the evidence (including the videotape, voicemail, confession, and fingerprint evidence) and how they would be used at trial. The Applicant stated he “basically” understood their conversations. The Applicant stated he was denied the opportunity to have a preliminary hearing. The Applicant stated the man on the

videotape held a piece of paper one way but that prints were found in a different place. The Applicant stated he mentioned this to trial counsel, who said he would address it in closing argument (but he did not). The Applicant also stated a different video was shown at trial. The Applicant stated he wanted to testify at trial in order to explain “the circumstances” but that trial counsel said he would look foolish and they would lose the final closing argument. The Applicant stated he was prejudiced because the “full facts” of the case were not known by the jury. The Applicant also stated he was prejudiced because he was in shackles during the trial.

Trial counsel testified he filed discovery motions with the State, received those materials, and reviewed them with the Applicant more than once. Trial counsel testified they reviewed the impact of the following evidence on the case: the videotape from the scene, the confession, the recorded conversation with Harley, and Donald Thompson’s testimony. Trial counsel testified Dr. Paul Baker (a clinical psychologist) met with the Applicant and said he was competent but somewhat delusional. Trial counsel testified the Applicant appeared to understand their discussions and participated in his defense. Trial counsel testified the Applicant never said he did not understand their discussions. Trial counsel testified he had the Applicant’s military records and there was no indication of a prior mental health issue. Trial counsel testified that he objected at trial to the videotape – arguing it was different – but that there was no evidence the tape had been edited. Trial counsel also testified that he recalled the Applicant explaining his concerns about the placement of the fingerprints but that he did not really understand his argument. Trial counsel testified he discussed the right to testify with the Applicant before trial. Trial counsel testified they discussed the advantages and disadvantages of testifying and that he did not make a recommendation as to what the Applicant should do. Trial counsel testified he objected on the first day of trial that the Applicant was wearing shackles. Trial counsel testified

the tables were draped with paper the first day and cloth the second day and that he argued this change was prejudicial because it drew attention.

This Court finds the Applicant's testimony is not credible, while also finding 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 his representation.

This Court finds the Applicant failed to meet his burden of proving he did not understand his discussions with trial counsel. This Court notes both the Applicant and trial counsel testified they reviewed the State's evidence and how it would be used at trial. While the Applicant stated he did not understand some of these discussions, trial counsel testified the Applicant never indicated this to him. Trial counsel also testified the Applicant appeared to understand their conversations. This Court finds trial counsel's testimony is credible. This Court also finds the Applicant has failed to present any evidence that he was suffering from a physical or mental condition that would have prevented him from understanding the circumstances he was facing. Rather, trial counsel testified the Applicant's records did not indicate any prior mental health issues. See Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (finding that, in a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have requested a preliminary hearing. This Court notes a defendant has no constitutional right to a preliminary hearing. State v. Keenan, 278 S.C. 361, 365, 296 S.E.2d 676, 678 (1982). This Court finds the Applicant to prove he was prejudiced by a lack of a preliminary hearing in his case.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not properly challenge the videotape or fingerprint evidence at trial. The Applicant argued the videotape at trial was not the same as the videotape they had reviewed. The Applicant also argued trial counsel failed to argue to the jury that the description of where the fingerprints were on the papers did not match with the videotaped image of where the person held the documents. Trial counsel moved to suppress the copy of the videotape and argued it appeared to have been edited. (Trial transcript, pp.58-62). Trial counsel later argued that he would not object to the original tape being admitted but would still object to the copy. (Trial transcript, pp.153-56). This Court finds the Applicant failed to provide any evidence or testimony that the videotape from the pawn shop had, in fact, been altered in some way. See Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814. This Court also notes the Applicant failed to present either the videotape or documents in order to demonstrate his issue about the fingerprint testimony. As such, this Court cannot speculate as to whether trial counsel should have pursued a different strategy with regard to those items. Cf. Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (holding that, since the contents of challenged documents were not presented at the PCR hearing, the Applicant could not demonstrate how the failure of counsel to obtain these documents prejudiced the defense).

This Court finds the Applicant failed to meet his burden of proving trial counsel somehow misadvised him about his right to testify at trial. Trial counsel testified he discussed the risks and advantages of testifying and did not make a recommendation to the Applicant. The trial judge also discussed the Applicant's right to testify and the potential hazards therein. (Trial transcript, pp.468-71). After a brief recess, trial counsel informed the trial judge that the Applicant chose not to testify and the Applicant said this was correct. (Trial transcript, p.471).

It is clear that the Applicant's decision not to testify was both informed and voluntary. See Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000) (holding a defendant's decision to testify or not must be made with knowledge of the consequences of either choice).

This Court finds the Applicant failed to meet his burden of proving trial counsel did not properly challenge the fact that he was wearing shackles at his trial. This Court has examined the trial record and notes that trial counsel objected various times to: the existence of the shackles, the efforts used to hide the shackles from the jury, and the prejudice to the Applicant. This Court notes the trial judge denied all of trial counsel's objections. As such, they were properly preserved for appellate review. The Court of Appeals reviewed this case pursuant to Anders and clearly did not believe this was a meritorious issue. See State v. McKennedy, 348 S.C. 270, 279, 559 S.E.2d 850, 855 (2002) ("The purpose of filing a brief under Anders is to ensure the merits of the appeal are not overlooked. The court has to conclude independently, regardless of counsel's conclusion, whether or not the appeal has merit before it can dismiss the appeal.").

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

### Subject Matter Jurisdiction

The Applicant stated he wrote a letter to the Clerk of Court after his trial and asked about the Grand Jury. The Applicant stated he received a letter in return which listed the names of the cases that were indicted and that his case was not on that list. The Applicant also stated the letter noted there were 15 grand jurors during that term. The Applicant argued the trial court did not have subject matter jurisdiction.

The record was re-opened after the conclusion of this PCR hearing.<sup>2</sup> At that time, this Court received information on the issue from an employee of the Clerk of Court's office (Cheryl Watson). Watson stated there was a copy in the file of the letter from the Applicant (and the reply from the clerk's office) that the Applicant referred to. Watson stated the July 14, 2009 Grand Jury documents indicated 15 members of the jury were present and at least 12 members voted in favor of all true-billed indictments. Watson stated the Applicant's four indictments were listed as true-billed. This Court finds the Applicant failed to meet his burden of proving either that the Grand Jury did not properly issue indictments or that the trial court did not have jurisdiction to hear his case.

### 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.

---

<sup>2</sup> This occurred the same day as the hearing and the Applicant, his attorney, and the attorney for the Respondent were all present.

**CONCLUSION**

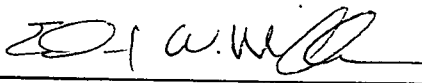
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this 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 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 12 day of December, 2013.

  
\_\_\_\_\_  
Edward W. Miller  
Presiding Judge  
Thirteenth Judicial Circuit

CLERK OF COURT  
PICKENS COUNTY  
SOUTH CAROLINA

2013 DEC 16 PM 12 49

Lawville, South Carolina.