THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas
Honorable Clifton Newman, Circuit Court Judge

Case No: 2012-CP-29-1668

Steven McFarland..... Appellant
S.C.D.C. No.: 263704

v.

The State.....Respondent

NOTICE OF APPEAL

Steven McFarland, appeals her/her Denial for Post Conviction Relief in this case. The Order of Dismissal was imposed and signed by the Honorable Clifton Newman, on DECEMBER 12, 2013, which I, Charles T. Brooks, III received on December 20, 2013.

December 20, 2013

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PROOF OF SERVICE

I, the undersigned, do hereby certify that on this 20th day of December, 2013, I served the foregoing **Notice of Appeal, Order of Dismissal,** as well as **Proof of Service** in this matter by depositing a true copy of it in the United States Mail, postage prepaid, on December 20, 2013 addressed to the following as indicated below:

South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

South Carolina Office of Appellate Defense
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29211-1589

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Steven McFarland, 263704
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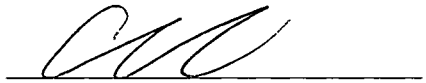
Dated: December 20, 2013



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December 20, 2013

South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

RE: Steven B McFarland v State of South Carolina
Case No. 2012-CP-29-1668

Dear Sir or Madam:

Enclosed herewith you will find the **Notice of Appeal, Order of Dismissal**, along with a **Proof of Service** in reference to the above named Applicant.

If you have any questions or concerns, please contact my office at the number stated above.

With kind regards, I am

Sincerely,

Charles T. Brooks, III
CTB/jlb

Enclosed as stated

Cc: Suzanne H. White, Office of Attorney's General
South Carolina Office of Appellate Defense
Steven McFarland, 263704

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SIXTH JUDICIAL CIRCUIT
COUNTY OF LANCASTER	)	
	)	
	)	
Steven B. McFarland, #263704,	)	2012-CP-29-1668
	)	
Applicant,	)	
	)	
v.	)	**ORDER OF DISMISSAL**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

This matter comes before the Court by way of an Application for Post-Conviction Relief filed November 26, 2012, and amendments filed May 13, 2013[1], and July 18, 2013. The Respondent made its Return on or about June 25, 2013. An evidentiary hearing into the matter was convened on August 5, 2013, at the Lancaster County Courthouse. The Applicant was present at the hearing and was represented by Charles T. Brooks III, 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. Mark Grier, Esquire, also testified. This Court also had before it a copy of the records of the Lancaster County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, the Appellate Court records, and the trial transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lancaster County Clerk of Court. The Applicant was indicted at the February 2010 term of the Lancaster County Grand Jury for shoplifting, third

[1] Applicant's first amendment was a claim for Default Judgment against the State for failure to file a Return in sixty days.

offense (2010-GS-29-0262). The Applicant was represented by Mark Grier, Esquire. On July 29, 2010, the Applicant proceeded to jury trial. The jury returned a verdict of guilty for shoplifting, third offense. The Applicant was sentenced by the Honorable Paul M. Burch to confinement for a period of ten (10) years for shoplifting, third offense, provided that upon the service of nine (9) years, the balance will be suspended with probation for five (5) years[2].

A timely Notice of Appeal was filed on the Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals dismissed the appeal. State v. McFarland, Op. No. 2012-UP-586 (filed October 31, 2012). The Remittitur was returned on December 3, 2012.

ALLEGATIONS

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

1. Ineffective assistance of counsel, in that;
   a. Counsel failed to object to trial court's denial of motion for continuance,
   b. Counsel failed to object to Applicant being tried in his absence,
   c. Counsel failed to object to excessive sentencing,
   d. Counsel failed to call as witnesses two witnesses under subpoena,
   e. Counsel failed to object to hearsay testimony of Officer Funderburk,
   f. Counsel failed to object to jury charge.

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

[2] Upon information and belief, Applicant was also charged with and sentenced to a concurrent ninety day sentence for contempt of court on July 29, 2010, following his failure to appear for the first day of his trial.

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), SCRCP). 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).

In addition to the claims raised in the application, Applicant testified that Counsel was ineffective for failing to challenge the indictment pursuant to Franks v. State. Applicant testified that he was sentenced to ninety days for contempt of court and Counsel never objected.

Counsel testified that he has practiced law since 1990 and at least 30-40% of his practice was criminal until 2006, at which time he began practicing primarily criminal law. Counsel testified that he was appointed the Sixth Circuit Public Defender in 2010. Counsel testified that he and the Applicant met several times prior to trial. Counsel testified that he filed Brady and Rule 5 motions and received discovery materials from the Solicitor's office. Counsel testified that he did not recall any conversation with the Applicant regarding problems with the indictments. Counsel acknowledged that he did not challenge the indictment or object to the contempt charge.

This Court finds that the Applicant has failed to meet his burden of proof as to any of these claims. The Applicant offered no testimony or evidence that had Counsel made these objections or challenges, the outcome of the proceedings would have been any different. Therefore, this claim is denied and dismissed.

Failure to object to denial of motion for continuance and

failure to object to Applicant being tried in his absence

The Applicant testified that Counsel did make a motion for continuance, but failed to argue against a trial in Applicant's absence. The Applicant testified that Counsel informed him that he needed to be at the courthouse by 9:00 am the morning of his trial, but Applicant testified that the case had already been called.

Counsel testified that the Applicant was given notice of the trial date and was actually present during the morning trial began. Counsel testified that Applicant was on bond during the

trial and left at lunch after indicating that he wanted to find the female involved. Counsel testified that he advised the Applicant to return to the courthouse that afternoon by 2:00 pm because the trial would begin. Counsel testified that he did not hire a private investigator to try and find the female involved in the shoplifting incident. However, Counsel testified that the female did appear on the second day of trial and Counsel did speak with her prior to calling her as a witness.

The South Carolina Supreme Court has held that notice of the term of court in which a defendant will be tried is sufficient notice to enable the defendant to make an effective waiver of his right to be present at his trial. State v. Ravenell, 387 S.C. 449, 456, 692 S.E.2d 554, 558 (Ct. App. 2010)(citing Ellis v. State, 267 S.C. 257, 261, 227 S.E.2d 304, 306 (1976)). Further, the deliberate absence of a defendant who knows that he stands accused in a criminal case and that his trial will begin during a specific period of time indicates nothing less than an intention to obstruct the orderly processes of justice. Id. The record reflects that the Applicant, after being present the morning of his trial, failed to return following a lunch break. Further, Counsel made a motion for continuance in order to locate the Applicant, but the trial court denied that motion based upon the fact that the Applicant had been present earlier that day. The Court found on the record that the Applicant had notice of the trial and voluntarily waived his right to be present.

The Applicant has failed to meet his burden of proof of establishing that Counsel was ineffective for failing to object to the denial of the motion for continuance or object to the Applicant being tried in absentia. As the record reflects, the Applicant was present the second day of trial and was able to testify and present his defense. Therefore, this Court finds that even if Counsel was deficient for not objecting to beginning the trial in Applicant's absence, there is

no prejudice as the Applicant was present for the remainder of his trial and was able to present his defense. This claim is denied and dismissed.

Failure to object to excessive sentencing

The Applicant testified that he is currently incarcerated with one and a half years left in confinement and then five years of probation. Applicant testified that the judge improperly sentenced him to nine years of confinement and five years of probation, which is more than the maximum of ten years on his charge. The court has broad discretion in imposing criminal sentences. State v. Franklin, 267 S.C. 240, 226 S.E.2d 896 (1976). Absent a showing of partiality, prejudice, oppression or corrupt motive by the sentencing court, or absent a showing that the statutory punishment in and of itself constitutes cruel and unusual punishment, the post-conviction relief court has no authority or jurisdiction to review or change a sentence falling within statutory limits. State v. Cogdell, 273 S.C. 563, 257 S.E.2d 748 (1979). Further, the trial judges are given the discretion at the time of the sentence to provide for a suspension of a part of such imprisonment and to then place the defendant on probation, after serving a designated portion of the term of imprisonment. Moore v. Patterson, 203 S.C. 90, 26 S.E.2d 319, 321 (1943). Therefore, Counsel had no obligation to object to a sentence that is within the sentencing guidelines and within the judge's discretion. This claim is denied and dismissed.

Failure to call two witnesses under subpoena

The Applicant testified that there were witnesses under subpoena regarding the lack of a Wal-Mart surveillance video, but they did not testify. Applicant also testified that Lieutenant Walker was in the store with Applicant, but did not testify. Counsel testified that the surveillance video was unavailable and Applicant's argument was that because the video was unavailable, he should not be found guilty. Counsel testified that he did not believe that there was anything an

investigator could have discovered that he and the Solicitor's office had not discovered. 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). The Applicant failed to offer the testimony of either witness that he claims Counsel was ineffective for failing to call at trial. Therefore, this Court would be required to speculate as to what, if any, testimony would have been given had those witnesses been called at trial. This Court finds that the Applicant failed to meet his burden of proof as to this claim and it is denied and dismissed.

Failure to object to hearsay testimony of Officer Funderburk

The Applicant testified that Counsel did not challenge the statements of the officer regarding statements allegedly made by Applicant. In regards to the Applicant's allegation that Counsel was deficient in his cross-examination of Officer Funderburk, this Court finds that the Applicant has failed to meet his burden of proof. Applicant also argued that Counsel was ineffective for failing to introduce the incident report as evidence during Officer Funderburk's testimony, when the report uses the word "I" repeatedly, but it should be "we" since both Officers Funderburk and Walker were present. Counsel acknowledged that he did not object to

the testimony of Officer Funderburk regarding statements made by the Applicant or introduce the incident report because he saw no need to do so.

The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995). The Applicant did not proffer any questions counsel allegedly failed to ask, and did not present any testimony showing the witnesses' answers at trial would have been different. Accordingly, the Applicant has not shown that a different approach to cross-examination would have been beneficial to the defense. This claim is dismissed.

Failure to object to jury charge

The Applicant testified that Counsel failed to object to the jury charge about conspiracy and "hands of one, hands of all." The facts must support a jury instruction for it to be proper. State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (S.C. 2003). South Carolina law dictates that jury instructions, when analyzed, must be considered in their entirety. *See* Todd v. State, 355 S.C. 396, 585 S.E.2d 305 (2003). The jury charge was based upon the facts presented to the trial judge and this Court finds nothing improper in the charge. The Applicant offered no evidence or testimony to support his claim that Counsel was ineffective for failing to object to the jury charge. Therefore, this claim is denied and dismissed.

Summary

This Court finds in regards to the allegation of ineffective assistance of counsel, the Applicant's testimony is not credible. This Court further finds Counsel adequately conferred

with the Applicant, conducted a proper investigation, 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. 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.

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 12th **day of** December**, 2013.**

Clifton Newman
Presiding Judge

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