

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

RECEIVED

JAN 27 2014

Honorable Steven H. John, Circuit Court Judge

S.C. Supreme Court

Case No.: 2012-CP-26-6426

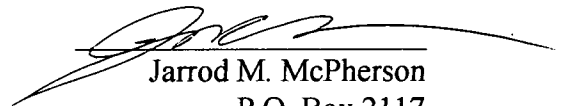
Lewis E. Pipher, #341432,Petitioner,

State of South Carolina,Respondent,

NOTICE OF APPEAL

The Petitioner appeals the Honorable Steven H. John's January 10, 2014, order denying post-conviction relief to the Respondent. Undersigned counsel received notice of entry of the order on January 17, 2014. A copy of the order on appeal is attached to this notice.

Respectfully submitted,



Jarrod M. McPherson
P.O. Box 2117
Murrells Inlet, SC 29576
Attorney for the Applicant

January 22, 2014

Other counsel of record:

Alan Wilson
Attorney General
Joshua L. Thomas
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

Robert M. Dudek
Chief Appellate Defender
1330 Lady Street, Suite 401
Columbia, SC 29201

Melanie Huggins-Ward
Horry County Clerk of Court
P.O. Box 677
Conway, SC 29528

Lewis E. Pipher, Jr. #341432 3A14
Trenton Corr. Inst.
84 Greenhouse Rd.
Trenton, SC 29847

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM Horry COUNTY
Court of Common Pleas

Honorable Steven H. John, Circuit Court Judge


Case No.: 2012-CP-26-6426

Lewis E. Pipher, #341432,Petitioner,

State of South Carolina,Respondent,

PROOF OF SERVICE

I, Jarrod M. McPherson, certify that I have today served the within notice of appeal upon Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record, Joshua L. Thomas, P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served This 22nd day of January, 2014.


Jarrod M. McPherson
P.O. Box 2117
Murrells Inlet, SC 29576
Attorney for Lewis E. Pipher

15
J7

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Lewis E. Pipher, #341432,)

Case No. 2012-CP-26-6426

Applicant,)

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)
_____)

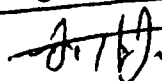
CLARE HIGGINS-WARD
CLERK OF COURT
JUL 10 PM 12:49
HORRY COUNTY

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed August 20, 2012. Respondent made its return on or about November 30, 2012. The Court convened an evidentiary hearing into the matter on December 16, 2013, at the Horry County Government and Judicial Complex. Applicant was present at the hearing and represented by Jarrod M. McPherson, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the PCR hearing. Applicant's trial counsel, Bobby G. Frederick, Esquire, also testified. The Court had before it a copy of the trial transcript, the records of the Horry County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the return. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In November 2009, the Horry County Grand Jury indicted Applicant for first degree burglary (2009-GS-26-4401). Bobby G.



Frederick, Esquire, ("trial counsel") represented Applicant. On June 16, 2010, Applicant proceeded to trial before the Honorable Larry B. Hyman, Jr., and a jury. Judge Hyman directed a verdict as to the first degree burglary indictment and submitted the lesser included offenses of second and third degree burglary to the jury. The jury found Applicant guilty of second degree burglary. Judge Hyman sentenced Applicant to fifteen (15) years imprisonment, suspended upon the service of nine (9) years of incarceration and three (3) years of probation.

Applicant filed a timely notice of appeal and Kathrine H. Hudgins, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on July 18, 2012. State v. Pipher, 2012-UP-424 (S.C. Ct. App. filed July 18, 2012). The remittitur was returned to the circuit court on August 3, 2012.

II. ALLEGATIONS

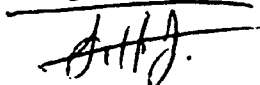
In his application, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
2. "Bias by trial judge"
3. "subject matter jurisdiction"

At the PCR hearing, Applicant withdrew his allegation regarding subject matter jurisdiction. Applicant proceeded on only the allegations of ineffective assistance of trial counsel and trial judge bias.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court reviewed the record in its entirety and heard the testimony and arguments presented at the PCR hearing. Further, this Court had the opportunity to observe each witness

A handwritten signature in black ink, appearing to be "A.H.J.", is written over a horizontal line.

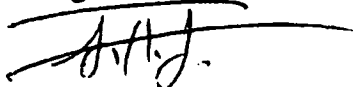
who testified at the hearing, and to closely pass upon their credibility. This Court weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

A. Summary of Testimony

Applicant testified he was initially charged with first degree burglary. He testified he only met with trial counsel three (3) times before trial, and they did not go over his case. Applicant testified he never discussed any witness statements with trial counsel. He also testified they did not review any of the State's evidence together. Applicant further testified he attempted to tell trial counsel his version of events, but trial counsel did not listen and merely said he would take care of things.

Applicant testified trial counsel should have cross-examined Jackie Eolder about inconsistencies in her initial statement to police and her trial testimony. Applicant claimed Eolder's initial statement indicated she saw the door to the victim's house open. Applicant believes this statement indicates the sun had not set when Eolder witnessed him leaving the victim's property.

Applicant also testified trial counsel should have done a better job cross-examining the victim's daughter, Carolyn Duncan. He testified Duncan lied when she testified she did not know Applicant or his co-defendant because his co-defendant's address is next door to Duncan's. Applicant also testified trial counsel was ineffective for failing to properly preserve an objection to the State's closing argument that the porch of the victim's house was not enclosed to qualify as a part of the structure. Applicant further testified he felt the trial judge showed bias in dismissing a juror who was making inappropriate comments in the jury room.

A handwritten signature in black ink, appearing to be "A.H.J.", written over a horizontal line.

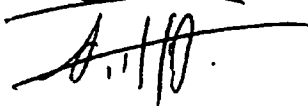
Trial counsel testified he met with Applicant three (3) or four (4) times prior to trial. He testified he does not recall the specifics of the meetings. However, on cross-examination trial counsel testified he always sends a copy of the State's discovery response to his clients and then reviews that information with them. Trial counsel testified he did file discovery motions in this case and has no reason to believe he would have deviated from his normal practice.

Trial counsel further testified he hired an investigator to review Applicant's case. He testified the investigator interviewed the victim's son-in-law, Eodler, Becky Johnson, and Mary Roberts. He also testified the investigator uncovered the information regarding the victim's address.

Regarding the specifics of his trial strategy, trial counsel candidly testified he does not recall some specifics of his decision making. He testified he did not know why he did not cross-examine Eolder on whether it was daylight when she witnessed Applicant leaving victim's house. However, he did recall his defense strategy was to get a directed verdict on the first degree burglary charge and to tell Applicant's version of events. He testified he was successful in getting the first degree burglary indictment dismissed in favor of charges on lesser included offenses of second and third degree burglary. Trial counsel also testified Applicant's version of events was presented to the jury through the testimony of his co-defendant. Trial counsel testified the story Applicant gave him was consistent with the co-defendant's testimony, but Applicant did not testify because his record was significantly worse than the co-defendant's.

B. Ineffective Assistance of Trial Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985)

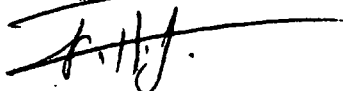
A handwritten signature in black ink, appearing to be "A. H. O.", is written over a horizontal line.

(citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel 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." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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." Id. at 117-18, 386 S.E.2d at 625.

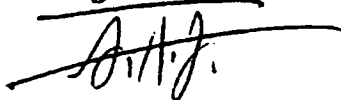
The Court finds Applicant failed to carry his burden of proving ineffective assistance of counsel. Specifically, the Court finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

A handwritten signature in black ink, appearing to be "A.H.J.", written over a horizontal line.

Applicant's primary complaint with trial counsel's performance centers around his presentation of evidence regarding whether the burglary was committed at night. However, further cross-examination of Eolder likely would not have caused her to recant her testimony that she observed the burglary occur in the evening (Trial Tr. 145:24). Instead, trial counsel articulated his trial strategy was to tell Applicant's version of events, including the contention it was not nighttime when Applicant entered the porch, through the testimony of his co-defendant. The Court finds this is a valid trial strategy under the circumstances. Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992))).

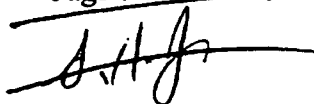
The evidence at trial overwhelmingly indicated the burglary occurred during the night time. Eolder testified she witnessed Applicant leaving the victim's house during the evening. (Trial Tr. 145:24). Officer Crews testified he stopped Applicant's vehicle during the nighttime. (Trial Tr. 191:22). The only evidence to rebut the State's contention the burglary occurred at night was the co-defendant's testimony, which the jury was free to believe or not believe. Furthermore, Applicant presented no evidence at the PCR hearing regarding the actual time of sunset the day of the burglary. He also did not produce any 911 records to corroborate or rebut the witnesses' testimony. Therefore, his testimony is merely speculative about what counsel could have uncovered with further cross-examination. See Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005).

Applicant's contention that trial counsel was ineffective for failing to preserve an objection to the State's closing argument is also without merit. The State presented evidence

A handwritten signature in black ink, appearing to be "A.H.J.", written over a horizontal line.

Applicant actually entered the house, not just the porch where the co-defendant claimed the washer and dryer were stored. Officer Miles testified the door to the house had been pried open. (Trial Tr. 155:20-156:2). He also testified there was a puddle of water in a room where a washer and dryer hook-up were located. (Trial Tr. 156:6-23). Therefore, there was evidence for the jury to believe Applicant entered the house to remove the washer and dryer.

Regardless, a porch may be a part of a building if it is used for storage of goods. S.C. Code Ann. § 16-11-310 defines a building as "any structure, vehicle, watercraft, or aircraft: (a) [w]here any person lodges or lives; or (b) [w]here people assemble for purposes of business, government, education, religion, entertainment, public transportation, or public use *or where goods are stored.*" The South Carolina Court of Appeals has previously defined "building" as "a [s]tructure designed for habitation, shelter, *storage* ... and the like." State v. Middleton, 367 S.C. 527, 530, 626 S.E.2d 74, 76 (Ct. App. 2006) (emphasis added) (citing Black's Law Dictionary 194 (6th ed. 1990)). In State v. Stone, 350 S.C. 442, 445-47, 567 S.E.2d 244, 246-47 (2002), the South Carolina Supreme Court held a porch attached to a house was part of the "dwelling" for purposes of the first degree burglary statute where the porch was used for the protection of the homeowner's property. If an attached porch can be part of a dwelling for purposes of a first degree burglary, then it certainly can be a part of a building for purposes of a second degree burglary. Furthermore, the trial judge properly charged the jury on the statutory definition of a building, which includes a structure where goods are stored. (Trial Tr. 353:7-12). Thus, the jury could have properly convicted Applicant of second degree burglary even if they believed Applicant merely entered a porch, and not the house itself.

A handwritten signature in black ink, appearing to be "S.H.J.", written over a horizontal line.

C. All Other Allegations

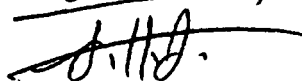
As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, the Court finds Applicant failed to present sufficient evidence regarding such allegations. Specifically, Applicant failed to present any evidence at the hearing in any way showing bias or error of the trial judge. Accordingly, the Court finds Applicant has abandoned any such allegations.

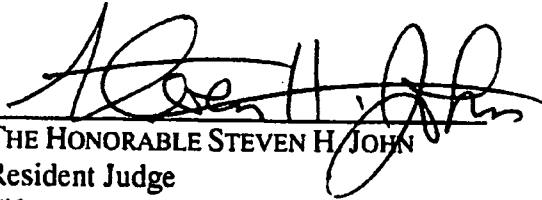
V. CONCLUSION

Based on the foregoing, the Court finds that 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.

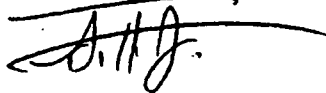
The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on the applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal. It is therefore

ORDERED that the Application for Post-Conviction Relief is denied and dismissed with prejudice and the Applicant is remanded to the custody of the Respondent.

A handwritten signature in black ink, appearing to be "J. H. H.", is written over a horizontal line.


THE HONORABLE STEVEN H. JOHN
Resident Judge
Fifteenth Judicial Circuit

January 10, 2014
Conway, South Carolina



JARROD M. MCPHERSON

ATTORNEY AT LAW, L.L.C.

Telephone (843) 597-1743
Facsimile (843) 492-6812

P. O. Box 2117
Murrells Inlet, SC 29576

*Licensed in SC & GA

RECEIVED

JAN 27 2014

S.C. Supreme Court

January 22, 2014

Daniel E. Shearouse
Clerk of Court - SC Supreme Court
Supreme Court
P.O. Box 11330
Columbia, SC 29211

*Re: Lewis E. Pipher # 341432 vs. State of South Carolina
2012-CP-26-6426*

Dear Mr. Shearouse:

Enclosed please find the original Notice of Appeal in the above referenced action and one copy. Please file the original and return the copy to me in the self addressed stamped envelope enclosed.

I was appointed as Mr. Pipher's PCR counsel, and as such would request that the Appellate Defender's office take over the appeal of this matter.

If you have any questions or concerns, please contact me.

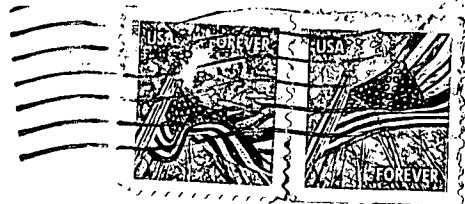
Sincerely,



Jarrod M. McPherson

JMM/
enclosures

J.M. McPherson
Atty. At Law
P.O. Box 2117
Murrells Inlet, SC 29576



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

2921181330_BO99

