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February 7, 2014

South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

RE: Steven Burton, #168626 vs. State of South Carolina
2012-CP-02-1421

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

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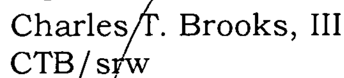
FEB 10 2014

S.C. SUPREME COURT

Sincerely,



Charles T. Brooks, III
CTB/srw

Enclosed as stated

Cc: Daniel Gourley,Office of Attorney's General
South Carolina Office of Appellate Defense
Steven Burton, #168626

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

Case No: 2012-CP-02-01421

Steven Burton......................Appellant
S.C.D.C. 168626
v.
The State. Respondent

NOTICE OF APPEAL

Steven Burton, appeals his Denial for Post Conviction Relief in this case. The order of Dismissal was imposed and signed by the Honorable R. Ferrell Cothran, Jr., August 19, 2013, which I, Charles T. Brooks, III, received on February 7, 2014.

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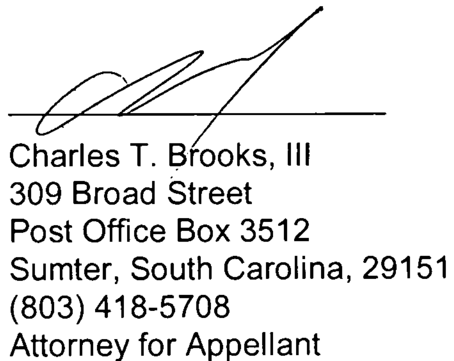
S.C. SUPREME COURT



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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

Case No: 2012-CP-02-01421

Steven Burton......................Appellant
S.C.D.C. 168626
v.
The State. Respondent

PROOF OF SERVICE

I, the undersigned, do hereby certify that on this 7th day of February, 2014, 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 February 7, 2014, addressed to the following as indicated below:

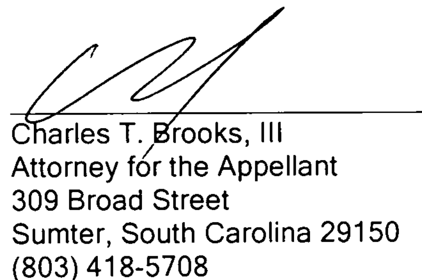
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

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

Office of Attorney's General
Attn: Daniel Gourley, Esquire
Post Office Box 11549
Columbia, South Carolina 29211-1549

Steven Burton, 168626
Allendale Correctional Institution
PO Box 1151
Fairfax, South Carolina, 29827

Dated: February 7, 2014



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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN) FOR THE SECOND JUDICIAL CIRCUIT

Steven Burton, #168626,) Case No. 2012-CP-02-01421

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 June 11, 2012. The Respondent made its Return on October 8, 2012. An evidentiary hearing into the matter was convened on July 10, 2013, at the Aiken County Courthouse. The Applicant was present at the hearing and was represented Charles T. Brooks, III, Esquire. The Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

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 Aiken County Clerk of Court. The Applicant was indicted at the March 2010 term of the Aiken County Grand Jury for Receiving Stolen Goods (2010-GS-02-0485) and eight counts of Violation of Motor Vehicle Chop Shop Act (2010-GS-02-0539/-0540/-0541/-0542/-0543/-545-/-546-/-547). The Applicant was represented by Michael Routzong, Esquire. The Applicant proceeded to a jury trial before the Honorable Doyet A. Early, III, where he was convicted as indicted. On March 18, 2010, Judge Early sentenced Applicant to ten years imprisonment for Receiving Stolen Goods and a consecutive five years imprisonment for one count of violation of Motor Vehicle

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C.C.P.&G.S.
Deputy Clerk

Chop Shop Act. Judge Early sentenced Applicant to five years imprisonment on each of the remaining seven counts of violation of Motor Vehicle Chop Shop Act with each to run concurrent.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Tristan Shaffer, Esquire. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Burton, 2012 -UP-138 (Ct. App. filed February 29, 2012). The Remittitur was sent on March 16, 2012. .

In his original and amended application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following allegations:

1. Ineffective Assistance of Counsel.
   a. "...Counsel's failure to adequately investigate, research and present a valid Fourth Amendment violation issue to the court."
   b. "Although Counsel did move to suppress the evidence prior to Applicant's trial, Counsel failed to provide the Court with adequate facts of case law to support such suppression."
   c. "Counsel failure to timely object to the introduction of evidence obtained in violation of Applicant's rights as guaranteed by the Fourth Amendment to the United States Constitution and South Carolina Law."
   d. "...Counsel failed to raise and argue a valid chain of custody issue concerning some of the evidence used against the Applicant."

SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. Additionally, Applicant presented testimony from plea counsel, Michael Routzong, Esquire (Counsel). This Court also had before it a copy of Applicant's trial transcript, Appellate records, the records of the Aiken County Clerk of Court, and Applicant's records from the South Carolina Department of Corrections.

During the evidentiary hearing, Applicant testified he met with Counsel one time prior to his trial. Applicant testified he reviewed some discovery with Counsel, but Applicant did not receive a copy of discovery until after his trial. Applicant testified he only discussed defenses with Counsel the day prior to trial. Applicant testified he requested Counsel to contact his car company to prove that Applicant could legally own car frames without vehicle identification numbers (VIN). Applicant testified he did not own the land and only owned the drag bike.

Following Applicant's testimony, Counsel was called to testify. Counsel testified he has been practicing criminal law since 2005. Counsel testified he was appointed in this case. Counsel testified Applicant was focused on retaining private Counsel. Counsel testified he met with Applicant seven times prior to his trial. Counsel testified he received and reviewed discovery with Applicant prior to his trial. Counsel testified Applicant asked for his brother to be a witness, however in Counsel's opinion, Applicant's brother's testimony was not beneficial. Counsel testified he reviewed the charges with Applicant and discussed his version of the facts. Counsel testified Applicant stated he received the stolen goods from a third party, who asked him to work on the various items. Counsel testified his overall trial strategy was to place the blame on the third party and portray Applicant as an innocent bystander.

Counsel testified he made a motion to suppress the evidence. Counsel testified he was not adequately prepared to argue the Fourth Amendment issue dealing with the suppression of the search warrant. Counsel testified he argued during the suppression motion that the evidence should have been suppressed because it was a product of an unlawful search. Counsel argued the evidence used to establish probable cause to obtain a search warrant was within the curtilage of the house. Counsel argued Investigator Prince impermissibly went to the back door of the trailer instead of knocking on the front door. Counsel further argued Investigator Prince could not have

properly identified the tools located in the shed, because Investigator Prince did not have any serial numbers for the tools. Counsel summarized that but for the unlawful intrusion upon Applicant's property, Investigator Prince would not have been able to establish the probable cause to obtain a search warrant. Counsel testified he was ineffective for failing to present to the court any case law in support of his arguments. Counsel further testified he was ineffective for failing to properly preserve the motion for Appellate review.

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 at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Specifically, this Court finds that Counsel's testimony is very credible while Applicant's testimony is not as credible. 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).

Ineffective Assistance of Counsel

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; 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). 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. After careful review based on the standard discussed above, the Applicant has failed to carry his burden in this action.

Counsel was ineffective for failing to research, argue, present, and preserve for appeal a Fourth Amendment issue.

After careful review based on the standard discussed above, this Court finds the Applicant has failed to prove Counsel was ineffective in his representation for failing to research, argue, and preserve for appeal a Fourth Amendment issue. Counsel testified he failed to properly preserve a Fourth Amendment issue for Appellate review. However, Applicant has failed to prove prejudice as a result of the unpreserved Fourth Amendment issue. An examination of the merits of the issue is appropriate in analyzing the prejudice prong in Applicants case. See generally Sikes v. State, 323 S.C. 28, 30, 448 S.E. 560, 562 (1994). ("When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, [the] defendant must show that such claim is meritorious and that the verdict would have been different absent the evidence that should have been excluded).

After careful review of the record this Court finds the Trial Court properly admitted the evidence seized as a result of a search warrant obtained after a proper investigation conduct on Appellant's property. "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Gaster, 349 S.C. 545, 564 S.E.2d 87, 93 (2002) (citations omitted). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." State v. McDonald, 343 S.C. 319, 540 S.E.2d 464, 467 (2000) (quoting Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528, 539 [2000]); State v. Moore, 377 S.C. 299, 659 S.E.2d 256, 259 (Ct. App. 2008). On appeal from a motion to suppress evidence based on Fourth Amendment grounds, appellate court review is limited to determining whether any evidence supports the circuit court's decision. State v. Bowman, 366 S.C. 485, 623 S.E.2d 378, 386 (2005); Moore, 659 S.E.2d at 259 260.

The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV. For Fourth Amendment purposes, "[a] search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property." Horton v. California, 496 U.S. 128, 133 (1990) (citing U.S. v. Jacobsen, 466 U.S. 109 [1984]); see also, Moore, 659 S.E.2d at 260.

Warrantless searches and seizures are *per se* unreasonable absent a recognized exception to the Fourth Amendment warrant requirement. Mincey v. Arizona, 437 U.S. 385, 390 (1978); State v. Abdullah, 357 S.C. 344, 592 S.E.2d 344, 348 (Ct. App. 2004). The seizure of items in plain view is a recognized exception to the warrant requirement. See State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995), *cert. denied*, 516 U.S. 1131(1996).

Under the plain view exception, objects falling within the plain view of a law enforcement officer lawfully in a position to view them are subject to seizure and admissible as evidence. State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999). "[T]he two elements needed to satisfy the plain view exception are: (1) the initial intrusion which afforded the authorities the plain view was lawful and (2) the incriminating nature of the evidence was immediately apparent to the seizing authorities." State v. Wright, 391 S.C. 436, 443, 706 S.E.2d 324, 327 (2011), reh'g denied (Mar. 16, 2011).

The South Carolina Supreme Court has also explored the powers of an officer in conducting an investigation and where he may travel in order to investigate a complaint or a report of a crime. See Wright, 391 S.C. at 444, 706 S.E.2d at 328. The Court examined federal law related to the investigatory powers of police: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Katz v. U.S., 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967) (citations omitted). "A policeman may lawfully go to a person's home to interview him. . . . In doing so, he obviously can go up to the door. . . ." U.S. v. Daoust, 916 F.2d 757, 758 (1st Cir.1990) (citations omitted). "A police officer without a warrant is privileged to enter private property to investigate a complaint or a report of an ongoing crime." 24 C.J.S. Criminal Law 2404 (2006); see also Clark v. City of Montgomery, 497 So.2d 1140, 1142 (Ala. Crim. App. 1986). Wright, 391 S.C. at 444, 706 S.E.2d at 327-328. The Court concluded investigators had the authority to enter a property based on an anonymous tip to investigate the complaint that dog fighting occurred on the property.

In the instant case, the incriminating nature of the items seen by Investigator Prince was readily apparent. The motorcycle's VIN number was filed off, which makes its possession very

incriminating. Further, Investigator Prince was able to see through an open shed door several items consistent with items missing from the recovered stolen M&W trailer which began the investigation. As a result this prong of the plain view doctrine has clearly been met.

Applicant's main contention was Investigator Prince had no reason to be on Applicant's property and had no justification for being where he could see the incriminating evidence. Investigator Prince was lawfully on Applicant's property at the time the items were seen. Investigator Prince was investigating the possession of stolen goods. He approached the door of the mobile home which appeared to be the most frequently used door. He knocked and did not receive an answer. He subsequently went to the door of the trailer and did not receive an answer. It was in the process of this investigation that he saw the stolen goods later recovered under the search warrant.

Investigator Prince had every right to investigate the crime by going up to the doors of the mobile home and trailer. He was permitted to be on the property to investigate and he could proceed to what appeared to be the most used door in order to attempt to make contact with Applicant. In doing so, any evidence out in plain view, such as the motorcycle and the tools in the open shed, was subject to seizure and certainly usable by Investigator Prince in preparing a search warrant for the property.

Investigator Prince was properly on Applicant's property conducting an investigation based on the information he received from Detective Sherman. The items he referenced in the search warrant were in plain view and seen by the officer while he was conducting his investigation. The incriminating nature of the items, filed off VIN numbers and tools matching those stolen from M&W, was readily apparent and Investigator Prince was where he lawfully had a right to be in order to conduct his investigation into the complaint. As a result, the items

were in plain view and were subject to seizure or use as grounds for probable cause to obtain a warrant for the entire property to search for stolen goods. Accordingly the trial court did not err in admitting the evidence obtained as a result of the execution of a validly obtained search warrant.

Based on the foregoing, even if Counsel had renewed his motion in order to properly preserve the Fourth Amendmnet issue, Applicant has not shown there is a reasonable probably that the outcome of the trial would have been different because his Fourth Amendment claim fails on the merits. Therefore, this Court finds Applicant has failed to establish the requisite prejudice to support his claim of ineffective assistance of Counsel.

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 evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

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 notes that that Applicant must file and serve a notice of appeal within thirty 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

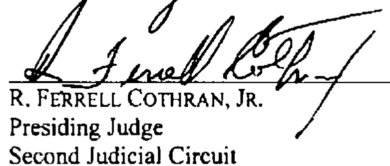
Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review. post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

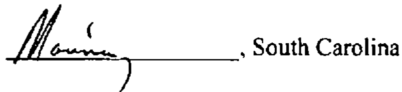
1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 19 day of Aug, 2013.



R. FERRELL COTHRAN, JR.
Presiding Judge
Second Judicial Circuit



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