

# RICHEY AND RICHEY

ATTORNEYS AT LAW

*A Professional Association*

Rodney W. Richey  
Lola S. Richey

**RECEIVED**

FEB 24 2014

**S.C. SUPREME COURT**

February 19, 2014

The Honorable Daniel E. Shearouse  
The Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, SC 29211

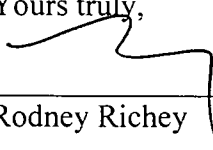
Re: Eric Todd Burgess, SCDC # 349367 vs. State of South Carolina  
Case No: 2012-CP-23-3901

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and a Proof of Service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,

  
\_\_\_\_\_  
Rodney Richey

RWR/tlg  
enclosures  
cc: Karen Ratigan, Esquire

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THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

HONORABLE G. EDWARD WELMAKER

2012-CP-23-3901

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FEB 24 2014

S.C. Supreme Court

Eric Burgess, SCDC # 349367,

APPELLANT,

against

STATE OF SOUTH CAROLINA,

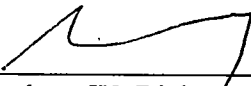
RESPONDENT.

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**NOTICE OF APPEAL**

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Eric Burgess appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable G. Edward Welmaker, Circuit Judge on December 17, 2013 and Order issued on February 5, 2014 and filed on February 17, 2014. The Appellant received notice of the judgment on February 18, 2014.

  
\_\_\_\_\_  
Rodney W. Richey  
Attorney for the Appellant  
Post Office Box 10916  
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(864) 467-0503

Other Counsel of Record:  
Karen Ratigan, Esquire  
Office of Attorney General State of SC  
Post Office Box 11549  
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

HONORABLE G. EDWARD WELMAKER

2012-CP-23-3901

Eric Burgess, SCDC # 349367,

against

STATE OF SOUTH CAROLINA,

RESPONDENT.

RECEIVED

FEB 24 2014

S.C. Supreme Court

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**PROOF OF SERVICE**

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I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on February 20, 2014, addressed to their attorney of record, Karen Ratigan, Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: February 20, 2014

RICHEY & RICHEY, P.A.



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Rodney W. Richey  
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(864) 467-0503

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2012CP2303901

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENSIMMER  
2014 FEB 17 AM 11 32

**Eric Burgess Todd vs. South Carolina 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: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
  - Affirmed;
  - Reversed;
  - Remanded;
  - Other: \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:**  See attached order:  Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

**PRESIDING JUDGE - G Edward Welmaker**

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:

Rodney Wade Richey PO Box 10916 Greenville, SC 29603-0916

Karen Christine Ratigan PO Box 11549 Columbia, SC 29211

**ATTORNEY(S) FOR THE PLAINTIFF(S)**

**ATTORNEY(S) FOR THE DEFENDANT(S)**

Paul B. Wickensimer Greenville County Clerk Of Court  
- Clerk of Court

**RECEIVED**

FEB 24 2014

**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 Eric Todd Burgess, )  
 S.C.D.C. No. 349367, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 C.A. No. 2012-CP-23-3901

**ORDER OF DISMISSAL**

FILED-CLERK OF COURT  
 GREENVILLE CO. S.C.  
 PAUL B. WICKENSIMMER  
 2014 FEB 17 AM 11 35

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed June 14, 2012. The Respondent made its return on November 30, 2012. An evidentiary hearing into the matter was convened on December 17, 2013 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Rodney W. Richey, 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, Larry Cooke, Esquire. 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, and 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 at the May 2011 term of the Greenville County Grand Jury for attempted murder (2010-GS-23-8937). He was represented by Larry Cooke, Esquire.

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FEB 24 2014

S.C. SUPREME COURT

After the State took the case to trial, the Applicant was convicted of the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN). On January 18, 2012, the Honorable Robin B. Stilwell sentenced the Applicant to seven years imprisonment. The Applicant did not appeal.

### ALLEGATIONS

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

1. "I filed a motion for fast and speedy as well to dismiss myself, because of a duralection of duty of my Public Defender one, Larry Cooke. Told that b/c Mr. Cooke was my (PD) I could not file those motions myself."

The Applicant, through counsel, submitted an amendment to his application dated January 11, 2013, in which he alleged the following:

1. Ineffective assistance of counsel:
  - a. Failed to conscientiously discharge professional responsibilities.
  - b. Failed to effectively challenge search and seizure.
  - c. Failed to act as a diligent and conscientious advocate.
  - d. Failed to give complete loyalty.
  - e. Did not have Applicant's best interest in mind.
  - f. Failed to serve the cause in good faith.
  - g. Neglected necessary investigations and preparation.
  - h. Did not do necessary factual investigations.
  - i. Did not do necessary legal research.
  - j. Did not conscientiously gather information to protect rights.
  - k. Did not try to have the case settled in a manner that would have been to my best advantage.
  - l. Did not advise me of all my rights or take any of the actions that were necessary to protect and preserve them.
  - m. Never properly ascertained whether or not I actually understood or comprehended all of the issues involved in the case.
  - n. Never properly consulted with me or kept me informed.
  - o. Never explained to me or discussed with me any of the elements.
  - p. Never made any attempt to ascertain whether or not I actually knew the elements of the crime charged or whether or not I understood exactly what "criminal element" meant.
  - q. Never explained or discussed with me how the elements of the



crime charged and the evidence that the prosecution planned to introduce into evidence against me related to one another and did not discuss how the sentencing would be done especially as it related to the elements of the crime as in State v. Boyd.

- r. Never informed me of any of the defenses that were available to me.
- s. Never intended to offer any defense to the court on my behalf.
- t. Never explained to me or discussed with me any kind of defense strategy.
- u. Never explained to me or discussed with me any of the tactical choices that were made or planned to be made.
- v. Dictated to me exactly how my case was going to be handled and offered no alternative options.
- w. Failed to properly acquaint herself with the law and facts surrounding my case and, as a result, there was a very serious error in the assessment of both the law and the facts.
- x. No defense at all was put in issue for me during the Court proceedings.
- y. Did not subject the prosecution's case to any adversarial testing.
- z. Failed to oppose the prosecution's case with any adversarial litigation.
- aa. Failed to function as the government's adversary in any sense of the word.
- bb. Failed to pursue any of the legal recourse that was available.
- cc. Failed to function as the counsel that the Constitution's Sixth Amendment guarantees.
- dd. Failed to call alibi witnesses on my behalf.
- ee. Failed to appeal my case.

At the PCR hearing, however, the Applicant proceeded solely upon the following allegations:

- 1. Ineffective assistance of counsel:
  - a. Failed to move to strike an attorney from the jury.
  - b. Failed to move for a speedy trial.
  - c. Failed to impeach witnesses committing perjury.
  - d. Failed to inform of a plea offer.
  - e. Failed to challenge the destruction of evidence.
  - f. Failed to notice the sentencing sheet was marked non-violent.
  - g. Failed to argue violation of Rule 3(c), SCRCrimP.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

*AND ALL OF APPLICANT'S SUBMISSIONS.*  
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 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 had three meetings with trial counsel and that, while they discussed his version of events, they never reviewed the evidence. The Applicant stated trial counsel should have argued there was a Rule 3(c), SCRCrimP violation. The Applicant stated he asked trial counsel to file a motion for a speedy trial but he did not do so. The Applicant stated trial counsel did not argue that his wife and the victim had destroyed evidence (by selling his



vehicle) that would have proved his innocence. The Applicant stated trial counsel never conveyed a plea offer to reduce the attempted murder charge to first-degree assault and battery. The Applicant stated he would have accepted this offer if trial counsel had discussed it. The Applicant stated trial counsel should have moved to strike a criminal defense attorney from the jury. The Applicant stated trial counsel failed to impeach State witnesses for committing perjury. The Applicant stated trial counsel did not act in his best interest because the sentencing sheet was marked non-violent when it should have been marked violent.

Trial counsel testified he filed discovery motions, received those materials, and reviewed them with the Applicant. Trial counsel testified they also reviewed the Applicant's version of events several times (that he did not try to kill the victim). Trial counsel testified the Applicant asked about a motion for speedy trial and that he made this motion (along with a motion to dismiss based on lack of evidence). Trial counsel testified both motions were denied. Trial counsel testified there was nothing he could do about the Applicant's vehicle having been sold, except to cross-examine the Applicant's wife about it (which he did). Trial counsel testified he received the plea offer in this case and that his office usually sends a copy of any plea offer to the client. Trial counsel testified his notes reflected that the Applicant called three times on May 19, 2011 and that his assistant tried to tell him about the offer but he simply wanted to argue with her. Trial counsel testified his notes reflected he and the Applicant discussed the plea offer on May 24, 2011 and the Applicant rejected it. Trial counsel testified having a criminal defense attorney as an alternate juror was a good thing.

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 trial counsel failed to investigate his case. This Court notes trial counsel testified he had pages of notations in his file and that the Applicant had been a combative client. This Court notes trial counsel testified he spent hours on this case and even visited the crime scene with an investigator to reconstruct the sequence of events. This Court notes trial counsel's testimony that the State had overwhelming evidence against the Applicant, which included an eyewitness. This Court agrees. This Court finds the Applicant has failed to articulate what else trial counsel could have done to investigate the case and achieve a different outcome at trial. See Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have made motions for a speedy trial and a violation of Rule 3(c), SCRCrimP. Trial counsel testified he did, in fact, make these motions and that they were denied. This Court finds the Applicant has failed to meet his burden of proof because these were the first matters taken up in pre-trial. (Trial transcript, pp.6-8).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have challenged that his wife destroyed evidence in his case. The Applicant contended his wife and the victim sold his vehicle, which was evidence that would have proven his innocence. Trial counsel testified he was aware of this, but that there was nothing he could do. This Court notes trial counsel cross-examined the Applicant's wife at trial about whether or not she sold the vehicle in question. (Trial transcript, pp.113-15). This Court finds there was nothing else trial counsel could have done to argue this point at trial.



This Court finds the Applicant failed to meet his burden of proving trial counsel did not relay a plea offer. This Court specifically finds trial counsel is more credible than the Applicant on this issue. This Court notes trial counsel's file contained notes that his assistant attempted to convey the plea offer and that he did convey it a week later. This Court also notes trial counsel testified the Applicant opting to refuse the offer. This Court finds trial counsel fulfilled his responsibilities in this regard. See Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (holding counsel's failure to convey the State's plea offer to defendant constituted deficient performance)

This Court finds the Applicant failed to meet his burden of proving trial counsel should have stricken a criminal defense attorney from the jury panel. Trial counsel confirmed a criminal defense attorney was seated as an alternate juror. Trial counsel testified he believed this was beneficial. This Court finds trial counsel articulated a valid strategic decision in this matter. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel). Regardless, the Applicant cannot prove any resulting prejudice, as the alternate jurors took no part in jury deliberations. (Trial transcript, p.19; p.155).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have shown the State's witnesses perjured themselves at trial. The Applicant, however, failed to point to specific examples of this alleged perjury and failed to articulate what trial counsel should have done to better question these witnesses at trial. The Applicant has failed to meet his burden of proof. See Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (finding a PCR 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 noted the sentencing sheet was marked non-violent instead of violent. The Applicant

7 

testified he was returned to court and appeared before Judge Verdin, who agreed this was in error. In any event, this Court finds the Applicant has failed to show how he was prejudiced by trial counsel's failure to catch this error.

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.

#### 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 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

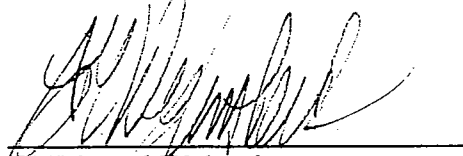


attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

**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 5 day of Feb, 2014.



G. Edward Welmaker  
Presiding Judge  
Thirteenth Judicial Circuit

Pickens, South Carolina.

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Greenville, SC 29603

The Honorable Daniel E. Shearouse  
The Supreme Court of South Carolina  
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