

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

RECEIVED

MAR - 4 2014

J. Derham Cole, Circuit Court Judge

S.C. Supreme Court

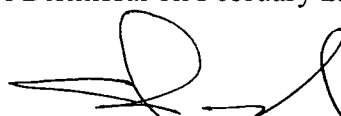
Case No. 2012-CP-42-3109

Bobby Mack Mathis.....Appellant
v.
State of South Carolina.....Respondent

NOTICE OF APPEAL

Bobby Mack Mathis appeals the Order of Dismissal issued by the Honorable J. Derham Cole dated February 20, 2013 (sic) and filed February 20, 2014 with the Spartanburg County Clerk of Court wherein Judge Cole denied Appellant's Application for Post-Conviction Relief. Appellant, by and through his undersigned attorney, received written notice of entry of the Order of Dismissal on February 25, 2014.

Date: March 3, 2014



Shane W. Rogers (S.C. Bar No. 16701)
Johnson Smith Hibbard & Wildman, L.L.P.
Post Office Drawer 5587
Spartanburg, South Carolina 29304
(864) 582-8121 FAX: (864) 585-5328
Attorney for Appellant Bobby Mack Mathis

Other Counsel of Record:

Suzanne H. White
Assistant Attorney General
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-3737
Attorney for Respondent

THE STATE OF SOUTH CAROLINA

In the Supreme Court

RECEIVED

MAR - 4 2014

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

S.C. Supreme Court

J. Derham Cole, Circuit Court Judge

Case No. 2012-CP-42-3109

Bobby Mack Mathis.....Appellant
v.
State of South Carolina.....Respondent

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on March 3, 2014, addressed to its attorney of record Suzanne H. White, Assistant Attorney General, P.O. Box 11549, Columbia, SC 29211.

Date: March 3, 2014



Shane W. Rogers
Johnson Smith Hibbard & Wildman, L.L.P.
Post Office Drawer 5587
Spartanburg, South Carolina 29304
(864) 582-8121 FAX: (864) 585-5328
Attorney for Appellant Bobby Mack Mathis

Johnson, Smith, Hibbard & Wildman

L A W F I R M , L . L . P

MILTON A. SMITH
Retired

DONALD B. WILDMAN
DOUG SMITH
DONNA FAYE SHETLEY
RANSOME A. COLEMAN
STEVEN M. QUERIN
KRISTIN BURNETT BARBER
SHANE W. ROGERS

220 NORTH CHURCH STREET (ZIP CODE 29306)
MAILING ADDRESS: P.O. DRAWER 5587
SPARTANBURG, SOUTH CAROLINA 29304-5587
TELEPHONE: 864-582-8121
TELECOPIER: 864-585-5328
www.jshwlaw.com

EDWIN W. JOHNSON (1904-1979)
PAUL R. HIBBARD (1941-2004)

JOSHUA O.C. LONON
HOWARD R. KINARD
REID WILDMAN[^]
[^] also admitted in North Carolina

RECEIVED

MAR - 4 2014

Sender's E-Mail Address:
srogers@jshwlaw.com

S.C. Supreme Court

March 3, 2014

VIA FEDERAL EXPRESS

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
1231 Gervais St.
Columbia, SC 29201

RE: Bobby Mack Mathis, Appellant, v. State of South Carolina, Respondent
Case No. 2012-CP-42-3109
Appeal from PCR Matter

Dear Mr. Shearouse:

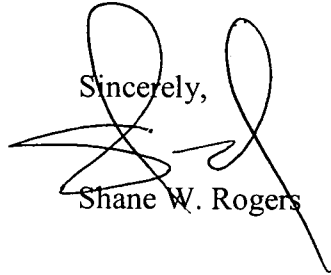
Enclosed for filing is an original and one copy of a Notice of Appeal in the above referenced case. Also enclosed are the following:

- (1) Proof of Service of the Notice of Appeal on the Respondent.
- (2) A copy of the Order which is the subject of the appeal.
- (3) This appeal is being filed with the Supreme Court, and a filing fee omitted, because it is an appeal from a final decision entered under the Post-Conviction Relief Act pursuant to Rule 243(a), SCACR, and Rule 240(d), SCACR, respectively.
- (4) Since I am appointed counsel for the indigent appellant, it is my understanding that I will be automatically relieved under Rule 602, SCACR. Please advise as to what, if anything

else, might be required of me regarding this matter.

Please return a copy of the filed Notice of Appeal to me in the enclosed self-addressed stamped envelope.

Sincerely,

A handwritten signature in black ink, appearing to read 'Shane W. Rogers', written over the typed name.

Shane W. Rogers

Enclosures

cc: Suzanne H. White
Assistant Attorney General
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-3737
Attorney for Respondent

Bobby Mack Mathis
SCDC #248562, Palmetto B4
Kershaw Correctional Institution
4848 Gold Mine Highway
Kershaw, SC 29067

The Honorable J. Derham Cole
P.O. Box 1744
180 Magnolia Street, 2nd Floor
Spartanburg, SC 29304-1744

Rec'd 2-25-2014

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
Bobby Mack Mathis, #248562,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2012-CP-42-3109

ORDER OF DISMISSAL

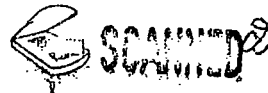
FILED
CLERK OF COURT
SPARTANBURG COUNTY
2014 FEB 20 PM 4:50
M. HOPE SCOTT

This matter comes before the Court by way of an Application for Post-Conviction Relief filed July 25, 2012. The Respondent made its Return on or about July 25, 2013. An evidentiary hearing into the matter was convened on October 1, 2013, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Shane W. Rogers, 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. James A. Cheek, Esquire, also testified. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, the plea transcript, and Applicant's memoranda.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the January 2012 term of the Spartanburg County Grand Jury for resisting arrest (2012-GS-42-0378) and throwing of bodily fluids (2012-GS-42-0379). The Applicant was represented by James Cheek, Esquire. On January 13, 2012, the Applicant pled no contest before the Honorable



Roger L. Couch and was sentenced to confinement for one year for resisting arrest and ten years, concurrent, for throwing of bodily fluids on local law enforcement officer. Applicant did not appeal his conviction and sentence.

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 was not present during plea and sent someone else,
 - b. Counsel failed to file an appeal, and
2. Prosecutorial misconduct and malicious prosecution, in that;
 - a. Prosecutor read past criminal history and spoke of charges the Applicant was not convicted of,
 - b. Dates on the warrants and indictments are incorrect.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2014 FEB 20 PM 4:50
M. HOPE S. ACHILLE

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 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), SCRCPP). 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).

Applicant testified that he was originally appointed Charles Snyder III to represent him and met with Mr. Snyder once, but then Counsel represented Applicant at the plea. Applicant testified that he met Counsel on the day of the plea. However, Applicant acknowledged that Counsel had represented him before on a similar charge. Applicant testified that he knew his plea was scheduled for January 13, 2012, and that there was a recommendation by the State for a five year cap. Applicant testified that Counsel did not object when the officer spoke to the court and indicated that Applicant was a threat to Applicant's family. Applicant testified that he

FILED
CLERK OF COURT
SPRINGFIELD
2014 FEB 28 PM 4:58
M. HOPE

believed Officer Owens used racial profiling when arresting him. Applicant also testified that he wanted an appeal of his guilty plea.

Counsel testified that he had previously represented the Applicant. Counsel testified that he reviewed the evidence the State had against the Applicant, which essentially consisted of the statement from the Officer. Counsel testified that he met with the Applicant in the jail room, which is adjacent to the courtroom. Counsel testified that he discussed pleading guilty pursuant to Alford and the recommendation for a cap of five years and the Applicant wanted to plead guilty. Counsel testified that he did not object to the Officer's statements because the statements were true. Counsel testified that he believes that the reason Applicant was sentenced over the recommended cap was because he lied to the plea court about his addictions and how and when he started huffing paint. Counsel testified that he never received a request for an appeal from the Applicant and Counsel saw no reason for an appeal.

This Court finds the testimony of Counsel to be more credible than the testimony of the Applicant. The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (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). The Applicant failed to point to any specific matters Counsel failed to discover, or any defenses that could have been pursued had Counsel been more fully prepared or met with him

FILED
CLERK OF COURT
Spartanburg, South Carolina
2011 FEB 20 AM 4:50
M. HOPKINS, CLERK

more often. Furthermore, the Applicant failed to show any prejudice that may have resulted from Counsel's alleged inadequate preparation. Accordingly, this allegation is dismissed.

Regarding Applicant's allegations that Counsel failed to object to statements made by the Officer, this Court finds that this allegation lacks merit. This Court reviewed plea transcript and found no deficiency that would have provided a basis for any objection. As the transcript reflects, the Applicant informed the court prior to the officer's statements that he thanked the officer because he "could have harmed [himself] or everybody." (Tr. p. 18-19). Furthermore, the plea judge indicated on the record that he had considered both the recommendation and the fact that the Applicant "either tried to mislead the Court or [...] just don't remember." (Tr. p. 22). There is no indication that Counsel's failure to object to Officer Owens' statement affected the Applicant's plea. Therefore, this Court finds that the Applicant has failed to meet his burden of proof as to this claim.

In Hill v. Lockhart, 474 U.S. 52 (1985), the United States Supreme Court held that the two-part standard adopted in Strickland v. Washington, *supra*, for evaluating claims of ineffective assistance of counsel applies, as well, to guilty plea challenges based on ineffective assistance of counsel. To meet the Court's "prejudice" requirement, a criminal defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Hill at 59. The Applicant has failed to establish that he would have proceeded to trial, but for, alleged deficiencies of Counsel. The Applicant informed the plea court that he was satisfied with Counsel and there was nothing more he needed to talk with or meet with Counsel about. (Tr. p. 11-12). Therefore, this claim is denied and dismissed.

The Applicant has also alleged that he is entitled to a belated review of direct appeal

issues pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). Counsel has a constitutionally-imposed duty to consult with a defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029 (2000). This Court finds that the Applicant failed to meet his burden of proof as to this allegation. This Court finds Counsel's testimony to be more credible than Applicant's testimony. This Court finds that the Applicant did not request an appeal and that there was no basis for Counsel to believe that Applicant wished to appeal. Therefore, this claim is denied and dismissed.

Prosecutorial Misconduct

Although raised in his application, the Applicant did not pursue these claims to the hearing. Therefore, this Court finds that the Applicant voluntarily abandoned these claims.

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, 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

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2014 FEB 20 PM 4:50
H. HOPKINS
COURT CLERK

met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, this allegation is denied.

CONCLUSION

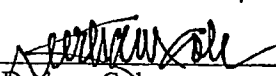
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

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 20 day of February, 2013.



J. Derham Cole
Presiding Judge

CLERK OF COURT
SPARTANBURG COUNTY
2014 FEB 20 PM 4:50
M. HOPE BLANCHARD

From: (864) 582-8121
Tammy Vaughn
lshw
220 N CHURCH ST
STE 4
SPARTANBURG, SC 29306

Origin ID: SPAA



J141014020703uv

Ship Date: 03MAR14
ActWgt: 1.0 LB
CAD: 1670904/INET3490

Delivery Address Bar Code



SHIP TO: (803) 734-1080

BILL SENDER

Daniel E. Shearhouse, Clerk
Supreme Court-South Carolina
1231 Gervais Street

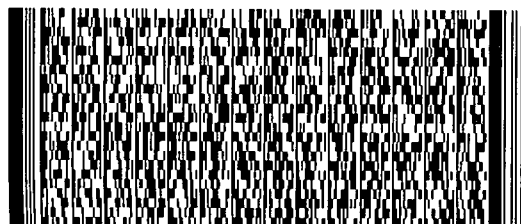
COLUMBIA, SC 29201

Ref # 212314
Invoice #
PO #
Dept #

TUE - 04 MAR AA
STANDARD OVERNIGHT

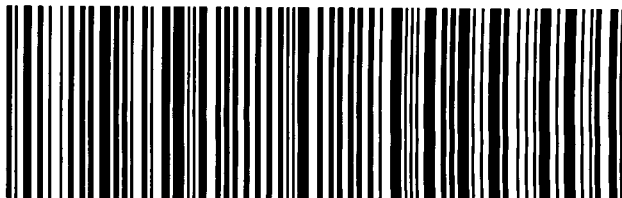
TRK# 7980 8982 1183

0201



XH USCA

29201
SC-US
CAE



522G1JCC4F/F220

After printing this label:

1. Use the 'Print' button on this page to print your label to your laser or inkjet printer.
2. Fold the printed page along the horizontal line.
3. Place label in shipping pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned.

Warning: Use only the printed original label for shipping. Using a photocopy of this label for shipping purposes is fraudulent and could result in additional billing charges, along with the cancellation of your FedEx account number.

Use of this system constitutes your agreement to the service conditions in the current FedEx Service Guide, available on fedex.com. FedEx will not be responsible for any claim in excess of \$100 per package, whether the result of loss, damage, delay, non-delivery, misdelivery, or misinformation, unless you declare a higher value, pay an additional charge, document your actual loss and file a timely claim. Limitations found in the current FedEx Service Guide apply. Your right to recover from FedEx for any loss, including intrinsic value of the package, loss of sales, income interest, profit, attorney's fees, costs, and other forms of damage whether direct, incidental, consequential, or special is limited to the greater of \$100 or the authorized declared value. Recovery cannot exceed actual documented loss. Maximum for items of extraordinary value is \$1,000, e.g. jewelry, precious metals, negotiable instruments and other items listed in our ServiceGuide. Written claims must be filed within strict time limits, see current FedEx Service Guide.