

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell, Circuit Court Judge

Case No. 2011-CP-42-3578

The State, Respondent,

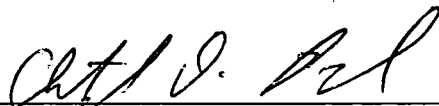
v.

Russell Sims, Appellant.

NOTICE OF INTENT TO APPEAL

Russell Sims appeals the denial of his application for Post-Conviction Relief in this case. The Order of Dismissal was imposed by the Honorable Robin B. Stilwell on March 5, 2014. Appellant received notice of the same on that date.

March 13, 2014


CHRISTOPHER D. BROUGH
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SPARTANBURG, SC 29306
(864) 585-3088
ATTORNEY FOR APPELLANT

Other Counsel of Record:
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S.C. SUPREME COURT

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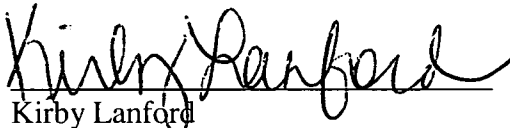
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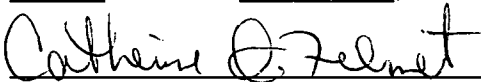
PROOF OF SERVICE

The undersigned hereby certifies that he is a person of such age and discretion as to be competent to serve papers and that a copy of the **Notice of Intent to Appeal**, was served upon the following person(s) on the State, by depositing copies of the same in the United States Mail, with sufficient postage affixed thereto, on March 13, 2014, addressed as follows:

The Honorable Alan Wilson
SC Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, S.C. 29201


Kirby Lanford

SWORN BEFORE ME THIS
13 DAY OF March, 2014.



NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: Aug 3, 2019

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

Russell Sims, #319755,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2011-CP-42-3578

ORDER OF DISMISSAL

This matter comes before the Court by way of an Application for Post-Conviction Relief filed August 15, 2011. The Respondent made its Return on or about June 1, 2012. An evidentiary hearing into the matter was convened on November 15, 2013, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Christopher D. Brough, 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, as well as Clarence Sinclair, friend of the Applicant. William H. McPherson, Esquire, also testified via telephone. 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 trial transcript, Applicant's appellate records and exhibits.

PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted the Applicant at the August 2006 and January 2007 terms of General

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Sessions for burglary in the first (06-GS-42-3064), four counts of weapons/pointing and/or presenting firearms at persons (06-GS-42-3065, -3067, -3068, -3073), murder and possession of a firearm during commission of a violent crime (06-GS-42-3066, counts one and two), attempted armed robbery (06-GS-42-3070), armed robbery (06-GS-42-3071), and two counts of assault and battery with intent to kill (ABWIK) (06-GS-42-3072, 07-GS-42-0205). The Applicant was represented by William H. McPherson, Esquire.

A jury trial was held from January 22-24, 2007. The jury found the Applicant guilty as indicted on all charges except the two ABWIKs, instead finding him guilty of the lesser included charges of assault and battery of a high and aggravated nature (ABHAN). The Honorable J. Derham Cole sentenced the Applicant to confinement for life for burglary in the first and murder; thirty (30) years for armed robbery; twenty (20) years for attempted armed robbery; and concurrent terms of five (5) years for each charge of weapons/pointing and/or presenting firearms at persons charge, possession of firearm during commission of a violent crime, and both lesser included charges of ABHAN. All sentences were to run concurrent.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Sims, Op. No. 2010-UP-080 (S.C. Ct. App. filed February 2, 2010, withdrawn, substituted, and re-filed March 18, 2010). A Petition for Rehearing was filed by the Applicant and denied by the Court on March 18, 2010. A Petition for Writ of Certiorari was filed on June 18, 2010. The Supreme Court of South Carolina denied the Petition for Writ of Certiorari on May 25, 2011. The Remittitur was issued on May 27, 2011.

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 investigate and prepare for trial, and
2. Denial of Due Process.

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), SCRPC). 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

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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 Counsel should have subpoenaed the medical records of Robert Jackson, the victim, regarding his death because Jackson was shot on May 20, 2006, but did not die until July 8, 2006. Applicant testified that the victim had preexisting heart disease, but that Counsel failed to cross-examine Dr. Charles Morrow, the victim's treating physician. However, Applicant did acknowledge that Counsel reviewed the autopsy report during the trial and focused on the different dates. Applicant entered into evidence the discharge summary for Robert Jackson on June 13, 2006 as Exhibit #1, the autopsy report dated July 8, 2006 as Exhibit #2, and the coroner's investigative notes dated May 20, 2006 (incident), and July 8, 2006 (death) as Exhibit #3. Applicant testified that he did not believe that the jury understood that the victim died on July 8, following the shooting on May 20, and believes that they wanted to know how the victim died.

Applicant testified that Counsel should have interviewed and called additional witnesses to support the claim of self-defense. Applicant testified that there were witnesses who could

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testify as to the victim having a gun, but then acknowledged that the witnesses could possibly only testify to seeing the gun, but not testify where it came from. Applicant testified that Counsel should have called Clarence Sinclair and nurses Suzanne Prince and Judy Keller as witnesses. Furthermore, Applicant testified that the testimony needed to be presented that the Applicant had permission to go into the homes.

Clarence Sinclair, friend of the Applicant, testified as well. Sinclair testified that he was aware that the Applicant was dating Diane Jackson, the victim's daughter. Sinclair testified that he knew that they were dating through word of mouth. Sinclair also testified that he could not recall if he had knowledge of the victim having a gun.

Counsel testified that he believed the evidence was sufficiently presented to ensure the jury knew that the victim died on July 6, 2006, not the date of the incident, May 20, 2006. Counsel testified that the Solicitor even noted the July 6 date in his opening statement. Counsel testified that he reviewed the autopsy report. Counsel testified that he interviewed Diane Jackson, the victim's daughter and girlfriend at the time of Applicant. Counsel testified that the Applicant asked him to track the victim's gun and find witnesses, but all the numbers for people that Applicant provided were disconnected. Counsel testified that he did not cross-examine Dr. Morrow, but did cross-examine Dr. Wren, who conducted the autopsy, as to the reasons for the victim's death. Counsel testified that he was trying to cause doubt as to the proximate cause of the victim's death. Counsel testified that he does not recall asking Dr. Wren whether or not the gunshot healed. Counsel also testified that he did not recall the documents regarding the victim's discharge from the hospital to restorative care on June 13, 2006, and acknowledged those documents might have been helpful. Counsel testified that the Applicant always alleged self-defense and was offered a forty year plea after the trial started, but Applicant turned the plea

down. However, Counsel testified that he did request and receive a self-defense jury charge. Counsel testified that he did not ever see any potential mental health issues with the Applicant.

This Court finds the testimony of Counsel to be more credible than the testimony of the Applicant. The Applicant's allegation that Counsel did not conduct an adequate pre-trial investigation or prepare for trial is without merit. Following testimony and review of the transcript, it is clear that Counsel had reviewed the facts and evidence, as well as the options that Applicant faced with 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 completed additional investigation. Therefore, this claim is denied and dismissed.

In regards to Applicant's claims that Counsel failed to interview and call witnesses to support his defense, this Court finds that the Applicant has failed to meet his burden of proof. 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). Although Mr. Sinclair testified, his testimony did not offer any support for the self-defense claim of Applicant and none of the other witnesses alleged to be needed were presented. Therefore, this Court finds that this claim should be denied and dismissed.

Finally, as to strategic decisions on who to cross-examine and what questions to ask, this Court finds that the Applicant failed to establish any deficiency on Counsel's behalf. This Court finds, after reviewing the file and testimony presented at the hearing, that the representation of Counsel was reasonably calculated to effect the best interests of his client, Applicant. Although the Applicant takes exception to some of the decisions made by Counsel, those decisions make practical sense in light of the evidence that was presented. This Court does not find Counsel's representation to be deficient. Furthermore, the Applicant failed to show any prejudice that may have resulted from Counsel's alleged inadequate preparation. Accordingly, these allegations are dismissed.

Denial of Due Process

Although raised in the application, Applicant did not pursue this allegation at the hearing. Therefore, this Court finds that the Applicant voluntarily waived this allegation.

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

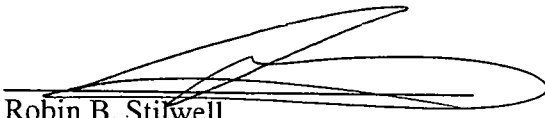
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

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 5 day of MARCH, 2014.


Robin B. Stilwell
Presiding Judge

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March 13, 2014

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

RE: THE STATE VS. RUSSELL SIMS

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

- (1) Original Proof of Service upon opposing counsel.
- (2) Order of Dismissal.

If I can be of any further assistance please feel free to call me.

Sincerely,

Christopher D. Brough

Enclosure

cc: South Carolina Office of the Attorney General

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S.C. SUPREME COURT

The Brough Law Firm
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The Honorable Daniel E. Shearouse
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