

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2012-CP-21-2694

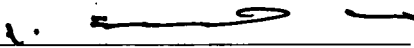
Lewis David Williams, #286960, Petitioner,

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 24th, addressed to the attorney of record, Joshua Lee Thomas , at his office at Post Office Box 11549, Columbia, SC 29211.

By: 
WILLCOX, BUYCK & WILLIAMS, P.A.
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Attorney for Petitioner

March 24, 2014

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE)
CIRCUIT)

Lewis David Williams, # 286960,)
Applicant,)

v.)

State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE TWELFTH JUDICIAL

Case No. 2012-CP-21-02694

ORDER

2014 MAR 10 AM 11:05
CONNIE REEL-SHEARIN
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, SC
FILED

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed on October 12, 2012. Respondent filed a Return on or around February 5, 2013. The Court convened a hearing in Florence County on February 10, 2014, at which time Applicant, Lewis David Williams (Applicant) was present in court and represented by Jerome Scott Kozacki, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented the Respondent, State of South Carolina (Respondent).

BACKGROUND

The Florence County Grand Jury, during the December 2008 term, indicted Applicant for first-degree burglary, armed robbery, and possession of a weapon during a violent crime (2008-GS-21-01800). The court appointed C. Stevens McLaurin, Esquire from the private bar to represent Applicant at trial. On June 18, 2009, a jury convicted Applicant as indicted on all charges. The Honorable Ralph King Anderson sentenced Applicant to concurrent twenty years imprisonment on each offense.

CERTIFIED: A TRUE COPY
Connie Reel Shearin
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

Subsequently, Applicant filed a timely notice of appeal. Deputy Chief Appellate Defender, Wanda H. Carter, Esquire, represent Applicant on appeal. The South Carolina Court of Appeals confirmed Applicant's conviction on or around March 12, 2012. Applicant is presently confined by the South Carolina Department of Corrections.

ISSUES PRESENTED

Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of (Trial) Counsel"
2. "Denied Due Process of Law" (Ineffective assistance of appellate counsel)
3. "Denied Constitutional Right to a Fair Trial"

STANDARD OF REVIEW

The Sixth Amendment of the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amen. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.E.2d 674 (1984); Holden v. State, 393 S.C. 565, 713 S.E.2d 611 (2011). A defendant is also entitled to effective assistance of appellate counsel. Tisdal v. State, 357 S.C. 474, 594 S.E.2d 166 (2004).

In a post-conviction relief action, Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, 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, 80 L.E.2d at 692; Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.E.2d 674. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies 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, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (citing Strickland, 80 L.E.2d 674). 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.

SUMMARY OF TESTIMONY

Applicant testified that his trial counsel was ineffective in the following ways: (a) failed to challenge references to gang activity; (b) allowed witness to address the jury; and (c) failed to make a motion to suppress information obtained from the State's witness, Hakeem Costa (Costa), through police interrogation.

First, Applicant stated that he met with his attorney on multiple occasions prior to trial to discuss the following: Applicant's charges, their elements, and potential defenses; trial strategy; and potential witnesses. Applicant testified that his trial counsel should have objected to any reference of his alleged gang involvement by any witness. Applicant averred that because

counsel permitted the State's witnesses to testify that Applicant was in a gang, the jury was misled and thus, readily convicted him.

The Court also heard testimony from Applicant's trial counsel, Mr. McLaurin. McLaurin testified that prior to trial he made a motion in limine regarding any potential "gang" allegations. The trial judge, however, denied his motion and determined that a gang reference would be permitted, so long as it is a reference and not an etiology on Applicant's alleged gang membership. Therefore, McLaurin averred that he made a difficult strategic decision to not object or cross a witness on any gang reference so as not to draw any unwanted attention to this allegation or open the door to potentially harmful testimony. Additionally, McLaurin stated that he asked Applicant after every witness if Applicant wanted him to ask any follow-up questions, yet Applicant never did.

Second, Applicant testified that his Aunt, Rosa Williams (Rosa), served as his alibi witness at trial. At the conclusion of her testimony, Rosa, without any prompt from the court or an attorney, turned to the jury and stated, "I just want to apologize to the people for what my nephew had done to them and give them my sympathy." Applicant argued that this improper statement prejudiced him in that it implicated Applicant and convinced the jury of his guilt.

Again, the Court heard McLaurin state that he made a strategic decision to withhold any object^{PN} regarding Rosa's statement. McLaurin testified that Rosa is the aunt to three individuals involved in this crime. McLaurin contended that during the moment, he did not believe Rosa—the final witness in the trial and Applicant's alibi witness—was referring to Applicant, but another nephew who admitted to the crime.

Third, Applicant testified that trial counsel was ineffective by counsel's failure to suppress Hekeem Randy Costa's initial statement to police. Applicant contended that Costa's constitutional rights were violated when he gave the statement because he was a minor and Costa's parents were not present during this confession. Applicant averred that his trial counsel had standing to suppress this statement. However, McLaurin testified that he was unsure about Applicant's standing to object to any violation of Costa's constitutional rights. Despite this legal quandary, McLaurin contented that Costa's initial statement was an integral part of Applicant's defense strategy, which was to discredit any witness who placed Applicant at the scene and introduce Applicant's aunt Rosa as an alibi witness. McLaurin averred that because Costa provided police with two conflicting statements, McLaurin could use these statements to impeach and discredit ^eon of the State's eye-witnesses.

Finally, Applicant testified that his appellate counsel was deficient. Applicant claimed he is entitled to relief because his appellate counsel failed to raise the fact that the trial judge charged the jury twice on the "hand-of-one is the hand-of-all" doctrine. Respondent contends that this was a strategic decision by appellate counsel. Furthermore, Respondent argued that this claim was frivolous; therefore, appellate counsel was not required to raise this issue on appeal.

ANALYSIS

The Court has reviewed the record in its entirety, heard the testimony and arguments presented at the PCR hearing, and reviewed the relevant case law. The Court has further had the opportunity to observe each witness who testified at the hearing and closely pass upon their credibility. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

I. Ineffective Assistance of Trial Counsel

Where trial counsel articulates valid reasons for employing certain strategy, the court will not deem his or her conduct as ineffective assistance. Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992); Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Furthermore, the court measures this strategy under an objective standard of reasonableness. Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002).

Here, trial counsel defended his actions as strategic decisions and his supporting logic was reasonable and manifold. It appears that Applicant and McLaurin developed a clear strategy prior to trial. This strategy focused on Applicant's alibi. McLaurin made several strategic decisions during the course of Applicant's trial in furtherance of this goal: he chose not to dwell or probe any witnesses about gang references; he did not object to Rosa's apology because he believed it helped strengthen her credibility; and he did not suppress Costa's initial statement to police because he wanted to use Costa's conflicting statements for impeachment. As such, this Court finds that Applicant's trial counsel was not deficient.

II. Ineffective Assistance of Appellate Counsel

Although appellate counsel must provide effective assistance of counsel, "appellate counsel is not required to raise every nonfrivolous issue that is presented by the record." Tisdal, 357 S.C. at 476, 594 S.E.2d at 167 (citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983)). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every "colorable" claim suggested by a client would disserve the very goal of vigorous and effective advocacy. . . ." Id. The burden of proof is on respondent to show that counsel's performance was deficient as measured by prevailing

professional norms, and that respondent was prejudiced by this deficiency. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Southerland, 524 S.E.2d at 836. On appeal, counsel for Applicant only raised the trial court's decision to admit the testimony of Applicant's alleged gang membership. It appears that counsel did not raise any other issues on appeal.

During the trial, it appears that the jury asked for the judge to re-charge them on the law regarding armed robbery. The court determined that the evidence presented at trial necessitated that he also re-charge the jury on the "hand-of-one is the hand-of-all" doctrine. McLaurin objected; the judge disagreed.

Trial court judges are required to charge the jury on the law, not to matters of fact. S.C. CONST Art. V, § 21. A trial court has a duty to give a requested instruction that correctly states the law applicable to the issues and which is supported by the evidence presented at trial. State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct. App. 2002). If any evidence exists to support a charge, it should be given. State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999). A jury charge which is substantially correct and covers the law does not require reversal. State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996). Furthermore, the court of appeals, when reviewing jury charges for error, consider the jury charge as a whole in light of the evidence and issues present at trial. State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003). An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion. State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007).

In the present case, the trial judge determined that upon the jury's request to be recharged on armed robbery he would reread his charge on the "hand-of-one is the hand-of-all" doctrine.

In doing so the judge stated,

It would be a very grave oversight on my part if I omitted the charge of the hand-of-one hand-of-all and charging the jury in a recharge setting in regard to their request of armed robbery. The offense of armed robbery does not in this case completely present itself without the applicability and efficacy of the hand-of-one hand-of-all doctrine.

This Court finds that the judge's accurate reading of the applicable law did not prejudice Applicant. As such, appellate counsel was not deficient for failing to raise this colorless claim on appeal. Assuming, *in arguendo*, that this charge was improper, his request for post-conviction relief fails because appellate counsel is not required to raise every potential claim on appeal.

CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant David Myers 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.

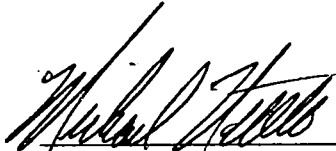
The Court notes that Myers must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an applicant has a right to 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 is DENIED.
2. That Applicant be remanded to the custody of the Department of Corrections to complete the remainder of his sentence.

AND IT IS SO ORDERED this 7 day of March, 2014.



Michael G. Nettles
Presiding Judge, Twelfth Judicial Circuit



, South Carolina

FILED
2014 MAR 10 AM 11:05
CONNIE REEL-SHEARIN
CCCP & GS
FLORENCE COUNTY, SC

CERTIFIED: A TRUE COPY
Connie Reel Shearin
CLERK OF COURT C.P. & G.S.
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March ²⁴~~20~~, 2014

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Reply To: Florence

Karen E. Ambroziak
1083 Langford Road
Blythewood, SC 29016

Re: Lewis David Williams v. State of South Carolina
Case No: 2012-CP-21-2694
Our File No: 13692.15920


Dear Ms. Ambroziak:

On February 10, 2014, the above case was heard before the Honorable Michael G. Nettles, Circuit Court Judge, in Florence County. My records indicate that you were the court reporter for this case.

I respectfully request that you provide me with a transcript of the hearing. Please transcribe the entire record. I agree to pay the per page charge for this transcript as provided by Rule 607, SCARC.

Please feel free to contact me with any questions or concerns.

With kindest regards,


J. Scott Kozacki
Email: skozacki@WillcoxLaw.com

jsk

Enclosures

Cc: Joshua Lee Thomas, Esq.
S.C. Court Administration
Clerk, Supreme Court of South Carolina
Office of Appellate Defense

RECEIVED

MAR 26 2014

S.C. SUPREME COURT

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Reply To: Florence

March ²⁴20, 2014

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

Re: Lewis David Williams v. State of South Carolina
Case No: 2012-CP-21-2694
Our File No: 13692.15920

Dear Sir or Madame:

Kindly find enclosed a copy of the original and one copy of the Notice of Appeal and Proof of Service in connection with the above referenced case. Additionally, kindly find enclosed a copy of the order which is to be challenged on appeal. This appeal is being filed with the Supreme Court pursuant to Rule 243 (a) of the South Carolina Appellate Court Rules. Please return the filed copy to my attention in the enclosed self-addressed pre-stamped envelope.

Please feel free to contact me with any questions or concerns.

RECEIVED

MAR 26 2014

S.C. SUPREME COURT

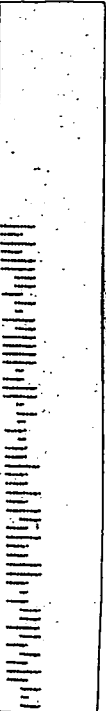
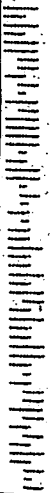
With kindest regards,



J. Scott Kozacki
Email: skozacki@WillcoxLaw.com

jsk
Enclosures

Cc: Joshua Lee Thomas, Esq.
Office of Appellate Defense



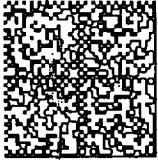
JIMMY BOWES

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