

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2012-CP-11-0111

Donald Scott Jones, #336980,

Appellant,

v.

State of South Carolina

Respondent.

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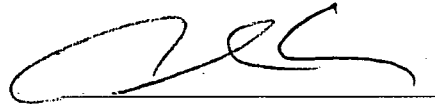
APR 01 2014

S.C. SUPREME COURT

NOTICE OF APPEAL

Donald Scott Jones appeals the order of dismissal of the Honorable J. Derham, dated February 20, 2014. Appellant received written notice of entry of this denied order of dismissal on February 26, 2014.

March 26, 2014



Alexander Hray, Jr.
SC Bar No.: 2736
389 East Henry Street, Ste. 107
Spartanburg, South Carolina 29032
(864) 342-1111
Attorney for Appellant Donald Scott Jones

Other Counsel of Record:
Suzanne H. White, Esq.
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211

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MAR 31 2014

SC Court of Appeals

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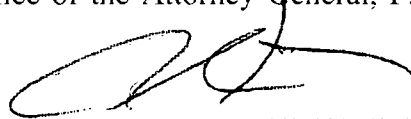
State of South Carolina

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 26, 2014, addressed to its attorney of record Suzanne H. White, Esq., Office of the Attorney General, P. O. Box 11549, Columbia, SC 29211.

March 26, 2014



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RECEIVED
MAR 31 2014

SC Court of Appeals

ALEXANDER HRAY, JR.
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March 26, 2014

The Honorable Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Donald Scott Jones, #336980 Appellant v. State of South Carolina,
Respondent
Case No. 2012-CP-11-0111

Dear Ms. Kitchens:

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

- (1) Proof of Service of the Notice of Appeal on the Respondent.
- (2) A copy of the Order of Dismissal which is to be challenged on appeal.

This appeal is of an order issued with respect to a Post Conviction Relief Application and is therefore exempt from the filing fee requirement.

Sincerely,



Alexander Hray, Jr.
SC Bar No.: 2736
389 East Henry Street, Ste. 107
Spartanburg, South Carolina 29032
(864) 342-1111
Attorney for Appellant Donald Scott Jones

AH,Jr.
cc: Suzanne H. White, Esq.(w/enclosures)
Office of the Attorney General
P.O. Box 11549,
Columbia, SC 29211-11549
Attorney for Respondent

Donald Scott Jones, (w/enclosures)

RECEIVED
MAR 31 2014
SC Court of Appeals

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF CHEROKEE

CASE NO: 2012CP1100111

IN THE COURT OF COMMON PLEAS

Donald Scott Jones, #336980 vs. State Of South Carolina

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2014 FEB 24 PM 3:34
BRADY W. MCBEE

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), SCRCP;
 - Rule 41(a), SCRCP (Vol. Nonsuit);
 - Rule 43(k), SCRCP (Settled);
 - Other: _____
- ACTION STRICKEN (CHECK REASON):**
 - Rule 40(j) SCRCP;
 - 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:

Order of Dismissal

Dated at Gaffney, South Carolina, this the 24th day of February, 2014.

Court Reporter:

s/ J. Derham Cole

PRESIDING JUDGE - J. Derham Cole

This judgment was entered on the the 20th day of February, 2014, and a copy mailed first class this the 24th day of February, 2014, to attorneys of record or to parties (when appearing pro se) as follows:

Donald Scott Jones, #336980 ,
Alexander Hray Jr. Alexander Hray, Jr., Attorney
At Law 389 E. Henry St., Ste 107 Spartanburg, SC
29302

Alan McCrory Wilson PO Box 11549 Columbia,
SC 29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Brady W. McBee

Brady W. McBee - Clerk of Court

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHEROKEE)
)
Donald Scott Jones, #336980,)
)
) Applicant,)
)
) v.)
)
 State of South Carolina,)
)
) Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2012-CP-11-0111

ORDER OF DISMISSAL

FILED
 CLERK OF COURT
 SEVENTH JUDICIAL CIRCUIT
 CHEROKEE COUNTY, S.C.
 FEB 13 2013 11:50 AM
 MOORE

This matter comes before the Court by way of an Application for Post-Conviction Relief filed February 13, 2012. The Respondent made its Return on or about November 30, 2012. An evidentiary hearing into the matter was convened on October 4, 2013, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Alexander Hray, Jr., 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. Thomas E. Shealy, Esquire, and Kim Leskancic, Esquire, also testified. This Court also had before it a copy of the records of the Cherokee County Clerk of Court regarding the subject convictions, Applicant’s records from the South Carolina Department of Corrections, the Return, Applicant’s appellate records and the trial transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. The Applicant was indicted by the Cherokee County Grand Jury in August 2009 for assault and battery with intent

to kill ("ABWIK") (09-GS-11-0924). He was represented by Thomas E. Shealy, Esquire. On September 15, 2009, the Applicant was convicted of the charge by a jury. Applicant was sentenced by the Honorable J. Mark Hayes II to a sentence of twenty years, provided upon the service of twelve years, the balance would be suspended to five years of probation.

A timely Notice of Appeal was filed and an appeal was perfected. The South Carolina Court of Appeals affirmed the conviction and sentence. State v. Jones, Op. No. 2011-UP-287 (filed June 13, 2011). The Remittitur was returned on June 29, 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.

At the hearing, Applicant indicated that he would also proceed on allegations that Counsel failed to make a motion to quash the indictment because the Applicant was originally indicted for assault and battery of a high and aggravated nature ("ABHAN"), but three years later Applicant was indicted for ABWIK, Counsel failed to interview key witnesses prior to trial, and Counsel failed to make a motion for a change of venue.

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 believed Counsel failed to properly investigate the case.

Applicant testified that he also wanted Counsel to investigate the change in the indictment. Applicant attempted to testify about allegations that the grand jury had not been properly convened, but the State objected because the allegation was not properly before the Court. This Court sustained the State's objection and ruled that the Applicant could not pursue that claim. Applicant testified that he told his story at trial and hoped the truth would prevail. However, Applicant did admit that his testimony included facts about the large amount of alcohol consumed by Applicant that day and the fact that the victim never had a weapon. Applicant also testified that he would not have ever pled guilty, but would have stood up for the truth.

Counsel testified he represented the Applicant on this charge while working at the Cherokee County Public Defender's office, but now works at the USC Children's Law Center. Counsel testified that he was unsure of the date he was appointed to represent the Applicant, but he filed a Motion for Discovery on May 31, 2006, so it was sometime prior to that date. Counsel testified that originally the Applicant was indicted for ABHAN and armed robbery, but prior to the trial three years after the original indictment, the State indicted Applicant for ABWIK and dismissed the armed robbery charge. Counsel testified that the State had offered a plea of twenty years for both charges, but Applicant always indicated to Counsel that Applicant would not accept twenty years. Counsel testified that he did push the Applicant to plea because Counsel was concerned about the risks of proceeding to trial, in particular in light of the fact that ABWIK was a most serious charge. Counsel testified that he was also representing Applicant on charges of criminal sexual conduct – 1st degree and another ABWIK charge related to a separate incident. Counsel testified that he did not make a motion to quash the indictment for ABWIK because Counsel believed the elements of the charge were present and that there was no prosecutorial misconduct involved in the new indictment.

Counsel testified that his case notes indicate that he spoke with the Applicant and witness Ricky Long, but does not recall that he found witness Tammy Byers to interview. However, Counsel testified that he letters from Byers discussing the facts and had discussed her planned testimony with the Assistant Solicitor. There was no question about the fact that the Applicant hit the victim with a large stick, but the issue was if it was done in defense of Ms. Byers. Counsel testified that because the theory of the defense was that Applicant hit the victim in defense of another, at least one of the two witnesses needed to back up the Applicant's story at trial. However, Counsel testified that neither witness, Mr. Long or Ms. Byers, provided testimony at trial to support Applicant's defense. In fact, Counsel testified that Ms. Byers' story changed numerous times and he felt you could not rely on anything she said. Counsel testified that he discussed Ms. Byers' possible testimony with the Applicant and the risks of proceeding to trial.

Counsel testified that he was not aware of any publicity surrounding this case because he did not take the local paper in Gaffney. However, Counsel testified that at no time did he consider making a motion for change of venue or see the necessity of a motion. Counsel testified that he requested and the jury was charged with both ABWIK and ABHAN, but came back with a verdict of guilty of ABWIK in thirty minutes.

Kim Leskanic, Esquire, testified that she was the Assistant Solicitor who prosecuted the Applicant on these and the later charges. Leskanic testified that in 2006, Assistant Solicitor Abel Gray handled the case, but once she moved to Cherokee in October 2006, the case became hers. Gray received an indictment for charges of ABHAN and armed robbery against Applicant in 2006 based upon the incident reports. There were no notes in the case file indicating that Gray had the opportunity to speak with any witnesses or the victim. However, Leskanic testified that

as she prepared the case for trial and met with witnesses, she determined that Applicant was not involved in the armed robbery, but did believe the case warranted an ABWIK indictment. Leskanic testified that she believed that was the appropriate charge.

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

This Court also finds that the Applicant failed to meet his burden of proof as to the claim that Counsel failed to interview key witnesses prior to trial. As the testimony indicates, Counsel acknowledged that he did not interview Ms. Byers prior to trial, but because of review of the incident reports, letters, and conversations with the Assistant Solicitor, he felt prepared for her possible testimony. "[A] defendant has a 'burden of supplying sufficiently precise information,'

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), SCRPC, 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.

of the evidence that would have been obtained had his counsel undertaken the desired investigation, and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995). The Applicant did not proffer any questions counsel allegedly failed to ask and did not present any testimony showing the witness' answers at trial would have been different. Accordingly, the Applicant has not shown that a different approach to cross-examination would have been beneficial to the defense. Therefore, this claim is denied and dismissed.

Regarding Applicant's allegation that Counsel failed to move to quash the indictment, this Court finds that this allegation lacks merit. This Court reviewed the indictment and found no deficiency that would have provided a basis for any objection. Further, this Court finds both Counsel and Ms. Leskanic's testimony to be credible. This Court finds that the crime did contain the elements of ABWIK and the jury was presented with both ABWIK and ABHAN as possible verdicts. Therefore, this Court finds that the Applicant has failed to meet his burden of proof as to this claim.

This Court also finds that the Applicant failed meet his burden of proof regarding Counsel's failure to make a motion for change of venue. The Applicant offered no evidence or testimony to demonstrate that the pretrial publicity was such that Counsel should have made a motion for change of venue or that the motion would have been granted had it been made. Therefore, this claim is denied and dismissed.

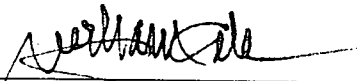
Summary

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

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, 2014.



J. Derham Cole
Presiding Judge

CLERK OF DISTRICT COURT
JUDICIAL DISTRICT NO. 1
SHERBOURNE, MONTGOMERY CO., MD.
2014 FEB 24 AM 8 50
BRANDY W. MOBEE

Alexander Gray, Jr., Attorney
389 E. Henry St., Suite 107
Spartanburg, SC 29302

The Honorable Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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