

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-21-0493

David Myers #298686,

Petitioner,

RECEIVED

v.

APR 28 2014

The State of South Carolina,


Respondent.

S.C. SUPREME COURT

NOTICE OF APPEAL

Petitioner appeals the order dismissing his post-conviction relief action signed by the Honorable Michael G. Nettles on March 7, 2014. This order was filed on March 10, 2014 and received by Petitioner on March 30, 2014.¹

April 23, 2014


Tristan M. Shaffer
120 Gantt Street
Lexington, South Carolina 29072
(803) 820-0727
SC Bar # 77565
Attorney for Petitioner

Other Counsel of Record:
Josh Thomas
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211
Attorney for Respondent

¹ This order was originally mailed to Counsel's old address was not received by counsel until March 30, 2014.

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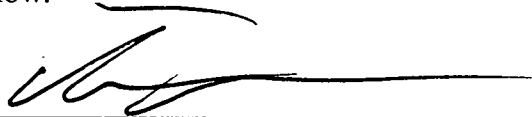
The State of South Carolina,

Respondent.

Proof of Service

I certify that on this day, I have served a copy of the Notice of Appeal in the above captioned case on Respondent by depositing it in the United States mail with postage prepaid and addressed to the Attorney for Respondent as listed below.

April 23, 2014



Tristan M. Shaffer
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SC Bar # 77565
Attorney for Petitioner

Other Counsel of Record:
Josh Thomas
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Attorney for Respondent

FILED

2014 MAR 11 PM 12:49

David Myers # 2926812 EDDIE REEL HEARIN *State of South Carolina*
 PLAINTIFF(S) FLORENCE COUNTY, SC DEFENDANT(S)

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (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. See Page 2 for additional information.
- 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 (formal order to follow) Statement of Judgment by the Court

ORDER INFORMATION

This order ends does not end the case.
 Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

CERTIFIED: A TRUE COPY
Annie Reed Speer
 CLERK OF COURT C.P. & G.S.
 FLORENCE COUNTY, SC

For Clerk of Court Office Use Only

This judgment was entered on the 10 day of MAR, 2014 and a copy mailed first class or placed in the appropriate attorney's box on this 11 day of MAR, 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Tristen M. Shiffer
P.O. Box 176
Chapin, S.C. 29036
ATTORNEY(S) FOR THE PLAINTIFF(S)

Joshua L. Thomas
P.O. Box 11549
Columbia, S.C. 29211-7549
ATTORNEY(S) FOR THE DEFENDANT(S)
Connie Reel-Shearin
CLERK OF COURT

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
 COUNTY OF FLORENCE)
)
)
 David Myers, # 298686,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 TWELFTH JUDICIAL CIRCUIT

Case No. 2013-CP-21-00493

ORDER

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

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed by David Myers (Applicant). Respondent made its Return on or around September 16, 2013. The Court convened an evidentiary hearing in Florence County on February 10, 2014, at which time Applicant was present in court and represented by Tristan M. Shafer, Esquire. The Respondent was represented by Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office.

BACKGROUND

In June 2011, the Florence County Grand Jury indicted Myers for shoplifting, third or subsequent offense (2011-GS-21-00981). Scott P. Floyd, Esquire, represented Myers. On June 29, 2011, a jury found Myers guilty as indicted. The Honorable Thomas A. Russo sentenced Myers to ten years. Myers filed a timely notice of appeal. Robert M. Pahak, Esquire, of the Office of Appellate Defense perfected the appeal with the filing of an *Anders* brief on October 11, 2011. The South Carolina Court of Appeals dismissed the appeal on January 30, 2013. State

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

v. Myers, Op. No. 2013-UP-051 (S.C. Ct. App. filed January 30, 2013). The remittitur was returned to the circuit court on February 28, 2013.

ISSUES PRESENTED

At his PCR hearing, Myers alleged that he is being held in custody unlawfully for the following reasons:

1. Because my charge is only a thirty day charge and was only valued at \$42.00;
2. Ineffective assistance of counsel...for failing to inform Defendant of the nature of the charges and failing to request a spoliation charge;
3. Denial of due process and equal protection of law;
4. Prosecutorial misconduct for the withholding of evidence.

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). 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 relief upon as having product 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.

All statutes are presumed constitutional and will, if possible, be construed so as to render them valid. *Davis v. Cnty. of Greenville*, 322 S.C. 73, 77, 470 S.E.2d 94, 96 (1996). A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear beyond a reasonable doubt. *Westvaco Corp. v. S.C. Dep't of Revenue*, 321 S.C. 59, 62, 467 S.E.2d 739, 741 (1995); *State v. Harrison*, 402 S.C. 288, 292-93, 741 S.E.2d 727, 729 (2013), reh'g denied (Apr. 3, 2013).

SUMMARY OF TESTIMONY

Applicant David Myers testified that he never met with his attorney prior to trial. Myers alleges that his attorney "tricked" him into going to trial, never informed him about the enhancements on shoplifting charges, never showed him any evidence, and only told him about a plea offer to serve four years after the conclusion of his trial. Myers also asserts that he never

admitted to the shoplifting offense. The Court also heard testimony from Myers that he has approximately seven prior convictions, two of which were shoplifting offenses for which he received thirty days for stealing beer and food. Furthermore, Myers averred that if his attorney informed him of the four-year plea offer, he would have accepted.

The Court also heard testimony from Scott Floyd. Floyd testified that he visited Myers in jail within a month of being assigned to represent him. Floyd testified that it was standard procedure for an investigator from his office to visit with inmates prior to an attorney being assigned to their case. Furthermore, Floyd testified that Myers confessed to the investigator that he committed the shoplifting offense. However, when Floyd met with Myers, he testified that Myers claimed he was innocent, that his cousin with the same name was the thief, and that he was arrested two days after the alleged event occurred.

Floyd also testified that after doing his own investigation he discovered that Myers was arrested within moments of the alleged theft and the State had several witnesses who knew Myers and were willing to testify that they saw him shoplift several bottles of turtle wax from Wal-Mart. The Court heard Floyd testify that he related the plea offer of four years to Myers and was mystified when Myers chose to reject that offer. Myer's attorney also stated that he discussed the charges, the elements of that charge, and potential defenses with Myers. In total, Floyd testified that he met with Myers at least three times prior to trial, filed several discovery motions on his behalf, and maintains that Myers was adamant about taking his case to trial.

ANALYSIS

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. The Court has further had the opportunity to observe

witnesses who testified at the hearing and to closely pass upon their credibility. The 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).

A. Ineffective Assistance of Counsel

The Court finds that Myers and his attorney, Scott Floyd, met on several occasions prior to trial. During these meetings, Myers and Floyd discussed the charges he faced, the elements and potential defenses to those charges, and all plea offers from the State. The Court finds that Myers chose to reject any plea offer and to proceed to trial. Despite the difficult challenges this case presented, Floyd was diligent throughout the discovery process and filed several pre-trial motions on Myers behalf.

Even assuming *in arguendo*, that Floyd was deficient for failing to request a spoliation charge, the Court further finds Myers cannot satisfy the prejudice prong of the Strickland analysis as to any of his allegations because the record contains overwhelming evidence of his guilt. Hutto v. State, 387 S.C. 244, 249, 692 S.E.2d 196, 198 (2010) (“No prejudice occurs, despite deficient performance, when there is overwhelming evidence of guilt.” (citing Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009))).

At his trial, two loss prevention officers employed by Wal-Mart testified that they witnessed Myers shoplifting. Furthermore, an officer with the Lake City Police Department testified that she noticed Myers running away from the dumpster where she later recovered the stolen items. The Court can discern nothing trial counsel could have done differently to counter this evidence. In sum, this Court finds Applicant’s claim for ineffective assistance of counsel fails because counsel was not deficient and the evidence overwhelmingly points to Myers’s guilt.

B. Denial of Due Process and Equal Protection

Myers argued during the PCR hearing that the penalty provision of section 16-13-110(B)(1) of the South Carolina Code, and his sentence pursuant to that provision, violates the Eight Amendment. This Court disagrees.

The Eighth Amendment to the United States Constitution, which applies against the States by virtue of the Fourteenth Amendment, provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The Eighth Amendment prohibits not only the barbaric punishments, but also sentences that are disproportionate to the crime. Solem v. Helm, 463 U.S. 277, 284, 103 S.Ct. 3001, 77 L.E.2d 637 (1983); State v. Harrison, 402 S.C. 288, 293, 741 S.E.2d 727, 729 (2013).

When analyzing proportionality under the Eighth Amendment, the court must first determine whether the relationship between the sentence and the crime committed gives rise to an inference of gross disproportionality. State v. Harrison, 402 S.C. at 300, 741 S.E.2d at 733. If the court does not find that an inference of gross disproportionality is present, the analysis ends. Id. "In the rare instance that this threshold comparison gives rise to such an inference, intrajurisdictional and interjurisdictional analysis is appropriate." Id.

Under section 16-13-110(B)(1) of the South Carolina Code, a person guilty of shoplifting if he takes possession of or carries away merchandise offered for sale by any store with the intent of depriving that merchant of its benefit without paying the full retail value. In the event that a person is guilty of this offense a third or subsequent time, then he is guilty of a Class E Felony and may be imprisoned for up to ten years. S.C. Code Ann. § 16-1-20(A)(5) (Supp. 1995). The statutory language must be construed in light of the intended purpose of the

statute. State v. Lewis, 325 S.C. 324, 327, 478 S.E.2d 696, 698 (Ct. App. 1996). In *Lewis*, the court identified the legislative reasoning behind this enhancement as the “three strikes and you’re out” principle. Id.

In the present case, it is clear from the record that Myers conviction for shoplifting was properly enhanced under the South Carolina Code. It appears from the Myers’ record that he has five previous property offenses, four of which led to shoplifting convictions. Additionally, Judge Russo considered the legislative intent behind the enhancement provisions in his colloquy with Myers at the sentencing stage. Prior to this offense, Myers received a sentence of five years suspended upon ninety-five days, time served, and two years of probation for shoplifting. Furthermore, Myers testified at his PCR hearing that he was facing ten years for his shoplifting charge if convicted. Therefore, this Court finds that due to Myers’ repetitive illegal actions, his apparent disregard for the law, and the legislative intent behind the enhancement penalty for this offense, the relationship between the sentence and the crime committed does not give rise to an inference of gross disproportionality. As such, the Court denies Myers allegation that his sentence violates the Eighth Amendment.

C. Prosecutorial Misconduct

Myers also alleges prosecutorial misconduct. Prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 439 S.E.2d 517, 520 (1993). Myers could have raised the issue of

prosecutorial misconduct on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is the applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794 (1989). It appears that Myers only alleged prosecutorial conduct during his PCR application. At the PCR hearing, Myers did not articulate how this misconduct occurred, nor has he shown what information was not provided to defense counsel. Therefore, the Court finds that Myers has failed to meet his burden as it relates to this allegation.

D. All Other Allegations

As to any other allegations raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Myers failed to present sufficient evidence regarding such allegations. Accordingly, the Court finds Myers has abandoned any such allegations.

CONCLUSIONS

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.

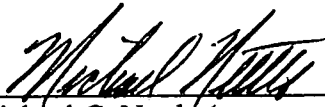
The Court notes that Myers must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an applicant 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

Spencer, 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.
FLORENCE COUNTY, S.C.



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April 23, 2014

The Supreme Court of South Carolina
Daniel E. Shearhouse, Clerk of Court
P.O. Box 11330
Columbia, SC 29211

RECEIVED

APR 28 2014

Re: David Myers v. State
2012-CP-21-0493

S.C. SUPREME COURT

Dear Clerk of Court,

Please find attached Notice of Appeal, Proof of Service and Order in the above referenced case. Please file a copy and return a stamped copy in the enclosed envelope.

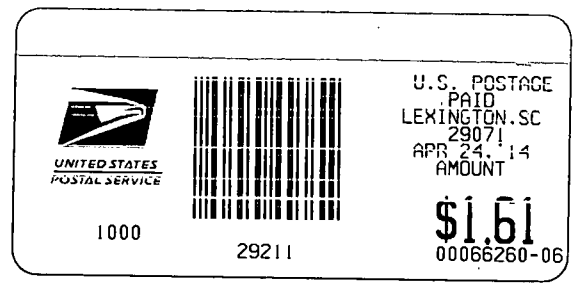
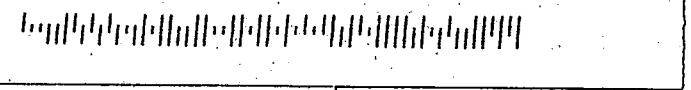
Thank you for your assistance in this matter.

Sincerely,

Tristan M. Shaffer

CC: Connie Reel-Shearin
Josh Thomas
Kimberly McCall
David Myers

Shearman & Sterling
12
Lexington, SC 29072



FIRST CLASS

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