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April 21, 2014

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

RECEIVED
APR 23 2014
S.C. SUPREME COURT

Re: Gerald Brown (#174505) v. State of South Carolina:
Case: No.: 2012-CP-23-7837
NOTICE of APPEAL

Dear Mr. Shearouse:

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[s].

(2) A copy of the order[s] [judgment] which is to be challenged on appeal.

(3) This appeal is being filed with the Supreme Court because this is an appeal of a final decision in a Post Conviction Relief motion pursuant to Rule 243

If you have any questions, please do not hesitate to contact me at the above listed number.

With kindest regards, I am,

Very truly yours,

James P. Craig

JPC/sg
Enclosure
Cc: Gerald Brown
Karen Ratigan, Esq.

RECEIVED
APR 23 2014
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

G. Edward Welmaker, Circuit Court Judge

Case No. 2012-CP-23-7837

The State, Respondent,

v.

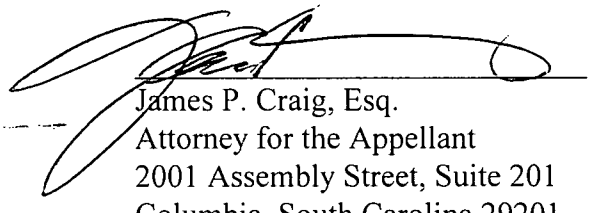
Gerald Brown, Appellant.
SCDC No. 174505,

NOTICE OF APPEAL

Gerald Brown appeals the order of the Honorable G. Edward Welmaker dated April 9, 2014, which denied Appellant's motion for post-conviction relief. Appellant received written notice of the order on April 14, 2014.

April 21, 2014

Respectfully submitted,



James P. Craig, Esq.
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Other Counsel of Record:
Karen C. Ratigan
Senior Assistant Deputy Attorney General
Post Office Box 11549
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(803) 734-4042

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion has been sent this 21st day of April, 2014, by regular United States Mail with sufficient postage affixed thereto to insure delivery thereof to the Karen Ratigan, Esq., Office of the Attorney General of South Carolina, P.O. Box 11549, Columbia, South Carolina 29211.

James P. Craig, Esq.
Attorney for the Appellant

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2012CP2307837

FILED-CLERK OF COURT
GREENVILLE COUNTY
PAUL B. WICKENSIMER
2014 APR -9 P 3:

Gerald Brown *vs.* South Carolina State Of

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:

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE - G Edward Welmaker

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

James P. Craig 2001 Assembly Street Ste. 201 Columbia, SC 29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

Karen Christine Ratigan PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court - Clerk of Court

CPFORM4M
SCCA SCRCP Form 4 Revised 06/2008

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	C.A. No. 2012-CP-23-7837
COUNTY OF GREENVILLE)	
)	
Gerald Brown,)	
S.C.D.C. No. 174505,)	
)	
Applicant,)	**ORDER OF DISMISSAL**
)	
v.)	
)	
State of South Carolina,)	
)	
Respondent.)	

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL D. WICKENSIMER
2014 APR -9 P 3:10

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed December 14, 2012. The Respondent made its return on May 3, 2013. An evidentiary hearing into the matter was convened on February 19, 2014 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by James P. Craig, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant, Andrell Terry and the Applicant's trial counsel, Randall L. Chambers, Esquire, testified at the PCR hearing. The Court had before it the trial transcript, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, the return, the appellate records, and Court's Exhibit 1.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the September 2007 term of the Greenville County Grand Jury for possession of a weapon during commission of a violent crime (2007-GS-23-7600), assault and battery of a high and

aggravated nature (ABHAN) (2007-GS-23-7602), impersonating law enforcement (2007-GS-23-7603), malicious injury to a police dog (2007-GS-23-7604), first-degree burglary (2007-GS-23-7605), armed robbery (2007-GS-23-7606), three counts of kidnapping (2007-GS-23-7622, counts 1-3), and resisting arrest (2007-GS-23-7633). He was represented by Randall L. Chambers, Esquire.

After the State brought the case to trial, the Applicant was found guilty. On April 16, 2009, the Honorable Edward W. Miller sentenced the Applicant to concurrent terms of five years for possession of a weapon during commission of a violent crime, ten years for ABHAN, one year for impersonating law enforcement, five years for malicious injury to a police dog, life imprisonment without parole (LWOP) for first-degree burglary, LWOP for armed robbery, LWOP for each count of kidnapping, and one year for resisting arrest.

A notice of appeal was filed at the South Carolina Court of Appeals. Tristan M. Shaffer, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. Brown, Op. No. 2012-UP-262 (S.C. Ct. App. filed May 2, 2012).

ALLEGATIONS

In his application and his pro se "Addendum to the Memorandum of Law in Support of Motion for Relief Pursuant to the Uniform Post-Conviction Procedure Act, S.C. Code Ann. 17-27-10, *et seq.*" filed on March 28, 2013, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel:
   a. Failed to conduct a proper pre-trial investigation.
   b. Failed to call an exculpatory witness (Andrell Terry).
   c. Failed "to introduce the blood-stained white tee-shirt worn by the [Applicant] when he was attacked by police dogs, along with a

blue tee-shirt and bullet proof vest taken from the assailant in this matter that showed no signs of blood."

d. Failed to cross-examine the victim about his criminal history.

e. Failed to cross-examine the victim about his prior contact with the Applicant.

f. Failed to present the theory of the defense during opening statement.

2. Ineffective assistance of appellate counsel:

a. Failed to raise the issue of whether the jury instruction about "hand of one is hand of all" was improper.

3. Violation of Constitutional rights:

a. Violation of Sixth and Fourteenth Amendments because trial judge did not allow the Applicant to obtain new counsel.

b. Violation of Due Process because the Applicant received a consecutive five-year sentence for possession of a weapon during the commission of a violent crime when he received a sentence of life imprisonment without parole for that underlying crime.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe the witnesses 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 Trial Counsel

The Applicant alleges he received ineffective assistance of trial 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).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v.

State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). To prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "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) (citation omitted).

The Applicant stated he discussed the State's evidence and his version of events with trial counsel. The Applicant stated he went to the victims' house that night with cash in order to buy drugs. The Applicant stated he did not have a police shirt, bulletproof vest, pistol or taser. The Applicant stated he told trial counsel that Terry dropped him off that night and gave counsel Terry's contact information the weekend before trial. The Applicant stated he called Terry when he was hiding in the woods near the victims' house but Terry did not answer his phone. The Applicant stated trial counsel did not obtain his cell phone records. The Applicant stated he "got to tussling" with a police officer in the woods. The Applicant stated he was not wearing a police shirt, bulletproof vest, or mask. The Applicant stated trial counsel should have mentioned his defense in his opening statement. The Applicant stated police collected his white t-shirt and that trial counsel should have introduced this shirt at trial because it was bloody and since the officers stated he was wearing it under the police shirt, the police shirt should have also been bloody. The Applicant stated he had known the adult victim for years, which was contrary to what the victim told police. The Applicant stated trial counsel should have contacted witnesses to refute the victim's testimony on this point. The Applicant stated trial counsel should have asked the victim about prior drug deals.

Andrell Terry, the Applicant's cousin, stated he drove the Applicant to the victims' house

that night but did not realize at the time where the Applicant was going. Terry stated the Applicant was wearing a white t-shirt and jeans and did not have anything else with him except for a shopping bag full of cash. Terry stated the Applicant never called him that night. Terry stated he became aware the Applicant was arrested for the home invasion of the victims' house a few months later. Terry stated he did not contact the Applicant's defense attorney to relay the events of the night. Terry stated he did not give the Applicant the bag full of cash and was surprised the Applicant testified to this at trial.

Trial counsel testified he was the Applicant's second attorney and was appointed in early 2009. Trial counsel testified he received the discovery motions from the first attorney and reviewed those materials both independently and with the Applicant. Trial counsel testified he had two meetings with the Applicant prior to the week before trial. Trial counsel testified the Applicant would not discuss his version of events on the night of the incident and said he wanted to hire another attorney. Trial counsel testified they had more meetings the week before the trial and estimated he spent 8 hours with the Applicant. Trial counsel testified he was well prepared from a discovery standpoint but that the Applicant would not actively assist him. Trial counsel testified the Applicant told him to contact Terry but that his investigator could not locate him. Trial counsel testified Terry never contacted him. Trial counsel testified he did not mention the defense theory in his opening argument both because he does not generally do this and because the Applicant never told him the events of the night. Trial counsel testified the defense developed as the trial progressed and the Applicant gained confidence in him. Trial counsel testified there were inconsistencies in the officers' testimony about the shirt the Applicant was wearing when he was arrested. Trial counsel testified he recalled the white t-shirt issue but did not remember why he did not offer it into evidence at trial. Trial counsel testified the Applicant

said he had known the adult victim for years (and even testified to this) but that, under the circumstances, this did not really matter.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not properly meet with him to discuss the case. Trial counsel testified they had numerous meetings before the trial (most of which took place the week beforehand) and that they reviewed the State's evidence in the case. Trial counsel testified he was willing to spend as much time as necessary to meet with the Applicant and prepare the case, but that the Applicant was hostile and would not discuss the case with him. This Court finds trial counsel's testimony is credible. This Court notes trial counsel is a very experienced criminal defense attorney and had to contend with an uncooperative client. Regardless, this Court finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation. This Court finds the Applicant failed to demonstrate what more trial counsel could have done in order to prepare his case for trial. See Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing he would have had a defense with additional time to prepare for trial).[1]

This Court finds the Applicant failed to meet his burden of proving trial counsel should have called Andrell Terry as a witness at trial. Terry stated he dropped the Applicant off near the victims' house that night. Terry stated the Applicant had a bag of cash but did not have a police shirt, mask, vest, or weapons. The Applicant corroborated Terry's testimony at the PCR hearing. The Applicant admitted that he testified at trial that Terry gave him the cash in this case and

[1] While the Applicant argued trial counsel should have obtained his cell phone records, this Court cannot speculate upon whether these records were vital to the case, as they were not introduced into evidence at the PCR hearing. See Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (holding that, since the contents of challenged documents were not presented at the PCR hearing, the Applicant could not demonstrate how the failure of counsel to obtain these documents prejudiced the defense).

stated this was a lie. The Applicant testified he never spoke to Terry after he was dropped off but admitted he testified differently at trial (that he spoke to Terry, who told him to hide in the woods). The Applicant admitted he never told Terry to contact trial counsel. Trial counsel testified he was unable to locate Terry before trial and that Terry never contacted him. This Court does not find either Terry or the Applicant to be credible witnesses. This Court finds trial counsel's testimony, however, is credible. This Court notes Terry and the Applicant are first cousins and that Terry knew about the Applicant's arrest prior to his trial. Regardless, Terry never contacted trial counsel in order to provide allegedly helpful information about the night in question. This Court finds this improbable. Rather, this Court finds trial counsel made every effort to locate Terry, was unable to do so, and informed the trial judge and jury of this. (Trial transcript, pp.355-56; pp.380-81). This Court finds the Applicant failed to prove trial counsel was deficient. This Court also finds that, based upon the utter lack of credibility of Terry's story, the Applicant also failed to prove any resulting prejudice.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have introduced his white t-shirt into evidence at trial. The Applicant argues this would have been beneficial because the t-shirt was bloody but the police shirt the officers said he was wearing over it was not. Trial counsel testified he did not recall why he did not introduce the t-shirt at trial and stated it may have been helpful. This Court finds the failure to introduce the white t-shirt into evidence was not deficient in light of the fact that the Applicant was hostile with trial counsel during trial preparation and the trial itself. Regardless, the Applicant cannot prove any resulting prejudice. Trial counsel actually made the argument during closing statements at trial that the police shirt should be bloody if the officers' accounts were accurate. (Trial transcript, p.389). And any potential deficiency in not introducing the white t-shirt at trial

was negated by the State's presentation of overwhelming evidence of the Applicant's guilt. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have contacted witnesses in order to refute the adult victim's contention that he did not know him. Trial counsel testified the Applicant addressed this issue during his trial testimony. Trial counsel also testified that, given the circumstances of this case, this was not a big issue. This Court agrees, based on the State's presentation of overwhelming evidence of the Applicant's guilt. See Franklin, 346 S.C. at 570 n.3, 552 S.E.2d at 722 n.3; Geter, 305 S.C. at 367, 409 S.E.2d at 346. Regardless, as these potential witnesses did not testify at the PCR hearing, this Court cannot speculate as to what they would have testified to at trial. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme Court "has repeatedly held a PCR 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.") (emphasis in original). Similarly, while the Applicant argued trial counsel should have asked the adult victim about his prior criminal record, he failed to present any evidence that such a record existed or that it would have been helpful in impeaching the victim's credibility. See Jackson v. State, 329 S.C. 345, 349-50, 495 S.E.2d 768, 770 (1998) (finding applicant failed to prove prejudice from counsel's failure to investigate criminal backgrounds of victims and witnesses when he failed to substantiate at the

PCR hearing that the victims and witnesses had criminal records).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have mentioned the defense theory in his opening argument. Trial counsel testified he does not do this in opening statements. Further, trial counsel testified the Applicant had not discussed the events of the night in question with him prior to the trial. This Court finds trial counsel's testimony is credible. This Court finds that, even if he had wanted to articulate a defense strategy to the jury, he could not have done so due to the Applicant's refusal to participate in trial preparation. This Court finds the Applicant failed to demonstrate trial counsel was deficient.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial 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 trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

Ineffective Assistance of Appellate Counsel

The Applicant stated appellate counsel failed to raise the issue of the "faulty" jury charge for hand of one is the hand of all because there was a "phantom accomplice" in this case.

This Court finds the Applicant has not met his burden of proving appellate counsel was ineffective. A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830 (1985). In analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when

analyzing a claim of ineffective assistance of trial counsel. See Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009); Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999) (noting courts apply the Strickland test to determine if appellate counsel was deficient for failing to raise an issue and whether the defendant was prejudiced from the failure to raise the issue). This Court finds the Applicant has failed to meet his burden of proving appellate counsel was deficient in not making the jury charge argument. This Court has examined the record and does not find this argument would have been successful. "'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765 (2000) (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)). This Court does not find the Applicant has overcome the presumption that his appellate counsel was effective.

Violation of Constitutional Rights

In his PCR application, the Applicant argues his constitutional rights were violated as a result of the trial judge's actions. This Court notes, however, that these issues should have been raised on direct appeal and not for the first time in a PCR action. These allegations are dismissed. See Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974); see also S.C. Code Ann. § 17-27-20(b) (2003) (noting PCR "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction"). This Court has expressly held "errors which can be reviewed on direct appeal may not be asserted for the first time . . . in post-conviction proceedings." Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 519 (1993).

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this

matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and

2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 3 day of April, 2014.

G. Edward Welmaker
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina.

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