

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
THE HONORABLE G. EDWARD WELMAKER

CA No. 2012-CP-23-7606

OSHAWN J. ROBINSON,
APPELLANT,
vs.
STATE OF SOUTH CAROLINA
RESPONDENT.

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2014 APR 25 AM 10 53

NOTICE OF APPEAL

Appellant OSHAWN J. ROBINSON, appeals from the Order of the Honorable G. EDWARD WELMAKER, Circuit Court Judge clocked March 25, 2014

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S.C. SUPREME COURT

Respectfully submitted,

Caroline M. Horlbeck

Caroline M. Horlbeck, Esq.
101 Whitsett St
Greenville, SC 29601

Date: April 25, 2014

Other Counsel of Record: Karen Ratigan, Esq.
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE SUPREME COURT

OSHAWN J. ROBINSON,)
)
)
APPELLANT,)

C.A. No. 2012-CP-23-7606

-vs-)

CERTIFICATE OF SERVICE

STATE OF SOUTH CAROLINA,)
)
)
RESPONDENT.)
_____)

This is to certify that I am an employee in the law office of Caroline M. Horlbeck, attorneys for Applicant, and that I have this day caused to be served upon the person(s) named below Applicant's Notice of Appeal by placing copies of same in the United States mail, with adequate postage thereon, addressed as follows:

Ms. Lorie French
S.C. Office of Appellate Defense
PO Box 11433
Columbia, SC 29211

Karen Ratigan, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Caroline M. Horlbeck
Caroline M. Horlbeck

Greenville, South Carolina

April 25, 2014

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 O'Shaun Joseph Robinson,)
 S.C.D.C. No. 327798,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2012-CP-23-7606

ORDER OF DISMISSAL

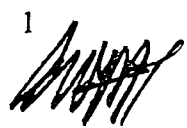
FILED-CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL B. WICKENSIMMER
 2014 MAR 25 PM 12 35

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed December 5, 2012. The Respondent made its return on June 21, 2013. An evidentiary hearing into the matter was convened on February 18, 2014 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's trial counsel, Andrew Moorman, Esquire. 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 Applicant's Exhibits 1-2.

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 August 2008 term of the Greenville County Grand Jury for armed robbery (2008-GS-23-

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5382, count 1), possession of a weapon during commission of a violent crime (2008-GS-23-5382, count 2), conspiracy (2008-GS-23-5383), and assault and battery of a high and aggravated nature (2008-GS-23-5384). He was represented by Andrew Moorman, Esquire.

After the State brought the case to trial, the Applicant was found guilty. On January 15, 2009, the Honorable C. Victor Pyle, Jr. sentenced the Applicant to concurrent terms of twenty-five years for armed robbery, five years for possession of a weapon during commission of a violent crime, five years for conspiracy, and thirty days for the lesser offense of assault and battery.

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Pachak, 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. Robinson, Op. No. 12-UP-042 (S.C. Ct. App. filed Jan. 25, 2012). The remittitur was issued on February 14, 2012.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel:
 - a. Failure to investigate and discover false statements.
 - b. Failure to object to armed robbery charge.
 - c. Failed to pursue Brady issue.
 - d. "Trial counsel ineffective assistance for not pursuing the trial sever based upon the record of evidence in regards to the discrepancies in the testimony of the testifying codefendant, T. Wright."
 - e. "Trial counsel ineffective assistance when he did not motion to the court for a direct verdict of not guilty based upon the lack of evidence on armed robbery due to the second trial having the main State's witness to proffer discrepancies in his testimony and this prejudiced the Applicant during trial and violated his rights to a fair trial."
 - f. Failed to argue the issue of the line-up process pre-trial.

- g. Failed to object to judge's inquiries "into the jury's numerical division."
 2. Ineffective assistance of appellate counsel:
 - a. "Appellate counsel ineffective assistance for not pursuing all available appeal remedies by the SC Appellate Court rules and processes."

At the post-conviction relief hearing, the Applicant proceeded solely upon the following allegations:¹

1. Ineffective assistance of trial counsel:
 - a. Failure to investigate discrepancies in Timothy Wright's testimony and statements.
 - b. Failure to investigate the victims' statements.
 - c. Failure to object to the Allen² charge.

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).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he

¹ This Court finds all other allegations listed in the PCR application have been abandoned.

² Allen v. United States, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896).

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). In order 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) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

The Applicant stated trial counsel was appointed and that they had two meetings. The Applicant stated they reviewed the State's evidence and he told trial counsel his version of events. The Applicant stated trial counsel failed to investigate a co-defendant (Timothy Wright) who gave inconsistent testimony between the first and second trial in this case. The Applicant stated he never saw a transcript from the first trial but that trial counsel should have cross-examined Wright about the discrepancies. The Applicant stated trial counsel failed to investigate the victims' statements – specifically the descriptions of the suspects' heights and weights. The Applicant conceded trial counsel cross-examined the victims about the height and weight issue, but stated he wanted trial counsel to make an argument regarding the description sheets³ received in discovery. The Applicant stated trial counsel should have objected to the Allen charge.

Trial counsel testified he was appointed and filed discovery motions. Trial counsel testified he had six meetings with the Applicant. Trial counsel testified he received full discovery from the State and reviewed those materials with the Applicant multiple times. Trial

³ The two description sheets were admitted as Applicant's Exhibits 1 and 2.

counsel testified they also reviewed Applicant's Exhibits 1 and 2 and the Applicant's version of events. Trial counsel testified the Applicant's first trial on these charges (which was also a joint trial) ended in a hung jury. Trial counsel testified approximately one month elapsed between the two trials. Trial counsel testified he did not have a transcript of the first trial but that he had notes and "a good understanding" of what transpired at the first trial. Trial counsel testified there were no glaring differences in Wright's testimony between the first and second trials. Trial counsel testified the victims' identification was a big issue at trial and that he questioned these witnesses about the height and weight discrepancies. Trial counsel testified he could not have done anything differently at the Biggers⁴ hearing and that he retained an expert in eyewitness identification to testify at trial. Trial counsel testified there was no legal basis to object to the Allen charge.

This Court finds the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court further 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 meet his burden of proving trial counsel should have investigated whether Wright gave inconsistent testimony between the first and second trials. Trial counsel testified the trials were held within a month of one another and that – based upon his notes and recollection from the first trial – Wright's testimony did not differ. This Court finds trial counsel's testimony is credible. This Court also finds that, as the Applicant failed to produce any evidence that Wright's testimony did, in fact, differ this Court cannot engage in speculation. See, e.g., Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999)

⁴ Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375 (1972).

⁵


(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); see also Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding 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). Regardless, this Court finds trial counsel cannot be found deficient, as the State presented strong evidence of the Applicant's guilt. See Harris v. State, 377 S.C. 66, 79-80, 659 S.E.2d 140, 147 (2008) (holding overwhelming evidence of defendant's guilt invalidated any argument that trial counsel should have had the first trial transcript available to potentially impeach a witness).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have investigated the victims' identification. This Court notes trial counsel did object to the identification in this case. Trial counsel questioned Officer Weiner during the Biggers hearing and later cross-examined him during the trial. (Trial transcript, pp.6-8; pp.13-19; pp.148-52). Trial counsel also called an expert witness to testify about faulty eyewitness identification. (Trial transcript, pp.156-67). While the Applicant testified an eyewitness said the perpetrator was 6'0" in height and 200 pounds in width and he actually was 5'8" tall and 140 pounds, this Court finds trial counsel did cross-examine the eyewitness about this discrepancy. (Trial transcript, pp.98-100). This Court finds trial counsel properly challenged the eyewitness identification in this case. This Court finds that specific reference to Applicant's Exhibits 1 and 2 would not have affected the outcome of the Applicant's trial. See Skeen v. State, supra.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the Allen charge. After the jury sent out a note that they were unable to reach a verdict, the trial judge gave the Allen charge. (Trial transcript, pp.252-56). Trial counsel

testified there was no legal reason to have objected to this charge. This Court agrees. An Allen charge is used to encourage a deadlocked jury to reach a verdict and involves instructing the jurors to, among other things, approach the evidence with an open mind and consider the opinions of their fellow jurors. See State v. Robinson, 360 S.C. 187, 193, 600 S.E.2d 100, 103 (Ct. App. 2004). An Allen charge should be even-handed, directing both the majority and the minority to consider the other's views. See State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999). This Court finds the trial judge's statement to the jury did not involve the type of language usually seen in an improper Allen charge and, therefore, there was no reason for trial counsel to have objected.

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.

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.

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CONCLUSION

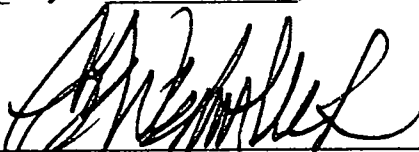
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this 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 19 day of MARCH, 2014.



G. Edward Welmaker
Presiding Judge
Thirteenth Judicial Circuit


_____, South Carolina.

CAROLINE M. HORLBECK
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April 25, 2014

Via Regular Mail

Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

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APR 30 2014

S.C. SUPREME COURT

Re: OSHAWN J. ROBINSON v. State

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondents. The Notice has been filed with the Greenville County Clerk of Court.

These matters are being referred to the Office of Appellate Defense in that we were participating as Court appointed counsel at trial.

Thank you for your attention to this matter.

Yours very truly,

Caroline M. Horlbeck, Esq.

Enclosure

cc: Office of the Attorney General
Office of Appellate Defense

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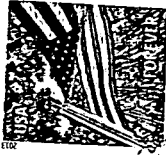
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U.S. DEPARTMENT OF JUSTICE

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