

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable George C. James, Jr., Circuit Court Judge

Case No.: 2011-CP-26-10651

Thomas E. Webb, #00291521, Petitioner,

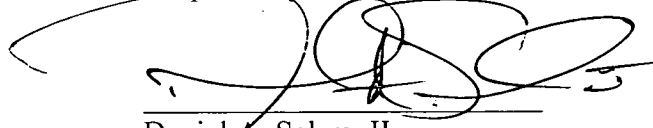
v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable George C. James, Jr.'s April 15, 2014, order, denying the Applicant's Petition for post-conviction relief. Undersigned counsel received notice of entry of the order on May 20, 2014 as indicated by the attached Letter dated April 24, 2014 and Stamped Envelope dated May 19, 2014 as the date of mailing which is attached hereto and incorporated by reference. A copy of the order on appeal is attached to this notice.

Respectfully submitted,



Daniel A. Selwa, II
1053 London Street, Suite A
Myrtle Beach, SC 29577
*Attorney for the PCR Applicant
Thomas Webb*

RECEIVED

JUN 26 2014

S.C. SUPREME COURT

June 19, 2014.

Other counsel of record:

Alan Wilson, Attorney General

Joshua L. Thomas, Assistant Attorney General

Post Office Box 11549

Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA
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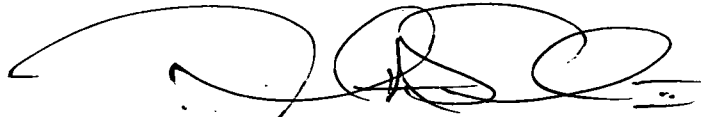
Thomas E. Webb, #00291521, Petitioner,

v.

State of South Carolina, Respondent.

PROOF OF SERVICE

I, Daniel A. Selwa, II, certify that I have served the within Notice of Appeal on the Respondent the State of South Carolina by depositing a copy of the same in the United States Mail, postage prepaid, addressed to his attorney of record, Alan Wilson, Attorney General, Post Office Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this 19th day of June 2014.



Daniel A. Selwa, II
1053 London Street, Suite A
Myrtle Beach, SC 29577
*Attorney for the PCR Applicant
Thomas Webb*

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Thomas E. Webb, #291521,)

Case No. 2011-CP-26-10651

Applicant,)

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)
_____)

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This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed December 20, 2011. Respondent made a timely Return on or about February 21, 2012. The Court convened an evidentiary hearing into the matter on March 17, 2014, at the Horry County Courthouse. Applicant was present at the hearing and represented by Daniel A. Selwa, II, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office represented Respondent.

Applicant testified on his own behalf at the PCR hearing. Applicant's trial counsel, Stuart M. Axelrod, Esquire, also testified. The Court had before it a copy of the trial transcript, the records of the Horry County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the return. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Horry County Clerk of Court. In January 2006, the Horry County Grand Jury indicted Applicant for first degree burglary (2006-GS-26-183), two counts of



kidnapping (2006-GS-26-182, -186), and two counts of armed robbery (2006-GS-26-184, -185). Stuart M. Axelrod, Esquire ("trial counsel"), represented Applicant. On March 3, 2008, Applicant proceeded to trial before the Honorable Edward B. Cottingham and a jury. On March 6, 2008, the jury found Applicant guilty as indicted on all charges. Judge Cottingham sentenced Applicant to concurrent terms of thirty (30) years for first degree burglary, thirty (30) years for each kidnapping conviction, and fifteen (15) years for one of the armed robbery convictions. On the other armed robbery conviction, Judge Cottingham sentenced Applicant to a consecutive term of fifteen (15) years.

Applicant filed a timely notice of appeal, and LaNelle C. Durant, Esquire, of the South Carolina Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed the conviction on July 7, 2010. State v. Webb, 389 S.C. 174, 697 S.E.2d 662 (Ct. App. 2010). The South Carolina Supreme Court denied Applicant's petition for writ of certiorari on November 3, 2011, and the remittitur was returned to the circuit court on November 7, 2011.

II. ALLEGATIONS

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

1. "ineffective counsel"
 - a. "Counsel did not bring forth co-defendants"
 - b. "Counsel was aware defendant couldnt read"
 - c. "Counsel fail to notify defendant of rights during trial"
2. "Prosecutor violated defendants rights"

In an attachment to the application, Applicant alleged trial counsel did not help him at all, never warned him of his rights, did not fight to protect his rights, and told him not to take the stand. He

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also alleged the solicitor violated his rights by calling him an animal and defamed his character.

At the PCR hearing, Applicant proceeded on allegations of ineffective assistance based on trial counsel's failure to call the co-defendant to testify; trial counsel's failure to properly object to Judge Cottingham's limitations on the cross-examination of two witnesses; and trial counsel's failure to allow Applicant to testify at trial. Applicant also alleged the solicitor's comments were improper and trial counsel failed to object to them in closing argument.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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 each witness 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. Summary of Testimony

Applicant testified he had a difficult relationship with trial counsel. He also testified trial counsel asked during trial "are you going to stab me?" Applicant recalled the solicitor referring to him as a wild animal throughout trial. Applicant also testified trial counsel objected to these comments during the opening statement, but not during closing. He also testified he wanted to take the stand, but trial counsel would not let him. On cross-examination, Applicant did recall the judge going over his right to testify. He also recalled discussing with trial counsel his charges and the possible defenses he had. Applicant also admitted he made the decision to decline a plea offer for twenty (20) years.

Trial counsel recalled meeting with Applicant many times before trial. Trial counsel

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testified that during those meetings they discussed the charges, Applicant's defenses, and the State's response to discovery. Trial counsel testified he advised Applicant to accept a plea, but Applicant declined. He further testified Applicant's theory of defense at trial was Applicant never entered the hotel room and the victims could not positively identify him as the robber.

Trial counsel did not recall making any comment to Applicant about a stabbing. However, he did recall objecting to the solicitor's "wild animal" comments during the opening. On cross-examination, trial counsel opined he could have also objected during closing and asked for a mistrial. Trial counsel recalled discussing with Applicant the right to testify. Trial counsel testified he advised Applicant to not take the stand because preserving last argument was important in a close case like this. He also feared cross-examination of Applicant would be harmful to the case. However, trial counsel did recall letting Applicant make the ultimate decision to remain silent. He also recalled Judge Cottingham explaining these rights to Applicant.

Trial counsel testified he did not call the co-defendant to the stand because the co-defendant would likely have exercised his right against self-incrimination. He also testified the only testimony the co-defendant would have given would have been to implicate Applicant in the crimes. On cross-examination, trial counsel admitted he tried to get the co-defendant's statement in through Investigator Mann, but Judge Cottingham ruled he could not. Trial counsel also testified he believed he should have objected to Judge Cottingham's limitations on the cross-examination of Ms. Hines. However, he further testified he was able to cross-examine Hines on her pending charges, her inconsistent prior statement, and her history of drug use.

B. Ineffective Assistance of Trial Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "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." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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." Id. at 117-18, 386 S.E.2d at 625.

The Court finds Applicant failed to meet his burden of proving trial counsel ineffective. In reaching this conclusion, the Court finds trial counsel's testimony credible, while finding Applicant's not credible. The Court further finds trial counsel adequately conferred with Applicant, conducted a proper investigation, and was thoroughly competent in his representation. To the extent Applicant's testimony about trial counsel's stabbing comments is an allegation of ineffective assistance of counsel, the Court find^g the allegation not credible and wholly without merit.

Applicant's allegation regarding trial counsel's failure to call the co-defendant to testify is also without merit. It appears from the transcript the co-defendant would not have testified Applicant was not involved in the robbery. Instead, it appears the co-defendant would have merely given a different account from the victim as to when Applicant presented the gun (Trial Tr. 218:21-25). Furthermore, trial counsel articulated a valid strategy for not calling the co-defendant in that he wanted to avoid the co-defendant implicating Applicant in the crime. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992))). Judge Cottingham also gave Applicant an opportunity to have the co-defendant brought to court to testify (Trial Tr. 231:6-12). See State v. Stanko, 402 S.C. 252, 270, 741 S.E.2d 708, 717 (2013) ("Appellant cannot now complain of an error which his own conduct induced." (citing State v. Babb, 299 S.C. 451, 385 S.E.2d 827 (1989))). Regardless, the co-defendant did not testify at the PCR hearing. Therefore, Applicant presented no evidence of what the co-defendant's testimony would have been if trial counsel had called him. Dempsey v.

State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence." (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995))).

The Court also finds meritless Applicant's claim regarding trial counsel's advice to not testify. The Court finds credible trial counsel's testimony he merely advised Applicant not to testify, but the final decision was Applicant's. Furthermore, the transcript reveals Judge Cottingham fully questioned Applicant about whether he would testify (Trial Tr. 231-235). Therefore, the evidence clearly demonstrates Applicant freely and voluntarily decided not to testify.

Applicant has also not shown trial counsel was ineffective in his cross examination of Hines and Investigator Mann. The Court of Appeals held trial counsel "did not object to the trial court's limitations" on his cross-examination of these witnesses regarding the co-defendant's statement, and refused to consider these arguments on appeal. This Court finds that holding curious as it appears that trial counsel asked questions, the solicitor objected, and the objections were sustained. However, the Court cannot discern what this further cross-examination would have yielded. It appears trial counsel was simply trying to show the jury there were conflicting accounts of the robbery. Even though Judge Cottingham sustained the solicitor's objections on hearsay grounds, trial counsel accomplished his goal of getting those conflicting accounts in front of the jury (Trial Tr. 221:8-222:16).

Furthermore, trial counsel was able to thoroughly impeach the only witness, ^{Hines (M)} Mann, who could identify Applicant as being a robber. Trial counsel questioned her about her pending

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charges, her inconsistent prior statement, and her history of drug use. In light of this thorough cross-examination, Applicant has not shown he was prejudiced by the lack of testimony regarding conflicting stories from the other co-defendant. See Edwards v. State, 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011) (“[W]here evidence produced during PCR proceedings is cumulative to or does not otherwise aid evidence introduced at trial, no prejudice results from counsel's failure to bring it forward.” (citations omitted)).

C. Prosecutorial Misconduct

Applicant also failed to meet his burden of proving prosecutorial misconduct. The evidence demonstrates the Court of Appeals considered that argument on direct appeal and rejected it. Webb, 389 S.C. at 178, 697 S.E.2d at 664 (“Webb argues the trial court erred in allowing the solicitor to refer to him as a “wild animal” in his opening and closing argument. [...] We disagree.”). Applicant presented no evidence trial counsel failed to preserve the objection as to the closing arguments as it is clear the Court of Appeals addressed the issue. Id. at 179, 697 S.E.2d at 665 (addressing the solicitor’s closing argument remarks). Because the issue was ruled upon by the Court of Appeals, Applicant cannot now challenge it on collateral review. Humbert v. State, 345 S.C. 332, 338, 548 S.E.2d 862, 866 (2001) (“PCR is not a substitute for appeal[.]” (citing Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993))). Furthermore, the Court agrees with the Court of Appeals and finds the solicitor's comments “did not so infect the trial with unfairness as to make [Applicant’s] conviction a denial of due process.” Webb, 389 S.C. at 180, 697 S.E.2d at 665. The Court also agrees with the Court of Appeals and finds there was overwhelming evidence of Applicant’s guilt. Id.

D. 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, the Court finds Applicant failed to present sufficient evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes 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.

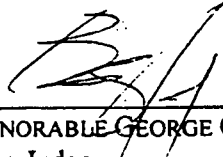
The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRPC, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

7-19


IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the State to complete the remainder of his sentence.

AND IT IS SO ORDERED this 9 day of April, 2014.



THE HONORABLE GEORGE C. JAMES, JR.
Presiding Judge


_____, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)
)
)
THOMAS E. WEBB, #291521)
 vs)
STATE OF SOUTH CAROLINA,)
)
 Respondent.)
_____)

IN THE COURT OF COMMON PLEAS

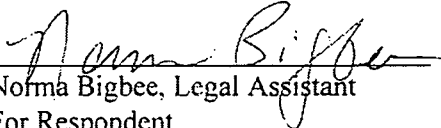
2011-CP-26-10651

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a filed copy of the Order of Dismissal in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Daniel A. Selwa, II, Esquire
1053 London St., Suite A
Myrtle Beach, SC 29577

DATED this 24th day of April, 2014.


Norma Bigbee, Legal Assistant
For Respondent



ALAN WILSON
ATTORNEY GENERAL

April 24, 2014


Daniel A. Selwa, II, Esquire
1053 London St., Suite A
Myrtle Beach, SC 29577

Re: Thomas E. Webb, #291521 v. State of South Carolina
2011-CP-26-10651

Dear Mr. Selwa:

Enclosed please find a filed copy of the Order of Dismissal signed by Judge James, in the above-captioned case.

Sincerely,


Joshua L. Thomas
Assistant Attorney General

JLT/nb

Enclosure



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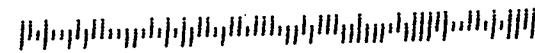


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DANIEL A. SELWA, II
Attorney at Law, L.L.C.

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JUN 26 2014

June 19, 2014

S.C. SUPREME COURT

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

Re: Thomas E. Webb, Petitioner v. State of South Carolina, Respondent
Civil Action No. 2011-CP-26-10651

Dear Mr. Shearouse:

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

1. A copy of the order to be challenged on appeal.
2. Proof of service of notice of appeal on the Respondent and parties as required under the rules.

As I was appointed as counsel for the Petitioner in his PCR application, I have forwarded this matter to the Office of Appellate Defense for their consideration in handling this appeal. Therefore, I would respectfully request any future correspondence also be directed to their office. If you should have any questions or concerns, please do not hesitate to contact me.

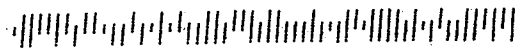
Sincerely,

Daniel A. Selwa, II

Enclosures

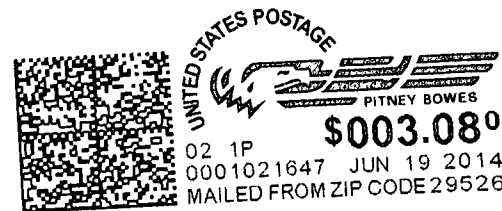
CC: Thomas E. Webb
Alan Wilson, Attorney General
Joshua L. Thomas, Assistant Attorney General
Robert M. Dudek, Office of Appellate Defense
The Honorable Melanie Huggins-Ward, Horry County Clerk of Court





DANIEL A. SELWA, II
ATTORNEY AT LAW, L.L.C.

1053 London Street, Ste. A
Myrtle Beach, S.C. 29577



The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
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