

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
Post Conviction Relief

Edgar W. Dickson, Circuit Court Judge

Case No.: 2011-CP-^B~~38~~-2240

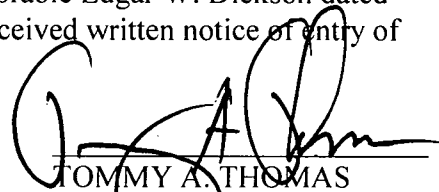
Bobby Russell, Jr., Appellant,

vs.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Bobby Russell, Jr., appeals the order of the Honorable Edgar W. Dickson dated June 30, 2014, and filed on July 14, 2014. Appellant received written notice of entry of this order on July 15, 2014.



TOMMY A. THOMAS
Attorney for Appellant
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

Other Counsel of Record:

Megan E. Harrigan, Esq.
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
Attorney for Respondent

Irmo, South Carolina
July 28, 2014

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JUL 30 2014

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
Post Conviction Relief

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Case No.: 2011-CP-¹⁸~~38~~-2240

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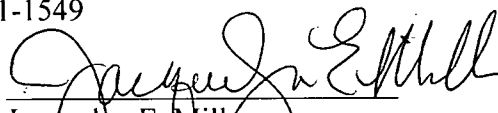
State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for the Appellant hereby certify that I placed in the United States Mail, a copy of an Notice of Appeal, with postage prepaid and the return address clearly shown on said envelope to Megan E.

Harrigan, Esq. of the Attorney General's Office, at:

Megan E. Harrigan, Esq.
Attorney General's Office
P.O. Box 11549
Columbia, SC 29211-1549


Jacquelyn E. Miller
Secretary to Tommy A. Thomas
Attorney for Applicant
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

Irmo, SC
July 28, 2014

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7/15/14

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP1802240

Bobby Russell Jr

CERTIFIED COPY
2014 JUL 14 11:42:29
South Carolina State of

Cheryl Williams
CLERK OF COURT
DORCHESTER COUNTY

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 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.**

STATE OF SOUTH CAROLINA)
 COUNTY OF DORCHESTER)
 Bobby Russell, Jr,)
 Applicant,)
 v.)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE FIRST JUDICIAL CIRCUIT

Case No. 2011-CP-18-2240

ORDER OF DISMISSAL

CERTIFIED COPY
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 CLERK OF COURT
 DORCHESTER COUNTY

PROCEDURAL HISTORY

This matter comes before the Court by way of an application for post-conviction relief filed November 7, 2011. The Respondent made its Return on January 18, 2012, requesting an evidentiary hearing be held. Evidentiary hearings into the matter were convened May 21, 2013, at the Orangeburg County Courthouse and October 18, 2013 at the Calhoun County Courthouse. Applicant was present at the hearing and was represented by counsel, Tommy A. Thomas, Esquire. Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office.

Applicant was indicted during the August 2009 term of the Dorchester County Grand Jury for two counts of Committing or Attempting a Lewd Act upon a Child (2009-GS-18-1097, -1275) and Criminal Sexual Conduct with a Minor in the First Degree (2009-GS-18-9990). Applicant was represented by Paul N. Uricchio, III, Esquire, and Chad W. Fuller, Esquire. On November 8, 2010, Applicant appeared before the Honorable Diane Goodstein and pled guilty to three counts of Committing or Attempting to Commit a Lewd Act upon a Child.¹ Pursuant to plea negotiations between Applicant and the State, Judge Goodstein sentenced Applicant to

¹ Two counts were as indicted, and the remaining count was pled to in place of the Criminal Sexual Conduct with a Minor in the First Degree charge after Applicant waived presentment to the Dorchester County Grand Jury.

[Handwritten signature]

testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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 (1984); Butler, 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, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use 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, 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. With respect to guilty plea counsel, the applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would

amounted to essentially a time served sentence rather than risk a much harsher sentence if convicted at trial.

This Court finds that this allegation is without merit, as it is refuted by Fuller's testimony and the transcript from Applicant's guilty plea proceeding. Fuller's credible testimony reveals that he and Uricchio reviewed the Sexually Violent Predator Act and civil commitment pursuant to the Act with Applicant before his guilty plea and advised him that he would be screened for the program based on his guilty pleas. This Court finds that counsel's performance was in accordance with "professional norms" and that Applicant has failed to establish any deficiency of counsel. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Furthermore, although this Court finds that counsel did inform Applicant of the Sexually Violent Predator Act and possible civil commitment pursuant to the Act, this Court notes that counsel is under no obligation to inform a client of the civil commitment process under the Sexually Violent Predator Act. See Page v. State, 364 S.C. 632, 637, 615 S.E.2d 740, 742 (2005) ("We conclude Petitioner's counsel had no duty to inform him about the civil commitment process under the SVPA. Although eligibility for civil commitment under the SVPA is triggered by conviction of a "sexually violent offense," civil commitment can be imposed only after testing, evaluation, a probable cause hearing, and a trial by either the court or jury. No one can be civilly committed as a "sexually violent predator" unless the State proves beyond a reasonable doubt the person suffers from a mental abnormality or personality disorder that makes the person likely to engage in sexual violence if not confined in a secure facility. Consequently, a person may be convicted of a predicate offense, and yet not be committed under the SVPA because the evidence is not sufficient to find that his or her present mental condition creates a likelihood of future sexually

Uricchio and told him that he was willing to testify on Applicant's behalf. He acknowledged that he has a prior criminal record. Applicant argues that counsel was ineffective for failing to call Lewellen as a witness at his guilty plea proceeding.

Fuller testified that he was aware of Lewellen and his willingness to testify. He testified he and Uricchio had concerns regarding calling Lewellen as a witness at trial, such as his prior record, which included impeachable offenses, and the possibility of losing the jury by bringing in an otherwise unrelated witness to attack the credibility of the minor victims' mother. He elaborated that once Applicant elected to accept the State's favorable plea offer, there was no need to subpoena Lewellen to testify. He testified that Lewellen had no involvement or knowledge regarding the third incident with an unrelated minor victim.

This Court finds that Applicant has failed to meet his requisite burden of proof and that this allegation must be denied and dismissed with prejudice. This Court finds that counsels' performance was not deficient, as there was no need to call any witnesses to refute the State's allegations when Applicant was voluntarily accepting guilt and admitting to the allegations as presented by the State. Furthermore, this Court finds that Applicant cannot establish prejudice, as there is no reasonable likelihood that the result would have been different absent this alleged deficiency. Applicant pled guilty pursuant to an extremely favorable plea negotiation that he entered into with the State and the trial court sentenced Applicant according to these negotiations. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that 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 notes that that Applicant must file and serve a notice of appeal within thirty 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 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.

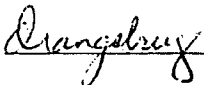
IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief shall be denied and dismissed with prejudice; and
2. The Applicant shall be remanded to and remain in the custody of the Respondent.

AND IT IS SO ORDERED this 30th day of June, 2014.



EDGAR W. DICKSON
Presiding Judge
First Judicial Circuit

 _____, South Carolina.

Tommy A. Thomas

ATTORNEY AND COUNSELOR AT LAW

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(803) 732-6542

July 28, 2014

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

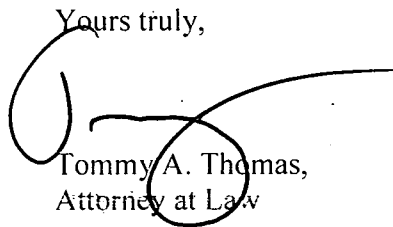
RE: Bobby Russell, Jr. v. State of South Carolina
Case No.: 2011-CP-~~28~~¹⁸-2240

Dear Sir or Madam:

Enclosed please find an original and a copy of the Notice of Appeal regarding the above matter. Kindly return a clocked copy to me in the enclosed envelope.

Thank you and should you have any questions, please feel free to contact me.

Yours truly,



Tommy A. Thomas,
Attorney at Law

TAT/jem
cc: Megan E. Harrigan, Esq.
Bobby Russell, Jr.

RECEIVED

JUL 30 2014

S.C. SUPREME COURT

*R.R.
Miss*

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