

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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PCR

APPEAL FROM YORK COUNTY
COURT OF COMMON PLEAS
HONORABLE J. ERNEST KINARD JR. CIRCUIT COURT JUDGE

S.C. SUPREME COURT

CASE NO: - 2014-CP-46-0278
ROBERT T. ARTIS APPELLANT
S.C.D.C. NO; 189722

-U-

THE STATE RESPONDET

NOTICE OF APPEAL

"ROBERT T. ARTIS" APPEALS HIS DENIAL FOR POST CONVICTION RELIEF IN THIS CASE. THE ORDER OF DISMISSAL WAS IMPOSED AND SIGNED BY THE HONORABLE J. ERNEST KINARD JR ON SEPTEMBER 3, 2014 WHICH I ROBERT T. ARTIS RECEIVED ON OCTOBER 2, 2014.

(OCTOBER 8, 2014)

OTHER COUNSEL ON RECORD
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ATTORNEY GENERAL OFFICE
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DATE: 10-10-2014

PRO: SE: Robert T. Artis
ROBERT T. ARTIS
MANNING C. I. WD-A-2B
502. BECKMAN DRIVE.
COLUMBIA S C, 29203

LEAH B. MOODY
235. E. MAIN ST. STE 115
P.O. BOX 1015
ROCK HILL S C
29730

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ROBERT T. ARTIS

PETITIONER

-V-

STATE OF SOUTH CAROLINA

RESPONDENT

CERTIFICATE OF SERVICE

OCTOBER 6, 2014

"THE UNDERSIGNED DO HERBY CERTIFY THAT ON THIS 6TH DAY OF OCTOBER 2014, I SERVED A PRO SE NOTICE OF INTENT TO APPEAL OF HONORABLE J. ERNEST KINARD JR. DENIAL OF POST CONVICTION RELIEF THAT I RECEIVED OCTOBER 2, 2014 ON THE OFFICES MENTIONED BELOW. BECAUSE MY ATTORNEY LEAH B. MOODY DOES NOT ACCEPT CALLS OR ANSWER LETTERS, I WOULD ALSO REQUEST APPOINTMENT OF COUNSEL FROM THE INDIGENT DEFENSE COMMISSION AND A COPY OF THE APPENDIX OF CASE NO: 2014-CP-46-0278 TO HELP PREPARE FOR APPEAL.

THE SOUTH CAROLINA CLERK
OF SUPREME COURT
DANIEL E. SHEAROUSE
P.O. BOX 11330
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PRO SE Robert T. Artis
ROBERT T. ARTIS #189722
MANNING C.I. W7-A-213
502. BECKMAN DRIVE
COLUMBIA S.C 29203
DATE: 10-10-2014

STATE OF SOUTH CAROLINA)
 COUNTY OF YORK)
)
 Robert T. Artis, #189722,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 SIXTEENTH JUDICIAL CIRCUIT

2014-CP-46-0278

ORDER OF DISMISSAL

DAVID HAMILTON
 C.C.P. & G.S.
 YORK COUNTY, SC

2014 SEP 26 AM 8:00

FILED-RECEIVED

This matter comes before the Court by way of an Application for Post-Conviction Relief filed February 4, 2014. The Respondent made its Return on May 22, 2014. An evidentiary hearing into the matter was convened on August 5, 2014, at the Moss Justice Center in York, SC. Leah B. Moody, Esquire represented the Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, Applicant testified on his own behalf. Dan Hall, Esquire also testified. This Court had before it a copy of the records of the York County Clerk of Court, records from the South Carolina Department of Corrections, the application, the State's Return and the trial transcript.

PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the York County Clerk of Court's orders of commitment. Applicant was indicted by the March 22, 2012 term of the York County Grand Jury for Petit Larceny/Property Enhancement (2012-GS-46-1098). Dan Hall, Esquire, represented him. On April 17, 2012, Applicant proceeded to a jury trial pursuant to which he was found guilty of Petit Larceny, 3rd or subsequent offense. The Honorable J. Michael

Baxley sentenced Applicant to confinement for seven (7) years.

A notice of appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Artis, 2013-UP-491 (filed December 23, 2013). The Remittitur was issued on January 8, 2014.

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel (Trial)"
2. "Ineffective Assistance of Counsel (PCR)"
3. "Due Process of Law"

At the hearing, Applicant proceeded on his claims of ineffective assistance of trial counsel.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. The Court also has read the trial transcript, all of which assists the Court in judging their credibility.

Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

SUMMARY OF TESTIMONY

At the evidentiary hearing, Applicant testified his grounds for ineffective assistance of counsel were Counsel's failure to challenge the State's usage of a 2006 conviction for Forgery, failure to properly cross-examine a witness concerning the video that was introduced into evidence and failure call witnesses on Applicant's behalf.

As to the failure to challenge the 2006 conviction, Applicant testified he did not have a 2006 conviction for Forgery and that Counsel failed to investigate this. Applicant stated this conviction

was brought up during the trial by the State and should not have been.

As to the failure to sufficiently cross-examine a witness concerning a video, Applicant alleged that a witness made a false statement while on the stand during the trial. Applicant claims Counsel failed to explain to the trial court that the witness committed perjury. Applicant also claims Counsel failed to question Victim concerning the video.

As to the failure to call witnesses on Applicant's behalf at trial, Applicant testified Counsel should have called the witnesses listed in the incident report. Specifically, Applicant wanted Counsel to call as witnesses: Alphonso McCrory, an employee at the scrap metal plant, Officer Bailey, who was the initial officer to respond, and Ms. Messy, Applicant's landlord, who could have testified that the piece of scrap metal was stolen before Applicant moved into the trailer he was renting.

On cross-examination, Applicant admitted he did not have documentation to prove his ownership of the scrap metal in question. Applicant also admitted he did not have any of the witnesses he wanted called at trial at the PCR hearing to provide testimony on his behalf. Applicant also stated he understood the State can retry this case if he is successful on PCR and he could receive ten years instead of the seven years he is serving.

Counsel testified he was appointed as a public defender in 2011 and has practiced criminal law since 1988. Counsel testified he received discovery and reviewed it with Applicant. Some of the documents he and Applicant reviewed were the pictures of the aluminum scrap metal at the scrap yard and the video. Counsel testified his trial defense strategy was that while it was clear that Applicant was at the scrap yard with the metal and that Applicant lived beside the business from which the metal was taken, the State could not prove Applicant's involvement because there were

other individuals who had access to the metal. Counsel also testified he made a pre-trial motion that the State should have to pick which charges to go forward on: either petit larceny or receiving stolen goods. While the trial judge denied this motion, he later granted a motion for directed verdict as to the receiving stolen goods charge.

Concerning Applicant's 2006 Forgery conviction, Counsel testified he received a certified conviction report of Applicant's 2007 Forgery conviction: Applicant was charged in 2006. Counsel also testified he argued that the petit larceny charge should be tried in magistrate's court and not circuit court. This motion was denied as Applicant had at least two prior convictions for petit larceny. Additionally, Counsel testified he researched the ownership of the metal by travelling to the business that owned the metal, but that business had closed down. Counsel stated he attempted to locate the witnesses named in the incident report. Counsel testified Alphonso McCrory was fired from his job for stealing from the scrap metal business and that Counsel used this as a trial strategy. Counsel also testified that, in his lengthy criminal law experience, calling a uniformed police officer on Applicant's behalf would not have produced a favorable outcome. Further, Counsel testified Ms. Messy, Applicant's landlord, would not have provided favorable testimony on Applicant's behalf. Counsel lastly stated he was prepared for trial and reviewed much more than just the video, as Applicant claimed.

On cross-examination, Counsel testified there were no other charges in the trial and that the jury did not hear the charges. Counsel testified he reviewed Applicant's prior convictions with him. As to the ownership of the scrap metal, Counsel tried to locate Strapping, even though his name was not included in the discovery. Counsel then stated he learned that the metal had come from Sam Strapping and he discussed this with Applicant. Counsel lastly stated he discussed the strengths and

weaknesses of the case with Applicant.

Ineffective Assistance of Counsel

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) (citing Rule 71.1(e), SCRCP). 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 v. State, 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, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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.

Failure to challenge Applicant's 2006 Forgery conviction

Applicant alleged Counsel was ineffective for failing to challenge a 2006 Forgery conviction.

Counsel testified Applicant was charged in 2006 but convicted in 2007. Counsel also testified he received a certified copy of this conviction. The Court finds the testimony of the Applicant concerning ineffective assistance of counsel not credible while finding the testimony of Dan Hall, Applicant's trial counsel, very credible. Therefore, this allegation is denied.

Failure to properly cross-examine a witness concerning the video

Applicant alleged Counsel was ineffective for failing to properly cross-examine a witness concerning the video that was played for the jury and entered into evidence during Applicant's trial.

The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation, and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995). Applicant did not proffer any questions Counsel allegedly failed to ask, and did not present any testimony showing the witness's (Dennis) or Victim's (Fanning) answers at trial would have been different. Accordingly, the Applicant has not shown that a different approach to cross-examination would have been beneficial to the defense. Therefore, this allegation is denied.

Failure to call witnesses on Applicant's behalf

Applicant alleged Counsel was ineffective for failing to call Alphonso McCrory, Officer Bailey and Ms. Messy on his behalf at trial.

Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991).

The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An 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. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

This Court finds Counsel was not ineffective for failing to interview or subpoena witnesses on the Applicant's behalf. The Applicant failed to produce any testimony or evidence at the PCR hearing to show what these witnesses would have testified to at trial or how their testimony would have altered the outcome of his trial. Additionally, the Applicant has failed to prove any resulting prejudice from Counsel's alleged shortcoming. Accordingly, this allegation is denied.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the 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 notifies the Applicant that he 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 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention 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 must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED!



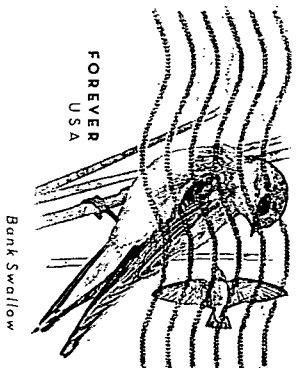
J. Ernest Kinard, Jr.
Presiding Circuit Court Judge
Sixteenth Judicial Circuit

9/3, 2014

Beaufort, South Carolina

ROBERT ARTIS-189922
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DAVID E. SHEAROUSE

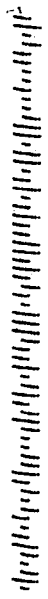
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