

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

OCT 20 2014

S.C. SUPREME COURT

James R. Barber, III, Circuit Court Judge

Case No. 2013-CP-23-04177

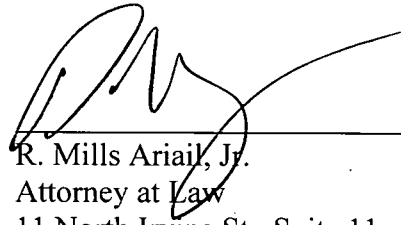
Cardelle Tyrone Washington,..... Appellant,

v.

State of South Carolina Respondent.

NOTICE OF APPEAL

Appellant appeals the Order of Dismissal of the Honorable James R. Barber, III dismissing Appellant's application for post-conviction relief. On September 24, 2014, the Honorable James R. Barber, III signed an order dismissing Appellant's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on October 14, 2014. A copy of the Order of Dismissal is attached.



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Attorney for Cardelle Tyrone Washington

Greenville, South Carolina
October 15, 2014

Other Counsel of Record and Interested Parties:

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Greenville County Courthouse
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SC Commission of Indigent Defense
Division of Appellate Defense
PO Box 11433
Columbia, SC 29211-1433

Cardelle Tyrone Washington SCDC# 290074
Perry Correctional Institution
430 Oaklawn Road
Pelzer, South Carolina 29669

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State of South Carolina Respondent.

CERTIFICATE OF SERVICE

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this October 16, 2014, I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, in an envelope addressed as set forth herein below:

Karen C. Ratigan, Esq.
Assistant Attorney General
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Attorney for the State of South Carolina

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Division of Appellate Defense
PO Box 11433
Columbia, SC 29211-1433

Denise Tanner LaBeck
Denise Tanner LaBeck

October 16, 2014

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2013CP2304177

FILED - CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2013 OCT 10 PM 3:55

Cardelle Washington 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), 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; Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE - James R Barber III

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:

R. Mills Ariail Jr. 11 North Irvine St., Ste., 11
Greenville, SC 29601

Email Judge Barber lawclerk
Karen Christine Ratigan PO Box 11549 Columbia,
SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

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

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Cardelle Tyrone Washington,¹)
 S.C.D.C. No. 290074,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2013-CP-23-4177

ORDER OF DISMISSAL

FILED-CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL B. WICKENSIMMER
 2014 OCT 10 PM 3 26

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed August 2, 2013. The Respondent made its return on April 8, 2014. An evidentiary hearing was held on August 28, 2014 at the Greenville County Courthouse. The Applicant was present and represented by R. Mills Ariail, Jr., 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, Randall L. Chambers, 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 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

¹ The South Carolina Department of Corrections lists the Applicant's name as Cordell Tyrone Washington.

at the November 2010 term of the Greenville County Grand Jury for armed robbery (2008-GS-23-1671, count 1), possession of a weapon during commission of a violent crime (2008-GS-23-1671, count 2), second-degree burglary (2008-GS-23-1672), and two counts of kidnapping (2008-GS-23-1673, counts 1, 2). He was represented by Randall L. Chambers, Esquire.

After the State brought the case to trial, the Applicant was found guilty. On December 8, 2010, the Honorable C. Victor Pyle, Jr. sentenced the Applicant to concurrent terms of thirty years for armed robbery, five years for possession of a weapon during commission of a violent crime, fifteen years for second-degree burglary, and thirty years for each count of kidnapping.

A notice of appeal was filed at the South Carolina Court of Appeals. Breen R. Stevens, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal in the form of an Anders² brief. The Court of Appeals dismissed the appeal. State v. Washington, Op. No. 2013-UP-079 (S.C. Ct. App. filed February 20, 2013). The Remittitur was sent on March 15, 2013.

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. Failed to raise double jeopardy claim before the jury was sworn.
 - b. Failed to object to State's direct examination of Douglas Ashmore.
 - c. Failed to move for directed verdict on indictment 2008-GS-23-1671 due to the insufficiency of the indictment language.
 - d. Failed to move for directed verdict on indictment 2008-GS-23-1673 (Gladys Harrison charge) due to insufficiency of the evidence.
 - e. Failed to object to State's improper comments in closing argument regarding unrelated events.
 - f. Failed to object to the State's improper comment in closing argument "for falsely stating applicant called Andrew White and

² Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

- Quentin Sullivan as witness.”
- g. Failed to object to State’s improper vouching for Andrew White and Quentin Sullivan.
 - h. Failed to object to State’s questioning Andrew White and saying “that no one from her office, or from the state, or anyone else promised anything in exchange for his guilty plea.”

In a pro se “Motion to Amend” filed September 6, 2013, the Applicant made the following additional allegations:

1. Ineffective assistance of trial counsel:
 - a. “Counsel erred in asking for a judgment notwithstanding the verdict (JNOV) in a criminal trial.”

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 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 represented him on these charges (related to the Burger King robbery) and another set of armed robbery charges. The Applicant stated he was in the South Carolina Department of Corrections when trial counsel was appointed and that they did not discuss these charges. The Applicant stated he and trial counsel only discussed the other set of charges and that he was ultimately found not guilty at a trial on those charges. The Applicant stated he met with trial counsel the day before trial but that he did not see the discovery materials. The Applicant stated he told trial counsel to contact Teresa Merritt because the State’s theory was that both sets of armed robberies were committed by the same people and Merritt testified at the first trial that the armed robbery was committed by two white males and one black male. The Applicant stated he never received a plea offer in this case. The Applicant stated trial counsel should have objected during the assistant solicitor’s closing argument. The Applicant stated trial counsel should have objected to the trial judge’s re-charge for second-degree burglary.

Trial counsel testified he filed discovery motions, received those materials, and his assistant sent a copy of them to the Applicant. Trial counsel testified the Applicant was already in the Department of Corrections when he was appointed. Trial counsel testified the Applicant was brought to court in order to discuss a plea offer and that he was brought to the jail a few days

before the trial. Trial counsel testified he met with the Applicant about these charges and that they had several phone calls about this case. Trial counsel testified he reviewed the discovery materials with the Applicant and informed him of the charges, elements, and penalties. Trial counsel testified the Applicant said he was not involved in this crime. Trial counsel testified he did not recall the Applicant asking him to have Merritt testify at this trial but that this would have been a terrible idea. Trial counsel testified the State made a twenty-five year offer for all pending charges, which the Applicant rejected.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not adequately meet with him to prepare his case for trial. Trial counsel represented the Applicant on two sets of armed robbery charges (the trial of the first set of charges resulted in acquittal). Trial counsel testified they reviewed the charges at issue in this case and discussed the discovery materials (which was sent to the Applicant as he received it). Trial counsel testified they had numerous phone calls and meetings to review the case and that he was prepared for trial. This Court finds trial counsel's testimony is credible. 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 has failed to articulate what else trial counsel should have done to investigate or prepare his case for trial. See 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).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have called Merritt as a witness. The Applicant stated Merritt testified at his other trial (which resulted in acquittal) that two white males and one black male perpetrated the robbery. The

Applicant stated this testimony would have been helpful, as the State's position was that these robberies were committed by the same group. Trial counsel testified he did not recall discussing this. regardless, trial counsel testified this would have been a terrible idea because then Merritt could be questioned about the other armed robbery. This Court agrees with trial counsel's assessment and finds his testimony is credible. This Court finds the Applicant failed to meet his burden of proving Merritt's testimony would have been helpful – rather than harmful – at his trial. See Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (holding the PCR applicant bears the burden of proving the allegations in their application).

This Court finds the Applicant failed to meet his burden of proving trial counsel did not convey a plea offer. Trial counsel testified the State made a twenty-five year offer for all pending charges, but that the Applicant rejected it. This Court finds trial counsel's testimony is credible. This Court notes the assistant solicitor mentioned this offer at trial and the Applicant did not comment or make an objection. (Trial transcript, p.229). This Court finds trial counsel fulfilled his responsibility to convey the plea offer but that the Applicant exercised his right to refuse the offer and proceed to trial. Cf. Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (holding counsel's failure to convey the plea offer to defendant constituted deficient performance).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected during closing argument. During her closing argument, the assistant solicitor stated, "Ladies and Gentlemen, we didn't pick Andrew White or Quentin Sullivan as witnesses in this case. The Defendant did. He picked them because they are his friends and they are his co-conspirators." (Trial transcript, p.188, lines 8-12). This Court finds there was no meritorious objection to be made to this statement. Counsel's arguments to the jury do not constitute

evidence. See Ex parte Morris, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006) (“It is well established that counsel’s statements regarding the facts of a case and counsel’s arguments are not admissible evidence.”). Further, the assistant solicitor is allowed to state her version of the testimony and comment on the weight to be given such testimony. See State v. Cooper, 334 S.C. 540, 553, 514 S.E.2d 584, 591 (1999).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the trial judge’s re-charge to the jury on second-degree burglary. The trial judge’s initial jury charge for second-degree burglary did not contain any language about the use of a weapon. (Trial transcript, p.208). At the conclusion of the jury charge, the assistant solicitor noted her exception, stating “we only instructed the jury as to the nighttime hour element of the burglary, not to the aggravator of having a deadly weapon or what appeared to be a deadly weapon.” (Trial transcript, p.218). The trial judge ultimately stated “[t]hat’s all I’m going to charge, Solicitor.” (Trial transcript, p.218). The trial judge later re-charged the jury on second-degree burglary and kidnapping. As to the second-degree burglary charge, the trial judge included language about the use of a dangerous weapon (or that the burglary happened during nighttime hours). (Trial transcript, p.223). Trial counsel was not deficient in failing to object, as the judge is required to charge the current and correct law of South Carolina. See Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004); see also State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001) (holding the law to be charged must be determined from the evidence presented at trial).

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.

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.

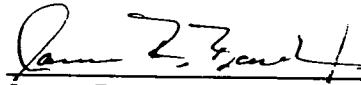
This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate 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 24 day of SEPTEMBER, 2014.



James R. Barber, III
Presiding Judge
Thirteenth Judicial Circuit

R. MILLS ARIAIL, JR.
ATTORNEY AT LAW

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October 15, 2014

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Via US Mail

Daniel Shearouse
Clerk of Court
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Post Office Box 11330
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S.C. SUPREME COURT

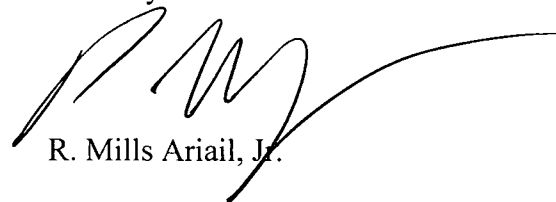
Re: *Notice of Intent to Appeal from Cordell Tyrone Washington v. State of SC*
C.A. No.: 2013-CP-23-4177

Dear Mr. Shearouse:

I was Court Appointed in the above referenced matter, and I expect that appellate defense will handle the appeal and petition for certiorari. On behalf of my client, enclosed for filing please find the Notice of Appeal and proof of service. I've enclosed a copy of the Honorable's Order of Dismissal to be challenged on appeal. By copy of this letter, I am also serving my client, counsel for the State of South Carolina, the South Carolina Commission of Indigent Defense - Appellate Defense Division and the Greenville County Clerk's Office.

Thank you for your assistance in this matter and if you have any questions, please feel free to contact me.

Sincerely,
LAW OFFICE OF R. MILLS ARIAIL, JR.
Attorney at Law



R. Mills Ariail, Jr.

RMAjr/dl
Enclosures (as stated)

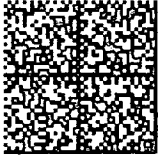
cc: Greenville County Clerk's Office
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