

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

James R. Barber, III, Circuit Court Judge

Case No. 2013-CP-39-789

Reginald Antonio Nance,..... 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 17, 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 20, 2014. A copy of the Order of Dismissal is attached.



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Attorney for Reginald Nance

Greenville, South Carolina
October 28, 2014

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OCT 30 2014

S.C. SUPREME COURT

Other Counsel of Record and Interested Parties:

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Assistant Attorney General
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Columbia, SC 29211

Pickens County Clerk's Office
Pickens County Courthouse
214 East Main Street
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SC Commission of Indigent Defense
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Reginald Nance SCDC# 00275742
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200 Prison Road
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CERTIFICATE OF SERVICE

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this October 28, 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:

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Denise Tanner LaBeck

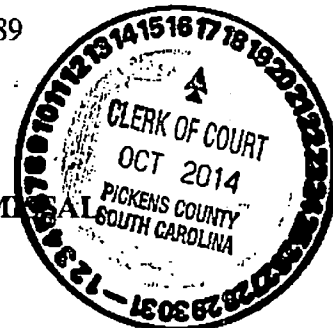
October 28, 2014

STATE OF SOUTH CAROLINA)
)
 COUNTY OF PICKENS)
)
 Reginald Antonio Nance,)
 S.C.D.C. No. 275742,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS

2013-CP-39-0789

ORDER OF DISMISSAL



This matter comes before the Court by way of an application for post-conviction relief (PCR) filed June 19, 2013. The Respondent made its return on December 3, 2013. An evidentiary hearing into the matter was held on August 25, 2014 at the Pickens 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, John W. DeJong, Esquire. The Court had before it the trial transcript, the Pickens County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, the return, and the appellate records.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Pickens County Clerk of Court. The Applicant was indicted at the March 2010 term of the Pickens County Grand Jury for grand larceny (2010-GS-39-0354), petit larceny (2010-GS-39-0355), two counts of second-degree burglary (2010-GS-39-0356, -

0357), possession of a weapon during the commission of a crime (2010-GS-39-0358), and malicious injury to real property (2010-GS-39-0360). He was represented by John W. DeJong, Esquire.

After the State called the case to trial, the Applicant was found guilty. On April 30, 2010, the Honorable G. Edward Welmaker sentenced the Applicant to concurrent terms of thirty days for petit larceny, eleven years for one count of second-degree burglary,¹ five years for possession of a weapon during the commission of a crime, and five years for malicious injury to real property. Judge Welmaker levied consecutive sentences of five years for grand larceny and eleven years for the second count of second-degree burglary.

A Notice of Appeal was filed at the South Carolina Court of Appeals. Tristan M. Shaffer, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. Nance, Op. No. 2013-UP-215 (S.C. Ct. App. filed May 22, 2013). The remittitur was sent June 14, 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. "[F]ailure to object to perjured testimony"
 - b. "[E]liciting bad act testimony"
 - c. "[F]ailure to object to impermissible questioning"
 - d. "[F]ailure to request proper jury charge"
 - e. "[F]ailure to object to closing argument"
 - f. "[F]ailing to investigate the charges against the applicant"
2. Prosecutorial misconduct:
 - a. "[P]resented perjured testimony; failed to correct perjured testimony; committed fraud on the court; violated due process"

¹ 2010-GS-39-0356.

3. Violated due process by denying a fair trial:
 - a. "Actual innocence"

At the PCR hearing, the Applicant proceeded solely upon allegations of ineffective assistance of trial counsel.

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 he had meetings and phone calls with trial counsel and that they also exchanged letters. The Applicant stated they discussed the charges and that trial counsel “pretty much” answered all of his questions. The Applicant stated he reviewed the CAD report with trial counsel and that it showed the State presented false evidence. The Applicant stated he told trial counsel at the first meeting that a video from the gas station would assist with his alibi. The Applicant stated, however, that the investigator could not retrieve the video because it had been erased. The Applicant stated he was with Sandra Williams the night of the offense but that he did not give this information to trial counsel because he was focused on obtaining the video. The Applicant stated trial counsel elicited bad act testimony about the stolen vehicle² and that this opened the door to allow the State to recall Baker. The Applicant stated there were no direct plea offers in his case, but that trial counsel asked if he would accept a five year sentence. The Applicant stated he still had not received the evidence and wanted a trial.

Trial counsel testified he filed discovery motions, received those materials,³ and reviewed them with the Applicant several times. Trial counsel testified he and the Applicant also reviewed the charges, the elements of the offenses, the sentence ranges, and the Applicant’s version of events. Trial counsel testified he received the CAD report in the discovery materials but has no independent recollection of it. Trial counsel testified there were no inconsistencies in the report and that details from the report were matters for cross-examination. Trial counsel testified the Applicant denied being at the scene. Trial counsel testified he sent his investigator to look for a

² This was repeatedly referred to as the Laurens vehicle.

³ Trial counsel did state he received some discovery about the Laurens vehicle late in his representation.

videotape at the service station but that it had been recorded over. Trial counsel testified he did not recall Williams. Trial counsel testified there was an issue with the Laurens vehicle, but he could not recall what it was. Trial counsel testified there was no basis to object to the evidence about the Laurens vehicle. Trial counsel testified it was possible he opened the door but that he had to take the opportunity to attack Lt. Byers on cross-examination. Trial counsel testified the State made a plea offer on October 26, 2009 for the Applicant to plead guilty to petit larceny, grand larceny, and two counts of second-degree burglary for five years. Trial counsel testified he conveyed this offer to the Applicant, who rejected it as he was always adamant that he wanted a jury trial.

Initially, this Court finds trial counsel reviewed the evidence, charges, and possible penalties with the Applicant and also discussed his version of events. 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 failed to meet his burden of proving trial counsel did not properly challenge the State's evidence with information from the CAD report. Trial counsel received the CAD report as part of the discovery materials. Trial counsel testified there were no inconsistencies in the CAD report and this Court notes he cross-examined witnesses about inconsistencies in their testimony and the timeline of events. Given trial counsel's thorough cross-examination of the State's witnesses, this Court finds the Applicant has failed to demonstrate his performance was deficient. Further, this Court cannot speculate on whether trial counsel could have used elements from the CAD report for more effective cross-examination because this document was not entered into evidence at the PCR hearing. Cf. Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (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).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have investigated and presented an alibi defense. This Court notes trial counsel sent his investigator to retrieve a videotape from a gas station that may have been helpful, but the video had already been erased. While the Applicant stated he spent the night in question with Sandra Williams, he admitted he did not convey this information to trial counsel. This Court finds the Applicant has failed to demonstrate trial counsel was deficient in his handling of the alibi issue. He attempted to retrieve the videotape and was unable to do so. Trial counsel cannot be found deficient for failing to contact Williams, as the Applicant never told him about this purported alibi witness. 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).⁴

This Court finds the Applicant failed to meet his burden of proving trial counsel did not properly handle the issue of the Laurens vehicle. During cross-examination, trial counsel asked Lt. Byers about whether there was confusion over a stolen vehicle. (Trial transcript, p.445). Over trial counsel's objection, the assistant solicitor explained to the trial judge that she would recall Detective Baker to because "it is believed that the vehicle was stolen and used by the defendant and codefendant to drive back to Greenville." (Trial transcript, p.471). Detective Baker testified this vehicle was stolen near the crime scene and recovered in Laurens County. (Trial transcript, pp.473-74). The Applicant's co-defendant subsequently testified they stole a

⁴ Further, this Court cannot speculate on the potential impact of Williams as an alibi witness because she did not testify at the PCR hearing. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme Court "has repeatedly held a PCR 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.") (emphasis in original).

vehicle in order to escape. (Trial transcript, pp.512-13). This Court finds the Applicant has failed to prove either error or prejudice. The Applicant argues trial counsel opened the door to damaging testimony when he asked Lt. Byers about a stolen vehicle. Trial counsel testified he questioned Byers about it, but not to show the Applicant committed another crime. Trial counsel testified he wanted to "take a shot at Byers" when he could. This Court finds trial counsel used a valid trial tactic in asking Byers whether there was confusion about the stolen vehicle, as this could have created uncertainty about this facet of the State's case. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel). This Court does not find trial counsel opened the door to damaging testimony. Further, the Applicant cannot prove he was prejudiced by this testimony, as the co-defendant is the witness who testified they stole this vehicle. As the co-defendant ultimately testified about the vehicle theft, there is no reasonable probability the result of the proceeding would have been different if trial counsel had not questioned Lt. Byers about the stolen vehicle. See Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not convey a plea offer. The Applicant stated he never received a formal plea offer. Trial counsel, however, has a note in his file about the date of the five-year offer and a specific recollection of relaying the offer. Trial counsel also testified the Applicant has always adamant about going to trial. This Court specifically finds trial counsel is more credible than the Applicant on this issue. This Court notes trial counsel's file contained documentation of the offer and also notes trial counsel had a specific recollection of relaying the offer to the Applicant and the Applicant opting to refuse it. This Court finds trial counsel fulfilled his responsibilities in this regard. Cf. Davie

v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (holding counsel's failure to convey the State's plea offer to defendant constituted deficient performance).

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 February, 2014.



James R. Barber, III
Presiding Judge
Thirteenth Judicial Circuit

The Circuit Court of South Carolina
Fifth Judicial Circuit

James R. Barber, III
Circuit Court Judge
Richland County Judicial Center
P.O. Box 2766
Columbia, South Carolina, 29201



CLERK OF COURT (803) 576-1779
PICKENS COUNTY FAX (803) 576-1782
SOUTH CAROLINA

2014 OCT 17 P 1:03

September 29, 2014

Ms. Jan White
Greenville County Clerk of Court
305 E. North Street
Greenville County Courthouse
Greenville, SC 29601

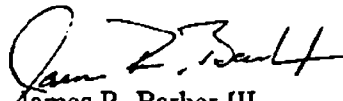
Re: Reginald Nance, #275742 v. State
~~Cardelle Washington, #290074 v. State~~

Pickens
County
Case

Dear Ms. White:

Enclosed are Orders of Dismissal in the above-referenced cases. Please file the orders and send an email confirming receipt of this letter to my law clerk, Robert Osborne, at Jbarberlc@sccourts.org. Additionally, please mail a copy of the orders to each of the two attorneys involved in the case—Ms. Karen Ratigan and Mr. Mills Ariail. Thank you for your assistance with this matter.

Sincerely yours,


James R. Barber III
Circuit Court Judge

PCR

R. MILLS ARIAIL, JR.
ATTORNEY AT LAW

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RECEIVED

October 28, 2014

OCT 30 2014

Via US Mail

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

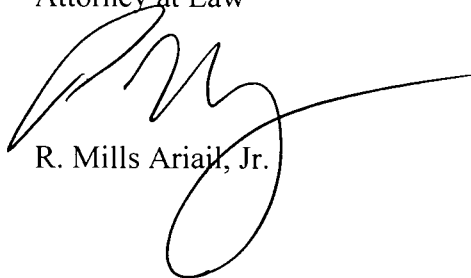
Re: *Notice of Intent to Appeal from Reginald Antonio Nance v. State of SC*
C.A. No.: 2013-CP-39-789

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 original and one (1) copy of the Notice of Appeal and proof of service. I've enclosed a copy of the Honorable James R. Barber'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 Pickens County Clerk's Office.

Thank you for your assistance in this matter and please send me one (1) copy of the filed Notice of Appeal. 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: Pickens County Clerk's Office
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