

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF SPARTANBURG )  
 )  
 Jerod Keykendall Harris, #255423, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 SEVENTH JUDICIAL CIRCUIT

2012-CP-42-4617

**ORDER OF DISMISSAL**

FILED

2014 DEC -2 AM 8:35

This matter comes before the Court by way of an Application for Post-Conviction Relief filed November 5, 2012. The Respondent made its Return on February 25, 2014. An evidentiary hearing was convened on November 4, 2014, at the Spartanburg County Courthouse. The Applicant was present at the hearing and proceeded *pro se*<sup>1</sup>. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, testimony was provided by the Applicant and Robert B. Hall, Esquire. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, the PCR Application, the Return, and the guilty plea transcript.

**PROCEDURAL HISTORY**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Applicant was indicted at the May 2011 term of the Spartanburg County Grand Jury for attempted murder (2011-GS-42-2429). Applicant was represented by Robert Hall, Esquire. On May 31, 2012,

<sup>1</sup> This Court notes that at a prior hearing on April 7, 2014, Applicant requested a continuance to allow him time to retain an attorney for this matter. Applicant was advised that if he chose to relieve appointed counsel, he would be required to either retain an attorney or proceed *pro se*. The Applicant chose to relieve appointed counsel and the Honorable J. Derham Cole signed an order on July 18, 2014, allowing for the continuance and relieving appointed counsel.

Applicant pled guilty to as indicted. Applicant was sentenced by the Honorable J. Mark Hayes, II to a negotiated sentence of fifteen (15) years imprisonment. The Applicant did not appeal his conviction or sentence.

### ALLEGATIONS

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

1. Ineffective assistance of counsel, in that:
  - a. Counsel failed to investigate my case and adequately prepare for trial,
  - b. Counsel gave me erroneous advice which caused me to give up my rights to trial by jury,
  - c. "I was denied my 6<sup>th</sup> amendment right of the United States Constitution."

At the hearing, Applicant indicated that he would proceed solely on an allegation of ineffective assistance of counsel for failing to object to a lack of jurisdiction because of an improperly convened grand jury. This Court finds that the Applicant voluntarily abandoned the other claims of ineffective assistance of 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) (citing Rule 71.1(e), SCRPC). 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, 80 L.Ed.2d 674, 692 (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. "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).

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 not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

Applicant testified that he believed his indictment was invalid because of an illegally convened grand jury based upon S.C. Code Ann. §§ 17-5-710; 17-9-170; 17-9-210. Applicant testified that the signature of the foreman of the grand jury was dated May 5, 2011, and the indictment was filed with the Spartanburg Clerk of Court's office on May 11, 2011. Applicant testified that he reviewed the scheduled terms and the week of May 5, 2011, was not a term of General Sessions. Applicant argued that his due process and equal protection rights afforded through the S. C. Constitution Articles 1 & 2 were violated. Applicant testified that he only discovered this issue once he received a copy of his discovery materials after he was incarcerated.

Counsel testified that the South Carolina Supreme Court had issued an Order allowing for scheduling of grand jury terms and the Solicitor or Attorney General can request additional terms. Counsel testified that he did not recall seeing an issue with the indictment; however, he testified that if he believed there was an issue, he would have made a motion to quash. Counsel testified that he did review discovery materials with the Applicant, as well as file a speedy trial motion on Applicant's behalf, which was granted.

This Court finds that Counsel's testimony is most credible. This Court also finds that the Applicant has failed to meet his burden of proof as to this claim. A presumption of regularity attaches to all proceedings in the courts of this State, and it is incumbent upon one who challenges a proceeding to prove his claims. *See, e.g., Tate v. State*, 345 S.C. 577, 549 S.E.2d 601 (2001); *Pringle v. State*, 287 S.C. 409, 339 S.E.2d 127 (1986). The Applicant failed to make a showing that the indictment was not properly true billed by the grand jury.

This Court also finds that any "challenge to the indictment on the ground of insufficiency must be made before the jury is sworn." *State v. Gentry*, 363 S.C. 93, 102, 610 S.E.2d 494, 500

(2005). Counsel testified that he saw no issues with the sufficiency of the indictment, but would have made a motion to quash if he had. This Court finds no deficient conduct on Counsel's behalf. This Court also finds that because the Applicant failed to meet his burden of proving that the grand jury was improperly convened according to the laws of this State, this claim is denied and dismissed.

### CONCLUSION

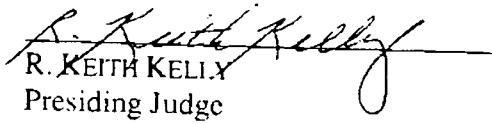
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.


This Court cautions 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), SCRCP, 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** this 26 day of November, 2014.

  
R. KEITH KELLY  
Presiding Judge

 , South Carolina

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CLERK OF COURT

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STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

Brad Keykendall Harris  
Applicant # 255423

7<sup>TH</sup> JUDICIAL CIRCUIT

CASE # 2012-CP-42-4617

VS  
State  
Respondent

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the Order of Dismissal  
in this action dated 12-2-14 on 12-5-14

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Brad Keykendall Harris  
John Brandt Rucker

12-5-14  
(Date)

[Signature]  
(Signature)