

J. FALKNER WILKES

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December 19, 2014

Honorable Daniel E. Shearouse
South Carolina Supreme Court
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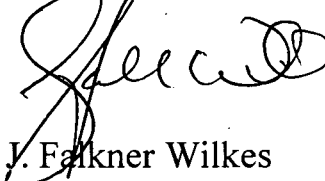
Re: Channack & Keam, 328676 v. State of South Carolina
Case No.: 2011-CP-42-2033

Dear Mr. Shearouse,

I am enclosing a copy of the Notice of Appeal in the above captioned case. Also enclosed is a copy of the Order of Dismissal from which appeal is taken. Mr. Keam is currently incarcerated and so I believe that he will qualify for the services of SCCID. I am therefore notifying Appellate Defense of the filing of this appeal and requesting that they conduct an evaluation as to Mr. Keam's eligibility for services. As I anticipate SCCID's involvement, I am not requesting a transcript in this case.

I have notified Mr. Keam of all of the above and provided SCCID with Mr. Keam's completed Affidavit of Indigent Status. I will take no further action in this case pending SCCID's evaluation unless directed to do so by SCCID or your office.

Sincerely,



J. Falkner Wilkes

Suzanne White, Assistant Atty. Gen.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

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DEC 22 2014

S.C. SUPREME COURT

M. Hope Blackley, Clerk
Spartanburg County Clerk of Court
PO Box 3483
Spartanburg, SC 29304-3483

Robert M. Dudek
SCCID/Appellate Division
Chief Appellate Defender
1330 Lady Street, Suite 401
Columbia, SC 29201

Channack Keam, 328676
McCormick Correctional Institution
386 Redemption Way
McCormick, SC 29899

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
COMMON PLEAS COURT
R. Keith Kelly, Circuit Court Judge

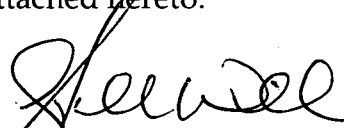
Case No. 2011-CP-42-2033

Channack Keam, #328676, Appellant,
v.
State of South Carolina, Respondent.

NOTICE OF APPEAL

Appellant, Channack Keam, hereby appeals from the Judgment in a Civil Case (Order of Dismiss in a Post Conviction Relief action) signed by the Hon. R. Keith Kelly, Circuit Judge on the 26th day of November, 2014, entered on the 2nd day of December 2014, for which written notice of entry was received on December 9, 2014,.

A copy of the Judgment and Order of Dismissal from which appeal is taken is provided herewith and incorporated as if attached hereto.



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Counsel for Appellant

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DEC 22 2014

S.C. SUPREME COURT

Other counsel of record:

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Columbia, SC 29211

Attorney for Respondent

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
COMMON PLEAS COURT
Hon. R. Keith Kelly, Circuit Court Judge

Case No. 2011-CP-42-2033

Channack Keam, #328676 Appellant,
v.
State of South Carolina, Respondent.

CERTIFICATE

I certify that on December 19, 2014, I served the Appellant's Notice of Appeal on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, addressed to counsel of record and others as indicated below, and by facsimile:

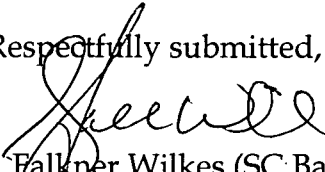
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Respectfully submitted,



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December 19, 2014.

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JWD

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
Channack Keam, #328676,)
)
)
Applicant,)
)
)
v.)
)
State of South Carolina,)
)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2011-CP-42-2033

ORDER OF DISMISSAL

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M. HOPE BLACKLEY
CLERK OF COURT
SPARTANBURG COUNTY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed May 26, 2011. The Respondent made its Return on or about May 2, 2012. An evidentiary hearing into the matter was convened on November 4, 2014, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by J. Falkner Wilkes, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, Samon Moeung and Amanda Condrey testified on Applicant's behalf. John G. Reckenbeil, Esquire, also testified. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, the Appellate Court records, the trial transcript and Applicant's Exhibits.

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 January 2008 term of the Spartanburg County Grand Jury for murder (08-GS-42-0129). He was represented by John G. Reckenbeil, Esquire. On June 2, 2008, the Applicant

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proceeded to trial, where he was found guilty of the charge by a jury. He was sentenced by the Honorable J. Derham Cole to confinement for thirty years.

A timely notice of appeal was filed. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Keam, Op. No. 2010-UP-264 (filed April 29, 2010). The Remittitur was returned on May 17, 2010.

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 effectively represent in the defense of the case,
 - b. Counsel failed to properly object and preserve issues during the trial,
2. Brady and discovery violations, in that;
 - a. The State failed to timely disclose discoverable information.

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).

Samon Moeung testified that he was good friends with both the Applicant and the victim, Shane Easler, at the time of the shooting. Moeung testified that at the time of the shooting, Easler was dating Moeung's sister. Moeung testified that his sister had a child with Alan Kennedy at that time and is married to Kennedy currently. Moeung testified that Easler had pushed his sister prior to the shooting and Kennedy was angry with Easler. Further, Moeung testified that one of the people hanging out with the Applicant and victim on the night of the

shooting was Tyler, who was Kennedy's best friend. Moeung testified that Tyler did not like the Applicant because the Applicant had dated Tyler's sister. Moeung testified that two or three days after the shooting, he saw Kennedy at his house with some "Mexican" driving a black Honda Civic. Moeung testified that he would have been willing to testify to these facts at trial had he been contacted by Counsel. However, Moeung acknowledged that he never tried to contact Applicant's attorney to offer his statement.

Amanda Condrey testified that she would have testified at trial to the fact that the victim had assaulted Moeung's sister and the sister made a statement that the victim "was dead." However, Condrey testified that she was not sure if Alan Kennedy knew that Easler had assaulted Moeung's sister. Condrey testified that she has seen Kennedy in a black Honda Civic with a "Mexican." Condrey also testified that she knew there were problems between Easler and Kennedy. Condrey testified that Kennedy and Tyler were seen at Red's that night with a black Honda Civic. Condrey testified that she spoke with Counsel on the phone once, but never heard from him again and was never subpoenaed for trial.

Counsel testified that he was retained by Applicant to represent him at trial on the murder charge. Counsel testified that at the time of Applicant's case, he handled predominately criminal cases and remained updated on all of the case law and statutes affecting criminal law practice. Counsel testified that the case was difficult, in particular because there was no known animosity between the victim and Applicant. Counsel testified that the overall theory of the defense was that Applicant was not guilty of murder because there was a lack of intent. Counsel testified that he focused on presenting evidence that Applicant and the victim were best of friends and had no animosity towards each other.

Counsel testified that he did not intend on arguing accident because there was no

evidence that the victim ever had his hand on the gun and the only option would be that a stray bullet just happened to hit the victim and kill him if Applicant had been randomly shooting in the air. Counsel acknowledged that he did not request a jury charge on accident. Further, Counsel testified that he could not argue that a third party committed the shooting because of the gun found on Applicant and the Applicant's statements to police that he had shot the victim.

Applicant introduced Exhibit #1, which was a packet including a statement from Teresa Bishop, a supplemental report from Officer Henderson, and an investigative report from Investigator Lindsey. Each document in the packet referenced Applicant stating that it was a drive-by shooting. Applicant also introduced Exhibit #2, which was a packet including statements of Daryl Hammacher, Michael Byars, Anthony Miles, Jeffrey Benfield, and Jolan Steven Baulig. Each statement referenced hearing multiple shots and several mentioned seeing a small dark car in the area. Applicant's Exhibit #3 included the statements of Curtis Gosnell and Joshua Bailey, two employees at Red's Grill who were present the night of the shooting. Each of those statements referenced seeing a small dark car with chrome rims near the parking lot of Red's. Applicant's Exhibit #4 was a letter from April Martin.

Counsel testified that he was aware of those reports and the statements made by Applicant and others regarding the dark car and a possible drive-by, but did not think that he could present a defense of a third party shooting Easler in a drive-by shooting. Counsel testified that he also recalled speaking with April Martin about the black car and supposed bad blood between the victim and others. Counsel testified that there were a great number of rumors going around regarding the shooting. Counsel testified that a gun was found in the Applicant's back pocket and ten shell casings were found in the area that matched the Applicant's gun. Counsel did acknowledge that the bullet that killed the victim was never found. Counsel testified that he

did not recall speaking with any of the other witnesses who provided statements. However, Counsel testified that he hired a investigator who talked with many of the witnesses. Applicant's Exhibit #5 included handwritten notes about an interview with Jeffrey Benfield and April's phone number. Counsel testified that he believed the handwriting was that of his investigator.

Counsel testified that he did not object to the State introducing the gun as evidence because he was not and is not aware of any legal argument he could make since the gun was found on the Applicant near a shooting while he was being searched incident to arrest for public disorderly conduct. Counsel testified that he had no good faith basis to make a motion to suppress the gun. This Court agrees and finds that Counsel was not deficient in failing to make a motion with no legal basis.

The Applicant alleged that Counsel was ineffective for failing to conduct a meaningful cross-examination of the State's witnesses, in particular, in regards to the possibility of the shooting occurring as a drive-by shooting from the small dark car. This Court notes that the State's witnesses Curtis Gosnell (ROA p. 77-8) and Joshua Bailey (ROA p. 87-9; p. 91) describe a small dark car driving by the parking lot of Red's around the time of the shooting. Witness Teresa Bishop testified that a car jerked into her lane right before she saw the victim, but later described the car as a large white pick-up. (ROA p. 94; p. 101). Bishop also testified that the Applicant told her a car had driven by and shot his friend. (ROA p. 97). Several officers also testified that the Applicant indicated that it was a drive-by shooting. (ROA p. 118).

In regards to the Applicant's allegation that Counsel was deficient in his cross-examination of the State's witnesses, this Court finds that the Applicant has failed to meet his burden of proof. 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). The Applicant did not proffer any questions counsel allegedly failed to ask, and did not present any testimony showing the witnesses' answers at trial would have been different. The statements about there being a drive-by shooting were presented to the jury and the testimony that a small dark car was driving near the scene at the time of the shooting was presented. As Counsel discussed, there was no additional evidence he thought he could present to support an argument of third-party guilt. Accordingly, the Applicant has not shown that a different approach to cross-examination would have been beneficial to the defense. Therefore, this claim is dismissed.

This Court also finds that Counsel was not ineffective for failing to further interview witnesses, investigate or pursue a defense of third-party guilt because as Counsel testified, the evidence was insufficient to present a legal defense of third-party guilt. As clarified in Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006), "a defendant [can] introduce evidence of third-party guilt regardless of the strength of the State's case if the evidence offered by the accused as to the commission of the crime by another person is limited to such facts as are inconsistent with his own guilt and that raise a reasonable inference or presumption as to his own innocence." Miller v. State, 379 S.C. 108, 114 n.2 (2008). The Applicant presented no evidence that would cause this Court to find that a legal defense of third-party guilt could have been utilized at trial. As discussed, there were merely rumors and possible inferences with the allegations of "bad blood" and sightings of a small black car near the scene. Therefore, this claim is denied and dismissed.

To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (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). The Applicant failed to point to any specific matters Counsel failed to discover, or any defenses that could have been pursued had Counsel investigated further. This Court notes that Counsel has years of experience representing clients on similar charges and remained updated on case law through research.

In making a fair assessment of attorney performance, a court must make every effort to “eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984). There is a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance and the “defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” Id. This Court finds that the Applicant has failed to meet his burden of proof as to this claim. The Applicant has failed to establish any deficient conduct on Counsel’s behalf. Therefore, this Court finds that the Applicant’s arguments have no merit and should be denied and dismissed.

Brady and Discovery Violations

This Court finds that the Applicant failed to offer any evidence or testimony to support his claim of a Brady violation or any discovery violations. This Court finds that the prosecution

suppressed no evidence that was favorable to the accused. Accordingly, this allegation is dismissed.

Summary

This Court finds in regards to the allegations of ineffective assistance of counsel and discovery violations, Counsel's testimony was most credible. This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in his representation, and that Counsel's conduct does not fall below the objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that 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 Counsel's performance. This Court concludes the Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, 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.

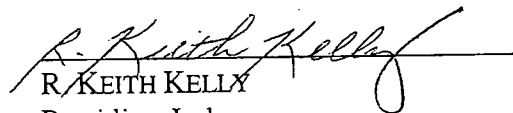
This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the

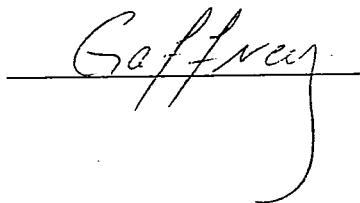
appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must 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

CLERK OF COURT
SPARTANBURG COUNTY
2014 DEC -2 AM 8:36
M. HOPE BLACKLEY

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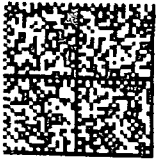
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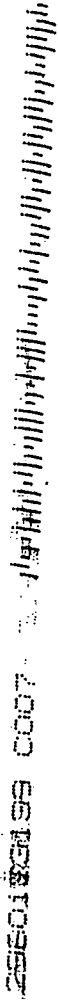


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