

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL OF SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2010-CP-42-3746

Rodney Alexander Nash

Appellant

v.

State of South Carolina

Respondent

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S.C. SUPREME COURT

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NOTICE OF INTENT TO APPEAL

Rodney Alexander Nash intends to and hereby appeals the Judgement of the Honorable J. Derham Cole, dated November 20, 2014. Appellant received written notice of entry of this Judgement on December 13, 2014.

January 3, 2015

Alexandria M. Wolf
Alexandria M. Wolf
1247 Boiling Springs Rd.
Spartanburg, S.C. 29303
(864) 591-1568
Attorney for Appellant

Other Counsel of Record;
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-1549
(803) 585-3873
Attorney for Respondent

IRTY
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At

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

Rodney Alexander Nash)

Plaintiff)

v.)

State of South Carolina)

Defendant.)

IN THE COURT OF COMMON PLEAS

CASE NO.
2010-CP-42-3746

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: Alexandria M. Wolf, Bar No. Address: 1247 Boiling Springs Road Spartanburg, South Carolina 29303 phone: fax: e-mail: other:	Defendant's Attorney: Suzanne H. White Bar No. Address: P.O. Box 11549 Columbia, SC 29211-11549 phone: (803) 734-3737 fax: (803) 734-4113 e-mail: other:
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MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
 FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
 PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

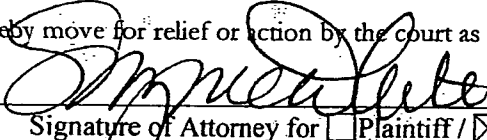
SECTION I: Hearing Information

Nature of Motion:
 Estimated Time Needed: Court Reporter Needed: YES / NO

SECTION II: Motion/Order Type

Written motion attached
 Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed Order.


 Signature of Attorney for Plaintiff / Defendant

October 29, 2013
 Date submitted

SECTION III: Motion Fee

PAID - AMOUNT:
 EXEMPT: Rule to Show Cause in Child or Spousal Support
 (check reason) Domestic Abuse or Abuse and Neglect
 Indigent Status State Agency v. Indigent Party
 Sexually Violent Predator Act Post-Conviction Relief
 Motion for Stay in Bankruptcy
 Motion for Publication Motion for Execution (Rule 69, SCRPC)
 Proposed order submitted at request of the court; or,
 reduced to writing from motion made in open court per judge's instructions
 Name of Court Reporter:
 Other:

JUDGE'S SECTION

Motion Fee to be paid upon filing of the attached order.
 Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____
 MOTION FEE COLLECTED:
 CONTESTED - AMOUNT DUE:

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STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
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)
 Rodney Alexander Nash, #292870,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2010-CP-42-3746

ORDER OF DISMISSAL

This matter comes before the Court by way of an Application for Post-Conviction Relief filed July 20, 2010. The Respondent made its Return on or about February 16, 2011. An evidentiary hearing into the matter was convened on January 7, 2013, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Alexandria M. Wolf, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. E.P. "Bill" Godfrey, Jr., 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, and the trial 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. Applicant was indicted at the January 2006 term of the Spartanburg County Grand Jury for murder

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possession of a firearm during commission of a violent crime (06-GS-42-0225, counts 1 and 2 respectively). Everett P. Godfrey, Jr., Esquire, represented him. On December 10, 2003, Applicant underwent trial, pursuant to which he was found guilty as indicted. The Honorable Thomas A. Russo sentenced him to confinement for forty years for murder (count 1) and five years for possession of a firearm during commission of a violent crime (count 2).

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. An Anders brief was submitted on Applicant's behalf. Applicant also submitted a *pro se* brief. The South Carolina Court of Appeals dismissed Applicant's appeal. State v. Nash, Op. No. 2010-UP-176 (S.C. Ct. App. filed March 1, 2010). The Remittitur was sent on March 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 request a jury instruction of the defense of alibi,
 - b. Counsel failed to object to improper comments made by prosecution during opening statements.

At the hearing, Applicant informed the court that he was proceeding solely on the allegations that Counsel was ineffective for failing to request an alibi jury instruction, failing to object to officer's testimony as an expert regarding a cigarette, and failing to obtain the transcript from the second trial following a hung jury before this 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 opportunity to observe each witness who testified at the hearing, and to closely pass upon the

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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, 188

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480 S.E.2d 733, 735 (1997) (citing Strickland).

Applicant testified that he retained Counsel, who represented him at three trials, where the first two ended with a hung jury. Applicant testified that he thought Counsel should have requested an alibi jury instruction because there was no overwhelming evidence of guilt. Applicant testified that he was not at the residence when the victim was shot driving by the residence. Applicant testified that his brother, Alex Nash, was present, along with Reginald Rice and James Thomas. Applicant testified that he had been at the home earlier in the day around 3:00 pm, at which time he washed cars and fed the dogs, but claimed that he left the home sometime between 5:00 and 6:00 pm. Applicant then testified that he cooked dinner at home and went to the store to get cigarettes before arriving back home around 9:00 pm. Applicant testified that the incident report indicates that the shooting occurred at 8:30 pm. Applicant testified that he gave his alibi to the Detective in charge of the case and Counsel was able to obtain the DVD from the convenience store where Applicant bought cigarettes. However, Applicant testified that the DVD placed him within fifteen minutes of the scene of the shooting within approximately fifteen minutes following the shooting. Applicant testified that he had no other information or no other witnesses to offer in support of his alibi.

Counsel testified that he had been practicing criminal defense in both state and federal courts since 1989. Counsel testified that Applicant's alibi was not actually an alibi because it was not impossible for him to have been present at the scene of the crime, in particular based upon the DVD and testimony that Applicant pulled into the convenience store from the direction of the shooting and not his home. Counsel testified that he did not think that an alibi charge was necessary and he wanted the jury to focus more on the shoddy investigation by police rather than the claim of alibi. Counsel testified that there were never any search warrants filed in the

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case, no interviews with anyone that was present at the house at the time of the shooting or any gunshot residue testing on anyone at the house. Counsel testified that his strategy was to attack the credibility of Wiggins and focus on the lack of direct evidence to support Applicant's guilt. This Court finds that as to the allegation that Counsel was ineffective for failing to request an alibi instruction, the Applicant failed to meet his burden of proof. To establish an alibi defense and thus be entitled to an instruction of alibi, a defendant must present some evidence that he was at another place at the time of the crime and could not therefore have committed the crime. State v. Diamond, 280 S.C. 296, 297, 312 S.E.2d 550 (1984), quoting State v. Robbins, 275 S.C. 273, 271 S.E.2d 319 (1980). To qualify as an alibi, defendant must be able to account for his whereabouts during the time of the crime such that it would have been physically impossible for the defendant to commit the crime. Walker v. State, 397 S.C. 226, 237, 723 S.E.2d 610, 616 (Ct. App. 2012)(citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)). As indicated by both Applicant and Counsel's testimonies, the Applicant was seen on a DVD within a fifteen minute drive from the scene of the shooting, at a time approximately fifteen minutes following the shooting. Therefore, Applicant's story did not provide an alibi and Counsel cannot be found deficient for failing to request an alibi instruction. Further, "[i]n evaluating whether a PCR applicant has suffered prejudice as a result of a jury charge, the jury charge must be viewed 'in its entirety and not in isolation.'" Gibbs v. State, 403 S.C. 484, 495, 744 S.E.2d 170, 176 (2013). As the record reflects, the jury was charged with instructions regarding the State's burden to prove the identity of the shooter beyond a reasonable doubt. (ROA p. 250). Therefore, this Court finds that the Applicant failed to demonstrate that Counsel was deficient in this regard, that Applicant suffered any prejudice as a result of alleged deficient performance. This claim is denied and dismissed.

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Applicant testified that during the trial, Officer Bogan testified regarding the age of a cigarette butt found at the residence where the shooting occurred. Applicant testified that the cigarette butt contained the DNA of Applicant and someone else, but they did not test the butt against anyone else's DNA. Applicant acknowledged that Counsel brought out to the jury that both Alex and James smoked as well. Applicant also acknowledged that when Bogan testified that the butt was "fresh," Counsel objected based on there being no foundation for the opinion and no expertise in the area. (ROA p. 80). However, Counsel's objection was overruled and the testimony was allowed in. (ROA p. 81). Applicant testified that he wanted Counsel to preserve the issue for a direct appeal, but Counsel never renewed the objection. Applicant testified that Counsel should have obtained an independent analysis of the DNA on the cigarette butt and preserved the issue for appeal.

Counsel testified that he did object to the Bogan's testimony regarding the age of the cigarette and cross-examined the investigator on what they did and what they did not do to investigate the case. This Court finds that the Applicant has failed to meet his burden of proof as to this claim. The record reflects that Counsel did object to Officer Bogan's testimony regarding the age of the cigarette butt and the objection was preserved. Therefore, this claim is denied and dismissed.

Applicant testified that Counsel failed to obtain the transcript from the second trial. Applicant testified that Counsel did have the transcript from the first trial in order to prepare for the second trial, but Counsel did not obtain the transcript from the second trial. Applicant testified that the transcript would have assisted Counsel because the victim's friend, Wiggins, offered contradictory testimony. Applicant testified that Wiggins' voluntary statement was inconsistent with his testimony at all three trials and Counsel should have introduced those

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inconsistencies at trial. Applicant testified that he was not aware of Wiggins' statement until after the third trial. Applicant testified that Wiggins stated that he saw Applicant going into the house and then saw Applicant shooting at victim, but Wiggins testified that Applicant was in a white t-shirt and jean pants, and Applicant stated that he was wearing a white tank top and jean shorts. Further, Counsel did not ask Alex or James Thomas what Applicant had been wearing when he left the home around 5:00 pm. Applicant testified that Counsel failed to interview defense witnesses Tamara Nash, Alex Nash, and James Thomas prior to trial to ensure that their testimony was consistent with the defense theory. Applicant introduced pages 97-120 from the first trial transcript as Applicant's #1, pages 114-135 from the second trial as Applicant's #2, and referred the court to pages 93-118 from the transcript of the third trial.

Counsel testified that he did not think that there was much difference between Wiggins' testimony between the first and second trials, so he saw no need to obtain the transcript from the second trial when he had the transcript from the first trial. Counsel testified that he did interview and talk with all defense witnesses prior to the trial. Counsel testified that the only difference between the first and second trials was that at the second trial, the Applicant's wife was not present and the jury returned with questions regarding the distance between the residence and the Lil Cricket convenience store where Applicant was seen on DVD. Counsel testified that he attempted to attack the credibility of Wiggins and his identification, by pointing out that the Applicant and his brothers looked similar.

As to the allegation that Counsel was ineffective for failing to obtain the transcript from the second trial, this Court finds that the Applicant has failed to meet his burden of proof. It is clear that Counsel had prepared extensively for each subsequent trial and was prepared to cross-examine each witness, including Wiggins, as to any inconsistencies. The nature and scope of

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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 Wiggins and did not present any testimony showing Wiggins' 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. Further, the Applicant has failed to offer any testimony or evidence to demonstrate that the outcome of this trial would have been any different had Counsel obtained that transcript. Therefore, this claim is denied and dismissed.

Summary

This Court finds in regards to the allegation of ineffective assistance of counsel, the testimony of Counsel was more credible than the testimony of the Applicant. This Court further finds that Counsel had prepared extensively for Applicant's trial. 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.

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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 30 day of November, 2014



J. Derham Cole
Presiding Judge

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ALEXANDRIA MARIE WOLF, ATTORNEY

1247 Boiling Springs Road
Spartanburg, SC 29303

Telephone: (864) 591 - 1568 • Fax: (864) 751 - 5310 (must dial 864)

The Honorable Daniel Shearouse
Clerk of the South Carolina Supreme Court
Post Office Box 11330
Columbia, S.C. 29211

January 13, 2015

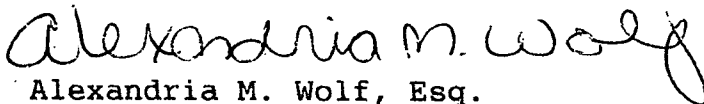
Re: Rodney Alexander Nash v. The State of South Carolina
Case No. 2010-CP-42-3746

Dear Mr. Shearouse:

Enclosed for filing is a Notice of Intent to Appeal in the above case. Also enclosed are the following:

1. Proof of service of the Notice of Appeal on the Respondent.
2. A copy of the judgment which is to be challenged on appeal.
3. My letter of good faith

Respectfully Submitted,



Alexandria M. Wolf, Esq.
1247 Boiling Springs Rd.
Spartanburg, S.C. 29303
864-591-1568
Attorney for Appellant

cc: Office of Appellate Defense
Suzanne H. White, Assistant Attorney General

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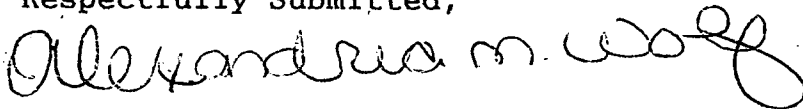
Re: Rodney Alexander Nash v. The State of South Carolina
Case No. 2010-CP-42-3746

Dear Mr. Shearouse:

This is to advise that I can set forth no arguable basis for asserting that Judge Cole's ruling (the denial of Mr. Nash's PCR application) was improper.

A full and fair hearing was held before Judge Cole and Mr. Nash's trial attorney testified and was cross examined thoroughly. I can find no issue regarding the application of law that was not reviewed by Mr. Nash's trial attorney prior to trial and I found nothing in the trial attorney's files, having reviewed his files from all three trials, that supports Mr. Nash's contention that his trial attorney did not properly prepare for the third and final trial by failing to review a copy of the transcript from the second trial.

Respectfully Submitted,



Alexandria M. Wolf, Esq.
1247 Boiling Springs Rd.
Spartanburg, S.C. 29303
864-591-1568
Attorney for Appellant

cc: Office of Appellate Defense
Rodney Alexander Nash

ALEXANDRIA MARIE WOLF, ATTORNEY

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Ms. Suzanne White, Attorney
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

Re: Rodney Nash v. State

January 12, 2015

Dear Ms. White:

Please find enclosed herewith and served upon you Mr. Nash's Notice of Intent to Appeal filed in the above referenced matter along with a copy of the affidavit of service and correspondence sent to the Honorable Daniel Shearhouse.

Sincerely,



Alexandria M. Wolf
Attorney at Law

cc: Rodney Nash

Alexandria Marie Wolf

ATTORNEY AT LAW

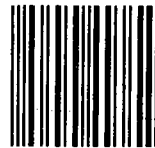
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