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January 8, 2014

VIA U.S. POSTAL

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JAN 13 2015

S.C. SUPREME COURT

Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Re: Marques Antonio Hudson vs. State of South Carolina
Case No.: 2013-CP-23-2903

Dear Supreme Court Clerk:

I am writing to you regarding the above referenced case. Please find enclosed a Notice of Appeal, Proof of Service, a copy of the Order of Dismissal, and a copy of the Return to Motion to Alter or Amend the Order of Dismissal.

If you wish to discuss the foregoing or need additional information please contact me at 864-331-1630.

Thank you.

Sincerely,



Brian P. Johnson

BPJ/lf
cc: Karen Ratigan, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
HONORABLE JAMES R BARBER III

Case No.: 2013-CP-23-2903

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JAN 13 2015

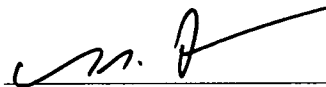
MARQUES ANTONIO HUDSON,)
)
 PETITIONER,)
)
 vs.)
)
 STATE OF SOUTH CAROLINA)
)
 RESPONDENT.)

S.C. SUPREME COURT

NOTICE OF APPEAL

The Petitioner, Marquis Antonio Hudson, hereby appeals the Honorable James R. Barber's September 30, 2014, Order denying post-conviction relief and November 14, 2014, Order denying reconsideration. A copy of the order on appeal is attached to this notice.

Respectfully submitted,



Brian P. Johnson, Esq.
522 North Church Street
Greenville, SC 29601
Attorney for Petitioner
SC Bar: 73996

Date: January 8, 2015
Other counsel of record: Karen Ratigan
P.O. Box 11549/Columbia, SC 29211

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
HONORABLE JAMES R BARBER III

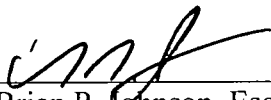
Case No.: 2013-CP-23-2903

MARQUES ANTONIO HUDSON,)
)
PETITIONER,)
)
vs.)
)
STATE OF SOUTH CAROLINA)
)
RESPONDENT.)
)

PROOF OF SERVICE

I, Brian P. Johnson, Esq., certify that I have today served the within notice of appeal upon the Respondent by depositing a copy in the United States Mail, postage prepaid, addressed to the attorney of record, Karen Ratigan, at P.O. Box 11549 Columbia, SC 29211.

Respectfully submitted,



Brian P. Johnson, Esq.
522 North Church Street
Greenville, SC 29601
Attorney for Petitioner
SC BAR: 73996

Greenville, SC
January 8, 2014

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2013CP2302903

Marques Hudson 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: _____

FILED - CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2014 OCT 21
9AM 11 45

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:

Brian P. Johnson 522 North Church Street
Greenville, SC 29601

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)
)
 Marques Antonio Hudson,)
 S.C.D.C. No. 324517,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS

2013-CP-23-2903

ORDER OF DISMISSAL

FILED-CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL B. WICKENSIMMER
 2014 OCT 21 AM 11 48

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed May 22, 2013. The Respondent made its return on November 22, 2013. An evidentiary hearing was held on August 27, 2014 at the Greenville County Courthouse. The Applicant was present and represented by Brian P. Johnson, 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 were Carrie Woodruff and the Applicant's trial counsel, Richard H. Warder, 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, Applicant's Exhibits 1-3, and Respondent'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 at the November 2004 term of the Greenville County Grand Jury for child abuse with great bodily injury (2004-GS-23-8143). He was represented by Richard H. Warder, Esquire.

After the State called the case to trial, the Applicant was found guilty of the charge as indicted. On October 10, 2007, the Honorable C. Victor Pyle, Jr. sentenced the Applicant to fifteen years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. LaNelle C. DuRant, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed Applicant's conviction and sentence. State v. Hudson, Op. No. 2010-UP-141 (S.C. Ct. App. filed Feb. 22, 2010). The Applicant filed a petition for writ of certiorari at the South Carolina Supreme Court, the petition was granted, and the parties submitted briefs. The Supreme Court dismissed the petition as improvidently granted. State v. Hudson, Op. No. 2012-MO-053 (S.C. Sup. Ct. filed Dec. 12, 2012). The remittitur was sent December 28, 2012.

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 make a timely Batson motion.
 - b. Failed to move for a mistrial based on the Solicitor's opening statement.
 - c. Failed to make proper objection to Dr. Johnson's testimony.
 - d. Failed to move to strike, request a curative instruction, or move for a mistrial after a hearsay objection to Dr. Johnson's testimony was sustained.
 - e. Failed to call witnesses to corroborate the Applicant's version of events.
 - f. Failed to call an expert witness.
 - g. Failed to adequately prepare a defense by not attempting to contact the State's witnesses before trial.
 - h. Failed to adequately cross-examine or impeach Wayne Campbell, Carrie Smith, Allison Jones, Melissa Tryling, Robert Seigler, and Deputy Craig Hawkings.
 - i. Failed to call witnesses to contradict the testimony of State's

- witnesses.
- j. Failed to object to the solicitor's closing argument.

At the PCR hearing, counsel for the Applicant stated they would proceed solely upon the following allegations:

1. Ineffective assistance of trial counsel:
 - a. Failed to properly preserve Batson issue.
 - b. Failed to move for a curative instruction or mistrial after Dr. Johnson provided hearsay testimony.
 - c. Failed to call witnesses.
 - d. Failed to object to the assistant solicitor's opening statement.
 - e. Failed to obtain DSS transcript.
 - f. Failed to properly cross-examine expert witnesses.

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 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 met with trial counsel twice to discuss the case but that he never saw the discovery materials. The Applicant stated that, while he was released on bond, he did not set up any meetings with trial counsel to review the case. The Applicant stated he was represented by another attorney in trial counsel’s office at his DSS trial. The Applicant stated trial counsel should have obtained the DSS transcript before this trial. The Applicant stated trial counsel failed to investigate potential witnesses – Lisa Rayle and Felicia Almodovar. The Applicant stated these individuals gave statements to police and would have been helpful to his case.¹ The Applicant stated trial counsel should have made a Batson motion when the State struck the only black juror from the pool. The Applicant argued that, while the State said it struck this juror because he was a criminal defense attorney, another juror was seated (James Carpenter) was an attorney who did criminal defense work. The Applicant stated trial counsel should have objected and moved for a mistrial when the assistant solicitor identified the victim before her opening statement. The Applicant stated trial counsel should have moved for a curative instruction or a mistrial when Dr. Johnson gave hearsay testimony. The Applicant stated trial counsel did not properly cross-examine the State’s expert witnesses.

Carrie Woodruff,² the victim’s grandmother, said she gave a statement to police³ and

¹ Rayle’s statement was Applicant’s Exhibit 2 and Almodovar’s statement was Applicant’s Exhibit 3.

² This witness was named Carrie Smith at the time of the Applicant’s trial.

³ Applicant’s Exhibit 1.

testified at the DSS hearing.

Trial counsel testified he filed discovery motions, received those materials, and reviewed them with the Applicant. Trial counsel testified the Applicant also relayed his version of the facts (including how the victim had sustained her injuries). Trial counsel testified they had more than one meeting about the Applicant's case and that the Applicant worked with his entire staff, including his investigator, in preparing the case. Trial counsel testified the trial strategy was to argue accident. Trial counsel confirmed another attorney in his firm represented the Applicant at the DSS hearing and stated he spoke to this attorney afterwards. Trial counsel stated he did not obtain a copy of the DSS transcript. Trial counsel testified he was sure Rayle's and Almodovar's statements were in the discovery materials and that he would have attempted to contact them – but that he did not have an independent recollection. Trial counsel testified he had very little memory of jury selection and did not know Carpenter. Trial counsel testified the State provided a race-neutral reason it struck the only black juror from the pool. Trial counsel testified there was no basis to object or move for a mistrial when the assistant solicitor referenced the crying victim before her opening statement. Trial counsel testified he counteracted the experts' testimony through the Applicant's testimony about the version of events.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have ordered the transcript from the DSS trial. Trial counsel testified he spoke with the attorney in his firm who handled the Applicant's DSS hearing. Trial counsel testified he had a copy of the order in the DSS case⁴ and would have discussed it with the Applicant. This Court finds the Applicant has failed to demonstrate the lack of the DSS transcript affected trial counsel's performance. The family court judge made a finding that the Applicant physically abused the

⁴ Respondent's Exhibit 1.

victim – it seems doubtful that any testimony from that hearing would have been helpful to the defense. Regardless, this Court cannot speculate as to the possible impact the DSS transcript may have had upon the trial preparation, as it was not introduced into evidence at the PCR hearing. See, e.g., 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 also finds the Applicant also failed to demonstrate he suffered any prejudice, as the State presented overwhelming evidence of his guilt. See Harris v. State, 377 S.C. 66, 79-80, 659 S.E.2d 140, 147 (2008) (holding overwhelming evidence of defendant’s guilt invalidated any argument that trial counsel should have had the first trial transcript available to potentially impeach a witness).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have investigated potential defense witnesses. The Applicant argued trial counsel should have investigated Rayle and Almodovar as potential witnesses because they were his neighbors and gave statements supporting his version of events. Trial counsel stated he was sure he tried to contact those witnesses. This Court has reviewed Applicant’s Exhibits 2 and 3. This Court, however, cannot speculate as to what these alleged witnesses would have testified about **at trial** because they 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).

This Court finds the Applicant failed to meet his burden of proving trial counsel should

have made a Batson motion. At trial, the sole black juror was struck from the jury panel. (Trial transcript, p.18). While there was no contemporaneous objection, trial counsel objected later. The assistant solicitor provided a race-neutral reason for the strike – that this juror was a criminal defense attorney. (Trial transcript, pp.22-23). While the Applicant argued there was another attorney in the jury pool that practiced criminal law, trial counsel testified he was not familiar with this person. This Court finds the Applicant has failed to prove that this other person was an attorney who practiced criminal law, that this information was known to trial counsel, or that his inclusion on the jury defeats the assistant solicitor’s race-neutral reason for having struck the black juror. 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 should have objected to a comment made by the assistant solicitor during opening arguments. Immediately before opening arguments, the trial transcript reflects the following:

(Whereupon the jury entered the courtroom at 2:08 pm)

(Whereupon the victim started crying)

Assistant solicitor: She’s the victim, your Honor.

The Court: That’s the victim? All right. solicitor, brief opening statement. Solicitor, --

Assistant solicitor: Yes, sir.

The Court: -- brief opening statement.

(Whereupon the victim was taken out of the courtroom)

(Trial transcript, p.54). The Applicant has failed to articulate a cognizable basis upon which trial counsel could have made a valid objection. There is no prohibition against the identification

of a victim. Regardless, the Applicant cannot demonstrate he was prejudiced because the State presented overwhelming evidence of his guilt. See State v. McFadden, 318 S.C. 404, 416, 458 S.E.2d 61, 68 (Ct. App. 1995) (holding the solicitor's comments did not infect the trial with unfairness to the extent that his conviction was a denial of due process where there was ample evidence of guilt in the record).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have moved for a curative instruction or mistrial after his objection to Dr. Johnson's testimony. During his testimony at trial, Dr. Johnson (an expert in pediatric ophthalmology) stated he was part of a team of various people involved in a case such as this. (App.pp.180-81). Dr. Johnson stated "the team would like nothing more than to find some other explanation other than a non-accidental injury. None of the team wants to find that and, therefore, all of the --." Trial counsel objected to the witness "speaking for the team." The trial judge replied "[I]et's move on to what specifically he did. I think you've gone far enough" and testimony resumed. (Trial transcript, p.181). Trial counsel properly objected and Dr. Johnson no longer spoke on behalf of the team. This Court finds the Applicant has failed to present a cognizable basis upon which trial counsel could have successfully moved for a curative instruction or a mistrial. See Butler v. State, 286 at 442, 334 S.E.2d at 814.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not properly cross-examine the State's expert witnesses. The Applicant argued these experts testified at the DSS trial and trial counsel should have cross-examined them on this testimony. The Applicant stated there were inconsistencies in the experts' testimony between the two trials but could not recall what these inconsistencies were. As noted supra, this Court cannot speculate on whether the experts' DSS testimony could have been used at the Applicant's trial because the

DSS transcript was not entered into evidence. Regardless, this Court finds trial counsel thoroughly cross-examined the experts in an attempt to argue the Applicant's version of events could have caused the victim's injuries. This evidence was all presented to the jury, who weighed it in their deliberations. See State v. Pipkin, 359 S.C. 322, 327, 597 S.E.2d 831, 833 (Ct. App. 2004) (noting the jury is "the finder of fact and weigher of credibility"). It is clear that, regardless of the strong cross-examination and arguments put forth by trial counsel, the jury simply did not accept the Applicant's version of events. See Craven v. Cunningham, 292 S.C. 441, 443, 357 S.E.2d 23, 25 (1987) ("The credibility of witnesses is for the triers of fact."); see also Bruno v. State, 347 S.C. 446, 556 S.E.2d 393 (2001) (noting that, by its verdict, the jury clearly rejected the defendant's account of what transpired).

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. The State presented overwhelming evidence of the Applicant's guilt. The victim was injured while no other adults were present. The victim had three whip marks on her back, a busted lip and numerous bruises, and severe brain injuries. While the Applicant claimed these injuries were the result of a slip in the bathtub followed by the two of them falling down the stairs, the Applicant did not have any bruises, injuries, or abrasions at the emergency room. As there was substantial evidence of the Applicant's guilt, there is no reasonable probability of a different result in this case if trial counsel had performed differently. See Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable

probability of a different result does not exist when there is overwhelming evidence of guilt). 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

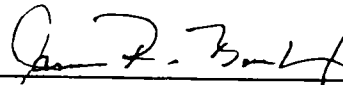
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this 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 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 30th day of SEPTEMBER, 2014.

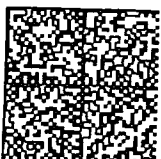


James R. Barber, III
Presiding Judge
Thirteenth Judicial Circuit

Law Office of Brian P. Johnson

522 North Church Street
Greenville, SC 29601

Supreme Court of South Carolina
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