

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2012-CP-32-2418

Michael F. Smith, 339508,

Petitioner,

v.

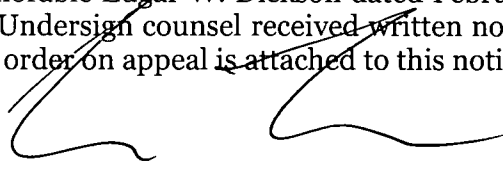
State of South Carolina,

Respondent.

NOTICE OF APPEAL

Michael F. Smith appeals the order of the Honorable Edgar W. Dickson dated February 14, 2015 denying post-conviction relief to Petitioner. Undersign counsel received written notice of entry of this order on March 10, 2015. A copy of the order on appeal is attached to this notice.

March 24, 2015



Christopher S. Leonard
P.O. Box 886
Columbia, SC 29202
(803) 667-3186

Attorney for the Petitioner

Other Counsel of Record:

Walt Whitmire, Esquire
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970
Attorney for the Respondent

RECEIVED

MAR 25 2015

S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2012-CP-32-2418

Michael F. Smith, 339508,

Petitioner,

v.

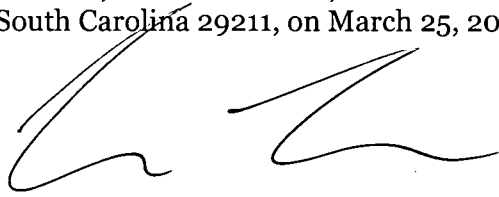
State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have served the attached *Notice of Appeal* on the State of South Carolina by U.S. Mail, addressed to the State's attorney of record, Walt Whitmire, South Carolina Attorney General's Office, P.O. Box 11549, Columbia, South Carolina 29211, on March 25, 2015.

March 25, 2015



Christopher S. Leonard
P.O. Box 886
Columbia, SC 29202
(803) 667-3186

RECEIVED

MAR 25 2015

S.C. Supreme Court

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)
)
)
)
 Michael F. Smith,)
 S.C.D.C. No. 339508,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 ELEVENTH JUDICIAL CIRCUIT

CASE NO.: 2012-CP-32-2418

ORIGINAL

ORDER OF DISMISSAL

2012 APR 25 11:26 AM
 CLERK OF COURT
 LEXINGTON, SOUTH CAROLINA

This matter comes before the Court pursuant to an Application for Post-Conviction Relief (PCR) filed June 8, 2012. Respondent made its Return. An evidentiary hearing into the matter was convened at the Lexington County Courthouse on August 15, 2013. Applicant was present at the hearing and was represented by Christopher S. Leonard, Esq. Respondent was represented by Walt Whitmire, Esq., of the South Carolina Attorney General's Office. At the hearing counsel testified.

Incorporated herein by reference are the records of the Lexington County Clerk of Court regarding the subject conviction(s), the Applicant's records from the Department of Corrections, the trial transcript, and Applicant's appellate records.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Lexington County. Applicant was indicted at the August 2008 term of Court of General Sessions for Lexington County on two counts of assault of a high and aggravated nature (AHAN) (2008-CP-32-271 O; -2711) and on two counts of lynching (2008-CP-32-2712; -2713). He was represented by Wayne Floyd, Esq., and Robert

T. Williams, Esq. On February 25, 2012, the State called its case to trial. Applicant was found guilty as indicted on all charges. The Honorable R. Knox McMahon sentenced Applicant to eight (8) year terms of imprisonment for each AHAN offense and sentenced Applicant to eight (8) year terms of imprisonment for each lynching conviction. The sentences were to be served concurrently.

A Notice of Appeal was filed on Applicant's behalf and was perfected by Wanda Carter, Esq., of the Office of Appellate Defense. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence in an unpublished opinion. State v. Michael Smith, Op. No. 2012-UP-087 (S.C. Ct. filed February 22, 2012). The Remittitur soon followed.

At the PCR hearing, Applicant proceeded on the following claims:

1. Ineffective Assistance of Counsel:
 - a. failure to apprise Applicant on the lynching indictments and communicate relevant case developments with him prior to trial;
 - b. failure to adequately advise Applicant on the terms of the solicitor's plea offer;
 - c. failure in declining to present a beneficial character witness at trial.

SUMMARY OF TESTIMONY

Applicant alleged his attorneys were ineffective for failing to adequately communicate with him during the course of their representation. Applicant claimed his attorneys never advised him of offenses for which he was charged. Applicant testified he retained Attorney Floyd a week after he was charged with assault of a high and aggravated nature (AHAN). He stated that he only spoke with Attorney Floyd thirty to forty-five minutes after retaining him. He stated that he "really didn't discuss" the specifics of the case with Attorney Floyd at his subsequent court appearance. Applicant claimed that he was not aware that he was charged with lynching until the solicitor called the trial. As a result, he stated that he suffered prejudice because no one

explained the sentencing exposure and elements of lynching. Applicant further claimed he was unaware of how the accomplice liability theory of "hand-of-one" could be used to establish his guilt at trial. He contended that it was never explained to him that all members of a mob could be found guilty without making physical contact with the victim. Applicant asserted that he retained Attorney Williams to second-chair his case on the eve of trial. He explained that he had already retained Attorney Williams to represent him on unrelated narcotics charges. He claimed his actions here were a result of Attorney Floyd's failure to discuss the trial preparations with him. Additionally, he stated that he did anticipate his case proceeding to trial when the State called the case. He acknowledged that he was out on bond prior to trial. Applicant explained that he never attempted to initiate contact with Attorney Floyd prior to trial because he "trusted Attorney Floyd." Yet, Applicant acknowledged Attorney Floyd would phone him from time-to-time prior to trial.

Applicant also alleged his attorneys were ineffective for failing to advise him on the terms of the solicitor's plea offer that he stated was made a week prior to his trial. Applicant stated that the solicitor offered to plead him to two counts of AHAN for a negotiated five year sentence. Applicant stated that he declined the offer because the solicitor required him to plead guilty to three unrelated narcotics charges. He stated that he rejected the offer because he was innocent on the pending narcotics charges. Applicant testified, in retrospect, he would have accepted the offer had he been advised of the sentencing exposure and elements of lynching.

Last, Applicant alleged counsel was ineffective for failing to call Alvin Campbell as a defense witness. He stated that he felt like his attorneys "didn't really put up a case." He claimed Campbell would have been a good character witness despite not being an eyewitness to the offense. He further extrapolated that there "were a lot of other circumstances with this case."

At the PCR hearing, Attorney Floyd testified to his course of conduct during the representation. Attorney Floyd had previously represented Applicant in a different matter in 2006. He recalled the State's evidence against Applicant in this case. It was Applicant's contention that he attempted to run over one of the victims with his vehicle but never struck either victim. He filed for discovery and continued to receive timely piecemeal disclosures from the solicitor as the case aged. Prior to trial, Attorney Floyd was noticed in writing from the solicitor that the State was charging Applicant for lynching in July of 2008. He immediately apprised Applicant of the new charges. Attorney Floyd would immediately inform Applicant of relevant developments in the case. Attorney Floyd discussed the elements of each offense, their sentencing schemes, and the strength of the State's evidence on each charge. Attorney Floyd testified Applicant declined the solicitor's guilty plea offer because he knew the plea would result in a probation revocation from his 2006 convictions. Attorney Floyd noted that Applicant did not want to be incarcerated while his narcotics charges were pending. Furthermore, Applicant did not want to enter guilty pleas to the narcotics charges where he protested his innocence. Attorney Floyd investigated Alvin Campbell as a potential defense witness at trial. The matter was discussed with Applicant. Floyd reasoned that the potential benefits in presenting Campbell at trial were negligible to the substantial detriment of losing the final closing argument. Attorney Floyd stated he had sufficient time to prepare Applicant's case for trial. It was his impression that the case was not overly complicated.

Attorney Williams testified to the manner in which he was retained in this case and how he aided Attorney Floyd in Applicant's trial. It was Attorney Williams' opinion that Attorney Floyd was a successful and diligent criminal defense lawyer. Attorney Williams' opinion was based upon his experience working with Attorney Floyd in Lexington County. He recalled taking part in Attorney Floyd's thorough pre-trial discussions of the trial preparations with

Applicant. It was Attorney Williams' impression that Applicant grasped the accomplice liability theory of "hand of one" entering trial. He stated, "in terms of lynching, if you are actively agitating, you can be found guilty."

APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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, (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668, 104 S.Ct. at 2064. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, supra. 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.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court's records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and exhibits from the prior proceedings, Applicant's appellate records, and legal arguments of counsel presented to this Court. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Applicant received effective assistance of not one but two attorneys. This Court finds Applicant has presented no credible evidence to show his attorneys were deficient in investigating his case. Also, Applicant has failed to show that his attorneys were deficient in communicating relevant developments in the case to him. This Court finds the testimonies of both attorneys convincing and the testimony of Applicant to be suspect, conclusory, and non-persuasive. Last, this Court finds counsels' decision to forgo calling a cursory character witness was reasonable under the circumstances of the case. Furthermore, Applicant failed to meet his burden to make a credible prima facie case here.

A.

This Court finds Applicant failed to meet his burden to prove his attorneys were ineffective for failing to communicate with him during the case. "From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the

more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." Strickland, 466 U.S. at 688, 104 S. Ct. 2052. Importantly, Applicant failed to produce credible evidence to even support a deficiency argument here. This Court disposes of this allegation based upon the credible testimonies of Attorney Floyd and Attorney Williams. This Court notes that Attorney Floyd is a well versed criminal defense attorney with decades of relevant experience to base his practice upon. Attorney Williams' testimony corroborates this finding and illustrates efforts Attorney Floyd made in Applicant's case. Applicant was indicted for lynching in August of 2008, well over a year prior to his trial. Attorney Floyd timely discussed the indictment and the nature and elements of the offense with Applicant. Attorney Floyd utilized the ample time he had prior to trial to prepare a reasonable defense theory of the case. This Court finds Applicant was afforded the benefit of two exceptional trial attorneys. It is simply illogical to grant evidentiary weight to Applicant's testimony that his attorneys failed to discuss his culpability on the lynching indictments prior to trial with him. Even if this Court found Applicant's testimony convincing here, he still had the responsibility to have contacted his attorneys while on bond to get the rudimentary information that every criminal defense attorney is required to immediately communicate to a client. Applicant was familiar with General Sessions procedures, as evidenced from his prior criminal record. Therefore, these allegations are denied and dismissed.

B.

Similarly, this Court finds Applicant failed to prove Attorney Floyd was ineffective for failing to advise on the terms of the solicitor's plea offer. "As a general rule, defense counsel has the duty to communicate formal prosecution offers to accept a plea on terms and conditions that

may be favorable to the accused." Missouri v. Frye, 132 S. Ct. 1399, 1402, 182 L.Ed.2d 379, 382 (2012). This Court finds Applicant's allegation here is entirely unsupported by his suspect testimony. For the reasons announced above, this Court finds Attorney Floyd properly advised Applicant on the lynching charge. A significant amount of time elapsed from when Applicant was indicted with lynching to when the plea offer was made. This Court finds Attorney Floyd's testimony credible that Applicant knowingly, intelligently, and voluntarily rejected the plea offer because it would have resulted in a probation revocation in addition to included narcotics charges to which Applicant protested his innocence. Thus, Applicant's prejudice argument is facially without merit because the plea would have been rendered involuntary where there was no factual basis of guilt on the narcotics charges without an admission of guilt. The solicitor acted within his discretion to tailor the plea offer to include all of Applicant's pending charges. See Custodio v. State, 373 S.C. 4, 10, 644 S.E.2d 36, 38-39 (2007) ("A defendant does not have a constitutional right to a plea bargain, a trial judge is not required to accept plea bargain, and that ordinarily a plea offer is nothing more than an offer until it is accepted by the defendant by entering a court-approved plea of guilty."). This Court finds Applicant made the ultimate decision to reject the plea offer based upon competent advice. Therefore, these allegations are denied and dismissed.

C.

This Court finds Applicant failed to meet his burden to prove his attorneys were ineffective for failing to present a defense at trial. Applicant supports his claim by the fact that his attorneys declined to present a case-in-chief and call allegedly favorable witnesses. This Court has reviewed the trial transcript and disagrees with Applicant's assessment. The attorneys quite competently presented a reasonable doubt theory of defense exhibited in their

cross-examinations. The attorneys, among other things, questioned the reliability of eyewitness accounts (Trial Transcript p.62); brought out Regina's failed relationship with Applicant as a motive to testify against Applicant (Trial Transcript p.64); questioned the ability of the victims who spoke English as a second language to understand statements made by Applicant (Trial Transcript p.99); brought out the limited investigation from police that failed to definitively corroborate the testimony from trial witnesses (Trial Transcript p.44; p.131); brought out illegal behavior from the victims and eyewitnesses on the night in question (Trial Transcript p.89); brought out the victim's state of intoxication during the offense (Trial Transcript pp.89-90); and brought out inconsistencies in eyewitness accounts (Trial Transcript p.131). See Jackson v. State, 329 S.C. 345, 352, 495 S.E.2d 768, 771-72 (1998) ("While it is true counsel did not present any witnesses at trial, a criminal defendant is not required to present evidence. Further, respondent has not shown what additional evidence counsel could have presented to support this defense."). In particular, Applicant failed to produce Campbell as a PCR witness to support his allegation that counsel was ineffective for not presenting him as a trial witness. See Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence."). Regardless, this Court finds the attorneys exhibited valid trial strategy in declining to present a fringe character witness. The potential detriment of losing the final argument is a pressing concern criminal defense attorneys face at trial in presenting their clients' theory of the case. Therefore, these allegations are denied and dismissed.

D.

Except as discussed above, this Court finds that the Applicant affirmatively abandons

the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

CONCLUSION

Based on all the forgoing, 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 for post-conviction relief. Therefore, his application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed. Accordingly,

IT IS THEREFORE ORDERED:

1. That this Application for Post-Conviction Relief be, and hereby is, denied and dismissed with prejudice; and
2. Applicant be, and hereby is, remanded to the custody of Respondent

AND IT IS SO ORDERED this 14th day of February, 2015.



EDGAR W. DICKSON
Presiding Judge
Eleventh Judicial Circuit

Orangeburg, South Carolina

FILED
2015 FEB 26 A 11:26
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

FORM 4

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

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2012CP3202418

Michael Frank Smith
 #339508

State Of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (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. See Page 2 for additional information.
- 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:

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; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

3/3/2015

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on 5th of March 2015, to attorneys of record or to parties (when appearing pro se) as follows:

Christopher Shannon Leonard
PO Box 886 Columbia, SC 29202

John Walter Whitmire
PO Box 11549 Columbia, SC 29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/mh

Court Reporter

Beth A. Carrigg - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
