

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Roger L. Couch, Circuit Court Judge

Case No.: 2013-CP-42-0534

The State,

Respondent,

v.

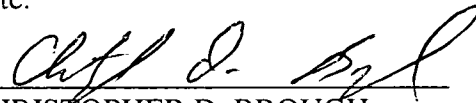
Kenneth D. Smith,

Appellant.

NOTICE OF INTENT TO APPEAL

Kenneth D. Smith appeals the denial of his application for Post-Conviction Relief in this case. The Order of Dismissal was imposed by the Honorable Roger L. Couch on March 26, 2016. Appellant received notice of the same on that date.

April 3, 2015



CHRISTOPHER D. BROUGH
175 Magnolia St., Suite 202
SPARTANBURG, SC 29306
(864) 585-3088
ATTORNEY FOR APPELLANT

Other Counsel of Record:
Suzanne H. White
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211-11549
(803) 734-3737

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Case No.: 2013-CP-42-0534

The State, Respondent,

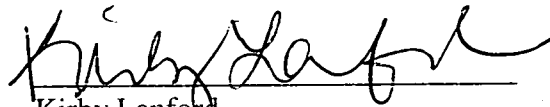
v.

Kenneth D. Smith, Appellant.

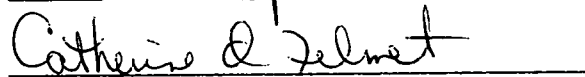
PROOF OF SERVICE

The undersigned hereby certifies that he is a person of such age and discretion as to be competent to serve papers and that a copy of the **Notice of Intent to Appeal**, was served upon the following person(s) on the State, by depositing copies of the same in the United States Mail, with sufficient postage affixed thereto, on April 3, 2015, addressed as follows:

The Honorable Alan Wilson
SC Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, S.C. 29201


Kirby Lanford

SWORN BEFORE ME THIS
3 DAY OF April, 2015.



NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: Aug, 3, 2019

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2013-CP-42-0534

Kenneth D. Smith, #297395,)
)
Applicant,)

ORDER OF DISMISSAL

v.)

State of South Carolina,)
)
Respondent.)

This matter comes before the Court by way of an Application for Post-Conviction Relief filed January 30, 2013. The Respondent made its Return on or about March 27, 2014. An evidentiary hearing into the matter was convened on September 18, 2014, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Christopher D. Brough, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

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At the hearing, the Applicant testified on his own behalf. Richard Whelchel, 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. He was indicted at the October 2008 term of the Spartanburg County Grand Jury for murder (2008-GS-42-6013) and the July 2009 term for breach of the peace of a high and aggravated nature (2009-GS-42-

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3470). The Applicant was represented by Richard Welchel, Esquire. On September 10, 2009, the Applicant proceeded to trial and was convicted by a jury. The Honorable J. Derham Cole sentenced Applicant to life for murder and ten years for breach of the peace of a high and aggravated nature.

A timely notice of appeal and Anders brief were filed on Applicant's behalf. The South Carolina Court of Appeals dismissed Applicant's appeal. State v. Smith, Op. No. 2012-UP-178 (filed March 14, 2012). The Remittitur was returned on March 30, 2012.

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;
 - i. Counsel failed to object to the trial court's improper comments on the facts and failed to move for a mistrial or new trial on that basis;
 - ii. Counsel failed to object to the judge's instruction on the facts of the murder offense that reduced the State's burden of proof;
 - iii. Counsel failed to object to the judge's instruction on the facts of the breach of peace charge that lessened the State's burden of proof;
 - iv. Counsel failed to object to the judge's mandatory presumption, burden-shifting and confusing jury instruction on the malice element of murder.

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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

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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. This Court found the testimony of Counsel to be more credible than the testimony of Applicant as to all allegations raised in the application and at the hearing.

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), SCRCP). 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 the 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).

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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."

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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).

Applicant testified that he was at the scene of the shooting, but claimed he did not fire the shots. Applicant alleged that the shooter “must have been” John Sainvil, his co-defendant. In addition to his own testimony, Applicant testified that the defense called Eugene Brannon as a witness. Applicant testified that Adam Solesbee was listed as a possible State witness, but was never called at trial. However, Applicant claimed that Solesbee did not place the gun in Applicant’s hand in his statement to police and Counsel should have called Solesbee to assist in the defense. Applicant also testified that the victim started the fight and Counsel should have requested a self-defense jury instruction. However, Applicant acknowledged that he asserted a defense the entire time that he had not shot the gun, not that he shot in self-defense.

Applicant testified that Counsel failed to object when Ruiz identified Applicant as “the guy who killed my brother,” when asked by the trial court to clarify which “him” the witness was describing. (ROA p. 115, lines 15-16). Applicant acknowledged that Counsel extensively examined Ruiz about inconsistencies with his statement and testimony and pointed out that Ruiz had never previously identified the Applicant as the shooter.

Applicant testified that Counsel failed to object to the jury instructions when the trial court improperly instructed the jury that they could infer malice because the use of a deadly weapon. (ROA p. 401, lines 6-7). Applicant stated that the charge violated the holding in State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009). Applicant also testified that the instructions regarding the charge of breach of peace were improper because it should not say “is guilty,” but this Court is unclear as to which specific part of the charge he alleges is improper.

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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 26th day of March, 2014.



 ROGER L. COUCH
 Presiding Judge

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The Brough Law Firm



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Phone: 864-585-3088
Fax: 864-585-3058
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April 3, 2015

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

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S.C. Supreme Court

RE: THE STATE VS. Kenneth D. Smith

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

- (1) Original Proof of Service upon opposing counsel.
- (2) Order of Dismissal.

If I can be of any further assistance please feel free to call me.

Sincerely,

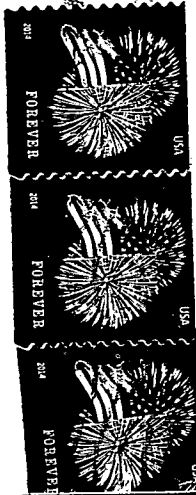
Christopher D. Brough

Enclosure

cc: South Carolina Office of the Attorney General
Kenneth Smith

The Brough Law Firm
175 Magnolia Street, Suite 202
Spartanburg, SC 29306

GREENVILLE SC
03 APR 2015



The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
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