

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

Case No. 2014-CP-23-2475

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S.C. Supreme Court


Kendrick Littlejohn,..... Appellant,

v.

State of South Carolina Respondent.

NOTICE OF APPEAL

Appellant appeals the Honorable Daniel Hall's Order of Dismissal dismissing Appellant's application for post-conviction relief. On March 4, 2015, the Honorable Daniel D. Hall signed an order dismissing Appellant's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on March 23, 2014. A copy of the Honorable Daniel Hall's Order of Dismissal is attached.



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Attorney for James Daniel Mayberry

Greenville, South Carolina
April 7, 2015

Other Counsel of Record and Interested Parties:

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Kendrick Littlejohn SCDC# 346082
Perry Correctional Institute
430 Oaklawn Road
Pelzer, SC29669

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Kendrick Littlejohn,..... Appellant,

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CERTIFICATE OF SERVICE

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this April 7, 2015, I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

Karen C. Ratigan, Esq.
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Attorney for the State of South Carolina

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Division of Appellate Defense
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Columbia, SC 29211-1433

Denise Tanner LaBeck
Denise Tanner LaBeck

April 7, 2015

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

JUDGMENT IN A CIVIL CASE
CASE NO: 2014CP2302475

FILED-CLERK OF COURT
GREENVILLE, SC.
PAUL B. WICKENSIMER
2015 MAR 19 PM 1:37

Kendrick Littlejohn 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):**
SCRCP (Vol. Nonsuit); Rule 12(b), SCRCP; Rule 41(a),
 Rule 43(k), SCRCP (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):**
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other: _____
 Rule 40(j) SCRCP; Bankruptcy;
- 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; Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this 19th day of March, 2015 .

Court Reporter:

PRESIDING JUDGE - Daniel D Hall

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:

R. Mills Arjail Jr. 11 North Irvine Street, Suite 11
Greenville, SC 29601

ATTORNEY(S) FOR THE PLAINTIFF(S)

Karen Christine Ratigan PO Box 11549 Columbia,
SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

Kendrick D. Littlejohn,)
S.C.D.C. No. 346082,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
C.A. No. 2014-CP-23-2475

ORDER OF DISMISSAL

ENTERED COMPUTER

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GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER
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This matter comes before the Court by way of an application for post-conviction relief (PCR) filed May 2, 2014. The Respondent made its return on October 21, 2014. An evidentiary hearing was held on February 17, 2015 at the Greenville County Courthouse. The Applicant was present and represented by R. Mills Ariail, Jr., 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 was the Applicant's trial counsel, Darren Haley, Esquire. The Court had before it the trial transcript, the Greenville County Clerk of Court records, the South Carolina Department of Corrections records, the PCR application, the return, the appellate records, and Applicant'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 August 2010 term of the Greenville County Grand Jury for assault and battery with intent to kill (ABWIK) (2010-GS-23-6449) and second-degree lynching (2010-GS-23-6450). He was represented by Darren Haley, Esquire.

After the State called the case to trial, the Applicant was found guilty. On April 26, 2011, the Honorable Edward W. Miller sentenced the Applicant to concurrent terms of 20 years suspended upon service of 14 years and 5 years probation for ABWIK and 10 years suspended during probation for second-degree lynching.

A notice of appeal was filed at the South Carolina Court of Appeals. Susan B. Hackett, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. Littlejohn, Op. No. 2014-UP-118 (S.C. Ct. App. filed March 19, 2014). The Remittitur was sent on April 4, 2014.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
 - a. Failure to object to a burden-shifting malice instruction.
 - b. Failure to object "to numerous references to other crimes and drugs."
 - c. Failure to obtain independent medical experts "to show that since victim was able to return and drive his vehicle away . . . that his injuries were not that serious and he may well have been malingering to upgrade the offense from ABHAN to ABWIK."
 - d. Failure to move to dismiss the ABWIK indictment based upon double jeopardy.
2. Was not given credit for time-served.

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).

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 only had one meeting with trial counsel, who told him the case was on the trial docket. The Applicant stated he and trial counsel did not discuss the following prior to trial: the State’s evidence, the elements of the charges, his version of events, possible defenses, the concept of “the hand of one is the hand of all,” or plea offers.¹ The Applicant stated he did not hit the victim and told trial counsel this on the day of trial. The Applicant stated he asked trial counsel to subpoena the confidential informant (whose name he did not do), but

¹ This Court notes that, even if he had received a plea offer, he would have still gone to trial.

that counsel did not do so. The Applicant stated trial counsel should have objected during jury deliberations when the trial judge explained ABWIK and assault and battery of a high and aggravated nature (ABHAN).

Trial counsel testified he was the Applicant's second attorney and was appointed in August 2010. Trial counsel testified discovery motions had already been filed, but he filed his own set of discovery motions. Trial counsel testified he received the discovery materials, reviewed them, and sent a copy to the Applicant. Trial counsel testified he was appointed to this case while the Applicant was on bond and that the Applicant never came to his office to discuss his case. Trial counsel testified he had copies of several letters in his file indicating the Applicant had missed meetings. Trial counsel testified there was a plea offer in place when he was appointed, that he conveyed such to the Applicant, and that the Applicant rejected the offer. Trial counsel testified this was confirmed in an October 18, 2010 letter he sent to the Applicant. Trial counsel testified he met with the Applicant at the detention center after he waived extradition from North Carolina. Trial counsel testified they reviewed the discovery materials, the Applicant's story, the elements of the charges, and the concept of "the hand of one is the hand of all" before trial. Trial counsel testified the defense was predicated upon the Applicant's contention that he did not hit the victim but admitted there were no witnesses to support this story. Trial counsel testified he did not recall the Applicant asking him about a confidential informant but that he would have advised against calling any witness.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not adequately meet with him and prepare for trial. Trial counsel testified he sent a copy of the discovery materials to the Applicant and also reviewed those materials with him. Trial counsel testified they also discussed the Applicant's version of events, the elements of the charges, and

the doctrine of accomplice liability. Trial counsel also testified the Applicant missed numerous appointments or meetings. This Court finds trial counsel's testimony is credible and notes trial counsel was able to reference notes and letters from his file during his testimony. This Court further finds the Applicant failed to articulate what more he wanted trial counsel to do in order to prepare his case for trial. See Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding 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).

This Court finds the Applicant failed to meet his burden of proving trial counsel did not convey a plea offer in this case. Trial counsel testified the plea offer in this case was in place when he was appointed. Trial counsel produced a copy of a letter dated October 18, 2010 that he sent to the Applicant in which he noted he had explained the offer to the Applicant and that it was rejected. This Court finds trial counsel's testimony is credible and notes trial counsel was able to reference notes and letters from his file during his testimony. This Court finds trial counsel fulfilled his obligation to convey and explain the plea offer to his client. See Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (holding counsel's failure to convey the State's plea offer to defendant constituted deficient performance).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have subpoenaed a confidential informant. The Applicant stated he told trial counsel to subpoena this person but admitted he did not know their name. Trial counsel testified he did not recall discussing a confidential informant with the Applicant but that he would have advised against putting up any witness at trial. Trial counsel testified there were no witnesses who corroborated the Applicant's story (that he did not hit the victim). This Court finds trial counsel's testimony is credible. This Court finds trial counsel articulated a valid trial strategy

(not putting up a defense case) in order to explain why he would have advised against calling a confidential informant as a witness. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel). Regardless, as the Applicant was unable to produce this alleged witness at the PCR hearing – or provide any information about this individual – this Court cannot speculate as to whether this witness would have had an impact upon the defense case. 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 objected to the judge re-charging the jury on ABWIK and ABHAN. During deliberations, the jury sent out the following note, “We would like to read or have explained again the definition related to the assault and battery with intent to kill versus aggravated assault and battery.” (Trial transcript, p.211, lines 9-12). The trial judge proposed sending the jury “copies of [his] entire charge so that noting is taken out of context” and the parties had no objection. (Trial transcript, p.211, lines 13-17). This Court finds the Applicant has failed to provide a cognizable reason for trial counsel to have objected. Without such, the Applicant failed to meet his burden of proof. See Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (finding a PCR applicant bears the burden of proving the allegations in their application).

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. 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

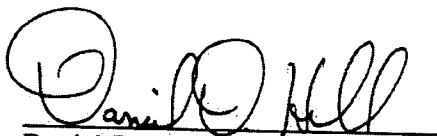
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel’s representation. Therefore, this 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 (30) 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 4th day of March, 2015.



Daniel D. Hall
Presiding Judge
Thirteenth Judicial Circuit

York, South Carolina.

R. MILLS ARIAIL, JR.
ATTORNEY AT LAW

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April 7, 2015

Via US Mail

Daniel Shearouse
Clerk of Court
South Carolina Supreme Court
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Columbia, South Carolina 29211

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S.C. Supreme Court

**Re: Notice of Intent to Appeal from Kendrick Littlejohn v. State of South Carolina
C.A. No.: 2014-CP-23-2475**

Dear Mr. Shearouse:

I was Court Appointed in the above referenced matter, and I expect that appellate defense will handle the appeal and petition for certiorari. On behalf of my client, enclosed for filing please find the Notice of Appeal and proof of service. I've enclosed a copy of the Honorable Daniel Hall's Order of Dismissal to be challenged on appeal. By copy of this letter, I am also serving my client, counsel for the State of South Carolina, the South Carolina Commission of Indigent Defense - Appellate Defense Division and the Greenville County Clerk's Office.

Thank you for your assistance in this matter and if you have any questions, please feel free to contact me.

Sincerely,
LAW OFFICE OF R. MILLS ARIAIL, JR.
Attorney at Law


R. Mills Ariail, Jr.

RMAjr/dl
Enclosures (as stated)

cc: Greenville County Clerk's Office
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Greenville, SC 29601

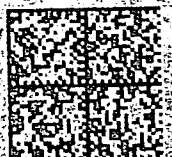
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