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April 14, 2015

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

Re: Case No. 2010-CP-26-8194
Telly D. Manning v. State of South Carolina

Dear Mr. Shearouse,

Enclosed for filing are two (2) copies of a Notice of Appeal in the above referenced Post-Conviction Relief case. Also enclosed are the following:

1. Proof of service of the notice of appeal on the respondent.
2. A copy of the order denying the application for Post-Conviction Relief.

Please return a clocked copy of the notice to my office in the self-addressed stamped envelope provided.

Thank you for your cooperation in this matter. Please feel free to contact my office if you have any questions or concerns.

Kindest regards,

Steve Fowler

Cc: Joshua Thomas, Assistant Attorney General

Enclosures: As stated

SF/kz

RECEIVED

APR 22 2015

S.C. Supreme Court

NOTICE OF APPEAL FROM COMMON PLEAS REGARDING A POST CONVICTION RELIEF (PCR) ACTION

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
[In The Supreme Court]

APPEAL FROM HORRY COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2010-CP-26-8194

The State of South Carolina, Respondent,

v.

Telly D. Manning, #304949, Appellant.

NOTICE OF APPEAL

Telly D. Manning appeals the order of the Honorable G. Thomas Cooper dated March 17, 2015, which denied and dismissed his Post-Conviction Relief application. The Appellant has the right to appeal pursuant to South Carolina Appellate Court Rules 203, 206, and 227(b).

April 14, 2015

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Attorney for Appellant

Other Counsel of Record:
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Assistant Attorney General
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PROOF OF SERVICE OF A NOTICE OF APPEAL

RECEIVED
APR 22 2015
S.C. Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2010-CP-26-8194

The State of South Carolina, Respondent,

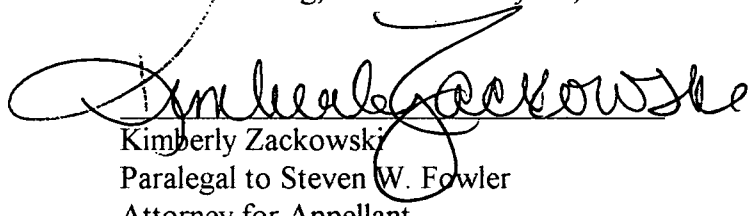
v.

Telly D. Manning, #304949, Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on The State of South Carolina, via the Attorney General's office, by depositing a copy of it in the United States Mail, postage prepaid, on April 16, 2015, addressed to the attorney of record, Joshua Thomas, Assistant Attorney General, SC Attorney General's Office, Rembert C. Dennis Building, 1000 Assembly St., Columbia, SC 29201.

April 16, 2015



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STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Telly D. Manning, #304949, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2010-CP-26-8194 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed September 3, 2010. Respondent made a timely Return on or about September 13, 2011. The Court convened an evidentiary hearing into the matter on February 2, 2015, at the Horry County Courthouse. Applicant was present at the hearing and represented by Steven W. Fowler, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Randall K. Mullins, Esquire, also testified. The Court had before it a copy of the trial transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the pleadings in this matter. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In May 2002, the Horry County Grand Jury indicted Applicant for murder (2002-GS-26-2043). Randall K. Mullins, Esquire ("trial counsel"), represented Applicant. On November 13, 2006, Applicant, along with co-defendant Roshad Baker,

proceeded to trial before the Honorable Steven H. John and a jury. On November 14, 2006, the jury found Applicant guilty as indicted. Judge John sentenced Applicant to thirty (30) years imprisonment.

Applicant filed a timely notice of appeal, and Joseph L. Savitz III, Esquire, of the Office of Appellate Defense perfected the appeal with the filing of an Anders[1] brief. The South Carolina Court of Appeals dismissed Applicant's appeal on September 3, 2009. State v. Manning, Op. No. 2009-UP-416 (S.C. Ct. App. filed September 3, 2009). The remittitur was returned to the circuit court on September 21, 2009.

II. ALLEGATIONS

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

1. "Ineffective Assistance of Counsel"

At the evidentiary hearing, Applicant proceeded on allegations of ineffective assistance of trial counsel in the following particulars:

1. Failure to call Dormaine Baker as a witness.
2. Failure to effectively cross-examine Derrick Bowens and Ernest Smith.
3. Failure to call Ms. Locklear and Ms. Bethea as witnesses.
4. Failure to share discovery.
5. Failure to investigate Ernest Smith's mental state.
6. Failure to move for a severance.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The Court has weighed the testimony accordingly. Generally, the Court finds trial counsel's testimony credible and

[1] Anders v. California, 386 U.S. 738 (1967).

Applicant's not credible. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

A. Summary of Testimony

Applicant testified he had one meeting with trial counsel. He recalled discussing his charges, but did not recall trial counsel reviewing discovery with him. Applicant testified he did "not really" go over any defenses or trial strategy. He specifically testified he did not review any recorded statements prior to trial.

Applicant testified Dormaine Baker was a co-defendant and his cousin. Applicant testified Baker gave a statement indicating Applicant did not have a weapon when he entered the victim's car. Applicant testified trial counsel did not investigate Baker and did not present him at trial. However, he admitted he did not tell trial counsel to investigate Baker. Applicant also testified trial counsel did not attempt to investigate Ms. Locklear and Ms. Bethea. He stated Locklear and Bethea were dating two (2) of the co-defendants. He alleged Bethea gave a statement describing those co-defendants' guns, the owner of the car, and the co-defendant's history of robbing drug dealers. Applicant believes Locklear's and Bethea's testimony would have shown the jury he was not the ringleader of the plan to rob the victim, but trial counsel made no effort to get them to court.

Applicant testified trial counsel failed to highlight Derrick Bowens's testimony on cross-examination that he only heard one (1) shot fired. Applicant also testified trial counsel failed to impeach Ernest Smith with his statement, which indicated Baker was driving the car, not Smith. Applicant further believed trial counsel could have further cross-examined Smith to clarify whether Smith saw Applicant with a gun. Applicant believed the attorney for his co-defendant did more effective cross-examination of Smith. Applicant also alleged trial counsel failed to investigate the fact Smith had mental issues and received a disability check each month.

Trial counsel testified he has been a practicing attorney since 1986. He recalled meeting with Applicant at the jail, at his preliminary hearing, and at Applicant's home in Dillon. Trial counsel recalled scheduling at least two (2) meetings with Applicant while he was out on bond. Trial counsel recalled personally reviewing the State's response to his discovery motion, as well as having an associate review it. He testified he also visited the scene and constructed timelines of the day of the murder. Trial counsel recalled sharing discovery with Applicant. He testified he reviewed a transcript of the co-defendants' statements with Applicant while in pre-trial detention. Trial counsel also testified he mailed Applicant a copy of the discovery response several times.

Trial counsel testified his trial strategy was to show the co-defendant was the shooter, and Applicant was merely present. However, he recalled the evidence demonstrated two weapons were used to shoot the victim, and Applicant was in the back seat of the victim's car. Trial counsel stated he attempted to counter this evidence by showing all the fatal shots were fired from the front seat of the car. However, he also recalled explaining the hand-of-one theory to Applicant repeatedly. Trial counsel testified he tried to implement his strategy by attacking the credibility of the eye-witnesses.

Trial counsel testified he did not move for a severance because he had no grounds for one. He recalled agreeing with the co-defendant's counsel to only have one attorney do the majority of impeachment on each witness. Trial counsel nevertheless recalled thoroughly cross-examining Smith and Bowens. Trial counsel testified he was fully familiar with Smith's inconsistent statements, but could not anticipate a further inconsistency at trial until Smith testified. He did not know of any way to more thoroughly cross-examine Smith. Trial counsel also testified Applicant never informed him Smith had any mental disability.

Trial counsel recalled speaking with the attorney representing each of the other co-defendants. He recalled Baker's attorney informing him Baker would exercise his Fifth Amendment right to

remain silent if called to testify. Trial counsel testified he did not call Baker as a witness because he would have lost credibility with the jury if Baker refused to testify. He also testified calling Baker would have given the State final closing argument, and it was important to him to have final closing argument. Trial counsel recalled Locklear and Bethea did not respond to his subpoenas, but he was able to have one served by North Carolina authorities. Trial counsel recalled Locklear and Bethea were not eye witnesses, and could not place the weapons in the co-defendant's possession. He further recalled the only testimony they could offer was about the owner of the car and the co-defendant's history of robbing drug dealers. Trial counsel testified such testimony may not have been admissible as a prior bad act. Trial counsel also testified he did not believe he could control Locklear and Bethea because they were dating Applicant's co-defendants.

B. Ineffective Assistance of Trial Counsel

In a post-conviction relief action, Applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of trial counsel as a ground for relief, Applicant must prove trial 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." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether trial counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S.at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). Applicant must

overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove trial counsel's performance was deficient. Id. Under this prong, the Court measures trial counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

1. Failure to call Dormaine Baker as a witness.

The Court finds Applicant failed to meet his burden to show trial counsel ineffective for failing to call Baker as a witness. Regarding this allegation, the Court finds trial counsel's testimony very credible. Trial counsel reviewed Baker's statements and discussed Baker's testimony with Baker's attorney. Cf. Jackson v. State, 329 S.C. 345, 350, 495 S.E.2d 768, 770 (1998) (attorney not defective in part because "counsel for the co-defendants [told attorney] any testimony given by them would be the same as their statements given to the police"). Based on these conversations, trial counsel determined Baker would not testify if called as a witness. Because Baker would not testify, trial counsel had no reason to call him as a witness. Furthermore, trial counsel did not want to lose credibility with the jury by calling a witness who would not help his client. The Court finds trial counsel's reasoning for not calling Baker as a witness constitutes a valid strategic decision. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992))). Furthermore, trial counsel stated he did not call Baker

because he did not want to lose the right to final closing arguments by presenting evidence. Again, such reasoning constitutes a valid, strategic decision. See Washington v. State, 581 S.E.2d 518, 522 (Ga. 2003) ("The preservation of the right to the first and last closing argument, which would be lost upon the presentation of evidence by the defense, is a decision involving trial strategy." (citing Brown v. State, 490 S.E.2d 75 (Ga. 1997))).

Regardless, Baker did not testify at the evidentiary hearing. Therefore, the Court cannot speculate as to whether his testimony at trial would have been beneficial to Applicant. 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." (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995))). Accordingly, the Court finds Applicant has not demonstrated trial counsel's performance fell below a reasonable standard or that he was prejudiced by trial counsel's performance.

2. Failure to effectively cross-examine Derrick Bowens and Ernest Smith.

The Court finds Applicant failed to meet his burden to demonstrate trial counsel ineffective in failing to further cross-examine Bowens or Smith. Trial counsel was prepared to challenge Bowens' and Smith's trial testimony. He read their statements, reviewed the discovery, and was not surprised by their testimony at trial. See, e.g., Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011) (citing Daniels v. State, 676 S.E.2d 13 (Ga. 2009)). He discussed the case with all of their attorneys. Jackson, 329 S.C. at 350, 495 S.E.2d at 770. Trial counsel's strategy was to show these witnesses lacked credibility. To the extent Bowens' and Smith's statements were inconsistent with their trial testimony, trial counsel brought those inconsistencies out on cross-examination. Trial counsel also attempted to credit Smith's first statement because that statement was most beneficial to Applicant.

Thus, trial counsel has articulated a valid explanation of his cross-examination strategy. Stokes, 308 S.C. at 548, 419 S.E.2d at 779.

Furthermore, the record shows trial counsel and counsel for the co-defendant thoroughly cross-examined Bowens and Smith on their prior statements, their criminal records, and their plea deals with the State. Applicant has not demonstrated how trial counsel could have further cross-examined these witnesses or how further cross-examination would have changed the outcome of his trial. See, e.g., Skeen v. State, 325 S.C. 210, 216-17, 481 S.E.2d 129, 133 (1997) ("[O]ne can only speculate whether a 'better' cross examination would have helped Skeen."); Simpson v. Moore, 367 S.C. 587, 598 n.2, 627 S.E.2d 701, 707 n.2 (2006) ("Though hindsight may provide a different view of counsel's actions, Simpson is not entitled to a new trial for the sole purpose of presenting a 'fancier' case." (citing Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998))). Accordingly, the Court finds trial counsel was not ineffective in this regard.

3. Failure to call Ms. Locklear and Ms. Bethea as witnesses.

The Court finds Applicant failed to meet his burden to show trial counsel ineffective for failing to call Locklear and Bethea as witnesses. Trial counsel articulated that he did not believe Locklear and Bethea could assist his defense because they did not place the guns in the co-defendant's hand. He also believed the only useful testimony they could have provided – regarding the co-defendant's prior bad acts – may not have been admissible. Trial counsel also feared they would not be helpful to Applicant because they dated other co-defendants. Jackson, 329 S.C. at 350, 495 S.E.2d at 771 (finding counsel articulated a valid strategy for not calling witnesses where, in part, "he 'didn't want to run the risk of calling them and having something go wrong.'"). Trial counsel also emphasized the importance of final closing argument to his case. Washington, 581 S.E.2d at 522. In light of these

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circumstances, the Court finds trial counsel's decision to forego calling these witnesses constitutes valid strategy. Stokes, 308 S.C. at 548, 419 S.E.2d at 779.

Regardless, Locklear and Bethea did not testify at the evidentiary hearing. Therefore, the Court cannot speculate as to whether their testimony at trial would have been beneficial to Applicant. Dempsey, 363 S.C. at 369, 610 S.E.2d at 814. Accordingly, the Court finds Applicant has not demonstrated trial counsel's decision was unreasonable or that he was prejudiced by trial counsel's decision.

4. Failure to share discovery.

The Court finds Applicant failed to demonstrate trial counsel ineffective for failing to share discovery. The Court finds the testimony of trial counsel very credible on this issue, while finding Applicant's testimony not credible. Trial counsel reviewed the State's discovery response with Applicant on several occasions, as well as providing Applicant several copies of the information. Even assuming trial counsel did not provide Applicant a copy of the entire file, Applicant was fully aware of the evidence against him. Accordingly, Applicant has not shown a deficiency in trial counsel's performance. Cf. Hyman v. State, 397 S.C. 35, 46, 723 S.E.2d 375, 381 (2012) (court unwilling to "assume that the Constitution requires disclosure of Brady evidence to a criminal defendant *personally*" (emphasis in original)). He also has not articulated how further personal copies of the discovery would have affected trial counsel's trial strategy. Id. at 49, 723 S.E.2d at 382 (applicant failed to demonstrate possibility of different outcome had he personally received discovery where he "was fully aware of the inculpatory nature of the [evidence])). Therefore, trial counsel not ineffective for failing to provide Applicant with further copies of the discovery materials.

5. Failure to investigate Ernest Smith's mental state.

The Court finds Applicant failed to meet his burden of proof to show trial counsel ineffective for failing to investigate Smith's mental state. Again, the Court finds trial counsel's testimony credible, while finding Applicant's testimony not credible. Trial counsel testified Applicant never mentioned Smith had mental issues. Applicant could not specifically recall telling trial counsel about Smith's disability check. Therefore, the Court finds trial counsel could not have reasonably been expected to discover any issues regarding Smith's mental state. Strickland, 466 U.S. at 691 ("[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable."); see also Rodriguez v. State, 74 S.W.3d 563, 568 (Tex. App. 2002) ("Moreover, we opt not to fault trial counsel for the intentional withholding of vital information by his client." (citations omitted)). Regardless, Applicant presented no evidence at the evidentiary hearing to support his allegations Smith suffered from a mental disability. Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) ("Since the contents of these documents were never revealed at the PCR hearing, Defendant has failed to present any evidence of probative value demonstrating how the failure to obtain [documents] prejudiced the defense." (citations omitted)). Therefore, the Court cannot speculate as to the evidentiary value of alleged information about Smith's mental disability. Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (finding of prejudice cannot be based on "pure conjecture"). Accordingly, the Court finds trial counsel was not ineffective in this regard.

6. Failure to move for a severance.

The Court finds Applicant did not meet his burden to demonstrate trial counsel ineffective for failing to move for a severance. The Court finds especially credible trial counsel's testimony there were no grounds to move for severance and agrees with his analysis. "Criminal defendants who are

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jointly tried [...] are not entitled to separate trials as a matter of right." State v. Dennis 337 S.C. 275, 281, 523 SE2d 173, 176 (1999) (citing State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998); State v. Holland, 261 S.C. 488, 201 S.E.2d 118 (1973); State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972)). Instead, a court should only grant a severance "when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent a jury from making a reliable judgment about a co-defendant's guilt." Id. at 282, 523 S.E.2d at 176. The testimonial and ballistic evidence in this case indicate Applicant and co-defendant were in the car with the victim, and that two guns were used in the shooting. In light of those facts, there is no evidence indicating a severance would have been warranted in this case. Therefore, trial counsel was not deficient in not requesting a severance. Palacio, 333 S.C. at 514, 511 S.E.2d at 67 (no deficiency in failing to make specific arguments where "it would have been futile for Attorney to have made such arguments").

Regardless, Applicant was not prejudiced by the joint trial with his co-defendant. A cautionary instruction as to multiple defendants is sufficient to protect each co-defendant from prejudice that might result from a joint trial. See State v. Holland, 261 S.C. 488, 494, 201 S.E.2d 118, 121 (1973). Here, Judge John gave a through instruction on the jury's duties regarding multiple defendants on three (3) separate occasions. (Trial Tr. p. 8, lines 8-5; p. 45, line 18-p. 46, line 4; p. 370, lines 5-12). These instructions negated any prejudice that may have resulted from the joint trial. Accordingly, Applicant has failed to prove prejudice from trial counsel's decision.

7. Overwhelming Evidence of Guilt.

Independent of the above analysis, the Court finds Applicant has not demonstrated he was prejudiced by the actions of trial counsel because there is overwhelming evidence of his guilt. Three witnesses testified Applicant and the co-defendant were in a car with the victim when he was shot; Applicant sat in the rear and the co-defendant sat in the passenger seat. One witness saw both men

with guns prior to entering the car. The witnesses also saw Applicant and the co-defendant run back to the car after hearing the shots. The forensic evidence overwhelmingly indicates the victim was shot with two different guns. The forensic evidence also indicates the victim was shot from the back and from the side. In light of this overwhelming evidence, the Court finds Applicant has not demonstrated trial counsel was ineffective in any way. See Harris v. State, 377 S.C. 66, 79, 659 S.E.2d 140, 147 (2008) (applicant cannot prove prejudice where there is overwhelming evidence of guilt).

C. 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, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes 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.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from his attorney's receipt 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, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, his attorney must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

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IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and

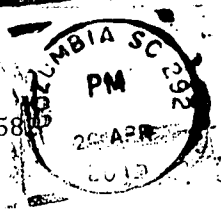
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 17th day of March, 2015.

THE HONORABLE G. THOMAS COOPER, JR.
Presiding Judge

Charleston, South Carolina

Fowler Law Firm
1019 Highway 17 South
North Myrtle Beach, SC 2958



The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
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