

AXELROD & ASSOCIATES, P.A.

Attorneys and Counselors at Law

"Success is all that matters"

Stuart Mark Axelrod†
W. Christopher Castro*
Tristan M. Shaffer
Emily M. Sordian‡
Caitlin M. Epley

4701 Oleander Drive
Myrtle Beach, SC 29577
Phone: (843) 916-9300
Fax: (843) 916-9311

†Certified Family Court Mediator
*Currently on Active Military Leave
‡Certified Guardian Ad Litem

April 22, 2015

RECEIVED

APR 27 2015

S.C. Supreme Court

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

RE: Emilio B. Craig v. State of South Carolina
Case No.: 2014-CP-16-320

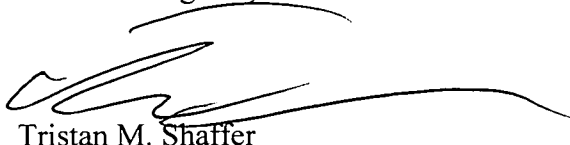
Dear Clerk of Court:

Enclosed please find an original and one copy of a Notice of Appeal, along with the Order we are appealing in the above referenced matter. If you would, please file the Notice of Appeal and return a clocked copy to me in the envelope provided.

Please be advised that I have been court appointed to represent Mr. Craig in this matter.

Thank you for your assistance in this matter. If you have any questions or concerns, please feel free to contact my office.

With kind regards,



Tristan M. Shaffer

TMS/dke
Encl.

cc: Joshua L Thomas, Esquire
Darlington County Clerk of Court
Loreen French
Emilio B. Craig

SUPREME COURT OF SOUTH CAROLINA

APPEAL FROM DARLINGTON COUNTY
In The Court of Common Pleas

Honorable Eugene C. Griffith, Jr.,
Common Pleas Judge of the Fourth Judicial Circuit

Case No.: 2014-CP-16-320

Emilio B. Craig #319662,

Petitioner,

v.


State of South Carolina,

Respondent.

NOTICE OF APPEAL

Petitioner appeals the Order of Dismissal of the Honorable Eugene C. Griffith, Jr. dated March 30, 2015, filed April 6, 2015 and received by Petitioner on April 17, 2015.

April 22, 2015



Tristan M. Shaffer, Esq.
AXELROD & ASSOCIATES P.A.
4701 Oleander Drive
Myrtle Beach, SC 29577
(843) 848-6708 Phone
(843) 848-6709 Fax
Tristan@Gotaxelrod.com
Attorney for Petitioner

Respondent's Attorney:
Joshua L. Thomas, Esquire
S.C. Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

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APR 27 2015

S.C. Supreme Court

SUPREME COURT OF SOUTH CAROLINA

APPEAL FROM DARLINGTON COUNTY
In The Court of Common Pleas

Honorable Eugene C. Griffith, Jr.,
Common Pleas Judge of the Fourth Judicial Circuit

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APR 27 2015

S.C. Supreme Court

Case No.: 2014-CP-16-320

Emilio B. Craig #319662,

Petitioner,

v.


State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

I, Deborah Evans, do hereby certify that I am an employee of Axelrod & Associates, P.A., in Myrtle Beach, South Carolina, and that I have this date served the Petitioner's Notice of Appeal upon the Respondent, by depositing a copy of same in the United States Mail, postage prepaid, addressed as follows:

Joshua L. Thomas, Esquire S.C. Office of the Attorney General Post Office Box 11549 Columbia, SC 29211	Emilio B. Craig #319662 Evans Correctional Institution 610 Highway 9 West Bennettsville, SC 29512
Darlington County Clerk of Court 1 Public Sq., Rm B4 Darlington, SC 29532-3213	Loreen French Appellate Defense 1330 Lady Street Columbia, SC 29201


Deborah Evans
Paralegal to Tristan M. Shaffer

April 22, 2015
Myrtle Beach, South Carolina

COPY

STATE OF SOUTH CAROLINA)
COUNTY OF DARLINGTON)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTH JUDICIAL CIRCUIT

Emilio B. Craig, #319662,)
)
Applicant,)

Case No. 2014-CP-16-320

v.)

ORDER OF DISMISSAL

State of South Carolina,)
)
Respondent.)

FILED
2015 APR -6 PM 3:08
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, SC

This matter comes before the Court by way of an Application for Post-Conviction Relief filed April 22, 2014. Respondent made a timely Return on or about November 19, 2014. The Court convened an evidentiary hearing into the matter on January 21, 2015, at the Darlington County Courthouse. Applicant was present at the hearing and represented by Tristan M. Shaffer, 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, William E. Grove, Esquire, also testified. The Court had before it a copy of the trial transcript, the records of the Darlington 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 Darlington County Clerk of Court. In July 2011, the Darlington County Grand Jury indicted Applicant for armed robbery (2011-GS-16-876), possession of a weapon during the commission of a violent crime (2011-GS-16-877), pointing and presenting a

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CLERK OF COURT/RMC
DARLINGTON COUNTY, SC

firearm (2011-GS-16-879), and petit larceny (2011-GS-16-880). William E. Grove, Esquire (“trial counsel”), represented Applicant. On August 29, 2011, Applicant proceeded to trial before the Honorable Howard P. King and a jury. On August 31, 2011, the jury found Applicant guilty of common law robbery and petit larceny. The jury found Applicant not guilty of possession of a weapon during the commission of a violent crime and pointing and presenting a firearm. Judge King sentenced Applicant to concurrent terms of fifteen years imprisonment for common law robbery and thirty days imprisonment for petit larceny.

Applicant filed a timely notice of appeal, and Wanda H. Carter, Esquire, of the Office of Appellate Defense, perfected the appeal with the filing of an Anders¹ brief. The South Carolina Court of Appeals dismissed Applicant’s appeal on June 19, 2013. ~~State v. Craig, Op. No. 2013-UP-255 (S.C. Ct. App. filed June 19, 2013).~~ The Court of Appeals returned the remittitur to the circuit court on July 9, 2013.

II. ALLEGATIONS

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

1. “Ineffective Assistance of Counsel”
 - a. “Mr. Grove argued with the Judge to add another charge and I was convicted of it!”
2. “Prejudicial Legal Error of Law/Abuse of Discretion”
 - a. “The Judge should have given a directed verdict motion.”
3. “Ineffective Assistance of Appellate Counsel”
 - a. “Mrs. Carter stated my appeal had no merit, when there is.”

At the evidentiary hearing, Applicant proceeded on only the allegation of ineffective assistance of trial counsel for requesting a charge on the lesser included offense of common law

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

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robbery where the facts only supported a charge of armed robbery.

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. 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

Trial counsel testified he had been practicing law two years when appointed to Applicant's case. He recalled having a sufficient number of meetings with Applicant to be prepared for trial. He recalled reviewing discovery and discussing Applicant's version of events during their meetings. Trial counsel testified his trial strategy was to argue the victim was lying about Applicant robbing him because he was actually disgruntled about Applicant not paying full price for some counterfeit shoes. He recalled having a lengthy charge conference with Judge King regarding his request to instruct the jury on the lesser-included offense of common law robbery. Trial counsel testified he discussed this strategy with Applicant at the time, and they decided it was advantageous to give the jury the option of convicting of the lesser-included offense. Trial counsel testified there was testimony Applicant had a gun when robbing the victim, but the police never recovered the gun. He testified the jury could believe Applicant forcibly took the shoes from the victim, but did not have a gun at the time.

Applicant recalled reviewing discovery with trial counsel and discussing his version of events. He testified he never discussed with trial counsel the possibility of submitting a lesser-included offense to the jury. He testified he would have wanted to pursue an all-or-nothing

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strategy if given the option. Applicant testified there was no evidence he was guilty of common law robbery. Instead, he maintained he purchased the shoes from the victim and the victim was unhappy about the price Applicant paid.

B. Ineffective Assistance of Trial Counsel

In this 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

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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.

The Court finds Applicant failed to meet his burden to prove trial counsel ineffective for requesting a charge on the lesser-included offense of common law robbery. Regarding this allegation, the Court finds trial counsel’s testimony credible and Applicant’s not credible. Common law robbery may be a lesser-included offense of armed robbery under the appropriate factual scenario. State v. Moore, 374 S.C. 468, 476, 649 S.E.2d 84, 88 (Ct. App. 2007) (citing State v. Scipio, 283 S.C. 124, 322 S.E.2d 15 (1984)). An instruction on common law robbery as a lesser included offense in appropriate where there is evidence the defendant took items “from the person or immediate presence of another by violence or intimidation.” State v. Rosemond, 356 S.C. 426, 430, 589 S.E.2d 757, 758-59 (2003) (citing State v. Hiott, 276 S.C. 72, 276 S.E.2d 163 (1981)). “When determining whether the robbery was committed with intimidation, the trial court should determine whether an ordinary, reasonable person in the victim’s position would feel a threat of bodily harm from the perpetrator’s acts.” Id. (citing United States v. Wagstaff, 865 F.2d 626 (4th Cir. 1989)).

Here, the record contains evidence to support the charge of common law robbery. The victim testified Applicant used a gun during the robbery. However, police never recovered a gun when Applicant was apprehended shortly after the robbery. The jury was free to believe the victim’s testimony the shoes were taken from him by force, but disbelieve his testimony a gun was used. See, e.g., Small v. Pioneer Mach., Inc., 329 S.C. 448, 465, 494 S.E.2d 835, 843 (Ct. App. 1997) (“[I]t is not unusual for a case to have contradictory evidence and inconsistent testimony from a witness. In a law case tried before a jury, it is the jury that must decide what part of the witness’s testimony it wants to believe and what part it wants to disbelieve.”).

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Furthermore, Applicant did not deny taking the shoes from the victim, he just denied using force² to do so. See State v. Jenkins, 228 S.C. 12, 15, 88 S.E.2d 770, 772 (1955) (“[T]he jury was at liberty to accept the statement of appellant that he killed the deceased and to reject, as being contrary to other facts established by the evidence, his version as to how it occurred[.]”). Thus, trial counsel’s arguments regarding the instruction on common-law robbery were reasonable in light of the facts adduced at trial. Cf. State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996) (where there is conflicting testimony about the use of a weapon when deciding to charge a lesser-included offense, the reviewing court is “not confined to the State’s version of the facts”). Furthermore, trial counsel testified he chose to request the common law robbery instruction to give the jury an alternative verdict if they disbelieved parts of the victim’s story.

Cf. Abney v. State, 408 S.C. 41, 47, 757 S.E.2d 544, 547 (Ct. App. 2014), cert. denied (Jan. 15, 2015) (acknowledging counsel should make strategic decisions regarding lesser-included offenses that are in client’s best interest). Accordingly, the Court finds trial counsel was not ineffective in requesting a jury instruction on the lesser included offense of common law robbery.

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.

² The Court notes the victim in this case was wheelchair-bound. Thus, viewing the “violence or intimidation” element of common law robbery from the perspective of a “reasonable person in the victim’s position,” Moore, 374 S.C. 468, 476, 649 S.E.2d 84, 88, the jury may have concluded the disparity in age, size, and health between Applicant and the victim constituted sufficient violence or intimidation to establish a robbery, even under Applicant’s version of facts.

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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.

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.

FILED
 2015 APR -6 PM 3:03
 SCOTT B. SUGGS
 CLERK OF COURT
 DARLINGTON COUNTY, S.C.

AND IT IS SO ORDERED this 30th day of March, 2015.

Markery, South Carolina

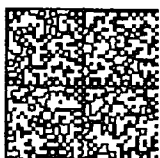
E. C. Griffith Jr.
 EUGENE C. GRIFFITH JR.
 Presiding Judge

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AXELROD

& ASSOCIATES
ATTORNEYS AT LAW

AKG1 Oleander Drive ♦ Myrtle Beach, SC 29577



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