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ATTORNEYS AT LAW

OF COUNSEL:
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Wednesday, April 22, 2015

VIA CERTIFIED MAIL
The Honorable Daniel Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: Claude Dunagin, #339745 vs. State of South Carolina
2012-DR-42-1873

Dear Mr. Shearouse:

Enclosed for filing are an original and a copy of a notice of appeal in the above-referenced case. I have been appointed to serve as attorney for the PCR applicant, Claude Dunagin, in this action. Also enclosed are the following:

1) Proof of service of the notice of appeal on the respondent.

2) A copy of the order which is to be challenged on appeal.

Insofar as this is an appeal from a Post-Conviction Relief case, I am not enclosing a filing fee, as I believe such fees are waived in these cases.

Best Regards,

Shawn M. Campbell, Esq.
Campbell & Shabel, LLC
175 Magnolia Street, Ste 201
Spartanburg, S.C. 29304
Telephone: 864-583-0001
FAX: 864-583-1199
Attorney for Appellant

cc: client
Ms. Suzanne H. White, Assistant Attorney General

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Circuit Court

The Honorable Roger L. Couch

Case No. 2012-CP-42-1873

State of South Carolina, Respondent

vs.

Claude Dunagin, SCDC#339745, Appellant

NOTICE OF APPEAL

Claude Dunagin, South Carolina Department of Corrections number 339745, hereby appeals the order of the Honorable Roger L. Couch, dated March 26, 2015 in Case Number 2012-CP-42-1873.

April 27, 2015

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Attorney for Applicant

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
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The Honorable Roger L. Couch

Case No. 2012-CP-42-1873

State of South Carolina, Respondent

vs.

Claude Dunagin, SCDC#339745, Appellant

PROOF OF SERVICE

I certified that I have served the Notice of Appeal by depositing a copy of it in the United States Mail, postage prepaid, on the State of South Carolina, addressed to its attorney of record, Suzanne H. White, Esq., SC Attorney General's Office, Post Office Box 11549, Columbia, SC 29211.

April 22, 2015

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Attorney for Applicant

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT
	)	2012-CP-42-1873
Claude Dunagin, #339745, Applicant, v. State of South Carolina, Respondent.	)	**ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed May 2, 2012. The Respondent made its Return on or about February 28, 2013. 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 Shawn M. Campbell, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. N. Douglas Brannon, 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 Clerk of Court for Spartanburg County. The Applicant was indicted by the Spartanburg County Grand Jury at the November 2008 term for second degree arson (08-GS-42-6184). He was represented by N. Douglas Brannon, Esquire. On March

8, 2010, the Applicant proceeded to trial after which a jury convicted him of the charge as indicted. He was sentenced on March 10, 2010, by the Honorable J. Derham Cole, to confinement for twenty-five (25) years, suspended upon service of sixteen (16) years to five (5) years of probation thereafter and restitution.

A timely Notice of Appeal and an Anders brief were filed on Applicant's behalf. The South Carolina Court of Appeals dismissed Applicant's appeal. State v. Dunagin, Op. No. 2011-UP-546 (S.C. Ct. App. filed December 6, 2011). The Remittitur was submitted on December 23, 2011.

ALLEGATIONS

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

1. Ineffective assistance of trial counsel, in that;
   a. Counsel failed to move, prior to jury selection, for dismissal based on lack of subject matter jurisdiction under S.C. Code Ann. § 17-19-90;
   b. Counsel failed to present evidence or testimony setting forth possible defense that structure was unfinished and thus did not constitute a dwelling house within the meaning of S.C. Code Ann. § 16-11-110(b);
      i. Counsel failed to object to indicted felony charge and argue that Applicant should have been charged under S.C. Code Ann. § 16-11-560, a misdemeanor.
   c. Counsel failed to adequately argue his motion for a directed verdict;
   d. Counsel failed to present exonerating evidence and testimony at trial;
      i. Counsel failed to subpoena and examine Applicant's requested witnesses whom he alleges would have proffered potentially exonerating testimony;
      ii. Counsel failed to move to compel appearance of witness with potentially exonerating testimony.
   e. Counsel, "admitted to [Applicant] that his representation was tantamount to ineffective assistance of counsel";

i. Admitted that he "had made mistakes and should have done a better job" and opined that the prosecution failed to satisfy its burden of proving every element of the charge.

f. Counsel failed to properly interview jurors during selection to uncover possible bias because of "close ties of friendship and family" between several jurors and police and fire rescue personnel, and failed to object to selection of such members.

g. Counsel failed to object to jury instructions.

2. The court erred in failing to grant directed verdict.

3. The court lacked subject matter jurisdiction to hear the case.

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. 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 that 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).

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." 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 arrested for arson after a home behind Applicant's property, which was partially completed, burned and was destroyed. Applicant testified that he retained Counsel in October 2008, and the trial was held in March 2010. Applicant testified that he met with Counsel only the one time to hire Counsel, although Applicant stated that he was on home detention while the charges were pending. Applicant also testified that he never met with Counsel's investigator, although he was aware that Counsel had an investigator working on his case.

Applicant testified that he only reviewed the discovery materials with Counsel and discussed the charges on the Sunday prior to trial. Applicant testified that he did not understand at the time of trial what the elements of the crime were or what the State needed to prove.

Applicant testified that Counsel did not explain that the charge required the structure to be a dwelling house until immediately prior to trial. Applicant testified that he believes he should have only been charged with a magistrate level offense because the building that burned down was not an inhabitable home at the time. Applicant stated that the house had not been inspected, so no one could live in the home at the time. Applicant acknowledged during cross-examination that the jury was provided with an option to find him guilty of the lesser-included offense of arson – 3rd degree, but still found him guilty of arson – 2nd degree.

Applicant testified that he provided names of various witnesses to Counsel, including Johnson, Foster, Wyatt, and Applicant's brother David. Applicant stated that he provided those witness names to Counsel via telephone call. Applicant acknowledged that Counsel subpoenaed each witness, but only called two as witnesses during trial. Applicant alleged that if Wyatt had testified, he would have been able to contradict other testimony in regards to whom actually set the fire at the home. Applicant also acknowledged that several witnesses testified against Applicant during the trial, including his former girlfriend, granddaughter and other family members. However, Applicant alleged that these witnesses all held a vendetta against Applicant because they each owed Applicant money and he was beginning the eviction process. Applicant acknowledged that Counsel did cross-examine each witness as to their bias and motivation for testifying.

Applicant stated that after the first couple of witnesses for the State, the State made an offer to allow Applicant to plead to arson – 3rd degree for three years. Applicant stated that he chose to not accept the plea at that time; however, Applicant attempted to plead guilty to the same offer later during trial, but the offer had been withdrawn by that time.

Applicant testified that Counsel did argue a motion for directed verdict, specifically

arguing that the structure was not a dwelling house because it was not able to be occupied at the time. However, Applicant stated that Counsel did not effectively make that argument. Applicant did acknowledge that Counsel also renewed the directed verdict motion at the end of trial. Applicant testified that Counsel never filed a motion for reconsideration and later explained to Applicant that Counsel was unprepared and ineffective.

Counsel testified that at the time of trial, he had practiced law for approximately fifteen years, with a substantial amount of his practice spent practicing criminal law. Counsel testified that he began representing the Applicant in October 2008. Counsel testified that he met with Applicant several times and reviewed the voluminous discovery materials with Applicant. Counsel testified that he became close with the Applicant's family and associates throughout the representation.

During their meetings, Counsel testified that he and the Applicant discussed Applicant's family's motives for testifying against Applicant, content of witness statements, and relationships of Applicant and various witnesses. Counsel testified that he and Applicant discussed the Applicant's connection to the property, as well as those he rented property to and the status of those rentals. Counsel testified that issues of a new girlfriend, possible eviction, allegations of manufacturing methamphetamine, and other issues were possible motives for the witnesses to testify against the Applicant. Counsel testified that he attempted to attack the ex-girlfriend's credibility because she testified that Applicant had confessed to burning down the house to her.

Counsel testified that he hired an investigator, Pete Heist, who interviewed all potential witnesses. Counsel acknowledged that he had subpoenaed the witnesses named by Applicant, but did not call them as witnesses because Counsel did not believe they would help the defense.

However, Counsel testified that he would have most certainly called them as witnesses if he believed their testimony would be helpful.

Counsel testified that he researched case law regarding the definition of a dwelling and prepared to argue that during his directed verdict motion. Counsel testified that the trial court ruled that because the structure was "intended for dwelling," that it qualified under the arson – 2nd degree charge.

Counsel testified that he did not need any additional time to prepare for trial. Counsel testified that he may have advised the Applicant to file a post-conviction relief application because Counsel felt the sentence was too harsh, but was confident that he did not tell Applicant that he was ineffective. Counsel testified that he could have filed a motion for reconsideration based upon the fact that Counsel felt the sentencing was too harsh. However, Counsel acknowledged that he has never known Judge Cole to grant a motion for reconsideration and there would have been a very small likelihood that a motion for reconsideration would have been granted.

Counsel testified that he did talk with Applicant extensively about the three year plea offer; however, by the time the Applicant was ready to accept the offer, the Solicitor stated that they had revoked the offer. At that time, the offer had been made to the Applicant twice and rejected by Applicant. Counsel testified that the discussions with the State had never progressed to discussing whether or not the three year offer was for a negotiated sentence or recommended sentence.

This Court finds that the Applicant's allegations that Counsel did not conduct an adequate pre-trial investigation or prepare enough for trial are without merit. The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle,

609 F.2d 756, 759 (5th Cir. 1980). To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (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).

When claims of ineffective assistance of counsel are based on lack of preparation time, an Applicant challenging his conviction must also show specific prejudice resulting from counsel's alleged lack of time to prepare. United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039 (1984); U. S. v. LaRouche, 896 F.2d 815 (4th Cir. 1990). This Court finds Counsel's testimony regarding the meetings with Applicant, discussions regarding the case, review of discovery materials, and preparation and research for trial to be most credible. Counsel properly researched the statutes and case law pertaining to the charge that Applicant faced in preparation for trial and for the directed verdict motion.

The Applicant failed to point to any specific matters Counsel failed to discover, or any defenses that could have been pursued had Counsel been more fully prepared or had additional time prior to the case being called to trial. This Court notes that Counsel has years of experience representing clients on similar charges and remains updated on case law through research.

Further, although the Applicant alleges that Counsel was ineffective for failing to challenge the subject matter jurisdiction of the court prior to the jury selection, this Court notes that Applicant has a misapprehension of the law regarding indictments and subject matter jurisdiction. Although it is true that a challenge to the indictment on the ground of insufficiency must be made before the jury is sworn as provided by § 17–19–90, the indictment itself is simply

a notice document. State v. Gentry, 363 S.C. 93, 102-03, 610 S.E.2d 494, 500 (2005). If an objection is timely made, the circuit court judges the sufficiency of the indictment by determining whether "(1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged." Id.

A circuit court has subject matter jurisdiction to convict a defendant of an offense if there is an indictment that sufficiently states the offense, the defendant waives presentment, or the offense is a lesser-included offense of the crime charged in the indictment. State v. Wilkes, 353 S.C. 462, 464-465, 578 S.E.2d 717, 719 (2003), *citing* Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001). The Applicant failed to meet his burden of proof of establishing that Counsel was deficient for either objecting to the sufficiency of the indictment or objecting to the trial court's lack of subject matter jurisdiction. This Court finds no deficiency on the face of the indictment and finds that it was sufficient to provide notice to the Applicant of the charge he faced. Counsel argued on Applicant's behalf during the directed verdict motion that the structure that burned was not inhabitable at the time and the verdict should be directed in Applicant's favor. Counsel presented case law and arguments to the court, but the motion was denied. The Applicant failed to show any other argument Counsel could have presented to have been successful. Applicant also failed to demonstrate any prejudice that may have resulted from Counsel's alleged inadequate preparation or lack of investigation. Accordingly, this allegation is dismissed.

This Court also finds the Applicant failed to meet his burden of proof regarding the allegation that Counsel was ineffective for failing to call particular witnesses for the defense. Again, Counsel's testimony as to this matter was most credible. Prejudice from trial counsel's

failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An 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. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Not only did Counsel testify that he had an investigator independently interview each of the potential witnesses, but he did subpoena witnesses for the trial. However, as Counsel testified, he made a strategic decision to not call certain witnesses based upon the fact that their testimony would not be helpful for the defense. The Applicant failed to present any witness or testimony that could have been presented at trial to establish the requisite prejudice. Therefore, this claim is denied and dismissed.

In regards to the Applicant's allegation that Counsel was deficient in his cross-examination of the State's witnesses, this Court finds that the Applicant has failed to meet his burden of proof. The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995). The Applicant did not proffer any questions counsel allegedly failed to ask, and did not present any testimony showing the witnesses' answers at trial would have been different.

This Court finds that Counsel effectively cross-examined the State's witnesses, in particular, those that might have a bias or motive for testifying against the Applicant. Accordingly, the Applicant has not shown that a different approach to cross-examination would have been beneficial to the defense. Therefore, this claim is dismissed.

In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and the "defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. This Court finds that the Applicant has failed to meet his burden of proof as to the claims that Counsel was ineffective. He offered no testimony or evidence to support his claim that Counsel's decision to not make an opening or closing statement was anything less than sound trial strategy. Furthermore, Applicant failed to demonstrate that had Counsel made an opening or closing statement, the outcome of Applicant's trial would have been any different. Therefore this claim is denied and dismissed.

Although raised in the application, Applicant did not address the allegation that Counsel failed to properly interview jurors during selection to uncover possible bias and failed to object to selection of such members at his hearing. Therefore, this Court finds that the Applicant voluntarily abandoned this claim.

Trial Court Error

This Court finds that any claim of trial court error raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised this issue at trial or on appeal. His failure to do so has waived this allegation as a ground for relief.

Lack of Subject Matter Jurisdiction

This Court finds that the allegation of a lack of subject matter jurisdiction lacks merit and should be denied. A circuit court has subject matter jurisdiction to convict a defendant of an offense if there is an indictment that sufficiently states the offense, the defendant waives presentment, or the offense is a lesser-included offense of the crime charged in the indictment. State v. Wilkes, 353 S.C. 462, 464-465, 578 S.E.2d 717, 719 (2003), *citing* Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001). In this case, the Applicant was indicted by the Spartanburg County grand jury. That indictment was true-billed and signed by the foreman of the grand jury. The said indictment contains all the necessary elements of the offense, and further cites the applicable statute. A presumption of regularity attaches to all proceedings in the courts of this State, and it is incumbent upon one who challenges a proceeding to prove his claims. *See, e.g.*, Tate v. State, 345 S.C. 577, 549 S.E.2d 601 (2001); Pringle v. State, 287 S.C. 409, 339 S.E.2d 127 (1986). The Applicant here cannot show any irregularity, because the indictments in question are sufficient on their face. Therefore, this claim is denied and dismissed.

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Summary

This Court finds in regards to the allegations of ineffective assistance of counsel, Counsel's testimony was more credible than the testimony of the Applicant. This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in his representation, and that Counsel's conduct does not fall below the objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that 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 Counsel's performance. This Court concludes the Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier *supra*. Therefore, this allegation is denied.

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 24th **day of** March 2015, ~~2014.~~ RLC

ROGER L. COUCH
Presiding Judge

FILED
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