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SC SUPREME COURT

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May 21, 2015

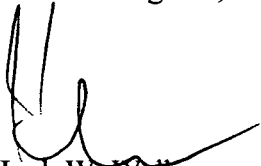
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

In RE: Dametriose Moss #326883 vs. State of South Carolina
Case #: 2013-CP-37-0207

Dear Sir/Madam:

Please find enclosed herewith the original and one (1) copy of the Appellant's Notice of Appeal in connection with the foregoing matter which I ask that you file for record, returning the clocked copy to my office. I also enclose a copy of the Order of Dismissal and the original Proof of Service on Walt Whitmire, Office of the Attorney General. Please use the enclosed self-addressed envelope to return the clocked copy to my office.

With kind regards,



Hugh W. Welborn

HWW/sba

cc: Office of the Appellate Defense
cc: Office of the Attorney General

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS
HONORABLE EDGAR W. DICKSON

2013-CP-37-207

DAMETRIOSE MOSS, #326883

APPELLANT,

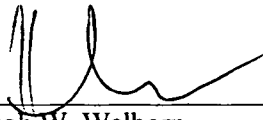
vs

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Dametriose Moss, #326883 appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Edgar W. Dickson, Circuit Court Judge on July 28, 2014, and Order of Dismissal issued on April 30, 2015, and filed on May 19, 2015. The Appellant received Order of Dismissal on May 21, 2015.



Hugh W. Welborn
Attorney for the Appellant
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Attorney for Dametriose Moss, #326883

Other Counsel of Record:
Walt Whitmire
Office of Attorney General State of SC
Post Office Box 11549
Columbia, South Carolina 29211

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS

HONORABLE EDGAR W. DICKSON

2013-CP-37-207

DAMETRIOSE MOSS, #326883

APPELLANT,

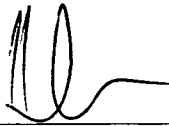
vs

STATE OF SOUTH CAROLINA,

RESPONDENT.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail postage prepaid on May 21, 2015, addressed to its attorney of record Walt Whitmire, Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549



Hugh W. Welborn
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(864) 226-5787
Attorney for Dametriose Moss, #326883

Anderson, South Carolina

21 May 2015

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SC SUPREME COURT

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)
Dametriose Moss,)
S.C.D.C. No. 326883,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

C.A. No. 2013-CP-37-207

ORDER OF DISMISSAL

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2015 MAY 19 PM 1 08

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed March 14, 2013. Respondent subsequently filed its responsive pleadings. An evidentiary hearing into the matter was convened on July 28, 2014 at the Oconee County Courthouse. Applicant was present and was represented by Hugh W. Welborn, Esq. Respondent was represented by Walt Whitmire, Esq., of the Office of the Attorney General.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Oconee County. The Applicant was indicted at the September 2011 term of the Court of General Sessions for Oconee County for murder and possession of a weapon during a violent crime (2011-GS-37-764), two counts of discharging a firearm into a dwelling (2011-GS-37-765), and attempted murder (2012-GS-37-401). The Applicant was represented by Scott D. Robinson, Esq. On July 25, 2012, Applicant proceeded to trial. He was found guilty of both charges of discharging a firearm into a dwelling, and not guilty of the other charges. The Honorable R. Lawton McIntosh sentenced Applicant to two consecutive sentences of ten (10) years imprisonment, the second of which was to be suspended

upon service of five (5) years and five (5) years probation. As a consequence of his convictions, Applicant's probation was revoked in full for prior offenses (2009-GS-04-2141, 2010-GS-04-1410, -1412, and 2007-GS-04-3646). Applicant did not appeal his sentences or convictions.

At the PCR hearing, Applicant proceeded on the limited allegations of ineffective assistance of counsel in his assertion that he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:
 - a. Failure to purportedly have "Applicant's best interest at heart;"
 - b. Failure to object and move to have Applicant's charges dismissed as a result of a purported "inconsistent verdict"
 - c. Failure to file a notice of appeal.
 - d. Failure to move to quash the indictment that was purportedly illegally true billed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject's convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a general matter, this Court grants Respondent's motion for summary judgment on the Application. Applicant presented his case-in-chief at the PCR hearing. Subsequently, Respondent moved for summary judgment on all of Applicant's allegations of ineffective assistance of counsel. This Court grants summary judgment as a matter of law on Applicant's

allegations concerning the “inconsistent verdicts” and the “issuance of the indictments.” The allegations concerning counsel’s “not having Applicant’s best interest at heart” was fatally vague, conclusory, and facially unavailing. Therefore, this Court is compelled to summarily dismiss the allegation. Because Applicant willfully abandoned his allegation of ineffective assistance for failure to file a notice of appeal, there were no issues of material fact for Respondent to dispute. Regardless, this Court has reviewed Applicant’s trial and finds that counsel received a favorable disposition and excellent assistance of counsel as related to the issues before this Court.

APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney’s performance by its "reasonableness

under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, *supra*. 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.

"All rules and statutes applicable in civil proceedings are available to the parties. The court may receive proof by affidavits, depositions, oral testimony or other evidence and may order the applicant brought before it for hearing." S.C. Code Ann. § 17-27-80. Summary judgment is proper where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Rule 56(c), SCRPC; Tupper v. Dorchester Cnty., 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). "Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below." Grier v. Amisub of S.C., Inc., 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012) (quoting CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)).

A.

This Court grants Respondent's motion to summarily dismiss Applicant's allegation that counsel "didn't have his best interests at heart." Ineffective assistance claims are not fungible but instead are highly fact-dependent. Hemmerle v. Schriro, 495 F.3d 1069, 1075 (9th Cir. 2007). Conclusory allegations not supported by specifics do not warrant relief. Jones v. Gomez, 66 F.3d 199, 204 (9th Cir. 1995). This Court finds that Applicant has entirely failed to make a sufficient prima facie showing on Strickland's prejudice prong here. Where petitioner claimed ineffective counsel for failure to object to prosecution questioning, the court found the allegation conclusory where no specific instance was identified and no details or particulars were provided. George v. Smith, 586 F.3d 479, 484- 86 (7th Cir. 2009). Thus, this Court finds Applicant has failed to meet

his burden where the allegation is solely reliant upon his vague and cryptic testimony. See Jones v. Gomez, 66 F.3d 199, 204 (9th Cir. 1995). Therefore, because Applicant produced no credible evidence or testimony to establish a prima facie case of ineffective assistance on the matter during his case-in-chief, this allegation is summarily denied and dismissed with prejudice.

B.

This Court grants Respondent's motion for summary judgment on Applicant's allegation that counsel was ineffective for failing to quash a purported illegal indictment. Applicant supported the allegation through his testimony that the State violated the applicable statute in true billing him during a term of common pleas. "[T]he United States Supreme Court, in United States v. Cotton, 535 U.S. 625 (2002), held that a defective indictment does not deprive a court of jurisdiction." State v. Gentry, 363 S.C. 93, 99, 610 S.E.2d 494, 498 (2005). "The circuit court should judge 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. at 102-03, 610- S.E.2d 494 at 500 (internal citations omitted). This Court agrees with Respondent that Applicant's assertions here are frivolous as a matter of law. This Court further finds that Respondent's testimony showed that he was properly noticed and was aware of the State's intent to try him on the charged offenses. He has produced no evidence or testimony to the contrary. Therefore, because Applicant produced no credible evidence or testimony to establish a prima facie case of ineffective assistance on the matter during his case-in-chief, this allegation is summarily denied and dismissed with prejudice.

C.

This Court grants Respondent's motion for summary judgment on Applicant's allegation that counsel was ineffective for failing to move to have his verdicts set aside and charges dismissed because the verdicts were inconsistent. This Court finds that Applicant's allegation is defective as a matter of law. Our supreme court has abolished the rule against inconsistent verdicts in this state. State v. Alexander, 303 S.C. 377, 383, 401 S.E.2d 146, 150 (1991). "Where there is no evidence to support a conviction, an order granting a new trial should be upheld." State v. Smith, 316 S.C. 53, 55, 447 S.E.2d 175, 176 (1993). "However, where there is competent evidence to sustain the jury's verdict, the judge may not substitute his judgment for that of the jury." State v. Prince, 316 S.C. 57, 63, 447 S.E.2d 177, 181 (1993). Therefore, this allegation is summarily denied and dismissed with prejudice as a matter of law.

D.

Except as discussed above, this Court finds that the Applicant affirmatively abandoned the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

CONCLUSION

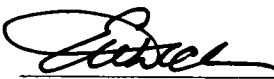
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

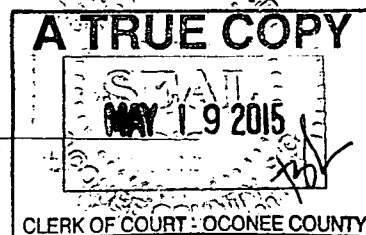
This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCPP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent

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


EDGAR W. DICKSON
Presiding Judge
Tenth Judicial Circuit



Orangelus, South Carolina

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2015 MAY 19 PM 1 08

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May 21, 2015

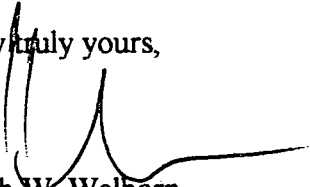
South Carolina Office of Appellate Defense
P. O. Box 11589
Columbia, South Carolina 29211-1589

In RE: Dametriose Moss #326883 vs. State of South Carolina
Case #: 2013-CP-37-0207

Dear Sir/Madam:

In connection with the foregoing matter, please be advised that I was the Court Appointed Attorney and enclose herewith a copy of my appointment. I also enclose copies of all documents you requested for filing a copy of the Appellant's Notice of Appeal in this matter together with a copy of the Order and Proof of Service. I ask that your office assume representation of this indigent Applicant.

Very truly yours,


Hugh W. Welborn

HWW/sba
Enclosures

cc: Court of Appeals
Office of Attorney General

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