

THE BOOZER LAW FIRM, LLC

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July 31, 2015

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED

AUG 03 2015

The Honorable Rhonda McElveen
Clerk, Barnwell County
P.O. Box 723
Barnwell, SC 29812

S.C. SUPREME COURT

**RE: Kevin Brown, #352266, v. State of South Carolina
2014-CP-06-139**

Dear Mr. Shearouse and Ms. McElveen:

Enclosed for filing is a Notice of Appeal in the above-referenced case. Also enclosed are the following:

- (1) Proof of Service of the Notice of Appeal;
- (2) A copy of the Order which is to be challenged on appeal; and
- (3) Prior Order of Appointment of Counsel.

As I was appointed to represent Mr. Brown in his PCR proceeding, I anticipate that the Office of Appellate Defense will represent Mr. Brown in this appeal.

Yours very truly,



Lance S. Boozer

cc: Daniel Gourley, AAG
Office of Appellate Defense
Kevin Brown, #352266

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

The Honorable Tanya A. Gee, Circuit Court Judge

RECEIVED

AUG 03 2015

S.C. SUPREME COURT

Case No. 2014-CP-06-139

Kevin Brown, #352266,Petitioner,

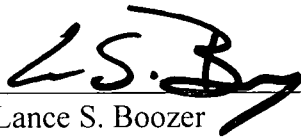
v.

State of South Carolina,.....Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable Tanya A. Gee's Order dated June 30, 2015, denying post-conviction relief to the Petitioner. The Order was received by undersigned counsel on July 11, 2015. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,


Lance S. Boozer
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Columbia, SC 29201
Tele: 803-608-5543

July 31, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

The Honorable Tanya A. Gee, Circuit Court Judge

Case No. 2014-CP-06-139

RECEIVED

AUG 03 2015

S.C. SUPREME COURT

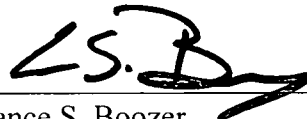
Kevin Brown, #352266,Petitioner,

v.

State of South Carolina,.....Respondent.

PROOF OF SERVICE

I, Lance S. Boozer, appointed attorney for Petitioner, certify that I have today served within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to Assistant Attorney General Daniel Gourley, P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 31st day of July, 2015.



Lance S. Boozer
The Boozer Law Firm, LLC
807 Gervais Street, Suite 203
Columbia, SC 29201
Tele: 803-608-5543

mic

STATE OF SOUTH CAROLINA)
 COUNTY OF BARNWELL)
 Kevin Brown, #352266,)
 Applicant,)
 v.)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE SECOND JUDICIAL CIRCUIT

2014-CP-06-139

ORDER OF DISMISSAL

FILED FOR RECORD
 2015 JUL -6 PM 2:09
 HONORABLE DANIEL GOURLEY
 CLERK OF COURT
 BARNWELL COUNTY, S.C.

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on April 4, 2014. Respondent filed a return on August 22, 2014. An evidentiary hearing was convened on May 18, 2015, at the Aiken County Courthouse. Applicant was present at the hearing and was represented by Lance Boozer, Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Barnwell County Clerk of Court. The Applicant was true bill indicted at the January 2012 term of the Barnwell County Grand Jury for Armed Robbery (2012-GS-06-00027); Kidnapping (2012-GS-06-00028); Conspiracy (2012-GS-06-00029); and Possession of a Weapon During a Violent Crime (2012-GS-06-00030). Charlie Johnson, Jr., Esquire, represented Applicant. Applicant proceeded to a jury trial before the Honorable Clifton Newman. Applicant was found guilty, and Judge Newman sentenced Applicant to a fifteen-year term of imprisonment for Armed Robbery, ten-year term of imprisonment for Kidnapping, five-year term of imprisonment for Criminal

Conspiracy, and five-year term of imprisonment for Possession of a Weapon During Violent Crime. All sentences were to run concurrently.

A timely Notice of Appeal was filed, and an Anders¹ brief was submitted on Applicant's behalf. The South Carolina Court of Appeals dismissed the Applicant's appeal. State v. Kevin Brown, Op. No. 2014-UP-037 (Ct. App. filed January 29, 2014). The Remittitur was issued on February 24, 2014.

ALLEGATIONS

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

1. Ineffective Assistance of Counsel
 - a. Failing to make a motion for a mistrial after Brenda O'Berry gave damaging and highly prejudicial testimony...counsel was to motion for a mistrial.
 - b. Counsel did not effectively impeach state witnesses regarding his deal with the State.
 - c. Counsel failed to contact Alibi Witnesses
 - d. Counsel gave erroneous advice when the Court asked if he wanted a mistrial.
2. Ineffective Assistance of Appellate Counsel
 - a. "Appellate counsel was ineffective for not raising that Brenda O'Berry testimony granted a mistrial."

During the evidentiary hearing, Applicant withdrew the allegations of failure to investigate alibi witnesses and ineffective assistance of appellate counsel.

SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. The State presented testimony from Charlie Johnson, Esquire (hereinafter "Trial Counsel"). This Court also had before it a copy of the trial transcript, the Aiken County Clerk of Court records, Applicant's

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

South Carolina Department of Correction records, appellate records, the PCR application, and return.

During the evidentiary hearing, Applicant testified that he received ineffective assistance of counsel due to Trial Counsel's failure to move for a mistrial, failure to impeach his co-defendant Jermaine Priester, and giving erroneous advice. Applicant stated that he wanted to withdraw his claim of ineffective assistance of counsel for failing to investigate into his alibi witnesses and his claim of ineffective assistance of appellate counsel.

Applicant stated he hired Trial Counsel in August 2011 and met with Trial Counsel approximately three times before his trial.

According to Applicant, Trial Counsel should have impeached the co-defendant Jermaine Priester about his alleged plea deal. Applicant assumed Priester must have had a plea deal because Priester received a time served sentence. However, Applicant conceded that counsel for his other co-defendant had questioned Priester about a possible plea deal.

Applicant also claimed that Trial Counsel gave erroneous advice when he advised Applicant to turn down the trial judge's offer of a mistrial. The basis for the mistrial was that one of the witnesses, Jamel Riley, said during direct examination that he heard "Juicy" jumped over the counter. Previously, the jury had been informed there "Juicy" was Applicant's street name. Applicant's Counsel objected to Riley's testimony, and the trial court asked if he wanted a mistrial due to Riley's improper statement. Trial Counsel advised Applicant to turn down the mistrial because they had a good jury and judge. Applicant followed this advice.

Applicant stated was also ineffective for failing to request a mistrial after Brenda O'Berry testified. Applicant stated Brenda O'Berry knew Applicant from school, and the State was attempting to use Brenda O'Berry as a way to identify Applicant in the surveillance video.

However, Trial Counsel continuously objected when the State attempted to use Brenda O'Berry as a means of identifying Applicant in the video, and nevertheless, O'Berry never identified Applicant in the video. Applicant claims Trial Counsel should have requested a curative instruction or a mistrial because of the State's questioning.

Following Applicant's testimony, Trial Counsel was called to testify by the State. Trial Counsel stated that he had been practicing law for nineteen years and was retained to represent Applicant. Trial Counsel stated he met with Applicant approximately three times prior to his trial. Trial Counsel stated he filed Brady and Rule 5 motions, and he reviewed the discovery material with Applicant prior to trial.

Trial Counsel admitted that the strongest evidence against Applicant was Priester's testimony, but there was no evidence of a plea deal offered to Priester in exchange for his testimony. Trial Counsel stated he could not cross-examine Priester on something that simply did not exist.

Trial Counsel stated he objected to Jamel Riley testifying that "Juicy" jumped over the counter. Trial Counsel stated he won the objection and successfully kept the information from being repeated in front of the jury. Trial Counsel stated the name "Juicy" was never mentioned again. Trial Counsel stated that he told Applicant it was his choice to either accept a mistrial or proceed with the trial. Trial Counsel advised Applicant that a mistrial simply meant that he would be tried separately at a different point in time. Trial Counsel stated that it was his opinion that they had a good judge and jury, so he advised against a mistrial. Trial Counsel stated that he did not request a curative instruction because he did not want to bring any additional attention to the name "Juicy."

Trial Counsel stated that the State attempted to use Brenda O'Berry as a way to identify Applicant in the surveillance video. Trial Counsel immediately objected and was able to keep that identification out. Trial Counsel stated that he did not request a mistrial because his objection was sustained.

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 at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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, (1984); Butler, 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, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. 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.

Counsel was not deficient for failing to impeach Jermaine Priester.

Applicant argues that counsel was ineffective for failing to impeach Jermaine Priester about his potential plea deal. I disagree. The transcript reflects that counsel for Applicant's co-defendant asked Priester about any plea deal he had received. Priester denied ever being offered a deal for testifying. (Tr. t. p. 219 lines 13-25). Furthermore, Trial Counsel credibly testified that there was no evidence of any plea deal given to Priester in exchange for his testimony. Accordingly, Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test – that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms.

Counsel was not ineffective for failing to request a mistrial regarding Brenda O'Berry's testimony.

Applicant next argues that counsel was ineffective for failing to request a mistrial due to Brenda O'Berry's testimony. I disagree. Trial Counsel continuously objected to the State's attempt to have Brenda O'Berry to identify Applicant in the surveillance video, and these objections were sustained. (Tr t. p. 183 line 11—p. 184 line 19; p. 185 line 3-8; p. 186 line 4—p. 193 line 19). Because O'Berry never identified Applicant to the jury, Trial Counsel had no basis for requesting a mistrial.

Accordingly, Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test – that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms.

Trial Counsel was not ineffective for advising Applicant to refuse the grant of a mistrial.

Finally Applicant argues that Trial Counsel was ineffective when he advised Applicant to turn down the trial judge's offer of a mistrial. I disagree. The transcript reveals that the trial court conducted a thorough colloquy regarding Applicant's rights to request a mistrial or severance. (Tr. t. p. 155 line 6—p. 156 line 19). Furthermore, Trial Counsel credibly testified that he advised Applicant that it was Applicant's decision to accept or refuse the mistrial.

Furthermore, Trial Counsel stated that it was their trial strategy to continue with the trial because it was their belief that they had a good judge and jury. Green v. State, 351 S.C. 184, 193, 509 S.E.2d. 318, 323 (2012). I find Trial Counsel's testimony was credible and the trial strategy was valid. Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel). Accordingly, Trial Counsel's advice was not deficient.

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.

[signature to follow]

CONCLUSION

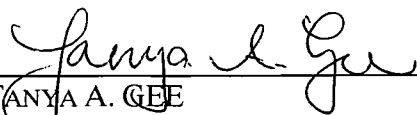
I find that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of appeal within thirty 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 post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

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


TANYA A. GEE
Presiding Judge
Second Judicial Circuit

Columbia, South Carolina

STATE OF SOUTH CAROLINA)
 COUNTY OF BARNWELL)
 Kevin C. Brown,)
 Plaintiff(s),)
 -vs-)
 South Carolina State of,)
 Defendant(s).)

IN THE COURT OF COMMON PLEAS
 Second JUDICIAL CIRCUIT
 CASE NO.: 2014CP0600139
 APPOINTMENT OF COUNSEL OR GAL
 (Select one.)

ORDER
 AMENDED ORDER

TYPE OF CASE/PROCEEDING: (Check one.)

- Post-Conviction Relief (PCR)/habeas case Adoption Juvenile
 SVP case Custody and/or Visitation Abuse and Neglect
 Minor Name Change Other: Post Convict Rel 500

It appears Kevin C. Brown, who is a litigant in this case, is entitled to court-appointed counsel or a guardian ad litem.

It further appears that: (Select only one.)

- counsel/guardian ad litem has not yet been appointed by the court; therefore, an appointment for counsel/guardian ad litem is necessary.
 counsel or a guardian ad litem was previously appointed by the court but has indicated either a possible conflict of interest, an entitlement to exemption, or other good cause warranting the appointment of new counsel or guardian ad litem based on:
 counsel was previously appointed by the court but has not indicated that the litigant has retained private counsel and is no longer entitled to appointed counsel.
 court appointed counsel has obtained , Esquire as substitute counsel pursuant to Rule 608(h)(2); provided, however, only the member who originally received the appointment and who sought substitute counsel shall receive credit.
 Other: .

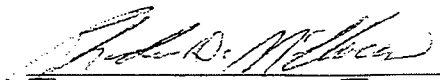
Therefore, it is ordered that Lance S. Boozer hereby is appointed as (Select one.)

counsel lead counsel (if capital PCR case) guardian ad litem
 for the above-named person. Any counsel or GAL previously appointed is/are hereby relieved.

(If Death Penalty PCR Case) It is further ordered that , Esquire, is hereby appointed as second counsel in this capital PCR case.

The clerk of court is directed to forward a copy of this order to all persons entitled to notice.

IT IS SO ORDERED
 May 13, 2014


 Circuit Judge Clerk of Court

Plaintiff Attorney:

Lance S. Boozer	
807 Gervais St., Suite 203	
Columbia, SC 29201	

Defendant Attorney:

Daniel Gourley	
PO Box 11549	
Columbia, SC 29211-1549	

NOTICE: SC Supreme Court Order of September 29, 2006, requires appointed counsel entitled to payment from the Office of Indigent Defense (OID) to register the case online with OID within fifteen (15) days of this appointment at www.sccid.sc.gov, and further directs that reimbursement vouchers be submitted directly to SCCID and not to the trial judge or clerk of court. See SCCID website for further details.

CLERK OF COURT
 BARNWELL COUNTY, SC
 MAY 14 AM 10:19
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