



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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Robert M. Dudek, Chief Appellate Defender
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March 13, 2012

Ms. Stacy L. Sheppard
Circuit Court Reporter
100 Lunsford Lane
Lexington, SC 29072

Dear Ms. Sheppard:

Please provide us with the following transcript:

Gene W. Hall v. State of South Carolina Case #: 10-CP-32-03685

County: Lexington Date of Trial: August 31, 2011

Presiding Judge: William P. Keesley

To ensure prompt payment, please sign and complete the enclosed CID FORM 3500 and include the original criminal case number (Indictment number) where the space is provided.

Please number the lines on the paper from 1-25, and include any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments.

If you are aware of any co-defendants or if the Attorney General's Office has already requested a transcript, please let us know.

Sincerely,


Lorlene French
Legal Services Coordinator

cc: S.C. Supreme Court
Attorney General's Office

RECEIVED

MAR 13 2012

S.C. Supreme Court

ROBERT CLELAND FITZSIMONS

Attorney At Law
1001 Beltline Boulevard
Columbia, South Carolina 29205
Phone (803) 738-0200 Fax (803) 787-4881

February 13, 2012

Hon. Daniel E. Shearouse
Clerk of the Supreme Court
Attn: Ms Janet Johnson
P.O. Box 12456
Columbia, SC 29211-2546

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FEB 13 2012

S.C. Supreme Court

BY HAND

Case Number 2010-CP-32-3685

Gene W. Hall, #338904, Petitioner Vs. State of South Carolina, Respondent

Dear Ms Johnson:

Thank you for your telephone calls. Enclosed please find for filing a copy of Judge Keesley's order in the above -captioned case.

Yours,

A handwritten signature in black ink, appearing to read 'Robert C FitzSimons', followed by a long horizontal line extending to the right.

Robert C FitzSimons
Attorney for Applicant Gene W. Hall

ORIGINAL

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STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)
)
)
)
Gene W. Hall, #338904,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
)
_____)

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

2010-CP-32-3685

ORDER OF DISMISSAL

FPB

2012 JAN 12 PM 12:38

FILED

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed August 30, 2010. Respondent made its Return on December 9, 2010. An evidentiary hearing into the matter was convened on August 31, 2011 at the Lexington County Courthouse. The Applicant was present at the hearing and was represented by Robert C. FitzSimons, Esquire. The Respondent was represented by Kaelon E. May of the South Carolina Attorney General's Office.

WJPC
#1

At the hearing, the Applicant testified on his own behalf. The State offered the testimony of Alex Postic, Esquire (Mr. Postic), Applicant's plea counsel. This Court also had before it the records of the Lexington County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript.

I. PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. The Applicant was indicted at the May 2009 term of the Lexington County Grand Jury for Criminal Conspiracy (2009-GS-32-1262), and Armed Robbery (2009-GS-32-1263). He was represented by Alex Thomas

Postic, Esquire. On January 14, 2010, the Applicant entered an Alford Plea to criminal conspiracy and attempted armed robbery. He was sentenced by the Honorable R. Farrell Cothran to confinement for five (5) years on the conspiracy charge, and a concurrent period of seven (7) years on the attempted armed robbery charge. The Applicant did not appeal his guilty plea or sentence.

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

1. Ineffective assistance of counsel;
 - a. "Was misled by my attorney" (regarding right to appeal).
 - b. "Attorney withheld evidence and new evidence."

At the PCR hearing, Applicant amended his Application to include the following allegations:

- c. Failure to investigate alibi witnesses
- d. Advising Applicant that a jury in Lexington would be racially biased

2. Involuntary Guilty Plea

**II. SUMMARY OF TESTIMONY AND EVIDENCE PRESENTED AT THE PCR
EVIDENTIARY HEARING**

Mr. Postic's Testimony

At the PCR hearing counsel testified that he represented the Applicant and met with him more than five (5) times prior to the Applicant's plea. Counsel testified that he was able to secure a bond with special circumstances (GPS bracelet) for the Applicant on April 2, 2009, and that the plea hearing was on January 14, 2010. Counsel testified that he filed a discovery motion and received the discovery materials. Counsel testified that the discovery materials included a video, incident reports, witness statements, search warrant, and an investigative report. Counsel testified that he reviewed the

video and the evidence with the Applicant, that the Solicitor made an offer to Applicant, and that counsel and Applicant discussed taking a plea. Counsel testified that he reviewed the pros and cons with the Applicant of taking a plea versus proceeding to trial and that Applicant got ~~out from~~ ^{WAC} a ten (10) year attempted armed robbery such that he be parole eligible. Counsel testified that he did not conduct an independent investigation, but that he was aware of/reviewed the video and the items recovered from the search warrant. Counsel testified that he and the Applicant discussed an alibi defense, that counsel investigated Applicant's alibi, but that counsel's investigation was not fruitful. Counsel testified there were statements made by the employees, that other employees did not identify the Applicant, and that this was a possible issue to raise at trial.

WAC #3
Counsel testified that he never told the Applicant that juries in Lexington County were racially prejudiced. Counsel testified that he informed the Applicant that the juries in Lexington County in counsel's opinion were pro-prosecution. Counsel testified that he informed Applicant if Applicant was convicted of Armed Robbery, Applicant could not receive less than a ten (10)-years sentence, but that if Applicant was not convicted he would serve no time. Counsel testified that he discussed a YOA sentence with the judge, but the judge informed counsel that Applicant was not eligible for a YOA sentence, and Applicant was aware of this and ~~choose~~ ^{CHOSE} ~~not to~~ ^{WAC} withdraw his plea at that time. Counsel testified that this was a straight-up plea, that Applicant did not proceed to trial because Applicant wanted to take an Alford plea. Counsel testified that he explained what an Alford plea meant and the issues pertaining to such a plea to the Applicant and that the Applicant indicated he understood counsel.

Counsel testified that he explained the concept of "no contest" and the advantage of taking a plea offer. Counsel testified that the Applicant was facing an armed robbery charge and kidnapping.

Counsel testified that when the solicitor presented the plea offer counsel discussed the offer with Applicant in counsel's office, that Applicant indicated he wanted to plead, and that Applicant's mother was present during this discussion when the Applicant decided to take the plea offer. Counsel testified that he did not recall seeing any problems with the indictments. Counsel testified a school resource officer identified Applicant through voice recognition. Counsel testified that he read the investigator's statement and questioned the investigator at the preliminary hearing. Counsel testified that he asked for DNA and fingerprints, that he challenged the crime-stoppers tip by questioning the resource officer about any training in voice recognition the officer had received. Counsel testified there was no evidence found in Applicant's house, that Applicant was arrested after his co-defendant. Counsel testified there were 4 parties to the crime and that it was possible the other two identified the Applicant, however there were no statements from these co-defendants.

WPC
H4
Counsel testified that he and the Applicant reviewed the potential sentence, that counsel did not hint at a low or high sentence, and that Applicant's mother and father were present at the guilty plea. Counsel testified that he visited Applicant after the plea and that the Applicant did not ask counsel to file an appeal.

Applicant's Testimony

At the PCR hearing Applicant testified that at the time of his plea he was nineteen (19) years of age, that he completed the ninth grade, and that he had worked at a fast food restaurant and supermarket. Applicant testified that when he pled guilty he expected probation and for his counsel to argue on his behalf. Applicant testified that his counsel should have investigated more thoroughly, that counsel should have raised more issues such as the statement in the investigative report that asserted the person who robbed the place was caucasian. Applicant testified that counsel informed

Applicant he could be convicted based on the color of his skin. Applicant testified that he understood what the guilty plea hearing entailed, that counsel advised Applicant he was facing twenty (20) years, and that the only reason Applicant did not want to proceed to trial was because counsel said Applicant would be convicted based on the color of his skin. Applicant testified that counsel should have investigated his alibi, specifically by interviewing Applicant's brother and step-father.

III. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

WPC
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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. 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. 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. With respect to guilty plea counsel, the Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

IV. FINDING 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 convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcript from Applicant's guilty plea, and legal arguments of counsel. Pursuant to S.C. Code Ann §17-27-80 (2003), this Court makes the following findings of facts and conclusions of law based upon all of the probative evidence presented.

1. Ineffective Assistance of Counsel

a. Failure to file appeal

This Court finds that Applicant was not deprived of his right to appeal. Applicant failed to prove that he instructed his attorney to appeal from his guilty plea. Weather v. State, 319 S.C. 59, 459 S.E.2d 838 (1995). Plea counsel testified credibly that he visited the Applicant at prison shortly after the plea hearing and that Applicant informed counsel that he did not wish to appeal. There is no constitutional requirement that necessitates that trial counsel inform a criminal defendant of his right to appeal, following a guilty plea. Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995); Carey v. Leverette, 605 F.2d 745 (4th Cir. 1979). Therefore, absent extraordinary circumstances, the failure

to be advised of his right to an appeal from the guilty plea does not result in a denial of the Applicant's due process rights. Younger v. Cox, 323 F.Supp. 412 (D.C. Va. 1971). There being nothing in the record to indicate that the Applicant conveyed to his trial attorney a desire to appeal, and there being no showing of extraordinary circumstances that would require counsel to inform his client of the right to appeal, this Court finds that counsel was not deficient nor was the Applicant prejudiced. Therefore, this allegation is denied and dismissed.

b. Attorney withheld evidence and new evidence

This Court finds that the Applicant abandoned his claim of newly discovered evidence, and he did not present any newly discovered evidence during the PCR hearing. This Court finds that the Applicant has failed to meet his burden of proof; therefore, this allegation is denied and dismissed.

c. Failure to investigate alibi witnesses

WAL #7
This Court finds that Applicant's allegation that plea counsel was ineffective for failing to investigate, specifically alibi witnesses, is without merit. This Court finds that while Applicant testified he asked counsel to interview his brother and step-father because they would provide alibis, Applicant did not present any alibi witnesses at the PCR hearing. Counsel testified that he investigated Applicant's alibi but that he was unable to substantiate an alibi for the Applicant. 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). 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). This

Court finds that the Applicant has failed to meet his burden of proof; therefore, this allegation is denied and dismissed.

d. Advising Applicant that a jury in Lexington would be racially biased

This Court finds that Applicant's allegation that plea counsel was ineffective for advising Applicant that a jury in Lexington would be racially biased and that Applicant would be convicted based on the color of his skin is without merit. Counsel denied making this statement, under oath. Counsel testified that he may have told the Applicant that juries in Lexington County tend to be pro-prosecution. This Court finds counsel's testimony in this regard to be credible. This Court finds that Applicant failed to show that counsel's performance was deficient and resulting prejudice; therefore, this allegation is denied and dismissed.

2. Involuntary Guilty Plea

This Court finds that Applicant has failed to prove that his plea was involuntary. Counsel testified and demonstrated that he was well-informed about Applicant's case; that he knew the strengths and weaknesses of the case; and, that he properly represented Applicant before, during, and after the plea. Counsel testified that he and the Applicant met multiple times, discussed the evidence in Applicant's case, and reviewed the options available to Applicant. Applicant elected to accept a plea offer from the solicitor and enter a plea under Alford and Applicant understood what he was doing. Counsel testified that he and the Applicant discussed what an Alford plea entailed and that Applicant understood. Applicant was fully apprised of the potential sentence he faced and counsel did not lead him to believe one way or another. This Court finds that Applicant has failed to carry his burden of proving that his guilty plea was not freely and voluntarily entered. The overwhelming evidence in the record and presented through the testimony of the witnesses at the hearing reflects

that the plea was knowingly and voluntarily entered. Boykin v. Alabama, 395 U.S. 238 (1969); Vickery v. State, 258 S.C. 33, 186 S.E.2d 827 (1972). Therefore, this Court finds that this allegation is denied and dismissed.

V. CONCLUSION

Based on all the forgoing, 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), SCRCP; 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.

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BETH A. ...
CLERK ...
LEXINGTON SC

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 Dec., 2011.

William P. Keesley
William P. Keesley
Presiding Judge
Eleventh Judicial Circuit

Lexington, South Carolina

#10

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CLERK OF COURT
LEXINGTON SC
PPB

PCR(?)

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FEB 06 2012

ROBERT CLELAND FITZSIMONS

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S.C. SUPREME COURT

February 2, 2012

Hon. Daniel E. Shearouse
Clerk of the Supreme Court
P.O. Box 12456
Columbia, SC 29211-2546

Hon. Beth A Carigg, Clerk of Court
Lexington County Courthouse
205 East Main St
Lexington, SC 29072

Case Number 2010-CP-32-3685
Gene W. Hall, #338904, Petitioner Vs. State of South Carolina, Respondent

Dear Sir and Madame:

Enclosed please find for filing copies of Petitioner's Notice of Appeal and Proof of Service by Mail in the above -captioned case.

I would appreciate your filing them appropriately.

Yours,



Robert C FitzSimons
Attorney for Applicant Gene W. Hall

Copies Sent:

Kaelon E May, Esquire
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29201

Gene W. Hall #338904
Ridgeland Corr Inst.
Post Office Box 2039
Ridgeland, SC 29936

Office of Appellate Defense
1330 Lady St, Suite 401
Columbia, SC 29201

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY

Court of Common Pleas

William P. Keesley, Presiding Judge

Case Number 2010-CP-32-3685
Gene W. Hall, #338904.....Petitioner

Vs.

State of South Carolina.....Respondent

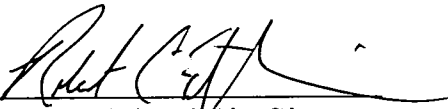
PETITIONER'S NOTICE OF APPEAL

Petitioner, through his undersigned attorney, hereby appeals the Final Order of the Honorable William P. Keelsey, dated December 30, 2011, and filed in the office of the Lexington County Clerk of Court on January 3, 2012.

RECEIVED

FEB 04 2012

S.C. SUPREME COURT



Robert Cleland FitzSimons
Attorney for Petitioner
1001 Beltline Boulevard
Columbia, SC 29205
(803) 738-0200

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY

Court of Common Pleas

William P. Keesley, Presiding Judge

Case Number 2010-CP-32-3685

Gene W. Hall, #338904.....Petitioner

Vs.

State of South Carolina.....Respondent

PETITIONER'S PROOF OF SERVICE BY MAIL

Petitioner, through his undersigned attorney, certifies that he has served Petitioner's Notice of Appeal on the following persons by delivering a copy of the same via the US Postal Service:

Kaelon E May, Esquire
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29201

Gene W. Hall #338904
Ridgeland Corr Inst.
Post Office Box 2039
Ridgeland, SC 29936

Office of Appellate Defense
1330 Lady St, Suite 401
Columbia, SC 29201

And has filed copies of these pleadings in the Supreme Court and the Lexington County Clerk of Court, this 2nd day of February, 2012.

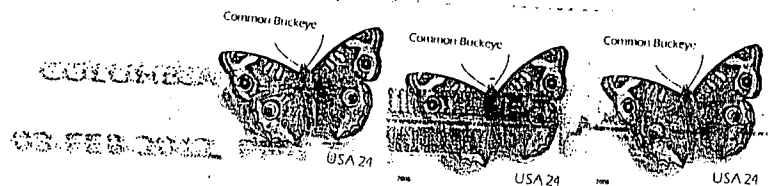


Robert Cleland FitzSimons
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*Gene W.
Hall*

