

AXELROD & ASSOCIATES, P.A.

Attorneys and Counselors at Law

"Success is all that matters"

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September 9, 2015

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

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SEP 14 2015

S.C. SUPREME COURT

RE: *Christopher Clemons v. State of South Carolina*
Case No.: 2013-CP-07-2204

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. Clemons 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,

Sincerely,



Tristan M. Shaffer
Attorney at Law

TMS/kmg

Encl.

cc: J. Rutledge Johnson, Esquire
Beaufort County Clerk of Court
Appellate Defense
Christopher Clemons

SUPREME COURT OF SOUTH CAROLINA

APPEAL FROM BEAUFORT COUNTY
In The Court of Common Pleas

Honorable Edgar W. Dickson,
Common Pleas Judge of the Fourteenth Judicial Circuit

Case No.: 2013-CP-07-2204

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SEP 14 2015

Christopher Clemons
#355221,

Petitioner,

S.C. SUPREME COURT

v.

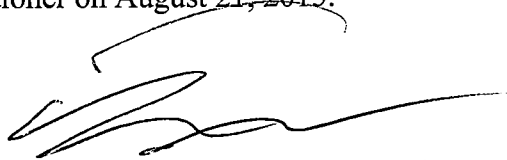
State of South Carolina,

Respondent.

NOTICE OF APPEAL

Petitioner appeals the Order of Dismissal of the Honorable Edgar W. Dickson dated August 14, 2015, filed August 19, 2015 and received by Petitioner on August 21, 2015.

September 9, 2015


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Respondent's Attorney:
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Columbia, SC 29211

SUPREME COURT OF SOUTH CAROLINA

APPEAL FROM BEAUFORT COUNTY
In The Court of Common Pleas

Honorable Edgar W. Dickson,
Common Pleas Judge of the Fourteenth Judicial Circuit

Case No.: 2013-CP-07-2204

Christopher Clemons
#355221,

Petitioner,

v.

State of South Carolina,

Respondent.

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S.C. SUPREME COURT

CERTIFICATE OF SERVICE

I, Krisina Gunnell, 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:

J. Rutledge Johnson, Esquire S.C. Office of the Attorney General Post Office Box 11549 Columbia, SC 29211	Christopher Clemons Ridgeland Correctional Institution 5 Correctional Road Ridgeland, SC 29936
Beaufort County Clerk of Court P.O. Box 1128 Beaufort, SC 29901-1128	Appellate Defense 1330 Lady Street Columbia, SC 29201

September 9, 2015
MYRTLE BEACH, SOUTH CAROLINA


Krisina Gunnell
Paralegal to Tristan M. Shaffer

robbery. Applicant was sentenced by the Honorable Carmen T. Mullen to confinement for a period of fifteen (15) years. Applicant did not appeal his conviction or sentence.

II. ALLEGATIONS

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

1. Ineffective assistance of counsel.
 - a. Failure to advise the Applicant of his right to appeal.
 - b. Failure to properly investigate the false testimony of co-defendant.
2. Brady violation.
 - a. The State withheld exculpatory evidence.

At the evidentiary hearing, Applicant proceeded on only ground 1(a), ineffective assistance of counsel for failing to investigate the false testimony of a co-defendant.

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.

A. Ineffective Assistance of Trial Counsel

In a 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 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 show trial counsel ineffective in failing to investigate testimony of a co-defendant. Initially, the Court notes Applicant was the only person charged with the crime for which he was tried. Although Applicant had co-defendants in his numerous other pending burglary cases, there was no co-defendant in this case. The Court finds very credible trial counsel's testimony that he had no strategic reason to raise issues relating to the credibility of those co-defendants in this trial. The Court also finds credible trial counsel's testimony that he would have attacked the credibility of the co-defendant at

subsequent trials if the State had brought the other charges to trial. The Court also notes trial counsel testified he did not recall Applicant providing him any statement from the co-defendant prior to trial.¹ The Court finds not credible Applicant's allegation that he wanted trial counsel to pursue issues of the co-defendant's credibility in relation to this trial. Accordingly, the Court finds trial counsel articulated a valid strategic reason for not further investigating the co-defendant in preparation for this trial and for not presenting matters of the co-defendant's credibility here. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992))). Trial counsel's pre-trial investigation and consultation with Applicant were reasonable under the circumstances, and did not fall below professional norms.

Furthermore, the Court finds Applicant wholly failed to demonstrate he was prejudiced by counsel's performance in this case. Applicant was charged with armed robbery, but counsel effectively presented a defense that the State had overcharged Applicant, and ultimately the jury found Applicant guilty of the lesser-included offense of strong arm robbery.² Furthermore, Applicant was caught on video committing the robbery and restrained by the victims until police arrived. In light of this overwhelming evidence of guilt, none of counsel's actions prejudiced

¹ See, e.g., Strickland, 466 U.S. at 691 ("[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable."); Moody v. Polk, 408 F.3d 141, 148 (4th Cir. 2005) ("Because of Moody's dishonesty to his own counsel, however, counsel were limited in their possibilities for mitigation investigation."); U.S. v. Pellerito, 878 F.2d 1535, 1543 (1st Cir. 1989) ("If counsel was ineffective in any sense, it was only because the client rendered him so, first by keeping Noriega in the dark, and then, by refusing to heed his advice. That is not the sort of "ineffectiveness" for which relief can be granted."); Rodriguez v. State, 74 S.W.3d 563, 568 (Tex. App. 2002) ("Moreover, we opt not to fault trial counsel for the intentional withholding of vital information by his client." (citations omitted)).

² The Court notes Applicant admitted his guilt to this crime at the evidentiary hearing and indicated he does not want a new trial, merely resentencing. Thus, the Court does not even have the power to grant the relief sought by Applicant. Gilstrap v. State, 252 S.C. 625, 628, 168 S.E.2d 88, 89 (1969) (successful habeas petition "entitled only to a new trial").

Applicant. See Harris v. State, 377 S.C. 66, 79, 659 S.E.2d 140, 147 (2008) (applicant cannot prove prejudice where there is overwhelming evidence of guilt). Accordingly, the Court finds Applicant failed to show he was prejudiced by trial counsel's decision to not further investigate the co-defendant's credibility in preparation for this trial.

B. 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.

IV. CONCLUSION

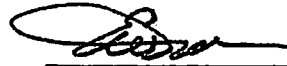
Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel'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), SCRPC, provides that if Applicant wishes to seek appellate review, PCR counsel 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.

AND IT IS SO ORDERED this 14th day of August, 2015



EDGAR W. DICKSON
Presiding Judge

Orangeburg, South Carolina



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