



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

MAR 20 2012

S.C. Supreme Court

March 20, 2012

The Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Clifton Cooke, 320091, Applicant v. State of South Carolina, Petitioner
Case No. 2010-CP-28-0452

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. Proof of service of the notice of appeal on the respondent(s).
2. A copy of the order which is to be challenged on appeal.

Sincerely,

Robert D. Corney
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Attorney for Petitioner

RDC/jri

cc: Jeremy A. Thompson; Attorney for Applicant
The Honorable Joyce McDonald, Kershaw County Clerk of Court
The Richland County Solicitor's Office
Office of Appellate Defense
David M. Tatarsky, Esquire
Trisha Allen, Victims Assistance Counselor

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Kershaw County

Honorable J. Ernest Kinard, Judge

RECEIVED

MAR 20 2012

S.C. Supreme Court

Clifton Cooke, 320091,

Respondent,

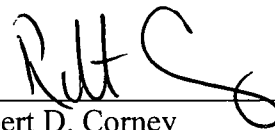
vs.

State of South Carolina,

Appellant.

NOTICE OF APPEAL

The State of South Carolina hereby appeals from the Order of the Honorable J. Ernest Kinard, Presiding Judge for the 5th Judicial Circuit, dated February 29, 2012 and received by the State on March 12, 2012 in the matter of Clifton Cooke vs. State of South Carolina, Case No. 2010-CP-28-0452.



Robert D. Corney
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Telephone: (803) 734-5178

March 20, 2012
Other Counsel of Record:

Jeremy A. Thompson, Esquire
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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Kershaw County
Honorable J. Ernest Kinard, Judge

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S.C. Supreme Court

Clifton Cooke, 320091,

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vs.

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PROOF OF SERVICE

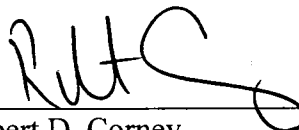
PERSONALLY appeared before me, Robert D. Corney, who being duly sworn, deposes and says:

That he is one of the attorneys for the Petitioner herein;

That there is a regular communication by mail throughout the State of South Carolina, and that this is a proper circumstances for service by mail; and

That he served the foregoing NOTICE OF APPEAL on the following person on March 20, 2012 by depositing one copy of each in the U.S. Mail, postage prepaid, and addressed as follows:

Jeremy A. Thompson, Esquire
1612 Marion Street, Suite 210
Post Office Box 12891
Columbia, South Carolina 29211



Robert D. Corney
Assistant Attorney General

STATE OF SOUTH CAROLINA)
)
COUNTY OF KERSHAW)

CLIFTON COOKE, #320091,)
)
Applicant,)
)
v.)
)
STATE OF SOUTH CAROLINA,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO.: 2010-CP-28-0452

ORDER

THIS MATTER comes before the Court by way of an Application for Post-Conviction Relief filed April 26, 2010. The State made its Return on May 10, 2010. An evidentiary hearing was convened in this case on January 9, 2012. The Applicant was present and was represented by Jeremy A. Thompson, Esquire. The State was represented by Brian T. Petrano, Assistant Attorney General.

**I.
PROCEDURAL HISTORY**

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Kershaw County Clerk of Court's orders of commitment. The Kershaw County Grand Jury indicted the Applicant at the April 26, 2006, term of General Sessions for Murder (2006-GS-28-0116). On February 13-14, 2007, the Applicant proceeded to trial by jury. He was represented at this proceeding by Joshua S. Kendrick, Esquire, and Theresa N. Johns, Esquire. At the conclusion of the trial, the jury found the Applicant guilty as charged. The Honorable James R. Barber, III, presiding circuit judge, sentenced the Applicant to forty years' imprisonment.

A timely Notice of Appeal was filed on the Applicant's behalf. Joseph L. Savitz, III, Chief Appellate Defender, represented the Applicant on appeal to the South Carolina Court of Appeals. In an unpublished opinion, the Court of Appeals affirmed the Applicant's conviction and sentence pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Cooke, 2009-IJP-556 (S.C. Ct. App. filed November 19, 2009).

II. ALLEGATIONS RAISED

In his Application for Post-Conviction Relief, the Applicant alleged that he is being held unlawfully for the following reasons:

1. Ineffective assistance of counsel;
2. Prosecutorial misconduct;
3. Due process violation.

He alleged generally that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, were violated prior to and during his trial. More specifically, he alleged that defense counsel was ineffective for failing to sufficiently investigate his case prior to trial.

At the evidentiary hearing convened in this case on January 9, 2012, the Applicant proceeded with his claim of ineffective assistance of counsel. In particular, he argued that defense counsel was ineffective for failing to call Gloria Moore as a witness at his trial. While this Court finds that this allegation was subsumed in the Applicant's failure to investigate claim, this Court finds that the allegation was tried by consent of the parties and is properly before the Court. See Simpson v. Moore, 367 S.C. 587, 599, 627 S.E.2d 701, 708 (2006); Rule 15(b), SCRPC.

III. EVIDENCE BEFORE THE COURT

At the Post-Conviction Relief hearing held in this case on January 9, 2012, the Applicant presented testimony from Gloria Moore, defense counsel Joshua S. Kendrick, Esquire, defense counsel Theresa N. Johns, Esquire, as well as his own testimony. In addition to this testimony, this Court has before it a transcript of the trial, a copy of the Anders brief filed on direct appeal, a copy of the Court of Appeals' opinion on direct appeal, a copy of the records of the Kershaw County Clerk of Court regarding the subject conviction, a copy of the Applicant's records with the South Carolina Department of Corrections, and the exhibits introduced by the parties during the evidentiary hearing. What follows below are findings of fact and rulings of law made by this Court in accordance with the Uniform Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 *et seq.*

As a threshold matter, this Court would note that the Applicant was represented by two experienced attorneys who are generally regarded for their competence. On the facts of this case, however, this Court finds that the combined effects of Attorney Kendrick's errors and omissions was such that the Applicant was denied the effective assistance of counsel at trial. For that reason, this Court finds that Attorney Kendrick failed to provide the Applicant reasonable, professional assistance of counsel.¹

IV. RELEVANT FACTS

For the purpose of evaluating this action, this Court would note the following relevant facts. On January 5, 2002, the victim, Troy Keitt, was shot seven times at his mother's home.

¹ As explained below, this Court finds defense counsel ineffective for failing to call Gloria Moore as a witness during the trial. Both of the Applicant's attorneys were clear in their testimony before this Court that the responsibility for interviewing witnesses and calling witnesses at trial was Attorney Kendrick's. Inasmuch as Attorney Johns was not involved in the mistakes that led to Moore not being called as a witness, this Court does not find her ineffective in this case.

The State's case against the Applicant consisted primarily of the victim's family's testimony as well as his co-defendant's testimony.

The victim's wife, Althea Keitt, testified at trial that she, the victim, and their children were at her mother-in-law's home when the Applicant came to the door and asked to speak to the victim. Tr. p. 80, line 8-p. 82, line 20; p. 89, lines 3-12. She further testified that she heard gunshots, that she ran outside, and that she found the victim on the ground. Tr. p. 84, line 21-p. 85, line 22. She testified that she asked the victim who shot him and he responded "Weasel and Clifton." Tr. p. 90, lines 9-19.²

The victim's sister, Makeitha Hollis, testified at trial that she was in the home when she heard the gunshots. Tr. p. 106, lines 12-24. When she first heard the gunshots, she ran outside and saw an individual fire three gunshots at the victim while the victim was on the ground. Tr. p. 107, lines 9-18. She also saw another individual standing outside with the shooter. Tr. p. 107, lines 18-19. She could not identify either of the individuals standing outside near the victim. Tr. p. 107, line 25-p. 108, line 2. She testified that she asked the victim "who it was" that shot him and the victim stated "Weasel" and "Clifton Cooke." Tr. p. 108, lines 8-18.

The victim's mother, Tiller Keitt, testified at trial that she looked outside following the knock on the door and saw two individuals standing with the victim. Tr. p. 47, lines 14-22; p. 51, lines 20-24. Following the gunshots, she ran outside and asked the victim "who shot him"; the victim responded "Clifton" and "Weasel." Tr. p. 54, lines 2-7.

The Applicant's co-defendant, Talmadge Dixon, testified at trial that he rode to Tiller Keitt's house with the Applicant and another individual named Wes to purchase some drugs. Tr. p. 124, line 4-p. 125, line 1. He further testified that the Applicant was the only individual to get out of the vehicle. Tr. p. 127, lines 9-10. The Applicant went to the front door, asked for the

² "Weasel" is the nickname of the Applicant's co-defendant, Talmadge Dixon.

victim, and began speaking to the victim outside of Tiller Keitt's house. Tr. p. 127, line 16-p. 128, line 1. He then saw the Applicant fire multiple gunshots at the victim. Tr. p. 128, lines 10-25. Based on this testimony, Dixon was permitted to plead guilty to accessory after the fact to murder. Tr. p. 139, lines 13-16.

One individual who was at the scene following the shooting but who did not testify at trial was Gloria Moore, an employee with the Internal Revenue Service. She testified before this Court that at the time of the shooting, she lived across the street from Tiller Keitt. When she heard the gunshots, she saw Makeitha Hollis outside with the victim and heard him ask who fired the shots at him. She testified that the victim responded "Weasel." She testified that Hollis immediately then asked where he had been shot and that the victim responded "all over" and that he didn't think he was going to make it. She testified that she never heard the victim say "Clifton" or "Clifton Cooke" but that she would have heard him say the Applicant's name had he initially said it to Hollis. Finally, she testified that she provided this information to police the night of the shooting and to an investigator for the defense prior to trial but that she was not subpoenaed to testify at trial by the defense.

The Applicant testified before this Court that he thought that Moore was going to be called as a witness at his trial and that he was surprised when she was not called. He further testified that when he asked Attorney Kendrick why he had not called her as a witness, Attorney Kendrick had responded that he had the trial in hand.

Defense counsel Joshua Kendrick testified before this Court that he was the lead attorney on the case and that he was responsible for determining which witnesses to subpoena prior to trial. Attorney Kendrick confirmed that it had been his investigator who spoke to Moore on January 16, 2007, approximately a month prior to the trial, but also stated that he did not speak to

Moore personally prior to trial. He further testified that he did not subpoena anyone to testify at the trial. He testified that he felt it was a mistake not to call Moore as a witness and that his failure to do so was extremely prejudicial to the Applicant. Finally, he testified that he did not make a conscious choice to not call Moore at the trial.

Defense counsel Theresa Johns testified that her primary responsibility was to cross-examine witnesses at trial and assist Attorney Kendrick during the trial. She testified that she was not involved in the pre-trial investigation portion of the case and that it was not her responsibility to subpoena witnesses for the trial.

V. STANDARD OF REVIEW

This Application for Post-Conviction Relief generally raises specific allegations of ineffective assistance of counsel. The burden of proof is on the Applicant in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. Bell v. State, 321 S.C. 238, 467 S.E.2d 926 (1996); Rule 71.1(e), SCRPC. In evaluating an Application for Post-Conviction Relief, the Applicant must demonstrate that trial counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standard for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668 (1984). In other words, the Applicant must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.; Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).

VI.
FINDINGS OF FACT AND CONCLUSIONS OF LAW

In this case, the Applicant presents one allegation of ineffective assistance of counsel: defense counsel's failure to call Gloria Moore as a witness at trial. The Applicant contends that defense counsel was deficient for failing to utilize Moore at trial. Furthermore, the Applicant contends that he was prejudiced because there is a reasonable probability that the result at his trial would have been different had Moore testified. Accordingly, the Applicant argues that he is entitled to a new trial. This Court agrees.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, supra, at 691. Defense counsel's failure to conduct a reasonable investigation "to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State" constitutes deficient performance. McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). Furthermore, defense counsel's failure to call favorable defense witnesses at trial constitutes deficient conduct. Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008).

As an initial matter, this Court has had an opportunity to observe Gloria Moore through her appearance before this Court and this Court finds that she is a very credible witness. She works for the Internal Revenue Service, has no connection to the Applicant, and has testified consistently with her statements given to the police ten years ago and to defense counsel's investigator five years ago.

Given her credibility, her lack of connection to the Applicant, and extremely beneficial testimony, there is no question that defense counsel was deficient for failing to call Gloria Moore to testify at trial. Attorney Kendrick had her information at his disposal well before the trial.

Attorney Kendrick, however, never attempted to speak to her personally, never attempted to serve her with a subpoena, and never attempted to call her as a witness during the Applicant's trial. Moreover, her testimony would have gone to the heart of the Applicant's defense—that Talmadge Dixon fired the shots that killed the victim. Based on her testimony, the victim's immediate, and sole, response to the question of who shot him was "Weasel." Such a declaration was "inherently reliable" because "the startling event suspend[ed] the declarant's process of reflective thought, reducing the likelihood of fabrication." State v. McHoney, 344 S.C. 85, 95, 544 S.E.2d 30, 34 (2001) (citing State v. Dennis, 337 S.C. 275, 523 S.E.2d 173 (1999)). Consequently, it is extremely likely that the jury would have believed that Dixon, not the Applicant, shot the victim had Moore testified at trial. While Attorney Kendrick's failure to call such a beneficial witness constitutes deficient conduct, Attorney Kendrick's deficient performance at trial was predicated by his admitted failure to even communicate with Moore prior to trial. Accordingly, this Court finds that the Applicant has satisfied his burden of proof with regard to Strickland's first prong.³

Furthermore, it is the extremely beneficial nature of Moore's testimony that demonstrates that the Applicant was prejudiced by defense counsel's deficient conduct. The Applicant's entire defense was predicated on the jury's belief that he did not shoot the victim and that Talmadge Dixon was the perpetrator. It is difficult to envision evidence that could have supported that defense more than Moore's testimony that the victim answered Weasel—and only Weasel—to the question of who shot him. Had this testimony been presented to the jury, this Court finds that there is a reasonable probability that the Applicant would have been acquitted at trial.


³ As noted above, Attorney Kendrick admitted that it was a mistake not to contact Moore prior to trial or call her as a witness at trial. Although Attorney Kendrick's admission of error is not dispositive of the Applicant's claim, it supports this Court's findings in this matter. See Miller v. State, 379 S.C. 108, 116, 665 S.E.2d 596, 600 (2008) (noting that "trial counsel conceded he was remiss in failing to adequately cross-examine Pauling regarding the specifics of the other armed robberies" in determining that counsel was ineffective).

Accordingly, this Court finds that the Applicant has met his burden of proof with regard to the second prong of Strickland. Having satisfied both prongs of Strickland, the Applicant is entitled to a new trial.

As a final matter, a factual dispute arose between Attorneys Kendrick and Johns during the hearing in this case over whether or not there was a conscious decision made not to call any witnesses at trial in order to preserve the right to last argument. Attorney Kendrick testified that this consideration did not play into the decision to not call any witnesses while Attorney Johns testified that there were discussions about preserving the last argument. This Court finds that it need not resolve this dispute for two reasons. First, the dispute arose in the context of their testimony regarding the Applicant's decision not to testify, so the dispute is irrelevant to the issue of whether or not Moore should have been called as a witness. Second, even if the dispute was somehow relevant to Attorney Kendrick's failure to call Moore at trial, this Court finds that a conscious decision to not call such a beneficial witness in order to preserve last argument is not an objectively reasonable trial strategy. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) ("counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness"). Therefore, Attorney Kendrick's deficient conduct cannot be shielded by the doctrine of trial strategy. Inasmuch as Attorney Kendrick's performance was unmistakably deficient and the Applicant was undoubtedly prejudiced by his attorney's deficient performance, this Court finds that the Applicant is entitled to a new trial.

**VII.
CONCLUSION**

This Application for Post-Conviction Relief is hereby granted. The Applicant's conviction and sentence for murder are vacated, and this matter is remanded to the Kershaw County Court of General Sessions for a new trial.



J. Ernest Kinard, Jr.
Presiding Circuit Judge
Fifth Judicial Circuit

This 29 day of Feb, 2012.

Columbia, South Carolina.