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October 13, 2015

RECEIVED

OCT 23 2015

S.C. SUPREME COURT

Via US Mail

Daniel Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: *Notice of Intent to Appeal from Robert Max Watkins v. State of South Carolina*
C.A. No.: 2014-CP-23-589

Dear Mr. Shearouse:

I was Court Appointed in the above referenced matter, and I expect that appellate defense will handle the appeal and petition for certiorari. On behalf of my client, enclosed for filing please find the Notice of Appeal and proof of service. I've enclosed a copy of the Honorable's Order of Dismissal to be challenged on appeal. By copy of this letter, I am also serving my client, counsel for the State of South Carolina, the South Carolina Commission of Indigent Defense - Appellate Defense Division and the Greenville County Clerk's Office.

Thank you for your assistance in this matter and if you have any questions, please feel free to contact me.

Sincerely,
LAW OFFICE OF R. MILLS ARIAIL, JR.
Attorney at Law


R. Mills Ariail, Jr.

RMAjr/dl
Enclosures (as stated)

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2014-DP-23-589

RECEIVED

OCT 23 2015

S.C. SUPREME COURT

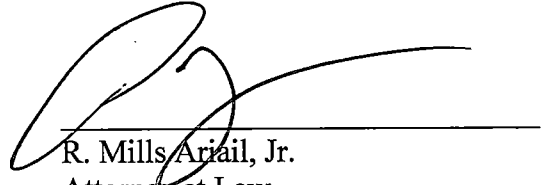
Robert Max Watkins,..... Appellant,

v.

State of South Carolina Respondent.

NOTICE OF APPEAL

Appellant appeals the Honorable Edward W. Miller's Order of Dismissal dismissing Appellant's application for post-conviction relief. On October 2, 2015, the Honorable Edward W. Miller signed an order dismissing Appellant's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on October 5, 2015. A copy of the Honorable Edward W. Miller's Order of Dismissal is attached.



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Attorney for Robert Max Watkins

Greenville, South Carolina
October 13, 2015

Other Counsel of Record and Interested Parties:

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Assistant Attorney General
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Greenville County Clerk's Office
Greenville County Courthouse
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Greenville, SC 29601

SC Commission of Indigent Defense
Division of Appellate Defense
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Robert Max Watkins SCDC# 243803
Perry Correctional Institute
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Pelzer, SC29669

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2014CP2300589

2015 OCT 2 PM 2:17

FILED - CLERK OF COURT
GREENVILLE CO., S.C.
PAUL B. WICKENSIMER

Robert Watkins vs. South Carolina State Of

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy: Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter: _____

PRESIDING JUDGE - Edward W Miller

This judgment was entered on the 2nd day of Oct. , and a copy mailed first class this 2nd day of Oct. , to attorneys of record or to parties (when appearing pro se) as follows:

R. Mills Ariail Jr. 11 North Irvine Street, Suite 11
Greenville, SC 29601

Karen Christine Ratigan PO Box 11549 Columbia,
SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B Wickensimer

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Robert Max Watkins,)
 S.C.D.C. No. 243803,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2014-CP-23-0589

ORDER OF DISMISSAL

FILED - CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL D. WICKENSIMMER
 2015 OCT 2 PM 1 41

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 31, 2014. The Respondent made its return on July 11, 2014. An evidentiary hearing was held on April 22, 2015 at the Greenville County Courthouse. The Applicant was present and represented by R. Mills Ariail, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's standby counsel, Stephen J. Henry, Esquire. The Court had before it the transcripts from the pre-trial hearings and the trial, the Greenville County Clerk of Court records, the South Carolina Department of Corrections records, the PCR application, the return, the appellate records, and Applicant's Exhibit 1.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the February 2002 term of the Greenville County Grand Jury for armed robbery (2002-GS-23-1063, count 1) and possession of a weapon during commission of a violent crime (2002-GS-23-

1063, count 2).

The State brought the case to trial.¹ After trial began, the Applicant successfully argued to have counsel relieved and proceeded pro se. Stephen J. Henry, Esquire was present as standby counsel. On September 24, 2008, the jury found the Applicant guilty and the Honorable Larry R. Patterson sentenced him to consecutive terms of 25 years for armed robbery and 5 years for possession of a weapon during commission of a violent crime.

A notice of appeal was filed at the South Carolina Court of Appeals. Elizabeth A. Franklin-Best, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals reversed the Applicant's convictions and sentences. State v. Watkins, Op. No. 2011-UP-091 (S.C. Ct. App. filed March 8, 2011). The Respondent filed a petition for writ of certiorari at the South Carolina Supreme Court. The Applicant was represented by David C. Alexander, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense. The Supreme Court granted the petition and the parties submitted briefs. The Supreme Court reversed the decision of the Court of Appeals on December 4, 2013. State v. Watkins, 406 S.C. 360, 752 S.E.2d 261 (2013). The Remittitur was sent on December 20, 2013.

ALLEGATIONS

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

1. Ineffective assistance of counsel (Stephen J. Henry) during a pre-trial suppression hearing:
 - a. Failed to articulate a Fourth Amendment claim pursuant to Franks

¹ The Applicant was originally convicted of these charges on October 20, 2002 and was unsuccessful in his subsequent direct appeal and PCR actions. Upon appeal from the denial of PCR, however, the South Carolina Supreme Court reversed and remanded the case for a new trial. Watkins v. State, 2008-MO-001 (S.C. Sup. Ct. filed Jan. 14, 2008).

v. Delaware.

- b. Failed to call the victims, officers, and defendants during the hearing to show false statements were made with reckless disregard for the truth.
 - c. Failed to challenge the search warrant pursuant to S.C. Code Ann. § 17-13-141.
 - d. Failed to file a motion for the trial judge to recuse himself pursuant to Canon 3(E)(a)(1).
 - e. Failed to “inform the trial court that Applicant was making a special appearance, and motion the trial dismiss or squash the indictment on grounds it was obtained in violation of Applicant’s procedural due process of rights and equal protection of rights, to SCRCrimPRule 3(c), and that the court lacks personal jurisdiction over Applicant due to an illegal process, and a practice that is unconstitutional.”
 - f. Failed to inform the Applicant he had access to an identification expert.
 - g. Failed to inform the Applicant what State witness Reilly told him when he interviewed her and what he testimony would be.
 - h. Waited “up until the trial date to coerce Applicant to agree to allow him to review the motion for Applicant to proceed pro se after Applicant decided to allow counsel to represent him, because Applicant, did not understand or know the rules of Criminal Procedures or Rules of Evidence.”
 - i. Failed to “disqualify himself under conflict of interest once [the trial judge] decided to appoint him a counsel, because of the assisting conflict of interest.”
2. Ineffective assistance of appellate counsel (Elizabeth A. Franklin-Best):
- a. Failed to “protect Applicant’s rights to a new trial granted to him by S.C. Court of Appeals.”
 - b. Failed to file a return to the State’s expedited motion to recall remittitur.
 - c. Failed to “file a motion to vacate the . . . order recalling the remittitur pursuant to SCRCP 60b(3).”
3. Ineffective assistance of appellate counsel (David C. Alexander):
- a. Failed to “bring to the SC Supreme Court attention the acts of fraud upon the S.C. Court of Appeals by [the State] by including false statements in an expedited motion to recall the remittitur.”
 - b. Stated “there is nothing he can do since the remittitur has been recalled.”
 - c. Failed to “file a return motion pursuant to SCACR 240(e) to [the State’s] motion out of time to argue against precedent.”
 - d. Failed to “present evidence to show judicial bias disqualifying [the trial judge] pursuant to SCACR 501 Canon 3E(a)(1) during oral argument.

- e. Failed "to take any exception to the recalling of the remittitur."
- 4. Lack of subject matter jurisdiction:
 - a. Violation of Rule 3(c), SCRCrimP.
- 5. Brady violation.
- 6. Double jeopardy.

In an "Amendment to PCR Application" filed May 2, 2014, the Applicant made the following additional allegations:

1. Ineffective assistance of appellate counsel (Elizabeth A. Franklin-Best):
 - a. Failed to "[f]ile a return pursuant to SCACR 240(e), to . . . expedited motion to recall the remittitur."
 - b. Failed to "[f]ile a motion pursuant to SCRCP Rule 60(b), (3)(4) to dismiss . . . Petition for a Writ of Certiorari, on grounds of fraud upon the Court, misrepresentation, or other Misconduct of adverse party and Judgement [sic] of S.C. Court of Appeals order recalling the remittitur is void."
2. Ineffective assistance of appellate counsel (David C. Alexander):
 - a. Failed to "[f]ile pursuant to SCRCP Rule 60(B)(3)(4) motion to dismiss the State's . . . Petition for a Writ of Certiorari, on grounds of fraud upon the court, misrepresentation or misconduct of the adverse party."
 - b. Failed to "take a position with respect to the reason for the recall of the remittitur, and bring to the attention of the court, the misconduct of the adverse party . . . fraud upon the court, to get the remittitur recalled so he could file a Petition for a Writ of Certiorari."
 - c. Failed to "[f]ile a petition for rehearing in reference to SC Supreme Court reversal of SC Court of Appeal reversal of my conviction. . . . Counsel should have filed a petition for rehearing in order to protect my rights to Federal Habeas Corpus by exhausting all states redemies [sic] and procedures such a petition for rehearing."
3. Indictment 2002-GS-23-1063 is void and the trial court lacked subject matter jurisdiction due to "the unconstitutional local practices of the Solicitors Office of Greenville County and violations of: of Due Process, Equal Protection, and the Fifth and Fourteenth Amendments of the state and federal constitution."

This Court does not take into consideration any pro se amendments filed after the appointment of PCR counsel on November 4, 2014. See Rule 11(a), SCRCP; Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002) (holding there is no constitutional right to hybrid

representation either at trial or on appeal).

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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This 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 (2003).

A.

The Applicant argued Counsel improperly handled the Franks hearing in his case.² The Applicant argued Counsel failed to challenge the truthfulness of the statements in the search warrant affidavit. The Applicant argued Counsel should have called the victims as witnesses at the Franks³ hearing to show they did not provide the information used in the affidavit. The Applicant argued Counsel failed to object after the Franks hearing in order to preserve the issue for appeal.

Counsel testified he was aware of inconsistencies between the testimony at the first and second trials. Counsel testified he questioned the magistrate about the time frame involved and the information she received from the officer. Counsel testified the officer admitted some of the information in the affidavit did not match the victims' statements. Counsel, however, testified it would have been foolish to call the victims as witnesses at the Franks hearing.

Initially, this Court notes Counsel is an experienced and accomplished criminal defense attorney. This Court finds Counsel was familiar with the issues, arguments, and testimony from

² This hearing was held before Counsel was relieved by the trial judge and ordered to remain as standby counsel.

³ Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674 (1978).

the Applicant's first trial. This Court has reviewed the transcript and can find no deficiency in how Counsel conducted the Franks hearing. This Court finds Counsel's decision not to call the victims as witnesses at this hearing was entirely proper, as doing so would likely have harmed the Applicant's case. This Court further notes it was not necessary for Counsel to have objected to the trial judge's ruling at the Franks hearing in order to preserve the issue for appellate review. This Court concludes the Applicant has not met his burden of proving this issue by a preponderance of the evidence. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (holding that, in a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence").

B.

The Applicant argued Krystyna Reilly was a surprise witness and Counsel did not tell him what he had discussed with Reilly. Counsel testified the State found Reilly (who was the missing fifth victim) and he was allowed to interview her. Counsel testified Reilly was not helpful and that he relayed this to the Applicant. This Court finds Counsel's testimony is credible. This Court finds the Applicant has failed to articulate what impact Reilly's testimony could have had upon the trial and, as Reilly did not testify at the PCR hearing, this Court cannot engage in speculation. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme Court "has repeatedly held a PCR 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.") (emphasis in original). This Court concludes the Applicant has not met his burden of proving this issue by a preponderance of the evidence. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

C.

The Applicant argued Counsel did not tell him that he had obtained an identification expert. The Applicant, however, failed to present this alleged expert witness – or any identification expert witness – at the PCR hearing, so this Court cannot speculate as to the impact such testimony may have had upon the trial. See Lorenzen v. State, 376 S.C. 521, 530, 657 S.E.2d 771, 777 (2008) (finding that, as the applicant failed to present any expert testimony at the PCR hearing, “it is merely speculative that these allegedly favorable expert witnesses would have aided in his defense”). This Court concludes the Applicant has not met his burden of proving this issue by a preponderance of the evidence. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

D.

The Applicant argued appellate counsel was ineffective because (1) the issue of personal jurisdiction was not raised on appeal and (2) counsel failed to file a motion arguing “fraud against the court” related to the State’s motion to recall the remittitur.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). In analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009).

This Court finds the Applicant has failed to demonstrate appellate counsel was deficient in failing to argue the State committed “fraud against the court” in filing his motion to recall the

remittitur. The Applicant did not present testimony from appellate counsel at the PCR hearing, so this Court cannot speculate as to whether appellate counsel considered filing such a motion or believed it would have any merit. See Bannister v. State, 333 S.C. at 303, 509 S.E.2d at 809. Regardless, the timeline of when the State received the Court of Appeals' denial of its petition for rehearing was presented to the Supreme Court and that Court chose to grant the State's motion. This Court finds the Applicant has failed to demonstrate either that appellate counsel was ineffective in his representation or that the lack of such a motion prejudiced his appeal.

This Court finds the allegation that appellate counsel was ineffective in failing to raise the personal jurisdiction issue on appeal is without merit. Appellate counsel, however, is not required to raise every non-frivolous claim, but instead may select among them in order to maximize the likelihood of a favorable outcome. Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765 (2000). The Applicant has failed to demonstrate either that this issue was meritorious or that raising this issue would have changed the outcome of his appeal.

This Court concludes the Applicant has not met his burden of proving this issue by a preponderance of the evidence. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

E.

The Applicant argued he was subjected to double jeopardy because he already served the 5-year sentence for the weapons charge. This Court finds the Applicant failed to demonstrate there was a violation of the Double Jeopardy Clause in his case. While he was convicted of these charges in 2002, these convictions were reversed and remanded for a new trial in 2008. Conviction after this re-trial does not constitute a violation of double jeopardy. See, e.g., State v. Nelson, 336 S.C. 186, 196, 519 S.E.2d 786, 791 (1999) (finding "the Double Jeopardy clause does not preclude retrial of a defendant whose conviction was set aside because of trial error").

Further, this Court notes the Applicant received credit for the time served since his original conviction on these charges. This Court concludes the Applicant has not met his burden of proving this issue by a preponderance of the evidence. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

F.

The Applicant argued S.C. Code § 17-13-141 was violated due to the magistrate's non-compliance. The Applicant, however, failed to present any evidence the magistrate did not comply with this statute. Regardless, this Court finds the Applicant failed to demonstrate prejudice. See State v. Wise, 272 S.C. 384, 252 S.E.2d 294, 295 (1979) (holding the State's failure to fulfill a ministerial requirement only voids the search warrant if the defendant demonstrates prejudice). This Court concludes the Applicant has not met his burden of proving this issue by a preponderance of the evidence. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

G.

The Applicant argued the trial judge lacked subject matter jurisdiction because of a violation of Rule 3(c), SCRCrimP. This Court finds the Applicant has not met his burden of proving the warrant in his case was invalid or that the trial court lacked subject matter jurisdiction. See State v. Culbreath, 282 S.C. 38, 40, 316 S.E.2d 681, 681 (1984) (“[T]he failure of the solicitor to act upon a warrant within ninety (90) days . . . does not within itself invalidate a warrant or prevent subsequent prosecution.”); see also State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007) (noting one must prove prejudice in order to prevail on an allegation that one's speedy trial rights were violated). The Applicant also argued his arraignment on the day of trial was improper. An arraignment is a mere formality and the arraignment in this case gave the

Applicant adequate notice of the charges he was facing. See State v. Ariail, 311 S.C. 35, 426 S.E.2d 751 (1993). This Court concludes the Applicant has not met his burden of proving these issues by a preponderance of the evidence. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

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.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial, sentencing, and appellate proceedings. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 2 day of October, 2015.



Edward W. Miller
Presiding Judge
Thirteenth Judicial Circuit

Nov, South Carolina.

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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2014-DP-23-589

Robert Max Watkins,..... Appellant,

v.

State of South Carolina Respondent.

CERTIFICATE OF SERVICE

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this October 13, 2015, I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

Karen C. Ratigan, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211
Attorney for the State of South Carolina

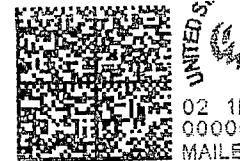
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Denise Tanner LaBeck
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October 13, 2015



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