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RECEIVED
NOV 09 2015
S.C. SUPREME COURT

October 26, 2015

The South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

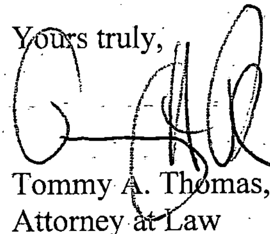
RE: Donnie R. Thigpen #350243 v. State of South Carolina
Docket No.: 2014-CP-28-1207

Dear Sir or Madam:

Enclosed please find an Original and a copy of a Notice of Appeal, along with a Certificate of Service and attachments. Please be advised that I was retained to represent Mr. Thigpen in this matter. However, Mr. Thigpen's family is unable to retain me to represent him for this appeal. I have forwarded an Affidavit of Indigency to Appellate Defense, by copy of this letter.

Kindly return a clocked copy to me in the enclosed envelope. Thank you and should you have any questions, or need any additional information, please do not hesitate to contact me.

Yours truly,



Tommy A. Thomas,
Attorney at Law

TAT/jem
cc: J. Clayton Mitchell, Esq.
Donnie Thigpen #350243
Appellate Defense

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas
Post-Conviction Relief
Tanya A. Gee - Presiding Judge

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S.C. SUPREME COURT

Case No.: 2014-CP-28-1207

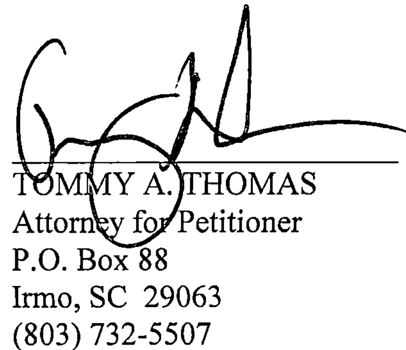
Donnie R. Thigpen #350243 ....Petitioner,

vs.

State of South Carolina ....Respondent.

NOTICE OF APPEAL

Donnie R. Thigpen #350243 appeals the Order of Dismissal of the Honorable Tanya A. Gee signed on October 15, 2015, filed on October 19, 2015. This Order was served on Counsel for Applicant on October 21, 2015.



TOMMY A. THOMAS
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Other Counsel of Record:
J. Clayton Mitchell, Esq.
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
Attorney for Respondent

Irmo, South Carolina
November 5, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas
Post-Conviction Relief
Tanya A. Gee - Presiding Judge

Case No.: 2014-CP-28-1207

Donnie R. Thigpen #350243 ....Petitioner,

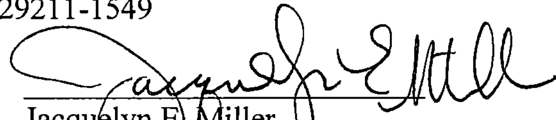
vs.

State of South Carolina ....Respondent.

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for the Petitioner hereby certify that I placed in the United States Mail, a copy of a Notice of Appeal, with postage prepaid and the return address clearly shown on said envelope to J. Clayton Mitchell, Esq. of the Attorney General's Office, at:

J. Clayton Mitchell, Esq.
Attorney General's Office
P.O. Box 11549
Columbia, SC 29211-1549



Jacquelyn E. Miller
Secretary to Tommy A. Thomas
Attorney for Applicant
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

Irmo, SC
November 4, 2015

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

Donnie R. Thigpen, #350243,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2014-CP-28-01207

ORDER OF DISMISSAL

FILED FOR RECORD
2015 OCT 19 AM 11:17
JOYCE MCDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed December 30, 2014. Respondent made its Return on June 15, 2015, requesting an evidentiary hearing be convened. Tommy A. Thomas, Esquire, was retained by Applicant to represent him on this action. An evidentiary hearing was held on August 25, 2015, at the Richland County Courthouse. Applicant was present and represented by Counsel Thomas. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent.

At the PCR hearing, Applicant testified on his own behalf. Also testifying was Applicant's counsel, Alex T. Postic, Esquire. This Court had before it the Kershaw County Clerk of Court records, Applicant's South Carolina Department of Corrections records, the PCR application, the Return, and the transcript.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Kershaw County. Applicant was indicted at the March 2012 term of the Court of General Sessions for Kershaw County for Hit and Run – Death Result (2009-GS-28-1171) and Felony DUI – Death Result (2009-GS-28-1164). Applicant

ATTEST True, Correct & Certified
Copy of Original on File in this
Court
Clerk of Court Kershaw County

was represented by Counsel Postic. Applicant proceeded to trial on March 23, 2012. He was convicted as indicted. The Honorable G. Thomas Cooper, Jr. sentenced Applicant to concurrent terms of ten (10) years' imprisonment.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Tommy A. Thomas, Esq. The South Carolina Court of Appeals affirmed the Applicant's conviction. State v. Thigpen, No. 2014-UP-386 (filed November 5, 2014). The Remittitur was issued on November 21, 2013.

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

I. Ineffective assistance of trial counsel in
   a. Failing to object to the introduction of evidence and testimony of the DataMaster examination, including the DataMaster video;
   b. Failing to preserve this objection for appellate review;
   c. Failing to properly object to the statement made by Applicant to law enforcement admitting his involvement in the accident;
   d. Failing to preserve this objection for appellate review;
   e. Failure to investigate the victim's phone records;
   f. Failure to challenge the chain of custody regarding the blood alcohol test results;
   g. Failure to challenge the DNA test results;
   h. Failure to investigate the note in the responding officer's report that there was a man in the woods near the scene of the crime;
   i. Failure to properly challenge the sufficiency of the Miranda[1] warnings.

II. APPLICABLE LAW

In a post-conviction relief action, Applicant bears the burden of proving the allegations in the 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, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial

[1] 384 U.S. 436 (1966).

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.

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. Applicant must overcome this presumption in order 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. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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.

III. FINDINGS 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 has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, appellate records, records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds counsel's testimony to be credible and persuasive on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below. As an initial matter, Applicant waived any challenged to appellate counsel's performance and made his intentions clear that he wished to go forward with Counsel Thomas.

Ineffective Assistance of Trial Counsel

Failure to object to the introduction of evidence and testimony of the DataMaster examination, including the DataMaster video

Applicant alleges Counsel was ineffective in failing to object to the introduction of evidence and testimony pertaining to the DataMaster examination, including the DataMaster video. Specifically, Applicant argues Counsel was ineffective in failing to argue that S.C. Code § 56-5-2950 provides for the exclusion of all evidence stemming from the testing result.

Counsel did object to the admissibility of the DataMaster test result's admission on the grounds that the sample was not taken within the time limits prescribed by statute. (Trial Tr. p. 72, lines 17 – p. 73, line 10). The trial court granted Counsel's motion to suppress the test result, but allowed the DataMaster video to be shown. (Trial Tr. p. 154-56). The trial court also allowed the administering officer to testify as to his observations of Applicant.

This Court finds this allegation without merit. Applicant has failed to meet his burden in proving Counsel was ineffective in any regard. This Court finds that Counsel made a strategic decision in allowing the video to be admitted. See Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992) (Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance.). Counsel credibly testified he thought the video would show the jury that Applicant was in fairly good shape for a man who

had just recently been involved in a horrific car accident. This was a reasonable trial strategy. As Counsel testified, he wanted to show the jury that Applicant was intoxicated because it tended to show that Applicant's confession was not given voluntarily. This Court finds Counsel was not deficient.

Applicant has cited no authority that such evidence must be excluded if the time parameters are not complied with. South Carolina Code § 56-5-2950(J) provides:

> [t]he failure to follow policies, procedures, and regulations, or the provision of this section, shall result in the exclusion from evidence of any *test results* if the trial judge or hearing officer finds that this failure materially affected the accuracy or reliability of the test results or the fairness of the testing procedure and the court trial judge or hearing officer rules specifically as to the manner in which the failure materially affected the accuracy of reliability of the test results of the fairness of the procedure.

(emphasis added). The statute is clear that *only* the test result shall be excluded. Applicant has also failed to cite any authority to exclude the officer's testimony as to his personal observations of Applicant. Applicant has therefore failed to prove any resulting prejudice because he cannot show that if an objection made been made, that it would have been successful.

Applicant further argues that even if the trial court overruled an objection to the DataMaster video and the related testimony, then it would have been reversed on appeal. The appellate courts will not disturb a trial court's ruling to admit evidence, absent an abuse of discretion. See State v. Horton, 359 S.C. 555, 566, 598 S.E.2d 279, 285 (Ct. App. 2004) (holding the trial court did not abuse its discretion in admitting the defendant's urine sample to show the level of defendant's intoxication). Here, a ruling admitting the evidence would clearly not be an abuse of discretion. This allegation is denied and dismissed with prejudice.

Failing to properly object to the statement made by Applicant to law enforcement admitting his involvement in the accident

Applicant alleges Counsel was ineffective in failing to object to the admissibly of the statement Applicant gave to investigators where he admitted to driving the vehicle. Applicant argues Counsel should have argued for suppression of that statement because the totality of the circumstances shows that he was deeply intoxicated at the time it was given. Counsel did object to Applicant's statement, but on the grounds that the investigators did not properly Mirandize Applicant. (Trial Tr. p. 85-91; 133-46) <u>See</u> <u>infra</u>.

This Court finds Applicant failed to meet his burden of proof. As Counsel realized at trial, "[t]he fact that one is intoxicated at the time a confession is made does not necessarily render him incapable of comprehending the meaning and effect of his words." <u>State v. Saxon</u>, 261 S.C. 523, 529, 201 S.E.2d 113, 117 (1973). "Therefore, proof that an accused was intoxicated at the time he made a confession does not render the statement inadmissible as a matter of law, unless the accused's intoxication was such that he did not realize what he was saying." <u>Id.</u> It was therefore reasonable for Counsel to not object under these grounds. This Court finds that a motion to suppress Applicant's statement on the grounds that he was intoxicated would have been futile. Importantly, this statement was given around 6:00pm, and Applicant had stopped drinking early that morning around 5:30am. (Trial. Tr. p. 320, lines 12-17; p. 436-50, p. 778, lines 23-24). The testimony reflects that Applicant had sobered up. (Trial Tr. p. 112-16; p. 127-31; p. 320, lines 7-13). This Court finds Applicant's statement was properly admitted. <u>See</u> <u>State v. Collins</u>, 266 S.C. 566, 673, 225 S.E.2d 189, 193 (1976) (the evidence regarding the defendant's intoxicated condition at the time he made a statement to police "presented a factual situation which the judge determined unfavorably to the defendant. We cannot say he erred."). This Court denies and dismisses this allegation.

Applicant also alleges that this issue would have been successful on appeal if the trial judge had not suppressed the statements. This Court finds otherwise. "When reviewing a trial court's ruling concerning voluntariness, this Court does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence." State v. Parker, 381 S.C. 68, 74, 671 S.E.2d 619, 622 (Ct. App. 2008) (internal citations omitted). A ruling that Applicant's statement was given voluntarily would not be disturbed on appeal. There is ample evidence in the record to support that finding; particularly that Applicant's level of intoxication had waned in the previous hours.

Failure to investigate the victim's phone records

Applicant further alleges that Counsel was ineffective for failing to investigate the victim's phone records. Counsel noted this and argued to the jury that law enforcement did no investigation into the victim's phone. (Trial Tr. p. 865, line 11 – p. 866, line 3). It was a reasonable strategy for Counsel to point out what he believed to be the weak points in the State's case. In any case, this allegation rests entirely on speculation because no records were produced at the hearing. See Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) ("failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result."). Applicant failed to present any evidence to this Court as to how the records could have changed the result of the trial.

Failure to challenge the chain of custody regarding the blood alcohol test results

Applicant alleges Counsel was ineffective in failing to challenge the chain of custody of the blood alcohol test results. This Court finds Counsel made a strategic decision in not prolonging the trial and challenging every step to the chain of custody. It was not Counsel's theory that Applicant had not been drinking that night, so the blood test results were not relevant

to his defense. Further, Applicant failed to show that the chain was not proper with any credible evidence. This allegation is denied and dismissed.

Failure to challenge the DNA test results

Applicant alleges Counsel was ineffective in failing to challenge the DNA test results. The State's DNA expert testified at trial that she was able to develop a partial DNA profile from blood on the driver side airbag. The expert testified that the blood did not match Applicant's and that it was from an unidentified male. (Trial Tr. p. 551, lines 10-19). The expert also determined that the DNA profile from the rear of the driver side airbag was a direct match to Applicant. Id. Counsel testified he retained his own DNA expert to help craft a strategy for cross-examining the State's DNA expert. Applicant has failed to produce any credible evidence that would support a challenge to the DNA results. Counsel had his consultant review the results of the State's expert and decided there was no basis to challenge the testing results. This was a very reasonable strategy. It was more appropriately to argue to the jury that it should be no surprise to find Applicant's DNA all over his own vehicle which Counsel did. However, this allegation rests on speculation. See Moorehead. It is denied and dismissed.

Failure to investigate the note in the responding officer's report that there was a man in the woods near the scene of the crime

Applicant alleges Counsel was ineffective in failing to investigate the fact that a man may have been found in the woods near the scene of the crime. Counsel testified credibly that he believed that to be a mistake in the officer's report and that the officer was questioned on this issue. Counsel explained that some of the confusion could have been due to a bicycle race or triathlon going on in the area at the time the vehicle was discovered. This Court finds Counsel's testimony credible and finds this was a mistake in the officer's report. This allegation is denied and dismissed.

563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

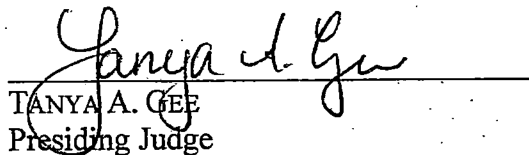
The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, 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 shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 15th day of October, 2015.



TANYA A. GEE
Presiding Judge

Columbia, South Carolina

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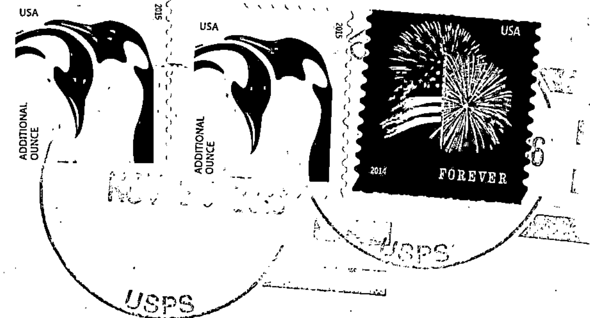

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