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November 9, 2015

RECEIVED
NOV 1 2 2015
S.C. SUPREME COURT

South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

RE: Kough, 338426 vs. State of SC
2011-CP-40-08760

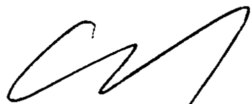
Dear Sir or Madam:

Enclosed herewith you will find the Notice of Appeal, Order of Dismissal, along with a Proof of Service in reference to the above named Applicant.

If you have any questions or concerns, please contact my office at the number stated above.

With kind regards, I am

Sincerely,



Charles T. Brooks, III
CTB/srw

Enclosed as stated
cc: J. Clayton Mitchell, Office of Attorney's General
South Carolina Office of Appellate Defense
Richard Kough, 338426

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas
Honorable Tanya A. Gee Circuit Court Judge

RECEIVED

NOV 1 2 2015

S.C. SUPREME COURT

Case No: 2011-CP-40-08760

Richard M. Kough.....................Appellant

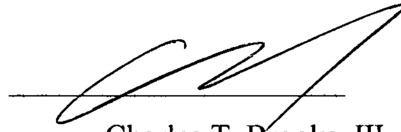
S.C.D.C. 338426

v.

The State...................Respondent

NOTICE OF APPEAL

Richard M. Kough, appeals his Denial for Post Conviction Relief in this case. The order of Dismissal was imposed and signed by the Honorable Tanya A. Gee, November 3, 2015, which I, Charles T. Brooks, III, received on November 9, 2015.



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Attorney for Appellant

Other Counsel on Record:
J. Clayton Mitchell, Esquire
Assistant Attorney General
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(803) 734-3970

Dated: November 9, 2015

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas
Honorable Tanya A. Gee Circuit Court Judge

RECEIVED

NOV 12 2015

S.C. SUPREME COURT

Case No: 2011-CP-40-08760

Richard M. Kough.....................Appellant

S.C.D.C. 338426

v.

The State..................Respondent

PROOF OF SERVICE

I, the undersigned, do hereby certify that on this 10th of November, 2015, I served the foregoing **Notice of Appeal, Order of Dismissal,** as well as **Proof of Service** in this matter by depositing a true copy of it in the United States Mail, postage prepaid, on November 10th, 2015, addressed to the following as indicated below:

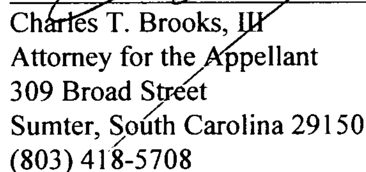
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

South Carolina Office of Appellate Defense
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29211-1589

Office of Attorney's General
Attn: J. Clayton Mitchell, Esquire
Post Office Box 11549
Columbia, South Carolina 29211-1549

Richard Kough, 338426
Kirkland Correctional Institution
4344 Broad River Road
Columbia, SC 29210

Dated: November 9, 2015



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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Richard M. Kough, #338426,

Applicant,

v.

State of South Carolina,

Respondent.

2011-CP-40-08760

ORDER OF DISMISSAL

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This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed December 27, 2011. Respondent made its Return on January 10, 2011, requesting an evidentiary hearing be convened. Jared H. Garraux, Esquire was appointed by the Richland County Clerk of Court to represent Applicant. A Petition for Substitution of Counsel was filed on February 7, 2012, where Adam S. Tesh, Esquire, took over representation by Order filed on February 7, 2012. Counsel Tesh was then relieved and Charles T. Brooks, III, Esquire was substituted as counsel. An evidentiary hearing was held on August 27, 2015, at the Richland County Courthouse. Applicant was present and represented by Counsel Brooks. 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 were Applicant's counsel, Charlie J. Johnson, Jr., Esquire, (Counsel), and Dr. Tora L. Brawley. This Court had before it the Richland 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 Richland County. Applicant was indicted at

the June 2009 term of the Court of General Sessions for Richland County for armed robbery (2009-GS-40-6661). Applicant was represented by Counsel Johnson. Applicant proceeded to trial on December 7, 2009. He was convicted as indicted. The Honorable J. Michelle Childs sentenced Applicant to sixteen (16) years' imprisonment.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed the Applicant's conviction. State v. Kough, No. 2011-UP-501 (filed November 9, 2011). The Remittitur was issued on November 28, 2011.

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 have Applicant evaluated for criminal responsibility and competency;
   b. Failing to investigate;
   c. Failing to effectively challenge law enforcement's search and seizures;
   d. Failing to effectively challenge the victim witness's identification of Applicant; and
   e. Failure to request a jury instruction on the lesser included offense of strong armed robbery.

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 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.

Ineffective Assistance of Trial Counsel

Failure to have Applicant evaluated for criminal responsibility and competency

Applicant alleges Counsel was ineffective for failing to have Applicant properly evaluated. Dr. Tora Brawley was qualified as an expert in clinical neuropsychology by the Court. She testified that she had met with and evaluated Applicant previously. She testified that Applicant had issues with seizure control and that he had part of his brain removed due to a tumor at the age of fourteen (14). She testified this would likely affect Applicant's behavior and impulse control. She testified she did not examine Applicant for his competency to stand trial or to examine whether he should be criminally responsible. Applicant testified as to the defense strategy in that they wanted to convince the jury that he did not have a weapon and therefore could not be convicted of armed robbery. Applicant also testified that he was offered a plea deal of fifteen (15) years' to strong armed robbery. Counsel testified he was aware of the issues testified to by Dr. Brawley. Counsel testified that he believed Applicant understood all of his rights and had no questions as to his competency to stand trial. He also did not have any problem communicating with Applicant. He noted he got along fairly well with Applicant and that they were able to form a defense strategy in hopes of being acquitted of armed robbery.

This Court finds the Applicant has failed to carry his burden of proving that a reasonable probability exists that he would have been found incompetent at the time of his guilty plea. A defendant must be mentally competent to stand trial to assist counsel in his defense. <u>Drope v. Missouri</u>, 420 U.S. 62 (1975). In every criminal case, it is presumed the defendant is sane. <u>State v. Milian-Hernandez</u>, 287 S.C. 183, 336 S.E.2d 476 (1985). Insanity is an affirmative defense to a prosecution for a crime. <u>Id</u>. South Carolina has adopted the M'Naghten test to determine insanity. <u>State v. Lewis</u>, 328 S.C. 273, 277-78, 494 S.E.2d 115, 117 (1997). A defendant is

insane if, at the time of the commission of the act constituting the offense, as a result of mental disease or defect, he lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong. Id.; see S.C. Code Ann. § 17-24-10(A) (Supp.1996).

A defendant must be mentally competent to stand trial to assist counsel in his defense. Drope v. Missouri, 420 U.S. 62 (1975). In determining if counsel is ineffective for failing to request a competency hearing, an applicant must show that a reasonable probability exists that he would be found incompetent at the time of this trial or plea. Jeter v. State, 308 S.C.230, 417 S.E.2d 594 (1992). Counsel may reasonably rely on his own perceptions in deciding if a client is competent to stand trial. Id.

This Court finds Applicant has failed to present any evidence showing he would have been found incompetent at the time of his trial had he been evaluated for competency at that time. The record is void of any indication that Applicant was unable to assist counsel in his defense. Applicant was able to effectively communicate with Counsel and took an active role in his defense, including making the decision to testify. This Court finds credible Counsel's perceptions that Applicant understood his advice, assisted in his defense, and was able to communicate effectively with Counsel. While Dr. Brawley was able to offer testimony as to Applicant's behavioral problems and to the possible causes therefrom, she was not able to present the Court with credible evidence as to Applicant's alleged lack of mental capacity or competency. This allegation is wholly without merit, and Applicant has failed to carry his burden of proving counsel was ineffective for failing to have the Applicant evaluated.

Failure to investigate

Applicant further alleges that Counsel was ineffective for failing to investigate the identity of the man who allowed law enforcement into the house where Applicant was found. This allegation rests entirely on speculation because the tenant was not produced at the hearing to allow the Court to judge the relevance of his testimony. 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 any evidence regarding the tenant could have changed the result of the trial.

Failure to effectively challenge law enforcement's search and seizure

Applicant further alleges Counsel was ineffective in failing to effectively challenge law enforcement's search of the house where Applicant was located. Counsel testified he did challenge the search, and the record reflects Counsel made a motion to suppress all evidence stemming from law enforcement's search done at the house. (Trial Tr. p. 177 – p. 178; 182-92; 215-223). There was an extensive argument over whether Applicant had an expectation of privacy in the room where he and his belongings were found. The trial court denied the motion to suppress and ruled that the police had a reasonable belief that the tenant had a common and apparent authority to enter the house by virtue of the key. (Trial Tr. p. 222, line 8 – p. 223, line 21). This Court finds Counsel made the appropriate motion and argument. This Court further finds that this issue was preserved for appellate review. This allegation is denied and dismissed with prejudice.

Failure to effectively challenge the victim and cabbie's identification of Applicant

Applicant alleges Counsel was ineffective in failing to effectively challenge the victim and the cabbie's identification of Applicant. Counsel testified a Biggers[1] hearing was held where the State put up a number of witnesses. Counsel testified he thoroughly argued that the victim and the cabbie's identification of Applicant should be suppressed. The record confirms Counsel's assertions. (Trial Tr. p. 175 – 76; p. 178-82; p. 194, lines 6-12). Counsel argued that the show-up identification was unduly suggestive and that it should be deemed inadmissible. The trial court found that while a show up identification is generally suggestive, when viewed under the totality of the circumstances, the identifications were admissible. This Court finds Counsel made the appropriate objection, preserved the issue for appellate review, and his performance was not deficient. This allegation is dismissed with prejudice.

Failure to request a jury instruction on the lesser included offense of strong armed robbery

Finally, Applicant alleges Counsel was ineffective for failing to request a jury instruction on the lesser included offense of strong armed robbery. (Trial Tr. p. 583, line 23 – p. 589, line 24; p. 591, line 5 – p. 592, line 10). Counsel argued that there was evidence presented to support a verdict for the lesser included offense of strong armed robbery. The trial court agreed and did in fact charge the jury with strong armed robbery. (Trial Tr. p. 655, line 17 – p. 656, line 6). This allegation is without merit. It is denied and dismissed with prejudice.

All Other Allegations

As to any and all allegations that were raised 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.

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[1] Neil v. Biggers, 409 U.S. 188 (1972).

IV. CONCLUSION

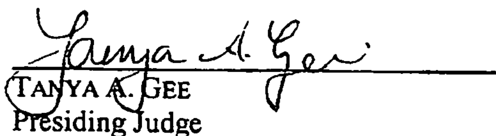
Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate counsels' performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 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 3rd day of November, 2015.



TANYA A. GEE
Presiding Judge

Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNT OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2011-CP-40-08760

RICHARD M. KOUGH, #338426

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

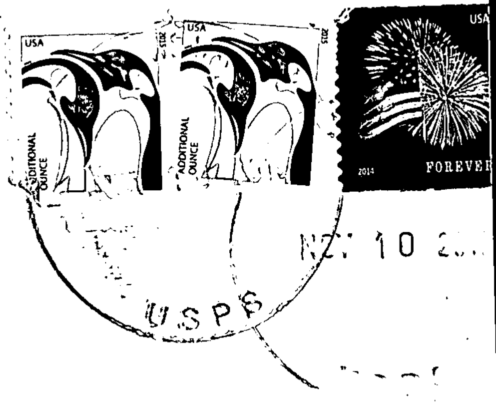
3. I have this day served a copy of the **Order of Dismissal** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Charles T. Brooks, III, Esquire
The Brooks Law Office, LLC
PO Box 3512
Sumter, SC 29151

DATED this 5rd day of November, 2015

Jenna C. Brown, Legal Assistant
For Respondent

THE BROOKS LAW OFFICES, LLC
309 BROAD STREET
P.O. BOX 3512
SUMTER, S.C. 29151



South Carolina Supreme Court
PO Box 11330
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