

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Oconee County

Edgar W. Dickson, Circuit Court Judge

RECEIVED

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S.C. Supreme Court

DAMETRIOSE MOSS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001132

APPENDIX

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ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF OCONEE)	TENTH JUDICIAL CIRCUIT
)	
Dametriose Moss,)	C.A. No. 2013-CP-37-207
S.C.D.C. No. 326883,)	
)	
Applicant,)	
)	
v.)	ORDER OF DISMISSAL
)	
State of South Carolina,)	
)	
Respondent.)	

FILED OCONEE, SC
 BEVERLY H. WHITEFIELD
 CLERK OF COURT
 2015 MAY 19 PM 1 08

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed March 14, 2013. Respondent subsequently filed its responsive pleadings. An evidentiary hearing into the matter was convened on July 28, 2014 at the Oconee County Courthouse. Applicant was present and was represented by Hugh W. Welborn, Esq. Respondent was represented by Walt Whitmire, Esq., of the Office of the Attorney General.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Oconee County. The Applicant was indicted at the September 2011 term of the Court of General Sessions for Oconee County for murder and possession of a weapon during a violent crime (2011-GS-37-764), two counts of discharging a firearm into a dwelling (2011-GS-37-765), and attempted murder (2012-GS-37-401). The Applicant was represented by Scott D. Robinson, Esq. On July 25, 2012, Applicant proceeded to trial. He was found guilty of both charges of discharging a firearm into a dwelling, and not guilty of the other charges. The Honorable R. Lawton McIntosh sentenced Applicant to two consecutive sentences of ten (10) years imprisonment, the second of which was to be suspended

upon service of five (5) years and five (5) years probation. As a consequence of his convictions, Applicant's probation was revoked in full for prior offenses (2009-GS-04-2141, 2010-GS-04-1410, -1412, and 2007-GS-04-3646). Applicant did not appeal his sentences or convictions.

At the PCR hearing, Applicant proceeded on the limited allegations of ineffective assistance of counsel in his assertion that he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:
 - a. Failure to purportedly have "Applicant's best interest at heart;"
 - b. Failure to object and move to have Applicant's charges dismissed as a result of a purported "inconsistent verdict"
 - c. Failure to file a notice of appeal.
 - d. Failure to move to quash the indictment that was purportedly illegally true billed.

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 reviewed the Clerk of Court records regarding the subject's convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and legal arguments of counsel. 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 general matter, this Court grants Respondent's motion for summary judgment on the Application. Applicant presented his case-in-chief at the PCR hearing. Subsequently, Respondent moved for summary judgment on all of Applicant's allegations of ineffective assistance of counsel. This Court grants summary judgment as a matter of law on Applicant's

allegations concerning the "inconsistent verdicts" and the "issuance of the indictments." The allegations concerning counsel's "not having Applicant's best interest at heart" was fatally vague, conclusory, and facially unavailing. Therefore, this Court is compelled to summarily dismiss the allegation. Because Applicant willfully abandoned his allegation of ineffective assistance for failure to file a notice of appeal, there were no issues of material fact for Respondent to dispute. Regardless, this Court has reviewed Applicant's trial and finds that counsel received a favorable disposition and excellent assistance of counsel as related to the issues before this Court.

APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his 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, the 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 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 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. at 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness

under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, *supra*. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

"All rules and statutes applicable in civil proceedings are available to the parties. The court may receive proof by affidavits, depositions, oral testimony or other evidence and may order the applicant brought before it for hearing." S.C. Code Ann. § 17-27-80. Summary judgment is proper where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Rule 56(c), SCRPC; Tupper v. Dorchester Cnty., 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). " 'Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below . ' " Grier v. Amisub of S.C., Inc., 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012) (quoting CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)).

A.

This Court grants Respondent's motion to summarily dismiss Applicant's allegation that counsel "didn't have his best interests at heart." Ineffective assistance claims are not fungible but instead are highly fact-dependent. Hemmerle v. Schriro, 495 F.3d 1069, 1075 (9th Cir. 2007). Conclusory allegations not supported by specifics do not warrant relief. Jones v. Gomez, 66 F.3d 199, 204 (9th Cir. 1995). This Court finds that Applicant has entirely failed to make a sufficient prima facie showing on Strickland's prejudice prong here. Where petitioner claimed ineffective counsel for failure to object to prosecution questioning, the court found the allegation conclusory where no specific instance was identified and no details or particulars were provided. George v. Smith, 586 F.3d 479, 484- 86 (7th Cir. 2009). Thus, this Court finds Applicant has failed to meet

his burden where the allegation is solely reliant upon his vague and cryptic testimony. See Jones v. Gomez, 66 F.3d 199, 204 (9th Cir. 1995). Therefore, because Applicant produced no credible evidence or testimony to establish a prima facie case of ineffective assistance on the matter during his case-in-chief, this allegation is summarily denied and dismissed with prejudice.

B.

This Court grants Respondent's motion for summary judgment on Applicant's allegation that counsel was ineffective for failing to quash a purported illegal indictment. Applicant supported the allegation through his testimony that the State violated the applicable statute in true billing him during a term of common pleas. "[T]he United States Supreme Court, in United States v. Cotton, 535 U.S. 625 (2002), held that a defective indictment does not deprive a court of jurisdiction." State v. Gentry, 363 S.C. 93, 99, 610 S.E.2d 494, 498 (2005). "The circuit court should judge the sufficiency of the indictment by determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged." Id. at 102-03, 610- S.E.2d 494 at 500 (internal citations omitted). This Court agrees with Respondent that Applicant's assertions here are frivolous as a matter of law. This Court further finds that Respondent's testimony showed that he was properly noticed and was aware of the State's intent to try him on the charged offenses. He has produced no evidence or testimony to the contrary. Therefore, because Applicant produced no credible evidence or testimony to establish a prima facie case of ineffective assistance on the matter during his case-in-chief, this allegation is summarily denied and dismissed with prejudice.

C.

This Court grants Respondent's motion for summary judgment on Applicant's allegation that counsel was ineffective for failing to move to have his verdicts set aside and charges dismissed because the verdicts were inconsistent. This Court finds that Applicant's allegation is defective as a matter of law. Our supreme court has abolished the rule against inconsistent verdicts in this state. State v. Alexander, 303 S.C. 377, 383, 401 S.E.2d 146, 150 (1991). "Where there is no evidence to support a conviction, an order granting a new trial should be upheld." State v. Smith, 316 S.C. 53, 55, 447 S.E.2d 175, 176 (1993). "However, where there is competent evidence to sustain the jury's verdict, the judge may not substitute his judgment for that of the jury." State v. Prince, 316 S.C. 57, 63, 447 S.E.2d 177, 181 (1993). Therefore, this allegation is summarily denied and dismissed with prejudice as a matter of law.

D.

Except as discussed above, this Court finds that the Applicant affirmatively abandoned the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

CONCLUSION

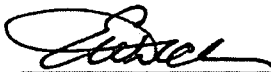
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and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

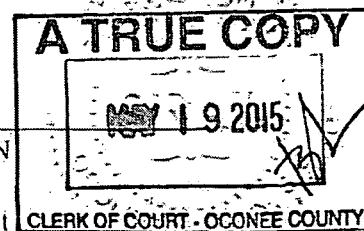
This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.


IT IS THEREFORE ORDERED

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 30TH day of April, 2015.


 EDGAR W. DICKSON
 Presiding Judge
 Tenth Judicial Circuit



 _____, South Carolina

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 BEVERLY H. WHITFIELD
 CLERK OF COURT
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2011 SEP - 7 P 3: 09

DOCKET NO. 2011GS37 00765

The State of South Carolina

County of Oconee

COURT OF GENERAL SESSIONS

SEP 06 2011
Term

THE STATE

vs.

Dametriose R Moss

BLS

Indictment for

Counts 1 through 2
Weapons / Discharging Firearms Into A
Dwelling

SC Code: 16-23-0440
CDR Code: 0052

WITNESSES

K Cain, Oconee Co Sheriff's Dept.

Kevin R Cain

Kevin R Cain

ARREST WARRANT NUMBER

N137891-92

ACTION OF GRAND JURY

True Bill

Shirley B. Hudson
For person of Grand Jury

SEP - 6 2011

Date:

VERDICT

X guilty

Eddie C. Crumley 7/25/12
For person of Petit Jury

Date:

Count 2: That **Dametrioise R Moss** did in Oconee County, on or about **May 18, 2011**, unlawfully discharge or cause to be discharged a firearm into the dwelling of Kurt Monahan, located at [REDACTED] Jasmine Lane, Seneca, South Carolina. This is in violation of §16-23-440(A) of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR