

IN THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT  
APPEAL FROM RICHLAND COUNTY  
COURT OF COMMON PLEAS  
G. THOMAS COOPER, JR., CIRCUIT COURT JUDGE  
2013-CP-40-5285

**RECEIVED**

JAN 5 2016

**SC SUPREME COURT**

Michael Jackson,.....Petitioner.

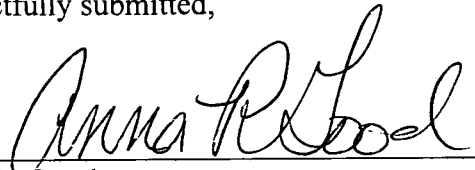
vs

The State of South Carolina,.....Respondent.

**NOTICE OF APPEAL**

Michael Jackson appeals the Honorable G. Thomas Cooper, Jr.'s dated December 10, 2015, Order of Dismissal. Undersigned counsel received notice of entry of the order on December 18, 2015. A copy of the order on appeal is attached to this notice.

Respectfully submitted,



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Attorney for the Petitioner.

January 5, 2016.

OTHER COUNSEL OF RECORD:  
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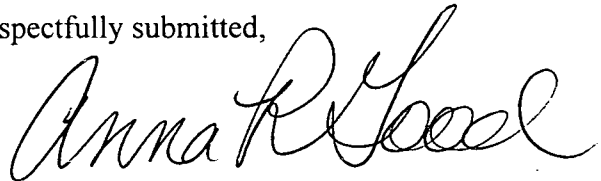
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**PROOF OF SERVICE**

I, Anna Good, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to the attorney of record, J. Clayton Mitchell, P.O. Box 11549, Columbia, South Carolina 29211-1549. I further certify that all parties required by Rule to be served have been served this 5th day of January 2016.

Respectfully submitted,



Anna R. Good, Esquire  
Law Office of Anna Good, LLC  
PO Box 7284  
Columbia, South Carolina 29202

**RECEIVED**

JAN 5 2016

**SC SUPREME COURT**

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

Michael D. Jackson, #294410,

2013-CP-40-05285

Applicant,

**ORDER OF DISMISSAL**

v.

State of South Carolina,

Respondent.

RICHLAND COUNTY  
FILED  
DEC 10 PM 2:06  
JEANETTE W. HARRIS  
C.C.P. & S.S. JUDGE

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed September 10, 2014. Respondent made its Return on March 12, 2015, requesting an evidentiary hearing be convened. Anna R. Good, Esquire, was appointed by the Richland County Clerk of Court. Applicant filed an amended application on May 6, 2014, and a second on October 1, 2014. An evidentiary hearing was held on July 14, 2015, at the Richland County Courthouse. Applicant was present and represented by Counsel Good. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent.

At the PCR hearing, Applicant testified on his own behalf. The Court had before it the Richland County Clerk of Court records, Applicant's South Carolina Department of Corrections records, the PCR application, the Return, the trial transcript, and the appellate records.

**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 true bill indicted during the April 2007 term of the Richland County Grand Jury for Armed Robbery (2007-GS-40-1683). Carol A. McCurry, Esquire, represented Applicant. Applicant proceeded to a jury trial before the Honorable J. Casey Manning, where he was convicted as indicted. On

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June 25, 2009, Judge Manning sentenced Applicant to life imprisonment without the possibility of parole.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Elizabeth A. Franklin-Best, Esquire. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence on December 1, 2011. State v. Jackson, No. 2011-UP-522 (S.C. Ct. App. December 1, 2011). The Remittitur was issued on April 7, 2013.

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

1. Ineffective assistance of counsel in
  - a. Failing to object to Applicant's shackles allegedly being visible before the jury;
  - b. Failing to properly prepare and form a defense strategy;
  - c. Failing to move to strike a juror who knew an employee of the solicitor's office;
  - d. Failing to challenge the victim's identification through a photo lineup;
  - e. Failing to move call Applicant as a witness during the Jackson v. Denno hearing.
  - f. Failing to object to a Crimestoppers tip;

## II. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their 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, 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

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, the 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 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." 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 transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the appellate records, 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. These credibility findings have been applied to the Court's findings and conclusions set forth below.

**Failing to object to Applicant's shackles allegedly being visible before the jury**

Applicant alleges Counsel was ineffective in failing to object to his shackles being visible to the jury. Applicant testified that the jury saw him in shackles. Specifically, he alleged that he was told to stand and face the jury before the entire jury panel and that his handcuffs were clearly visible.<sup>1</sup> This Court finds this allegation without merit. Applicant relies on Deck v. Missouri, 544 U.S. 622 (2005) in support of his allegation. Deck held that a criminal defendant has a right to remain free of physical restraints that are visible to the jury absent a trial court determine that they are justified by a state interest specific to a particular trial. This Court finds Applicant's testimony not credible on the issue. Applicant's testimony is self-serving and unsupported by *any* evidence before the Court. Applicant has failed to present any probative evidence that his shackles were ever visible to the jury. This Court finds Applicant failed to meet his burden in proving Counsel was ineffective as he had not shown there to have been an objectionable issue with any credible evidence.

Applicant has also failed to show how he was prejudiced in any manner because there is overwhelming evidence of his guilt. In Humbert v. State, 345 S.C. 332 (2001), the supreme court faced the issue of whether the PCR court erred in finding no prejudice where the applicant was wearing a jail uniform and shackles during his trial. The court held that there was not a reasonable probability that he outcome of the trial would have been different had he not been dressed in a jail uniform. Humbert v. State, 345 S.C. at 338. See Byers v. Basinger, 610 F.3d 980, 989 n.6 (7th Cir. 2010) (finding that even if a defendant proceeds to a jury trial while

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<sup>1</sup> Applicant's trial counsel, Carol A. McCurry (Counsel), did not testify at the PCR hearing. She has moved out of state and was unwilling to participate in the proceeding. Applicant made a motion to compel Counsel's compliance with a subpoena in turning over her defense file. This Court issued an Order on February 12, 2015, which gave Counsel 30 days to produce the file. Counsel failed to do so. This Court has since ordered Counsel to forward without her file and testimony.



wearing ankle restraints, he must still prove his appearance affected the outcome of his trial); Whitman v. Bartow, 434 F.3d 968, 971-72 (7th Cir. 2006) (finding any error in having the defendant proceed to a jury trial while wearing a prison jumpsuit was harmless because the State presented overwhelming evidence of the defendant's guilt); see also Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

Here, even assuming Applicant was wearing shackles that were seen by the jury prior to jury selection, this Court finds no prejudice resulted. The facts in Humbert are more egregious than the facts here because the applicant in Humbert was wearing a jail uniform plainly visible to all. Here, Applicant was allegedly wearing handcuffs throughout the trial that may or may not have been seen by the jury. Applicant cannot show that the result of the trial likely would have been different if his restraints were not visible to the jury. Applicant entered This Is It Video, an adult video store, and robbed the cashier, Michael Vazquez. Applicant told Vazquez that he had something in his pocket which Vazquez believed to be a weapon. Applicant hit Vazquez in the face and absconded with around one-hundred dollars (\$100). Law enforcement received a Crimestoppers tip that Applicant was involved in the robbery. A photo line-up was compiled and Applicant was identified by Vazquez. The robbery was captured on video surveillance which showed Applicant committing the crime. Applicant gave a full confession to law enforcement after his arrest where he admitted that he robbed the store but stated that the box cutter did not have a blade in it. Furthermore, the jury deliberated less than two hours before they found Applicant guilty. See Dugas v. Coplan, 428 F.3d 317, 335 n.28 (1st Cir. 2005) (The court has looked not only to the strength of inculpatory evidence, but also the brevity of the jury's

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deliberations). There is clearly overwhelming evidence to support the jury's conviction. This Court denies and dismisses this allegation with prejudice.

**Failing to properly prepare and form a defense strategy**

Applicant alleges Counsel was ineffective in failing to prepare the case for trial. He argues Counsel did not present the proper facts to support a jury instruction on strong arm robbery. To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). This Court finds Applicant has failed to meet his burden in proving prejudice. The evidence against Applicant was very strong which made Counsel's job much more difficult. It was Counsel's strategy to challenge the State's evidence, argue Applicant was under the influence of drugs, and highlight that the victim did not feel threatened. This was certainly reasonable under the circumstances of the case. Applicant has not presented any alternative defense or strategy that would have been stronger. Counsel cannot be held ineffective just because the State had a very strong case against Applicant. Furthermore, as discussed above Applicant cannot prove prejudice because there was overwhelming evidence of his guilt. This allegation is denied and dismissed.

**Failing to move to strike a juror who knew an employee of the solicitor's office**

Next, Applicant alleges Counsel was ineffective for failing to move to strike a juror who knew an employee of the solicitor's office. A defendant has a constitutional right to be tried by competent jurors, which implies a tribunal both impartial and mentally competent to afford a hearing. U.S.C.A. Const.Amend. 6. State v. Bell, 374 S.C. 136, 646 S.E.2d 888 (Ct. App. 2007). A decision on whether to dismiss a juror and replace her with an alternate is within the sound

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discretion. Id at 147, 894. This Court finds Applicant failed to meet his burden in proving that Counsel was ineffective. The prosecuting solicitor brought this issue to Judge Manning's attention. (Trial Tr. p. 58, lines 5-22; p. 106, lines 1-3). The employee was a law clerk with the solicitor's office and a swim team coach at the Jewish Community Center. (Trial Tr. p. 106, lines 6-17). The juror had two children on the swim team coached by the employee. (Trial Tr. p. 106, lines 18-21). Counsel then requested that Judge Manning inquire into the juror to see if she can remain fair and impartial and if she did in fact know any employees at the solicitor's office. The juror reiterated her answer that she did not know any employees of the solicitor's office. (Trial Tr. p. 109, lines 16-24). The juror then responded that she would remain fair and impartial. (Trial Tr. p. 111, lines 11-17). Counsel then noted that she did not have any objection. (Trial Tr. p. 112, line 1).

This Court finds Applicant failed to prove Counsel was ineffective in failing to move to strike the juror at that stage of the trial. Additionally, Judge Manning's colloquy with the juror showed that she could be fair and impartial. An objection to the juror remaining or a motion to strike the juror would have been baseless considering the juror's answers to Judge Manning's questions. This Court further finds Applicant has failed to prove he was prejudiced. Judge Manning would not have struck the juror after she informed him that she did not know the employee well, had not had many conversations with him, and that she could remain fair and impartial. This allegation is denied and dismissed with prejudice.

**Failing to challenge the victim's identification through a photo lineup**

Applicant next alleges Counsel was ineffective for failing to object to the victim's identification of Applicant through a photo lineup. Applicant argues that a Counsel should have

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requested that a Neil v. Biggers<sup>2</sup> hearing be held. This Court cannot make an informed decision of whether Counsel was ineffective in this regard because no evidence was presented on whether the identification was suggestive. It is possible that Counsel made the strategic decision not to challenge the identification because it would have been frivolous, but absent the victim being called to testify as to the specifics of the identification procedure, this Court will not presume deficiency. This allegation rests entirely on speculation because Applicant did not present any evidence to show that the lineup and lineup procedure was unduly suggestive. 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.”). As noted, Applicant also cannot show prejudice. This allegation is denied and dismissed.

**Failing to move call Applicant as a witness during the Jackson v. Denno hearing**

Applicant also alleges Counsel was ineffective for failing to call Applicant as a witness during the Jackson v. Denno hearing. Applicant testified that he was high on cocaine and heroin when he made his statement and that he had been on a bender for nine (9) days prior to the robbery. He alleges that he did not make his statement knowingly and voluntarily because of his intoxicated condition and that Judge Manning would have suppressed his statement had he given that testimony at the Denno hearing. This Court finds this contention without merit.

“The 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.” State v. Saxon, 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

<sup>2</sup> Neil v. Biggers, 409 U.S. 188 (1972).

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saying.” Id. Judge Manning properly found that his statement was given knowingly and voluntarily and ruled that it was admissible. The investigator testified that Applicant told him he took a break from smoking crack and believed Applicant to be fully coherent and not under the influence of drugs. (Trial Tr. p. 91, line 14 – p. 92, line 11). He also testified that he has interviewed suspects who were on crack cocaine but did not believe Applicant to be high at the time. (Trial Tr. p. 86, line 21 – p. 87, line 2). This Court finds that Applicant would not have persuaded Judge Manning to suppress the statement with his testimony that he was intoxicated. Specifically with regards to Counsel’s failure to call Applicant as a witness, Counsel was able to argue this point without having Applicant testify as she aptly cross examined the investigator on this topic. (Trial Tr. p. 86-87). Furthermore, Applicant cannot show any prejudice from this alleged deficiency.

#### **Failing to object to a Crimestoppers tip**

Finally, Applicant alleges Counsel was ineffective in failing to object to testimony regarding an anonymous Crimestoppers tip. Applicant argues Counsel should have moved to have the tip and all evidence obtained therefrom suppressed. This Court disagrees and finds the testimony concerning the anonymous tip was properly admitted. Any challenge to the tip would have to be made as a challenge to the officer’s reasonable suspicion that Applicant was involved in the crime. This Court finds there was adequate reasonable suspicion in acting on the anonymous tip that Applicant committed the robbery and that he could be found walking on Broad River Road. Any challenge to the tip would have been fruitless. The required reasonable suspicion can arise from an anonymous tip provided that the totality of the surrounding circumstances justifies acting on the tip. State v. Taylor, 401 S.C. 104, 108, 736 S.E.2d 663, 665

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able to match stills from the surveillance videos to known photographs of Applicant. They were able to confirm that he was in fact walking along Broad River Road. The investigator's reliance on the tip was further justified because the anonymous tipster was known to the investigators. See State v. Driggers, 322 S.C. 506, 511, 473 S.E.2d 57, 60 (“[A] non-confidential informant should be given higher level of credibility because he exposes himself to public view and to possible criminal and civil liability should the information he supplied prove to be false.”). Additionally, there was testimony presented at trial that investigators believed Investigator Scott McDonald knew Applicant and was able to corroborate the anonymous tip. (Trial Tr. p. 81, line 17 – p. 82, line 16). As noted, Applicant cannot prove any resulting prejudice due to the overwhelming evidence of his guilt.

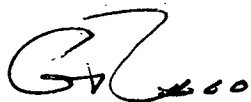
#### **All Other Allegations**

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.

#### **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



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 10 day of DECEMBER, 2015.



G. THOMAS COOPER, JR.  
Presiding Judge

COLUMBIA, South Carolina