

R. MILLS ARIAIL, JR.
ATTORNEY AT LAW

11 NORTH IRVINE STREET, SUITE 11 • GREENVILLE, SC 29601
PHONE 864.232.9390 • FAX 864.232.9392 • E-MAIL MILLS@RMALAWOFFICE.COM

January 21, 2016

RECEIVED

JAN 25 2016

Via US Mail

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

S.C. SUPREME COURT

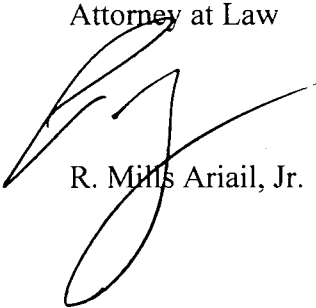
Re: Notice of Intent to Appeal from Norman Keith Burgess vs. State of South Carolina C.A. No.: 2014-CP-39-0909

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 Perry H. Gravely'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 Pickens 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

RECEIVED

JAN 25 2016

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Perry H. Gravely, Circuit Court Judge

Case No. 2014-CP-39-0909

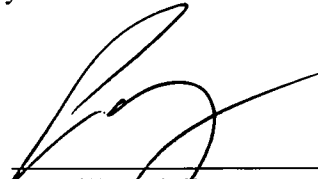
Norman Keith Burgess,..... Appellant,

v.

State of South Carolina Respondent.

NOTICE OF APPEAL

Appellant appeals the Honorable Perry H. Gravely's Order of Dismissal dismissing Appellant's application for post-conviction relief. On January 14, 2016, the Honorable Perry H. Gravely 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 January 19, 2016. A copy of the Honorable Perry H. Gravely's Order of Dismissal is attached.



R. Mills Ariall, Jr.
Attorney at Law
11 North Irvine St., Suite 11
Greenville, SC 29601
Telephone (864) 232-9390
Facsimile (864) 232-9392
Attorney for Norman Keith Burgess

Greenville, South Carolina
January 21, 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Case No.2014-CP-39-0909

Norman Keith Burgess,..... Appellant,

v.

State of South Carolina Respondent.

CERTIFICATE OF SERVICE

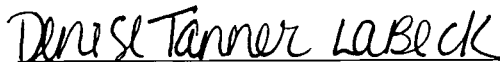
I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on January 21, 2016, I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

Karen C. Ratigan, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211

Pickens County Clerk's Office
Pickens County Courthouse
214 East Main Street
Pickens, SC 29671

Norman Keith Burgess SCDC# 353672
Broad River Correctional Institution
4460 Broad River Road
Columbia, South Carolina 29210

SC Commission of Indigent Defense
Division of Appellate Defense
PO Box 11433
Columbia, SC 29211-1433


Denise Tanner LaBeck

January 21, 2016

STATE OF SOUTH CAROLINA)
)
 COUNTY OF PICKENS)
)
 Norman Keith Burgess,)
 S.C.D.C. No. 353672,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2014-CP-39-909

ORDER OF DISMISSAL

CLERK OF COURT
 PICKENS COUNTY
 SOUTH CAROLINA

2016 JAN 15 AM 10 09

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed July 29, 2014. The Respondent made its return on January 8, 2015. An evidentiary hearing was held on December 16, 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 trial counsel, John Abdalla, Esquire. The Court had before it the trial transcript, the Pickens County Clerk of Court records, the South Carolina Department of Corrections records, the PCR application, the return, and the appellate records.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Pickens County Clerk of Court. The Applicant was indicted at the November 2007 term of the Pickens County Grand Jury for lewd act upon a child (2007-GS-39-2240) and second-degree criminal sexual conduct (CSC) with a minor and at the August 2012 term for third-degree CSC with a minor (2012-GS-39-1770). He was represented by John

Abdalla, Esquire and Brandt Rucker, Esquire.¹

After the State called the case to trial, the Applicant was found guilty. On December 19, 2012, the Honorable G. Edward Welmaker sentenced the Applicant to consecutive terms of 150 months for lewd act upon a child, 200 months for second-degree CSC with a minor, and 100 months for third-degree CSC with a minor.

A notice of appeal was filed at the South Carolina Court of Appeals. David Alexander, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal in the form of an Anders² brief. The Court of Appeals dismissed the appeal. State v. Burgess, Op. No. 2014-UP-239 (S.C. Ct. App. filed June 25, 2014). The remittitur was sent on July 11, 2014.

ALLEGATIONS

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

1. Ineffective assistance of trial counsel.
2. “[F]undamentally unfair trial tactics by the State in submitting a two (2) five (5)-year-old indictments the day before my jury trial.”
3. “[T]he trial court did not have personal jurisdiction of me to try me for these offenses because there was no actual evidence proving the charges and, as such, my conviction violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.”

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

¹ This Court notes the PCR application did not contain any allegations related to Mr. Rucker and the Applicant did not make any allegations against Mr. Rucker at the PCR hearing.

² Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

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).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

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); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

The Applicant stated he hired trial counsel before he was released on bond. The Applicant stated he had adequate conversations with trial counsel prior to trial. The Applicant admitted he had sex with the victim but stated occurred after she was 17 years old. The Applicant stated trial counsel should have called Angela Tollison and Josh Smollett as witnesses. The Applicant stated Tollison (his girlfriend and the victim's mother) could have testified the victim was lying and Smollett could have testified he had sex with the victim prior to the

Applicant. The Applicant stated trial counsel should have objected to the State's expert witness because she did not know anything about this case. The Applicant stated trial counsel should have investigated the victim's character:

Trial counsel confirmed he was retained in this case. Trial counsel testified the Applicant called him when he was "on the run" from these allegations and that he drove the Applicant to turn himself in. Trial counsel testified they reviewed the discovery materials with the Applicant, as well as his version of events. Trial counsel testified he spoke to Angela Tollison at the Applicant's request. Trial counsel testified Tollison was very weak and submissive and he thought she could hurt their case because she could very easily be made to appear as someone who allowed the abuse to happen. Trial counsel testified he believed they discussed Josh Smollett but that he does not favor attacking the victim. Trial counsel testified the Applicant wanted him to look into the victim's history but that he did not find anything that would be helpful.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have called Angelia Tollison and Josh Smollett as witnesses. Trial counsel testified he spoke to Tollison but would not call her as a witness "under any circumstance" based on the harm her testimony could cause. Trial counsel also testified he did not believe calling Smollett to testify about his history with the victim would have been favorable. This Court finds trial counsel's testimony is credible and that he provided strategic reasons why he did not call Tollison or Smollett as witnesses. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel). Regardless, as neither of these individuals testified at the PCR hearing, any discussion regarding what they would have testified

about at trial is purely speculative. 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 finds the Applicant failed to meet his burden of proving trial counsel should have objected to testimony from the State’s expert witness in delayed disclosure (Shauna Galloway-Williams) because she did not know anything about this case. This Court finds the Applicant has failed to articulate a valid reason for trial counsel to have objected to Galloway-Williams’ testimony. The recent appellate decision in State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015) is instructive (and, in fact, deals with the same expert witness testifying about the same topic of delayed disclosure of abuse by minors). This Court finds Galloway-Williams’ testimony in the Applicant’s case was permitted under the holding in Brown. This Court finds there was no basis for trial counsel to have made an objection to the expert’s testimony.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have investigated the victim’s character. Trial counsel testified he did not favor attacking the victim’s character. Trial counsel testified, however, that he did not find anything in the victim’s history that would have been helpful in this case. This Court finds trial counsel had a strategic reason for not presenting information about the victim’s background at trial. Regardless, the Applicant failed to meet his burden of proof because he did not present any evidence or testimony at the PCR hearing regarding (1) what information about the victim could have been obtained upon further information and (2) any potential impact that such could have had upon his

trial. See Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing he would have had a defense with additional time to prepare for trial); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. 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 and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. 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.

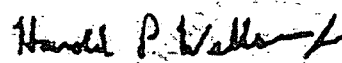
AND IT IS SO ORDERED this 14th day of January, 2016.



 Perry H. Gravely
 Presiding Judge
 Thirteenth Judicial Circuit

2016 JAN 15 AM 10 09
 CLERK OF COURT
 PICKENS COUNTY
 SOUTH CAROLINA

Pickens, South Carolina.

Certified Copy

Clerk of Court
Pickens County, SC
 Dated Jan 2016
 mr3

R. MILLS ARIALL, JR.

11 NORTH IRVINE STREET, SUITE 11
GREENVILLE, SC 29601

Via US Mail

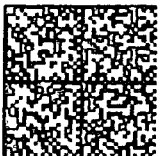
Daniel Shearouse

Clerk of Court

South Carolina Supreme Court

Post Office Box 11330

Columbia, South Carolina 29211



UNITED STATES POSTAGE
02 1P
\$001.860
0000563972 JAN 20 2016
MAILED FROM ZIP CODE 29601
FITNEY BOWES