

THE

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LAW FIRM, LLC

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JAN 27 2016

SC SUPREME COURT

January 25, 2016

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

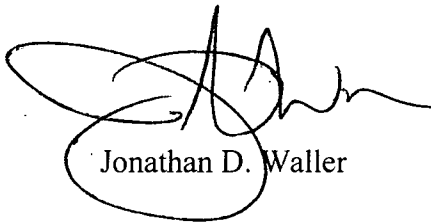
Re: Walter James Greene, Jr. vs. State of South Carolina
C/A No: 2013-CP-38-01060

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Greene in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-708-6767.

Sincerely,



Jonathan D. Waller

Cc: J. Clayton Mitchell, South Carolina Office of Attorney General

Enclosures

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Maité Murphy, Circuit Court Judge

2013-CP-38-01060

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SC SUPREME COURT

Walter J. Greene, Jr., #313126,

Appellant,

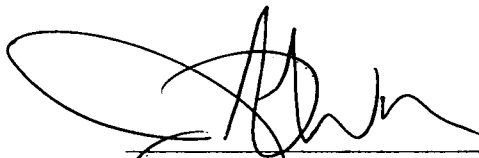
v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Walter James Greene, Jr., #313126, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed December 8, 2015 and served on counsel by letter dated December 22, 2015, issued by the Honorable Maité Murphy, Presiding Judge, First Judicial Circuit.



Jonathan D. Waller

Giese Law Firm
SC Bar No.: 76290
1315 Blanding Street
Columbia, SC 29201
803-708-6767 (phone)
803-708-6769 (fax)
jwaller@thegieselawfirm.com
ATTORNEY FOR PETITIONER

This 25 day of January, 2016.

Other Counsel of Record:
J. Clayton Mitchell, Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3319

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Maité Murphy, Circuit Court Judge

2013-CP-38-01060

RECEIVED

JAN 27 2016

SC SUPREME COURT

Walter James Greene, Jr, #313126,

Appellant,


v.

STATE OF SOUTH CAROLINA,

Respondent.

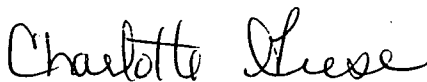
CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, J. Clayton Mitchell, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 25th day of January 2016.



Kelly Giese

SWORN TO BEFORE me this 25 day
of January, 2016.



Notary Public for South Carolina
My Commission Expires: 1/24/21

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

Walter J. Greene, Jr., #313126,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

FILED
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ORANGEBURG

2013-CP-38-01060

ORDER OF DISMISSAL

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed September 13, 2013. Respondent filed a Return on January 6, 2014, requesting an evidentiary hearing be convened. Jonathan D. Waller was appointed by the Orangeburg Clerk of Court. An evidentiary hearing was held on May 21, 2015, at the Dorchester County Courthouse. Applicant was represented by Counsel Waller. 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 trial counsel Margaret E. Hinds, Esquire, and Mark Wise, Esquire. This Court had before it the Orangeburg County Clerk of Court records, Applicant's South Carolina Department of Corrections records, appellate 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 Orangeburg County Clerk of Court. Applicant was indicted during the August 2010 term of the Orangeburg County Grand Jury for Burglary in the First Degree (2010-GS-38-1024), Assault and Battery with Intent to Kill (2010-GS-38-1025), and Armed Robbery (2010-GS-38-1026). Applicant was represented by Counsel Hinds and Counsel

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ORANGEBURG COUNTY, SC

Wise. On October 5, 2010, Applicant proceeded to a jury trial before the Honorable Edgar W. Dickson, where he was convicted as indicted of Burglary in the First Degree, Assault and Battery with Intent to Kill and of the lesser included offense of Attempted Armed Robbery. Judge Dickson sentenced Applicant to twenty-five (25) years' imprisonment for Burglary in the First Degree, twenty (20) years' imprisonment for Assault and Battery with Intent to Kill, and to twenty (20) years' for Attempted Armed Robbery, with the sentences to be served concurrently.

A Notice of Appeal was filed and an appeal was perfected on Applicant's behalf. Following briefing, the South Carolina Court of Appeals affirmed his convictions and sentences by unpublished opinion. State v. Walter J. Greene Jr. 2012-UP-507 (Ct. App. filed September 5, 2012). The Remittitur was sent on September 21, 2012.

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 properly object to the identification made by the victim through a photo lineup.
 - b. Failing to properly object to the State bringing Applicant before the jury to observe his physical characteristics.
 - c. Failing to object during the solicitor's closing argument.

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.

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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 transcript, Applicant's 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.

Failure to properly object to the identification made by the victim through a photo lineup

Applicant alleges Counsel were ineffective for failing to properly object to the identifications made by the victim. Applicant argues that if the identifications were properly

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suppressed, then it is likely that the result of the trial would have been different. Applicant testified that identification^{was MM} the big issue in the case. Counsel Wise concurred in this testimony and testified a motion to suppress^{the MM} to identifications was made. Applicant also argues that Counsel were ineffective in failing to contemporaneously object to the victim's in-court identification. Counsel Hinds credibly testified that she likely did not want to bring attention to it by making an objection.

This Court finds this allegation must be denied. Here, a Neil v. Biggers¹ hearing was held where Counsel Hinds argued that the victim's in-court and out-of-court identifications should be suppressed. Counsel Hinds went through the relevant factors and argued that the identification was not reliable and that the lineup was suggestive because he was the only person with a tear drop tattoo under his eye. Judge Dickson denied the motion to suppress and ruled that the identifications were reliable and that the marking under Applicant's eye seemed to be a blemish, not a tattoo. Furthermore, this was the issue briefed on appeal and ruled upon by the South Carolina Court of Appeals. While the State argued that the issue may not be preserved in its brief, the court of appeals' opinion addresses the merits, so this Court finds that the issue was preserved. Counsel cannot be held to be ineffective when the proper objection was made which preserved the issue for appellate review.

As to Applicant's argument that Counsel did not contemporaneously object to the in-court identification, Applicant cannot show that if such objection was made that it would have been granted. Judge Dickson made it very clear that both identifications would be admissible in the pre-trial suppression hearing. "An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of

¹ Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972).

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irreparable misidentification.” State v. Tisdale, 338 S.C. 607, 611, 527 S.E.2d 389, 392 (Ct. App. 2000) (citations omitted). Here, the out-of-court identification was ruled reliable. Applicant has failed to meet his burden in proving prejudice. Therefore, this allegation is denied and dismissed ^{with} prejudice.

Failure to properly object to the State bringing Applicant before the jury to observe his physical characteristics

Applicant alleges Counsel were ineffective in allowing the State to have Applicant stand before the jury to observe his physical characteristics, specifically his height and facial features. This Court finds that Counsel Wise did object to this issue and properly preserved the argument for appellate review. (Trial Tr. p. 334-38). Counsel Wise argued that this testimony was irrelevant and cumulative to the evidence the State had already admitted. He described it as “parading” Applicant before the jury. Judge Dickson allowed Applicant to be brought before the jury because the issue of identification was so important. He ruled that the jury would be allowed to judge Applicant’s height and whether he had a tear drop tattoo or some kind of facial blemish.²

As Judge Dickson noted, the State is allowed to bring a defendant before the jury so they can make a better observation as to his or her physical features. See State v. Hart, 306 S.C. 344, 412 S.E.2d 380, 381 (S.C.1991) (“It is well-settled that the State’s exhibition of a defendant’s physical characteristics does not implicate the defendant’s privilege against self-incrimination because such an exhibition is not testimonial.” (citing Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826, 16 L.Ed.2d 908 (1966))). This Court finds that Counsel was in no way ineffective in presenting his argument to the court. Applicant has also failed to prove any resulting prejudice.

This allegation is denied and dismissed with prejudice. m

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² The defense challenged the victim’s statement that Applicant was five feet four inches tall. The defense also challenged the victim’s statement that the suspect had a tear drop tattoo under his eye.

Failure to object during the solicitor's closing argument

Finally, Applicant alleges Counsel ^{were M} ~~was~~ ineffective for failing to object during the solicitor's closing arguments. The specific remarks are as follows:

He didn't have a gun out initially because if she looks out of a window, you know, if she peeps out the window and he's standing on her porch with a gun it ain't no way that door's getting opened. It ain't no way it's getting opened. Of course, if he's just standing there – You know, he had to have watched her come in, had to have watched her come in. Why else would you up and knock on somebody's door.

(Trial Tr. p. 518, line 24 – p. 519, line 6).

[responding investigator] finds a shell casing, he finds a shell casing and finds evidence of a bullet fragment, because I submit to you, that bullet that struck her, it had to have struck the gun she was holding, you know, it had to have hit something solid to have fragmented like that, little tiny pieces of the bullet, that is what grazes her.

(Trial Tr. p. 528, lines 15-20).

And then Mr. Greene, the man now who's been arrested three days later, three days later, black male, twenty-two years of age, five foot six, a hundred fifty-six pounds, dark complexion, short twists in his hair, and a tear drop, I mean literally a birth mark or tattoo or whatever it is, I mean, you had a chance to see it, I mean it's clear as day on his cheek under his right eye, clear as day.

(Trial Tr. p. 531, lines 8-16).

This Court finds this allegation without merit. Unquestionably, the solicitor was permitted to comment on the evidence adduced during trial and the inferences to be drawn from it. See State v. Pitts, 256 S.C. 420, 428, 182 S.E.2d 738, 742 (1971) (“The solicitor had a perfect right to state his version of the testimony and to comment on the weight that should be given to such.”). This Court finds Applicant has failed to meet his burden in proving Counsel ^{were M} ~~was~~ ineffective in failing to object to the solicitor's comments. In the first challenged comment, the solicitor is arguing his version of events. He drew the inference that Applicant observed the

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victim entering her residence before committing the crimes. This Court finds this is not objectionable.

As to the second challenged comment, the solicitor concludes that the bullet struck a gun the victim was holding. The solicitor was merely arguing his case and the facts as he saw them from the evidence. This passage is not objectionable because it is an inference that can be reasonably drawn from the evidence.

In the third challenged remark, the solicitor mentions that the mark or blemish under Applicant's eye is a tear drop. He is then quick to say "or whatever it is." This Court finds this was not objectionable because the solicitor was just repeating what the victim said in her initial statement. That evidence is clearly before the jury. The solicitor was also quick to note that the accuracy of that description would be left up to them as the fact finders.

Applicant has also failed to show ^{that} ~~how~~ ^{it} ~~if~~ an objection, ^{if} ~~was~~ made to any of the challenged comments, ^{could} ~~that it would~~ have been sustained or that the result of the trial would have been different. Applicant cannot prove any resulting prejudice from the alleged deficiencies. This allegation 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.

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

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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.

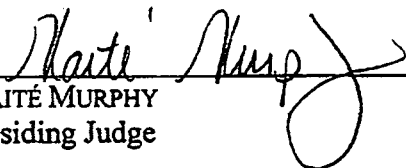
The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRPC, 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 2 day of Dec, 2015.

Dec. 2, South Carolina


MAITÉ MURPHY
Presiding Judge

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THE

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