

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

RECEIVED

MAR 28 2012

S.C. Supreme Court

HERBERT L. MATTHEWS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

(2)

MOTION FOR AN EXTENSION OF TIME
IN WHICH TO FILE THE PETITION FOR
WRIT OF CERTIORARI AND APPENDIX

Counsel for Herbert Matthews respectfully requests an extension of thirty (30) days in which to file the petition for writ of certiorari and appendix in this case. This motion is made pursuant to the Order of the South Carolina Supreme Court dated March 18, 2009. This is a second request for an extension. In support of this request, counsel shows:

- (1) The petition for writ of certiorari and appendix are due to be served and filed today. The Court has granted one previous extension.
- (2) Counsel for Mr. Matthews respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time. Given the number of extensions previously granted and the order in which counsel attempts to

manage her caseload, counsel hopes that no further extension requests will be required.

- (3) Counsel is preparing to file the petition for writ of certiorari and appendix in the case of Donald Hulon v. State and the initial brief of appellant and designation of matter in the case of State v. Eric Spratt today, March 28, 2012. On March 22, 2012, counsel filed the petition for rehearing in the case of State v. Shane Epting. On March 19, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Clarence Logan and the petition for writ of certiorari and appendix in the case of Jerry Galbreath v. State. On March 14, 2012, counsel had an oral argument in the case of State v. Cameron Hammonds in the Court of Appeals. On March 13, 2012, counsel had an oral argument in the case of State v. Bennie Golston in the Court of Appeals. On March 8, 2012, counsel filed the petition for rehearing in the cases of State v. Andre Massey and State v. Jake Wilson. On March 7, 2012, counsel had an oral argument in the case of In the Matter of the Care and Treatment of Bobby Manigo in this Court. On March 6, 2012, counsel had an oral argument in the case of State v. Patrick Herb in this Court. On February 23, 2012, counsel filed the petition for rehearing in the case of State v. James Nash. On February 21, 2012, counsel filed the initial reply brief of appellant in the case of State v. Brian Phillips and the return to petition for rehearing in the case of In the Matter of the Care and Treatment of Orlando Williams. On February 15, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Daniel Rogers. On February 14, 2012, counsel had an oral argument in the case of State v. Jaymes Wood in the Court of Appeals and filed the initial brief of

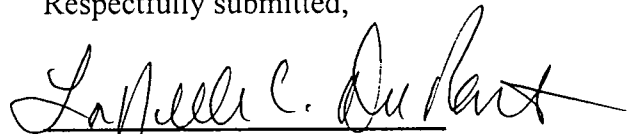
appellant and designation of matter in the case of State v. Alonza Dennis. On February 13, 2012, counsel had an oral argument in the case of State v. Kevin Epting in the Court of Appeals. On February 10, 2012, counsel filed the petition for writ of certiorari and appendix in the case of Mario Hunter v. State and the return to petition for writ of certiorari to the Court of Appeals in the case of State v. Phillip Sawyer.

(4) Counsel makes this request in good faith and not for purpose of delay. Counsel intends to continue to work on the cases with more than three extensions first so that the caseload will hopefully become more manageable in the near future, and less extensions will need to be requested.

(5) Counsel for the Attorney General's office has been informed of this request

WHEREFORE, the undersigned counsel would respectfully request an additional extension of thirty (30) days in which to file the petition for writ of certiorari and appendix in this case based upon the above exigent circumstances.

Respectfully submitted,



LaNelle C. Durant
Appellate Defender

Attorney for Petitioner

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Deadra L. Jefferson, Circuit Court Judge

HERBERT L. MATTHEWS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

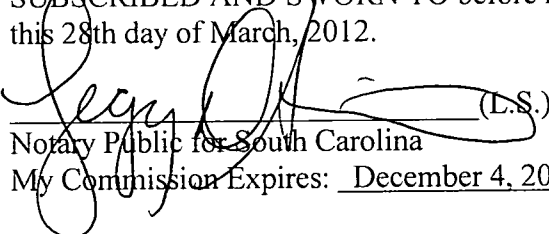
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of motion for an extension of time in which to file the petition for writ of certiorari and appendix in the above referenced case has been served upon Matthew Friedman, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201, this 28th day of March, 2012.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 28th day of March, 2012.


(L.S.)
Notary Public for South Carolina
My Commission Expires: December 4, 2017.



Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

December 28, 2011

RECEIVED

FEB 27 2012

The Honorable Daniel E. Shearouse
Clerk of Court, S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

S.C. Supreme Court

Re: Herbert Matthews v. The State

Dear Mr. Shearouse:

The petition for writ of certiorari and appendix in this case are due to be served and filed with the Court today. However, because of my heavy workload at this time, I am requesting an extension for 30 days, in which to serve and file the petition.

By copy of this letter, I am informing Matthew Friedman, of the Attorney General's Office, of my request.

Sincerely,

LaNelle C. Durant
Appellate Defender

LCD/pds

cc: Matthew Friedman, Esquire



SCCID

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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

December 29, 2011

RECEIVED

DEC 29 2011

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
Post Office Box 11330
Columbia, SC 29211

S.C. Supreme Court

Dear Mr. Shearouse:

The following case falls under the 60 day rule for appeals, and the date we received the transcript is listed to the side.

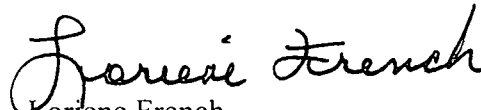
Herbert L. Matthews v. State of South Carolina

12/29/2011

I would appreciate you beginning our time limits from the above date, and if you need additional information, or have any questions please contact me.

Thank you for your assistance in this matter.

Sincerely,



Lorlene French
Legal Services Coordinator



SCCID

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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

RECEIVED

NOV 18 2011

November 18, 2011

S.C. Supreme Court

Ms. Amanda K. Haffenden
Circuit Court Reporter
P O Box 424
Summerville, SC 29484

Dear Ms. Haffenden:

Please provide us with the following transcript:

Herbert L. Matthews v. State of South Carolina Case #: 10-CP-10-05394

County: Charleston Date of Trial: May 24, 2011

Presiding Judge: Deadra L. Jefferson

To ensure prompt payment, please sign and complete the enclosed CID FORM 3500 and include the original criminal case number (Indictment number) where the space is provided.

Please number the lines on the paper from 1-25, and include any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments.

If you are aware of any co-defendants or if the Attorney General's Office has already requested a transcript, please let us know.

Sincerely,

Sharon A. Graham
Administrative Coordinator

cc: S.C. Supreme Court
Attorney General's Office

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Deadra L. Jefferson, Circuit Court Judge

Case No. 2010-CP-10-5394

The State,

Respondent,

v.

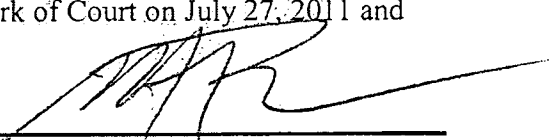
Herbert L. Matthews,

Appellant.

NOTICE OF INTENT TO APPEAL

Herbert L. Matthews respectfully appeals the denial of his Application for Post Conviction Release. The denial was imposed by the Honorable Deadra L. Jefferson by Order dated July 26, 2011, filed with the Charleston County Clerk of Court on July 27, 2011 and received by the Defendant on August 4, 2011.

August 9, 2011



Mark A. Peper
The Peper Law Firm, PA
1637 Savannah Highway
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mark@peperlawfirm.com

Other Counsel of Record:

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Mary Ford, Esquire
Andrew Grimes, Esquire
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PO Box 11549
Columbia, SC 29211

Elizabeth A. Franklin-Best, Esquire
SC Commission on Indigent Defense
Appellate Division
1330 Lady Street, Suite 401
Columbia, SC 29201

PROOF OF SERVICE OF A NOTICE OF APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Deadra L. Jefferson, Circuit Court Judge

Case No. 2010-CP-10-5394

The State,

Respondent,

v.

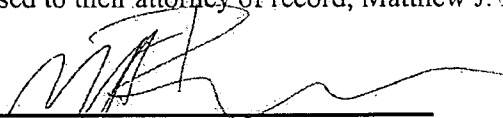
Herbert L. Matthews,

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on The SC Attorney General's Office by depositing a copy of it in the United States Mail, postage prepaid, on October 24, 2011, addressed to their attorney of record, Matthew J. Friedman, Esquire, Post Office Box 11549 Columbia, SC 29211.

October 24, 2011



Mark A. Peper
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Other Counsel of Record:

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1330 Lady Street, Suite 401
Columbia, SC 29201

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 Herbert L. Matthews, #242905,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT
 CASE NO.: 2010-CP-10-5394

ORDER OF DISMISSAL

FILED
 2011 JUL 27 PM 12:18
 JULIE J. ARMSTRONG
 CLERK OF COURT

Presiding Judge:	Deadra L. Jefferson
Applicant's Attorney:	Mark A. Peper, Esq.
Respondent's Attorney:	Matthew J. Friedman, Esq.
Trial Counsel:	Mary Ford, Esq. Andrew Grimes, Esq.
Appellate Counsel:	Elizabeth A. Franklin-Best, Esq.
Date of Hearing:	May 24, 2011
Court Reporter:	Amanda Haffenden

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed July 8, 2010. The Respondent made its Return on November 23, 2010 which was filed on November 29, 2010. An evidentiary hearing into the matter was convened on May 24, 2011 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Mark A. Peper, Esquire. Matthew J. Friedman, Esquire, of the South Carolina Attorney General's Office represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Applicant's trial counsel, Mary Ford, Esquire, who sat as first chair at trial, and Andrew Grimes, Esquire, who sat as second chair at trial, also testified at the hearing. This Court had before it the records of the Charleston County Clerk of Court regarding the subject convictions, the Applicant's records from the Department of Corrections, the trial transcript, the Amended Final Brief of Appellant,

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the Final Brief of Respondent, the South Carolina Court of Appeals' opinion affirming the conviction and sentence, the Remittitur dated March 31, 2010, the PCR application, and the State's Return thereto.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Charleston County. The Applicant was indicted at the September 2006 term of the Charleston County Grand Jury for armed robbery (2006-GS-10-9246), pointing and presenting a firearm (2006-GS-10-9245), and possession of a firearm during commission of a violent crime (2006-GS-10-9247). Mary Ford, Esquire, and Andrew Grimes, Esquire, represented the Applicant. The Applicant proceeded to trial on August 7-8, 2007, after which a jury found him guilty as indicted. The Honorable John C. Few sentenced the Applicant to confinement for thirty (30) years for armed robbery, five (5) years for pointing and presenting a firearm, and five (5) years for possession of a firearm. The sentences were to run concurrently.

A timely Notice of Appeal was filed on August 13, 2007 on Applicant's behalf and an appeal was perfected. Elizabeth A. Franklin-Best, Esquire, of the South Carolina Commission on Indigent Defense, represented Applicant on appeal. After full briefing by both sides, the South Carolina Court of Appeals affirmed the conviction and sentence. State v. Matthews, Op. No. 2010-UP-210 (S.C. Ct. App. filed March 15, 2010). The Remittitur was issued on March 31, 2010.

ALLEGATIONS

The Applicant alleges he is being held in custody unlawfully for the following reasons:

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1. Ineffective assistance of trial counsel in that counsel failed to call favorable witnesses to testify.
2. Prosecutorial misconduct in that prosecutor made statement that Applicant was guilty and implied personal belief.

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 hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon his or her 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).

The Applicant testified that he went to trial because he did not understand the plea bargain. He asserted that he decided at one point to accept the plea offer of ten (10) years, but he was scared because the offer was not properly explained to him. He testified that counsel could have better explained the offer and encouraged him to accept it. He admitted it was his decision to reject the plea offer. Applicant testified that it was solely counsel's decision that he not testify at trial. He testified that counsel failed to challenge Officer Scott Hille's qualifications as an expert. Applicant asserted that counsel failed to call Ms. Harris as a witness at trial.

Trial counsel, Mary Ford, Esquire, testified that she met with Applicant about sixteen (16) times and sent four (4) letters to Applicant. Counsel testified that she thought Applicant understood the focus of his case was to get a reduction in his charge. She testified that she communicated the plea offer of ten (10) years to Applicant, but he wanted the charge reduced to strong arm robbery. She asked the solicitor about strong arm robbery, but he refused to offer a lesser offense. The Applicant had already had a prior armed robbery charge reduced to strong arm robbery, and he was on probation at the time of this incident. Counsel asserted that she

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never thought Applicant misunderstood the terms of the plea offer. She testified that he rejected the plea offer and refused to go to court, and his case was then placed on the trial docket. She testified that Applicant wanted the ten (10) year plea offer back at the time of trial, but the solicitor refused to put the offer back on the table. Counsel testified that Applicant later agreed to plead straight up to armed robbery before Judge Hughston, but once the plea hearing began Applicant changed his mind and refused to plead guilty. She asserted that she told Applicant it was in his best interest to plead guilty. Counsel further told Applicant there was a good chance he would receive thirty (30) years if convicted at trial.

Ms. Ford testified that her investigator spoke with the victim and Ms. Harrison, both of whom worked at the dollar store, in January 2007. Counsel testified that her investigator tried to talk to the victim again closer to trial, but the victim would not talk to them as he had already discussed everything with the solicitor. She did not think Ms. Harrison had anything to offer at trial because the police never took a statement from her, she did not identify anyone, and she did not see any clothing. She asserted there was no one able to identify Applicant's face, and it was a strategy decision not to call as many witnesses as possible who could testify to the identity of the assailant. Counsel testified that she did not plan on putting up a defense unless Applicant testified, so it was part of her trial strategy not to call any witnesses, including Ms. Harrison. Counsel testified that she did not want to risk losing the last closing argument. She testified Applicant gave her several names and phone numbers, all whom she called. The Applicant informed counsel that his cousin could refute what the officer stated. However, when speaking with his cousin over several occasions he stated that he had not spoken with the Applicant in a while. She further testified that the applicant's cousin indicated he was no on the telephone with him at the time of the incident and she was not going to offer testimony that was perjurous.

Counsel testified she tried to obtain phone records to confirm Applicant's contention; however a prepaid phone was used, and as a result records are not kept by any carrier. Therefore, counsel did not want to call the Applicant's cousin to testify to something contrary to his assertion. She asserted that Applicant testified at the Neil v. Biggers hearing, but it did not go well as he ultimately recanted his testimony and asserted his Fifth Amendment rights. Counsel testified she advised Applicant not to testify due to his criminal record, but ultimately it was Applicant's decision not to testify at trial.

Counsel testified that Applicant was evaluated for mitigation purposes, and the doctor found no mental health issues or signs of schizophrenia. She testified the evaluation reflected that the Applicant was of average intellect and no problems were noted on the evaluation. Counsel asserted that she did not have any problems communicating with Applicant. She testified that she did not believe the State's closing argument was improper when the solicitor told the jury to find Applicant guilty because he is guilty. (Tr. 267:3.) She asserted she saw no basis to challenge the expertise of Officer Scott Hille. Counsel further testified there was no basis to hire an expert due to the absence of fingerprints.

Mr. Grimes testified, in accord with Ms. Ford's testimony, he did not believe the solicitor's statement in closing that the Applicant should be found guilty because he is guilty was objectionable. He asserted that if an objection was made it probably would have been overruled or at most a curative instruction would have been made, but it was not a basis for a mistrial.

Ineffective Assistance of Counsel

The Applicant alleges that he received ineffective assistance of counsel. In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where

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ineffective assistance of counsel is alleged 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, 686, 104 S. Ct. 2052, 2064 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

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 690, 104 S. Ct. at 2066. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under prevailing professional norms.” Id. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). 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.” Id. at 117–18, 386 S.E.2d at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

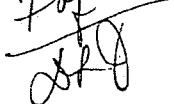
This Court finds that trial counsel’s testimony is credible. This Court finds that counsel is a trial practitioner who has extensive experience in the trial of serious offenses. Counsel conferred with the Applicant on several occasions. During conferences with the Applicant, counsel discussed the pending charges, discovery, the elements of the charges and what the State

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[Signature]

was required to prove, Applicant's constitutional rights, and possible defenses or lack thereof.

Regarding Applicant's claims of ineffective assistance of counsel, this Court finds Applicant has failed to meet his burden of proof. This Court finds that counsel demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 5, 239 S.E.2d 750, 752 (1977); Strickland, 466 U.S. at 687-88, 104 S. Ct. at 2064-65; Butler, 286 S.C. at 442, 334 S.E.2d at 814. This Court further finds counsel adequately conferred with Applicant, conducted a proper investigation, and was thoroughly competent in her representation. This Court finds that counsel's representation did not fall below an objective standard of reasonableness.

This Court finds that it was Applicant's free, informed, and voluntary decision to reject the plea offers. This Court finds that Applicant understood the terms of the offers and knowingly chose to decline the offers because he wanted the State to reduce the charge to strong arm robbery. This Court finds that it was Applicant's free and informed decision not to testify at trial based on counsel's advice. The Court finds counsel's testimony credible that after hearing Applicant's testimony in-camera, she felt it was not in his best interest to testify at trial. This was a valid strategy and will not be deemed as ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992); Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). The trial court questioned counsel about whether she had discussed the right to testify with Applicant, and the court allowed a break for the Applicant to discuss with counsel whether he should testify. (Tr. 246:17-247:16.) After the break and swearing the Applicant, the trial court went over the right to testify with Applicant, and Applicant asserted it was his decision not to testify. (Tr. 247:17-250:6.)

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This Court finds that counsel made a valid strategic decision not to call any witnesses to preserve last argument. “There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in a case.” Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). Where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. Stokes, 308 S.C. 546, 419 S.E.2d 778; Whitehead, 308 S.C. 119, 417 S.E.2d 529. Counsel's strategy will be reviewed under “an objective standard of reasonableness.” Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). Here, counsel testified that she and her investigator spoke with Ms. Harrison and did not believe Ms. Harrison had anything to offer at trial. Moreover, Ms. Harrison did not testify at the PCR hearing so it would be speculative to assume her testimony would have assisted Applicant at trial. See Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). Further, there was nothing to be gained by calling Applicant's cousin, as he would have testified contrary to Applicant's assertions.

This Court finds that counsel was not ineffective for failing to object to the solicitor's closing statement, “Find the defendant guilty because he is guilty.” (Tr. 267:2–3.) The statement was a comment on the evidence rather than a personal opinion, and thus was not objectionable. Moreover, it is doubtful an objection to such comment would have been sustained. This Court finds counsel was not ineffective for failing to challenge Officer Hille's expertise as there was no basis to do so. This Court further finds counsel's testimony credible that there was no basis to hire an expert for the absence of fingerprints.

This Court finds that a jury instruction on identification based on the totality of the record would not have made an appreciable difference in the outcome of the trial, and counsel was not deficient for failing to request one. After closing instructions, the court asked if there were any

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exceptions, and Mr. Grimes stated, "And I don't know if you want to charge on expert or identification. . . ." (Tr. 282:15-17.) The court responded that it would have charged identification if requested. (Tr. 282:18-22.) Mr. Grimes stated, "We will leave it at the court's discretion. I don't think we had a strong position on it." (Tr. 282:23-24.) Based on the dialogue between counsel and the court, this Court can only assume counsel failed to request an identification charge to support counsel's theory that no one was able to identify Applicant's face, which led to the strategy to not call any witnesses and preserve last closing argument. Further, an instruction on identification would not have added anything to exculpate the Applicant. When considering a charge the court looks at the totality of the instruction. The charge as given by the court instructs that the State must prove beyond a reasonable doubt that the Applicant committed the acts charged with and the elements of Armed Robbery. (Tr. 277:2-278:3.) While an additional instruction on identity would have given and directed the jury that the Applicant is to be found not guilty if identity is not proven beyond a reasonable doubt, the charge in its totality imposes the same burden on the State in establishing the elements of the offense. Therefore, counsel's failure to request a charge on identification does not rise to the level of deficient performance. This Court also finds that a jury instruction on expert witnesses would not have made an appreciable difference in the outcome of the trial, and counsel was not deficient for failing to request one. The trial court is not required to give a separate instruction on expert witnesses when the jury is instructed on witness credibility and believability, which the trial court properly instructed in this case. (Tr. 273:14-274:10.) This Court further finds Applicant's argument that a jury charge on mere presence (Tr. 279:1-5) and crime of violence (Tr. 278:4-11) are not supported by the record to be without merit. There is no case law that supports the contention that they should not be instructed. Moreover, Mr. Grimes objected to the

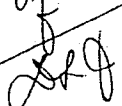
charge that armed robbery is a crime of violence, and it was overruled. (Tr. 282:5-13.) This Court finds that a jury instruction on mere presence and crime of violence made no appreciable difference in the outcome of the trial. The Court further finds that an instruction defining a crime of violence is required as a definitional section of the statute clarifying the required elements of the offense. The Court further finds considering the totality of the record an instruction on mere presence inured to the Applicant's benefit.

This Court finds that appellate counsel was not ineffective for failing to file a writ for certiorari. There is no right to supreme court review of a decision by the court of appeals by way of a writ of certiorari. See Douglas v. State, 369 S.C. 213, 631 S.E.2d 542 (2006) (declining to impose a duty on appellate counsel to file a petition for rehearing or certiorari from a decision of the court of appeals in a criminal matter, and overruling Poston v. State, 339 S.C. 37, 528 S.E.2d 422 (2000) to the extent it can be read to impose such a duty).

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test, specifically that counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that counsel committed either errors or omissions in her representation of the Applicant. The Applicant failed to show that counsel's performance was deficient. This Court also finds the Applicant has failed to prove the second prong of Strickland; specifically that he was prejudiced by counsel's performance. Applicant's complaints concerning counsel's performance are without merit and are denied and dismissed.

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

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present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

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 or sentencing proceedings. Counsel was not deficient in any manner, nor was the Applicant 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 written notice of entry of this Order 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 served and filed.

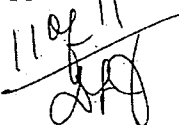
IT IS THEREFORE ORDERED:

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 26th day of July, 2011.


The Honorable Deedra L. Jefferson
Presiding Judge, Ninth Judicial Circuit

Charleston, South Carolina.

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11 of 11


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843.225.2554 (F)

August 9, 2011

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VIA LEGAL MAIL

Herbert Lee Matthews, Jr. #242905
Lieber Correctional Institution
Wando-D-#188
Post Office Box 205
Ridgeville, SC 29472

Re: Post Conviction Relief Appeal

Dear Herbert:

I hope this correspondence finds you doing well. Enclosed please find a copy of Judge Jefferson's Order, along with my Notice of Intent to Appeal. I have copied the Office of Appellate Indigent Defense since they will be representing you on this matter if you choose to move forward. They can be reached at:


Elizabeth Franklin-Best, Esquire
SC Commission on Indigent Defense
Appellate Division
1330 Lady Street, Suite 401
Columbia, SC 29201
(803)734-1343

I encourage you to reach out to them in a timely manner so they can evaluate your case.

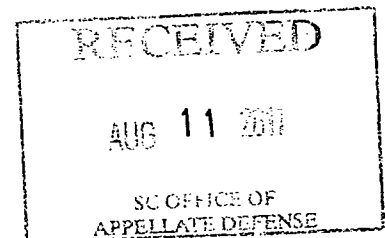
I wish you the best of luck, and regret that I was unable to convince the Court to grant your motion. Keep your head up and try and stay as positive as you can. I look forward to seeing you in the community upon your release.

With best regards, I am

Sincerely,



Mark A. Peper



Enclosures as stated.

cc: Matthew Friedman, Esquire
Elizabeth Franklin-Best, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Deadra L. Jefferson, Circuit Court Judge

Case No. 2010-CP-10-5394

The State,

Respondent,

v.

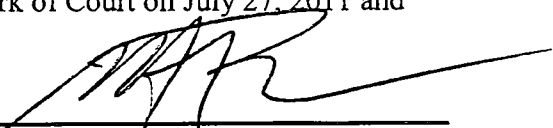
Herbert L. Matthews,

Appellant.

NOTICE OF INTENT TO APPEAL

Herbert L. Matthews respectfully appeals the denial of his Application for Post Conviction Release. The denial was imposed by the Honorable Deadra L. Jefferson by Order dated July 26, 2011, filed with the Charleston County Clerk of Court on July 27, 2011 and received by the Defendant on August 4, 2011.

August 9, 2011


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