

R. MILLS ARIAIL, JR.
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January 28, 2016

RECEIVED

JAN 28 2016

S.C. SUPREME COURT

Via US Mail

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

Re: *Notice of Intent to Appeal from Bobbie Albert McCann v. State of SC*
C.A. No.: 2015-CP-39-0080

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

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Case No. 2015-CP-39-0080

RECEIVED

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S.C. SUPREME COURT

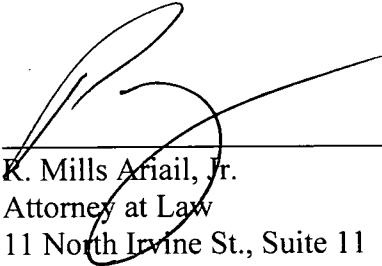
Bobbie Albert McCann,..... Appellant,

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 11, 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 25, 2016. A copy of the Honorable Perry H. Gravely's Order of Dismissal is attached.



R. Mills Afiail, Jr.
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Greenville, SC 29601
Telephone (864) 232-9390
Facsimile (864) 232-9392
Attorney for Bobbie Albert McCann

Greenville, South Carolina
January 28, 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.2015-CP-39-0080

Bobbie Albert McCann,..... 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 this January 28, 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

Bobbie Albert McCann SCDC# 350650
Lieber Correctional Institute
PO Box 205
Ridgeville, SC 29472

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


Denise Tanner LaBeck

January 28, 2016

STATE OF SOUTH CAROLINA
COUNTY OF PICKENS
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
2016 JAN 19 6 01 AM
CASE NO: 2015 CP 3900080

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

Bobbie Albert McCann vs. South Carolina The State of

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**
 - Rule 12(b), SCRPC;
 - Rule 41(a), SCRPC (Vol. Nonsuit);
 - Rule 43(k), SCRPC (Settled);
 - Other: _____
- ACTION STRICKEN (CHECK REASON):**
 - Rule 40(j) SCRPC;
 - Bankruptcy;
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 - Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 - Affirmed;
 - Reversed;
 - Remanded;
 - Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court;

Order of Dismissal

A copy mailed first class this 19th, day of January, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

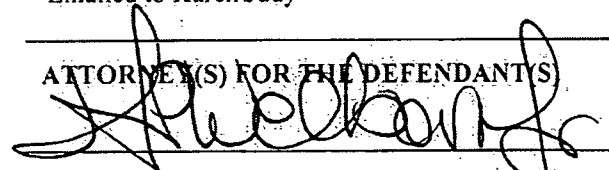
MB

✓ Bobbie Albert McCann #350650 Lieber Corr Inst. Stono B-43 Po. Box 205 Ridgeville, SC 29472
R. Mills Ariail Jr. 11 North Irvine Street, Suite 11 Greenville, SC 29601

✓ Karen Christine Ratigan PO Box 11549 Columbia, SC 29211
**Emailed to KarenJudy

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)



Harold P. Welborn, Jr. - Clerk of Court

MB

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	Clerk of Court
COUNTY OF PICKENS)	C.A. No. 2015-CP-39-0080
)	PICKENS COUNTY
)	SOUTH CAROLINA
Bobbie Albert McCann,)	
S.C.D.C. No. 350650,)	
)	
Applicant,)	
)	ORDER OF DISMISSAL
v.)	
)	
State of South Carolina,)	
)	
Respondent.)	

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 16, 2015. The Respondent made its return on May 29, 2015. An evidentiary hearing was held on December 14, 2015 at the Pickens 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, David Cantrell, 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 February 2012 term of the Pickens County Grand Jury for lewd act upon a child (2012-GS-39-0497) and two counts of first-degree criminal sexual conduct (CSC) with a minor (2012-GS-

39-0498,¹ -0499). He was represented by David Cantrell, Esquire.

After the State called the case to trial, the Applicant was found guilty. On April 24, 2012, the Honorable Robin B. Stilwell sentenced the Applicant to concurrent sentences of 25 years for each charge of first-degree CSC with a minor and a consecutive sentence of 5 years for lewd act upon a child.

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Dudek, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. McCann, Op. No. 2014-UP-355 (S.C. Ct. App. filed October 8, 2014). The remittitur was sent on October 27, 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:
 - a. Failure to object to expert opinion "that in ninety percent of cases of child sexual abuse the person who is committing the acts is somebody who's known and loved and trusted by the child and that in 'about seventy percent [of adult survivors of childhood sexual abuse] have never told anyone.'"
 - b. Failure to raise the defense of third-party guilt.
 - c. Failure to subpoena three witnesses (Margaret Durnil, Donnie, and Danielle).
 - d. Failure to file motion requesting expert witness funds to "consult with and retain independent child sexual abuse expert/forensic medical examiner."

The Applicant proceeded solely upon the issue of failure to call three witnesses at trial. This Court notes the Applicant specifically withdrew all issues related to an expert witness.

¹ This Court notes this charge was in the first-degree because the Applicant had a prior conviction.

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 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). 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 had numerous discussions with trial counsel about his case and the evidence and that he told trial counsel he wanted to go to trial because he was not guilty. The Applicant stated he told trial counsel about some witnesses who could testify the victim recanted. The Applicant admitted however, that he knew only one person by name (Margaret Durnil, the

victim's grandmother) and did not give any contact information to trial counsel.

Trial counsel testified he reviewed the discovery materials with the Applicant, as well as his version of events. Trial counsel testified he was given names of people who had visited the residence for use as potential witnesses. Trial counsel testified he spoke to these individuals and there was very little useful information to help with the defense case.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have subpoenaed witnesses for trial. Initially, this Court finds credible trial counsel's testimony that he spoke to several potential witnesses and that they had would add little value to the defense case. Regardless, Petitioner could only provide the name of one alleged witnesses at the PCR hearing and none of the alleged witnesses testified. As such, 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).

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.

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CLERK OF COURT
AICKENS COUNTY
SOUTH CAROLINA

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 11th day of January, 2016.



Perry H. Gravely
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina.