

THE BOOZER LAW FIRM, LLC

Lance S. Boozer, Esq.*
*Also admitted in Florida

807 Gervais Street, Suite 203
Columbia, SC 29201

Telephone: 803-608-5543
Fax: 803-926-3463

Email: lsb@boozerlawfirm.com
Website: www.boozerlawfirm.com

March 16, 2016

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED

MAR 18 2016

The Honorable Liz Godard
Clerk of Court
P.O. Box 583
Aiken, SC 29802-0583

S.C. SUPREME COURT

RE: Javier Hickson, #306715, v. State of South Carolina
2013-CP-02-1146

Dear Mr. Shearouse and Ms. Godard:

Enclosed for filing is a Notice of Appeal in the above-referenced case. Also enclosed are the following:

- (1) Proof of Service of the Notice of Appeal;
- (2) A copy of the Order which is to be challenged on appeal; and
- (3) Prior Order of Appointment of Counsel.

As I was appointed to represent Mr. Hickson in his PCR proceeding, I anticipate that the Office of Appellate Defense will represent Mr. Hickson in this appeal.

Yours very truly,



Lance S. Boozer

cc: Daniel Gourley, AAG
Office of Appellate Defense
Javier Hickson, #306715

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

RECEIVED

MAR 18 2016

The Honorable Tanya A. Gee, Circuit Court Judge

S.C. SUPREME COURT

Case No. 2013-CP-02-1146

Javier Hickson, #306715Petitioner,

v.

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

NOTICE OF APPEAL

The Petitioner appeals the Honorable Tanya A. Gee's Order dated March 8, 2016, denying post-conviction relief to the Petitioner. The Order was received by undersigned counsel on March 16, 2016. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,



Lance S. Boozer
The Boozer Law Firm, LLC
807 Gervais Street, Suite 203
Columbia, SC 29201
Tele: 803-608-5543

March 16, 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

RECEIVED

The Honorable Tanya A. Gee, Circuit Court Judge

MAR 18 2016

S.C. SUPREME COURT

Case No. 2013-CP-02-1146

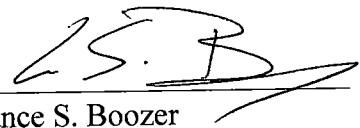
Javier Hickson, #306715,Petitioner,

v.

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

PROOF OF SERVICE

I, Lance S. Boozer, appointed attorney for Petitioner, certify that I have today served within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to Assistant Attorney General Daniel Gourley, P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 16th day of March, 2016.



Lance S. Boozer
The Boozer Law Firm, LLC
807 Gervais Street, Suite 203
Columbia, SC 29201
Tele: 803-608-5543

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

) IN THE COURT OF COMMON PLEAS
) FOR THE SECOND JUDICIAL CIRCUIT

Javier Hickson, #306715,

) 2013-CP-02-1146

) Applicant,

) v.

) **ORDER OF DISMISSAL**

) State of South Carolina,

) Respondent.

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on May 20, 2013. Respondent filed its return on July 9, 2013. An evidentiary hearing was convened on May 19, 2015, at the Aiken County Courthouse. Applicant was present at the hearing and was represented by Lance Boozer, Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. The Applicant was true bill indicted at the December 2009 term of the Aiken County Grand Jury for Armed Robbery (2009-GS-02-2291) and at the April 2010 term of the Aiken County Grand Jury for Possession of a Firearm During the Commission of or Attempt to Commit a Violent Crime (2010-GS-02-0679). Michael Routzong, Esquire, represented Applicant. Applicant proceeded to a jury trial before the Honorable Doyet A. Early, III. Applicant was found guilty, and on September 22, 2010, Applicant was sentenced to twenty-eight years imprisonment for Armed Robbery and five years'

imprisonment for Possession of a Firearm During the Commission of or Attempt to Commit a Violent Crime with all sentences to run concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Jerry M. Screen, Esquire. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Hickson, Op. No. 2012- UP- 661 (Ct. App. filed December 19, 2012). The Remittitur was issued on February 11, 2013.

ALLEGATIONS

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

1. Ineffective assistance of trial counsel.
 - a. Trial counsel's failure during pretrial to move to quash the arrest warrants in Applicant's armed robbery and possession of a weapon during the commission of a violent crime charges because the affidavit in support of each warrant was conclusory and insufficient to establish probable cause.
 - b. Trial counsel's failure during pretrial to move to suppress evidence emanating from Applicant's armed robbery and possession of a weapon during the commission of a violent crime arrest warrants because the affidavit in support of each warrant was conclusory and insufficient to establish probable cause.
 - c. Trial counsel's failure to move to dismiss with prejudice against the State, Applicant's armed robbery and possession of a weapon during the commission of a violent crime arrest warrants because the affidavit in support of each warrant was conclusory and insufficient to establish probable cause.
 - d. Trial counsel's failure to call alibi witnesses Crystal Harris, Charles Smalls, and Tommy Parker, for the defense during applicant's criminal trial.
 - e. Trial counsel's failure to advise Applicant as to the pros and cons of offering testimony, negligently advising Applicant not to testify, and failing to explain to Applicant that without his testimony, his attempt to corroborate his alibi witness testimony would be seriously compromised.

- f. Trial counsel's failure to request a Neil -vs- Biggers Hearing due to the fact that the alleged victim's bank employee never picked Applicant out of any type of photo array or line-up procedures prior to his arrest.
- g. Trial counsel's failure to move to strike Sabrina Oakman and Candice Patrice Bryant's trial testimony.

Applicant filed an amended application for post-conviction relief on March 12, 2015, alleging that he was being held in custody unlawfully based on the following:

- h. "Although counsel made an objection to Bryant's statement coming into evidence, see Tr. p. 197, lines 14-15, yet counsel never introduced Bryant's statement into evidence but rather only had it marked for identification purposes. See Tr. p. 197, lines 16-21; pg. 258, lines 2-10, confirmed by the court reporter at trial judge's request. Counsel prejudiced me when he failed to make a contemporaneous objection. Nor did counsel get a ruling on his objection. Both errors denied me proper appellate review upon the merits."
- i. (d-1 and f) "Counsel prejudiced me when he failed to investigate or call my alibi witness Mr. Charles Smalls" "Counsel further prejudiced me when he failed to investigate or call Mr. Tommy Parker upon my behalf." "Counsel prejudiced my whole case by calling my alibi witnesses, knowing that the State was going to rely on this alleged co-defendant(s) theory/lies."
- j. Appellate counsel failed to file a Motion for Rehearing following the Court of Appeals' decision.
- k. Appellate counsel failed to raise the issue that Investigator Savell had not been qualified as an expert in facial recognition.

SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant presented testimony from Michael Routzong, Esquire (hereinafter "Trial Counsel"). This Court also had before it a copy of the trial transcript, the Aiken County Clerk of Court records, Applicant's South Carolina Department of Correction records, appellate records, the PCR application, and return. Applicant further introduced various exhibits during the evidentiary hearing.

During the evidentiary hearing, Applicant stated Michael Routzong ("Trial Counsel") was appointed to represent him. Applicant stated that he met with Trial Counsel twice prior to bonding out, but that he did not meet with Trial Counsel after bonding out of prison. Applicant further stated that Trial Counsel informed him that he did not have any defenses to the charges he was facing. Applicant maintained that Trial Counsel should have moved to suppress the arrest warrants because they were conclusory and lacked probable cause.

Applicant recalled that Trial Counsel did not present a defense at trial, despite the fact that Applicant's defense was that he was not present at the time of the crimes alleged. Applicant stated he asked Trial Counsel to investigate his two alibi witnesses: Charles Smalls and "Uncle Parker."

Applicant opined that Trial Counsel should have requested a Neil v. Biggers hearing because there was an alleged photo lineup conducted by the police. Applicant stated Trial Counsel was ineffective for failing to investigate the State's witnesses Sabrina Oakman and Candice Bryant. Applicant further stated Trial Counsel should have investigated into whether his co-defendants David Kears and Randy Wilson received plea deals in exchange for their testimony at trial.

Applicant stated Trial Counsel was also ineffective for failing to make a motion for reconsideration. Additionally, Applicant stated Trial Counsel should have objected to Investigator Gregg Savel's testimony about Applicant's characteristics. Applicant noted that his co-defendant's counsel objected to this testimony, and Trial Counsel only joined the objection. Applicant further stated Trial Counsel was ineffective for failing to object to Candice Bryant's statement coming into evidence as well as the judge's jury instruction.

During the evidentiary hearing, Trial Counsel stated he was currently working for the Aiken County Public Defender's office. Trial Counsel stated he was appointed to represent Applicant in July 2009 and the trial began in September 2010. Trial Counsel stated that he met with Applicant at least two to five separate times. Trial Counsel opined that they met a sufficient number of times prior to trial and he was prepared for trial. Trial Counsel stated that he felt a plea offer would eventually be made to Applicant. Trial Counsel stated that he could not recall a plea offer ever being made to Applicant and that he did not see any basis to suppress the arrest warrant. Trial Counsel testified that he investigated the alibi witnesses and determined that they were not credible.

Trial Counsel recalled that Applicant did not want to testify at trial because he was concerned with being impeached with his prior record. Trial Counsel stated that he did not request a Neil v. Biggers hearing because there was never any identification procedure arranged by the police.

Trial Counsel stated that he had no information that either of Applicant's co-defendants received any pre-arranged plea deals in exchange for their testimonies. Trial Counsel further stated that he did object to Investigator Greg Savell's testimony regarding Applicant's characteristics as well as to Candice Bryant's statement coming into evidence. Trial Counsel additionally testified that he did not feel the judge's jury charge was objectionable.

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 at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh

their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where 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, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption 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. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

1. Ineffective assistance of counsel for failing to move to suppress the arrest warrant.

Applicant's allegation of ineffective assistance of counsel due to Trial Counsel's failure to move to suppress the arrest warrant is meritless. Trial Counsel was not deficient for failing to move to suppress the arrest warrant because the warrant established probable cause. Furthermore, as the warrant was valid, Applicant can show no prejudice due to Trial Counsel's failure to suppress the warrant. Based on the foregoing, this allegation is denied and dismissed with prejudice.

2. Ineffective assistance of counsel for failing to call alibi witnesses.

Applicant's allegation that he received ineffective assistance of counsel for failing to call his alibi witnesses at trial is meritless. Trial Counsel was not deficient for failing to call the purported alibi witnesses because Trial Counsel interviewed those witnesses and determined their testimony was not credible. Accordingly, Trial Counsel articulated a valid strategic reason for not calling those witnesses. Although he stated that he regretted employing that strategy in hindsight, it was nevertheless a reasonable decision at the time it was made. Furthermore, Applicant failed to demonstrate prejudice because the alibi witnesses did not testify at the PCR hearing. Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) (a PCR applicant cannot show prejudice from counsel's failure to call a favorable witness to testify at trial if the witness does not testify at the PCR hearing or otherwise offer testimony within the rules of evidence).

3. Ineffective Assistance of Counsel for failing to request a Neil v. Biggers hearing based on the victim's identification of Applicant.

Applicant's allegation that he received ineffective assistance of counsel due to Trial Counsel's failure to request a Neil v. Biggers hearing is meritless. Trial Counsel was not deficient in failing to request a Neil v. Biggers hearing because there was no identification procedure arranged by the police.

4. Ineffective Assistance of Counsel for failing to investigate the States witnesses Sabrina Oakman and Candice Bryant.

Applicant's allegation that he received ineffective assistance of counsel due to Trial Counsel's failure to investigate State witnesses Sabrina Oakman and Candice Bryant is meritless. Applicant failed to show what more Trial Counsel could have done to investigate the State's witnesses. Furthermore, Applicant failed to present any evidence of what further investigation would have revealed. See 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). As a result, this allegation is denied and dismissed with prejudice.

5. Ineffective Assistance of Counsel for failing to investigate into whether Applicant's co-defendant had a plea deal in exchange for his trial testimony.

Applicant's allegation that he received ineffective assistance of counsel for failing to investigate into whether his co-defendant had a plea deal in exchange for his trial testimony is meritless. Trial counsel was not deficient in failing to investigate co-defendant Kears's plea deal. At the time of trial, counsel for applicant's co-defendant (Artrell Hickson) cross-examined Kears on the amount of time he faced and elicited testimony that Kears was facing less time because he was testifying against the Hicksons. (R. 247-48). Thus, it would have been redundant

for Applicant's attorney to repeat those questions. Additionally, Applicant cannot show prejudice.

6. Ineffective assistance of counsel for failing to file a motion for reconsideration.

Applicant's allegation that Trial Counsel was ineffective for failing to file a motion for reconsideration is meritless. Trial Counsel was not deficient in failing to file a motion to reconsider the Applicant's sentence because the Applicant never requested such a motion to be filed.

7. Trial Counsel was ineffective in failing to object to investigator Gregg Savell testifying to Applicant's characteristics.

Applicant's allegation that he received ineffective assistance of counsel due to Trial Counsel's failure to object to investigator Gregg Savell's testimony regarding Applicant's characteristics is meritless. This Court finds no deficiency or prejudice because Trial counsel did, in fact, object to this testimony. (R. 118-19).

8. Ineffective assistance of counsel for failing to object to the jury instruction.

Applicant's allegation that Trial Counsel was ineffective for failing to object the judge's jury instruction is meritless. Trial counsel was not deficient in failing to object to the jury instruction in which the judge used "fair and impartial" language. In State v. Daniels, the Supreme Court cautioned trial judges to remove any suggestion that "a criminal jury's duty is to return a verdict that is 'just' or 'fair' to all parties." The Court reasoned that such language could alter the jury's perception of the burden of proof and the reference to "all parties involved" may

cause jurors to believe they have a duty to decide whether their verdict is fair to the victim. Here, the trial judge's reference to an impartial verdict was certainly not objectionable, so the only potentially objectionable word was the word "fair." This reference, without more, does not rise to the level of the improper charge used in State v. Daniels. Furthermore, even if the charge was objectionable and Trial Counsel should have objected, Applicant has failed to show how he was prejudiced in light of the overwhelming evidence of his guilt.

9. Ineffective assistance of counsel for failing to object to Candice Bryant's statement being introduced into evidence.

Applicant's allegation that Trial Counsel was ineffective for failing to object to Candice Bryant's statement being introduced into evidence is meritless. Trial Counsel did object to the statement being introduced into evidence. (R. 197). As a result, Applicant can show neither deficiency nor prejudice.

10. Ineffective assistance of appellate counsel for failing to file a petition for rehearing following the denial of his appeal.

Applicant's allegation that appellate counsel was ineffective for failing to file a petition for rehearing following the denial of his appeal is meritless. Appellate counsel was not deficient in failing to file a petition for rehearing from the Court of Appeals' opinion because there was no evidence that Applicant requested him to file a petition for rehearing.

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, the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, the Applicant has abandoned any such allegations.

CONCLUSION


Based on all the foregoing, Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel 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 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 8th day of March, 2016.


TANYA A. GEE
Presiding Judge
Second Judicial Circuit

Columbia, South Carolina

STATE OF SOUTH CAROLINA)
 COUNTY OF AIKEN)
 Javier Hickson,)
 Plaintiff(s),)
 -vs-)
 South Carolina State Of,)
 Defendant(s).)

IN THE COURT OF COMMON PLEAS
 JUDICIAL CIRCUIT
 CASE NO.: 2013CP0201146
 APPOINTMENT OF COUNSEL OR GAL
 (Select one.)

ORDER
 AMENDED ORDER

TYPE OF CASE/PROCEEDING: (Check one.)

- Post-Conviction Relief (PCR)/habeas case Adoption Juvenile
 SVP case Custody and/or Visitation Abuse and Neglect
 Minor Name Change Other: Post Convict Rel 500

It appears Javier Hickson, who is a litigant in this case, is entitled to court-appointed counsel or a guardian ad litem.

It further appears that: (Select only one.)

- counsel/guardian ad litem has not yet been appointed by the court; therefore, an appointment for counsel/guardian ad litem is necessary.
 counsel or a guardian ad litem was previously appointed by the court but has indicated either a possible conflict of interest, an entitlement to exemption, or other good cause warranting the appointment of new counsel or guardian ad litem based on:
 counsel was previously appointed by the court but has not indicated that the litigant has retained private counsel and is no longer entitled to appointed counsel.
 court appointed counsel has obtained, Esquire as substitute counsel pursuant to Rule 608(h)(2); provided, however, only the member who originally received the appointment and who sought substitute counsel shall receive credit.
 Other: .

Therefore, it is ordered that Lance Boozer hereby is appointed as (Select one.)

counsel lead counsel (if capital PCR case) guardian ad litem
 for the above-named person. Any counsel or GAL previously appointed is/are hereby relieved.

(If Death Penalty PCR Case) It is further ordered that, Esquire, is hereby appointed as second counsel in this capital PCR case.

The clerk of court is directed to forward a copy of this order to all persons entitled to notice.

IT IS SO ORDERED
 June 18, 2013

Shirley Godard by: Kelly Cape
 Circuit Judge Clerk of Court

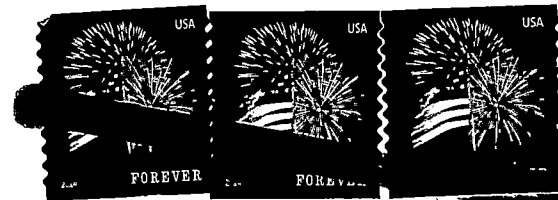
Plaintiff Attorney:	
Lance Boozer	<i>Javier Hickson</i>
1331 Park Street	<i>Lei Rich C-220</i>
Columbia, SC 29201	<i>990 Wisconsin Highway</i>
	<i>Disappointment, SC 29010</i>
Defendant Attorney:	
Daniel Francis Gourley	<i>Shirley Godard</i>
P.O Box 11549	<i>J.C.C.P.&G.S.</i>
Columbia, SC 29211	<i>215 Kelly Cape</i>

NOTICE: SC Supreme Court Order of September 29, 2006, requires appointed counsel entitled to payment from the Office of Indigent Defense (OID) to register the case online with OID within fifteen (15) days of this appointment at www.sccid.sc.gov, and further directs that reimbursement vouchers be submitted directly to SCCID and not to the trial judge or clerk of court. See SCCID website for further details.

CP20 (08/08)
 SCCA/267 (03/07)

THE BOOZER LAW FIRM, LLC

807 Gervais Street, Suite 203
Columbia, SC 29201



The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211