

IN THE STATE OF SOUTH CAROLINA  
In The South Carolina Court of Appeals

RECEIVED

MAR 24 2016

SC Court of Appeals

APPEAL FROM BAMBERG COUNTY  
Court of Common Pleas

Tanya A. Gee, Circuit Court Judge

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MAR 30 2016

SC SUPREME COURT

Case No.: 2013-CP-05-30

State of South Carolina ..... Defendant/Respondent

v.

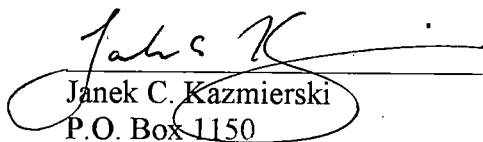
Edward Tyler ..... Defendant/Appellant

NOTICE OF INTENT TO APPEAL

Edward Tyler hereby appeals the Order of Dismissal entered in the above matter on March 14, 2016. A copy of the Order of Dismissal is attached hereto.

WILSON & LUGINBILL, LLC

March 21, 2016

  
Janek C. Kazmierski

P.O. Box 1150

Bamberg, SC 29003

(803) 245-7799

Attorney for Appellant (appointment)

Other Counsel of Record:

Daniel Gourley  
Assistant Attorney General  
P.O. Box 11549  
Columbia, SC 29211





# Wilson & Luginbill, LLC

J. Christopher Wilson  
Daniel W. Luginbill  
Lauren Bailey  
Janek Kazmierski

Reply to:  
Post Office Box 1150  
Bamberg, SC 29003

March 16, 2016

RECEIVED

MAR 24 2016

SC Court of Appeals

South Carolina Court of Appeals  
Attn: Jenny Kitchings, Clerk of Court  
P.O. Box 11629  
Columbia, SC 29211

Re: *Edward Tyler v. State of South Carolina*  
Case No. 2013-CP-05-30

Dear Ms. Kitchings:

Enclosed please find for filing a Notice of Intent to Appeal in the above matter along with Proof of Service and a copy of the Order being appealed. Please file the original and return a certified copy to me. No filing fee is required because this is an appeal from a Court-appointed post-conviction relief case with an indigent Applicant. Please return a clocked copy to me in the enclosed envelope.

Thank you for your attention to this matter. Please contact me if you have any questions.

Sincerely,

Janek C. Kazmierski

JCK/nk  
Enclosure

cc: Daniel Gourley  
Assistant Attorney General  
P.O. Box 11549  
Columbia, SC 29211

Edward Tyler

RECEIVED

MAR 30 2016

SC SUPREME COURT

# The South Carolina Court of Appeals

Edward Tyler, #318077, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2016-000634

**RECEIVED**

MAR 30 2016

**SC SUPREME COURT**

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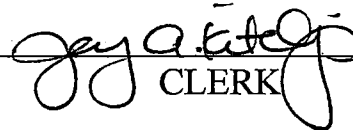
ORDER

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This case is transferred to the Supreme Court of South Carolina pursuant to Rule 204(a) of the South Carolina Appellate Court Rules.

FOR THE COURT

BY

  
CLERK

Columbia, South Carolina

cc:

Janek Christopher Kazmierski, Esquire

Daniel Francis Gourley, II, Esquire

**FILED**  
3/29/16

A TRUE COPY

Attest. J. B. Hill  
CLERK OF COURT  
BAMBERG COUNTY, SC

STATE OF SOUTH CAROLINA )  
COUNTY OF BAMBERG )

Edward Tyler, #318077 )

Applicant, )

v. )

State of South Carolina, )

Respondent. )

IN THE COURT OF COMMON PLEAS  
FOR THE SECOND JUDICIAL CIRCUIT

Case No 2013-CP-05-30

SC Court of Appeals

ORDER OF DISMISSAL

FILED  
BAMBERG COUNTY  
2016 MAR 14 AM 9:35  
JAMES B. HERRICK  
CLERK OF COURT  
BAMBERG, S.C.  
RECEIVED  
MAR 30 2016  
SC SUPREME COURT

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on February 25, 2013. An evidentiary hearing was convened on May 21, 2015, at the Aiken County Courthouse. Applicant was present at the hearing and was represented by Janek Kazmierksi, 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 Bamberg County Clerk of Court. The Applicant was true billed indicted at the January 2007 term of the Bamberg County Grand Jury for Criminal Domestic Violence (2007-GS-05-041), Murder (2007-GS-05-042), and Possession Weapon During a Violent Crime (2007-GS-05-043). Richard Ness, Esquire represented Applicant. On June 4, 2008, Applicant pled guilty before the Honorable Doyet A. Early, III, to Murder.<sup>1</sup> Judge Early sentenced Applicant to forty years imprisonment for Murder. Applicant did not appeal his guilty plea or sentence.

<sup>1</sup> Applicant's indictments for Criminal Domestic Violence (2007-GS-05-041) and Possession of a Weapon During a Violent Crime (2007-GS-05-043) were *nolle prossed* pursuant to a plea agreement.

In its Return and Motion to Dismiss, filed on June 18, 2013, Respondent requested that the application be summarily dismissed as untimely pursuant to S.C. Code Ann. § 17-27-45. On June 24, 2013, the Honorable Doyet A. Early, III, acting in his capacity as Chief Administrative Judge of the Second Judicial Circuit, signed a Conditional Order of Dismissal, provisionally dismissing the application, but allowing Applicant twenty days to show why the dismissal should not become final. Applicant responded on July 11, 2013, alleging that mental health concerns prevented him from timely filing his application. Based on his response and in light of Ferguson v. State, 382 S.C. 615, 677 S.E.2d 600 (2009) (requiring the tolling of the statute of limitations if Applicant can establish that mental incompetence prevented the timely filing of his or her application), the Respondent filed an amended return requesting an evidentiary hearing on the matter. By order filed September 17, 2013, Judge Early vacated his conditional order of dismissal and set the case for a hearing to determine whether Applicant's lack of capacity prevented him from timely filing his post-conviction relief application.

Applicant's Counsel, Daniel Luginbill, Esquire filed a motion for funding to have Applicant's mental health evaluated on February 25, 2013. A hearing was held on December 4, 2013, at the Bamberg County Courthouse. Applicant was present and represented by Daniel Luginbill, Esquire and Janek Kazmierski, Esquire. Respondent was present and represented by Daniel Gourley, Esquire of the South Carolina Attorney General's Office. By Order filed December 27, 2013, Judge Early denied Applicant's request for funding to have his mental health evaluated.

A hearing on the State's motion to dismiss was convened on July 30, 2014, at the Aiken County Courthouse. Applicant was present at the hearing and was represented by counsel, Janek Kazmierski, Esquire. Respondent was represented by Assistant Attorney General Daniel

Gourley of the South Carolina Attorney General's Office. By order dated October 3, 2014, and filed on October 13, 2014, the Honorable R. Knox McMahon found Applicant's mental incompetency prevented him from timely filing his application. Judge McMahon granted Applicant a full evidentiary hearing.

### ALLEGATIONS

In his current Application, Applicant alleges that he is being held in custody unlawfully due to his attorney's failure to pursue battered spouse syndrome as a defense at trial.

### SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. The State presented testimony from Richard Ness (hereinafter "Plea Counsel"), a copy of the Aiken County Clerk of Court records, Applicant's South Carolina Department of Correction records, the PCR application, and return.<sup>2</sup>

During the evidentiary hearing, Applicant testified that he pled guilty to murder and received a forty-year sentence. Applicant stated that Patrick Wright represented him prior to Plea Counsel taking over his case and that Kent Kirkland represented him on an unrelated case. Applicant further stated that he met with Plea Counsel one time prior to his guilty plea and that he never discussed the case with Plea Counsel during that meeting. Applicant also recalled that the plea was a negotiated sentence for forty years and that Plea Counsel advised him that he

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<sup>2</sup> This Court notes the Respondent produced a letter from the Court Reporter at the guilty plea hearing (Court Exhibit 1), which stated the plea transcript was unavailable because Rule 607 requires the Court Reporter to retain the record for a period of five years. Applicant's guilty plea hearing was taken on June 4, 2008, and the transcript was not ordered until October 14, 2014. As a result, the guilty plea hearing transcript was destroyed. At the conclusion of the PCR hearing, the parties reconstructed the record with testimony from assistant solicitor Benjamin Moore, Plea Counsel, and the Applicant. This Court finds the record was adequately reconstructed.

could potentially get life without parole if he was found guilty of murder, but that plea counsel told him if he pled guilty he would get thirty years.

At the hearing, Applicant recalled that he was mentally evaluated prior to trial. Applicant testified that he and his attorney did not discuss the facts of the case before the plea, that he was hoping for a voluntary manslaughter plea, and that he expected to receive a thirty-five year sentence. Applicant also stated Plea Counsel never asked about his violent history with Rosalyn Tyler (hereinafter "Victim"). Specifically, Applicant stated Victim was violent towards him and that on October 6, 2006, Victim had a knife. Applicant stated that he told Patrick Wright about Victim possessing a knife and was defending himself when he shot Victim. Plea Counsel advised Applicant that he had no defenses despite Applicant's belief that he could argue self-defense.

Applicant recalled that he discussed the battered spouse defense with Plea Counsel one time while at court and that Plea Counsel reviewed the questions that the plea court was likely to ask. Specifically, Applicant stated that he reviewed the charges he was facing and that Plea Counsel told him if he proceeded to trial he could get life without parole if convicted. Applicant stated that he chose to plead guilty because forty years was better than a life sentence.

Following Applicant's testimony, Plea Counsel was called to testify. Plea Counsel stated that he has been practicing law for thirty-two years and that he was retained to represent Applicant in this matter. Plea Counsel further stated that he was aware of Applicant's rocky relationship with Victim and that both Applicant and Victim suffered from alcohol/drug problems. Plea Counsel recalled that he filed a motion to get Applicant evaluated and that the evaluation revealed that Applicant was criminally responsible.

During his testimony, Plea Counsel stated that a spousal abuse defense was not viable in this case. He noted that Applicant is 6'3" and 280 lbs., while Victim was 5'6" and 315 lbs., and therefore it would have been difficult to argue that Victim abused Applicant. Plea Counsel further stated that the evidence did not support a spousal abuse defense. Applicant had said he and Victim were arguing over a T.V. set. Plea Counsel explained that the evidence showed that Applicant got a single-barrel shotgun, shot Victim once in the lower back/butt, Victim went outside and fell into the front yard, and that Applicant followed Victim outside of their house, went up to Victim, and shot her in the chest. Evidence also showed that Applicant fled the scene and was not found for another five or six hours. Applicant had the shotgun in his possession when he was arrested.

Plea Counsel stated that there were multiple witnesses outside who viewed the shooting. Specifically, Plea Counsel stated Willie Rogers was on the phone with Victim prior to her being shot and then subsequently heard a gunshot. Rogers would have testified that Victim and Applicant were not fighting. Plea Counsel also stated a witness named Henry Odom heard a commotion and went outside. Plea Counsel admitted there were some inconsistencies in their statements.

Plea Counsel recalled that he and Applicant discussed the issue of whether Victim possessed a knife, but that a knife was never recovered from the scene and no witnesses saw a knife. Plea Counsel stated that he and Applicant discussed the possibility of arguing that Applicant was acting under the heat of passion, but that Plea Counsel did not think a jury would believe that Applicant killed Victim in a heat of passion.

Plea Counsel stated the Solicitor's office refused to offer a voluntary manslaughter plea and offered a forty-year negotiated plea. Plea Counsel testified that Applicant understood the terms of the agreement.

### 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. Specifically, this Court finds Counsel's testimony credible, while Applicant's testimony is not credible. 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 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). 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. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart , 474 U.S. 52, 106 S.Ct. 366 (1985).

*Plea Counsel was not ineffective for failing to pursue a battered spouse defense.*

Applicant's allegation that he received ineffective assistance of counsel due to Plea Counsel's failure to pursue a battered spouse defense is denied. Plea Counsel testified that he was aware of Applicant and Victim's violent history, but that the evidence did not support a theory of battered spouse syndrome. This Court agrees. Moreover, Applicant has not shown what additional evidence Plea Counsel could have presented to support this defense. See Glover v. State, 318 S.C. 496, 458 S.E.2d 53 (1995). Accordingly, Applicant failed to establish that Plea Counsel was deficient or that any deficient performance prejudiced his defense.

#### **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

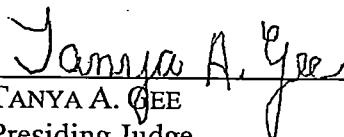
Based on all the foregoing, Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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 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 is denied and dismissed with prejudice; and
2. The Applicant is 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

FILED  
BAMBERG COUNTY  
2016 MAR 14 AM 9:57  
JAMES B. HIERS  
CLERK OF COURT  
BAMBERG, SC