

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Anderson County

Edgar W. Dickson, Circuit Court Judge

TERRY N. HAMBY, JR

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001829

A P P E N D I X

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

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Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

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State of South Carolina

In the Court of General Sessions

County of Anderson

State of South Carolina,)

Plaintiff,)

2012-GS-04-614/616, 1176, 2490

-vs-)

December 6, 2012

Terry Neil Hamby,)

Defendant.)

Transcript of Record

BEFORE:

The Honorable J. Cordell Maddox, Jr., Judge

APPEARANCES:

Rame Campbell, Esquire
Assistant Solicitor for Tenth Judicial Circuit
Attorney for the State

Jennifer Johnson, Esquire
Attorney for the Defendant

Renee H. Tollison
Circuit Court Reporter

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EXHIBITS

No	DESCRIPTION	ID	EV
	No Exhibits Were Presented During the Hearing		

State v. Terry Neil Hamby *2012-GS-04-614/616, 1176, 2490*
Guilty Plea Hearing *June 18, 2013*

3

1 (WHEREUPON, court convened with all parties present
2 and the following proceedings were had commencing at
3 approximately 3:24 p.m.)

4 THE COURT: Okay. Yes, sir, Mr. Campbell.

5 MR. CAMPBELL: Your Honor, before you is Terry
6 Neil Hamby, Jr. He's pleading to indictment number 2012-
7 614 grand larceny between two and ten, 615 receiving
8 stolen goods between two and ten, 616 receiving stolen
9 goods between two and ten, 1176 armed robbery, and 2490
10 grand larceny between two and ten. He's also on
11 probation.

12 Mr. Hamby was actually on the trial docket for this
13 week, and it worked out. There's a recommended sentence
14 of ten years. There is a restitution amount in this. He
15 actually had restitution while he was on probation that
16 he never even made, and it was converted to civil
17 judgment.

18 THE COURT: Is probation here?

19 MS. BARKER: Yes. I'm right here, sir.

20 THE COURT: I'm sorry. I didn't see you over
21 there. Okay. So just straight ten years?

22 MR. CAMPBELL: Yes, sir. And my understanding
23 -- we looked at it -- three hundred six days he'd get
24 credit for. And one of them's actually a waiver. It's a
25 -- the 2490 is a waiver.

1 THE COURT: How many days? Three hundred what?

2 MS. JOHNSON: Three hundred and six.

3 (Off record discussion)

4 THE COURT: All right. Mr. Hamby, if you
5 would, raise your right hand.

6 **TERRY NEIL HAMBY, JR.,**

7 BEING FIRST DULY SWORN TESTIFIED AS FOLLOWS:

8 EXAMINATION

9 BY THE COURT:

10 THE COURT: All right. You need to really
11 speak up because she's taking everything down.

12 How old are you?

13 THE DEFENDANT: Twenty-seven.

14 THE COURT: And how far did you go in school?

15 THE DEFENDANT: Ninth grade.

16 THE COURT: Where did you last work?

17 THE DEFENDANT: (Inaudible)

18 THE COURT: How long you been in jail, three
19 hundred and six days?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Have you had any drugs or alcohol
22 within the last twenty-four hours?

23 THE DEFENDANT: No, sir.

24 THE COURT: You understand that part of this
25 plea is that there's restitution. I'm signing civil

State v. Terry Neil Hamby 2012-GS-04-614/616, 1176, 2490
Guilty Plea Hearing June 18, 2013

5

1 judgment orders now which basically will act as judgments
2 against you. Do you understand that?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Are you taking any kind of
5 prescription or medication that would prevent you from
6 knowing what's going on here today?

7 THE DEFENDANT: No, sir.

8 THE COURT: Has anybody promised you anything
9 or threatened you in any way to get you to plead guilty
10 here today?

11 THE DEFENDANT: No, sir.

12 THE COURT: You understand that you have to
13 waive your constitutional rights if you want to plead
14 guilty?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: The first right you have is the
17 right to have your cases presented to the Grand Jury.
18 And indictment 2490 has not been presented to the Grand
19 Jury. Are you waiving that right?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Are you also waiving your right to
22 a jury trial?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: You're waiving your right to remain
25 silent?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Are you waiving your right to put
3 up a defense to these charges?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Are you also waiving your right to
6 confront the witnesses that would come in and testify
7 against you?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Have you had plenty of time to
10 speak with your lawyer?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: And you're satisfied with her
13 services?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Have you had plenty of time to
16 speak to your client? You think he understands the
17 waiver of constitutional rights and the elements of these
18 charges?

19 MS. JOHNSON: Yes, sir, I do.

20 THE COURT: All right. Mr. Hamby, do you want
21 to plead guilty to all of these charge?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: And are you guilty?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Yes, sir?

1 MR. CAMPBELL: May it please the Court. Your
2 Honor, on the 2012-615, he was found in possession of a
3 '95 Ford Thunderbird that was reported stolen which he
4 acknowledged to law enforcement.

5 In 2012-616, he was found in possession of a '91
6 Honda Accord which he knew was stolen. Ms. Kizzie
7 Pickens, the victim, she's actually present in the
8 courtroom today. She did not wish to address the Court.

9 In the 2012-614, he was found in possession of a
10 1994 Ford van. And all of those were greater than two
11 thousand dollars value.

12 The 2012-2490 he was found removing an air
13 conditioning unit from a residence belonging to Mr.

14 ~~Kenneth Jordan. Mr. Jordan is present in the courtroom~~
15 today. He indicated he also did not wish to address the
16 Court, but understands what's going on.

17 The case, the last case, is the 2012-1176 is the
18 armed robbery. The victim in this case, Ms. Cathy
19 Lockridge, was a school teacher at Homeland Park. He had
20 come up to her, she claims, with a tire tool. Was able
21 to get a pocketbook from her. He was caught -- he was
22 questioned about it, and he actually gave a confession to
23 it acknowledging it. All these crimes occurred within
24 probably about a five-week period when he told law
25 enforcement basically he was strung out on dope, which

1 the pattern indicates. She did not wish to be present
2 today. This is with her consent. We had gone through --
3 Ms. Jordan has spoken with her. Johnson, I mean. She
4 said she did not wish to be here in the same room, but
5 she was happy with what we had done. This was with
6 actually her blessing.

7 He was also on probation at the time. He had a
8 burglary second and a grand larceny at the time which is
9 what Ms. Barker is here for.

10 THE COURT: All right. Mr. Hamby, you
11 understand this plea going to violate your probation?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: How much time's he got hanging over
14 his head?

15 MS. BARKER: Seven years minus ninety days,
16 Your Honor, when you sentenced him back in July -- I'm
17 sorry -- June the 11th, 2009, on those charges.

18 THE COURT: And what was my sentence back then?

19 MS. BARKER: Seven years suspended to five
20 years probation.

21 THE COURT: Mr. Hamby, you're the type that
22 makes me, when I do these pleas -- and I don't remember
23 whether that was a recommendation or not. But I put
24 people on probation and give them that chance. And then
25 four or five years later, when I'm looking at them across

State v. Terry Neil Hamby 2012-GS-04-614/616, 1176, 2490
Guilty Plea Hearing June 18, 2013

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1 the thing, it makes me doubt whether I should put anybody
2 on probation. Do you understand that?

3 THE DEFENDANT: Yes, sir, I totally understand.

4 THE COURT: You admit to those facts?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: All right.

7 Yes, ma'am?

8 MS. JOHNSON: Thank you, Your Honor. Your
9 Honor, I'll be brief as there is a recommendation we are
10 asking the Court to accept. The charges that he's on
11 probation for, those are his first and only General
12 Sessions charges. He has never been in prison before.
13 And I know that the ten years to a lot of people doesn't
14 sound like a lot of time, but this is an eighty-five
15 percent offense. And so he is going to have to serve a
16 lot of time. And we're asking for you to accept the
17 recommendation in this case. He has struggled with some
18 drug abuse.

19 I will say this. I looked back to the prior
20 probation cases. Basically it was monetary violations.
21 I mean, he had been compliant and been reporting with the
22 probation, but I think he did start struggling with some
23 addiction.

24 I talked to his girlfriend who is present with him
25 today. His mother died of cancer four years ago, and he

1 just has not handled that situation very well and has
2 medicated with street drugs. And it's a habit that got
3 increasingly worse. And she's actually -- she told me
4 she's thankful he's here because otherwise she figures
5 that he might be dead. So I am asking the Court to go
6 along with the recommendation that's been made.

7 THE COURT: Okay. Mr. Hamby, anything you want
8 to tell me?

9 THE DEFENDANT: No, sir. I just ask for your
10 leniency, sir.

11 THE COURT: Do you have any children?

12 THE DEFENDANT: No, sir.

13 THE COURT: No?

14 All right. I'm going to accept the pleas and find
15 them was freely and voluntarily and made based upon
16 advice of counsel. I find that he waives his right to
17 presentment on indictment 2490 and waived all of his
18 other constitutional rights knowingly and voluntarily.
19 I'll go along with the recommendation. The sentence on
20 each to run concurrent ten years, credit for time served.
21 I'm ordering A.T.U., Alcohol Treatment Unit, which is the
22 only thing I can do for alcohol and drug abuse. But
23 quite frankly, I don't have a lot of confidence in it.
24 And I'm also signing all of these civil judgments for the
25 victims.

State v. Terry Neil Hamby 2012-GS-04-614/616, 1176, 2490
Guilty Plea Hearing June 18, 2013

11

1 I wish you luck.

2 MS. JOHNSON: Thank you, Your Honor.

3 MS. BARKER: And your Honor, on the probation,
4 do you want us to ---

5 THE COURT: Yeah.

6 MS. BARKER: --- terminate the balance?

7 THE COURT: Just terminate ---

8 MS. BARKER: Civil judgement for the
9 restitution?

10 THE COURT: --- the six years and run them
11 concurrent and -- revoke six years and run them
12 concurrent and terminate. Civil judgment.

13 MS. JOHNSON: Thank you, Your Honor.

14 THE COURT: Okay.

15 (WHEREUPON, the hearing ended at approximately 3:35
16 p.m.)

17 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

FORM 5

2013-CP-04-01947

STATE OF SOUTH CAROLINA)
County of Anderson)

IN THE COURT OF COMMON PLEAS

COMMON PLEAS AND
GENERAL SESSIONS

2013 AUG 28 PM 11 40

FILED CLERK'S OFFICE
ANDERSON SC

Terry Neil Hamby Jr. 353487)
Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

APPLICATION FOR

POST-CONVICTION RELIEF

ATRUE COPY
AUG 28 2013
Clerk of Court
Diana Kelly

INSTRUCTIONS B READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Anderson County Detention Center
2. Name and location of Court which imposed sentence 10th Circuit Court
100 S. Main St. Anderson S.C. 29621
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2012 GS 0401176

(b) _____
(c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

(a) December 6, 2012 10 years
(b) _____
(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____
(b) after a plea of not guilty _____
(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

No

8. If you answered Ayes@ to (7), list:

(a) the name of each Court to which you appealed:
i. _____
ii. _____
iii. _____

(b) the result in each such Court to which you appealed:
i. _____
ii. _____
iii. _____

(c) the date of each such result:
i. _____
ii. _____
iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:
i. _____
ii. _____
iii. _____

9. If you answered Ano@ to (7), state your reasons for not so appealing:

(a) Attorney failed to advise me of right to appeal

- (b) _____
- (c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective Assistance of Council
- (b) Court lack subject matter Jurisdiction to impose conviction and
- (c) Sentencing

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) Attorney failed to properly advise me of my rights
- (b) _____
- (c) _____

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No

13. If you answered Ayes@ to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (b) the name and location of the Court in which each was filed:
 - i. _____
 - ii. _____
 - iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) N/A
- (b) _____
- (c) _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? Yes
- (b) your trial, if any? _____
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

18. If you answered Ayes@ to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
 - i. Jennifer Johnson
301 Camson Rd. Anderson, S.C. 29625
 - ii. _____
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. _____
 - ii. _____
 - iii. _____

19. State clearly the relief you seek in filing this application:

Conviction Vacated

20. Are you now under sentence from any other court that you have not challenged?

No

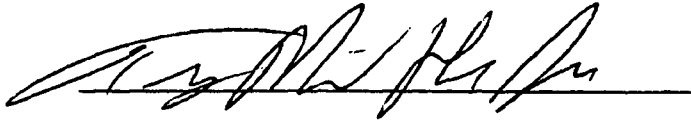
2013- CP - 04 - ~~01947~~ Revised 3/2003

STATE OF SOUTH CAROLINA)
County of Anderson)

VERIFICATION

FILED CLERK'S OFFICE
ANDERSON SC
2013 AUG 28 AM 11 40
COMMON PLEAS AND
GENERAL SESSIONS
AUG 28 2013
P. A. O. H. H. H.
CLERK OF COURT
A TRUE COPY

I, Terry Neil Hamby Jr., being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

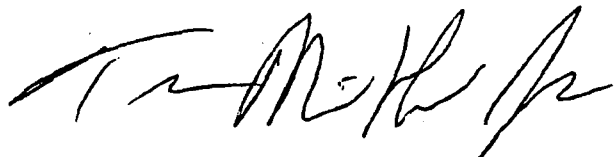


SWORN to and subscribed before me this 26 day of July, 2013.

Cathrine A. Amos (L.S.)
Notary Public

My Commission Expires: ~~My Commission Expires~~ December 22, 2018

FILED CLERK'S OFFICE
ANDERSON SC
2013 AUG 28 AM 11 40
COMMON PLEAS AND
GENERAL SESSIONS



2013-CP-04-01947

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Terry Neil Hamby Jr., hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Terry Neil Hamby Jr.
Applicant

SWORN or affirmed to and subscribed before me this 26 day of July, 2013.

Catherine A. Amador
Notary Public

My Commission Expires: ~~My Commission Expires~~ December 22, 2014

FILED CLERK'S OFFICE
ANDERSON SC
2013 AUG 28 PM 11 40
COMMON PLEAS AND
GENERAL SESSIONS

ATRUE COPY
AUG 28 2013
Blair Kelly
CLERK OF COURT

7 *Terry Neil Hamby Jr.*

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON)	
)	Case No. 2013-CP-04-1947
Terry Neil Hamby, Jr.,)	
S.C.D.C. No. 353487,)	
)	
Applicant,)	
)	
v.)	RETURN
)	
State of South Carolina,)	
)	
Respondent.)	
)	

Respondent, making its Return to the application for post-conviction relief filed August 28, 2013 would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. Applicant was indicted by the Anderson County Grand Jury for larceny/grand larceny, value more than \$2,000 but less than \$10,000 (2012-GS-04-0614), and two counts of RSG/ receiving stolen goods, value more than \$2,000 but less than \$10,000 (2012-GS-04-0615; -0616). Applicant was also indicted at the May 2012 term of the Anderson County Grand Jury for robbery/armed robbery while armed with a deadly weapon (2012-GS-04-1176), Applicant was represented by Jennifer Johnson Esq. On December 6, 2012, the State called its case. Applicant entered a guilty plea as indicted. Applicant also waived presentment and entered guilty plea to larceny/grand larceny, value more than \$2,000 but less than \$10,000 (2012-GS-04-2490). The Honorable J. Cordell Maddox, Jr., sentenced Applicant to ten (10) years imprisonment for grand larceny (-0614), ten (10) years imprisonment on both counts of receiving stolen goods (-0614; -0616), ten (10) years

imprisonment for robbery/armed robbery (-1176), ten (10) years imprisonment for larceny/grand larceny, value more than \$2,000 but less than \$10,000 (-2490). Judge Maddox further revoked Applicant's probation for grand larceny (2009-GS-04-689) and imposed the remainder six (6) year active sentence along with revoking Applicant's probation for burglary, second-degree (2009-GS-04-0688) and imposed the remainder six (6) year active sentence. All sentences were to be served concurrently.

Attached herewith and incorporated herein are the records of the Anderson County Clerk of Court regarding the subject conviction, the applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

1. Ineffective Assistance of Counsel:
 - a. "Attorney failed to properly advise me of my rights."
2. "Court lack subject matter jurisdiction to impose conviction and sentencing."

Any claims not specifically enumerated in the PCR application or amendments **not filed timely ten (10) days prior of the evidentiary hearing** will be opposed by the State, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRPC.

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the

application alleges ineffective assistance of counsel as a ground for relief, 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, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 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 (1985).

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an

evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant also alleges a subject matter jurisdiction claim. Defects in the indictment do not affect subject matter jurisdiction. See State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); See also U.S. v. Cotton, 535 U.S. 625, 122 S.Ct. 1781 (2002). The indictment is a notice document, and any challenges to its sufficiency must be made in accordance with S.C. Code Ann. § 17-19-90 (2003). See also S.C. Code § 17-19-20 (2003). Subject matter jurisdiction is the power of a court to hear a particular class of cases, and it has nothing to do with the indictment document. See Gentry, 363 S.C. 93, 610 S.E.2d 494; Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994).

In post-conviction relief, an Applicant wishing to raise challenges to the sufficiency of an indictment must do so in the context of ineffective assistance of counsel, basically alleging that his trial counsel failed to properly move to quash the indictment in accordance with S.C. Code Ann. § 17-19-90 (2003). A claim of this nature is subject to the procedural bars in the Uniform Post-Conviction Procedure Act – notably the statute of limitations and successiveness. See S.C. Code §§ 17-27-45, -90 (2003).

An Applicant may still challenge the subject matter jurisdiction of the trial court, and such a claim is one that may be raised at any time. See Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001), overruled in part by Gentry, 363 S.C. 93, 610 S.E.2d 494. However, “[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters.” Gentry, 363 S.C. at 101, 610 S.E.2d at 499; See also S.C. Const. Art. V, § 7. Thus, Applicant must present evidence that his case is of some class over which the circuit court does not have the authority to preside.

Applicant's conviction involved a criminal charge in General Sessions Court. Thus, the circuit court had subject matter jurisdiction.

V.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

VI.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

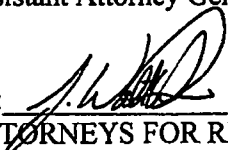
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

J. WALT WHITMIRE
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

Dec 31st, 2013

STATE OF SOUTH CAROLINA)
)
 COUNTY OF ANDERSON)
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)
)
 TERRY NEIL HAMBY, JR. # 353487)
)
 Applicant,)
)
 vs)
)
 STATE OF SOUTH CAROLINA,)
)
 Respondent)
 _____)

IN THE COURT OF COMMON PLEAS
 IN THE TENTH CIRCUIT

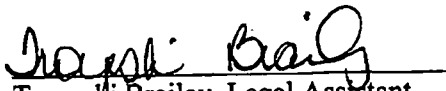
2013-CP-04-1947

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Hugh W. Welborn, Esq.
Post Office Box 173
Anderson, SC 29622

DATED this 31st day of December, 2013


 Troyeshi Brailey, Legal Assistant
 For Respondent

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EXHIBITS

No	DESCRIPTION	ID	EV
	<i>No exhibits were presented during the hearing</i>		

Terry Neil Hamby - Direct Examination by Mr. Welborn

4

1 THE COURT: Okay.

2 Mr. Welborn, is there any issue on behalf of the
3 applicant as to the subject-matter jurisdiction?

4 MR. WELBORN: That is an issue. And, Your
5 Honor, my client would like to testify about that if he
6 could.

7 THE COURT: Okay. Well, then I'll make ...
8 I'll let you make your motion after he testifies.

9 MR. WHITMIRE: Thank you, Your Honor.

10 THE COURT: Thank you, sir.

11 Mr. Welborn, whenever you're ready.

12 MR. WELBORN: Yes, sir. I would call Terry
13 Hamby to the stand.

14 (WHEREUPON, the witness was duly sworn.)

15 THE COURT: Your Witness.

16 MR. WELBORN: May it please the Court.

17 THE COURT: Yes, sir.

18 TERRY NEIL HAMBY,

19 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

20 DIRECT EXAMINATION

21 BY MR. WELBORN:

22 Q. Mr. Hamby, you are Terry Hamby; is that correct,
23 sir?

24 A. Yes, sir.

25 Q. And you are currently serving a sentence as was

1 advised by the Court just a few minutes ago that is --
2 those are the sentences and the crimes for which you pled
3 guilty before Judge Maddox on or about December 6th of
4 2012; is that correct?

5 A. Yes, sir.

6 Q. Now, you've alleged in your application, Mr. Hamby,
7 that you had ineffective assistance of your attorney, I
8 believe Jennifer Johnson, because of a couple of things.
9 Number one, she failed to advise you properly of your
10 rights. Now, tell the Court what rights are those that
11 she failed to advise you about, Mr. Hamby.

12 A. Well, first of all, was my right to appeal. I mean,
13 she told me at the time that if I was taking my plea, I
14 wouldn't be able to -- she told me there wasn't nothing
15 I'd be able to do to bring back my plea. After that, I
16 found out about P.C.R. I was unaware of the P.C.R. or an
17 appeal matter at that time.

18 Q. Well, now, just so the Court understands and I
19 understand, you pled guilty. And a lot of times when
20 people plead guilty, there's an understanding, without
21 even talking about an appeal, that you don't want to
22 appeal. That's why you pled guilty and admitted all
23 these things in court. So tell the Court why you wish
24 she had told you under those circumstances that you have
25 a right to an appeal.

Terry Neil Hamby - Direct Examination by Mr. Welborn

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1 A. Because I'm locked up on a warrant that ain't for
2 me.

3 Q. Can you speak up?

4 A. Because I'm locked up on a warrant that ain't even
5 for me.

6 Q. They didn't inform you of what, sir?

7 A. I'm locked up on a warrant that isn't even for me.

8 Q. There's a warrant they didn't inform you about?

9 A. No. A warrant that isn't for me.

10 Q. That isn't for you. What warrant is that?

11 A. For armed robbery.

12 Q. And, now, was that the one we talked about that you
13 waived being indicted on and pled guilty to?

14 A. Yes, sir.

15 Q. Now, can you explain why you did that if ---

16 A. Under the threat of being sentenced to twenty-five
17 years.

18 Q. Now, who threatened to sentence you to twenty-five
19 years?

20 A. If I didn't take it, if I didn't go up to plead, I
21 would catch twenty-five.

22 Q. Now, who said that?

23 A. My lawyer.

24 Q. Ms. Johnson?

25 A. Yes, sir.

1 Q. So if she hadn't threatened you with twenty-five
2 years, you would not have pled guilty to something that
3 you knew at that time you weren't guilty of anyway. Is
4 that what you're telling the Court?

5 A. Yes, sir.

6 Q. So you knowingly pled guilty to something that day
7 you knew you weren't guilty of?

8 A. I know I had a lot of charges against me. It didn't
9 look good with me going to trial.

10 Q. Didn't look good going to trial?

11 A. Yes, sir.

12 Q. Well, what is it that you're not guilty of for the
13 Court's understanding?

14 A. Armed robbery.

15 Q. And who is guilty of that?

16 A. I don't know who's guilty of it. The warrant wasn't
17 signed on me. It was signed on my daddy, but it was put
18 on me in Anderson County.

19 Q. It was signed by on your daddy. Is that what you
20 said?

21 A. Yes, sir.

22 Q. So is he guilty of that?

23 A. No, sir.

24 Q. He's not? And you're not either?

25 A. No, sir.

Terry Neil Hamby - Direct Examination by Mr. Welborn

8

1 Q. So you're asking the Court to find that your lawyer
2 somehow told you to go ahead and plead guilty to
3 something you weren't guilty of because if you didn't,
4 you'd get twenty-five years. Do I understand that?

5 A. Basically, yes, sir.

6 Q. Okay. All right. You also said that the court
7 lacked subject-matter jurisdiction to impose the
8 conviction and sentencing. Now, we talked downstairs a
9 little while ago and over the phone another day. Didn't
10 you tell me that that relates to what we just talked
11 about?

12 A. Excuse me. I never talked to you on the phone.

13 Q. Okay. That's possible. I've talk to so many of
14 them. So I apologize. I don't want to say something
15 that's not right. But we did talk downstairs a little
16 while ago. And we've written several letters back and
17 forth through the previous months; isn't that true?

18 A. Yes, sir. I've received three letters from you.

19 Q. Yes, sir. I responded to your three letters; is
20 that correct?

21 A. Yes, sir.

22 Q. Thank you.

23 A. You wrote me a letter letting me know I was supposed
24 to be in court. But even after I wrote you to let you
25 know that I'd been moved from Kershaw, you wrote me a

1 confirmation letter that I had moved from Kershaw to
2 Livesay, you still wrote me back at the Kershaw
3 institution asking me for the same information I'd
4 already spoke with you.

5 Q. Thank you. Now, tell the Court why it lacks
6 subject-matter jurisdiction to impose a conviction and
7 sentencing on you.

8 A. Because there is not a warrant on me for armed
9 robbery. How was I sentenced to something where there
10 wasn't a warrant on me for armed robbery?

11 Q. Okay. Now, is that the warrant we talked about a
12 moment ago that you waived and gave up the right to have
13 an indictment made on? Is that it?

14 A. Yes, sir.

15 Q. And that's the same one you talked about that your
16 lawyer said plead guilty to it anyway or you'll get
17 twenty-five years?

18 A. Yeah.

19 Q. Are you asking the Court then to find ineffective
20 assistance of counsel on those issues, sir?

21 A. Those and more.

22 Q. Okay. What's the more?

23 A. Upon speaking with Jennifer Johnson, I told her when
24 the detectives come and picked me up from Anderson County
25 Detention Center and took me to the sheriff's department

Terry Neil Hamby - Direct Examination by Mr. Welborn

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1 and was speaking with me on the armed robbery, when they
2 told me it was an armed robbery, from the very get-go I
3 told them I wanted my attorney. Which then at that point
4 they informed me that they were going to sign warrants on
5 my daddy and my girlfriend for accessory after the fact.
6 Asked me if I still didn't want to make a statement. At
7 that time I still told them I wanted an attorney. That's
8 when he told the other officer in the room with us to go
9 and sign the warrant, go have the warrant signed. That's
10 when I said, "You going to use my family against me to
11 try to get a statement out of me?"

12 Q. So you're saying you didn't -- your rights were sort
13 of -- you were forced into saying things that weren't
14 true. Is that what you're trying to say?

15 A. Exactly.

16 Q. All right. What else?

17 A. That when I spoke to her on this and told her that
18 the warrant wasn't for me, she said the indictment would
19 be for me. Later on when we spoke, she said the
20 indictment was signed. Turned out -- well, apparently
21 from what you're telling me, the indictment was never
22 signed. So there again, I'm telling her that there's
23 problems with this case, and she's not doing nothing. I
24 told her that I asked for an attorney. Yet, she didn't
25 check into me asking about an attorney because she was

1 already representing me on other charges.

2 Q. Okay.

3 A. And she said due to the fact she didn't follow to be
4 my attorney for that armed robbery at that point in time,
5 I asked for an attorney when I was giving my oral
6 statement. They refused me an attorney.

7 Q. Is there anything else?

8 A. No, sir, I don't believe so.

9 Q. Thank you. Answer anything opposing counsel or the
10 Court may have for you.

11 MR. WHITMIRE: May it please the Court.

12 THE COURT: Yes, sir.

13 CROSS-EXAMINATION

14 BY MR. WHITMIRE:

15 Q. So, Mr. Hamby, correct me if I'm wrong. But what
16 you're saying is you were never actually arrested and
17 indicted for armed robbery?

18 A. I was on a warrant that wasn't for me.

19 Q. And all the offenses you pled guilty to, you're
20 indicted on, correct, except one?

21 A. Yes, sir, I believe so.

22 Q. And that one in which you waived presentment was one
23 of the larceny, grand larcenies; is that correct?

24 A. Yes, sir.

25 Q. Your guilty plea was December of 2012?

- 1 A. Yes, sir.
- 2 Q. And you were arrested or at least you were served
3 the arrest warrant March 26th, 2012?
- 4 A. Yes, sir.
- 5 Q. Indicted May 22nd, 2012?
- 6 A. Yes, sir.
- 7 Q. Okay. And this isn't your first guilty plea, is it?
- 8 A. No, sir.
- 9 Q. When was your first guilty plea?
- 10 A. On these or ---
- 11 Q. 2009, a prior case.
- 12 A. It was 2009 for grand larceny and second degree
13 burglary.
- 14 Q. Same judge?
- 15 A. I'm not exactly sure, to be honest with you.
- 16 Q. Who was your attorney on those charges?
- 17 A. I cannot recall at this point.
- 18 Q. Now, on these set of charges, did you let Ms.
19 Johnson know your concerns about the statement you gave?
- 20 A. Yes, sir.
- 21 Q. Y'all talked about it?
- 22 A. Yes, sir.
- 23 Q. How many times did she visit you?
- 24 A. Two or three times.
- 25 Q. And I believe -- correct me if I'm wrong again --

1 you said you pled guilty because you had twenty-five
2 years hanging over your head?

3 A. Yes, sir.

4 Q. Did you contest your guilt at the guilty plea
5 hearing?

6 A. No, sir. I wasn't trying to get no more time than
7 ten years.

8 Q. So you made the decision to get the benefit of
9 entering that plea?

10 A. Yes, sir.

11 Q. Did you want to go to trial?

12 A. At the time, yes, I wanted to go to trial. But when
13 she informed me that it was a slim to none chance, it was
14 going to be my word against the detective's word if I
15 asked for an attorney initially when I walked into the
16 room with the detectives they had me go ahead and sign my
17 paper.

18 Q. So you signed a Miranda waiver?

19 A. Yes. And then later they wanted to tell me what
20 this was concerning.

21 Q. But you signed a Miranda waiver first; correct?

22 A. Yes, sir.

23 MR. WHITMIRE: I beg the Court's indulgence.

24 THE COURT: Take your time.

25 Q. And, again, correct me if I'm wrong. This was a

Terry Neil Hamby - Cross-examination by Mr. Whitmire

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1 recommended offer from the State?

2 A. No. It was an open plea. That's what my attorney
3 was telling me. It was an open plea.

4 Q. Did y'all talk about how much time you were looking
5 at getting?

6 A. When I come here, she met me downstairs and told me
7 that if I'd sign the paper today, it would be a ten-year
8 sentence.

9 Q. And what is your sentence again?

10 A. Ten years.

11 Q. So you signed the plea sheets before the hearing?

12 A. Yes, sir.

13 Q. And you were determined to go forward at that point?

14 A. Yes, sir.

15 Q. Now, when did you decide you wanted to appeal your
16 guilty plea?

17 A. When I learned of all of these facts in the case.

18 Q. After you filed a P.C.R.?

19 A. No, sir. It was right before I filed the P.C.R.

20 Q. Did you appeal your 2009 conviction?

21 A. No, sir.

22 Q. You got the sentence that she told you you were
23 probably going to get, your attorney?

24 A. (No verbal response)

25 MR. WHITMIRE: No further questions, Your

1 Honor.

2 Thank you, Mr. Hamby.

3 THE COURT: All right. Mr. Welborn, before you
4 ask any questions, I just want to make sure ...

5 Mr. Hamby, how old are you?

6 THE WITNESS: Twenty-nine. Well, I'll be
7 twenty-nine this month.

8 THE COURT: Okay. So what you're arguing about
9 is the fact that on the warrant and on the sentencing
10 sheet they give your daddy's social security number and
11 age on it?

12 THE WITNESS: Yes, sir.

13 THE COURT: And not yours. Is that what you're
14 talking about?

15 THE WITNESS: Yes, sir. And the fact that he's
16 also being punished on the outside while I'm being
17 punished on the inside. His license was suspended
18 because he was charged with armed robbery.

19 THE COURT: Okay. Your last four digits of
20 your social security number are not 3925?

21 THE WITNESS: No, sir.

22 THE COURT: All right.

23 Okay. Mr. Welborn?

24 MR. WELBORN: Just one or two brief questions.

25 REDIRECT EXAMINATION

Terry Neil Hamby - Redirect Examination by Mr. Welborn

16

1 BY MR. WELBORN:

2 Q. From my own work with my staff, I think I tried to
3 contact you Friday. Were you gone on some type of
4 medical situation, Mr. Hamby?

5 A. No, sir. I'm housed at Livesay B Institution, but I
6 go to work at Livesay A on the ward. So I may have been
7 on the other -- on the other institution.

8 Q. That could have happened then? Thank you, so much.
9 That clarifies a few things.

10 THE COURT: Okay.

11 Q. I know I'd made an appointment to talk to you and
12 just didn't get to at that time. Thank you, sir.

13 MR. WELBORN: That's all I have.

14 THE COURT: Thank you, sir. Anything on
15 recross?

16 MR. WHITMIRE: Nothing, Your Honor. The State
17 reserves the right to recall Mr. Hamby in its case.

18 THE COURT: Okay.

19 All right. Mr. Hamby, you can step down. Thank
20 you, sir.

21 MR. WELBORN: That's our case, Your Honor.

22 THE COURT: All right. Mr. Whitmire?

23 MR. WHITMIRE: Yes, Your Honor. At this time,
24 Your Honor, the State calls Ms. Johnson to the stand.

25 THE COURT: Okay.

1 the charges that were prior to the armed robbery. The
2 armed robbery was first in time but not first in arrest
3 date. It looks like he was arrested on February 13th,
4 2012, for a grand larceny. And on February 15th, 2012,
5 he was questioned regarding the armed robbery, but
6 nothing -- he didn't have a charge at that time.

7 He was also -- let's see here. He applied on the
8 6th of March 2012 and was accepted as a public defender
9 client at that time. I was appointed on or about March
10 8th, again, regarding the grand larceny. Later in March,
11 looks like March 26th, Detective Epps and Gebing at the
12 Anderson County Sheriff's Office did take the defendant
13 from the detention center to the sheriff's office
14 regarding a statement for the armed robbery. The
15 incident date for the armed robbery was actually January
16 23rd, 2012. So he was -- he did have counsel at the time
17 but not on that charge. And that's where the -- that was
18 the issue that Mr. Hamby and I spoke about. And I
19 investigated the legal background for that. Of course,
20 there were a couple of different things going on. The
21 first question was a factual question, as he alluded to,
22 as to whether or not he had indeed asked for counsel.
23 But he did sign a waiver of rights form at that time.
24 And then, of course, the other matter was more of a
25 legal matter of could the police question him without

1 counsel on this unrelated matter. I did some more
2 research into it at that time. It was pretty clear that
3 the case law says that South Carolina follows the federal
4 constitutional rule that the Sixth Amendment right to
5 counsel is offense-specific. Basically the fact that I
6 was appointed to represent him on one matter did not
7 translate into him having counsel on an unrelated matter.

8 Q. Do you recall just the facts of that armed robbery?

9 A. Yes, sir. The armed robbery occurred at a local
10 elementary school here in Anderson. I believe it was
11 Homeland Park Elementary. The victim in that case was a
12 teacher. As she was getting out of her car that morning
13 to go to work -- I believe she was removing some things
14 either from her passenger or trunk -- I forget which --
15 and at that time was approached by an individual who she
16 claimed was wielding a tire iron and demanded her
17 pocketbook. That individual did obtain property from her
18 and fled. Some of that property was recovered. There
19 was a witness, Tyrone Davis, and also a Shannon Stanton.
20 Ms. Stanton was actually Mr. Hamby's girlfriend at the
21 time. Both of them gave statements because they actually
22 possessed some of the property that was stolen during
23 that armed robbery.

24 Q. Was there any dispute regarding the identification
25 of the assailant of the armed robbery?

1 A. Honestly, I'd have to go back. I don't remember
2 whether there was a photograph or other lineup procedure
3 done relative to the identification. Give me one second.
4 I did have a note. I do have a general note that just
5 says "I.D. question mark" on my discovery materials dated
6 May 29th, 2012. So I think the I.D. was largely based on
7 Mr. Hamby's admission in the case. And, of course, the
8 other two circumstantial or collateral pieces of evidence
9 that there were two individuals who turned over stolen
10 property from that case to the sheriff's office and
11 identified him as the source of that.

12 Q. Did Mr. Hamby give you his version of the facts of
13 this charge in particular?

14 A. Yes. He did not deny the offense. He was
15 concerned, as he alluded to in his testimony earlier,
16 about the statement he had given law enforcement. And
17 naturally, having gone to trial -- his case was actually
18 on the trial docket -- the armed robbery case was on the
19 docket for the week -- whatever it was the week that he
20 pled. And we had discussed going forward, but it was my
21 impression then and now that his intentions were never
22 really to go to trial. But, of course, the only way to
23 attack a statement was really to have a pre-trial hearing
24 after the case was called to trial.

25 Q. Just a generic question. What is your general

1 practice procedure for advising a client on the benefits
2 and detriments of entering a plea?

3 A. I mean, generally, I go through -- in this case
4 because, it was docketed for trial. We'd actually gone
5 through some pretty specific procedures about what would
6 happen. You know, how a jury is selected. You know, how
7 we call witnesses. Of course, the fact that we don't
8 have to present a defense. Basically sort of the gamut
9 of what his constitutional rights were relating to a
10 trial. We reviewed probably in more detail because this
11 case had reached a point where it was docketed for trial.
12 So no question in my mind that he was adequately advised
13 of his constitutional rights regarding a trial.

14 As to the appeal, honestly, I can't say because this
15 was a situation where we had a sentencing recommendation
16 and we actually asked the court to accept that sentencing
17 recommendation. So that scenario would not -- that would
18 not be a case that I typically would appeal. If the
19 court had maybe not gone along with that or something had
20 happened unusual during the plea, it might have been a
21 different scenario.

22 Q. I'm going to backtrack just a little bit. Prior to
23 trial, were you able to develop a strategy for trial had
24 he decided he wanted to go, to proceed?

25 A. Yes. And I, you know, I reached out and I talked to

1 Sharon [sic] Stanton who was his girlfriend and also a
2 witness in the case. I brought Sharon [sic] into my
3 office. I interviewed her. I reached out to the victim
4 in this case. I actually had called her or contacted her
5 by email attempting to get her to agree to allow the
6 State to reduce the charge to a common-law or strong-arm
7 robbery with the recommendation of a maximum sentence in
8 that case because the maximum would be fifteen on the
9 strong-arm. The prosecutor let me know in no uncertain
10 terms that that was not -- that that was not going to
11 happen, that the victim and her family were not okay with
12 that recommendation.

13 Q. What was your impression of the strength of the
14 State's case?

15 A. I believe if Mr. Hamby had stood trial, he would
16 have been convicted.

17 Q. Again, backing up just a little bit. The arrest
18 warrant and indictments were served on Mr. Hamby?

19 A. Honestly, regarding the indictments, a lot of times
20 we don't see those until we're in the courtroom.

21 Regarding the arrest warrant, I think can address that if
22 you'd give me one second. I was looking back through the
23 various arrest warrants that were served in this case.
24 As to everything except the armed robbery warrant, the
25 party's name -- the defendant's name was listed Terry

1 Neil Hamby, Jr. On the armed robbery warrant, it simply
2 says Terry Neil Hamby. It does not specify junior or
3 senior.

4 Q. A scrivener's error?

5 A. It appears to be a scrivener's error. I didn't
6 compare the social security -- it does have two different
7 Social security numbers on that. I hadn't noticed that.
8 But, yes, the defect of a warrant, of course, would have
9 been cured by the indictment.

10 Q. Just one more question regarding the warrant issue.
11 There's no question he was on notice of the State's case
12 against him; right?

13 A. No. And there was no question in my mind this was
14 not a case of they charged the wrong guy. It was a
15 question of do we have -- you know, can we do something
16 with the statement that was given was really the issue.

17 Q. Just a few more questions for you. Do you recall
18 how many times you met with Mr. Hamby during the course
19 of the representation?

20 A. I would estimate between four and six times. It
21 might have been more often than that. Again, with this
22 case being in the position of having gone to trial -- or
23 not going to trial -- being docketed for trial, we met
24 frequently. I never thought it was a situation that ...

25 Q. And just for the record, Ms. Johnson, whose decision

1 is it to enter a guilty plea?

2 A. Mr. Hamby's.

3 Q. And had he wanted to go to trial, would you have
4 proceeded forward?

5 A. Absolutely.

6 Q. One more final question. Did you try this case to
7 the best of your ability?

8 A. Yes, sir.

9 MR. WHITMIRE: No further questions, Your
10 Honor.

11 Please answer any questions from opposing counsel.

12 THE COURT: Mr. Welborn, any questions?

13 MR. WELBORN: Briefly. May it please the
14 Court.

15 CROSS-EXAMINATION

16 BY MR. WELBORN:

17 Q. Ms. Johnson, I listened carefully. I'm still a
18 little confused. Maybe you can help me with this. My
19 client says you threatened him with twenty-five years if
20 he didn't plead guilty to something he hadn't done. Can
21 you tell the Court of your understanding of that at all?
22 What happened, if it did?

23 A. Well, I don't think I threatened him with anything.
24 But if it had been a threat of time, it would have been
25 more than twenty-five years because armed robbery carries

1 up to thirty years plus the other offenses that the State
2 had against him plus he was on probation. So it was
3 actually significantly more than thirty years that he was
4 facing as a maximum possible punishment.

5 Q. Well, as a defense lawyer, would you tell a client
6 to plead guilty to something they're not guilty of?

7 A. Of course not.

8 Q. Did he admit to you that he was the one that did the
9 robbery at this Homeland Park School?

10 A. Of the teacher, yes, sir.

11 Q. Of a teacher?

12 A. Yes, sir.

13 MR. WELBORN: Bear with me. That's all I have.

14 Thank you.

15 THE COURT: Anything on redirect?

16 MR. WHITMIRE: Nothing further, Your Honor.

17 The State rests and would ask that Ms. Johnson be
18 released from her subpoena.

19 THE COURT: Any objection? Any objection to
20 her being released?

21 MR. WELBORN: No, sir. No objection.

22 THE COURT: Thank you, ma'am.

23 THE WITNESS: Thank you.

24 THE COURT: I appreciate it.

25 Any other witnesses on behalf of the State?

1 MR. WHITMIRE: None, Your Honor. The State
2 would rest and would be happy to answer any questions
3 that you may have regarding the record.

4 THE COURT: Well, I'm looking over the warrant.
5 The warrant does apparently have his father's social
6 security number on it and birthday on it. I'm assuming
7 his father was born about in 1956.

8 THE APPLICANT: Yes, sir.

9 THE COURT: And they've carried that over onto
10 the sentencing sheet. That was not amended. But the
11 warrant itself does indicate that Mr. Terry Neil Hamby,
12 Jr., did take the pocketbook from the teacher. And so
13 I'm going to take that as a scrivener's error. But let
14 me tell you what I am concerned about that he testified
15 to was the fact that he said his father lost his license
16 because apparently his social security number is being
17 carried on this. And I don't know how to correct that,
18 but ...

19 MR. WHITMIRE: May it please the Court, Your
20 Honor. It's always been our position since 2005 in State
21 v. Gentry that an indictment, arrest warrant, they're
22 notice documents. I didn't notice the social security
23 number. In fact, those should be redacted from now on,
24 according to the Supreme Court's court rules of our
25 transcripts and court's records. I didn't notice it.

1 I'm certain there's ways -- and Mr. Welborn and I can
2 discuss this and maybe fix any problem that might exist.

3 THE COURT: Well, I would appreciate your doing
4 that.

5 MR. WHITMIRE: Yeah.

6 THE COURT: Okay. As far as him having any
7 grounds -- meeting his burden of proof for any grounds to
8 grant his post-conviction relief, I don't find that he's
9 met his burden, and I'm denying his post-conviction
10 relief action. Okay?

11 MR. WHITMIRE: Thank you, Your Honor. I'll get
12 you a proposed order.

13 THE COURT: All right. But if you would get
14 together with Mr. Welborn and try and straighten that out
15 with his father, I'd appreciate it.

16 MR. WHITMIRE: No problem.

17 MR. WELBORN: Thank you, Your Honor.

18 THE COURT: Thank you.

19 (WHEREUPON, court stood at recess at approximately
20 11:04 a.m.)

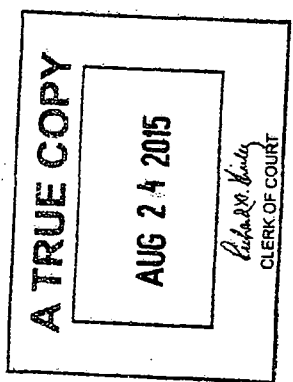
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2015 AUG 24 AM 11:)
COUNTY OF ANDERSON)
COMMON PLEAS AND)
GENERAL SECTION)
Terry Neil Hamby, Jr.,)
S.C.D.C. No. 353487,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT
C.A. No. 2013-CP-04-1947

ORDER OF DISMISSAL



This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed August 28, 2013. Respondent subsequently filed its responsive pleadings. An evidentiary hearing into the matter was convened on July 31, 2014 at the Anderson County Courthouse. Applicant was present and was represented by Hugh W. Welborn, Esq. Respondent was represented by Walt Whitmire, Esq., of the Office of the Attorney General.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. Applicant was indicted by the Anderson County Grand Jury for larceny/grand larceny, value more than \$2,000 but less than \$10,000 (2012-GS-04-0614), and two counts of RSG/ receiving stolen goods, value more than \$2,000 but less than \$10,000 (2012-GS-04-0615; -0616). Applicant was also indicted at the May 2012 term of the Anderson County Grand Jury for robbery/armed robbery while armed with a deadly weapon (2012-GS-04-1176). Applicant was represented by Jennifer Johnson Esq. On December 6, 2012, the State called its case. Applicant entered a guilty plea as indicted. Applicant also waived presentment and entered guilty plea to larceny/grand larceny, value more than \$2,000 but less than \$10,000 (2012-GS-04-2490). The Honorable J. Cordell Maddox, Jr.,

sentenced Applicant to ten (10) years imprisonment for grand larceny (-0614), ten (10) years imprisonment on both counts of receiving stolen goods (-0614; -0616), ten (10) years imprisonment for robbery/armed robbery (-1176), ten (10) years imprisonment for larceny/grand larceny, value more than \$2,000 but less than \$10,000 (-2490). Judge Maddox further revoked Applicant's probation for grand larceny (2009-GS-04-689) and imposed the remainder six (6) year active sentence along with revoking Applicant's probation for burglary, second-degree (2009-GS-04-0688) and imposed the remainder six (6) year active sentence. All sentences were to be served concurrently. Applicant did not appeal his sentences or convictions

At the PCR hearing, Applicant proceeded on the limited allegations of ineffective assistance of counsel and lack of subject matter jurisdiction in his assertion that he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:
 - a. failure to reasonably investigate a suppression defense concerning Applicant's confession.
2. Subject Matter Jurisdiction:
 - a. The defective arrest warrant deprived the Plea Judge of jurisdiction to take the plea.

SUMMARY OF TESTIMONY

(a) Applicant's testimony

At the PCR hearing, Applicant testified the police arrested him by mistake for armed robbery. He stated that the arrest warrant named his father and was meant for him. However, he acknowledged that he was correctly identified in the indictment for armed robbery that was true billed nearly two months later.

Applicant protested his innocence; yet he acknowledged that he gave a confession. Applicant stated that he only gave the confession because the police threatened to pursue charges against his girlfriend and father if he did not cooperate. Applicant testified that he communicated

his concerns about the State's evidence and with the conduct of the police to counsel; he opined that counsel "didn't do anything." He stated that counsel visited him two to three times before adjudication. He stated that counsel told him that it was very unlikely that she would be able to successfully move to suppress his statement because it would be his word against the word of the detectives. He also acknowledged that he signed Miranda waivers prior to giving his statement.

Applicant testified that he made the decision to plead guilty because he had twenty-five years of exposure to incarceration hanging over his head. He stated that he received the sentence that he expected. Despite testifying to his experience in General Sessions Court from his prior convictions, Applicant testified he did not learn that he could have ~~appear~~^{appealed} his sentence until he filed this PCR Application.

(b) Counsel's testimony

Counsel testified to her course of conduct during the representation. She served as an Anderson County Public Defender with well over a decade's worth of experience as a criminal defense attorney when she was appointed to Applicant's case. She stated that she held four to six consultations with Applicant during the representation. Counsel testified to her evaluation of the State's evidence. Counsel outlined the facts and noted that Applicant's identification was based upon his confession to police. Counsel discussed the circumstances surrounding the interrogation and confession with Applicant. Counsel stated that Applicant expressed concerns about his confession to her although he did not deny his culpability. Counsel stated that the insignificant scrivener's error in arrest warrant would not have invalidated the legality of Applicant's Miranda waiver and confession. Furthermore, counsel stated that the indictments cured any defect in the arrest warrant at issue. Based on counsel's impression of the State's case, she testified that a trial would have resulted in a conviction.

Counsel testified to her general procedure in advising a client on the constitutional implications inherent with entering a plea. She noted that Applicant's case was on the trial docket at the time of the plea. Counsel had interviewed Applicant's girlfriend and sought out the victim to get her approval in an attempt ~~to~~ elicit a more favorable plea bargain for Applicant. These attempts proved futile. Counsel stated Applicant made the decision to plead guilty.

APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, 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. at 441, 334 S.E.2d at 813.

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 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, *supra*. 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.

A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Kolle v. State, 386 S.C. 578, 588, 690 S.E.2d 73, 78 (2010)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject's convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds counsel's representation on the allegations at issue to be sound. Counsel provided credible and compelling testimony that evidenced her preparation for the PCR hearing and diligence in Applicant's case. This Court finds Applicant's claim that a scrivener's error in the arrest warrant deprived the Plea Court of jurisdiction to be farcical. Applicant is an experienced accused who has unfortunately used this forum to go down the rabbit hole of frivolous jailhouse litigation on hyper-technical defects that sometimes occur during the preliminary stages of prosecution. On a collateral matter, this Court instructs law enforcement take remedial measures, upon remand, to either redact or strike Applicant's father's social security number in Arrest Warrant J-945267.¹

¹ S.S.N. No. ending in -3925. This Court's instruction is intended to protect Applicant's father from any adverse consequences associated with scrivener's error. S.C. Code Ann. § 17-27-80 (1976) provides the PCR court may enter

A.

This Court finds Applicant's allegation that a defect in the arrest warrant deprived the Plea Court of subject matter jurisdiction to be frivolous. "[T]he United States Supreme Court, in United States v. Cotton, 535 U.S. 625 (2002), held that a defective indictment does not deprive a court of jurisdiction." State v. Gentry, 363 S.C. 93, 99, 610 S.E.2d 494, 498 (2005). This Court finds any nominal defect in the arrest warrant was cured in the subsequent indictment. Regardless, the allegation is per se without merit where a defect in a notice document does not deprive the competent court of jurisdiction. Therefore, this allegation is denied and dismissed with prejudice.

B.

This Court finds Applicant was fallen well short of meeting his burden to prove "ineffective assistance of counsel - failure to reasonably investigate a suppression defense concerning Applicant's confession." This Court finds counsel's testimony convincing and dispositive in light of Applicant's suspect testimony on the matter.

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). "State must show the statement was voluntarily made by a preponderance of the evidence." Jackson v. Denno, 378 U.S. 368, 376, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). If the statement is found to have been given voluntarily, it is then submitted to the jury, where its voluntariness must be established beyond a reasonable doubt. State v. Washington, 296 S.C. 54, 56, 370 S.E.2d 611, 612 (1988). "When reviewing a trial court's ruling concerning voluntariness, this Court does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply

any "supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence or other matters that may be necessary and proper." Id.

determines whether the trial court's ruling is supported by any evidence." State v. Parker, 381 S.C. 68, 74, 671 S.E.2d 619, 622 (Ct. App. 2008).

Counsel gave credible testimony that based upon her review of Applicant's statement and her consultations with him, she concluded that there was no meritorious argument for suppression. See Nickel v. Hannigan, 97 F.3d 403 (10th Cir. 1996) (failure to object to an allegedly involuntary confession failed the prejudice prong where there was no evidence of police coercion as required). This Court finds Applicant has produced no credible evidence of taint or illegality in the police procedures in his case to warrant a meritorious suppression. Where Applicant's allegation rests solely upon suspect speculation, further discussion is unnecessary. See Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) ("failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result"). Therefore, this allegation is denied and dismissed with prejudice.

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 Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

CONCLUSION

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

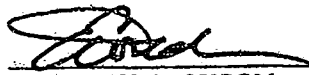
This Court notes that that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate


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.

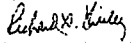
AND IT IS SO ORDERED this 14th day of August, 2015.



 EDGAR W. DICKSON
 Presiding Judge
 Eleventh Judicial Circuit
 TENTH 

Orangeburg, South Carolina

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 ANDERSON SC
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 COMMON PLEAS AND
 GENERAL SESSIONS

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 AUG 24 2015

 CLERK OF COURT

WITNESSES

G Eggs, Anderson Co. Sheriff's Office

DOCKET NO. 2012GS04 01176

The State of South Carolina

County of Anderson

COURT OF GENERAL SESSIONS

MAY 22 2012

Term

ARREST WARRANT NUMBER

J945267

THE STATE

vs.

Terry Neil Hamby

COMMITMENT

ACTION OF GRAND JURY

MAY 22 2012

Foreperson of Grand Jury

Date:

VERDICT

RLC

Indictment for

Robbery / Armed Robbery, robbery while armed or allegedly armed

SC Code: 16-11-0330(A)

CDR Code: 0139

Foreperson of Petit Jury

Date:

STATE OF SOUTH CAROLINA)
)
COUNTY OF Anderson)

INDICTMENT

At a Court of General Sessions, convened on MAY 22 2012, the Grand Jurors of Anderson County present upon their oath:

Robbery / Armed Robbery, robbery while armed or allegedly armed

That Terry Neil Hamby did in Anderson County, on or about January 23, 2012, while armed with a deadly weapon, to wit: a tire tool, or while alleging either by action or words he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery would reasonably believe to be a deadly weapon, take by means of force or intimidation, goods or monies described as: a pocket book and lunch bag from the person or presence of Catherine Laughridge. This is in violation of §16-11-330(A) of the *South Carolina Code of Laws (1976)*, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Ramel Campbell
ASSISTANT SOLICITOR

WITNESSES

Tracy Call, Anderson County Sheriff's Dept.

DOCKET NO. 2012GS04 00614

The State of South Carolina

County of Anderson

COURT OF GENERAL SESSIONS

MAR 13 2012

Term

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APR - 8 2016
LARRY WILSON
ANDERSON CLERK OF COURT

ARREST WARRANT NUMBER

J911355

THE STATE

vs.

Terry Neil Hamby Jr

COMMITMENT

12/10/12-DT

ACTION OF GRAND JURY

TRUE BILL

MAR 13 2012

Foreperson of Grand Jury
Date: [Signature]

VERDICT

AAM

Indictment for

Larceny/Grand Larceny, value more than \$2,000 but less than \$10,000

SC Code: 16-13-30(B)
CDR Code: 3420

Foreperson of Petit Jury
Date:

STATE OF SOUTH CAROLINA)
COUNTY OF Anderson)

INDICTMENT

At a Court of General Sessions, convened on APR 2 2012, the Grand Jurors of Anderson County present upon their oath:

Larceny/Grand Larceny, value more than \$2,000 but less than \$10,000

That Terry Neil Hamby Jr did in Anderson County, on or about December 28, 2011, feloniously take and carry away the personal property of Gary Joe Lanier, to wit: a 1994 Ford van, with a total value of more than Two Thousand Dollars but less than Ten Thousand Dollars with the intent to deprive the owner permanently of such property. This is in violation of 16-13-30 of the South Carolina Code of Laws (1976) as amended

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APR - 8 2016
Richard M. Hunter
ANDERSON CLERK OF COURT

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

[Signature]
ASSISTANT SOLICITOR

WITNESSES

M W Hunnicutt, Anderson County Sheriff's Dept

DOCKET NO. 2012GS04 00615

The State of South Carolina

County of Anderson

COURT OF GENERAL SESSIONS

MAR 28 2012

Term

ARREST WARRANT NUMBER

J894352

THE STATE

vs.

Terry Neil Hamby Jr

ACTION OF GRAND JURY
TRUE BILL
MAR 14 2012
Foreperson of Grand Jury
Date: *[Signature]*

VERDICT

AAM

Indictment for

RSG/Receiving stolen goods, value more than \$2,000 but less than \$10,000

SC Code: 16-13-0180(A)

CDR Code: 3426

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APR - 8 2016
[Signature]
ANDERSON COUNTY CLERK OF COURT

COMMITMENT

12/6/12-12

STATE OF SOUTH CAROLINA)
)
COUNTY OF Anderson)

INDICTMENT

At a Court of General Sessions, convened on MAR 2 2012, the Grand Jurors of Anderson County present upon their oath:

RSG/Receiving stolen goods, value more than \$2,000 but less than \$10,000

That Terry Neil Hamby Jr did in Anderson County, on or about December 12, 2011, receive, buy or possess stolen goods, chattels, or other property, to wit: a 1995 Ford Thunderbird belonging to RCR Auto Sales, such goods being valued at more than Two Thousand Dollars. Terry Neil Hamby Jr did knowingly of have reason to believe the goods, chattels or property to be stolen. This is in violation of 16-13-180(A) of the South Carolina Code of Laws (1976) as amended.

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APR - 8 2016
Richard M. Hinder
ANDERSON CLERK OF COURT

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

[Signature]
ASSISTANT SOLICITOR

WITNESSES

M V/ Hunnicutt, Anderson County Sheriff's Dept

DOCKET NO. 2012GS04 00616

The State of South Carolina

County of Anderson

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APR - 8 2016
Blair, Kim
ANDERSON CLERK OF COURT

COURT OF GENERAL SESSIONS

MAR - 8 2012

Term

ARREST WARRANT NUMBER

J894351

THE STATE

vs.

Terry Neil Hamby Jr

COMMITMENT

121012RT

ACTION OF GRAND JURY

TRUEBILL

MAR 1 2012

Foreperson of Grand Jury
Date: [Signature]

VERDICT

AAM

Indictment for

RSSG/Receiving stolen goods, value more than \$2,000 but less than \$10,000

SC Code: 16-13-0180(A)
CDR Code: 3426

Foreperson of Petit Jury
Date:

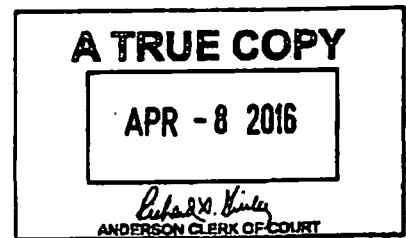
STATE OF SOUTH CAROLINA)
COUNTY OF Anderson)

INDICTMENT

At a Court of General Sessions, convened on APR 2 2016, the Grand Jurors of Anderson County present upon their oath:

RSG/Receiving stolen goods, value more than \$2,000 but less than \$10,000

That Terry Neil Hamby Jr did in Anderson County, on or about December 12, 2011, receive, buy or possess stolen goods, chattels, or other property, to wit: a 1991 Honda Accord belonging to Kizzy Pickens, such goods being valued at more than Two Thousand Dollars. Terry Neil Hamby Jr did knowingly or have reason to believe the goods, chattels or property to be stolen. This is in violation of 16-13-180(A) of the South Carolina Code of Laws (1976) as amended



Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR

WITNESSES

K Marzolf, Anderson County Sheriff's Dept.

DOCKET NO. 2012GS04

02490

The State of South Carolina

County of Anderson

COURT OF GENERAL SESSIONS

Term

ARREST WARRANT NUMBER

J894470

THE STATE

vs.

Terry Neil Hamby Jr

ACTION OF GRAND JURY

Foreperson of Grand Jury

Date:

VERDICT

AAM

Indictment for

Larceny/Grand Larceny, value more than \$2,000 but less than \$10,000

SC Code: 16-13-30(B)

CDR Code: 3420

Foreperson of Petit Jury
Date:

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APR - 8 2016
Cheryl K. ...
ANDERSON CLERK OF COURT

COMMITMENT

12/6/12-R

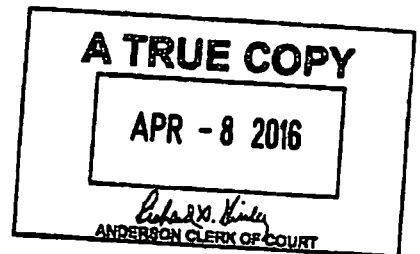
STATE OF SOUTH CAROLINA)
COUNTY OF Anderson)

INDICTMENT

At a Court of General Sessions, convened on _____, the Grand Jurors of Anderson County present upon their oath:

Larceny/Grand Larceny, value more than \$2,000 but less than \$10,000

That Terry Neil Hamby Jr did in Anderson County, on or about January 18, 2012, feloniously take and carry away the personal property of Kenneth Jordan, to wit: a three and one half ton air condition unit, with a total value of more than Two Thousand Dollars but less than Ten Thousand Dollars with the intent to deprive the owner permanently of such property. This is in violation of 16-13-30 of the South Carolina Code of Laws (1976) as amended



Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Rame L Campbell
ASSISTANT SOLICITOR