

The Brooks Law Office, LLC

CHARLES T. BROOKS, III, ATTORNEY AT LAW
IRMA R. BROOKS, ATTORNEY AT LAW

309 BROAD STREET ~ SUMTER, SOUTH CAROLINA 29150
POST OFFICE BOX 3512 ~ SUMTER, SOUTH CAROLINA 29151
(803) 418-5708

FAX: (803) 934-9618 TOLL FREE: (877) 770-8792

Email: cbrooks@ctbrooks.com

RECEIVED

April 21, 2016

APR 25 2016

South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

S.C. SUPREME COURT

RE: Mario Shivers, 344174 vs. South Carolina
2013-CP-38-00016

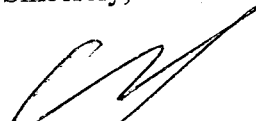
Dear Sir or Madam:

Enclosed herewith you will find the **Notice of Appeal, Order of Dismissal**, along with a **Proof of Service** in reference to the above named Applicant.

If you have any questions or concerns, please contact my office at the number stated above.

With kind regards, I am

Sincerely,



Charles T. Brooks, III
CTB/srw

Enclosed as stated

cc: J. Clay Mitchell, Office of Attorney's General
South Carolina Office of Appellate Defense
Mr. Mario Shivers, 344174

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
Honorable Kristi L. Harrington, Circuit Court Judge

Case No: 2013-CP-38-00016

Mario Shivers.....Appellant
S.C.D.C. 344174

v.

The State.....Respondent

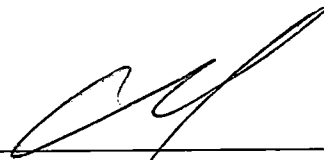
RECEIVED

APR 25 2016

S.C. SUPREME COURT

NOTICE OF APPEAL

Mario Shivers, appeals his Denial for Post Conviction Relief in this case. The order of Dismissal was imposed and signed by the Honorable Kristi L. Harrington, January 15, 2015, which I, Charles T. Brooks, III, received on April 21, 2016.



Charles T. Brooks, III
309 Broad Street
Post Office Box 3512
Sumter, South Carolina, 29151
(803) 418-5708
Attorney for Appellant

Other Counsel on Record:
J. Clay Mitchell, Esquire
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3970

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
Honorable Kristi L. Harrington, Circuit Court Judge

RECEIVED

APR 23 2016

Case No: 2013-CP-38-00016

S.C. SUPREME COURT

Mario Shivers.....Appellant
S.C.D.C. 344174

v.

The State.....Respondent

PROOF OF SERVICE

I, the undersigned, do hereby certify that on this 21st day of April, 2016, I served the foregoing **Notice of Appeal, Order of Dismissal**, as well as **Proof of Service** in this matter by depositing a true copy of it in the United States Mail, postage prepaid, on April 21, 2016, addressed to the following as indicated below:


South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

South Carolina Office of Appellate Defense
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29211-1589

Office of Attorney's General
Attn: J. Clay Mitchell, Esquire
Post Office Box 11549
Columbia, South Carolina 29211-1549

Mr. Mario Shivers, 344174
McCormick Correctional Institution
386 Redemption Way
McCormick, South Carolina, 29899

Dated: April 21, 2016


Charles T. Brooks, III
Attorney for the Appellant
309 Broad Street
Sumter, South Carolina 29150
(803) 418-5708

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

Mario Shivers, #344174,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

CASE NO.: 2013-CP-38-00016

ORDER OF DISMISSAL

FILED FOR RECORD
WINNIE G. CLARK
CLERK OF COURT
ORANGEBURG, SC

2015 JAN 22 AM 11:32

THIS MATTER COMES BEFORE THE COURT pursuant to an application for post-conviction relief (PCR) filed January 10, 2013. Respondent made its Return on May 7, 2013, requesting an evidentiary hearing be convened. Charles T. Brooks, III, Esquire, was appointed by the Orangeburg County Clerk of Court. Applicant filed a Motion for Funding in order to hire an expert investigator. A hearing was held on said Motion on May 29, 2014, at the Dorchester County Courthouse. Applicant and Counsel Brooks were present. The Court denied that motion by written Order filed August 22, 2014.

An evidentiary hearing was held on October 27, 2014, at the Dorchester County Courthouse. Applicant was present and represented by Counsel Brooks. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent.

Applicant testified on his own behalf at the PCR hearing. Also testifying was Applicant's trial counsel, Joshua Koger, Jr., Esquire. The Court had before it the Orangeburg County Clerk of Court records, Applicant's South Carolina Department of Corrections records, the PCR application, the Return, the trial transcript, and the appellate records.

ATTEST: TRUE COPY

Winnys B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. Applicant was true bill indicted during the May 2010 term of the Orangeburg County Grand Jury for Murder (2010-GS-38-0822), Burglary, First Degree (2010-GS-38-0823), Armed Robbery (2010-GS-38-0824), Possession of a Weapon during the Commission of a Violent Crime (2010-GS-38-0825), and Kidnapping (2010-GS-38-0826). Joshua Koger, Jr., Esquire represented Applicant.

On December 10, 2010, Applicant proceeded to a jury trial alongside his four co-defendants before the Honorable Edgar W. Dickson. On December 17, 2010, the jury convicted Applicant of Murder, Armed Robbery, and Burglary, First Degree. Judge Dickson sentenced Applicant to fifty years imprisonment for Murder, fifty years imprisonment for Burglary, First Degree, and thirty years imprisonment for the Armed Robbery, with all sentences to be served concurrently. The remaining indictments were *nolle prossed*.

A Notice of Appeal was filed with the South Carolina Court of Appeals and an appeal was perfected on the Applicant's behalf by Elizabeth A. Franklin-Best, Esquire, of the South Carolina Commission on Indigent Defense, Division of Appellate Defense. Counsel Best raised the following issue on appeal:

Whether the trial court judge erred when he did not sever the trials of Shivers and his four co-defendants, when his failure to do so violated Shiver's right to due process by forfeiting his right to last closing and affecting his cross-examination of state's witnesses?

The South Carolina Court of Appeals denied the appeal. *State v. Shivers*, Op. No. 2012-UP-646 (S.C. Ct. App. filed May 5, 2012). The Remittitur was issued on January 4, 2013.

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

1. Ineffective assistance of counsel in that counsel failed to investigate the facts and circumstances of Applicant's case.

PCR HEARING

At the PCR hearing, Applicant alleged Counsel did not adequately investigate the case. He testified that if Counsel properly investigated the case, he would have discovered Applicant was at home when the incident occurred and that his younger brother and former girlfriend would have testified to that effect. Applicant asserted Counsel should have presented an alibi defense to the jury. Applicant testified he was misidentified from a photo lineup. He stated he had dread locks at the time the incident occurred but did not have them in the picture in the photo lineup. Applicant contended the victim's girlfriend, Ashley D. Parsley, gave conflicting statements, first describing Applicant as having dark skin, and then describing him as having light skin. Applicant testified that Counsel should have emphasized to the jury the discrepancies in Parsley's identifying him. Applicant did concede Counsel cross-examined Parsley on the identification and also argued it in closing arguments. Applicant testified he discussed the alleged misidentification with Counsel.

Applicant testified that Counsel introduced into evidence a prior statement of codefendant, as well as State's witness, Patrick Tyler and as a result, he and the other four (4) codefendants on trial would not be able to deliver the final closing argument.

Counsel testified that he has been practicing law for over twenty (20) years. Counsel testified he was appointed by the Orangeburg County Clerk to represent Applicant. He stated he met with Applicant numerous times and discussed discovery and defenses available to Applicant.

Counsel testified he submitted a Notice of Alibi where he listed Applicant's brother and former girlfriend as witnesses. Counsel testified he contacted both alibi witnesses. Counsel stated

Applicant's then-girlfriend was not willing to testify in the case and that after speaking with Applicant's younger brother he concluded his testimony would not be helpful.

Applicant testified the most damaging evidence was codefendant Tyler's statement that placed the other defendants at the scene of the crime. Counsel testified he cross-examined Parsley on her identification of Applicant. Counsel introduced a prior statement made by Parsley that was inconsistent with other statements and the testimony she gave at trial. Counsel testified this was to drive home the argument that Applicant was misidentified. Counsel also pointed out that he was the last attorney to do examinations which he thought was an advantage since he could build off the attorneys who proceeded before him.

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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (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. Applicant must overcome this presumption in order 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. *Id.* at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was

deficient. *Id.* Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." *Id.* (citing *Strickland*, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 117-18, 386 S.E.2d at 625.

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, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, Applicant's appellate records, and the legal arguments made by the attorneys. 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.

Failure to Investigate

Applicant's allegations that Counsel was ineffective for failing to investigate the facts and circumstances of the case must be denied. "[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). To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. *Jackson v. State*, 329 S.C. 345, 495 S.E.2d 768 (1998).

Applicant specifically argues Counsel was ineffective for failing to investigate alibi witnesses. This allegation is without merit. This Court finds Counsel was not ineffective for failing to call an alibi witness for the Applicant during trial. To qualify as an alibi, a witness's testimony must account for the defendant's whereabouts during the time of the crime such that it would have been physically impossible for the defendant to commit the crime. *Walker v. State*, 397 S.C. 226, 237, 723 S.E.2d 610, 616 (Ct. App. 2012). When a PCR applicant alleges trial counsel failed to investigate or present an alibi witness, the PCR court must make two findings to determine if counsel's deficient performance constitutes prejudice under *Strickland*. *Id.* First, the court must find as a matter of law whether the witness's testimony meets the legal definition of an alibi. Second, the court must assess the witness's credibility. *Id.* In making the first finding, the court must consider the entire record to determine what the testimony would have been if it had been presented at trial. *Id.* The PCR court must consider the testimony as a whole, take it as true and credible, and view it in the light most favorable to the PCR applicant. *Id.*

This Court finds trial Counsel articulated a valid strategic reason for not presenting the testimony of the Applicant's alleged alibi witnesses at trial. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992).

This Court finds Counsel provided credible testimony that he decided not to call the Applicant's alleged alibi witnesses because their testimony would not be helpful to Applicant's

defense. Counsel investigated Applicant's alibi claims, spoke to the witnesses provided by Applicant, and filed a Notice of Alibi. Upon further investigation, Counsel determined neither witness was going to be helpful to Applicant's defense. This Court finds Counsel articulated a valid reason for employing such strategy and Applicant has failed to carry his burden of proving Counsel was deficient for failing to call the Applicant's alleged alibi witnesses.

This Court also finds Applicant failed to present the testimony of the alleged alibi witnesses at the evidentiary hearing for this Court to assess. In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, an applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). This Court finds it will not speculate as to the substance of the testimony of Applicant's alleged alibi witnesses. This Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective for failing to call the his alleged alibi witnesses.

Failure to Present Misidentification Defense

This Court finds Applicant's contention that Counsel should have presented a defense of misidentification to the jury is without merit. Counsel argued that Applicant was misidentified by Parsley throughout the trial. Counsel highlighted Parsley's prior statements attempting to show they were inconsistent with her trial testimony. Counsel introduced this statement to show inconsistencies in her description of the assailant's skin tone. Counsel also argued this his closing argument. This issue became a question for the jury as misidentification was essentially Applicant's entire defense. *See State v. Pipkin* 359 S.C. 322, 327, 597 S.E.2d 831, 833 (Ct. App.

2004) (noting the jury is “the finder of fact and weigher of credibility.”). It is clear the jury accepted the State’s theory of the case. *See Craven v. Cunningham*, 292 S.C. 441, 443, 357 S.E.2d 23, 25 (1987) (“The credibility of witnesses is for the triers of fact.”).

Failure to Preserve Final Closing Argument

Finally, this Court finds Applicant’s allegation that Counsel was ineffective in introducing Parsley’s prior statement to investigators because doing so waived final argument is without merit. Counsel articulated a valid strategic reason for introducing Parsley’s prior statement, so therefore this Court finds Applicant has failed to prove Counsel was ineffective. *Abney v. State*, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) (Pieper, J., concurring) (Whether to preserve final closing argument is a strategic decision to be made by trial counsel)(citation omitted). *See Rosoboro; Underwood; Stokes*. Counsel introduced Parsley’s prior statement to investigators to emphasize that her identification was inaccurate.

Accordingly, this Court finds the Applicant failed to prove the first prong of the *Strickland* test – that trial Counsel failed to render reasonably effective assistance under prevailing professional norms. This Court also finds the Applicant failed to prove the second prong of *Strickland* – that he was prejudiced by trial Counsel’s performance. This Court concludes Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. *See Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

CONCLUSION

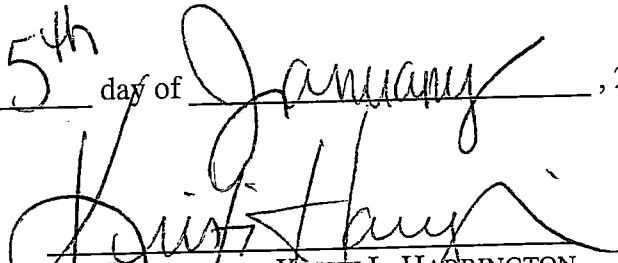
Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate Counsel’s performance was unreasonable under prevailing professional norms. *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625; *Stalk v. State*, 383 S.C. 559,

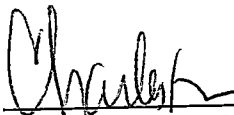
563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief is denied and dismissed with prejudice.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant will remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 15th day of January, 2015.

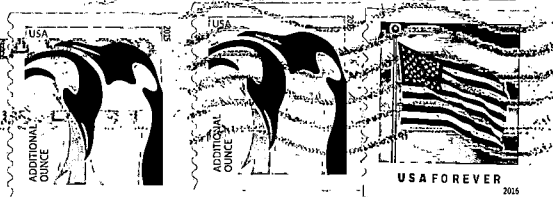

THE HONORABLE KRISTI L. HARRINGTON
Presiding Judge

 South Carolina

THE BROOKS LAW OFFICES, LLC
309 BROAD STREET
P.O. BOX 3512
SUMTER, S.C. 29151

COLUMBIA

21 SEP 2011



**South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211**

29211133030

