

THE

GIESE

LAW FIRM, LLC

April 28, 2016

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

RECEIVED

MAY 02 2016

S.C. SUPREME COURT

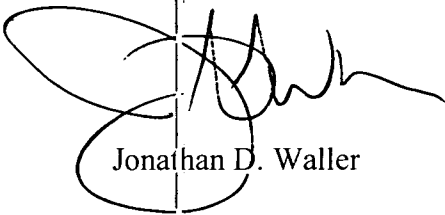
Re: Tyris Bernard Glover vs. State of South Carolina
C/A No: 2014-CP-40-01525

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Glover in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-708-6767.

Sincerely,



Jonathan D. Waller

Cc: J. Clayton Mitchell, South Carolina Office of Attorney General

Enclosures

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

2014-CP-40-01525

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MAY 02 2016

S.C. SUPREME COURT

Tyris Bernard Glover, #157418,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Tyris Bernard Glover, #157418, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed December 23, 2015 and served on counsel by letter dated March 31, 2016, issued by the Honorable G. Thomas Cooper, Jr., Presiding Judge, Fifth Judicial Circuit.



Jonathan D. Waller

Giese Law Firm
SC Bar No.: 76290
1315 Blanding Street
Columbia, SC 29201
803-708-6767 (phone)
803-708-6769 (fax)
jwaller@thegieselawfirm.com
ATTORNEY FOR PETITIONER

This 28 day of April, 2016.

Other Counsel of Record:

J. Clayton Mitchell, Assistant Attorney General

Post Office Box 11549

Columbia, SC 29211

(803) 734-3319

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHALND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

2014-CP-40-01525

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MAY 02 2016

S.C. SUPREME COURT

Tyris Bernard Glover, #157418,

Appellant,

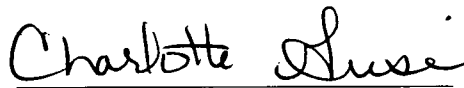
v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, J. Clayton Mitchell, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 28 day of April 2016, to his office located at P.O. Box 11549, Columbia, SC 29211.


Charlotte Giese

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2014CP4001525

Tyris Bernard #157418 Glover

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-represented litigant

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DISPOSITION TYPE (CHECK ONE)

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

S.C. SUPREME COURT
FILED
 RICHLAND COUNTY
 J. C. P. & G.S.
 JEANETTE W. BRIDGE
 DEC 23 AM 4:59
 MAY 02 2016

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

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 29 day of Dec, 2015 to attorneys of record or to parties (when appearing pro se) as follows:

Tyris Bernard #157418 Glover

Jonathan D Waller

Megan Harrigan Jameson

Tyris Bernard #157418 Glover

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Tyris B. Glover, #157418,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2014-CP-40-01525

ORDER OF DISMISSAL

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed March 10, 2014. Respondent file a Return on July 7, 2014, requesting an evidentiary hearing be convened. Jonathan D. Waller, Esquire, was appointed by the Richland County Clerk of Court. An evidentiary hearing was held on July 15, 2015, at the Richland County Courthouse. Applicant was present and represented by Counsel Waller. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent.

At the PCR hearing, Applicant testified on his own behalf. Also testifying was Applicant's trial counsel, Jeremy J. MacNealy, Esquire. The Court had before it the Richland 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.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was indicted during February 2012 term of the Richland County Grand Jury for Burglary – 2nd Degree (Violent) (2012-GS-40-00854) and Property Crime – 3rd or Subsequent Offense (2012-GS-40-00857). He

RICHLAND COUNTY
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JEANETTE W. McBRIDE
Clerk of Court
500 N. DECEMBER 23 11 41 56
C.C.S. & S.

was represented by Counsel MacNealy and James D. Cooper, III, Esquire.¹ On April 26-27, 2012, Applicant proceeded to a jury trial before the Honorable R. Knox McMahon, where he was convicted as indicted. Judge McMahon sentenced Applicant to twelve (12) years' for Burglary – 2nd Degree (Violent) and ten (10) years' for Enhancement/Property Offense – 3rd or Subsequent Offense, to be served concurrently.

Applicant filed a notice of appeal and was represented by Appellate Defender David Alexander. Following briefing, the South Carolina Court of Appeals affirmed Applicant's convictions and sentence by unpublished opinion. State v. Tyris Bernard Glover, 2014-UP-043 (Ct. App. filed February 5, 2014). The Remittitur was sent on February 24, 2014.

In this action, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Trial counsel was ineffective in:
 - a. Failing to contemporaneously object to the in-court identification by witness Ron Hubbard;
 - b. Failing to investigate the unaltered surveillance video; and
 - c. Failing to properly object to arresting officer's interactions with Applicant.

II. 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.

¹ Counsel Cooper passed away prior to the PCR hearing.

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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.

III. 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 has reviewed the Clerk of Court records regarding the subject convictions, the transcripts, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the 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.

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds Counsel's testimony to be credible. These credibility findings have been applied to the Court's findings and conclusions set forth below.

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Ineffective Assistance of Trial Counsel

Failing to contemporaneously object to the in-court identification by witness Ron Hubbard

First, Applicant alleges Counsel was ineffective in failing to object to the in-court identification made by witness Ron Hubbard. Hubbard was the general manager of Sharky's Bar where the crime took place. Applicant takes issue with the fact that Hubbard's identification was based off of what he saw on the surveillance footage. Hubbard identified Applicant as the individual he recognized from the video surveillance. (Trial Tr. p. 114, lines 9-24).

This Court finds this allegation without merit. The remedy for any suggestiveness of an in-court identification is cross examination and argument. State v. Lewis, 363 S.C. 37, 42-43, 609 S.E.2d 515, 518 (2005)(declining to require trial court to evaluate factors enunciated in Neil v. Biggers, 409 U.S. 188, 199 (1972), where first-time identifications take place in court because "the judge is present and can adequately address relevant problems; the jury is physically present to witness the identification, rather than merely hearing testimony about it; and cross-examination offers defendants an adequate safeguard or remedy against suggestive examinations"). Here, Counsel's strategy in cross examining Hubbard was to highlight the fact that the responding officer, Officer White's report contained inaccuracies. This was also argued in closing by Counsel. (Trial Tr. p. 306, lines 22-23). As to Hubbard's identification of Applicant, Counsel questioned him in a manner to let the jury know that they will be watching the video themselves and will be able to judge the reliability of the identification. (Trial Tr. p. 124, line 14 – p. 125, line 6; p. 127, lines 15-19). In closing argument, Counsel also challenged Hubbard's testimony that he could see Applicant's face on the video:

If you recall Mr. Hubbard said and I asked him I think about three times and I almost couldn't believe what I was hearing, I asked him, are you sure you could see Mr. Glover's face in that video? Yep, he's sure. Now you all watched that video on the big blowup screen. I think you know the answer to that.

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(Trial Tr. p. 307, lines 11-16). This Court finds Counsel made the strategic decision to not object to Hubbard's in-court identification because he wanted to use the identification to impeach his credibility. This was certainly a reasonable strategy in handling the issue.

Applicant cannot show that if such objection was made that it would have been granted. Applicant has failed to meet his burden in proving prejudice. There also exists overwhelming evidence of Applicant's guilt. Therefore, this allegation is denied and dismissed.

Failing to investigate the unaltered surveillance video

Next, Applicant alleges Counsel was ineffective in failing to obtain the unaltered surveillance footage prior to trial. Applicant also argues the original video from all cameras should have been admitted. Counsel testified that the video surveillance was turned over by the solicitor's office through discovery. He testified that he was not provided footage from all thirty-two (32) cameras. He explained the version he received did not show Applicant's face and that he could not be positively identified from the video.

First, Applicant claims Counsel was ineffective in failing to obtain all available surveillance footage. "Criminal 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) (internal citations omitted). Applicant has not provided this Court with any evidence to show that the surveillance footage from the other cameras would have been helpful in any manner. This Court finds it is likely the cameras would have reaffirmed what was shown to the jury in the clip that was introduced.

Notably, this allegation rests entirely on speculation because no records were produced at the hearing. See Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) ("failure to conduct

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an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result.”). Applicant failed to present any evidence to this Court as to how this investigation could have changed the result of the trial.

Second, Applicant argues Counsel was ineffective in failing to object to surveillance video being admitted in an altered fashion. He argues that Counsel should have objected under Rule 1002, SCRE. This Court disagrees. The video was properly authenticated and admitted as evidence. There has been no evidence presented that any alterations or deletions affected the substance of what was recorded.

Applicant has failed to prove prejudice in this regard. Applicant must show that an objection under Rule 1002, SCRE, would have been successful. This Court finds that it is likely that objection would have been overruled. “The question of whether to admit evidence under [Rules 1001 to 1004, collectively known as the best evidence rule,] is also addressed to the discretion of the trial court.” State v. Mitchell, 399 S.C. 410, 421, 731 S.E.2d 889, 895-96 (Ct. App. 2012) *citing* State v. Halcomb, 382 S.C. 432, 443-44, 676 S.E.2d 149, 154-55 (Ct.App.2009) (parentheticals in original). Therefore, Applicant cannot prove that it is likely the result of the trial would have been different had trial counsel made an objection under Rule 1002, SCRE. These allegations are denied and dismissed with prejudice.

Failing to properly object to arresting officer’s interactions with Applicant

Finally, Applicant alleges Counsel was ineffective in failing to properly object to the arresting officer’s interactions with Applicant. Specifically, Applicant argues the officer improperly asked him to walk towards his car to see if his gait resembled that of the assailant captured on surveillance video. This Court finds that allegations amounts to a challenge to the search and seizure conducted by the officer. The court of appeals affirmed Applicant’s

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conviction on the grounds that Applicant gave consent to the search and that the seizure was proper. See S.C. Code Ann. § 17-27-20(b) (2003); Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974) (Post-Conviction relief is not a substitute for an appeal); Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) (A Post-Conviction relief application cannot assert any issues that could have been raised at trial or on appeal.) The appellate court's finding bars this allegation from being raised in this proceeding. Even examined on the merits, this Court finds Applicant freely complied with the officer's request to walk towards his car.

In any event, Applicant cannot prove prejudice as the evidence of his guilt is clear. He was captured on video committing the crime. He was located on Millwood Avenue wearing the same clothes as the assailant in the video. Packs of cigarettes were recovered from Applicant during a search of his bag that matched the brand stolen from the bar. This allegation is denied and dismissed with prejudice.

All Other Allegations

As to any and all allegations that were raised 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.

IV. 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 counsels' 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 must be denied and dismissed with prejudice.


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The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt 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, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

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

AND IT IS SO ORDERED this 22 day of December, 2015.



G. THOMAS COOPER, JR.
Presiding Judge

COLUMBIA, South Carolina

THE

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