



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

JUN 27 2016

SC SUPREME COURT

June 27, 2016

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

Re: Hubert Brown, Respondent v. State, Petitioner
Case No. 2014-CP-46-4219

Dear Mr. Shearouse:

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

1. A copy of the order which is to be challenged on appeal.
2. Proof of service of notice of appeal on the Respondent.
3. A copy of the letter ordering the PCR transcript from the court reporter.

Sincerely,

Justin Hunter
Assistant Attorney General

cc: Tommy A. Thomas, Esquire
South Carolina Department of Corrections
York County Clerk of Court
Solicitor Kevin Brackett
Office of Appellate Defense
Trisha Allen, Victim Services (w/o enclosures)

RECEIVED

JUN 27 2016

SC SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable Frank R. Addy, Jr., Circuit Court Judge

Case No. 2014-CP-46-4219

Hubert Brown, #161888, ...Respondent,

v.

State of South Carolina, ...Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the order of the Honorable Frank R. Addy, Jr., dated June 16, 2016, and filed June 20, 2016. Petitioner received written notice of entry of this order on June 16, 2016.

June 27, 2016



JUSTIN J. HUNTER
Assistant Attorney General
S.C. Bar No. 101254

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

Other Counsel of Record:

Tommy A. Thomas, Esquire
PO Box 88
Irmo, South Carolina 29063

R 7-7-16

JUN 27 2016

SC SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable Frank R. Addy, Jr., Circuit Court Judge

Case No. 2014-CP-46-4219

Hubert Brown, #161888, ...Respondent,

v.

State of South Carolina, ...Petitioner.

PROOF OF SERVICE

I, Justin Hunter, certify that I have served the within Notice of Appeal on Respondent Hubert Brown by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record at the following address:

Tommy A. Thomas, Esquire
PO Box 88
Irmo, South Carolina 29063

I further certify that all parties required by Rule to be served have been served.

June 27, 2016



JUSTIN HUNTER
Assistant Attorney General
S.C. Bar No. 101254

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP4604219**

Hubert Brown

South Carolina State of

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

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. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ 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: _____

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: **ORDER GRANTING POST CONVICTION RELIEF**

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 (List amount(s) below)

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.

s/ Frank R. Addy, Jr.

2159

6/16/2016

Frank R. Addy, Jr.

Judge Code

Date

Circuit Court Judge

For Clerk of Court Office Use Only

This judgment was entered on **June 20, 2016**, and a copy mailed first class or placed in the appropriate attorney's box on **June 20, 2016**, to attorneys of record or to parties (when appearing pro se) as follows:

Tommy Arthur Thomas PO Box 88 Irmo, SC 29063

Justin James Hunter PO Box 11549 Columbia, SC
29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS

HUBERT BROWN,)
#161888,)

DOCKET NO.: 2014-CP-46-4219

Applicant,)

ORDER GRANTING POST
CONVICTION RELIEF

v.)

STATE OF SOUTH CAROLINA,)

Respondent.)

FILED-RECEIVED
2016 JUN 20 PM 12:55
DAVID HAMILTON
S.C.C.C.P. & J.S.C.
YORK COUNTY, S.C.

THIS MATTER COMES BEFORE THE COURT pursuant to an Application for Post-Conviction Relief filed on December 31, 2014. The State filed their Return dated July 8, 2015. Present before the Court is Justin Hunter from the Office of the Attorney General representing the Respondent. The Applicant was present represented by his attorney Tommy A. Thomas. Plea counsel, David C. Cook, was also present.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for York County. The Applicant was indicted by the York County Grand Jury for burglary 1st (2012-GS-466-3185) and attempted murder (2012-GS-46-3187). Applicant proceeded to a jury trial before the Honorable John C. Hayes, III. Pursuant to S.C. Code Ann. §17-25-45, the State served notice of its intention to seek life imprisonment without the possibility of parole. On July 11, 2013, Applicant was found guilty as charged and was sentenced to imprisonment for a term of life without the possibility of parole on each charge.

Applicant filed a Notice of Appeal and a direct appeal was perfected by Appellate Defender, Carmen V. Ganjehsani of the South Carolina Commission on Indigent Defense, Division of Appellate Defense. After both parties briefed the issues, the South



Carolina Court of Appeals affirmed Applicant's conviction by unpublished opinion filed.
State v. Brown, Op. No. 2014-UP-425 (S.C. Ct. App. Filed November 26, 2014).

ISSUES PRESENTED

The allegations raised by Applicant regarding ineffective assistance of counsel are as follows:

- a. That Counsel did not point out inconsistencies in the Solicitor's opening statement. That these comments were not supported by any of the testimony or evidence presented at trial.
- b. That the motive for the alleged assault was that the applicant had been fired from his employment. That Counsel was ineffective for not bringing witnesses who could have testified that the Applicant had voluntarily left his employment.
- c. That the State failed to provide complete discovery through Rule 5 and/or Discovery processes. That Counsel was ineffective for failure to pursue this information.
- d. That counsel was ineffective for no objecting to lay witnesses identifying certain stains as blood. No proper foundation was laid for these witnesses to testify in regards to blood evidence.
- e. That counsel was ineffective for failure to object to lay testimony identifying the type of weapon or blade that caused the injuries to the victim.
- f. That counsel was ineffective for not clarifying evidence regarding a text supposedly sent by the Applicant to the victim stating that he would finish the job.

g. That counsel was ineffective for failure to object to Detective Strickland's testimony regarding the elements of Burglary 1st and Self Defense.

h. That counsel was ineffective for improperly advising the Applicant regarding the possibility of being found guilty at Jury Trial.

i. That counsel was ineffective for not properly consulting the Applicant regarding his case. Most of the case information was conveyed through the Applicant's wife and that Defense counsel very rarely met with the Applicant regarding preparation for trial.

j. That counsel was deficient in not properly presenting evidence to refute the allegations of the State that the Applicant had fled the scene.

k. That counsel was ineffective for not challenging the State's evidence of the Applicant's bloody shirt. When in fact this shirt was stained by a cherry red juice drink.

l. That counsel was ineffective for not properly challenging the expert testimony of Dr. Richard Friarson.

m. That counsel was ineffective for not challenging the introduction of the 911 tape. This tape appeared to be adulterated and the beginning and end of this recording were either erased or modified in some manner.

n. That counsel failed to object to the trial Court's general intent jury instruction.

DISCUSSION OF LAW

Pursuant to his Application, the Applicant has alleged ineffective assistance of trial counsel. In a PCR Action, the "burden of proof is on the applicant to prove his

allegations by a preponderance of the evidence." *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP).

In *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), the United States Supreme Court set forth a two-prong test applicable to claims of ineffective assistance of trial counsel. The first prong analyzes whether the trial counsel's performance fell below an objective standard of reasonableness. *Id.* The second prong places the burden on the Applicant to show that but for the deficient performance the outcome would have been different. *Id.* The second prong is known as the "prejudice" requirement. This requirement is met if counsel's actions or inactions resulted in prejudice to the Applicant. See *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 539 (1995).

FINDING OF FACTS AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the entire record and has heard the testimony and arguments as presented at the hearing. This Court has also had the opportunity to observe each witness and pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Again, Applicant was tried and convicted of Attempted Murder and Burglary 1st degree. He was sentence to LWOP due to a prior conviction for a most serious offense.

After suffering a significant head injury in an altercation immediately preceding the acts giving rise to the charges, Applicant armed himself with a large knife, entered the home, swung the knife toward the victim, and severed the victim's thumb. Applicant immediately fled the home. Fortunately, the victim's thumb was later surgically



reattached. Testimony at trial indicates that the Applicant did not attempt to repeatedly stab the victim during the altercation inside the home. In essence, Applicant left as soon as the victim's injury was inflicted.

Applicant maintains that trial counsel was ineffective for failing to object to the trial court's general intent instruction as it related to the attempted murder charge. Having reviewed the transcript, the Court finds that the capable trial judge did mistakenly instruct the jury that the State need only prove general intent as opposed to specific intent. *See* Trial Transcript, p. 350, line 25 – p. 351, line 4. The Assistant Solicitor did point this fact out to the trial court, but trial counsel did not join in the Assistant Solicitor's efforts to have the jury correctly charged on the law,¹ and the trial court declined to alter the erroneous instruction.

Significantly, the erroneous charge gave the jury the impression that they only had to find general intent to harm, as opposed to a specific intent to kill. *See State v. King*, 412 S.C. 403 (Ct. App. 2015) The fact that the jury may have struggled with this issue is evident in the jury's request for a recharge on the elements of attempted murder. Trial Transcript, p. 366, lines 14-19. In response to this request, the trial court again recharged general as opposed to specific intent. Therefore, twice the trial court mistakenly stated that specific intent to kill is not an element of attempted murder.

Additionally, for the reasons state in part B, the Court finds that the Applicant's mental state was the key issue in this case with regard to both the attempted murder charge and the burglary charge. With respect to the burglary charge, the State argued that

¹ The Court of Appeals apparently found this issue was not preserved for direct appeal due to trial counsel's failure to join in the objection. *State v. Brown*, 2013-001543, November 26, 2014.

the crime the Applicant intended to commit once he entered the dwelling was the attempted murder. Trial Transcript p. 333, line 25 – p. 335, line 3. Therefore, although the attempted murder charge is technically the only charge affected by the erroneous instruction, the issue of Applicants *mens rea* is clearly relevant to both charges, so the burglary charge was also likely tangentially affected by this erroneous instruction.

The Court finds that trial counsel should have joined in the State's objection to this incorrect instruction and that a reasonable attorney would have objected. Factually, the victim's injuries resulted from a single swipe of the knife, which is quite different from the Applicant repeatedly attempting to stab the victim. Therefore, specific intent to kill, as opposed to general intent to harm, was a crucial issue in this case, and the jury likely struggled with this distinction in light of their request to be reinstructed on the attempted murder charge. Furthermore, the Court finds that Applicant has demonstrated sufficient prejudice in that, but for counsel's error, the outcome at trial would likely have been different. Accordingly, PCR is granted with respect to the attempted murder conviction on this ground.

Applicant also maintains that trial counsel was deficient for agreeing to the admission of Applicant's mental evaluation as authored by Dr. Shannon Hansen with DMH without Dr. Hansen being called to testify at trial. Trial Transcript p. 316, lines 10-11.

Significantly, Applicant's defense at trial was temporary insanity. Essentially, Applicant's trial counsel argued that the skull fracture and resulting temporary damage to Applicant's faculties rendered him incapable of discerning legal right from wrong.

Applicant's retained expert, Dr. Carol Walser, testified regarding her findings, and she was also subject to cross examination by the State. Having examined Applicant extensively, Dr. Walser opined that the severe blow to Applicant's head caused him to lose momentarily his ability to reason and thereby rendered him temporarily insane under the law. Eye witnesses to the altercation also described Applicant as appearing "dazed" after his skull was fractured during the initial altercation. Dr. Hansen's report also confirms Applicant's reported lack of memory concerning the events subsequent to his head trauma.

Inexplicably, Dr. Hansen was not required to testify concerning her findings. Having subsequently reviewed her report, this Court concludes that many of her findings would have supported Applicant's assertions and Applicant's expert's opinion. For example, Dr. Hansen stated in her report that Applicant reported having no memory of the events and continued to suffer from the injuries. Significantly, nowhere in her report did Dr. Hansen indicate that she had considered and excluded temporary insanity due to head trauma as a potential diagnosis, and trial counsel could have potentially brought this to the attention of the jury if the report's author had been required to testify. Furthermore, Dr. Hansen left the employment of DMH somewhat suddenly just prior to trial and no explanation was given for her separation from DMH; the Court notes that this departure from her employment could have been an area ripe and beneficial for cross examination.

Applicant had the burden of proving insanity by the preponderance of the evidence, and the State then had to prove sanity beyond a reasonable doubt. This Court is aware that, at times, a preferable trial strategy would be to deemphasize an expert

7 

witness' report by not objecting to that report coming into evidence despite the expert's absence. However, Applicant's trial counsel offered no explanation as to why he consented to the report's admission. More significantly and considering the specific facts of this case, by consenting to the admission of Dr. Hansen's report as substantive evidence, trial counsel undercut Applicant's sole defense and lessened the effectiveness of Applicant's expert's testimony. This report was furnished for the jury to consider without allowing the Defendant to challenge Dr. Hansen on her assumptions, methods, conclusions and whether she considered other potential diagnoses. In light of Applicant's lower burden of proof on this central issue, this Court finds trial counsel representation was deficient and that this deficiency clearly resulted in prejudice to the Applicant. This is particularly true in light of the erroneous general intent instruction as explained above and in light of the Assistant Solicitor emphasizing Dr. Hansen's report in his closing. Trial Transcript, p. 332. Put another way, Applicant's mental state was the sole issue in this case as it related to both the burglary and attempted murder charges, and Dr. Walser's testimony was key to Applicant's defense. Therefore, the errors with respect to the admission of the DMH report are compounded by the trial court's mistaken instruction on the attempted murder charge.

The Court also finds that, to the extent the State's reply witness, Dr. Frierson, was permitted to testify or allude to the contents of Dr. Hansen's report, trial counsel was also deficient in failing to object. The Assistant Solicitor also argued in closing that Dr. Frierson reviewed and approved Dr. Hansen's report, thereby bolstering a report authored by an unchallenged witness. Trial Transcript, p. 332, lines 12-19. Simply put, Dr.

Frierson never examined Applicant; therefore, by definition he could not offer any diagnosis.

Although this Court is aware that reports such as these are sometimes admitted by consent or under the business records exception, especially when admission is *pro forma* such as during a guilty plea, the Court is unaware of any circumstances by which an expert witness should be allowed to give their expert opinion to the jury on the sole and ultimate issue in the case without the benefit of cross examination. Accordingly, the Court grants Applicant's request for relief on this ground as it relates to both the burglary and attempted murder charges.

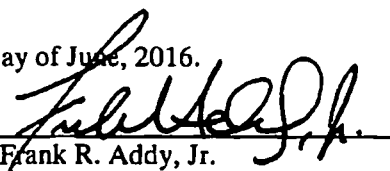
Although not raised by Applicant, the Court also wishes to note that the Assistant Solicitor's reference to Applicant's expert as a "lady doctor" on page 330 was an inappropriate, but potentially unintentional, comment on the Doctor's gender. Such comments are objectionable and should be discouraged.

The Court has considered Applicant's remaining grounds and denies relief on those grounds. To the extent any error may have been committed by trial counsel concerning the remaining grounds, Applicant suffered no prejudice.

IT IS THEREFORE ORDERED:

1. That the Application for Post Conviction Relief be granted and that the Applicant's sentence be vacated, and
2. That the Applicant be released from the custody of SCDC and transferred to the custody of York County pending the disposition of his case.

AND IT IS SO ORDERED this 16th day of June, 2016.


Frank R. Addy, Jr.
Judge of the Sixteenth Judicial Circuit