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August 10, 2016

Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Mykel Johnson , 2014-CP-07-01759

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, Order of Dismissal and Order denying Motion to Alter/ Amend Sentence in the above Beaufort County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,

James K Falk

Thank you for your assistance.

Cc: Rutledge Johnson, Esq.; Mykel Johnson 351916.

Mailing Address: PO Box 1058, Charleston, S.C. 29402
Location: 38 Broad Street, Suite 350, Charleston, S.C. 29401

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Honorable Brooks P Goldsmith, Circuit Judge

Case No.: 2014-CP-07-1759

Mykel Johnson 351916.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Mykel Johnson appeals the Honorable Brooks Goldsmith's June 20, 2016 Order of Dismissal and Judge Goldsmith's denial of Petitioner's Motion to Alter/Amend Sentence. Undersigned counsel received notice of entry of Judge Goldsmith's order denying the Motion to Alter/ Amend Sentence on August 10, 2016. A copy of the orders on appeal are attached hereto.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

August 10, 2016

Rutledge Johnson, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA

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APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Honorable Brooks P Goldsmith, Circuit Judge

Case No.: 2014-CP-07-01759

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PROOF OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Rutledge Johnson, Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this August 10, 2016.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Mykel Johnson

Applicant

vs.

State of South Carolina

Respondent

COURT OF COMMON PLEAS

FOR THE 14th JUDICIAL CIRCUIT

2016 AUG -3 PM 3:04
TERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

2014-CP-07-1759

MOTION TO ALTER/AMEND

SENTENCE

This matter comes before the Court by way of Applicant's Motion pursuant to Rule 59(e), requesting that this court alter or amend the Order of Dismissal dated June 20, 2016.

After reviewing memorandum submitted by both parties I find no reason to alter or amend the prior Order.

THE MOTION OF THE APPLICANT IS ACCORDINGLY DENIED.

July 31, 2016

BROOKS P. GOLDSMITH

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	)	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
Mykel Johnson, #351916, Applicant, v. State of South Carolina, Respondent.	)	2014-CP-07-1759 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed July 21, 2014. The Respondent made its Return on January 29, 2016. An evidentiary hearing into the matter was convened on May 17, 2016, at the Beaufort County Courthouse in Beaufort, SC. Jim Falk, Esquire, represented the Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Eric Erickson, Esquire, also testified. This Court had before it a copy of the records of the Beaufort County Clerk of Court, records from the South Carolina Department of Corrections, the trial transcript, and the appellate records.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. The Applicant was indicted at the December 2011 term of the Beaufort County Grand Jury for two (2) counts of

Attempted Murder (2012-GS-07-2269, 2270). Eric Erickson, Esquire, represented him. The Applicant proceeded to a jury trial pursuant to which he was found guilty as indicted. The Honorable Carmen T. Mullen sentenced Applicant to incarceration for fifteen (15) years for each count of Attempted Murder, with the sentences to run concurrently.

A notice of appeal was filed on Applicant's behalf and an appeal perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Johnson, 2014-UP-134 (Filed on April 2, 2014). The Remittitur was issued on April 18, 2014.

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

1. "My lawyer didn't probably(sic) represent me at trial."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witness presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

SUMMARY OF TESTIMONY

At the evidentiary hearing, Counsel testified that he was retained by Applicant's mother and visited Applicant at least five times while Applicant was in custody. During these meetings, he and

Applicant discussed possible alibi witnesses, and Applicant gave him a list of witnesses to locate including: Malcolm Moore, was called at trial; Josh Dowling, a police officer; and Kendale Simmons, a friend of Applicant's who was in custody at the time. Counsel then testified that he called Mr. Moore at trial and had spoken with Mr. Moore on March 12, 2012 concerning his testimony prior to trial. Counsel then testified that the State's rebuttal witness was that Mr. Simmons' testimony needed to be "straight," which Counsel considered to mean tell the truth. Counsel admitted he did not review all of the jail tapes. Counsel then stated that one of the victims had identified the Applicant prior to and during trial. Counsel stated he did not object to Ofc. Dowling's testimony on page 101 of the transcript because he did not see that it would be hearsay testimony.

Counsel then testified that his strategy was to have any of Applicant's statements suppressed prior to trial. He also addressed the photo lineup during a pretrial hearing, arguing that it should be suppressed; however this pretrial motion was denied. Counsel also stated that the 911 tape which was introduced at trial was an excited utterance. Counsel lastly testified he did not object on page 103 of the transcript because he did not consider the officer's testimony a comment on his right to remain silent.

On cross-examination, Counsel testified he has tried cases since 1996. Counsel admitted this was his first attempted murder case, however he had tried cases that dealt with assault and battery with intent to kill (which was changed to attend murder and 2010) prior to this case. Counsel also testified he had dealt with Jackson v. Denno hearings as well as Neil v. Biggers hearings prior to this

case. Counsel reiterated that one of the victims identified Applicant in a photo lineup and also during the incident. Counsel then stated he found no reason to object to Ofc. Dowling's testimony because he was simply testifying to what he saw at the time. Counsel lastly stated that while the male victim identified the Applicant, he emphasized at trial that the female victim could not identify the Applicant.

Applicant testified that when he was advised of his Miranda rights, he told the officer that he did not want to talk to him until he had an attorney.

Ineffective Assistance of Counsel

The Applicant alleges he is entitled to post-conviction relief on the basis that he received ineffective assistance of trial counsel. In a PCR action, "[t]he 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). To be entitled to post conviction relief, the Applicant must prove both of the following: (1) his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) the Applicant suffered prejudice by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). Under this standard, counsel's deficient performance must have prejudiced the Applicant to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

First, this Court finds Applicant's testimony concerning Counsel's alleged ineffectiveness not credible while finding Counsel's testimony credible.

A. **Trial counsel's failure to object to the testimony by Officer Dowling.**

Applicant contends that Counsel was ineffective for failing to object to Ofc. Dowling's testimony on p. 101 of the transcript. This argument is without merit.

Where trial counsel articulates a valid reason for employing certain trial strategy, such conduct should not be deemed ineffective assistance of counsel. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). "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).

Further, "a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct **from counsel's perspective at the time.**" State v. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985) (emphasis added), citing Strickland v. Washington, 104 S.Ct. 2052, 890 L.E.2d 674(1984). Because of the difficulties inherent in making the evaluation, a court must

indulge a strong presumption that counsel's conduct falls within the range of reasonable professional assistance. Id.

In this case, Counsel clearly articulated that he did not object to Ofc. Dowling's testimony because he did not see this testimony as hearsay, but rather what he saw at the time. This court agrees that the statements were not hearsay as he observed the victim identify Applicant in a photo lineup and thus counsel had no reasonable basis on which to object. This Court finds these are legitimate reasons for his lack of objection to the testimony.

Under Butler and Whitehead, Counsel's representation of Applicant in this regard was not ineffective based on his particular trial strategy. Thus, this allegation is denied.

B. Doyle v. Ohio violation

Applicant also alleges that Counsel was ineffective for failing to Ofc Dowling's testimony that when Applicant was arrested, he invoked his right remain silent. This allegation is without merit.

This allegation raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973).

This was the exact issue raised in Applicant's direct appeal. (See Anders Brief of Appellant pp. 5-6). As such, this issue is not proper for the PCR forum. Therefore, this allegation is denied.

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 application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) 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 PCR. Rule 71.1(g), SCRCP, provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

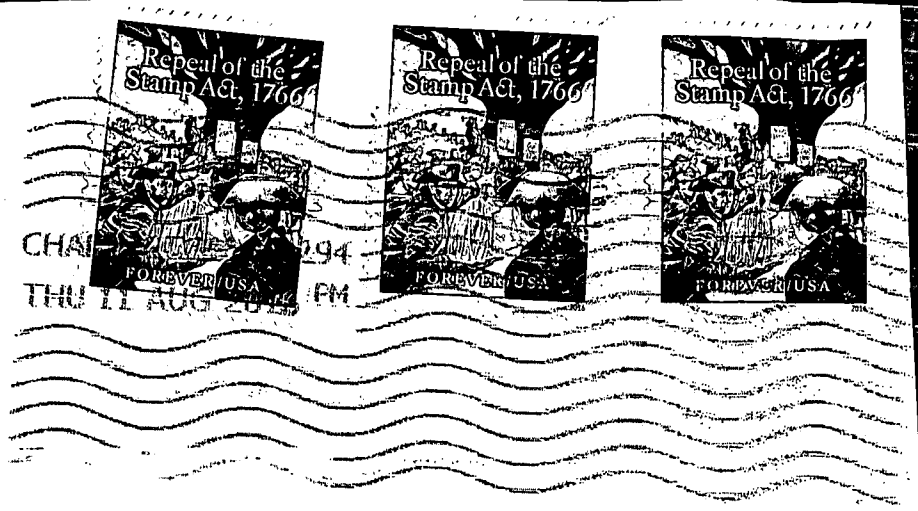
1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED!

Brooks P. Goldsmith
Presiding Circuit Court Judge
Fourteenth Judicial Circuit

June 20, 2016



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