THE BAX LAW FIRM, PA

August 16, 2016

RECEIVED
AUG 18 2016
SC SUPREME COURT

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

RE: Anthony Wilder v. State of South Carolina, of which Anthony Wilder is the Appellant
Case No. 2013-CP-10-5655

Dear Mr. Shearouse:

Enclosed for filing is the Notice of Intent to Appeal in the above captioned case. Also enclosed is the following:

1) Proof of service of the notice of appeal on the respondents.
2) A copy of the order which is to be challenged on appeal.

This appeal is being filed with the Supreme Court because it is an appeal of a PCR proceeding. Therefore, there is no filing fee required pursuant to Rule 240(d) SCACR.

Please let me know if you have any questions.

Sincerely yours,

Naki Richardson-Bax
ATTORNEY FOR APPELLANT

Enclosures

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RECEIVED
AUG 18 2016
SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS
Deadra L. Jefferson, Circuit Court Judge

Case No. 2013-CP-10-5655

Anthony Wilder,
Appellant,

vs.

State of South Carolina,
Respondent,

NOTICE OF INTENT TO APPEAL

Anthony Wilder, by and through counsel, hereby appeals the Amended Order of Dismissal issued by the Honorable Deadra L. Jefferson dated July 26, 2016 and filed on July 26, 2016, a copy of which is attached hereto. Counsel received written notice of the entry of the order on August 1, 2016.

August 16, 2016

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ATTORNEY FOR APPELLANT

Other Counsel of Record:

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT
Anthony Wilder, #328282, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2013-CP-10-5655 **AMENDED[1]** **ORDER OF DISMISSAL**

Presiding Judge:	Hon. Deadra L. Jefferson
Applicant's Attorney:	Sharnaisha Naki Richardson-Bax, Esquire
Respondent's Attorney:	J. Rutledge Johnson, Esquire
Trial Counsel:	V. Lynn Lofton, Esquire
	Lionel S. Lofton, Esquire
	Nathan S. Williams, Esquire
Appellate Counsel:	Robert M. Dudek, Esquire
Date of Hearing:	December 15, 2015
Court Reporter:	Ruth Weese

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed September 25, 2013. The Respondent made its Return on February 19, 2014 and filed on February 21, 2014. A Notice of Amendment to the Applicant's PCR Application was filed on April 24, 2014. An evidentiary hearing into the matter was convened on December 15, 2015, at the Charleston County Courthouse. The Applicant was present at the hearing and represented by

[1] Pursuant to the Defendant's Motion to Alter/Amend Judgment filed on May 26, 2016 and received on June 10, 2016 this order is amended to reflect the Applicant's allegations made in his Notice of Amendment to his Post-Conviction Relief Application. Counsel submitted copies of letters to the Court dated January 6, 2016 and January 14, 2016 that were sent to the State which addressed the issues raised by her client after the hearing. This Motion is disposed of without the necessity of a hearing and decided on the record and written motion. Rule 59(f), SCRCP; Pollard v. City of Florence, 314 S.C. 397, 401–402, 444 S.E.2d 534, 536 (Ct. App. 1994). The State was given the opportunity to respond to the Motion and declined. This Court finds that all of the issues that were raised during the hearing have now been addressed and those raised afterwards are waived as untimely.

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Sharnaisha Naki Richardson-Bax, Esquire. J. Rutledge Johnson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

At the hearing, Applicant testified on his behalf. Lionel Lofton, Esquire, also testified. This Court had before it a copy of the records of the Charleston County Clerk of Court, records from the South Carolina Department of Corrections, Applicant's PCR Application, the State's Return, 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 Charleston County Clerk of Court. The Applicant was indicted at the March 2008 term of the Charleston County Grand Jury for Murder (2008-GS-10-2383),[2] Burglary-First degree (2008-GS-10-2385),[3] Assault and Battery with Intent to Kill (ABWIK) (2008-GS-10-2386),[4] and two counts of Kidnapping (2008-GS-10-2384, -2390).[5] The Applicant was represented by Lionel S. Lofton, Esquire, and V. Lynn Lofton, Esquire.

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[2] Murder is a violent, most serious felony punishable by death, imprisonment for life, or by a mandatory minimum term of imprisonment for thirty (30) years. See S.C. CODE ANN. §§ 16–3–10, –20 (2003), 16–1–60 (2003), 17–25–45 (2003). Life imprisonment means until death of the offender without the possibility of parole. See S.C. CODE ANN. §§ 16–3–20 (2003).

[3] "Burglary in the first degree is a [violent, most serious] felony punishable by life imprisonment. For purposes of this section, "life" means until death. The court, in its discretion, may sentence the defendant to a term of not less than fifteen [(15)] years." S.C. CODE ANN. § 16–11–311 (2005); S.C. CODE ANN. § 16–1–60 (2005); S.C. CODE ANN. § 17–25–45 (2005).

[4] "The crime of assault and battery with intent to kill shall be a [most serious, violent] felony in this State and any person convicted of such crime shall be punished by imprisonment not to exceed twenty [(20)] years." S.C. CODE ANN. § 16–3–620 (2007); S.C. CODE ANN. § 17–25–45 (2007); S.C. CODE ANN. § 16–1–60 (2007).

[5] Kidnapping is a violent, most serious felony punishable by thirty (30) years' imprisonment. See S.C. CODE ANN. § 16–3–910 (2012); S.C. CODE ANN. § 16–1–60 (2012); S.C. CODE ANN. § 17–25–45 (2012).

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On May 5-9, 2008, the Applicant proceeded to trial and was found guilty as indicted. The Applicant was sentenced by the Honorable J. Derham Cole to confinement for a period of life for Murder and Burglary, twenty (20) years for ABWIK, and thirty (30) years for kidnapping.[6]

The Applicant filed a timely Notice of Appeal. His appeal was perfected by Robert M. Dudek, Esquire, of the South Carolina Office of Appellate Defense. The Applicant's convictions and sentences were affirmed by the Court of Appeals. State v. Wilder, No. 2011-UP-385 (S.C. Ct. App. August 9, 2011). The Applicant filed a Petition for Rehearing, which was denied on November 17, 2011. The Applicant petitioned for Writ of Certiorari to the South Carolina Supreme Court. The South Carolina Supreme Court denied the Petition on March 20, 2013. The Remittitur was issued April 9, 2013.

ALLEGATIONS

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

1. Ineffective assistance of Counsel.
   a. Counsel did not object to hearsay testimony.
   b. Counsel did not call attention to discrepancies between the testimony of one witness and the written statement of another witness.
2. Prosecutorial misconduct.
   a. Allowed a State witness to commit perjury in trial testimony.
3. Ineffective assistant of Appellate Counsel
   a. Counsel did not raise the issue of whether the trial court was correct in admitting certain physical evidence over the timely objection of trial counsel.

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[6] The sentence for kidnapping indictment 2008-GS-10-2390 was suspended because the Applicant was also convicted of murder for the same victim.

SUMMARY OF TESTIMONY

At the evidentiary hearing, Applicant testified Counsel was hired because he was a family friend and was the third attorney on this case. Applicant stated he received discovery from Counsel and met with him two (2) to three (3) times prior to his trial. Applicant claimed Counsel did not have a defense for his case, but had an opportunity to ask about possible defenses. Applicant stated that a witness would identify him in court; however, this is not in the discovery. Applicant claimed Counsel did not object to hearsay testimony on pages 293 through 294 in his trial transcript, when a law enforcement officer announced a vehicle description from a third-party witness.

Applicant also claimed that the Assistant Solicitor offered perjured testimony in his opening statement. Applicant claimed the Assistant Solicitor then allowed Officer Jackson to perjure himself during direct examination.

Applicant then claimed Appellate Counsel was ineffective for failing to raise the issue of whether the trial court was correct in admitting evidence over a timely objection of his trial counsel. However, the State objected to this issue, as this was the exact issue raised on appeal. This Court sustained the objection.

Counsel testified that he has been practicing law since 1971 and was a federal prosecutor for twelve (12) years prior to entering private practice. He further testified that he now practices solely in the area of medical malpractice. Counsel stated Applicant was in jail during the entire pendency of trial. Counsel testified he reviewed the discovery with Applicant, as these were substantial charges. Counsel then testified his theory of the case was to challenge the chain of custody regarding the collection, potential comingling and testing of any DNA samples found on evidence and the Applicant's clothing. Counsel stated he discussed defenses with Applicant; however, this case was difficult to defend, as Applicant was caught in a car fleeing the scene in a "hot pursuit" and observed

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discarding evidence from of the car during the ensuing chase. This evidence was collected from the side of the road in proximity of the Applicant's car right after his vehicle crashed. He further testified from an evidentiary standpoint these were "substantial hurdles to overcome."

Counsel articulated that the main legal issue was the chain of custody of Applicant's clothing and a possibility of contamination with the Victim's blood. He further testified that another legal he pursued vigorously was the issue of the identification of Applicant, which was raised and argued strenuously by Counsel at trial. Counsel stated that because the DNA results were contaminated, he did not consider consulting an expert. Counsel stated he did not object to the alleged hearsay testimony claimed by Applicant because it was a statement of a witness as indicated by Officer Jackson. This statement was used to show what Officer Jackson did in response to the statement and was not being offered for its truth and therefore was not hearsay. Counsel then stated Assistant Solicitor Williams did not participate in prosecutorial misconduct.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. The Court has also read the trial transcript and the appellate records, all of which assists the Court in judging their credibility.

Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

Ineffective Assistance of 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) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the

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adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 686, 104 S. Ct. at 2064).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. See Strickland at 690, 104 S. Ct. at 2066. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. See Id. at 117–18, 386 S.E.2d at 625. Under this prong, attorney performance is measured by its "'reasonableness under prevailing professional norms.'" Id. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 668, 104 S. Ct. at 2052). 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.'" Id. at 117–18, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068).

This Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. This Court also has read the trial transcript and appellate records, all of which assists the Court in judging the witnesses' credibility. This Court finds that Applicant's testimony regarding Counsel's ineffectiveness is not credible, while also finding Counsel's testimony is persuasive and

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very credible.

This Court finds Counsel's representation of Applicant in this case well above the professional norms. Counsel fully investigated this case and assisted Applicant in his defense. Counsel vigorously objected to the introduction of the DNA evidence based on defects in the chain of custody of this evidence and cross-examined the State's witnesses, specifically concerning the possible contamination of DNA on the defendant's clothes (Tr. 668: 7-25; 669-681; 682: 1-8; 734: 8-25; 735-736). Counsel also strenuously objected to the introduction of the identification of the Applicant as the perpetrator and cross-examined the State's witnesses concerning the identification of Applicant (Tr. 168: 6-25; 169-175; 176: 1-11). Further, Counsel had no legal basis to object to the statement by Officer Jackson, as this statement was not offered for the truth of the matter asserted; rather, the statement was offered to show subsequent action by law enforcement (Tr. 293: 20-25; 294: 1-2). Therefore, this Court finds the Applicant has failed to meet his burden of proving Counsel's performance was deficient or that he was prejudiced thereby. Accordingly, these allegations are denied.

Prosecutorial misconduct

Applicant contends that the assistant solicitor offered perjured testimony and that a witness gave an inconsistent statement to his opening argument. Because it was simply an inconsistent statement, Counsel had ample opportunity to cross-examine that witness, which he did. This Court finds absolutely no evidence of prosecutorial misconduct or wrongdoing in this case. Therefore, this allegation is also denied.

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Ineffective Assistance of Appellate Counsel

A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 749, 103 S. Ct. 3308, 3311 (1983). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy. . . ." Jones, 463 U.S. at 754, 103 S. Ct. at 3314. The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift v. State, 302 S.C. at 537, 397 S.E.2d at 525; Gilchrist v. State, 364 S.C. 173, 178, 612 S.E.2d 702, 705 (2005); Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

Furthermore, "[t]he *Simmons* rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal." Drayton v. Evatt, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993). "Issues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective assistance of counsel." Drayton v. Evatt, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993).

Here, Applicant contends Appellate Counsel did not raise the issue of whether the trial court was correct in admitting certain physical evidence over the timely objection of trial counsel. The issue of whether the trial court erred in admitting the DNA evidence developed from Wilder's pants was raised and addressed by the Court of Appeals. The Court of Appeals held that "conflicting

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theories of how evidence was collected and the potential for contamination related did not render DNA evidence so tainted it was totally unreliable." State v. Wilder, No. 2011-UP-385 (S.C. Ct. App. Aug. 9, 2011). Furthermore, the Court of Appeals found that even if the trial court erred in admitting the DNA evidence it was harmless because the Applicant was not prejudiced and other competent evidence established Applicant's guilt beyond a reasonable doubt. Id.

Thus, this Court finds the Applicant has failed to meet his burden of proving counsel's performance was deficient or that he was prejudiced thereby. Accordingly, this allegation is denied.

Overwhelming Evidence of Guilt

This Court further finds overwhelming evidence of Applicant's guilt in this case. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); See also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001), Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (S.C. 1991). In Ford, trial counsel failed to request an alibi instruction and his representation was found deficient as a result. However, the evidence of the applicant's guilt in Ford was overwhelming and the South Carolina Supreme Court held that the Applicant failed to prove the second prong of Strickland, which requires that an Applicant show prejudice by the deficient representation.

Even assuming *arguendo* Counsel performed deficiently, Applicant can prove no resulting prejudice. Counsel challenged the DNA evidence, the identification of Applicant, the chain of custody, and the shell casings. Additionally, Applicant was identified at the crime scene, was observed discarding the fruits of the crime while in flight, and subsequently arrested at the scene of the vehicle crash after a hot pursuit very close in time and proximity to the crime scene. Based on the entirety of the trial transcript, there is overwhelming evidence of Applicant's guilt in this case.

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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. Applicant's 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!

Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

July 26, 2016
Charleston, South Carolina

10/8/10

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS
Deadra L. Jefferon, Circuit Court Judge

Case No. 2013-CP-10-5655

Anthony Wilder,

Appellant,

vs.

State of South Carolina,

Respondent,

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Notice of Intent to Appeal in the above referenced case has been deposited in the United States Mail, postage prepaid on August 16, 2016 addressed to:

Rutledge Johnson, Jr., Esq.
Assistant Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, 29211-1549

Appellate Defense
P.O. Box 11433
Columbia, SC 29211-1433

The Honorable Julie J. Armstrong
Charleston County Clerk Of Court
100 Broad Street, Suite 106
Charleston, SC 29401-2258

This 16th day of August, 2016.

Naki Richardson-Bax
ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 16th day of August 2016.

(L.S.)

SHERRI JORDAN
NOTARY
My Comm. Expires
February 25, 2026
PUBLIC
SOUTH CAROLINA

Notary Public for South Carolina
My Commission Expires:

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