

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS

RECEIVED

HONORABLE R. SCOTT SPROUSE

AUG 29 2016

2015-CP-37-0225

DAN L. TEMPLE, #240638

S.C. SUPREME COURT

APPELLANT,


vs

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Dan L. Temple, #240638 appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable R. Scott Sprouse Circuit Court Judge on June 6, 2016, and Order of Dismissal issued on August 12, 2016 and filed on August 15, 2016. The Appellant received Order of Dismissal on August 25, 2016.



Hugh W. Welborn
Attorney for the Appellant
Post Office Box 173
Anderson, South Carolina 29622
(864) 226-5787
Attorney for Dan L. Temple, #240638

Other Counsel of Record:
Johanna C. Valenzuela
Office of Attorney General State of SC
Post Office Box 11549
Columbia, South Carolina 29211

THE STATE OF SOUTH CAROLINA

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vs

STATE OF SOUTH CAROLINA,

RESPONDENT.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail postage prepaid on August 25, 2016 addressed to its attorney of record Johanna C. Valenzuela, Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549



Hugh W. Weiborn
Attorney for the Appellant
Post Office Box 173
Anderson, South Carolina 29622
(864) 226-5787
Attorney for Dan L. Temple, #240638

Anderson, South Carolina

August 25, 2016

Hugh W. Welborn

Attorney at Law
Post Office Box 173
913 Carolina Circle
Anderson, South Carolina 29622

Office (864) 226-5787
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hughwelborn@bellsouth.net

August 25, 2016

RECEIVED

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

AUG 29 2016

In RE: Dan L. Temple, #240638 vs. State of South Carolina
Case #: 2015-CP-37-0225

S.C. SUPREME COURT

Dear Sir/Madam:

Please find enclosed herewith the original and one (1) copy of the Appellant's Notice of Appeal in connection with the foregoing matter which I ask that you file for record, returning the clocked copy to my office. I also enclose a copy of the Order of Dismissal and the original Proof of Service on Johanna C. Valenzuela, Office of the Attorney General. Please use the enclosed self-addressed envelope to return the clocked copy to my office.

With kind regards,



Hugh W. Welborn

HWW/sba
Enclosures

cc: Office of the Appellate Defense
Office of the Attorney General
Client

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF (Select one.)

COMMON PLEAS FAMILY COURT

TENTH JUDICIAL CIRCUIT

CASE NO.: 2015-CP-37-0225

APPOINTMENT OF COUNSEL OR GAL

(Select one.)

ORDER

AMENDED ORDER

Dan Lavert Temple,
Plaintiff(s),

-vs-

State of South Carolina,
Defendant(s).

TYPE OF CASE/PROCEEDING: (Check one.)

Post-Conviction Relief (PCR)/habeas case

Adoption

Juvenile

SVP case

Custody and/or Visitation

Abuse and Neglect

Minor Name Change

Other:

It appears that Dan Lavert Temple, who is a litigant in this case, is entitled to court-appointed counsel or a guardian ad litem.

It further appears that: (Select only one.)

counsel/guardian ad litem has not yet been appointed by the court; therefore, an appointment for counsel/guardian ad litem is necessary.

counsel or a guardian ad litem was previously appointed by the court but has indicated either a possible conflict of interest, an entitlement to exemption, or other good cause warranting the appointment of new counsel or guardian ad litem based on: _____

counsel was previously appointed by the court but has not indicated that the litigant has retained private counsel and is no longer entitled to appointed counsel.

court appointed counsel has obtained _____, Esquire as substitute counsel pursuant to Rule 608(h)(2); provided, however, only the member who originally received the appointment and who sought substitute counsel shall receive credit.

Other:

counsel lead counsel (if capital PCR case) guardian ad litem

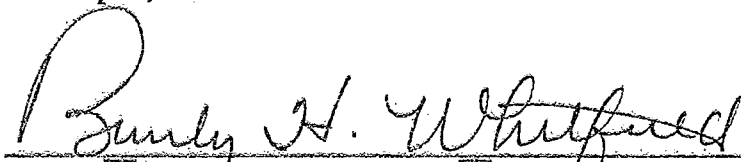
Therefore, it is ordered that HUGH WELBORN, P.O. Box 173, Anderson, SC, 29622, telephone (864) 226-5787, hereby is appointed as (Select one.)

for the above-named person. Any counsel or GAL previously appointed is/are hereby relieved.

(if Death Penalty PCR Case) It is further ordered that _____, Esquire, is hereby appointed as second counsel in this capital PCR case.

The clerk of court is directed to forward a copy of this order to all persons entitled to notice.

IT IS SO ORDERED THIS 2nd DAY OF April, 2015.


 Circuit Judge Clerk of Court

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT

2015 APR -2 A 11:16

NOTICE: SC Supreme Court Order of September 29, 2006, requires appointed counsel entitled to payment from the Office of Indigent Defense (OID) to register the case online with OID within fifteen (15) days of this appointment at www.sccid.sc.gov, and further directs that reimbursement vouchers be submitted directly to SCCID and not to the trial judge or clerk of court. See SCCID website for further details.

IN THE COURT OF COMMON PLEAS

CASE NO. 2015-CP-37-0225

FILED OCONEE COUNTY, SC
BEVERLY H. WHITFIELD
CLERK OF COURT

Dan L. Temple, S.C.D.C. No. 740638
PLAINTIFF(S)

State of South Carolina 7/11/16 15 P 3:19
DEFENDANT(S)

Submitted by: Court

Attorney for: Plaintiff Defendant
or
 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), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); 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

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 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

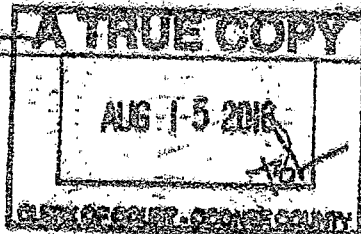
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		

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 in the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

[Signature]
Circuit Court Judge



2752
Judge Code

8-12-16
Date

For Clerk of Court Office Use Only

This judgment was entered on the 15th day of Aug 20 16 and a copy mailed first class or placed in the appropriate attorney's box on this 15th day of Aug 20 16, to attorneys of record or to parties (when appearing pro se) as follows:

Dani Temple pro se

Johanna C. Valenzuela

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Beverly L. Court
CLERK OF COURT

Court Reporter:

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 OCONEE

Dan L. Temple,
S.C.D.C. No. 240638,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

FOR THE TENTH JUDICIAL CIRCUIT

C.A. No. 2015-CP-37-0225

ORDER OF DISMISSAL

FILED
MAY 15 10 31 19

REC'D
GENERAL CLERK OF COURT
OCONEE COUNTY, SC

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed March 16, 2015. Respondent made its return on or about May 6, 2016. An evidentiary hearing was held on June 6, 2016, at the Oconee County Courthouse. Applicant was present and represented by Hugh W. Welborn, Esquire, Senior Assistant Deputy Attorney General. Johanna C. Valenzuela represented Respondent.

Applicant and his trial counsel, E. Delane Rosemond, Esquire testified at the hearing. The Court had before it Applicant's trial transcript, the Oconee County Clerk of Court records, Applicant's appellate records, the South Carolina Department of Corrections records, the PCR application, and the Return.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Oconee County Clerk of Court. Applicant was indicted by the January 2013 term of the Oconee County Grand Jury for manufacture, distribution, etc. of

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cocaine base, third or subsequent offense (2013-GS-37-0184) and possession of other controlled substance in schedule I to V, second or subsequent offense (2013-GS-37-0185). R. Delana Rosemond, Esq., represented Applicant. On March 18-21, 2013, Applicant proceeded to a trial before the Honorable Alexander S. Macaulay and a jury. He was found guilty of the lesser included offense of possession of crack cocaine; and as indicted for possession of other controlled substance, second or subsequent. Judge Macaulay sentenced Applicant to a term of imprisonment for ten (10) years for possession of crack cocaine; and to a term of imprisonment for one (1) year possession of other controlled substance.¹ These sentences were to be served consecutively.

A timely notice of appeal was filed and perfected on Applicant's behalf. Carmen Ganjehsani, Esq., represented Applicant on appeal. The South Carolina Court of Appeals affirmed Applicant's conviction. State v. Temple, Op. No. 2015-UP-061 (S.C. Ct. App. filed February 5, 2015). The Remittitur was issued on February 23, 2015.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the case law presented at the hearing, to review the record in its entirety, to hear the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely 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

¹ Applicant's criminal history is also relevant. Although not charged in this application, Applicant pled guilty to voluntary manslaughter (2002-GS-03-0152) in Allendale County on August 23, 2004, for an incident occurring while in prison. Applicant was sentenced to eleven (11) years imprisonment and, upon his release, he began serving probation for 1997-GS-37-0089. After the jury found Applicant guilty of the charges he is challenging in this

by 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 SCRPC 71.1(e)). Where the application alleges ineffective assistance of counsel as a ground for relief, 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 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

First, the applicant must show that counsel's performance "fell below an objective standard of reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; see Strickland v. Washington, 466 U.S. 668, 688, 692, 104 S. Ct. 2052, 2065, 2067 (1984) ("[T]he

application, Judge Macaulay revoked his probation and sentenced Applicant to five (5) years in prison. This was

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defendant must show that counsel's representation fell below an objective standard of reasonableness [and] . . . any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.""); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) ("PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case,").

And "where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006 (citing Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992))). "Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (quoting Strickland, 466 U.S. at 690, 104 S.Ct. 2052). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Id. (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)).

This Court will now address each allegation of ineffective assistance of counsel:

also to be served consecutively.

I. Failure to preserve objection.

Applicant argued that because Applicant's counsel failed to object, and therefore preserve, the admission of the drug evidence in his case, that trial counsel was ineffective. This failure to object has been held by the appellate courts to be ineffective assistance of counsel. However, Applicant failed to prove he was prejudiced by this failure to preserve. Applicant has not met his burden of establishing the magistrate's finding of probable cause and issuance of the search warrant would have resulted in the case being reversed had trial counsel objected during the trial in addition to making the argument in pretrial. State v. Bellamy, 323 S.C. 199, 205, 473 S.E.2d 838, 842 (Cl. App. 1996). The Court cannot make a finding that there is a reasonable probability of a different outcome; therefore, this claim fails.

II. Failure to investigate the first indictment.

Applicant has failed to present sufficient evidence of this allegation to meet his burden of proof.

III. Failure to interview the twin brother.

Applicant argues trial counsel was ineffective for failing to call his twin brother as a witness in his trial. Applicant testified that his twin brother, while fraternal, looks like him. Trial counsel testified he did not interview the twin brother because the charges that the State ended up proceeding to trial on involved law enforcement finding only Applicant and Applicant's friend in a hotel room with the drugs and arresting them on sight. Separate charges where Applicant's identity could have been challenged were not the charges involved at the trial. Applicant did not present any testimony from his twin brother at the hearing. This Court finds Applicant has failed

to prove how counsel's failure to call Applicant's brother as a witness could have affected the case and has thus failed to meet his burden of proof on this issue.

IV. Failure to investigate the Georgia conviction for enhancement purposes.

Applicant argued trial counsel was ineffective for not objecting to his prior conviction that arose out of Georgia. This conviction was presented to and considered by the sentencing judge and has been the subject of a prior post-conviction relief application. (Trial Tr. p. 419, l. 20 - p. 412, l. 13.) Furthermore, as the sentencing judge noted, even without the Georgia conviction, Applicant was two other convictions that would qualify. (Trial Tr. p. 418, ll. 2-11.) This Court finds Applicant has failed to meet his burden of proof on this allegation in light of the fact that the Court outlined at sentencing other convictions that triggered enhanced sentencing for Applicant.

V. Failure to ask the Magistrate to Recuse himself at the Preliminary Hearing.

Applicant argued his trial counsel was ineffective for failing to object to the magistrate judge presiding over his preliminary hearing. Applicant has failed to meet his burden of proof on this allegation. This has no bearing on Applicant's conviction. The State indicted Applicant, rendering the Preliminary Hearing moot. See State v. McClure, 277 S.C. 432, 434, 289 S.E.2d 158, 160 (1982) ("The indictment itself constitutes a finding of probable cause and thus avoids the need for a preliminary hearing." (citing U.S. v. Werbroeck, 589 F.2d. 273 (7th Cir. 1978))). This Court finds there was no prejudice for this alleged ineffective assistance of counsel.

VI. Failure to request concurrent sentences

Applicant argues his trial counsel was ineffective for failing to request concurrent sentences. The trial transcript shows trial counsel did in fact request the sentencing court impose concurrent sentences. (Trial Tr. p. 409, ll. 18-21 ("I ask you not to run that consecutively and certainly run all those sentences concurrently and allow [Applicant] to serve his time that way.")) Therefore, Applicant's claim fails.

All Other Allegations

As to any additional allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds Applicant has abandoned any such allegations.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial or sentencing proceedings. Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.


IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and

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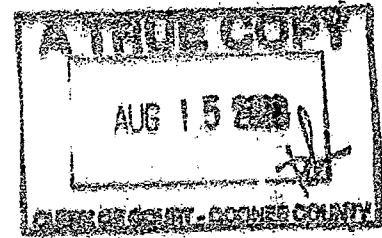
2. That Applicant be remanded to the custody of Respondant.

AND IT IS SO ORDERED this 18 day of August, 2016.


R. Scott Sprouse
Presiding Judge
Tenth Judicial Circuit

2016 AUG 15 P 3:19
CLERK OF COURT
GENERAL CLERK
SOUTH CAROLINA

Wichita, South Carolina.



Hugh W. Welborn

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hughwelborn@bellsouth.net

August 25, 2016

Johanna C. Valenzuela
Assistant to Attorney General
P. O. Box 11549
Columbia, South Carolina 29211-1549

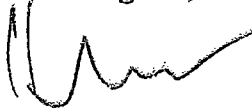
In RE: Dan L. Temple, #240638 vs. State of South Carolina
Case #: 2015-CP-37-0225

Dear Johanna:

Please find enclosed herewith a copy of the Appellant's Notice of Appeal, Proof of Service and Order of Dismissal in connection with the foregoing matter. I also enclose copies of correspondence to the Appellate Defense Office and the Supreme Court. I have also forwarded copies of all documents to my client.

If you have any questions, please do not hesitate to contact my office.

With kind regards,



Hugh W. Welborn

HWW/sba
Enclosures

cc: South Carolina Supreme Court
Office of Appellate Defense

Hugh W. Welborn

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August 25, 2016

South Carolina Office of Appellate Defense
P. O. Box 11589
Columbia, South Carolina 29211-1589

In RE: Dan L. Temple, #240638 vs. State of South Carolina
Case #: 2015-CP-37-0225

Dear Sir or Madam:

In connection with the foregoing matter, please be advised that I was the Court Appointed Attorney and enclose herewith a copy of my appointment. I also enclose copies of all documents you requested for filing a copy of the Appellant's Notice of Appeal in this matter together with a copy of the Order and Proof of Service. I ask that your office assume representation of this indigent Applicant.

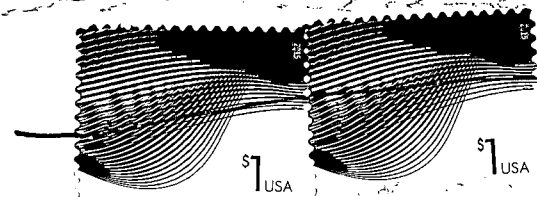
Very truly yours,


Hugh W. Welborn

HWW/sba
Enclosures

cc: South Carolina Supreme Court
Office of Attorney General
Client

Hugh W. Welborn
Attorney At Law
P.O. Box 173
Anderson, SC 29622



South Carolina Supreme Court
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