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SEP 09 2016

*Hugh W. Welborn*

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**S.C. SUPREME COURT**

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September 7, 2016

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

In RE: James Anthony Tucker, #260993 vs. State of South Carolina  
Case #: 2012-CP-04-00505

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

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

**RECEIVED**

APPEAL FROM ANDERSON COUNTY  
COURT OF COMMON PLEAS

SEP 09 2016

HONORABLE R. SCOTT SPROUSE S.C. SUPREME COURT

2012-CP-04-0505

JAMES ANTHONY TUCKER, #260993

APPELLANT,

vs

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**NOTICE OF APPEAL**

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James Anthony Tucker, #260993 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 10, 2016, and Order of Dismissal issued on September 1, 2016 and filed on September 6, 2016. The Appellant received Order of Dismissal on September 7, 2016.



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Hugh W. Welborn  
Attorney for the Appellant  
Post Office Box 173  
Anderson, South Carolina 29622  
(864) 226-5787  
Attorney for James Anthony Tucker, #260993

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  
IN THE SUPREME COURT  
APPEAL FROM ANDERSON COUNTY  
COURT OF COMMON PLEAS

HONORABLE R. SCOTT SPROUSE

2012-CP-04-0505

JAMES ANTHONY TUCKER, #260993

APPELLANT,

vs

STATE OF SOUTH CAROLINA,

RESPONDENT.

RECEIVED

SEP 09 2016

S.C. SUPREME COURT

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**PROOF OF SERVICE**

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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 September 7, 2016 addressed to its attorney of record Johanna C. Valenzuela, Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549



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Hugh W. Welborn  
Attorney for the Appellant  
Post Office Box 173  
Anderson, South Carolina 29622  
(864) 226-5787  
Attorney for James Anthony Tucker, #260993

Anderson, South Carolina

07 September 2016

STATE OF SOUTH CAROLINA  
COUNTY OF ANDERSON

James Anthony Tucker,  
Plaintiff(s),

-vs-

South Carolina State Of,  
Defendant(s).

2015 SEP 29 PM 4:36

IN THE COURT OF COMMON PLEAS  
JUDICIAL CIRCUIT  
CASE NO. 2012CP0400503  
APPOINTMENT OF COUNSEL OR GAL  
(Select one.)

ORDER  
 AMENDED ORDER

TYPE OF CASE/PROCEEDING: (Check one.)

- Post-Conviction Relief (PCR)/habeas case
- SVP case
- Minor Name Change
- Adoption
- Custody and/or Visitation
- Other: Post Convict Rel 500
- Juvenile
- Abuse and Neglect

It appears James Anthony Tucker, 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 a substitute counsel pursuant to Rule 200(d)(2), provided however, only the member who originally received the appointment and who sought substitute counsel will receive credit.
- Other: .

**A TRUE COPY**

**SEP 29 2015**

*Richard D. Hiley*  
CLERK OF COURT

Therefore, it is ordered that Hugh Welborn hereby is appointed as (Select one.)

- counsel
  - lead counsel (if capital PCR case)
  - guardian ad litem
- 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  
September 29, 2015

*Richard D. Hiley*

Circuit Judge       Clerk of Court

Plaintiff Attorney:

--

Defendant Attorney:

John Walter Whitmire
PO Box 212069
Columbia, SC 29211-9930

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](http://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.



FILED-CLERK'S OFFICE  
IN THE COURT OF COMMON PLEAS ANDERSON SC

CASE NO. 2012-CP-04-0505

2016 SEP -6 AM 9: 28

James Anthony Tucker, S.C.D.C. No. 260993

PLAINTIFF(S)

COMMON PLEAS AND  
GENERAL SESSIONS

State of South Carolina

DEFENDANT(S)

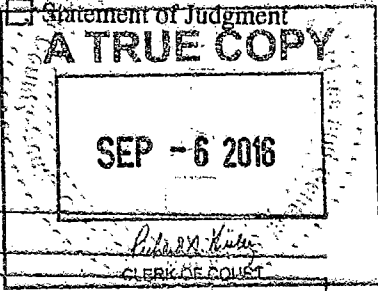
Submitted by: Court	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or
	<input type="checkbox"/> Self-Represented Litigant

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 (formal order to follow)



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)

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.

*[Signature]*  
Circuit Court Judge

2752  
Judge Code

9-1-16  
Date



FILED-CLERK'S OFFICE  
ANDERSON SC



STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS  
2016 SEP -6 AM 9:28  
COUNTY OF ANDERSON COMMON PLEAS AND THE TENTH JUDICIAL CIRCUIT  
GENERAL SESSIONS

James Anthony Tucker,  
S.C.D.C. No. 260993,

Applicant,

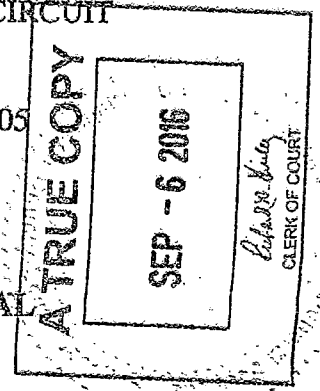
v.

State of South Carolina,

Respondent.

C.A. No. 2012-CP-04-0505

ORDER OF DISMISSAL



This matter comes before the Court by way of an application for post-conviction relief (PCR) filed February 21, 2012. Respondent made its return on or about May 22, 2012. An evidentiary hearing was held on June 10, 2016, at the Anderson 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, Andrew Potter, Esquire testified at the hearing. The Court had before it Applicant's trial transcript, the Anderson 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 Anderson County Clerk of Court. Applicant was indicted by the April 2009 term of the Anderson County Grand Jury for assault and battery with intent to kill

RSS

(2009-GS-04-1023) and armed robbery (2009-GS-04-1024). Andrew Potter, Esq., represented Applicant. The State took the case to trial, and on September 16, 2009, Applicant was found guilty. The Honorable J. Cordell Maddox, Jr., sentenced Applicant to a term of life imprisonment without parole for both charges.

A timely notice of appeal was filed and perfected on Applicant's behalf. Elizabeth A. Franklin-Best, Esq., represented Applicant on appeal. The South Carolina Court of Appeals affirmed Applicant's conviction. State v. James, Op. No. 2011-UP-537 (S.C. Ct. App. filed December 5, 2011). The Remittitur was sent on December 21, 2011.

#### 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 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 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)).

Applicant made two allegations in his PCR application: (1) prosecutorial misconduct and (2) conflict of interest. Additionally, counsel for Applicant notified Respondent of an additional allegation prior to the hearing: failure to file for a psychological examination and the ability to understand proceedings due to prescribed medications. During the hearing, Applicant also alleged his trial counsel should have provided information when the foreman sent a note to the Court during the trial, trial counsel should have called Jeannie Durham as an alibi witness, and that trial counsel should have had the victim's toxicology report to establish he was intoxicated. This Court will now address each allegation of ineffective assistance of counsel:

*I. Prosecutorial Misconduct*

Applicant argues there was prosecutorial misconduct because the search warrant return showed the only item that had his DNA evidence came from his brother in laws home but the State testified they found it at Applicant's home. Trial counsel testified the property report

showing the address changes was provided to him prior to trial and that he provided it to his client.

The trial transcript shows this exact issue was raised and addressed during the trial and explained as a scrivener's issue. (Trial Tr. p. 202, l. 8 – p. 206, l. 6; p. 170, l. 14 – p. 173, l. 10; p. 191, ll. 1-20.) Applicant had this information going to trial and was able to challenge it before the Court and the jury. As such, this allegation is denied as Applicant has failed to establish prosecutorial misconduct or any ineffective assistance of counsel related to this issue.

## *II. Conflict of Interest*

No evidence was presented at the PCR Hearing regarding a conflict of interest. This Court finds Applicant has failed to meet his burden on establishing there was a conflict of interest.

## *III. Failure to file for a psychological examination and the ability to understand proceedings due to prescribed medications*

Applicant claims he was on at least three anti-depressants during the trial and that those anti-depressants affected his memory and caused abnormal thinking and disorientation. Trial Counsel testified Applicant did not appear to have any trouble understanding him either before or during his trial. Trial Counsel pointed out that Applicant was active in his own defense; Applicant was the one to initially note the scrivener's error on the Search Warrant return and was able to provide names of potential witnesses. During trial, Applicant did not appear to have any trouble understanding the proceedings.

Aside from Applicant's own assertions, Applicant presented no evidence of how much of this medication he was taking, the effects of these medications, or that these medications had an effect on Applicant that prevented him from having the ability to consult with his lawyer and understand the proceedings. This Court finds Trial Counsel's testimony credible and finds Applicant has not met his burden of proving his incompetence by a preponderance of the evidence. See McLaughlin v. State, 352 S.C. 476, 481, 575 S.E.2d 841, 843 (2003) (finding the applicant did not meet his burden where a pharmacist testified at his PCR hearing and he produced prison records of his medications but neither related to the applicant's ability to consult with his counsel and understand the proceedings).

*IV. Failure to provided information when the foreman sent a note to the Court during the trial*

Applicant argues Trial Counsel should have objected and insisted information be provided to the jury when the foreman sent a question to the Court during the State's case asking "can jurors ask a question for clarification? Two examples, need more information or don't understand something." (Trial Tr. p. 223, ll. 20-22.) The Court explained to the parties that he was just going to tell the jurors, "no." (Trial Tr. p. 223, ll. 22-23.) Trial Counsel testified that he believed the jurors question to be in Applicant's favor. The question was raised during the state's case when the state had the burden of proof. Trial Counsel also testified that he preferred to control what questions were asked and what issues were clarified for the jury.

This Court finds Applicant has not established Trial Counsel was ineffective for failing to object to the Court's decision not to allow jurors to ask questions during the trial and finds Applicant has not established prejudice.

*V. Failure to call Jeannie Durham as an alibi witness*

Applicant argues Trial Counsel was ineffective for failing to call his girlfriend at the time as a witness. Applicant claims Ms. Durham would have provided him with an alibi for the time of the crime. Jeannie Durham did not testify or appear at the PCR hearing.

Trial Counsel testified his notes indicated his private investigator interviewed Ms. Durham and said she would in no way be a credible witness.

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

*VI. Failure to enter victim's toxicology report to establish he was intoxicated.*

Applicant argues Trial Counsel was ineffective for failing to enter the victim's toxicology report. No toxicology report was admitted as evidence at the PCR hearing. Trial Counsel testified that he did not recall there being a toxicology report for the victim.

This Court finds Applicant has failed to meet his burden of proof on this allegation.

*VII. Overwhelming Evidence of Guilt*

This Court further finds Applicant cannot meet his burden to show that he was prejudiced by any alleged deficiencies because there is overwhelming evidence of his guilt. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), cert. denied, 535 U.S. 1114, 122 S.Ct. 2332, 153 L.Ed.2d 162 (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of the defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt); cf.

Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (holding respondent failed to prove prejudice from trial counsel's failure to request an alibi charge where there was overwhelming evidence of guilt).

The victim in this case was Applicant's own father, who was able to identify Applicant. (Trial Tr. p. 121, ll. 1-18; p. 127, l. 17 – p. 130, l. 20.) Additionally, Applicant gave a confession in this case. (Trial Tr. p. 249, ll. 2-4; p. 256, l. 9 – p. 258, l. 1.) There was also DNA evidence linking Applicant to the crime. (Trial Tr. p. 216, ll 2-14.)

#### 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.

11

**IT IS THEREFORE ORDERED:**

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 1 day of September, 2016.



R. Scott Sprouse  
Presiding Judge  
Tenth Judicial Circuit

Waltham, South Carolina.

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ANDERSON SC  
2016 SEP -6 AM 9:28  
COMMON PLEAS AND  
GENERAL SESSIONS

*Hugh W. Welborn*

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September 7, 2016

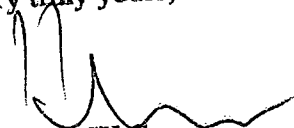
South Carolina Office of Appellate Defense  
P. O. Box 11589  
Columbia, South Carolina 29211-1589

In RE: James Anthony Tucker, #260993 vs. State of South Carolina  
Case #: 2012-CP-04-00505

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

