

THE BOOZER LAW FIRM, LLC

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November 22, 2016

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

The Honorable Scott B. Suggs
Clerk of Court
1 Public Square
Darlington, SC 29532

RECEIVED

NOV 28 2016

S.C. SUPREME COURT

**RE: Larry Tyler, #354459, v. State of South Carolina
2015-CP-16-16**

Dear Mr. Shearouse and Mr. Suggs:

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

- (1) Proof of Service of the Notice of Appeal;
- (2) A copy of the Order which is to be challenged on appeal; and
- (3) Prior Order of Appointment of Counsel.

As I was appointed to represent Mr. Tyler in his PCR proceeding, I anticipate that the Office of Appellate Defense will represent Mr. Tyler in this appeal.

Yours very truly,



Lance S. Boozer

Enclosures

cc: Caitlin Hastings, AAG
Loriene French, OAD
Larry Tyler, #354459

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

NOV 28 2016

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable G. Thomas Cooper, Circuit Court Judge

Case No. 2015-CP-16-16

Larry Tyler, #354459,Petitioner,

v.

State of South Carolina,Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable G. Thomas Cooper's Order dated November 2, 2016, denying post-conviction relief to the Petitioner. The Order was received by undersigned counsel on November 21, 2016. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,



Lance S. Boozer
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November 22, 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable G. Thomas Cooper, Circuit Court Judge

Case No. 2015-CP-16-16

Larry Tyler, #354459,Petitioner,

v.

State of South Carolina,.....Respondent.

PROOF OF SERVICE

I, Lance S. Boozer, appointed attorney for Petitioner, certify that I have today served within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to Assistant Attorney General Caitlin Hastings, P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 22nd day of November, 2016.



Lance S. Boozer
The Boozer Law Firm, LLC
807 Gervais Street, Suite 203
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Tele: 803-608-5543

Handwritten signature

STATE OF SOUTH CAROLINA)
)
COUNTY OF DARLINGTON)
)
Larry James Tyler,)
S.C.D.C. No. 354459,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
OF THE FOURTH JUDICIAL CIRCUIT

2015-CP-16-0016

ORDER OF DISMISSAL

SCOTT B. STRODS
CLERK OF COURT/REG. CL.
DARLINGTON COUNTY, S.C.

2015 NOV -4 AM 11:35

FILED

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 2, 2015. Respondent made its return on September 10, 2015. An evidentiary hearing was held on July 18, 2016, at the Chesterfield County Courthouse. Applicant was present and represented by Lance Boozer, Esquire. J. Rutledge Johnson, Esquire, of the South Carolina Office of the Attorney General represented Respondent.

Applicant and his trial counsel, J. Richard Jones, Esquire, testified at the hearing. The Court had before it Applicant's trial transcript, the Darlington County Clerk of Court records, the South Carolina Department of Corrections records, Applicant's appellate records, and the Return.

PROCEDURAL HISTORY

Applicant is no longer confined in the South Carolina Department of Corrections. In February 2013, the Darlington County Grand Jury indicted Applicant for criminal solicitation of a minor (2013-GS-16-603), second-degree sexual exploitation of a minor (2013-GS-16-604), contributing to the delinquency of a minor (2013-GS-16-605), and disseminating harmful material to minors (2013-GS-16-606).

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J. Richard Jones, Esquire, represented Applicant. On February 25, 2013, Applicant proceeded to trial before the Honorable Paul M. Burch and a jury. On February 27, 2013, the jury found Applicant guilty as indicted. Judge Burch sentenced Applicant to concurrent terms of imprisonment of eight years for each charge, except contributing to the delinquency of a minor, for which Judge Burch sentenced him to three years imprisonment.

Applicant filed a timely notice of appeal, and Robert M. Pachak, Esquire, of the Office of Appellate Defense, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on January 14, 2015. State v. Tyler, Op. No. 2015-UP-025 (S.C. Ct. App. filed January 14, 2015). The remittitur was returned to the circuit court on January 30, 2015.

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 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

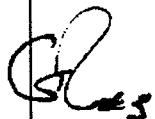
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at 814.

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



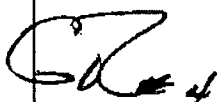
from the rebuttable presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (quoting Strickland, 466 U.S. at 690, 104 S.Ct. 2052). "Accordingly, when counsel 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)).

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

Applicant alleged trial counsel failed to object to the consolidation of trials that Applicant was entitled to have severed; failed to challenge the validity of the search of Applicant's home, computer, and email as well as the admissibility of any evidence seized as a result of the search; failed to object to the admission of any photos obtained from Applicant's email account that were not on his computer; and failed to remedy alleged double jeopardy violations with respect to Applicant's convictions.

I. Alleged failure to object to consolidation of trials

At the hearing, Applicant claimed Trial Counsel was ineffective for failing to move to sever the charges. Applicant claims that he was entitled to two different trials based on the four indictments involved in the case. Trial Counsel testified that he did not see any reason to object to the consolidation of Applicant's charges into one trial nor to make a motion to sever the matter into two trials. Trial Counsel testified that all four of the indictments resulted from related



incidents and a subsequent search warrant of Applicant's home and computer. Trial Counsel also stated that he was familiar with all four of the indictments and felt prepared to handle all of them.

"Generally, when offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place, and character, the trial [court] has the discretion to order the indictments tried together, but only so long as the defendant's substantive rights are not prejudiced." State v. Cutro, 365 S.C. 366, 374, 618 S.E.2d 890, 894 (2005).

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to move to sever the charges to be without merit. This Court finds Trial Counsel's performance to be well within "reasonable professional norms." Trial Counsel noted that all charges stemmed from the same events and one search warrant. This Court agrees with Trial Counsel's assertion and finds that there was no reasonable basis to make a motion to sever the charges.

Additionally, this Court finds Applicant can show no prejudice as a result of Trial Counsel's alleged deficiency for failing to file a motion to sever the charges. Notably, the Trial Judge charged the jury that "there are four different charges here, so you will have to take up each of the charges separately in your deliberations and *reach separate verdicts on each and every charge.*" (Tr. Vol. 3 p. 178 lines 7-10) (emphasis added). It is clear that the trial judge instructed the jury to decide Applicant's guilt beyond a reasonable doubt as to each individual charge. This Court finds that Counsel's performance was reasonable according to professional standards. As a result, Applicant can show no prejudice. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

II. Alleged failure to challenge the validity of the search of Applicant's home, computer, and email and to quash the indictments

5/1/05

Applicant asserts that Trial Counsel was ineffective for failing to challenge the validity of the search of Applicant's home computer and email. Applicant alleges that the investigators had no legal right to search his home computer and email. Additionally, Applicant asserts that Trial Counsel was ineffective for failing to challenge the indictments. Applicant claims the indictments were invalid since the search of his of his home computer and email were illegal. Trial Counsel testified that he saw no reason to challenge the validity of the search warrants nor a reason to quash the indictments.

This Court finds Applicant has failed to meet his burden of establishing trial counsel was ineffective for failing to challenge the validity of the search warrants. Trial Counsel testified that he saw no reason why the warrant or indictments would be invalid. The investigators in this case obtained the search warrant after the Victim's mother turned in the cell phone due to the troubling photos and messages. (Tr. Vol. 1 p. 88-90). Therefore, this Court finds Trial Counsel acted within "reasonable professional norms." Further, this Court finds Applicant can show no prejudice as a result of Trial Counsel's alleged deficiency for failing to challenge the search warrant and indictments. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

III. Alleged failure to object to the admission of photos obtained from the search of Applicant's home computer and email

Applicant asserts that Trial Counsel was ineffective for failing to challenge the admission of photos and messages obtained from the search of Applicant's home computer and email. Applicant claims the photos and email messages admitted into evidence that were procured from his email cloud account were inflammatory to the jury. During Applicant's trial, Trial Counsel did make a motion to exclude one of the photos in particular that the State was trying to admit into evidence; however, the Trial Judge denied Trial Counsel's motion. (Tr. Vol. 1 p. 21-22).

Trial Counsel also testified that his strategy for trial was to minimize the worst photos by introducing them himself rather than the State. As part of his trial preparation, he hired a computer expert to assess what was on the computer so that he would be prepared for whatever the State would try and enter into evidence.

This Court finds Applicant has failed to meet his burden of establishing Trial Counsel was ineffective for failing to challenge the admission of photos obtained from the search of Applicant's computer and email cloud account into evidence. Further, this Court finds Applicant can show no prejudice. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

IV. Alleged failure to remedy potential double jeopardy violations

Applicant alleges that Trial Counsel was ineffective for failing to challenge alleged double jeopardy violations involved in his trial. Trial Counsel testified that he doesn't recall there being any issues with double jeopardy in Applicant's case because there is no commonality between the charges or elements.

This Court finds Applicant has failed to meet his burden of establishing Trial Counsel was ineffective for failing to challenge alleged double jeopardy violations. Further, this Court finds Applicant can show no prejudice. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

Ineffective Assistance of Appellate Counsel

Applicant alleges he was denied effective assistance of appellate counsel in that appellate counsel failed to raise all meritorious issues that could have been raised on appeal. This Court finds Applicant has failed to make a prima facie showing that appellate counsel was ineffective. A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v.

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Lucey, 469 U.S. 387, 396 (1985). "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) (citing Jones v. Barnes, 463 U.S. 745 (1983)). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones, 463 U.S. at 753. Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226, 1235 (4th Cir. 1985).

The applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, 302 S.C. at 537, 397 S.E.2d at 526; Strickland, 466 U.S. at 687. When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

This Court finds that Applicant has failed to meet his burden of establishing Appellate Counsel was ineffective for allegedly abandoning Applicant's preserved motion for directed verdict on appeal. This Court finds that Applicant has failed to show that Appellate Counsel's decision was not strategic. Further, the failure to appeal all trial errors is not ineffective assistance of counsel. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

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

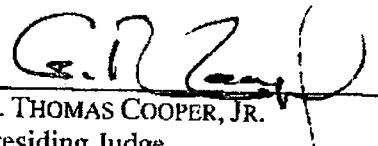
Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial or appeal. Trial and Appellate counsel were not deficient in any manner, and Applicant was not prejudiced by their representation. Therefore, 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
2. That Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 2nd day of November 2016.


G. THOMAS COOPER, JR.
Presiding Judge
Fourth Judicial Circuit

Camden, South Carolina.

2016 NOV -4 AM 11:35
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

FILED

STATE OF SOUTH CAROLINA)
 COUNTY OF DARLINGTON)
 Larry James Tyler,)
 Plaintiff(s),)
 -vs-)
 South Carolina State Of,)
 Defendant(s).)

IN THE COURT OF COMMON PLEAS
 Fourth JUDICIAL CIRCUIT
 CASE NO.: 2015CP1600016
 APPOINTMENT OF COUNSEL OR GAL
 (Select one.)

ORDER
 AMENDED ORDER

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: Post Convict Rel 500

It appears Larry James Tyler, 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: .

Therefore, it is ordered that Lance Boozer 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

June 3, 2015

Scott B. Suggs 
 Circuit Judge Clerk of Court

Plaintiff Attorney:

Lance Boozer
 807 Gervais Street, Suite 203
 Columbia, SC 29201

Defendant Attorney:

Joshua L. Thomas
 PO Box 11549
 Columbia, SC 29211

TRUE CERTIFIED COPY,

Scott B. Suggs

CLERK OF COURT/R/M/C

DARLINGTON COUNTY, SC

FILED
 2015 JUN -3 AM 11:11
 SCOTT B. SUGGS
 CLERK OF COURT/R.M.C.
 DARLINGTON COUNTY, S.C.

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.

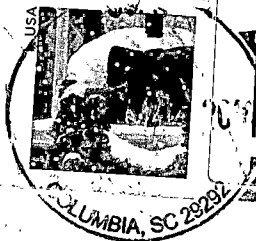
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Columbia, SC 29211