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December 27, 2016

RECEIVED
DEC 30 2016
S.C. SUPREME COURT

Via US Mail
Daniel Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

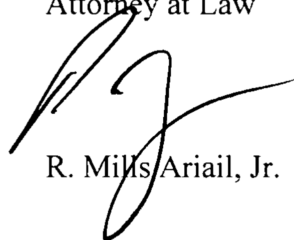
Re: Notice of Intent to Appeal from State of SC v. David Stevenson Boyd II
C.A. No.: 2014-CP-23-5952

Dear Mr. Shearouse:

I was Court Appointed in the above referenced matter, and I expect that appellate defense will handle the appeal and petition for certiorari. On behalf of my client, enclosed for filing please find the Notice of Appeal and proof of service. I've enclosed a copy of the Honorable John C. Hayes, III's Order of Dismissal to be challenged on appeal. By copy of this letter, I am also serving my client, counsel for the State of South Carolina, the South Carolina Commission of Indigent Defense - Appellate Defense Division and the Greenville County Clerk's Office.

Thank you for your assistance in this matter and if you have any questions, please feel free to contact me.

Sincerely,
LAW OFFICE OF R. MILLS ARIAIL, JR.
Attorney at Law



R. Mills Ariail, Jr.

RMAjr/dl
Enclosures (as stated)

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

RECEIVED
DEC 30 2016
S.C. SUPREME COURT

John C. Hayes, III, Circuit Court Judge

Case No. 2014-CP-23-5952

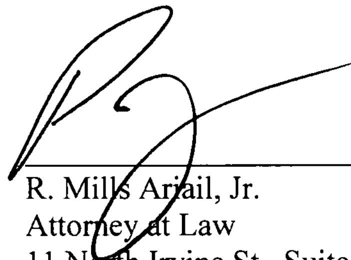
David Stevenson Boyd, II,.. Appellant,

v.

State of South Carolina .... Respondent.

NOTICE OF APPEAL

Appellant appeals the Honorable John C. Hayes, III's Order of Dismissal dismissing Appellant's application for post-conviction relief. On December 13, 2016, the Honorable John C. Hayes, III signed an order dismissing Appellant's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on December 22, 2016. A copy of the Honorable John C. Hayes, III's Order of Dismissal is attached.



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Attorney for David Boyd

Greenville, South Carolina
December 27, 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

RECEIVED
DEC 30 2016
S.C. SUPREME COURT

John C. Hayes, III, Circuit Court Judge

Case No.2014-CP-23-5952

David Stevenson Boyd, II,.. Appellant,

v.

State of South Carolina .... Respondent.

CERTIFICATE OF SERVICE

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this December 27, 2016, I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

Patrick Schmeckpeper, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211
Attorney for the State of South Carolina

Greenville County Clerk's Office
Greenville County Courthouse
305 East North Street
Greenville, SC 29601

David Boyd SCDC# 349271
Perry Correctional Institution
430 Oaklawn Road
Pelzer, SC

SC Commission of Indigent Defense
Division of Appellate Defense
PO Box 11433
Columbia, SC 29211-1433

Denise Tanner LaBeck
Denise Tanner LaBeck

December 27, 2016

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2014CP2305952

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2016 DEC 21 AM 9 41

David Stevenson Boyd II *vs.* **South Carolina State Of**

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.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: ____________________

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ 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:

Dated at Greenville, South Carolina, this .

Court Reporter:

____

PRESIDING JUDGE - John C Hayes, III

This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

R. Mills Ariail Jr. 11 North Irvine Street, Suite 11
Greenville, SC 29601

ATTORNEY(S) FOR THE PLAINTIFF(S)

Patrick Lowell Schmeckpeper PO Box 11549
Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

____

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

CPFORM4M
SCCA SCRCP Form 4 Revised 06/2008

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2014-CP-23-5952

David Stevenson Boyd, II,
SCDC No. 349271,

Applicant,

vs.

State of South Carolina,

Respondent.

ORDER

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2016 DEC 21 AM 9 41

Applicant filed this application for Post-Conviction Relief October 30, 2014. This matter was heard December 5, 2016. Applicant was represented by R. Mills Ariail, Jr., Esquire. The State was represented by Patrick Schmeckpeper, Esquire.

Applicant is currently incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the December 2009 term of General Sessions for possession or receiving stolen goods (third property offense) (2009-GS-23-1985), armed robbery (2009-GS-23-9988, count 1), possession of a weapon during commission of a violent crime (2009-GS-23-9988, count 2), and assault and battery with intent to kill (ABWIK) (2009-GS-23-9989). Brian P. Johnson, Esquire represented the Applicant.

After the State called the case to trial, the Applicant was found guilty. On January 13, 2012, the Honorable Letitia H. Verdin sentenced the Applicant to concurrent terms of 10 years for possessing and receiving stolen goods (third property offense), 20 years for armed robbery, and 5 years for possession of a weapon during commission of a violent crime. Judge Verdin levied a 20 year sentence for ABWIK, which was to be consecutive to the armed robbery sentence.

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Pachak, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, perfected the appeal in the form of an *Anders*[1] brief. The Court of Appeals dismissed the appeal. *State v. Boyd*, Op. No. 2013-UP-4-1 (S.C. Ct. App. filed October 30, 2013). The Remittitur was sent on November 15, 2013.

In his application for post-conviction relief, the Applicant alleged he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
    a. Failure to call alibi witnesses.
    b. Failure to properly object to evidence submitted by the prosecution.
    c. Failure to fully investigate and obtain evidence.

By way to two handwritten supplements to his application, Applicant has raised additional issues addressed herein below.

Applicant alleges ineffective assistance of counsel as a ground for relief. 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 adversarial process that the trial cannot be relied on has having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this

[1] *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967).

presumption in order to receive relief. *See Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." *Cherry v. State*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065). 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2052).

Applicant's primary issue revolves around testimony concerning the absence of dye on Applicant's person or clothing at the time he was apprehended. A dye pack was placed in a bag with money stolen from the Bank of Travelers Rest on December 10, 2008[2]. (Trial Record p. 91, ll. 22-24 and p. 100 l. 14 through p. 101, l. 6). Red smoke from the dye pack was seen coming out of the driver's side of a minivan thought to be the robber's getaway vehicle. (Trial Record p. 128, l. 5 though p. 129, l. 13). Traces of what appeared to be dye were found in the minivan (Trial Record p. 589, ll. 14-16) and dye packs were found in the minivan[3]. (Trial Record p. 586, ll. 7-9).

[2] There is additional testimony in the record reflecting the dye packs being placed in the robber's bag with the bank's money.

[3] There is additional testimony in the record reflecting red dye and dye packs were found in the subject minivan.

Applicant claims trial counsel was ineffective for not calling an expert witness to testify as to the activation of dye packs. Applicant claims such an expert would have been beneficial to his case as no dye was found on his person or his clothing.[4] Applicant also claims trial counsel should have called his treating doctors to testify that they saw no red dye on his body during their treatment.[5]

The record is clear that dye packs were placed in a plastic bag at the Bank of Travelers Rest with the bank money. The record is also clear that the getaway vehicle emitted red smoke when being followed and that there was evidence of dye and actual dye packs inside the getaway vehicle. Further, the evidence is clear that at no point was the presence of red dye detected on Applicant's person or his clothing. This point was hammered home by Applicant's trial counsel. (Trial Record p. 948, ll. 5-8; p. 952, ll. 22 through p. 957, l. 12).

Applicant called no witnesses at his hearing to testify on the issue of dye pack activation. Applicant claims trial counsel knew this was a potential issue and, in fact, discussed the issue with a witness, Mr. Lynch (the court has no way of knowing if this witness would qualify as an expert on dye pack activation, in fact, trial counsel testified that Mr. Lynch was not really an expert). Trial counsel testified that he discussed the activation issue with Mr. Lynch and a technician from the dye pack producer's company. Trial counsel testified that the more he talked with Mr. Lynch, the less sure he was that Lynch would be of any help and finally decided Mr. Lynch's testimony would not have been helpful. This decision was, trial counsel testified, fortified by his discussion with the technician. This was an acceptable trial strategy. Where counsel articulates valid reasons for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.

[4] Since this is a point conceded by the State, supporting transcript citations are not set forth.
[5] Applicant had been shot when apprehended (Trial Record p. 469, l. 26 through p. 470, l. 16).

J: H #4

Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992); *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). Where counsel articulates a strategy, it is measured under an objective standard of reasonableness. *Ingle v. State*, 348 S.C. 467, 506 S.E.2d 401 (2002). Additionally, Applicant did not call either Mr. Lynch nor the technician at his hearing. Therefore, the Court is unable to analyze whether either testimony would have been beneficial to Applicant.

Applicant testified he had an alibi witness, Amy Foster. Ms. Foster did not testify at Applicant's hearing and Applicant did not testify as to what her testimony would be which would constitute an alibi. Trial counsel himself, or through his investigator, talked with Ms. Foster prior to trial. Trial counsel testified that he did not believe Ms. Foster and could not put her on the stand and allow her to perjure herself. Trial counsel did not testify to the substance of what Ms. Foster intended to testify to, but he did state that if she had been reliable he "sure would have called her." This was also an acceptable trial strategy. Additionally, Applicant did not call Ms. Foster as a witness at his hearing. Therefore, the Court is unable to analyze whether her testimony would have been beneficial to Applicant.

Applicant testified that a Mr. Dill, who had followed the getaway vehicle from the bank and was shot by its driver, testified that he had been shot multiple times after telling some news agency that he had been shot once. Trial counsel would not be ineffective for not presenting evidence as to the number of shots which struck Mr. Dill. The number of shots Mr. Dill suffered was relevant in no way to the issue of Applicant's guilt, nor was it exculpatory. Additionally, Applicant presented no evidence, other than his own testimony, that Mr. Dill said he was shot once at some juncture and shot more than once at others. To the extent his is a claim of ineffective assistance of counsel, it is unfounded.

In a somewhat weird twist from the numerous post-conviction relief applications from guilty pleas, Applicant in essence claims trial counsel was ineffective for not coercing him to enter a plea of guilty. This is, of course, without merit. Additionally, Applicant testified he wanted a trial and was expecting a favorable result based on expert testimony (presumably as to dye pack activation), his alibi (the existence of which has not been proved), and the absence of dye on his person or clothes at the time of his arrest.

Applicant alleges trial counsel was ineffective for not requesting a charge on a lesser offense from assault and battery with intent to kill such as assault and battery of a high and aggravated nature. Trial counsel testified that under the facts he did not think Applicant was entitled to a lesser included charge. Trial counsel also testified that such a charge would water down their defense which was that they have the wrong guy based on the absence of dye on Applicant's person or clothing. This was an acceptable trial strategy.

In his exhibit 1 from his post-conviction relief application, at number 3 therein, Applicant asserts that trial counsel was ineffective for not objecting to the trial judge's charge on the inference of malice from the use of a gun. This claim is predicated on Applicant's claim that the charge was improper as there was evidence in the record of mitigating circumstances. The mitigating evidence Applicant presents is the issue of the number of shots testified to by Mr. Dill. The number of shots fired by an assailant does not remotely, at least in this case under these facts, rise to the level of mitigation evidence. The trial judge's charge correctly reflected the applicable law. Trial counsel was not ineffective for not objecting to a correct charge on the law.

Applicant claims ineffective assistance of counsel based on a lack of issue preservation. Applicant has presented no evidence that any errors by the trial judge, if any, were not preserved for appellate review. This issue is without merit.

Applicant alleges trial counsel was ineffective for not consulting with him between his first and second trial. Applicant testified trial counsel, prior to the first trial, met with him between 5 and 10 times, discussed the State's evidence with him, went over the State's offers, went over the elements of the charges pending against him, and discussed the sentences attached to those charges. Trial counsel acknowledges he met with Applicant only once between the two trials. It cannot be said that trial counsel was ineffective for not meeting more often with Applicant between his trials. Trial counsel testified that if a new development occurred between trials he would have discussed it with Applicant and trial counsel testified affirmatively that he was prepared for trial. A review of the record and the testimony of trial counsel at the hearing negates any claim that trial counsel was ineffective relative to his preparation for trial. Additionally, Applicant has not shown any prejudice resulting from the minimal between-trial contacts by trial counsel. This claim is without merit.

Applicant asserts trial counsel was ineffective in failing to subpoena "favorable witnesses." This issue is couched, as above, as to Ms. Foster and Mr. Lynch. No other witness is named nor were any witnesses called to testify on Applicant's behalf at his post-conviction relief hearing. This issue is without merit.

Applicant claims trial counsel failed to "fully investigate and obtain evidence." There is nothing in the record to support this claim.

Applicant generally argues his conviction and sentence was in violation of several amendments to the United States Constitution. Such claim is too general to address.

JCH #7

Applicant asserts trial counsel was ineffective for failing to object to a "void indictment for armed robbery." Applicant has presented no evidence that such indictment (2009-GS-23-9989) lacked validity. This claim is baseless.

Applicant seems to argue that trial counsel should have objected to the introduction of charges related to the Bank of Travelers Rest as it is a federally chartered bank. This claim is baseless.

Applicant alleges trial counsel was ineffective for not requesting a *Jackson v. Denno*[6] hearing regarding certain statements attributable to Applicant by law enforcement officers. Detective Weiner and Officer Heger testified at trial as to two instances of statements by Applicant subsequent to his arrest, which are set forth hereinbelow. These statements were subject to a *Jackson v. Denno* hearing at Applicant's first trial. The trial judge at the first trial determined these statements were "freely, voluntarily, and intelligently made." (Trial Record p. 19, ll. 7-14). This statement by counsel for the State, Allen O. Fretwell, Esquire was in the context of alerting the trial judge to "issues that were decided in the last case, we wanted the opportunity to put these issues on the record at this point." (Trial Record p. 18, l. 23 through p. 19, l. 3). Solicitor Fretwell, after making the above statement, stated to the court "I believe we're mostly in agreement on what those issues are." (Trial Record p. 19, ll. 1-5). After making this presentation to the trial judge, the solicitor invited Applicant's trial counsel to "...weigh in at the appropriate time." (Trial Record p. 19, ll. 5-6).

After the above, the following colloquy was exchanged by the trial judge and Applicant's trial counsel:

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[6] *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774 (1964).

JAH 8

The Court: All right. Very well. We're in good shape on that. All right. Any matters we need to take up and put any objections on the record?

Mr. Johnson: Uh, things are pretty much as he stated as far as how thing played previously. I don't know, at this time. is it appropriate to reiterated arguments with regards to those objections?

The Court: I think it would be – I think if you want just in the interest of time. You've made those arguments. Since I can not rule on them again, if you made those arguments previously, then if you just want to state, renew your objection and very briefly state your grounds for it, I think is the interest of time, that will protect the record.

* * *

Mr. Johnson: With regards to the statements made by my client to, uh, Detective Weiner at the time of his shooting, at the time he was shot, uh, again, I think that, uh, it violates his 14th Amendment right to due process. I say that in the totality of the circumstances, the statement must be voluntary. One of the main examples given with regards to that type of thing is the threat of physical violence. He was shot three times. He had a gun held on him. I think under the totality of the circumstances, most certainly, that was an involuntary statement.[7]

* * *

[7] Trial counsel did not mention the statement to Officer Heger. That statement about Applicant wanting a soda is encompassed as preserved by the trial judge's remarks as to Judge Welmaker's previous rulings.

Jt #9

The Court: All right. Well, your objections are noted for the record. Of course, Judge Welmaker's previous rulings stand. As to the things he has not yet – he did not rule upon the previous trial, we'll address those as we come to them.

(Trial Record p. 23, l. 8 through p. 26, l. 14).

One of the statements at issue was made to Detective Weiner. At the scene of his arrest, Detective Weiner testified Applicant stated "He says just look me in the eye and kill me. Just get it over with." (Trial Record p. 470, ll. 15-16). The other statement was made to Officer Heger at the hospital while Applicant was being treated for gunshot wounds. Officer Heger testified that "he [Applicant] gave me a name. I can't recall what it was. But then any other question after that he would just request a soda. He wasn't answering any questions after that." (Trial Record p. 525, ll. 2-13). Applicant's request for a soda is not incriminating in any way.

Trial counsel was not ineffective for not requesting a *Jackson v. Denno* hearing at the second trial. Judge Verdin made it clear the rulings from the first trial would "stand" for the second trial and noted trial counsel's objections. Trial counsel, prior to the trial judge's statements of record, had vigorously argued that the statement by his client should not be allowed into the record as it was obtained in violation of Applicant's right to due process.[8]

The record was completely protected by trial counsel and any issues as to the voluntariness of the statements were preserved for appellate review. That is all that is required for effective assistance by trial counsel. Applicant's claims as to trial counsel's failure to request a *Jackson v. Denno* hearing at Applicant's second trial is without merit.

[8] As earlier noted, while trial counsel's argument was directed to the statements to Detective Weiner, the trial judge let stand all of the first trial judge's rulings.

Ex #10

I find, applying the *Strickland*, supra, and *Cherry*, supra, tests to Applicant's trial counsel's performance, that Applicant has failed in his burden of proof. Applicant has not proven by the greater weight or preponderance of the evidence that trial counsel's representation was below the range of competence required in criminal cases. I affirmatively find trial counsel's performance was well within the range of competence required in criminal cases.

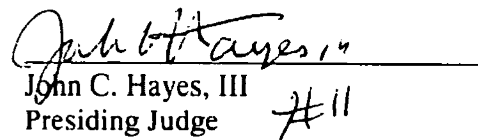
I affirmatively find trial counsel's representation of Applicant was reasonable under prevailing professional norms.

Trial counsel's representation of Applicant in no way worked to Applicant's prejudice.

Therefore, Applicant's Application for Post-Conviction Relief is denied and dismissed with prejudice.

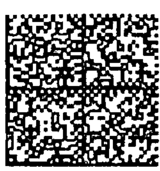
This Court hereby advises Applicant that he must file and serve a Petition for Writ of Certiorari within thirty (30) days of the service of this Order to secure appellate review. *See* Rules 203 and 243, South Carolina Appellate Court Rules (SCACR). The Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the Petition.

IT IS SO ORDERED.



December 13th, 2016
Greenville, South Carolina

John C. Hayes, III
Presiding Judge #11



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