

THE BOOZER LAW FIRM, LLC

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January 6, 2017

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

RECEIVED

JAN -9 2017

The Honorable James C. Campbell
Clerk, Sumter County
215 N. Harvin Street
Sumter, SC 29150

S.C. SUPREME COURT

RE: Joseph Dunbar, Jr., #348569, v. State of South Carolina
2014-CP-43-2351

Dear Mr. Shearouse and Mr. Campbell:

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. Dunbar in his PCR proceeding, I anticipate that the Office of Appellate Defense will represent Mr. Dunbar in this appeal.

Yours very truly,



Lance S. Boozer

Enclosures

cc: Julie Coleman, AAG
Loriene French, OAD
Joseph Dunbar, #348569

RECEIVED

JAN -9 2017

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable Jocelyn Newman, Circuit Court Judge

Case No. 2014-CP-43-2351

Joseph Dunbar, Jr., #348569,Petitioner,

v.

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

NOTICE OF APPEAL

The Petitioner appeals the Honorable Jocelyn Newman's Order dated December 20, 2016, denying post-conviction relief to the Petitioner and received by undersigned counsel on January 4, 2017. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,



Lance S. Boozer
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January 6, 2017

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. SUPREME COURT

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable Jocelyn Newman, Circuit Court Judge

Case No. 2014-CP-43-2351

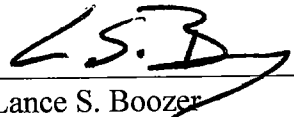
Joseph Dunbar, Jr., #348569,Petitioner,

v.

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

PROOF OF SERVICE

I, Lance S. Boozer, 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 Julie Coleman, P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 6th day of January, 2017.


Lance S. Boozer
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STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER 2016 DEC 30 PM 3:59 THIRD JUDICIAL CIRCUIT

Joseph Wadell Dunbar, Jr., #348569 (S.C. 011) FILED 2014-CP-43-2351
CLERK OF COURT
SUMTER COUNTY, S.C.

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on November 5, 2014. Respondent submitted its return on January 23, 2015. An evidentiary hearing was convened on July 26, 2016, at the Sumter County Courthouse. Applicant was present at the hearing and was represented by Lance Boozer, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. Applicant was true bill indicted at the May 2010 term of the Sumter County Grand Jury for burglary (violent) – second degree and armed robbery (2010-GS-43-0543). Will Brunson, Esquire represented Applicant. Applicant proceeded to a jury trial before the Honorable W. Jeffrey Young. Applicant was subsequently found guilty as indicted. Judge Young sentenced Applicant to thirty year term of imprisonment for armed robbery and fifteen year term of imprisonment for burglary-second degree.

A timely Notice of Appeal was filed on Applicant's behalf and an Anders brief was submitted. The South Carolina Court of Appeals dismissed the appeal. State v. Dunbar, Jr., Un.



Op. 2014-UP-353 (S.C. Ct. App. filed October 8, 2014). The Remittitur was issued on October 24, 2014.

II. ALLEGATIONS

In his current application, Applicant alleges that he is being held in custody unlawfully based on the following allegations:

1. Ineffective Assistance of Trial Counsel
 - a. Trial Counsel did not subpoena alibi witnesses.
2. Ineffective Assistance of Appellate Counsel
 - a. Appellate Counsel did not raise claim concerning unlawful identification procedure that was preserved for appeal.

III. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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 upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness

under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. With respect to guilty pleas, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

IV. 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 at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. This Court further finds all three alibi witnesses presented at the hearing to be not credible. In contrast, this Court finds Counsel's testimony to be credible and persuasive. These credibility findings have been applied to the Court's findings and conclusions set forth below.

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant has asserted an allegation of ineffective assistance of counsel. This Court finds this claim to be meritless and it is denied and dismissed with prejudice. At the evidentiary hearing, Applicant presented three witnesses that he asserted Trial Counsel should have presented at trial as alibi witnesses. Their testimony is summarized as follows:

Applicant

Applicant testified that he was arrested for this crime in Palm Beach, Florida on January 7, 2010. The crime was alleged to have taken place on January 1, 2010. He stated that he is from Florida and he lives in Boynton Beach, Florida with his father, but he had taken a trip to Sumter, South Carolina, to visit his children in November of 2009. On January 1, 2010, however, the day of the crime, Applicant testified that he was at his father's residence in Florida at a pool party.

Applicant stated that he woke up that morning at his father's house, went to a friend's house for an hour or two, left his friend's house at 12:30 P.M., and went back to his father's house to play video games with his brother. Applicant testified that he then went to his grandmother's apartment to eat, because she lived in the same apartment complex as his father. He stated that he then went to a pool party at the apartment complex around 4:00 or 4:30 P.M. with his family until it got dark. Afterwards, he stated that he went back to his father's apartment, watched television and played a game, and listened to music until he went to sleep. He testified that he did not leave Boynton Beach that day.

Applicant testified that he gave Trial Counsel a list of all of his alibi witnesses and asked him to investigate them, and Trial Counsel told him he would put up his alibi defense and call all of these witnesses to testify at trial. He stated that Trial Counsel did not call them to testify at trial because he did not subpoena them, and he never explained why. He stated that his case was scheduled for trial twice before it actually went forward, and it was continued both times for various reasons. Applicant stated that his alibi witnesses were present in court at both of the original trial dates, but they did not appear at the actual trial because they were never notified of it.

Joseph Dunbar, Sr.

Joseph Dunbar, Sr. testified that he is Applicant's father and he lives in Fort Pierce, Florida. He stated that he lived in Boynton Beach, Florida, on January 1, 2010, in an apartment complex called La Costa. Mr. Dunbar testified that Applicant came to visit him and stay at his apartment on December 5 or 6, 2009 with all of Mr. Dunbar's children.

Mr. Dunbar testified that on January 1, 2010, he woke up early, then went to see his friends. He stated that he talked with his friends for about an hour, then came back home to get ready for the pool party. He stated that Applicant was at the pool party with him that day, and he had been there all day and had no chance to get to South Carolina on that day. He testified that Crystal West and Gertrude Dunbar also attended the pool party that day. Mr. Dunbar stated that he left the pool at night time when it got dark, and Applicant left shortly after he did. He stated that Applicant then came home and was hanging out outside the apartment.

Mr. Dunbar testified that he hired Trial Counsel to represent his son, but he never met him or spoke to him. He stated that he came to Sumter twice to see his son's trial because his family called him and told him that it was scheduled for trial. He stated that Trial Counsel never contacted him about the trial. He stated that he wanted to testify at trial with his alibi.

Crystaline West

Crystaline West, or Crystal West, testified that she is married to Applicant's father, Mr. Joseph Dunbar, Sr. She stated that she lives in Fort Pierce, Florida, and she previously lived with her husband in the La Costa apartments in Boynton Beach, Florida. She testified that Applicant came to stay with them on December 4, 2009, and her children and step-children all lived there with them.



On January 1, 2010, Crystaline West testified that when she woke up and got dressed, her children and Applicant's sister Joanna were at the apartment, but Joseph Sr. and Applicant were gone. She stated that they got back home around 2:30 or 3:00 that afternoon. She testified that she was cooking food for the pool party that afternoon, and they all went to the pool until dark. She testified that, although this pool party took place on an afternoon six years prior to the evidentiary hearing, she remembered the details about the day because it was the day that Applicant taught her son how to swim.

Ms. West testified that she came to court for the first and second trial dates, and she was ready to testify on both dates. She stated that she was never contacted by Trial Counsel and she was never subpoenaed to testify at trial.

Gertrude Dunbar Cooper

Gertrude Dunbar Cooper testified that she is Applicant's grandmother, and is Joseph Dunbar Sr.'s mother. She stated that she lives in Sumter, but she lived in the La Costa apartments in Boynton Beach, Florida for thirty-five years prior to that, until November of 2013. She stated that Applicant came to stay at her apartment complex the first week of December, 2009.

Ms. Dunbar Cooper testified that, on January 1, 2010, she went for a walk early in the morning, then went to her son's apartment, where everyone was asleep. She stated that she watched television, cooked and got ready for the pool party, then went to the pool between 4:00 and 5:00 P.M. She stated that Applicant, Joseph Dunbar Sr., Crystal West and her children, and some family friends were all at the pool party that day. She testified that she left the pool around 7:00 or 7:30 that evening.

Ms. Dunbar Cooper testified that she came to the first and second dates for trial and was prepared to testify, but she was never subpoenaed to testify. She stated that she spoke with Trial

Counsel before the trial about the charges, a plea deal, and payment of legal fees, but not about testifying. She stated that she never told Trial Counsel about her alibi.

Trial Counsel

Trial Counsel testified that he filed an alibi defense in this case. However, he stated that Applicant gave him a different alibi. He stated that Applicant told him he was at home with his children in Sumter on January 1, 2010. Trial Counsel testified that he investigated two alibi witnesses, Dexter Dunbar and Janice Dunbar, but the time frame did not add up, so he abandoned the defense and did not subpoena those witnesses at trial.

Trial Counsel testified that Applicant never told him about the alibi witnesses that were presented at the evidentiary hearing. He stated that he spoke with Applicant's grandmother, Ms. Dunbar Cooper, a number of times, but she never told him about Applicant being in Florida. He stated that these witnesses appeared at the first two trial dates to support Applicant, but they never told him that they wanted to testify.

Rulings

Applicant has failed to present any probative evidence that any of Trial Counsel's actions or inactions in regard to this allegation were ineffective and prejudicial, and this allegation is denied and dismissed with prejudice.

To qualify as an alibi, a witness's testimony must account for the defendant's whereabouts during the time of the crime such that it would have been physically impossible for the defendant to commit the crime. Walker v. State, 397 S.C. 226, 237, 723 S.E.2d 610, 616 (Ct. App. 2012). In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or

otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995).

"When a PCR applicant alleges trial counsel failed to investigate or present an alibi witness, the PCR court must make two findings to determine if counsel's deficient performance constitutes prejudice under *Strickland*. First, the court must find as a matter of law whether the witness's testimony meets the legal definition of an alibi. Second, the court must assess the witness's credibility." Walker v. State, 397 S.C. 226, 238, 723 S.E.2d 610, 616 (Ct. App. 2012).

This Court finds that the alibi witnesses presented were not credible. Regardless of whether their testimony would have met the legal definition of an alibi, these witnesses are not credible and their testimony would not have changed the outcome of the trial, thus Applicant cannot satisfy the prejudice prong of the Strickland test.

Furthermore, this Court finds that Trial Counsel was not ineffective in failing to call these witnesses because he was never told about their alibi. Despite speaking to Ms. Gertrude Dunbar Cooper a number of times about the case, this Court finds very credible Trial Counsel's testimony that she never mentioned to him that Applicant was in Florida on the day of the crime. Trial Counsel credibly testified that Applicant never told him about these witnesses or their alibi, and he could not have investigated them. Furthermore, Trial Counsel credibly testified that Applicant told him a different alibi story, that he was in Sumter with his children on the day of the crime, which contradicts the alibi presented at the evidentiary hearing.

This Court accordingly finds that Applicant has presented no credible evidence that Trial Counsel was ineffective on these grounds, and this application is denied and dismissed with prejudice.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

This Court finds that Applicant has failed to present evidence on his claim for ineffective assistance of appellate counsel, and thus has failed to meet his burden of proof. Therefore, this allegation is denied and dismissed with prejudice.

ALL OTHER ALLEGATIONS

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

V. CONCLUSION


Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 20th day of December, 2016.



JOCELYN NEWMAN
Presiding Judge
Third Judicial Circuit

Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF

RECORDED IN THE COURT OF (Select one.)
 COMMON PLEAS FAMILY COURT
JUDICIAL CIRCUIT

Joseph Woodell Dunbar Jr

2016 MAR 17 PM 12:13
CLERK OF COURT
SUMNER COUNTY

CASE NO.: 2014-CP-43-2351

APPOINTMENT OF COUNSEL OR GAL

Plaintiff(s),

-vs-

State of S.C.

Defendant(s).

(Select one.)

ORDER

AMENDED ORDER

CERTIFIED TRUE COPY
OF ORIGINAL FILED

Sherry H. Hart
CLERK OF COURT
SUMNER COUNTY
SOUTH CAROLINA

TYPE OF CASE/PROCEEDING: (Check one.)

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

It appears that *Joseph Dunbar Jr*, 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:

Louise Boozer
1331 Park St
Columbia, SC 29201

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

Therefore, it is ordered that *Boozer* hereby is appointed as (Select one.)
for the above-named person. Any counsel or GAL previously appointed is/are hereby relieved.

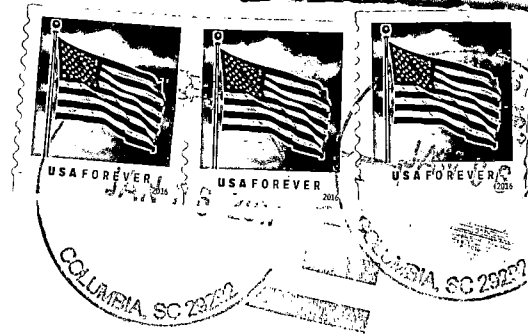
(If Death Penalty PCR Case) It is further ordered that _____, Esquire, is hereby appointed as second counsel in this capital PCR case.

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

IT IS SO ORDERED THIS 17 DAY OF *Mar*, 20 16.

THE BOOZER LAW FIRM, LLC

1400 Laurel Street, Suite 4A
Columbia, SC 29201



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