

R. MILLS ARIAIL, JR.
ATTORNEY AT LAW

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January 27, 2017

RECEIVED

JAN 31 2017

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 Michael L. Couch C.A. No.: 2014-CP-37-0433

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 Letitia H. Verdin'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 Oconee 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 OCONEE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2014-CP-37-0433

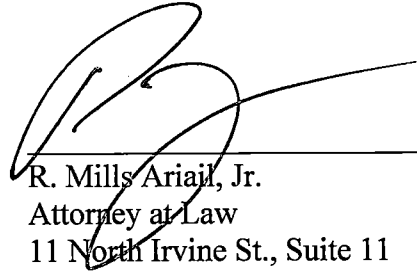
Michael L. Couch,..... Appellant,

v.

State of South Carolina Respondent.

NOTICE OF APPEAL

Appellant appeals the Honorable Letitia H. Verdin's Order of Dismissal dismissing Appellant's application for post-conviction relief. On December 28, 2016, the Honorable Letitia H. Verdin 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 January 23, 2017. A copy of the Honorable Letitia H. Verdin's Order of Dismissal is attached.



R. Mills Ariail, Jr.
Attorney at Law
11 North Irvine St., Suite 11
Greenville, SC 29601
Telephone (864) 232-9390
Facsimile (864) 232-9392
Attorney for Michael L. Couch

Greenville, South Carolina
January 27, 2017

RECEIVED

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
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Michael L. Couch,..... 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 January 27, 2017, 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:

Johanna Valenzuela, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211

Oconee County Clerk's Office
Oconee County Courthouse
PO Box 678
Walhalla, SC 29691

Michael L. Couch SCDC# 282654
Allendale Correctional Institution
1057 Revolutionary Trail F4-A-48
Fairfax, South Carolina 29827

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

Denise Tanner LaBeck

Denise Tanner LaBeck

January 27, 2017

FORM 4

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP370433

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

CLERK OF COURT
CEVELEY H. WHITFIELD
ED OCONEE COUNTY, SC

Michael L. Couch

2017 JAN 20 A 8:45

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 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: 41(b)
- 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) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

2162
Judge Code

12/15/2016
Date

CPFORM4Cm
SCCA SCRPC Form 4C (Revised 3/2013)

A TRUE COPY
JAN 20 2017
CLERK OF COURT - OCONEE COUNTY

Copies to:
Atty (P) Mills (D) Valenzuela
DSS other _____
Mailed Boxed _____ handed _____

ENTERED
[Signature]
COMPUTER

For Clerk of Court Office Use Only

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

R. Mills Ariail, Jr.

Johanna Valenzuela

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Beverly H. Whitfield

Beverly H. Whitfield Oconee County Clerk of Court
- Clerk of Court

Court Reporter

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

FILED OCONEE COUNTY, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2017 JAN 20 A 8 45

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

Michael L. Couch, SCDC # 282654,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
OF THE TENTH JUDICIAL CIRCUIT

Case No.: 2014-CP-37-0433

ORDER OF DISMISSAL

FILED OCONEE COUNTY, SC
BEVERLY H. WHITEHEAD
CLERK OF COURT
2017 JAN 20 A 8:45

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed July 29, 2014, and amended on via letter dated October 29, 2015. Respondent filed a Return on or about October 29, 2014. An evidentiary hearing into the matter was convened on October 24, 2016, at the Oconee County Courthouse. Applicant was present and represented by R. Mills Ariail, Jr., Esquire. Respondent was represented by Senior Assistant Deputy Attorney General Johanna C. Valenzuela.

Applicant and Applicant's trial counsel, E. Delane Rosemond, Esquire, testified at the hearing on October 24, 2016. This Court also had before it all relevant pleadings and documents, the Clerk of Court records for Oconee County, the South Carolina Department of Corrections' records, the transcript of Applicant's trial, and Applicant's appellate records.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Oconee County Clerk of Court. In May 2011, the Oconee County Grand Jury indicted Applicant for Attempted Murder (2011-GS-37-0391), Criminal Domestic Violence of a High and Aggravated Nature (CDVHAN) (2011-GS-37-0403), and Possession of a Weapon during a Violent Crime (2011-GS-37-0404). R. Delane Rosemond,

Esquire, represented Applicant. On October 19, 2011, Applicant proceeded to trial before the Honorable Alexander S. Macaulay and a jury. The jury found Applicant guilty of Assault and Battery of a High and Aggravated Nature (ABHAN) as a lesser included offense to Attempted Murder, CDVHAN, and Possession of a Weapon during the Commission of a Violent Crime. Judge Macaulay sentenced Applicant as follows:

- Twenty (20) years for ABHAN with five (5) years of probation upon the service of fifteen (15) years,
- Ten (10) years for CDVHAN with five (5) years of probation upon the service of five (5) years,
- Five (5) years for Poss. of a Weapon during the Comm. of a Violent Crime.

Applicant filed a timely notice of appeal. David Alexander, Esquire, of the SCCID Division of Appellate Defense, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on July 10, 2013. State v. Couch, Op. No. 2013-UP-313 (S.C. Ct. App. filed October 31, 2012). The remittitur was returned to the circuit court on August 16, 2013.

SUMMARY OF TESTIMONY

Applicant and his trial counsel, E. Delane Rosemond, Esquire, testified at trial. According to Applicant, his counsel was ineffective for failing to argue for a directed verdict based on neither victim testifying as to the knife; failing to object to the 911 call being admitted into evidence; for failing to prevent the female victim in the case from testifying in the trial and not preserving the argument of spousal immunity; for failing to object to expert witness testimony that a knife could have caused victim's injuries; for failing to argue self-defense; and for stating that Applicant "may be guilty of something" during his closing argument.

Directed Verdict

Applicant testified his counsel was deficient for failing to argue for directed verdict when neither victim testified to Applicant being in possession of a knife. Applicant acknowledged the female victim gave a written statement after the incident indicating Applicant had a knife in his hand, but Applicant noted the female victim admitted at trial that when she wrote the statement, she was taking Lortab. Applicant claimed the female victim did not observe Applicant cut the male victim. Applicant claims the doctor's testimony about the cut being done by a knife was purely speculative.

Trial counsel testified he did move for a directed verdict on the weapon charge because it was the best shot to undermine the other charges. Trial counsel testified the charge only applied to the female victim and not the male victim's charges.

911 Call

Applicant argued his counsel was ineffective for failing to object to the 911 call on the basis that no one's voice was ever identified on the call and the call was prejudicial to him. Applicant claimed he had no knowledge of the 911 call prior to going to trial.

Trial counsel noted that while his trial notes did not specifically state that he had played the 911 call for Applicant, he believes he would have played the call for him. Trial counsel's notes, specifically his trial outline, indicate he was aware the 911 call was of concern. Trial counsel explained, however, that he did not see a way to challenge the 911 call being entered as evidence.

Female Victim

Applicant testified his attorney should have explained to the female victim that she could use the Fifth Amendment to prevent her from having to testify. Applicant also argued that even

though his Trial Counsel did object on the basis of spousal immunity, that he still believed Trial Counsel was ineffective for failing to preserve the issue for appellate review.

Trial counsel testified he did object and the issue was preserved.

Expert Witness

Applicant claims his counsel was ineffective for not objecting to the expert witness testifying as to his opinion that victim's injuries could have been caused by a knife. Trial Counsel explained he saw no reason to object because he believed the witness, having been qualified as an expert, could testify as to his opinion.

Self-Defense

Applicant claims he believed trial strategy was to focus on self-defense, and he was surprised by his trial counsel abandoning that argument in closing argument.

Trial counsel explained that he and Applicant had discussed self-defense as a primary trial strategy, but as testimony developed throughout the trial it became apparent that self-defense was not going to be successful. Applicant was in one of the victims' homes, he was drinking, and he gave a written statement in which he claimed he woke up to see the female victim kissing the male victim, all of which was hard to align with self-defense. Trial counsel noted that prior to closing argument, he and Applicant discussed what trial counsel planned to argue in closing argument.

Closing Argument

Applicant argues his counsel was disloyal for stating in closing argument that Applicant was "guilty of something."

Trial counsel stated he and Applicant had discussed this strategy prior to closing arguments. Trial counsel also noted he was successful in getting the Court to charge Assault and

Battery, Third Degree, and ultimately, ensuring Applicant was only convicted of the lesser included charge of Assault and Battery of a High and Aggravated Nature instead of Attempted Murder.

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. Furthermore, this Court has had the opportunity to observe the witnesses presented at the hearing, and closely pass upon all witnesses' 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 (2003).

Ineffective Assistance of Counsel

Applicant alleges he received 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 Rule 71.1(e), SCRCP). 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 upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. at 441, 334 S.E.2d at 813. Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland, 466 U.S. at 668, 104 S.Ct. at 2064). Second, counsel's deficient performance must have prejudiced 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.

Directed Verdict

Applicant testified his counsel was deficient for failing to argue for directed verdict when neither victim testified as to client being possession of a knife. Applicant acknowledged the female victim gave a written statement after the incident indicating Applicant had a knife in his hand, but Applicant noted the female victim admitted at trial that, when she wrote the statement, she was taking Lortab. Applicant claimed the female victim did not observe Applicant cut the male victim. Applicant claims the doctor's testimony about the cut being done by a knife was purely speculative.

Trial counsel testified he did move for a directed verdict on the weapon charge because it was the best shot to undermine the other charges. Trial counsel testified the charge only applied to the female victim and not the male victim's charges. The trial transcript shows trial counsel did move for a directed verdict on Applicant's possession of a weapon charge, but when the State pointed out that the female victim's written statement was in evidence and that it identified Applicant having a knife the night of the event, along with the doctor's testimony as to victim's injuries, the Court denied the motion. (Tr. pp. 283-86.)

Applicant has failed to prove counsel was deficient or that he suffered any prejudice.

911 Call

Applicant argued his counsel was ineffective for failing to object to the 911 call on the basis that no one's voice was ever identified on the call and the call was prejudicial to him. Applicant claimed he had no knowledge of the 911 call prior to going to trial.

Trial counsel noted that while his trial notes did not specifically state that he had played the 911 call for Applicant, he believes he would have played the call for him. Trial counsel's notes, specifically his trial outline, indicate he was aware the 911 call was of concern. Trial counsel explained, however, that he did not see a way to challenge the 911 call being entered as evidence.

Applicant has failed to prove counsel was deficient or that he suffered any prejudice.

Female Victim

Applicant testified that his attorney should have explained to the female victim that she could use the Fifth Amendment to prevent her from having to testify. Applicant also argued that even though his Trial Counsel did object on the basis of spousal immunity, that he still believed Trial Counsel was ineffective for failing to preserve the issue for appellate review.

Applicant has not shown how the victim would have used the Fifth Amendment to avoid testifying and has not offered any proof she would have voluntarily used the Fifth Amendment to avoid testifying. Further, Trial Counsel had no duty to explain to the victim what her constitutional rights were.

As to the claim of spousal immunity, the Court of Appeals ruled on that matter, holding that it was the trial court's discretion to overrule Trial Counsel's objection. The Court of Appeals decision does not cite to any law suggesting it is holding Applicant's convictions or sentences

were being affirmed due to Trial Counsel's failure to preserve an issue for appeal. Applicant has not presented any evidence that Trial Counsel failed to preserve the issue for appeal.

Expert Witness

Applicant claims his counsel was ineffective for not objecting to the expert witness testifying as to his opinion that victim's injuries could have been caused by a knife. Trial Counsel explained he saw no reason to object because he believed the witness, having been qualified as an expert, could testify as to his opinion. The trial transcript shows the witness was qualified as an expert (Tr. p. 265) and that he testified that the injuries could have been caused by a knife or by a fist. (Tr. p. 270 ("And you can get cuts from punches but you can also get cuts from knives as well. That seemed a fairly smooth cut," which would be "fairly consistent with a cut with a knife."))

Self-Defense and Closing Argument

Applicant claims he believed trial strategy was to focus on self-defense, and he was surprised by his trial counsel abandoning that argument in closing argument. Applicant also argues his counsel was disloyal for stating in closing argument that Applicant was "guilty of something."

Where trial counsel articulates a valid reason for employing certain trial strategy, such conduct should not be deemed ineffective assistance of counsel. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d, 529 (1992).

Further, a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's

challenged conduct, and to evaluate the conduct from counsel's perspective at the time. State v. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985) (citing Strickland v. Washington, 104 S.Ct. 2052, 890 L.E.2d 674 (1984)). Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the range of reasonable professional assistance. Id.

Here, trial counsel explained that he and Applicant had discussed self-defense as a primary trial strategy, but as testimony developed throughout the trial it became apparent that self-defense was not going to be successful. Trial counsel noted that he and Applicant discussed what trial counsel planned to argue in closing argument before closing argument. Further, trial counsel was successful in getting the Court to charge Assault and Battery, Third Degree, and ultimately, getting Applicant convicted of the lesser included charge of Assault and Battery of a High and Aggravated Nature instead of Attempted Murder. Applicant has failed to prove counsel was deficient or that he suffered any prejudice.

Accordingly, this Court finds Applicant has failed to prove the first prong of the Strickland test: that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of Applicant.

This Court also finds Applicant has failed to prove the second prong of Strickland: that he was prejudiced by Counsel's performance. This Court concludes Applicant has not met his burden of proving counsel failed to render reasonably effective assistance.

Therefore, having reviewed the pleadings, considered the applicable law, reflected upon the testimony and evidence at trial, and considered the arguments of counsel, this Court finds Applicant is not entitled to relief.

Overwhelming Evidence

Furthermore, any alleged error was harmless and therefore did not cause Applicant any prejudice because of the overwhelming evidence presented against him at trial.

Where there is overwhelming evidence of guilt, representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); see also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001), Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (1991). In Ford, trial counsel failed to request an alibi instruction and his representation was found deficient as a result. However, the evidence of the Petitioner's guilt in Ford was overwhelming and the South Carolina Supreme Court held that the Petitioner failed to prove the second prong of Strickland, which requires that an Applicant show prejudice by the deficient representation.

Applicant can prove no resulting prejudice. Despite backing away from her statement at trial, the female victim gave a statement the night of the attack that identified Applicant as the one who attacked her with a knife. The male victim testified Applicant attacked him. The 911 call recorded the sounds of an attack from the address where Applicant was later arrested. Photographs and testimony by the treating physician showed the extensive injuries to both victims. Applicant also gave a written statement. Applicant's DNA was found on the hilt of the knife, which was collected from the scene.

Applicant was not prejudiced by any alleged deficiency by trial counsel because there was overwhelming evidence of Applicant's guilt.

CONCLUSION

Based on all the foregoing, this Court finds and concludes 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 notifies Applicant that he must file and serve a notice of appeal within thirty (30) 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 PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

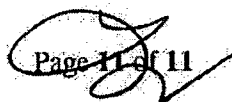
1. That the application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Respondent.

IT IS SO ORDERED.


LETITIA H. VERDIN
Presiding Judge
Tenth Judicial Circuit

FILED OCONEE COUNTY, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2017 JAN 20 A 8:45

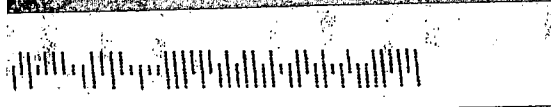
12/08/16 (date)
Greenville, South Carolina

Page 11 of 11


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 South Carolina Supreme Court
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 Columbia, South Carolina 29211

Amount