

Timothy L. Griffith Attorney at Law
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March 6, 2017

Clerk of Court, South Carolina Supreme Court
Case # 2015-CP-43-2134

Please see the included Notice of Appeal. I have also forwarded by separate mail copies to:

The Sumter County Clerk of Court
The Office of the Attorney General of South Carolina
SC Office of Indigent Defense / Commission of Indigent Defense

Please file the included NOTICE OF APPEAL for the case captioned.

Attorney Timothy L. Griffith was appointed as PCR Council and not retained and will not be handling the Appeal.

Thank You,



Timothy L. Griffith, Esquire

RECEIVED

MAR 13 2017

S.C. SUPREME COURT

**NOTICE OF APPEAL FROM A PCR DENIAL BY THE COURT OF
COMMON PLEAS**

THE STATE OF SOUTH CAROLINA
In Supreme Court of SC

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Case # 2015-CP-43-2134

RECEIVED

MAR 13 2017

S.C. SUPREME COURT

The State,

Respondent,

v.

David A. Duren # 181965

Appellant.

NOTICE OF APPEAL

David A. Duren # 181965, appeals his denial of PCR request in this case. The PCR was denied by The Honorable Jocelyn Newman where Mr. Duren requested that he represent himself and his appointed under 608 attorney Timothy L. Griffith Esquire was relieved as counsel on July 25, 2016. A Form Order was filed and recorded November 15, 2016 and received by his attorney on 11-21-2016 and an appeal was noticed. The Court filed a REMITTITUR and ORDER December 19, 2016 which remanded to circuit Court to enter a written order a copy of which is attached herewith. An Order was then filed 2/28/17 and is attached herewith. The corrected appeal follows with the required order herein attached and a copy of which is also forwarded to the SCCID Appellate Division.

Dated

3/6/17

Timothy L. Griffith, Esquire
360 W. Wesmark Blvd,
Sumter, South Carolina 29150
Telephone: (803)607-9087
Attorney for Appellant (relieved)
Will not be representing on appeal

Other Counsel of Record:
Julie A. Coleman, Esquire

Assistant Attorney General
South Carolina Attorney General's Office P.O. Box 11549
Columbia, S.C. 29211

PROOF OF SERVICE OF A NOTICE OF APPEAL

THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Case # 2015-CP-43-2134

RECEIVED

MAR 13 2017

S.C. SUPREME COURT

The State,

Respondent,

v.

David A. Duren # 181965

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the Office of the Attorney General of South Carolina, PCR Division, by U.S. Postal Service, postage prepaid, to P.O. Box 11549, Columbia, S.C. 29211, on November 21, 2016

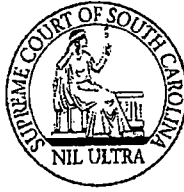
Date 03-06-2017

I received a copy of the Notice of Appeal
on this ____ day of _____, 2017

Office of the Attorney General
PCR Division



Timothy L. Griffith
2338 Mount Vernon Dr.
Sumter, SC 29154
Telephone: (803) 499-2012
Attorney for Appellant



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211

1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
www.sccourts.org

December 19, 2016

The Honorable James C. Campbell
Sumter County Judicial Center
215 North Harvin Street
Sumter SC 29150-4974

REMITTITUR

Re: David A. Duren V. State
Lower Court Case No. 2015CP4302134
Appellate Case No. 2016-002356

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

CLERK

cc: Timothy Lee Griffith, Esquire
Julie Amanda Coleman, Esquire

The Supreme Court of South Carolina

David A. Duren, Petitioner,

v.

State of South Carolina, Respondent.

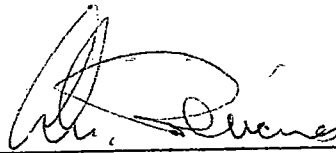
Appellate Case No. 2016-002356

Lower Court Case No. 2015CP4302134

ORDER

Petitioner has served and filed a notice of appeal from a form order dated November 9, 2016. This order, which was apparently issued after an evidentiary hearing was held in this matter, does not indicate that any full written order is to follow.

The order does not contain specific findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80. Accordingly, the order of November 9, 2016, is vacated, the notice of appeal is dismissed without prejudice, and the matter is remanded to the circuit court to enter a written order that complies with the statute.



C.J.

FOR THE COURT

Columbia, South Carolina

December 1, 2016

cc: Timothy Lee Griffith, Esquire
Julie Amanda Coleman, Esquire

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP4302134

RECORDED

2017 FEB 28 AM 11:08

David A Duren

South Carolina State of

CERTIFIED TRUE COPY
OF ORIGINAL FILED

JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

DEPUTY CLERK OF COURT
SUMTER COUNTY
SOUTH CAROLINA

PLAINTIFF(S)

DEFENDANT(S)

Attorney for: Plaintiff Defendant

Self-Represented Litigant

Submitted by: Clerk of Court

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON): Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- STAYED DUE TO BANKRUPTCY
- 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: **See attached Order.**

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.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

	2099	2/28/2017
Circuit Court Judge	Judge Code	Date

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:

David A #181965 Duren Lieber Correctional Inst/Wando
B-134 P O Box 205 Ridgeville, SC 29472
Timothy Lee Griffith 360 W Wesmark Blvd Second Floor
Sumter, SC 29150

Alan McCrory Wilson PO Box 11549 Columbia, SC
29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

James C. Campbell

Court Reporter

James C. Campbell - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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.

STATE OF SOUTH CAROLINA)
COUNTY OF SUMTER)
RECORDED)
2017 FEB 28 AM 9:19)
IN THE COURT OF COMMON PLEAS)
THIRD JUDICIAL CIRCUIT)

David A. Duren, #181965,

JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

2015-CP-43-2134

CERTIFIED TRUE COPY
OF ORIGINAL FILED.

Applicant,)

James C. Campbell
DEPUTY CLERK OF COURT
SUMTER COUNTY
SOUTH CAROLINA

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on September 14, 2015. Respondent submitted its Return and Partial Motion to Dismiss on December 3, 2015. An evidentiary hearing into the matter was convened on July 25, 2016, at the Sumter County Courthouse. Applicant was present at the hearing and was represented by Timothy Griffith, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

I. PROCEDURAL HISTORY

The records before this Court indicate that 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 2015 term of the Sumter County Grand Jury for Burglary- Second Degree (2012-GS-43-1149). Applicant proceeded pro-se at trial before the Honorable George C. James, Jr. Applicant was found guilty as indicted on May 20, 2015. Judge James sentenced Applicant to life without parole. Applicant did not appeal his conviction or sentence.

Additionally, Applicant was true bill indicted at the February 2002 term of the Sumter County Grand Jury for three counts Burglary – Second Degree and Arson Second Degree (2002-GS43-109).¹ Jack Howle, esquire represented Applicant. On April 4, 2002, Applicant pled guilty as indicted before the Honorable Clifton Newman. Judge Newman sentenced Applicant to seven year term of imprisonment for burglary – second degree for two counts of burglary-second degree and six year term of imprisonment for arson – second degree with those charges running concurrent to each other. Applicant did not appeal his guilty plea or sentence.

Applicant filed a timely application for post-conviction relief on September 14, 2015.

II. ALLEGATIONS

In his current application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. “4th, 5th, 6th, 8th, 13th, 14th, amend. Violation.”
2. Due process violation.
3. Fraud upon the court.
4. Subject matter jurisdiction
5. Ineffective Assistance of Counsel

At the evidentiary hearing, Respondent moved to dismiss any allegations pertaining to Applicant's Burglary and Arson charges from 2002 as untimely. This Court granted Respondent's motion and dismissed those allegations accordingly for Applicant's lack of due diligence in raising them. Applicant proceeded only on the allegations regarding his 2015 convictions.

III. APPLICABLE LAW

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must

¹ Applicant listed this indictment on his current PCR application.



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. 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. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption 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. First, the 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). 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.

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. 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 several allegations of ineffective assistance of counsel. This Court finds these claims to be meritless and they should be denied and dismissed with prejudice.

Based on the testimony at the evidentiary hearing as well as the trial transcript, it is clear that Applicant wished to represent himself at trial, and he relieved his prior attorney in order to represent himself. The record indicates that Applicant was deemed able to represent himself at trial after being given all proper warnings at a pre-trial hearing with Judge Cothran.

At the evidentiary hearing, prior counsel Jacob Smith testified that he met with Applicant ten to fifteen times during the brief course of his representation. He stated that he filed discovery motions, reviewed the materials with Applicant, discussed the elements of the charges, relayed the State's plea offers, and investigated possible alibi defenses. Mr. Smith stated that Applicant decided to go *pro se* and he had him relieved as counsel. Based on this testimony, this Court finds that the representation of Applicant's prior counsel did not fall below standards of professional norms. Applicant has failed to meet his burden in proving that any of the attorneys who previously represented him were ineffective, and that any alleged ineffectiveness prejudiced him in any way. Therefore, this allegation is denied and dismissed with prejudice.

DUE PROCESS

Applicant alleges that he was denied due process of law. Applicant's allegation claims infringement of his rights under certain amendments to the United States Constitution. However,



Applicant fails to set forth with specificity the grounds upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act requires that the Applicant must "... specifically set forth the grounds upon which the application is based." Section 17-27-50 of the Code of Laws of South Carolina (1976).

This Court finds that Applicant did not present any meritorious evidence of a due process violation and thus has failed to meet his burden of proof, and this allegation is denied and dismissed with prejudice.

SUBJECT MATTER JURISDICTION

Applicant has claimed that the trial court lacked subject matter jurisdiction. Defects in the indictment do not affect subject matter jurisdiction. Subject matter jurisdiction is the power of a court to hear a particular class of cases. See State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994).

An applicant may still challenge the subject matter jurisdiction of the trial court, and such a claim is one that may be raised at any time. See Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001), overruled in part by Gentry, supra. However, "[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters." Gentry, supra, 610 S.E.2d at 499; See also S.C. Const. Art. V, § 7. Thus, to meet his burden, Applicant must present evidence that his case is of some class over which the circuit court does not have the authority to preside. Applicant's conviction involved a criminal charge in General Sessions Court. Thus, the circuit court had subject matter jurisdiction. Therefore, because Applicant has failed to meet his burden in proving that the court lacked subject matter jurisdiction, this allegation is denied and dismissed with prejudice.



FAILURE TO STATE A CLAIM

Applicant further alleges various constitutional violations as well as fraud upon the court. This Court finds these allegations to be meritless, as Applicant has failed to state a claim that is cognizable under the Uniform Post-Conviction Relief Act, S.C. Code Ann. § 17-27-10 to -160.

An applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy....

S.C. Code Ann. § 17-27-20 (1976).

Even if the facts alleged by Applicant are true, these facts do not support a cognizable claim for post-conviction relief under any of the statutory grounds. The allegations presented by Applicant raises direct appeal issues that are procedurally barred by S.C. Code Ann. § 17-27-20(b) (1985). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d

501 (1973). Therefore, this allegation is denied and dismissed as it is not proper in a post-conviction relief action.

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), SCRCP, 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.

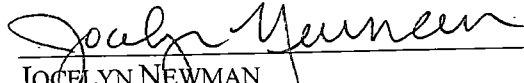
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IT IS THEREFORE ORDERED:

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.

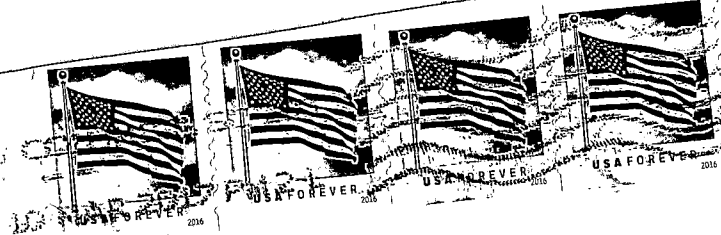
AND IT IS SO ORDERED this 22nd day of February, 2016¹⁷.


JOCELYN NEWMAN
Presiding Judge
Third Judicial Circuit

Columbia, South Carolina

Timothy L. Griffith, Attorney at Law
360 West Wesmark Blvd, 2nd Floor
Sumter, SC 29150

Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211



29211-133030

