

# The Law Office of Tristan M. Shaffer

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Litigation • Injury Law • Criminal Defense

March 27, 2017

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

**RECEIVED**

MAR 30 2017

**S.C. SUPREME COURT**

Re: Henry James Ross v. State 2014-CP-16-0456

Dear Mr. Shearouse,

Please find the enclosed Notice of Appeal, Certificate of Service, and Order of Dismissal in the above referenced case.

Sincerely,



Tristan M. Shaffer

CC:  
Valerie Giovanoli  
Darlington County Clerk of Court  
Paula Murdoch

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM DARLINGTON COUNTY  
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2014-CP-16-0456

Henry J. Ross, Jr. # 306790,

Petitioner,

v.

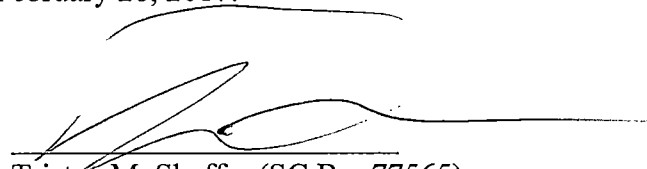
The State of South Carolina,

Respondent.

NOTICE OF APPEAL

Petitioner appeals the order dismissing his post-conviction relief action filed on February 24, 2017. This order was received by Petitioner on February 28, 2017.

March 27, 2017



Tristan M. Shaffer (SC Bar 77565)  
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Attorney for Petitioner

Other Counsel of Record:  
Valerie Giovanoli  
South Carolina Attorney General's Office  
P.O. Box 11549  
Columbia, South Carolina 29211  
Attorney for Respondent

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**S.C. SUPREME COURT**

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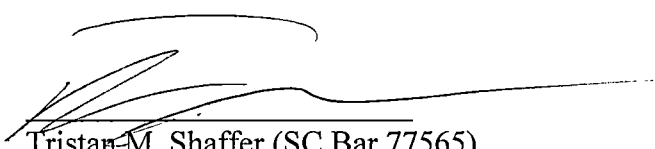
The State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that on the date below I served the Notice of Appeal on The State of South Carolina by mailing a copy to the Attorney General's Office at P.O. Box 11549, SC 29211.

March 27, 2017



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Attorney for Respondent

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MAR 30 2017

**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF DARLINGTON )  
 )  
 Henry James Ross, Jr., )  
 S.C.D.C. No. 306790, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 OF THE FOURTH JUDICIAL CIRCUIT

**TRUE CERTIFIED COPY,**

2014-CP-16-0456

*Scott B. Suggs*  
**CLERK OF COURT/RMC  
 DARLINGTON COUNTY, SC**

**ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed June 9, 2014. Respondent made its return on November 19, 2014. An evidentiary hearing was held on July 20, 2016, at the Chesterfield County Courthouse. Applicant was present and represented by Tristan M. Shaffer, Esquire. Caitlin Bazan Hastings, Esquire, of the South Carolina Office of the Attorney General represented Respondent.

Applicant and his trial counsel, Matthew S. Swilley, Esquire, testified at the hearing. The Court had before it Applicant's trial transcript, the Darlington County Clerk of Court records, the South Carolina Department of Corrections records, Applicant's appellate records, Applicant's PCR application and amendments, and the Return.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Darlington County Clerk of Court. In July 2010, the Darlington County Grand Jury indicted Applicant for first degree burglary (2010-GS-16-774), armed robbery (2010-GS-16-775), assault and battery of a high and aggravated nature (2010-GS-16-776) and possession of a weapon during the commission of a violent crime. Matthew S.

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 CLERK OF COURT/RMC  
 DARLINGTON COUNTY, S.C.

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Swilley, Esquire, represented Applicant. On January 31, 2011, Applicant proceeded to trial before the Honorable Howard P. King and a jury. On February 4, 2011, the jury found Applicant guilty of first degree burglary. The jury found Applicant not guilty of all other charges. Judge King sentenced Applicant to twenty-five (25) years imprisonment for first degree burglary.

Applicant filed a timely notice of appeal, and Breen Richard Stevens, Esquire, of the Office of Appellate Defense perfected the appeal with the filing of an Anders<sup>1</sup> brief. The South Carolina Court of Appeals dismissed Applicant's appeal on February 5, 2014. State v. Ross, Op. No. 2014-UP-52 (S.C. Ct. App. filed February 5, 2014). The remittitur was returned to the circuit court on February 25, 2014.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

#### Ineffective Assistance of Counsel

In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing SCRCP 71.1(e)). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d

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<sup>1</sup> Anders v. California, 386 U.S. 738 (1967).

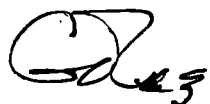


at 814.

First, the applicant must show that counsel's performance "fell below an objective standard of reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. " Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Second, Counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; see Strickland v. Washington, 466 U.S. 668, 688, 692, 104 S. Ct. 2052, 2065, 2067 (1984) ("[T]he defendant must show that counsel's representation fell below an objective standard of reasonableness [and] . . . any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution."); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) ("PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case.").

And "where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006 (citing Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992))). "Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds



from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (quoting Strickland, 466 U.S. at 690, 104 S.Ct. 2052). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Id. (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)).

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

Applicant alleged Trial Counsel failed to contest alleged violations of Applicant's Miranda Rights; failed to object to portions of the Solicitor's closing statement; failed to move to quash the indictment; failed to present a defense of third party guilt; and alleged due process violations from Trial Counsel's alleged ineffectiveness.

#### **I. Alleged violation of Applicant's 6th Amendment Rights**

At the hearing, PCR Counsel moved to amend Applicant's PCR application to include an allegation that Applicant's 6th Amendment rights were violated by the Darlington police officers investigating Applicant's case. With this new amendment, PCR Counsel alleged that Applicant possibly exercised his 6th Amendment Right to Counsel at his bond hearing by filling out a general form in which he requested a public defender. Filling out this form is standard procedure in some counties throughout the State. After his bond hearing, Applicant was immediately taken to the police station where he was mirandized and questioned by officers. This Court allowed PCR Counsel to amend Applicant's application and kept the record open allowing PCR Counsel



to provide this Court and the South Carolina Attorney General's Office with any further information he found that indicated Applicant was already represented by a public defender when he was taken to the station to be questioned after his bond hearing. PCR Counsel has provided no further information on this allegation. Accordingly, this Court finds that this allegation cannot be further considered and must, therefore, be denied and dismissed with prejudice.

**II. Alleged failure to contest alleged violations of Applicant's Miranda Rights**

At the hearing, Applicant testified that Trial Counsel was ineffective for failing to contest alleged Miranda violations that occurred during the investigation of his case. Applicant testified that the two statements he gave the police were not knowing and voluntary and, therefore, violated his rights. Applicant testified that although he confessed via a video statement in which he was mirandized, his confession "was not correct." Applicant stated that he was "blind to the law," and thought that the police would "leave him alone if he said what they wanted him to." Trial Counsel testified that he did make a motion to suppress both Applicant's pre-arrest and post-arrest statements made to the police. A Jackson v. Denno hearing was subsequently held. During the hearing, Trial Counsel testified that he argued that Applicant's "will had been overborne" by the police, and the State could therefore not show voluntariness. However, the trial judge denied both Trial Counsel's motions, allowing both statements to come into evidence.

This Court finds Applicant has failed to meet his burden of establishing that Trial Counsel was ineffective for failing to contest the alleged violations of Applicant's Miranda rights. At the beginning of the trial, Trial Counsel moved to suppress both statements Applicant made to the police while being questioned. Accordingly, the trial court held a Jackson v. Denno hearing. After the hearing, the trial court found that both the pre-arrest and post-arrest statements



made by Applicant were “knowingly, intelligently, [and] voluntarily made.” (Tr. p. 33-95). Therefore, this Court finds Trial Counsel acted within “reasonable professional norms.” Further, this Court finds Applicant can show no prejudice as a result of Trial Counsel’s alleged deficiency. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

### **III. Alleged failure to object to portions of Solicitor’s Closing Statement**

Applicant asserts that Trial Counsel was ineffective for failing to object to portions of the Solicitor’s closing statement that were designed to appeal to the passions and prejudices of the jury. Trial Counsel testified that he’s not aware of anything in the Solicitor’s closing that he should have objected to and explained it is his practice to object to closing remarks if necessary.

This Court finds that Applicant has failed to meet his burden of establishing that Trial Counsel was ineffective for failing to object to the Solicitor’s closing remarks. Further, this Court finds that Trial Counsel acted within “reasonable professional norms,” and Applicant can show no prejudice as a result of Trial Counsel’s alleged deficiency. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

### **IV. Alleged failure to move to quash the indictment**

Applicant asserts that Trial Counsel was ineffective for failing to move to quash Applicant’s indictments. Applicant alleges that his indictments are in violation of S.C. Code Ann. § 14-9-210 because they were true billed before the grand jury convened. Applicant testified that his indictments show that they were true billed on July 15, 2010, but that the grand jury did not convene until July 19, 2010. Trial Counsel testified that he did not remember there being an issue with Applicant’s indictments. When questioned about the conflicting dates, Trial Counsel still testified that he did not believe this was an issue for Applicant’s case. Trial Counsel

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further testified that the Grand Jury convenes in secret, so it's not uncommon for there to be errors reflecting the dates.

During the first term of general sessions of the calendar year, the county grand jury is empaneled. Brown v. State, 316 S.C. 258, 260, 449 S.E.2d 494, 495 (1994). "By Administrative Order of the Chief Justice, the Chief Judge for Administrative Purposes in each judicial circuit is responsible for scheduling when the grand jury in each county within the circuit will convene to receive evidence and deliberate." Id. Once the grand jury has convened and deliberated, it reports its findings as either "True Bill" or "No Bill" to the court of general sessions. Id. This report may be made on the same day as the grand jury's deliberations, or it may be at some earlier or later time. Id. In certain counties, it is not out of the ordinary for the grand jury to take action on indictments on a date which is earlier than the date on which they make their report to the court of general sessions. Id.

This Court finds Applicant has failed to meet his burden of establishing that Trial Counsel was ineffective for failing to move to quash his indictments. Further, this Court finds that Trial Counsel acted within "reasonable professional norms," and Applicant can show no prejudice. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

**V. Alleged failure to present third party guilt as a defense**

Applicant asserts that Trial Counsel was ineffective for failing to present a defense of third party guilt at his trial. After the Court denied Trial Counsel's motion to suppress Applicant's confession, Trial Counsel testified that his strategy was to show that Applicant confessed due to fear and that the police had no evidence directly linking Applicant to his charges other than his confession. The theme of Trial Counsel's closing statement was "Where's

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the beef?" (T. p. 267-69). Trial Counsel argued that the State did not have any meat in their hamburger; it only had the buns. Throughout his examinations, Trial Counsel illuminated how the State had no knife despite the Victim's claims that one was used during the commission of the crime. Trial Counsel also argued the State had no matching prints or DNA from Applicant from the Victim's home either. Further, Trial Counsel testified that he did try to introduce evidence of potential third party guilt at trial by showing that on the incident report another man was listed as the suspect (T. p. 169-70).

This Court finds Applicant has failed to meet his burden of establishing Trial Counsel was ineffective for failing to present a defense in Applicant's case. This Court further finds that Trial Counsel acted within "reasonable professional norms," and Applicant can show no prejudice. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

#### **VI. Alleged Due Process Violations**

Applicant asserts that he suffered due process violations due to Trial Counsel's alleged ineffectiveness. This allegation appears to be merely recitations of his other grounds for relief. Therefore, this Court finds that this allegation is without merit and must be denied and dismissed with prejudice.

#### **All Other Allegations**

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



**CONCLUSION**


Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial. Trial Counsel was not deficient in any manner, and Applicant was not prejudiced by his representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

**IT IS THEREFORE ORDERED:**

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That Applicant be remanded to the custody of Respondent.

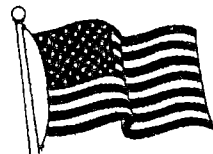
AND IT IS SO ORDERED this 17 day of February, 2017.

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

Cooper, South Carolina.

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SCOTT B. SUGGS  
CLERK OF COURT/R.O.D.  
DARLINGTON COUNTY, S.C.

FILED



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