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APR 07 2017

April 5, 2017

S.C. SUPREME COURT

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

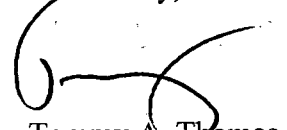
RE: Dominique R. Johnson #362300 v. State of South Carolina
Docket No.: 2015-CP-02-1417

Dear Sir or Madam:

Enclosed please find an Original and a copy of a Notice of Appeal, along with a Certificate of Service and attachments. I was retained to represent Mr. Johnson for his Post-Conviction Relief Action. However, as of this date, I have not been retained to represent Mr. Johnson on Appeal. I have sent Mr. Johnson an Affidavit of Indigency and will provide it to Appellate Defense for consideration as soon as I receive it back from Mr. Johnson.

Kindly return a clocked copy to me in the enclosed envelope. Thank you and should you have any questions, or need any additional information, please do not hesitate to contact me.

Yours truly,


Tommy A. Thomas,
Attorney at Law

TAT/jem
cc: Julie A. Coleman, Esq.
Dominique R. Johnson #362300
Appellate Defense

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Post Conviction Relief

Maite Murphy, Circuit Court Judge

Docket No.: 2015-CP-02-1417

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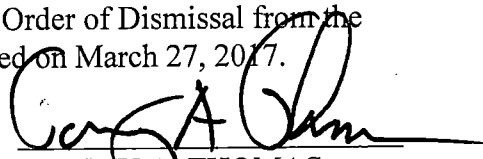
Dominique Roscell Johnson #362300,..... Appellant,

vs.

State of South Carolina,Respondent.

NOTICE OF APPEAL

Dominique Roscell Johnson #362300 appeals the Order of Dismissal from the Honorable Matie Murphy dated March 13, 2017 and received on March 27, 2017.


TOMMY A. THOMAS
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Other Counsel of Record:

Julie Coleman, Esq.
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Attorney for Respondent

Irmo, South Carolina
April 5, 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Post Conviction Relief

Maite Murphy, Circuit Court Judge

Docket No.: 2015-CP-02-1417

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S.C. SUPREME COURT

Dominique Roscell Johnson #362300,..... Appellant,

vs.

State of South Carolina,Respondent.

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for the Appellant hereby certify that I placed in the United States Mail, a copy of a Notice of Appeal , with postage prepaid and the return address clearly shown on said envelope to Valerie Garcia Giovanoli, Esq. of the Attorney General's Office, at:

Julie Coleman Esq.
Attorney General's Office
P.O. Box 11549
Columbia, SC 29211-1549



Jacquelyn E. Miller
Secretary to Tommy A. Thomas
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April 5, 2017

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)
Dominique Roscell Johnson, #362300,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

2015-CP-02-01417

ORDER OF DISMISSAL

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on June 12, 2015. Respondent submitted its return on July 27, 2016. An evidentiary hearing was convened on January 23, 2017, at the Bamberg County Courthouse. Applicant was present at the hearing and was represented by Tommy Thomas, 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 Aiken County Clerk of Court. In August 2014, the Aiken County Grand Jury indicted Applicant for Attempted Murder (2014-GS-02-01159), Possession of a Firearm during Commission of or Attempt to Commit a Violent Crime (2014-GS-02-01160), and Unlawful Carrying of a Pistol (2014-GS-02-01161). Robert J. Harte, Esquire, represented Applicant. On December 2, 2014, Applicant pled guilty to the lesser included offense of Assault and Battery of a High and Aggravated Nature (2014-GS-02-01159), and Applicant pled guilty as indicted for Possession of a Firearm during Commission of or Attempt to Commit a Violent Crime (2014-GS-02-01160). In accordance with

the plea agreement the charge of Unlawful Carrying of a Pistol (2014-GS-02-01161) was *nolle prosequi*. Following a recommendation by the State, the Honorable Doyet A. Early, III sentenced Applicant to twelve years' imprisonment for the lesser included offense of Assault and Battery of a High and Aggravated Nature (2014-GS-02-01159) and five years' imprisonment for Possession of a Firearm during Commission of or Attempt to Commit a Violent Crime, to be served concurrently.

Applicant filed a timely notice of appeal. The South Carolina Court of Appeals dismissed Applicant's appeal on March 4, 2015, for the Appellant's failure to provide a sufficient explanation for appealing a guilty plea as required by Rule 203(d)(1)(B)(iv) of the South Carolina Appellate Court Rules (SCACR). The Remittitur was issued on April 3, 2015.

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 Counsel
 - a. "Failed to Investigate Mental Health Incompetency"
 - b. "Failed to Conduct Pre trial Investigation"

In a document entitled "Memorandum of Law in Support of Post-Conviction Relief Application" the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. "The Applicant Mother informed trial counsel at hand that her son has a mental health background and was seen by the Aiken Barnwell mental health, and the applicant has been diagnosis (sic) with "ADHD" and the applicant medication call Adderall slows mental activity down. Counsel prejudice applicant by failing to investigate and retrieve Mental Health records."
 - b. "the petitioner argues his counsel was ineffective for failing to request mental examination which may have formed the basis of

an insanity defense or a determination that he was not competent to stand trial.”

- c. “Trial Counsel prejudice Applicant by advise applicant plea guilty without thoroughly reviewing Brady material which would have reveal missing Exculpatory Evidence which is not List in Chain of Custody Report”
- d. “Trail Counsel Prejudice Applicant by advising the Applicant to Plea Guilty without conducting a pre-trial investigation Requesting the Ballistic Report to determine what caliber Bullet or what type of gun that was used during shooting.”

2. Due Process Violation

- a. “[Applicant] was mentally incompetent at the time of this crime in 2015 and at the guilty plea, 2014...the conviction of an accused person who is not mentally competent to stand trial violates due process.”

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. GUILTY PLEA TRANSCRIPT

Before the evidentiary hearing on January 23, 2017, Respondent informed this Court that the transcript from the guilty plea was no longer in existence and needed to be reconstructed.¹ Respondent presented testimony from Jay Slocum, Esquire, who prosecuted the case, and Plea Counsel Robert J. Harte, Esquire, who were both present at the plea. After testimony was presented, this Court found that the guilty plea record had been reconstructed.

V. SUMMARY OF RELEVANT TESTIMONY

At the evidentiary hearing, Applicant testified on his own behalf and presented testimony from LaQuan Holston, and Trial Counsel, Robert J. Harte, Esquire. Following the hearing, the record was left open for ten days to allow Applicant to provide additional testimony. Applicant filed an affidavit of testimony from witness Jerome Dunbar.

¹ The audio tapes from Applicant's guilty plea were lost and could not be recovered.

Applicant

Applicant testified that the event from which his conviction stemmed took place in the summer. He stated that there had been an argument between himself and the Victim earlier that day. He testified that there was a barbecue at the Victim's house, and Applicant drove to the house, spoke to the Victim, and got into another argument. He stated that as he was getting back into his car to leave, the Victim punched him in the face. Applicant stated that as he drove away, he turned behind him and shot a gun out the window. He stated that his shot hit the Victim and he fell to the ground. The Victim was killed by the gunshot.

Applicant testified that he was originally charged with three crimes, but he pled guilty to Assault and Battery of a High and Aggravated Nature. He stated that he was facing a potential sentence of 36 years if he went to trial, but he pled guilty and received a twelve year sentence. He stated that he met with Plea Counsel four or five times prior to his guilty plea. He testified that he was going to raise "stand your ground" as a defense and he wanted to go to trial, but none of his witnesses were subpoenaed at the "stand your ground" hearing, so it was not successful, and he pled guilty immediately after the hearing. He stated that they did not receive the discovery until they went to court. He stated that he wanted Plea Counsel to use a video that a witness had recorded on his phone of the fight before the shooting.

Applicant testified that he did not go looking for the Victim, but he shot him because the Victim "did him wrong." He stated that he gave law enforcement a statement admitting that he shot the Victim, and there was never any question that he shot the Victim. He testified that he thought that he would get parole when he pled guilty, and he did not find out until after he pled that he was not parole eligible.

Applicant testified that he was diagnosed with ADHD in the fifth or sixth grade and he took medication for it. He stated that Plea Counsel never asked him if he had ADHD. Applicant testified that his strategy was self-defense. He stated that he was afraid of the Victim because he knew that he carried registered guns. He stated that he was not on the Victim's property; he was parked on the side of the road. Applicant stated that someone was shooting at him after he shot the Victim as he was driving away, so he knew that they had guns.

LaQuan Holston

LaQuan Holston testified that he attended the barbecue at which the crime took place. He stated that he saw Applicant in his car, and his car was surrounded by people. He stated that there were probably seventy-five people at the party. He testified that he was not close to where the car was, so he could not see what was happening very well, but he did not see anyone carrying a gun. He stated that he was not subpoenaed to testify at the evidentiary hearing, and he would have been willing to testify at the "stand your ground" hearing even if he had not been subpoenaed. Mr. Holston testified that he did not believe that Applicant intended to shoot the Victim.

Plea Counsel

Plea Counsel testified that he was appointed to Applicant's case on July 8, 2014, and he met with Applicant five or six times prior to his guilty plea. He stated that he specifically recalled reviewing and discussing the discovery with Applicant. Plea Counsel stated that Applicant never informed him of any mental competency issues, and he had no reason at the time to consider having him evaluated for competency.

Plea Counsel testified that Applicant wanted a trial on his charges in September, but Plea Counsel requested a continuance. He stated that there were some complaints from the Victim's

family and friends about improper contact from Applicant. Plea Counsel stated that the "stand your ground" hearing took place on December 1, the day before Applicant pled guilty. He stated that the State called three or four witnesses at the hearing, including the Victim's mother and some other ladies who attending the barbecue. He stated that there were substantial discrepancies in their statements, and he brought these out on cross-examination.

Plea Counsel testified that he investigated and gathered affidavits from two witnesses, one of which was LaQuan Holston, who did not actually see what happened during the shooting. Plea Counsel stated that, even though the "stand your ground" hearing was not successful, he still could have argued "stand your ground" to a jury at trial. However, Plea Counsel stated that he did not believe that the argument would have been successful at trial.

Plea Counsel testified that he had adequate time to prepare for trial and there was no need to hire a private investigator. He stated that Applicant gave him names of potential witnesses, and Plea Counsel investigated and spoke with them and put their names on the witness list. Plea Counsel testified that he had no knowledge of the cell phone video of the fight because Applicant never told him about it. He stated that, at the "stand your ground" hearing, the audio tape of Applicant's confession to law enforcement was played in which Applicant admitted to shooting the Victim as he was driving away.

Plea Counsel testified that he still does not think that the witnesses from the barbecue, including LaQuan Holston, would have been helpful at trial. He testified that Applicant told him that shots were fired at him as he was driving away, but other witnesses he spoke to did not confirm that story. He stated that there was no reason to do a ballistics test because Applicant admitted that he shot the Victim.

VI. 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. Each allegation presented at the evidentiary hearing is addressed below.

Mental Competency

Applicant alleges that Plea Counsel was ineffective for failing to have him evaluated for mental competency. This allegation is meritless.

A defendant must be mentally competent to stand trial to assist counsel in his defense. Drope v. Missouri, 420 U.S. 62 (1975). In determining if counsel is ineffective for failing to request a competency hearing, an applicant must show that a reasonable probability exists that he would be found incompetent at the time of this trial or plea. Jeter v. State, 308 S.C.230, 417 S.E.2d 594 (1992). Counsel may reasonably rely on his own perceptions in deciding if a client is competent to stand trial. Id.

This Court finds that Applicant did not meet his burden of proof under Strickland in showing that Plea Counsel was ineffective in this regard. Plea Counsel testified there was no reason at the time to think that Applicant needed to be evaluated for competency. Applicant never mentioned this as a concern to Plea Counsel, and the plea court questioned Applicant on his mental state during the guilty plea.

This Court considered the testimony of Plea Counsel to be credible and concludes his investigation into Applicant's mental health was adequate given all the facts available to him at the time. Moreover, even if Plea Counsel was ineffective in this regard, Applicant failed to show that he was prejudiced as a result. Therefore, this allegation is denied and dismissed with prejudice.

Failure to Investigate

Applicant alleges that Plea Counsel was ineffective for failing to conduct a pre-trial investigation. This allegation is meritless.

Plea Counsel credibly testified that he investigated and spoke with multiple witnesses in this case, including LaQuan Holston, who testified at the evidentiary hearing. He gathered affidavits and had their names on the witness list for trial. There was no reason to hire an investigator or have a ballistics test, as Applicant had already given a statement admitting that he shot and killed the Victim. This Court finds that Plea Counsel's investigation was adequate given all the facts available to him at the time. Furthermore, even if Plea Counsel had been deficient in this regard, Applicant has shown no prejudice resulting from this deficiency. Applicant pled guilty and has not met his burden in proving that he would have gone to trial rather than plead guilty if Plea Counsel would have investigated further.

Applicant has failed to prove either prong of the Strickland test, and this allegation is denied and dismissed with prejudice.

Failure to present witnesses at "Stand Your Ground" hearing

Applicant alleges in supplemental evidence presented that Plea Counsel failed to present witnesses at his "stand your ground" hearing, which resulted in him choosing to plead guilty rather than go to trial. This allegation is meritless.

Plea Counsel credibly testified that he thoroughly cross-examined the State's witnesses at the hearing and pointed out their inconsistencies. He stated that he investigated all witnesses that Applicant provided him with information about and spoke to them. He stated that these witnesses were not very helpful and could not corroborate Applicant's version of the events.

This Court finds that Plea Counsel was not ineffective in choosing not to call these witnesses at the hearing. Furthermore, even if Plea Counsel had called witness LaQuan Holston to testify at the hearing, this Court finds that it does not create a reasonable probability that the result of the proceeding would have been different. Therefore, Applicant has failed to meet his burden of proof and this allegation is denied and dismissed with prejudice.

DUE PROCESS VIOLATION

Applicant alleges that he was denied due process of law. However, Applicant failed 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." S.C. Code Ann. § 17-27-50. In an application for post-conviction relief, it is incumbent upon the Applicant to make at least a *prima facie* showing that would entitle him to relief before an evidentiary hearing will be held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140

S.E.2d 784 (1965). Since the Applicant has failed to make even a prima facie showing, this Court finds that this allegation should be dismissed for failing to meet the requirements of the Uniform Post-Conviction Procedures Act. Applicant presented no credible evidence proving that he was denied due process in any manner. Accordingly, 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.

VII. CONCLUSION

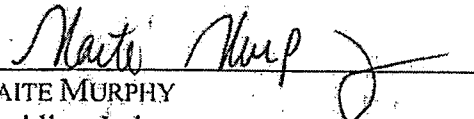
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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:

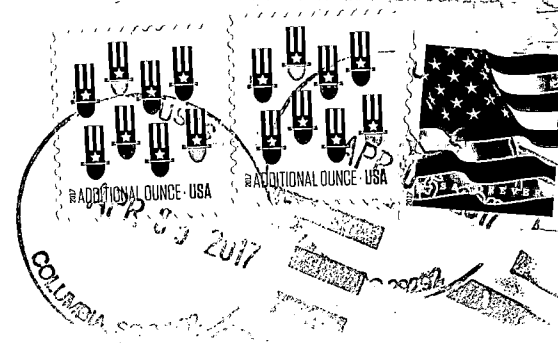
1. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 13 day of March, 2017.


MAITE MURPHY
Presiding Judge
Second Judicial Circuit

S. Matthews South Carolina

Tommy A. Thomas, P.C.
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