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May 8, 2017

Clerk of Court, South Carolina Supreme Court
Case # 2016-CP-43-0632

Tre'Vaughn Jackson #349787 v State of South Carolina

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,

A handwritten signature in black ink, appearing to read 'Timothy L. Griffith', with a large, sweeping flourish at the end.

Timothy L. Griffith, Esquire

**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

The Honorable Brian Gibbons , Circuit Court Judge

Case # 2016-CP-43-0632

The State,

Respondent,

v.

Tre'Vaughn Jackson #349787

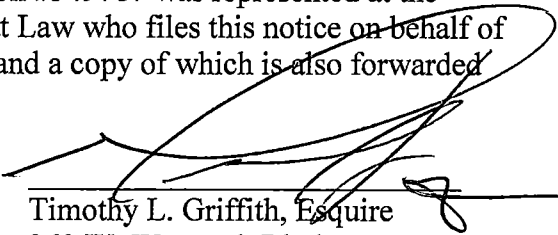
Appellant.

NOTICE OF APPEAL

Tre'Vaughn Jackson #349787, appeals the decision of the Court, on November 8, 2016, where Mr. Tre'Vaughn Jackson #349787 was denied his request for Post Conviction Relief. Mr. Tre'Vaughn Jackson #349787 was represented at the hearing by Timothy L. Griffith, Attorney at Law who files this notice on behalf of the Appellant. The order herein attached and a copy of which is also forwarded to the SCCID Appellate Division.

Dated

May 8, 2017



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

The Honorable Brian Gibbons, Circuit Court Judge

Case # 2016-CP-43-0632

The State,

Respondent,

v.

Tre'Vaughn Jackson #349787

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 May 8, 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
360 West Wesmark Blvd
Sumter, SC 29150
Telephone: (803) 607-9087
Attorney for Appellant

STATE OF SOUTH CAROLINA)
COUNTY OF SUMTER)
Tre'Vaughn Jackson, #349787,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

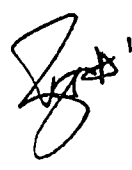
2016-CP-43-632

ORDER OF DISMISSAL

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on April 11, 2016. Respondent submitted its return on September 30, 2016. An evidentiary hearing was convened on November 8, 2016, at the Williamsburg 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 currently incarcerated with the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. Applicant was indicted by the November 2013 term of the Sumter County Grand Jury for two counts of Attempted Murder, one count of Possession of a Weapon During the Commission of a Violent Crime, one count of Unlawful Carrying of a Pistol, and one count of Discharging a Firearm Into a Dwelling (2013-GS-43-1067). Tiffany Butler, Esquire, represented Applicant. On August 28, 2014, Applicant proceeded to a jury trial pursuant to which he was found guilty as indicted for both counts of Attempted Murder, Possession of a Weapon During the Commission of a Violent Crime, and Discharging a Firearm Into a Dwelling.



The count of Unlawful Carrying of a Pistol charge was dismissed. The Honorable W. Jeffrey Young sentenced Applicant to a thirty year term of imprisonment for each count of Attempted Murder, to run consecutively, as well a concurrent sentence of five years' imprisonment for Possession of a Weapon During the Commission of a Violent Crime and ten years' imprisonment for Discharging a Firearm Into a Dwelling.

A notice of appeal was filed on Applicant's behalf and an appeal perfected pursuant to Anders v. California, 378 U.S. 738, 87 S. Ct. 1396 (1967). The South Carolina Court of Appeals dismissed Applicant's appeal. State v. Jackson, Op. No. 2016-UP-116 (filed on March 2, 2016). The Remittitur was issued on March 18, 2016.

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. "...failing to object to the trial court's accomplice liability instructions when there was no evidence presented during trial to support such an instruction." (sic)
 - b. "...when counsel failed to object to the trial court's jury instruction of the hand of one is the hand of all charge, especially in light of the trial court's request to counsel "any objection to the charge under the facts of this case?" Counsel merely stated "for the record" without establishing any particular argument as to why the instruction did not fit the facts of the case." (sic)
 - c. "...for failing to request a jury instruction on the lesser-included offense(s) of assault and battery with a high and aggravated nature and assault and battery in the first degree" (sic)
 - d. "...for failing to object to the trial court's jury instructions on "express malice" when the court used "hypothetical examples" of Applicant's case, that a reasonable jurist could have concluded was a comment on the facts of the case." (sic)
 - e. "...for failing to object to the consecutive sentences handed down by the court since the crimes stemmed from a continuous course of conduct."
 - f. "...for failing to object to the trial court's jury instructions when the court instructed the jury that "a specific intent to kill is not an element of attempted murder, but there must be a general intent to commit serious



- bodily injury.”
- g. “...for failing to impeach State’s witness Lenard J. Johnson with this prior inconsistent statements made to trial counsel’s investigation that contradicted his trial testimony on material points”
2. “Denial of 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. SUMMARY OF RELEVANT TESTIMONY

At the evidentiary hearing, Applicant presented testimony from Trial Counsel Tiffany Butler, Esquire. Applicant did not testify.

Trial Counsel testified that she was appointed to represent Applicant as an Assistant Public Defender. She stated that she met with Applicant several times at the jail while he was incarcerated. Trial Counsel stated that she filed Rule 5 and Brady motions and she reviewed the discovery material with Applicant. She testified that the State's evidence against Applicant included statements from 3 or 4 witnesses who were at the site of the shooting and identified Applicant as the shooter. She stated that two shell casings were recovered at the scene but no weapon was recovered. She stated that Applicant gave a statement denying his involvement and his presence at the scene.

Trial Counsel testified that she hired an investigator to locate and speak to all the witnesses and to thoroughly investigate the forensics from the crime scene. She stated that Applicant did not give her any names of potential witnesses to investigate. She stated that her trial strategy was to attack the credibility of the State's witnesses through impeachment and highlight to the jury the chaos that surrounded the crime scene during the shooting.

Trial Counsel testified that there was no reason to object to the trial court's accomplice liability instructions or to the "hand of one hand of all" instructions because law enforcement never found the person who was allegedly with Applicant during the shooting. She stated that she could not recall why she did not request an instruction on the lesser-included offense, but she opined that it was possible that she did not want to include an additional way to be found guilty



if Applicant could have been found not-guilty of the original charge. Trial Counsel testified that she did not see anything objectionable about the trial court's hypothetical examples to the jury on express malice. She testified that there was no reason to object to the trial court's consecutive sentence because it was within the legal sentencing guidelines in the judge's discretion. She noted that she did ask for a concurrent sentence during mitigation, but her request was denied. She explained that two victims were shot, which made it two separate events; this was the basis of the two charges of attempted murder and why Applicant was sentenced to two consecutive terms of imprisonment. She stated that there was no reason to object to the jury instruction regarding general intent instead of specific intent. Finally, Trial Counsel testified that she did impeach the State's witness Lenard Johnson with his prior inconsistent statements at trial.

V. 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 Trial Counsel's testimony to be credible and persuasive. This credibility finding has 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.

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Failure to object to accomplice liability instructions
and "hand of one hand of all" charge

Applicant alleges that Trial Counsel was ineffective for failing to object to accomplice liability instructions and a "hand of one, hand of all" charge. This allegation is meritless. There was evidence presented that another person was involved in the shooting, although law enforcement never identified who it was. Trial Counsel testified that there was no reason to object to these instructions, and this Court agrees. Applicant has failed to meet his burden of proving either prong of the Strickland test, and this allegation is denied and dismissed with prejudice.

Failure to request the lesser-included offense

Applicant alleges that Trial Counsel was ineffective for failing to request an instruction on the lesser included offense of Assault and Battery of a High and Aggravated Nature. This allegation is meritless.

Although Trial Counsel could not recall her reasoning for choosing not to request the lesser included offense, she expressed that it was possible that she did not want Applicant to be convicted of a lesser included offense when there was a chance he would be found not guilty of attempted murder. In this case, he would not have any convictions. It is reasonable to assume that this is a valid strategy that Trial Counsel could have been choosing. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). 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). Recognize, however, that a strategic



or tactical decision does not have to be articulated by counsel on the record; counsel doesn't to have to personally identify his or her thinking. Federal courts have held that it is enough that the record show a basis for strategy, not that counsel announce that strategy on the record. Wood v. Allen, 558 U.S. 290, ___, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010).

This Court finds that Trial Counsel was not ineffective for choosing not to request an instruction for the lesser-included offense. Applicant has failed to meet his burden of proof, and this allegation is denied and dismissed with prejudice.

Failure to object to hypothetical examples of express malice in jury instructions

Applicant alleges that Trial Counsel was ineffective for failing to object to the trial judge's use of hypothetical examples when explaining express malice to the jury. This allegation is meritless. This Court finds there was no reason to object to these instructions, as they were part of the standard jury charges used to compare express and implied malice. Furthermore, any objection that might have been made to this would not have changed the outcome of the trial. Since Applicant has failed to prove either prong of the Strickland test, this allegation is denied and dismissed with prejudice.

Failure to object to consecutive sentences

Applicant alleges that Trial Counsel was ineffective for failing to object to the trial court's consecutive sentences. This allegation is meritless.

South Carolina law states:

In determining the number of offenses for the purpose of imposition of sentence, the court shall treat as one offense any number of offenses which have been committed at times so closely connected in point of time that they may be considered as one offense, notwithstanding under the law they constitute separate and distinct offenses.

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S.C. Code Ann. § 17-25-50. Applicant was sentenced to two consecutive thirty-year sentences based on his two charges of attempted murder. Here, there were **two** victims shot. These people were the victims of two separate and distinct crimes—both of them were shot and injured. This was the basis for the trial court's sentence, and this Court agrees with its reasoning. This Court finds that the trial court properly sentenced Applicant within its discretion and within the statutory limits of the sentence. Trial Counsel credibly testified that she asked for concurrent sentences in her mitigation at sentencing. This Court finds that Trial Counsel was not ineffective for failing to object to the sentence.

Furthermore, Applicant has not shown that the implication of this sentence changed the outcome of the trial. Any objection to the sentence would only have potentially altered the sentence, not the jury's verdict. Regardless, Applicant has not proven that any objection would have been successful.

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

Failure to object to general intent instruction

Applicant alleges that Trial Counsel was ineffective for failing to object to the trial court's jury instruction that general intent, not specific intent, was the proper standard to meet the elements of attempted murder. This allegation is meritless.

Under current South Carolina case law, attempted murder is defined by the courts as a specific intent crime. The Court of Appeals settled this question in 2015 in State v. King: "We find the Legislature intended to require the State to prove specific intent to commit murder as an element of attempted murder, and therefore the trial court erred by charging the jury that attempted murder is a general intent crime." State v. King, 412 S.C. 403, 411, 772 S.E.2d 189,

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193 (Ct. App. 2015), reh'g denied (June 5, 2015). The King decision was appealed to the South Carolina Supreme Court and is currently pending. While the current law states that attempted murder is a specific intent crime, this could be reversed on appeal, meaning that a general intent standard applies.

Regardless of the current state of the law on this issue, the Court of Appeals opinion in King was not decided until April of 2015. Applicant's trial was held in August of 2014, before this opinion existed. To claim that Trial Counsel was ineffective for failing to object, Applicant must prove that Trial Counsel had knowledge or should have had knowledge of the case law at the time. At the time of Applicant's trial, the general intent instruction was proper. Trial Counsel cannot be expected to be clairvoyant in the law to object to issues that have not yet arisen before the courts. "This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial." Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993).

This Court finds that Trial Counsel was not ineffective in failing to object to a jury instruction that was proper at the time it was given under South Carolina law. Applicant has failed to prove ineffectiveness or prejudice, and therefore this allegations is denied and dismissed with prejudice.

*Failure to impeach witness Lenard Johnson
with prior inconsistent statement*

Applicant has failed to meet his burden in proving that Trial Counsel was ineffective for failing to properly cross-examine witnesses at trial.

The purpose of cross-examination at trial is "to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness." State v. Gillian, 360 S.C.



433, 451, 602 S.E.2d 62, 71 (Ct. App. 2004) aff'd as modified, 373 S.C. 601, 646 S.E.2d 872 (2007) (citing Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)).

This Court finds that Trial Counsel properly cross-examined each of the State's witnesses enough to expose their biases and create doubt as to their credibility in the minds of the jury. Trial Counsel credibly testified that her trial strategy was to show the jury that the State's witnesses were not consistent. She emphasized to the jury the high level of chaos during the shooting which made the witnesses' testimony more unreliable. Furthermore, Trial Counsel *did* impeach witness Lenard Johnson with his prior inconsistent statement. Trial Tr. at 322.

Furthermore, Applicant failed to present the proper cross-examination testimony from witnesses at the evidentiary hearing, and thus cannot establish prejudice because their testimony is merely speculative. "This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial." Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995).

Since Applicant cannot prove either prong of the Strickland test, this allegation is denied and dismissed with prejudice.

DUE PROCESS

Applicant alleges that he was denied due process of law. 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." 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 has 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.

VI. 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-

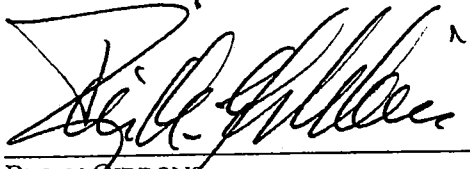


conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

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.

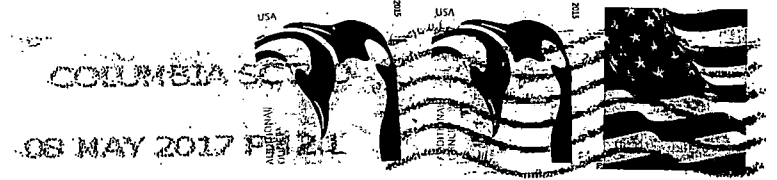
AND IT IS SO ORDERED this _____ day of 4/25, 2017.



BRIAN GIBBONS
Presiding Judge
Third Judicial Circuit

_____, South Carolina

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Sumter, SC 29150



Supreme Court of South Carolina
P.O. Box 11330
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29211-133030

