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May 18, 2017

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

RE: State v. Anderson; 2015-CP-26-2194

Dear Sir or Madam:

Enclosed is a copy of a notice of appeal on behalf of the above Defendant. Mr. Fowler was appointed to represent the Defendant in the Court of Common Pleas, however, he does not represent him on this appeal.

FOWLER LAW FIRM

Patti

Patricia F. Clapper
Advanced Certified Paralegal
NC Certified Paralegal

cc: Horry County Clerk of Court
South Carolina Commission on Indigent Defense

RECEIVED

MAY 22 2017

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

MAY 22 2017

S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY

Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Case No. 2015-CP-26-2194

James Anderson #260010, Petitioner,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable Michael G. Nettles' Order dated May 4, 2017, denying post-conviction relief to the Petitioner. The Order was received by the undersigned counsel on May 5, 2017. A copy of the Order on appeal is attached to this notice.

5/18/17



Steven W. Fowler
Fowler Law Firm
1019 Highway 17 South
NMB, SC 29582
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SC Bar #69683

THE STATE OF SOUTH CAROLINA

In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY

Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Case No. 2015-CP-26-2194

James Anderson #260010, Petitioner,

v.

State of South Carolina,Respondent.

PROOF OF SERVICE

I, Steven W. Fowler, appointed attorney for Petitioner, certify that I have today served within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to the Assistant Attorney General, PO Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 11 day May, 2017.

5/18/17



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STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)
James Anderson, #260010,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No. 2015-CP-26-2194

**ORDER OF DISMISSAL
WITH PREJUDICE**

FILED
HORRY COUNTY
17 MAY -4 AM 11:23
RECEIVED
CLERK OF COURT
HORRY COUNTY, SC

This matter comes before the Court by way of an Application for Post-Conviction Relief filed March 3, 2015. Respondent made its Return on or about August 31, 2015. An evidentiary hearing was convened into the matter on February 7, 2017 at the Horry County Courthouse. Applicant was present and represented by Steven W. Fowler, Esquire. Valerie Garcia Giovanoli, Esquire, of the South Carolina Office of the Attorney General represented Respondent.

At the hearing, Applicant testified on his own behalf. Applicant's trial counsel, William Edward Chrisco, Esquire, (Counsel) and Laurie Richardson Ortiz (Ortiz), Esquire, of the Fifteenth Circuit Solicitor's Office also testified. This Court had before it a copy of the Horry County Clerk of Court records regarding the subject convictions, Applicant's SCDC records, the trial transcript, Applicant's appellate records, and the records of this PCR action.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In July 2010, the Horry County Grand Jury indicted Applicant for first-degree burglary (2010-GS-26-2883). William Edward Chrisco,

Esquire, represented Applicant. On March 12-14, 2012, Applicant proceeded to trial before the Honorable Benjamin H. Culbertson and a jury. On March 14, 2012, the jury found Applicant guilty as indicted. Judge Culbertson sentenced Applicant to twenty-five years imprisonment.

Applicant filed a timely notice of appeal, and Susan B. Hackett, Esquire, of the Office of Appellate Defense, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on February 12, 2014. State v. Anderson, 407 S.C. 278, 754 S.E.2d 905 (Ct. App. 2014), reh'g denied (Mar. 21, 2014), cert. denied (Nov. 10, 2014). The remittitur was returned to the circuit court on December 12, 2014.

II.

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

1. Ineffective assistance of counsel at trial
 - a. "Counsel failed to adequately investigate the facts and circumstances surrounding the direct evidence of eye witness testimony."
 - b. "Counsel's failure to such an investigation deprived the jury of vital information relevant to an accurate assessment of applicant's guilt or innocence."
 - c. "Counsel failed to seek an instruction stating that a burglary charge must set forth one, specific crime intended upon entry and stating what the specific crime was in this case."
2. Ineffective assistance of counsel at sentencing
 - a. "Counsel failed to investigate, develop, and present all available, relevant, and admissible mitigating evidence. As a result of counsel's failure to uncover and present this evidence, applicant's sentence is unreliable."
 - b. "Counsel failed to object on all possible grounds to inflammatory and irrelevant evidence presented by the prosecution. As a result of counsel's failure to make all appropriate objections, applicant's sentence is unreliable."

3. Prosecutorial misconduct
 - a. "Prosecutor did not provide trial defense counsel with discovery materials in a timely fashion."
 - b. "Prosecutor did not provide defense counsel with all relevant discovery materials."
 - c. "Prosecutor did provide fraudulent materials to defense counsel six days prior to trial."
 - d. "Prosecutors deceiving tactics did impede the defense in making reasonable decision did result in unethical conduct."
4. Denial of right to fair and impartial jury
 - a. "Juror who was empaneled and sat through entire trial did intentionally conceal information and was directly in contempt of court."
 - b. "Juror concealed information that would have supported a challenge for cause or would have been a material factor in the use of the party's preemptory challenges."

At the PCR hearing, Applicant proceeded on his claims of ineffective assistance of counseling, specifically that Counsel failed to investigate an eye witness and failed to adequately cross exam the eye witness. Applicant also proceeded on his claims that his indictment was defective, prosecutorial misconduct in that the State failed to turn over evidence, and juror misconduct in that he knew a juror.

SUMMARY OF TESTIMONY

I. Applicant testified to the following:

Counsel was appointed to Applicant's case through the Public Defender's Office. Applicant first met Counsel when he came to county jail to visit Applicant. The meeting was not very long, but Counsel asked Applicant about his case. Applicant became unsatisfied with Counsel during his trial because there were things Applicant wanted Counsel to do that he would not do. One thing included not cross examining witness, a minor named Joe Emming (Emming), better based on his previous statement that he could not identify the burglar. Counsel's cross examination of Emming was not up

to Applicant's standards. Applicant claims he did not know Emming was going to testify. Applicant claims Counsel received a letter on March 6, 2012 that included a witness list, but that Counsel failed to question those witnesses or investigate them. Counsel also failed to object to Emming's testimony.¹

Applicant also claimed that his indictment was prejudicial because it clearly points out that Applicant committed the crime and the language of the indictment made it sound like Applicant was guilty. Applicant also claimed that the Solicitor had fingerprint evidence that were never turned over to Applicant in discovery.² Applicant also complained that the prosecutor painted a picture that made Applicant look guilty although he was not.

Applicant recognized a juror at his trial. The juror kept staring at him. However, Applicant could not recall the juror's name and admittedly did not mention it to Counsel at trial. Applicant believes Counsel performed poorly and because of his poor performance, Applicant was sentenced to a lengthy term of imprisonment.

II. Counsel testified to the following:

Counsel testified that he has been practicing criminal law for nearly three decades and he is the 15th Judicial Circuit Chief Public Defender. He was appointed to represent Applicant on nine different cases, including the case that's the basis for this PCR action. Counsel made a formal request for discovery and received discovery on four times. Counsel had thirty two months to prepare Applicant's case for trial, which Counsel found to be ample time. Counsel met with Applicant approximately thirty times, anywhere from five to thirty minutes per meeting. During

¹ Applicant, himself, objected to Emming's testimony and Counsel assisted in his objection. Applicant requested Emming's testimony be stricken and the Court denied his request. Trial Tr. p. 147, l. 15 - p. 149, l. 19.

² This exact issue was taken up on appeal where the Court of Appeals found no *Brady* violation.

those meetings, Counsel reviewed discovery with Applicant and relayed several plea offers. Counsel advised Applicant to accept the State's plea offer based on his likelihood of conviction. Counsel estimated the likelihood of conviction was 85%. This was compounded by the fact that Applicant changed his version of the facts multiple times across meetings with Counsel.

Counsel was aware of the State's witness, Emming, and that he was in the hotel room at the time of the burglary. His prior statement was provided to Counsel a week before the trial. The statement was that Emming saw someone that was a black male of average height in the hotel room, but could not specifically identify the burglar. Counsel found Emming's statement to be helpful, since identification was the main issue at trial. Because the statement was helpful to Applicant's defense, Counsel did not find it necessary to investigate Emming further. However, at trial, Emming surprisingly identified Applicant. Emming didn't seem sure in his identification, so Counsel pursued this uncertainty during his cross-examination. Counsel did not believe he would have been any more prepared had Emming's statement been provided to him earlier.

Counsel believes the State should have provided him the other twenty eight finger prints that the fingerprint expert did not analyze so that Counsel could have an expert determine if they were a match to those found at the crime scene. Counsel brought this to the Court's attention twice, asking for the fingerprint testimony to be stricken, or in the alternative, for a mistrial. The issue was taken up on appeal as a novel issue.

Applicant never mentioned anything to Counsel about possibly knowing one of the jurors. Had Counsel known, he would have brought it to the Court's attention. Counsel did not find any defects in the indictment.

III. Ortiz testified to the following:

Ortiz has been practicing criminal law since 2009. She was the assigned Assistant Solicitor for Applicant's criminal case. Applicant had numerous pending charges. Ortiz recalled the evidence in the case included a fingerprint on the window ledge where the occupants of the hotel room alleged the burglar entered. One of the occupants of the hotel room saw Applicant in the room, but did not see him enter. There was another couple in another room of the hotel, but neither saw Applicant. Emming was a minor who was also in the room and saw the burglar. Emming's father did not want him to testify. However, he ultimately did testify. Emming's identification testimony at trial came as a surprise to Ortiz, also. Emming had not identified Applicant prior to trial.

Ortiz turned over everything in the case to the defense. She did not withhold any evidence or information. She did not provide Emming's statement until a week before trial because she did not know about it. Ortiz also provided an additional list of potential witnesses. Ortiz provided everything she had regarding the fingerprints. Nothing was ever mentioned at trial about juror misconduct.

FINDINGS OF FACT AND CONCLUSION 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 had the opportunity to observe the witnesses presented at the hearing, and has weighed their testimony and credibility accordingly. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017).

As a matter of general impression, this Court finds the testimony of Counsel and Ortiz to be credible. This Court further finds that the testimony by Applicant is not credible.

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, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). 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.

Failure to investigate and adequately cross examine witness

This Court finds Applicant has failed to meet his burden to prove Counsel was ineffective for failing to investigating the facts and circumstances surrounding eye witness testimony. Emming identified the defendant during direct examination by the State. Trial Tr. p. 48, ll. 20-22. Counsel

sensed some uncertainty in Emming's identification and pursued that during cross examination. Trial Tr. p. 51, ll. 12-19. Counsel also impeached Emming by using his prior statement to law enforcement in which he could not identify Applicant. Trial Tr. p. 51, l.23 – p. 52, l. 12. This Court finds Counsel's cross examination of the witness not only reasonable in light of the circumstances, but an effective impeachment to call into question the witness's credibility for the jury to consider.

This Court finds Counsel and Ortiz's testimony that Emming's prior statement was inconsistent with his identification testimony at trial is credible. Based on the discovery that was provided to Counsel, it was reasonable to view Emming's statement as favorable to his defense and opt not to pursue an interview with the minor witness. Counsel is not expected to have the foresight to know a witness will testify to something different than their statement to law enforcement. With such a surprise, Counsel was astute in his decision to cross examine him based on his prior inconsistent statement and impeach his credibility. Ultimately, the credibility of his testimony was for the jury to determine. Therefore, this Court finds these allegations are without merit and are denied and dismissed with prejudice.

Defective Indictment

Despite Applicant's failure to allege defects in his indictment in his PCR application or amendment thereto, this Court addresses Applicant's claim made *at the hearing* that his indictment was defective because it points out that Applicant committed the crime. The indictment is a notice document, and any challenges to its sufficiency must be made in accordance with S.C. Code Ann. § 17-19-90 (2003). *See also* S.C. Code § 17-19-20 (2003). In post-conviction relief, an Applicant wishing to raise challenges to the sufficiency of an indictment must do so in the context of ineffective assistance of counsel, basically alleging that his trial counsel failed to properly move to

quash the indictment in accordance with S.C. Code Ann. § 17-19-90 (2003). Applicant has not made such an allegation against Counsel and this Court declines to infer an allegation of ineffective assistance of counsel from Applicant's indictment complaint.³ Nevertheless, this Court notes that indictments are charging documents that *allege* the indicted committed a particular crime. Necessarily, indictments point to the indicted as the person who committed the crime alleged. However, the opening charge by the trial court expressly instructs the jurors that the indictment is simply a charging document and not evidence of the allegation contained therein. Trial Tr. p. 36, ll. 4-9. This Court finds Applicant's allegation of a defective indictment lacks merit and is denied and dismissed with prejudice.

Prosecutorial Misconduct

Applicant also alleges prosecutorial misconduct in that the State failed to provide him all of the fingerprint evidence. Prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant raised this very issue on appeal and the Court of Appeals affirmed, finding no Brady violation occurred. This Court finds this allegation is not proper for PCR and therefore it is denied and dismissed with prejudice.

³ At trial, Applicant made a motion to quash the indictment which was denied by the court. Trial Tr. p. 9, l. 20 – p. 10, l. 14.

Similarly, with regard to Applicant's complaint that the State failed to make a timely disclosure of certain witnesses and statements, this Court finds this prosecutorial misconduct claim is not proper for PCR. Regardless, this Court finds Ortiz's testimony that she turned over the witness list and statement as soon as she obtained it to be credible. Counsel's testimony that he would not have benefitted from receiving it earlier is also credible. This Court finds the State provided Applicant with all of the discovery in this case and committed no error by disclosing discovery the week before trial, where the State was not aware of the discovery beforehand. This allegation is also denied and dismissed with prejudice.

Juror Misconduct

Juror concealed information

This Court finds Applicant has failed to meet his burden of proving by a preponderance of the evidence that juror misconduct occurred. Applicant alleges that he knew a juror, yet the juror failed to disclose that information. Applicant has failed to present evidence of who the juror is or how he knows the juror. Regardless of the credibility of Applicant's testimony that he knew a juror, it was incumbent upon Applicant to raise that issue to his counsel or the trial court, had the juror failed to disclose it himself. This Court finds Counsel and Ortiz's testimony that no juror issue was ever brought to their attention⁴ to be credible. Having failed to meet his burden to prove this allegation, this Court denies and dismisses this claim with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any violations that would require this Court to grant his application. Therefore, this application for

⁴ Nor was it brought to the trial court's attention as evident from the transcript.

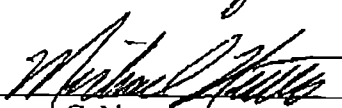
post-conviction relief must be denied and dismissed with prejudice. This Court also finds that Applicant failed to present evidence as to the other allegations, and thus, this Court deems the other allegations abandoned.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCP. You must look at Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 1 day of May, 2017.


MICHAEL G. NETTLES
Presiding Judge
Fifteenth Judicial Circuit

, South Carolina

MAILED
5-4-17 *Pow*

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Supreme Court of South Carolina
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