



# The Brough Law Firm



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May 24, 2017

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, SC 29211

**RECEIVED**

MAY 26 2017

S.C. SUPREME COURT

RE: THE STATE VS. Charvus T. Nesbitt

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

- (1) Original Proof of Service upon opposing counsel;
- (2) Order of Dismissal.

If I can be of any further assistance, please feel free to call me.

Sincerely,

Christopher D. Brough

Enclosure

cc: South Carolina Office of the Attorney General  
Charvus T. Nesbitt

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

RECEIVED

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

MAY 26 2017

The Honorable Robin B. Stilwell., Circuit Court Judge

S.C. SUPREME COURT

Case No.: 2016-CP-42-0103

The State,

Respondent,

v.

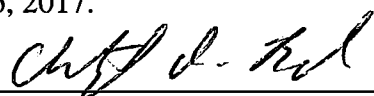
Charvus T. Nesbitt,

Appellant.

NOTICE OF INTENT TO APPEAL

Charvus T. Nesbitt appeals the denial of his application for Post-Conviction Relief in this case. The Order of Dismissal was imposed by the Honorable Robin B. Stilwell on April 21, 2017. Appellant received notice of the same on April 26, 2017.

May 24, 2017

  
CHRISTOPHER D. BROUGH  
275 EAST HENRY STREET  
SPARTANBURG, SC 29306  
(864) 585-3088  
ATTORNEY FOR APPELLANT

Other Counsel of Record:  
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Assistant Attorney General  
P.O. Box 11549  
Columbia, SC 29211-11549  
(803) 734-3737

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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MAY 26 2017

APPEAL FROM SPARTANBURG COUNTY  
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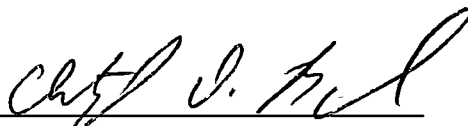
Charvus T. Nesbitt,

Appellant.

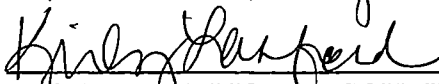
PROOF OF SERVICE

The undersigned hereby certifies that he is a person of such age and discretion as to be competent to serve papers and that a copy of the **Notice of Intent to Appeal**, was served upon the following person(s) on the State, by depositing copies of the same in the United States Mail, with sufficient postage affixed thereto, on May 24, 2017, addressed as follows:

The Honorable Alan Wilson  
SC Attorney General  
Rembert Dennis Building  
1000 Assembly Street, Room 519  
Columbia, S.C. 29201

  
Christopher D. Brough

SWORN BEFORE ME THIS  
24 DAY OF May, 2017.

  
NOTARY PUBLIC FOR SOUTH CAROLINA  
MY COMMISSION EXPIRES: 10/29/2018

STATE OF SOUTH CAROLINA )  
 COUNTY OF SPARTANBURG )  
 )  
 Charvus T. Nesbitt, #349711, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 FOR THE SEVENTH JUDICIAL CIRCUIT

2016-CP-42-0103

**ORDER OF DISMISSAL**

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 M. HOPE BLACKEY

This matter comes before the Court by way of an application for Post-Conviction Relief (PCR) filed January 13, 2016. Respondent made its Return on July 12, 2016. An evidentiary hearing into the matter was convened on March 23, 2017 at the Spartanburg County Courthouse. Christopher Brough, Esquire, represented Applicant. Valerie Garcia Giovanoli, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. Fletcher N. Smith, Jr., Esquire, also testified. This Court had before it a copy of the records of the Spartanburg County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the appellate records, the PCR application, Respondent's Return and the plea transcript.

**PROCEDURAL HISTORY**

Charvus T. Nesbitt ("Applicant") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. Applicant was indicted at the March 2011 term of the Spartanburg County Grand Jury for murder, possession of a weapon during the commission of a violent crime (2011-GS-42-1414, counts 1 and

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2), and attempted murder (2011-GS-42-1415). Applicant was subsequently indicted at the January 2012 term of the Spartanburg County Grand Jury for attempted armed robbery (2012-GS-42-0349). Fletcher N. Smith, Esquire, represented Applicant. On February 23, 2012, Applicant pleaded guilty under North Carolina v. Alford<sup>1</sup> before the Honorable Roger L. Couch. Judge Couch sentenced Applicant, pursuant to a negotiated sentence, to imprisonment for concurrent terms of 40 years for murder, 30 years for attempted murder, and 20 years for attempted armed robbery.

Applicant then left the courtroom, at which time the Deputy Solicitor brought to Judge Couch's attention that he had not addressed the weapons charge. Judge Couch then imposed a concurrent five year sentence for the possession of a weapon charge. However, Applicant was not brought back into the courtroom for further proceedings. On February 23, 2012, a motion for reconsideration or new trial was filed on the weapons charge. An amended motion was filed on March 7, 2012. Judge Couch heard the motion on April 26, 2012. Kenneth P. Shabel, Esquire, represented Applicant at this hearing. On May 24, 2012, Judge Couch issued an Order vacating the conviction and sentence on the weapons charge but affirming the other convictions and sentences.

Applicant filed a timely notice of appeal. Kenneth P. Shabel, Esquire, represented Applicant on appeal. The South Carolina Supreme Court affirmed Applicant's conviction as modified. State v. Nesbitt, 411 S.C. 194 (Ct. App. 2015). The Remittitur was returned on January 30, 2015.

In his original Application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Failure to Investigate by Trial Counsel;

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<sup>1</sup> North Carolina v. Alford, 400 U.S. 25 (1970).

*Rms*

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M. HOPE BLACKLEY

- a. "Trial Counsel failed to talk to necessary defense witnesses";
2. Ineffective Assistance of Trial Counsel, in that;
  - a. "Trial Counsel failed to subpoena and call necessary defense witnesses at trial";
3. Involuntary Plea, in that:
  - a. "Due to Trial Counsel's lack of preparation, Applicant was forced to plead under North Carolina versus Alford."

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M. HOPE BLACKEY

At the hearing, Applicant proceeded on his claims of ineffective assistance of plea counsel and involuntary plea.

### SUMMARY OF TESTIMONY

Applicant testified to the following:

Applicant retained Georgia Patricia Anderson initially to represent him. He and his family decided to relieve her and retain Fletcher N. Smith, Jr., when he realized that Anderson wanted him to cooperate with the State in exchange for a plea deal. Applicant had three other co-defendants who participated in the crime: Teddy Byers (Byers), Hazel Stoudemire (Stoudemire), and Johnathon Petty (Petty). The State alleged that Applicant was the shooter. Applicant was fully aware of what an Alford plea was and the consequences of entering one. Applicant was also informed of the law of the hand of one, hand of all, by his plea counsel.

Applicant testified that he reviewed all of the discovery with which he was provided. However, Applicant claimed he was in possession of more discovery than what he was originally provided with. Applicant pled under Alford because he believed he would be convicted. Applicant confirmed that he had only one prior conviction from 2010 for trespassing. Applicant introduced his criminal history into evidence as Applicant's Exhibit 1. Applicant then identified an investigative report that was part of the discovery in his case and introduced it as Applicant's Exhibit 2. Applicant

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had never seen the investigative report until it was provided to him by his PCR counsel. The investigative report contained an identification of Applicant made by a witness to and victim of the incident. The certainty of one witness when identifying Applicant as the assailant was 40-50% and the certainty of the victim was 5 out of 10. Applicant introduced an affidavit of identification as Applicant's Exhibit 3. In the affidavit, one of the witnesses identified Applicant from a photo line-up, but noted that she was only 40-50% sure and that he had different facial and head hair. Applicant was unaware of the low certainty percentage or the distinguishing statement when he reviewed the evidence with his plea counsel. The victim's son was also a named witness who had given a statement. He described the detail that two black men entered into the house. The son described one as short and the other taller. The son stated that the shooter was shorter and had dreadlocks and he wasn't able to see what the other man looked like. Applicant is 6 feet tall and taller than his co-defendants.

The gun used in the shooting was recovered. The gun was registered in Applicant's name. The gun was also reported stolen. Applicant's Exhibit 4, a voluntary statement by an eleven year old witness of the incident and resident of the home in which the shooting occurred, was introduced into evidence. The witness stated that he only got a good look at one of the two guys that entered the house that night and that he was short and had dread locks. Applicant also introduced the search warrant, into evidence as Applicant's Exhibit 5. The search warrant indicated that Byers was cohabitating with Applicant and that evidence could be located in their home and vehicles.

Applicant testified that all of the evidence presented to this Court had not been seen by Applicant prior to entering his plea. Had Applicant known about this evidence, he would have insisted on going to trial. Applicant claims his plea was involuntary based on the deficient advice

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given to him by his plea counsel.

On cross examination, Applicant admitted that he reported the gun stolen immediately after the incident. Applicant was offered to make a deal with the State in exchange for his cooperation, which he turned down. Applicant refused to cooperate with the State. Applicant was aware that all of his co-defendants singled him out as the shooter. Applicant was also aware that one of his co-defendants (Petty) fled after the incident, but was later recaptured.

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H. HOPE BLANCHLEY

Counsel testified to the following:

Counsel has been practicing law for thirty-five years. He has his own general practice. He has handled many criminal cases although he does not exclusively practice criminal law. Counsel was retained to represent Applicant. Counsel requested discovery and rule 5 Brady material. He received all of the discovery in the case and reviewed all of it with Applicant. Counsel went through all of the evidence in detail with Applicant and then gave him two weeks to decide if he wanted to plead or go to trial.

Counsel believed the likelihood of conviction was high for Applicant and advised him of such. Counsel also advised Applicant that pleading under Alford was in his best interest. Counsel informed Applicant of all of his Constitutional rights. Counsel informed him of the elements of the crimes for which Applicant was charged and the potential sentences for those crimes. Applicant decided to plead to the charges and Counsel did not unduly pressure or coerce him to plead. Counsel was aware that Applicant was twenty-three and had a pretty clean record, however he testified that being young and having a clean record does not preclude a judge from sentencing you to the maximum. Assistant Solicitor Balsa wanted to put Applicant away for life. Counsel was aware of

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the inconsistencies in victim's statements, but there were still three co-defendants all pointing the finger at Applicant, the two guns used were registered to Applicant, and Applicant had reported the recovered gun stolen immediately after the incident. Applicant had also placed himself inside of the victim's home at the time of the shooting which invoked the hand of one, hand of all doctrine.

## APPLICABLE LAW

### 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

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unprofessional errors, the result of the proceeding would have been different." Cherry, 306 S.Ct. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, 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).

STATE OF ALABAMA  
COURT OF APPEALS  
MONTGOMERY  
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### Involuntary Plea

Applicant alleges that his plea was involuntary. To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In Boykin the United States Supreme Court held that before a court can accept a guilty plea, a criminal defendant must be advised of the constitutional rights he is waiving. *Id.* at 243, 89 S.Ct. at 1712. Specifically, the accused must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. *Id.* Moreover, a criminal defendant entering a guilty plea "must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citation omitted). A criminal defendant's knowing and voluntary waiver of statutory or constitutional rights in a guilty plea "must be established by a complete record, and may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000).

In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984). An applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of

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the plea by showing that trial counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for trial counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. See Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993).

### 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 (2003).

This Court finds the Applicant's testimony regarding Counsel's ineffectiveness is not credible while also finding Counsel's testimony is credible.

This Court also finds Counsel provided effective assistance in this case and Applicant's plea was made voluntarily. Counsel advised Applicant of all of the charges and the possible sentences the charges carried. This Court further finds that Applicant was fully aware of his rights and those rights that he was waiving.

This Court finds Counsel's testimony with regard to fully reviewing all of the discovery with Applicant to be credible, while finding Applicant's testimony that he was not aware of some of the discovery to be not credible. The record is clear that during the plea hearing, Counsel indicated that he had a full understanding of the inconsistencies in the victim identification, but that he also had a full understanding of all the other inculpatory evidence the State had against Applicant. Applicant was also present at this plea hearing and did not question anything put forth to the plea court by his

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M. HOPE BLANKLEY

counsel. Counsel was aware of the statements made by victims, witnesses, and Applicant's co-defendants and was presented with no potential witnesses that could testify in favor of Applicant. This Court finds that Counsel conducted a thorough investigation of the case and reviewed all of the discovery with Applicant. After review of the discovery, it was Applicant's own decision to plead pursuant to Alford instead of going to trial.

Accordingly, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. Therefore, these allegations are denied and dismissed with prejudice. This Court finds Applicant made the decision to plead pursuant to Alford on his own accord upon the sound advice of learned counsel. Additionally, this Court finds Applicant made this decision freely and voluntarily without any undue pressure or coercion.

Accordingly, this Court finds Applicant has not met the burden of proof to illustrate that Counsel rendered ineffective assistance or that his plea was made involuntary. Therefore, these allegations are denied and dismissed with prejudice.

#### CONCLUSION

Based on all the foregoing, this Court finds and concludes that 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.

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M. HOPE BLACKEY

This Court also finds as to all other allegations that Applicant failed to present evidence of such claims and thus, this Court deems them abandoned.

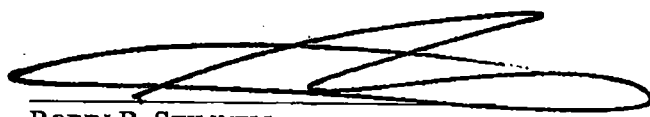
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRPC, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 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 21 day of APRIL 2017

2017 APR 26 PM 2:02  
M. HOPE BLACKLETT



ROBIN B. STILWELL  
Presiding Judge  
Seventh Judicial Circuit

Charleston, South Carolina

The Brough Law Firm  
275 E. Her.ry Street  
Spartanburg, SC 29306



The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
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*Handwritten signature or initials in the bottom right corner.*