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June 20, 2017

The Supreme Court of South Carolina
ATTN: Daniel Shearouse, Clerk of Court
PO Box 11330
Columbia, SC 29211

RECEIVED

JUN 22 2017

S.C. SUPREME COURT

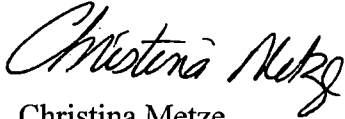
RE : Benjamin P. Green v. State of SC
2013CP0200477

Dear Mr. Shearouse:

Enclosed please find a Notice of Appeal along with a Certificate of Service and a copy of the Order being appealed. Also enclosed is a copy which I request you stamp as "filed" and return to me in the enclosed stamped envelope.

Thank you for your assistance in this matter.

Yours very truly,



Christina Metzé
Paralegal

cc: Julie Coleman
Robert J. Harte, Aiken County Clerk of Court
Benjamin P. Green

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No.: 2013CP0200477

RECEIVED

JUN 22 2017

S.C. SUPREME COURT

State of South Carolina,

Respondent,

v.

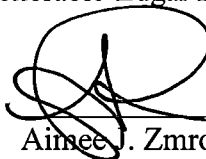
Benjamin P. Green,

Appellant.

NOTICE OF APPEAL

Benjamin P. Green, #335365, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed January 17, 2017, and received by counsel on January 17, 2017, and the Order Denying Rule 59(E) Motion filed March 17, 2017, and received by counsel on June 16, 2017, issued by the Honorable Edgar Dickson, presiding Judge.

June 20, 2017



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Counsel for Respondent

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No.: 2013CP0200477

RECEIVED

JUN 22 2017

S.C. SUPREME COURT

State of South Carolina,

Respondent,

v.

Benjamin P. Green,


Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Julie Coleman by depositing a copy of it in the United States Mail, postage prepaid, on June 20, 2017, addressed to her office at:

PO Box 11549
Columbia, SC 29211

June 20, 2017


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ajzlawfirm@gmail.com
Attorney for Appellant

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

Benjamin P. Green, #335365,)
)
Applicant,)
)
vs.)
)
State of South Carolina,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

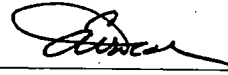
Case No.: 2013-CP-02-00477

**ORDER DENYING APPLICANT'S
MOTION TO RECONSIDER**

This matter comes before the Court on Applicant's Motion to Reconsider an Order of this Court pursuant to Rule 59(e), SCRCP, denying Applicant's claim and dismissing it with prejudice. After due deliberation and review of the case law and motion of counsel, this Court finds that there is nothing warranting reconsideration.

THEREFORE, Applicant's Motion to Reconsider is DENIED.

AND IT IS SO ORDERED.

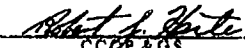
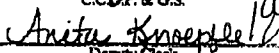


Edgar W. Dickson
Presiding Judge, Second Judicial Circuit

~~February~~ March 14, 2017
Orangeburg, South Carolina

FILED

3.17.17


C.C.P. & O.S.

Deputy Clerk

For Clerk of Court Office Use Only

This judgment was entered on 3-17-17, and a copy mailed first class or placed in the appropriate attorney's box on 3-17-17, to attorneys of record or to parties (when appearing pro se) as follows:

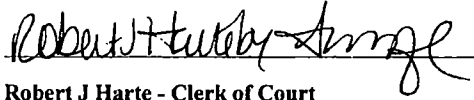
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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter


Robert J Harte - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRPC.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

Minor (2007-GS-02-190). Michael D. McMullen, Esquire, represented him. Applicant proceeded to a jury trial before the Honorable Doyet A. Early, III. Applicant was found guilty, and on June 17, 2009, Applicant was sentenced to twelve years imprisonment for Attempted Criminal Sexual Conduct with a Minor in the Second Degree and ten years imprisonment for Criminal Solicitation of a Minor with all sentences to run concurrent.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Wanda H. Carter, Esquire. The South Carolina Supreme Court affirmed Applicant's conviction and sentence. State v. Green, Op. No. 27108 (Ct. App. filed April 4, 2012). Remittitur was issued on May 3, 2012.

Applicant filed a timely application for post-conviction relief on February 27, 2013.

II. ALLEGATIONS

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

1. Ineffective Assistance of Counsel
 - a. "Applicant was denied the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth amendments to the U.S. Constitution, and by Article I, § 3 and 14 of the S.C. Constitution during the guilt or innocence phase of his trial.
 - b. "Trial counsel's performance during the guilt-or-innocence phase was both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984). Counsel's acts or omissions included, but are not limited to the following:"
 - c. "Trial counsel failed to request a jury instruction that included the necessary 'present ability' element needed to prove an attempt crime, according to law, even though counsel had previously argued this fact."
 - d. "Trial counsel failed to adequately research the attempt charge, whereas he would have acquired and been able to provide the case law needed to prove the proper elements that constitute an attempt, even though counsel had used the lack of the 'present ability' element as a main point of defense."
 - e. "Trial counsel failed to properly object to the use of a supposed

incriminating statement that was never submitted to the jury to determine the voluntariness, as is required by state law.”

- f. “Trial counsel failed to argue against the voluntariness of a supposed incriminating statement during the Jackson v. Denno hearing, instead focusing on the reliability of the statement.”
- g. “Trial counsel failed to contemporaneously object to trial judge’s improper comments that were made in the presence of the jury.”
- h. “Trial counsel failed to sufficient Yahoo Messenger’s auto archiving feature, which would have led him to discover the facts needed to contest the Attorney general’s office claims on how the auto archiving feature functions.
- i. “Trial counsel failed to move for the suppression of evidence, whose probative value was substantially outweighed by the danger of unfair prejudice.”
- j. “Trial counsel failed to maintain adequate knowledge of relevant details of case law that said counsel provided to the trial judge.”
- k. “Trial counsel failed to call to question the integrity of conflicting testimony from the prosecutions witnesses”

2. Ineffective Assistance of Appellate Counsel

- a. “Applicant was denied the right to effective assistance of appellate counsel during the post-trial appellate process.”
- b. “Appellate counsel’s performance during the post-trial appellate process was both unreasonable and prejudicial. Evitts v. Lucey, 469 U.S. 387 (1985). Appellate counsel’s acts or omissions included, but are not limited to the following.”
- c. “Appellate counsel failed to raise an obvious reversible error on direct appeal that had clearly been preserved for appeal.”
- d. “Appellate counsel failed to exercise due diligence when researching the preserved issues, in spite of having filed for multiple extensions.”
- e. “Appellate counsel failed to exercise due diligence when studying the particulars of the case, which resulted in a prejudicial lack of knowledge concerning specific relevant details during the appellate hearing.”
- f. “Appellate counsel argued issues during the appellate hearing that only was not preserved for appeal, but was not even brought up during the trial proceedings, thereby taking away from the material issues.”
- g. “Appellate counsel failed to include meritorious issues in appellant’s brief.”
- h. “Appellate counsel failed to include requested relevant information in appellant’s brief, thereby depriving the Supreme Court the ability to make a properly informed decision regarding the issues.”

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. 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).

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant raises several allegations arguing that Trial Counsel was ineffective in his representation surrounding his trial. In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. See Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (1999) (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)).

Summary of Testimony Presented

Applicant asserts that Trial Counsel was ineffective for failing to call a digital expert to challenge the State's evidence against him on his laptop computer. At the PCR hearing, Applicant presented testimony from Chris Watkins, a digital expert, who was hired to review the digital evidence in this case. He gave testimony on the investigator's report of Applicant's laptop computer. Although he testified about several issues he saw in the report, Mr. Watkins agreed that this report was not used as evidence or discussed at trial. He further testified about computer software that could have been used to properly investigate this case, such as "Cell Bright," which is a program that is used to extract cell phone information, but he was not certain if any of this technology could have been used to investigate this laptop computer in 2006 before the trial. Mr. Watkins also testified that he did not have access to the cell phone in this case and was unable to

access the information that could have been extracted from the cell phone, so he was unsure what it would have been.

Mr. Watkins testified about the unreliability of the technology and software used in the investigator's original report; however he agreed that these faults were elicited at trial on cross-examination of the State's investigator.

Mr. Watkins testified that he found no evidence that the "blak slyder" screen name had ever been created, accessed, or deleted from that laptop computer. He further explained that if it those records had been deleted from the laptop, he would probably be able to tell that it had been there. However, he testified that there are times when information is deleted from computers that cannot be recovered, and there is no way to be absolutely certain that a laptop would show records of deleted information.

Mr. Watkins testified that Trial Counsel should have subpoenaed chat records from Yahoo! Chats and other documents in order to properly investigate this case. However, he testified that he was not an attorney and that he had not actually subpoenaed the documents for this case about which he testified, so he could not know for sure what they would have said.

Findings

This Court finds that the testimony presented at the PCR hearings satisfies neither prong of the Strickland test; Applicant can show neither ineffectiveness nor prejudice.

As Mr. Watkins testified, there may have been several faults or discrepancies in the report run by the State's investigator. However, Trial Counsel elicited many of these faults on cross examination at trial, and they were adequately presented to the jury to consider. Trial Counsel was not ineffective in choosing not to produce a witness to testify to this effect. Furthermore, the report that Mr. Watkins examined and testified about was not discussed at trial

nor introduced to the jury, so it was not considered as evidence by the jury during deliberations. Thus, Applicant can show no prejudice because bringing in an expert to criticize the integrity of a report that was not discussed at trial would not have affected the outcome of the trial.

Additionally, Applicant has failed to meet his burden in proving that Trial Counsel should have subpoenaed the records from the cell phone or from the Yahoo! chats because he did not subpoena them himself or prove what useful information these records would have contained that would have changed the outcome of this trial. Without the exact evidence that would have been used at trial, it is improper to speculate that there could have been some additional evidence that might have changed the jury's verdict. See Bannister v. State, 333 S.C. 303, 509 S.E.2d 807 (1998).

Furthermore, Mr. Watkin's testimony that there was no evidence that the laptop computer ever created, accessed, or deleted the username "blak slyder" is inconclusive. He agreed that there is no way to be sure that anything was not deleted from a laptop, and he further agreed that the username could have been accessed or deleted from a different device. Mr. Watkin's speculation about what might have never existed on a laptop is not enough to satisfy the burden of proof in this case.

Lastly, Applicant has offered no evidence that Trial Counsel's strategy in the arguments he made during the Jackson v. Denno hearing were ineffective or prejudicial, and thus has failed to satisfy his burden of proof.

Applicant has failed to meet his burden in proving trial counsel was ineffective in any regard. Applicant has not shown that he was prejudiced by any of trial counsel's actions as he has failed to show that the result of his trial would have been different but for trial counsel's actions. Accordingly these allegations are denied and dismissed with prejudice.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Applicant has failed to present sufficient evidence at the evidentiary hearings to support his allegations of ineffective assistance of appellate counsel, and thus has failed to meet his burden of proof. Therefore, these allegations are denied and dismissed with prejudice.

OVERWHELMING EVIDENCE

Applicant cannot meet his burden to show that he was prejudiced by any alleged deficiencies because there is overwhelming evidence of his guilt. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), cert. denied, 535 U.S. 1114, 122 S.Ct. 2332, 153 L.Ed.2d 162 (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of the defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt); cf. Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (holding respondent failed to prove prejudice from trial counsel's failure to request an alibi charge where there was overwhelming evidence of guilt).

The chat messages from the "blak slyder" screen name provided evidence that identifies Applicant as the perpetrator, such as stating that his name was Ben and that he worked at a plant. Transcript pg. 148, 152. There was also no question that Applicant appeared at the specified meeting place in the vehicle identified in the chat and with all of the items that "blak slyder" stated he would bring in the chat, such as the DVDs, his cell phone, condoms, alcohol, printed directions to the locations, and sexual enhancement supplements. When Applicant arrived, he stated that he was there to meet a fourteen year old girl name Mandy. Furthermore, Applicant sent two photographs of his penis as well as a picture of his face to the investigators in the chat.

The South Carolina Supreme Court found the evidence against Applicant overwhelming in the direct appeal of this case. "Moreover, even if the judge erred in admitting the photographs, we find any error to be harmless given that the text of the online chats, the testimony of the investigating officers, and the evidence found in Green's car conclusively established the elements of the crimes for which Green was charged." State v. Green, 397 S.C. 268, 288, 724 S.E.2d 664, 674 (2012)(citing State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989), recognizing that an insubstantial error not affecting the result of the trial is harmless where "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.")

The testimony at the PCR hearing reflected the exact evidence used at trial was correct. Applicant did not dispute the evidence against him. This is clearly overwhelming evidence of Applicant's guilt. As a result, Applicant can show no prejudice from any of the allegations raised in his PCR application as no deficiency on behalf of trial counsel could have reasonably changed the outcome of trial, and these allegations are 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.

V. 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 29th day of December, 2016.



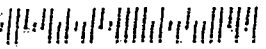
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Presiding Judge
Third Judicial Circuit

Orangeburg, South Carolina

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