

State of South Carolina
IN THE Court of Common Pleas
Notice of Appeal from Abbeville County
H. Thomas Hooper, Jr. Post-conviction
relief hearing Judge

Dwayne EDDIE Starks

Applicant,

Vs.

The State of South Carolina

Respondent

Post-conviction relief Case No. 2015-CP-01-165

Notice of APPEAL

S/ Dwayne Starks
Dwayne Starks #253926
386 Redemption Way
764 Cormick, S.C. 29549

State of South Carolina
County of Abbeville

South Carolina Law Offices of
Laura Saunders

Dwayne Starks ^{SCDC} *253926
Applicant

Post-conviction relief: Case No. 2015-CP-01-165

Vs.

Request to appeal judgement order of dismissal

Laura M. Saunders
Respondent

AFFIDAVIT

To Laura Saunders

I'm writing you in the matter of the judgement order of dismissal,
Judge H. Thomas Heoper, Jr. signed on the 16 day of June, 2017.
Ms. Saunders, I request that you file an appeal on this judgement
because judge didnt abide with Rule 17-27-80 of the South
Carolina Code of Law.

sworn before me this

29 day of June, 2017

Notary s/ J Franklin

expires 12-10-2019

Respectfully submitted

s/ Dwayne Starks

Dwayne Eddie Starks *253926
586 Redemption Way
7600 Cosmick, S.C. 29899

Copy

State of South Carolina
IN THE COURT OF Common Pleas

A notice of appeal from Abbeville County
H. Thomas Hooper, Jr. Post-conviction
relief Judge Case No. 2015-CP-01-165

Dwayne Eddie Starks

Applicant,

vs.

The State of South Carolina

Respondent

AFFIDAVIT of service

I, Dwayne Starke S.C.P.C. #253926 does hereby certify that service of a certified copy of this notice of appeal in the above referenced case, was made upon the below listed person by placing same in the United States mail, first class postage pre-paid, at the below listed address clearly indicated on said envelope this day of August 2017, and a copy of letter applicant wrote and sent to counsel. addressed as follows:

The supreme court of south Carolina
Daniel E. Shearouse
Clerk of court
P.O. Box 11330
Columbia, S.C. 29211

RECEIVED

AUG 17 2017

S.C. SUPREME COURT

sworn before me this

14 day of August 2017

Notary s/ J. Franklin
expires 12-16-2019

Respectfully submitted
s/ Dwayne Starke
Dwayne Eddie Starks #253926
386 Redemption Way
McCormick, S.C. 29899

STATE OF SOUTH CAROLINA)
)
 COUNTY OF ABBEVILLE)
)
 Dwayne Starks,)
 S.C.D.C. No. 253926,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 OF THE EIGHTH JUDICIAL CIRCUIT

2015-CP-01-165

ORDER OF DISMISSAL

TRUE COPY
 BY *[Signature]*
 ABBEVILLE COUNTY CLERK OF COURT

EMORY
 CLERK OF COURT

2017 JUN 21 AM 9:02

STATE OF SOUTH CAROLINA
 COUNTY OF ABBEVILLE

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed June 10, 2015. An evidentiary hearing into the matter was convened on June 5, 2017, at the Laurens County Courthouse in Laurens, South Carolina. Applicant was present at the hearing and represented by Laura Saunders, Esquire. Justin Hunter, Esquire, of the South Carolina Attorney General's Office represented Respondent. At the hearing, Applicant testified on his own behalf. Applicant's trial counsel, Patricia Bolen, Esquire, also testified. This Court had before it a copy of Applicant's records from the Abbeville County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's PCR Application, and Respondent's Return.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Abbeville County Clerk of Court. Applicant was indicted at the July 2012 term of the Abbeville County Grand Jury for Armed Robbery (2012-GS-01-391) and Possession of a Firearm During the Commission of a Violent Crime (2012-GS-01-392). Applicant was represented by Patricia Bolen, Esquire. On April 1-3, 2013, Applicant proceeded

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to a jury trial before the Honorable Thomas L. Hughston, Jr., and was found guilty on both counts. He was sentenced to imprisonment for concurrent terms of twenty-five years for armed robbery and five years for the weapons charge.

Applicant timely filed a notice of appeal and an appeal was perfected. John Edward Robinson, Esquire, and Chief Appellate Defender Robert Dudek represented Applicant. The South Carolina Court of Appeals affirmed Applicant's convictions by an Unpublished Opinion filed October 29, 2014. State v. Dwayne Eddie Starks, Op. No. 2014-UP-490 (Ct. App. filed October 29, 2014). Applicant filed a petition for rehearing which was denied on December 12, 2014. Applicant filed a petition for writ of certiorari to the South Carolina Supreme Court. The Petition was denied on April 9, 2015. The Remittitur was issued April 10, 2015.

PCR Application

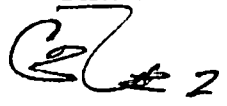
On June 10, 2015, Applicant filed an application for post-conviction relief alleging ineffective assistance of counsel. On April 8, 2016, Applicant filed a Motion to Amend, alleging the following grounds:

1. Conflict of Interest
 - a. Trial Counsel prosecuted defendant in a past conviction but didn't recuse
2. Ineffective Assistance of Counsel
 - a. Trial Counsel was ineffective where she agreed to the amendment of indictment
 - b. Trial Counsel failure to object to exhibit #27
 - c. Trial Counsel did not object to the trial judge failing to present all elements of the offense to the jury during the jury charge

II. SUMMARY OF THE TESTIMONY

Applicant's Testimony

Applicant testified that during his second or third meeting with Counsel, she informed him that she previously prosecuted a case against him in 2009 when she was with the Solicitor's Office. He testified that he never gave her the right to waive the conflict and never told her that



he did not want her representing him. He testified that he never said anything to her because he did not know about the conflict of interest.

Applicant testified that Counsel should have objected to errors in his indictment. He testified that the indictment was amended by the State to allege that he robbed a Shell Station when it was originally listed in the indictment as a One Stop.

Applicant testified that Counsel should have objected to a chain of custody issue where there was a day two break in the chain. He testified that the evidence chain showed that Lieutenant Chris Wilkie took the evidence items to SLED on 3/20/12 but the items were not clocked into SLED until 3/22/12.

Counsel Patricia Bolen's Testimony

Counsel testified that she worked in the Eighth Circuit Solicitor's Office from 2007 to 2011. She testified that she discussed with Applicant that in 2009 she prosecuted a criminal domestic violence charge against Applicant. She testified that she worked out a deal with Applicant to plead to a time-served charge on the lesser offense of assault and battery. Counsel testified that because she moved from the Solicitor's Office to the Public Defender's Office in the same circuit, she revealed her prior employment to her clients for a period of time. Counsel testified that she told Applicant that he could be represented by Shane Goranson (Applicant's prior public defender) if he was uncomfortable with her representation. She testified that Applicant told her that it was not a problem. Counsel further testified that there was not an actual conflict under Rule 1.7 or 1.8 because she was not representing Applicant on a similar or related matter as his previous case.

Counsel testified that any change to Applicant's indictment would have to be done prior to the jury being sworn. She testified that she discussed this with Applicant but Applicant told



her not to object because he did not want to delay the case. She testified that she told Applicant that if she objects to the indictment then the solicitor can re-indict him at a later date. She testified that the Shell Station was previously a One Stop and that they are physically the same location. She testified that she did not object to the amendment of the indictment because she believed the error was due to scrivener's error. Counsel testified that the officer probably knew the gas station when it was a One Stop. She further testified that this change in wording had no effect on Applicant's case. Furthermore, Counsel testified that the defense strategy was actual innocence and she made a strategic decision to not object to the amendment of the indictment because if she had objected then she would have been asserting a privacy right in the Shell Station that would be inconsistent with actual innocence.

Counsel testified that she cannot remember any problem with the chain of custody.

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.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Counsel's testimony to be credible and persuasive on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below.

Ineffective Assistance of Counsel

This Court finds that Counsel demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, 466 U.S. at 668; Butler, 286 S.C. 441, 334 S.E.2d 813. This Court finds that Applicant has failed to

prove that Counsel was ineffective for failing to object to the amended indictment. This Court finds that Counsel provided credible testimony that the physical location of the gas station Applicant was alleged to have robbed was the same even if the officer who wrote the arrest warrant referred to it by a previous name. This Court agrees with Counsel that the error in the name of the gas station on the indictment was most likely due to scrivener's error. This Court also agrees with Counsel that Applicant suffered no prejudice as the physical location of the gas station remained the same and because the State could simply re-indict Applicant without the scrivener's error. As such, this Court finds that Counsel was not ineffective and Applicant has failed to prove that the outcome of his trial would have been different. Accordingly, this allegation must be dismissed.

Applicant alleged that Counsel was ineffective for failing to object to the chain of custody regarding items of clothing, where Lieutenant Chris Wilkie testified that he removed the items from the evidence room on March 20, 2012, and took it to SLED on March 22, 2012. See Trial Transcript p. 208, ll. 3-16. This Court finds that Applicant has failed to prove that Counsel was ineffective for failing to object and has failed to show that the chain of custody was objectionable. The record reveals that Lieutenant Wilkie testified that he placed the clothing items into a labeled bag into evidence on February 28, 2012. Trial Transcript p. 208, ll. 4-10. He testified that he secured the item into the evidence room, removed it on March 20, and took it to SLED on March 22. Trial Transcript p. 208, ll. 11-14. There is no evidence that there is a break in the chain of possession during that time or that anyone other than Lieutenant Wilkie handled the bag between March 20 and March 22. State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001) ("Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete."). The record reflects that these non-fungible items were



secured in an evidence bag and there has been no showing that the items were tampered with or that they were in the possession of any officer outside of Lieutenant Wilkie. This Court finds that the chain at issue here was not objectionable and Counsel was not ineffective for failing to object. Applicant has failed to meet his burden of proving that Counsel was deficient in this regard and has failed to prove resulting prejudice. Accordingly, this allegation must be dismissed.

Conflict of Interest

"An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007). This Court has further stated that a conflict of interest occurs when "a defense attorney places himself in a situation inherently conducive to divided loyalties." Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008).

Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for a claim of ineffective assistance of counsel arising from multiple representation. Langford v. State, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993) (citing Cuyler v. Sullivan, 446 U.S. 335, 350 (1980); see also Burger v. Kemp, 483 U.S. 776, 783 (1987)). "The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." State v. Gregory, 364 S.C. 150, 152-53, 612 S.E.2d 449, 450 (2005). A defendant need not demonstrate prejudice if there is an actual conflict of interest." Id., 364 S.C. at 153, 612 S.E.2d at 450.

Applicant alleged that Counsel had a conflict of interest because she prosecuted a case against Applicant four years prior to the trial when she was employed at the Eighth Circuit Solicitor's Office. This Court finds that Counsel provided credible testimony that she disclosed

her prior dealing with Applicant and he did not object. This Court finds that Counsel was not ineffective as there was no conflict of interest in her representation of Applicant. This Court also finds that Applicant has failed to show that Counsel represented interests adverse to Applicant's or that she had any divided loyalties based on her work in the Solicitor's Office years before representing Applicant. Furthermore, this Court finds that Counsel did not violate Rules 1.7 and 1.8 of the Rules of Professional Conduct that govern conflicts of interest. Accordingly, this allegation must be dismissed.

IV. CONCLUSION

Based on the foregoing facts, the Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Applicant failed to demonstrate that Counsel's performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.


The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt 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, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant 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; and
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 16 day of June, 2017.



G. THOMAS COOPER, JR.
Presiding Judge
Eighth Judicial Circuit

Clemson, South Carolina

STATE OF SOUTH CAROLINA,)
)
COUNTY OF ABBEVILLE.)

IN THE COURT OF COMMON PLEAS.

Dwayne E. Starks, #253926,)
)
Applicant,)

v.)

State of South Carolina,)
)
)
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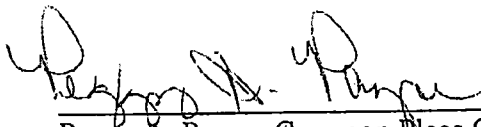
CERTIFICATE OF SERVICE BY MAIL

15-CP-01-165

The undersigned, an employee of the Abbeville County Clerk of Court's Office, does hereby certify that service of a certified copy of the Order of Dismissal filed June 21, 2017, in the above-referenced case, was made upon the following persons by placing same in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 21st day of June, 2017, addressed as follows:

Justin J. Hunter, Esq.
Office of the Attorney General
Post-Conviction Relief Section
Post Office Box 11549
Columbia, SC 29211

Dwayne E. Starks, #253926
MCCI - F2-B-232
386 Redemption Way
McCormick, SC 29899



Peggy A. Payne, Common Pleas Clerk

McCormick Correctional Institute
386 Redemption Way
McCormick, SC 29899

The Supreme Court of South Carolina
Daniel E. Shearouse
Clerk of Court
P.O. Box 11330
Columbia, S.C. 29211

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CORRECTIONAL INST

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