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August 23, 2017

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

Re: Dayton Frinks 2015-CP-26-04770

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Horry County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,

James K Falk

Thank you for your assistance.

Cc. Valerie Garcia Giovanoli, Esq.; Dayton Frinks 355560.

Mailing Address: PO Box 1058, Charleston, S.C. 29402
Location: 38 Broad Street, Suite 350, Charleston, S.C. 29401

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM HORRY COUNTY

Court of Common Pleas

Honorable Roger E. Henderson, Circuit Judge

RECEIVED

AUG 28 2017

S.C. SUPREME COURT

Case No.: 2015-CP-26-04770

Dayton Frinks 355560.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner James Little appeals the Honorable Roger E. Henderson's August 7, 2017 Order of Dismissal. Undersigned counsel received notice of entry of the order on August 22, 2017. A copy of the order on appeal is attached hereto.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

August 23, 2017

Valerie Garcia Giovanoli, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

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PROOF OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Valerie Garcia Giovanoli, Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this August 23, 2017.

James K Falk
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Charleston, SC 29402

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Dayton C. Frinks, Jr., #355560, Applicant,	)	Case No. 2015-CP-26-4770
v.	)	**ORDER OF DISMISSAL WITH PREJUDICE**
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of an Application for Post-Conviction Relief filed June 22, 2015. Respondent made its Return on or about December 6, 2016. An evidentiary hearing was convened into the matter on May 23, 2017 at the Horry County Courthouse. Applicant was present and represented by James K. Falk, 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, James C. Galmore, III, Esquire, (Counsel) also testified. This Court had before it a copy of the Horry County Clerk of Court records regarding the subject conviction, Applicant's SCDC records, the trial transcript, Applicant's appellate records, and the records of this PCR action.

PROCEDURAL HISTORY

Applicant is presently incarcerated with the South Carolina Department of Corrections pursuant to the Horry County Clerk of Court's orders of commitment. The Horry County Grand Jury indicted the Applicant at the January 2013 term for kidnapping (2013-GS-26-0189) and first-degree burglary (2013-GS-26-0190). James C. Galmore, III, Esquire represented Applicant.

On May 15, 2013, the case proceeded to a jury trial before the Honorable Edward B. Cottingham. On May 16, 2013, the jury found Applicant not guilty of kidnapping, but guilty of first-degree burglary. Judge Cottingham sentenced Applicant to fifteen (15) years' imprisonment for first-degree burglary.

Applicant filed a timely notice of appeal, Appellate Case Number 2013-001127. Susan B. Hackett, Esquire, perfected the appeal in the form of an Anders[1] brief. Applicant filed a *pro se* brief. Subsequently, the Court of Appeals dismissed his appeal on March 18, 2015 (2015-UP-157). The remittitur was issued April 3, 2015.

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

1. Ineffective Assistance of Counsel
   a. "Trial Counsel's performance was deficient when he failed to request a King charge (lesser included offense), when the only evidence before the court was Applicant's fingerprint on the exterior of the home's window, and a broken window pane was the only evidence of a crime."2
2. Violation of Sixth Amendment Rights

At the PCR hearing, Applicant proceeded on his claim of ineffective assistance of counsel that was alleged in his application. Applicant added two additional claims at the start of the hearing that:

1. Counsel failed to conduct a Biggers[3] hearing; and
2. Counsel asked an improper question during cross-examination of the victim that yielded a first-time, in-court identification of Applicant.

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1 Anders v. California, 386 U.S. 738 (1967).
2 Because a King charge, a jury instruction that if there is reasonable doubt between the lesser and greater offenses, jury must resolve that doubt in defendant's favor, was inapplicable in Applicant's trial where the jury was only charged with first-degree burglary, this claim is interpreted as counsel failing to request a charge of a lesser included offense. State v. King, 158 S.C. 251, 155 S.E. 409 (1930).
3 Neil v. Biggers, 409 U.S. 188 (1972).

Respondent objected to the untimely amendment to Applicant's allegations, pursuant to Rule 15, SCRCP, but this Court allowed Applicant to proceed on the additional claims.

SUMMARY OF TESTIMONY

I. Counsel testified to the following:

Counsel has practiced criminal law for eighteen years. Counsel was appointed to Applicant's case through the Public Defender's Office. Counsel requested discovery and reviewed all of it with Applicant. Based on the discovery, Counsel believed the state did not have much evidence against Applicant. He recalled the evidence being a fingerprint on the outside of a window pane that matched Applicant. There was no other identification evidence prior to trial and the fingerprint on the outside of the window was not sufficient to convict Applicant. There was a screen over the window that had been slit and the window had been broken. However, Counsel did not necessarily believe the screen was on the outside of the house and cutting the screen would not necessarily be sufficient to show entry. The victim had only given a physical description, including the angularity of his chin, lips, his skin color, and stature – not necessarily sufficient enough to identify the Applicant specifically. Counsel agreed that the victim did not specifically identify Applicant during direct examination and that after he asked "one too many questions" on cross examination, the victim identified Applicant as the burglar. After that identification, the state confirmed the identification during its re-direct examination by eliciting testimony that the victim had actually identified him to his neighbor at the preliminary hearing while in a room of other defendants. Had the victim not identified Applicant, much to everyone's surprise, Counsel was prepared to make a directed verdict motion and had the case law to help back up his argument that the fingerprint on the outside of the window was insufficient to prove Applicant entered the home.

On cross examination, when asked why he asked "one too many questions," Counsel testified he was strategically attempting to "seal the deal" in showing the jury and the judge that there was no identification of Applicant. This strategy was based on the evidence available to Counsel at that time. After the regrettable question and surprise answer from the victim, Counsel proceeded to impeach the victim based on the fact he had never before made an identification of Applicant prior to that day. He also thoroughly argued the credibility of the surprise identification in his closing argument.

Counsel also testified there were discussions of a plea deal, but no discussion regarding a possibility of a lesser-included offense. Counsel testified his strategy in not requesting a lesser included charge was that the jury would either believe the identification and find him guilty, or not believe the identification and find him not guilty – and that the evidence of a firearm being used and the burglary occurring in the nighttime exceed the scope of burglary second or third degree.

II. Applicant testified to the following:

Applicant testified he first received a plea offer of fifteen years. The state then withdrew that offer and extended a thirty year offer. After the thirty year offer, they again offered him fifteen years. Applicant believed the testimony from the victim describing his assailant's lips and chin was preposterous because the victim could not describe the half-mask that was worn. Applicant recalled that Counsel told him the state had a weak case against him. Applicant also testified the state offered him a plea deal under the YOA, but only if he would tell them who were the two other men involved in the burglary. Applicant claimed he could not tell them because he did not know. Applicant rejected all offers made by the State. Applicant acknowledged he was sentence to the minimum sentence allowable by law for the crime for which he was convicted.

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 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 request lesser included offense

This Court finds Applicant has failed to meet his burden to prove Counsel was ineffective for failing to request a charge for a lesser included offense. The evidence presented at trial would not support a conviction of a lesser included offense over the greater. The defense was based on lack of identification. Counsel testified the jury would either find Applicant was not sufficiently identified as the perpetrator and acquit him or find there was a sufficient identification and convict him. There was no reason to request a charge for a lesser included offense where the evidence only supported first degree burglary. This Court finds Counsel was not deficient in not requesting a charge of a lesser included offense. This Court also finds there was no prejudice suffered by Applicant as a result of not requesting a lesser included offense. Having failed to meet his burden to prove Counsel was ineffective for failing to request a lesser included offense, this allegation is denied and dismissed with prejudice.

Failure to request a pre-trial Biggers hearing

This Court finds Applicant has failed to meet his burden to prove Counsel was ineffective for failing to request a pre-trial Biggers hearing. It is clear there was never an identification made of Applicant by the victim prior to trial. Based on the knowledge and information available to Counsel at the time of trial, there was no reasonable basis to conduct a Biggers hearing. In fact, lack of identification was Counsel's primary defense to the charges against Applicant. Counsel reviewed all

of the discovery in this case, including the victim's prior physical description of Applicant. However, nothing in the discovery indicated the victim had ever or would be able to identify Applicant as the perpetrator. This Court finds there was no basis to request a Biggers hearing prior to trial and therefore Counsel was not deficient. Applicant has failed to meet his burden to prove Counsel was deficient for failing to request a Biggers hearing, therefore this allegation is denied and dismissed with prejudice.

Asking improper question on cross examination of the victim

This Court finds Applicant has failed to meet his burden to prove Counsel was ineffective for improperly cross examining the victim. Although Counsel admits he asked "one too many questions" of the victim during cross examination, his questioning was the product of a well-reasoned trial strategy. Counsel was pursuing the defense of insufficient identification at trial. This defense was based on a thorough investigation of the case and review of the discovery. Counsel reasonably believed he could secure a directed verdict in favor of Applicant based on the fact the victim had never before identified Applicant prior to trial *or* during direct examination by the state. During the direct examination of the victim by the state, the victim only gave a physical description of the perpetrator that did not specifically or sufficiently identify Applicant. During cross-examination by Counsel, Counsel attempted to "seal the deal" when he asked, "you can't say, hey, that's the guy that did it?" Trial Tr. p. 40, l. 13. This was a strategic decision by Counsel that, much to everyone's surprise, resulted in a first-time identification of Applicant. After the surprise testimony, Counsel proceeded to thoroughly impeach the victim based on his never before identifying Applicant to any law enforcement or state official. Counsel also thoroughly addressed the credibility of the first-time identification during his closing argument.

This Court notes the reasonableness of Counsel's conduct must be measured *at the time* of the challenged conduct. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. "After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." Harrington v. Richter, 131 S. Ct. 770, 790, 178 L. Ed. 2d 624 (2011) (citing Strickland, 466 U.S. 688). This Court refuses to allow the distorting effects of hindsight to blur the objective standard to which Counsel's performance must be held. Counsel's decision to ask the victim whether or not he could identify Applicant was a reasonable one based on the information available at the time of trial. No one, including Counsel, could have foreseen the surprising, first-time, in-court identification by the victim. This Court finds Counsel was not deficient for eliciting an identification of Applicant during his cross examination of the victim. Therefore, this allegation is denied and dismissed 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 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 7th day of August, 2017.

ROGER E. HENDERSON
Presiding Judge
Fifteenth Judicial Circuit

Dillon, South Carolina