



**DANIEL A. SELWA, II**  
Attorney at Law, L.L.C.

LITIGATION OFFICE  
1053 LONDON STREET  
MYRTLE BEACH, S.C. 29577  
OFFICE: (843) 492-5449  
FAX: (843) 353-0683  
MOBILE: (843) 450-7566

REAL ESTATE OFFICE  
302 MAIN STREET  
N. MYRTLE BEACH, S.C. 29582  
OFFICE: (843) 281-2156  
FAX: (843) 281-2159  
SELWA@SCLAWYERS.NET

WWW.SCLAWYERS.NET

April 22, 2015

Daniel E. Shearouse  
Clerk of Court – SC Supreme Court  
Supreme Court  
P.O. Box 11330  
Columbia, SC 29211

**RECEIVED**

APR 27 2015

**S.C. Supreme Court**

Re: Mark Allen Elliott #343763 v. State of South Carolina  
2013-CP-26-1843

Dear Mr. Shearouse:

Enclosed please find the original Notice of Appeal in the above-entitled action and one copy. Please file and return the copy to me in the self addressed stamped envelope enclosed.

If you should have any questions or concerns, please do not hesitate to contact me.

Sincerely,

Daniel A. Selwa, II

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

**RECEIVED**

APR 27 2015

---

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

**S.C. Supreme Court**

Honorable John C. Hayes, III, Circuit Court Judge

---

Case No.: 2013-CP-26-1843

---

Mark Allen Elliot #343763,..... Petitioner,

v.

State of South Carolina,..... Respondent.

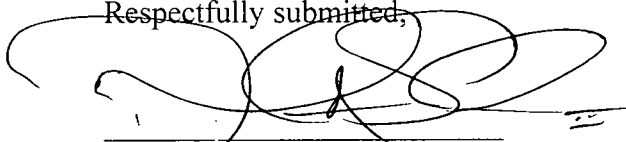
---

**NOTICE OF APPEAL**

---

The Petitioner appeals the Honorable John C. Hayes', III, November 18, 2014, order, denying the Applicant's Petition for post-conviction relief. Undersigned counsel received notice of entry of the order on March 25, 2015. A copy of the order on appeal is attached to this notice.

Respectfully submitted,



---

Daniel A. Selwa, II  
1055 London Street, Suite A  
Myrtle Beach, SC 29577  
*Attorney for the PCR Applicant*

April 22, 2015

*Other counsel of record:*

Alan Wilson, Attorney General

Joshua L. Thomas, Assistant Attorney General

Post Office Box 11549

Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

APR 27 2015

S.C. Supreme Court

---

APPEAL FROM HORRY COUNTY  
Honorable John C. Hayes, III, Circuit Court Judge

---

Case No.: 2013-CP-26-1843

---

Mark Allen Elliot #343763,..... Petitioner,

v.

State of South Carolina,..... Respondent.

---

**PROOF OF SERVICE**

---

I, Daniel A. Selwa, II, certify that I have served the within Notice of Appeal on the Respondent, the State of South Carolina, by depositing a copy of the same in the United States Mail, postage prepaid, addressed to his attorney of record, Alan Wilson, Attorney General, Post Office Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this 22nd day of April 2015.



---

Daniel A. Selwa, II  
1053 London Street, Suite A  
Myrtle Beach, SC 29577  
*Attorney for the PCR Applicant*

11  
J

FILED  
STATE OF SOUTH CAROLINA Horry County IN THE COURT OF COMMON PLEAS  
COUNTY OF HORRY 2014 NOV 24 PM 1:41 FIFTEENTH JUDICIAL CIRCUIT

MELANIE HUGGINS-WARD  
CLERK OF COURT C.A. No.: 2013-CP-26-1843

Mark Allen Elliot,  
Applicant,  
v.  
State of South Carolina,  
Respondent.

**ORDER**  
This is a Post-Conviction Relief Proceeding

Applicant filed this post-conviction relief application on March 27, 2013. The undersigned heard this case on October 27, 2014. Daniel Selwa, II, Esquire, represented the Applicant. Josh Thomas, Esquire, represented the State.

The Applicant is currently incarcerated in South Carolina Department of Correction pursuant to Order from the Horry County Clerk of Court. The Applicant was indicted at the July 2009 term of the Horry County Grand Jury for kidnapping (2009-GS-26-2889). Ronald W. Hazzard, Esquire, and Melinda Knowles, Esquire, represented the Applicant.

The State took the case to trial, and on November 19, 2010 the Applicant was found guilty. The Honorable Larry B. Hyman, Jr. sentenced the Applicant to thirty (30) years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. Breen R. Stevens, Esquire, of the South Carolina Commission on Indigent Defense perfected the appeal. The Court of Appeals affirmed the Applicant's conviction and sentence. *State v. Mark Elliot*, Op. No. 2013-UP-112 (S.C. Ct. App. filed March 13, 2013). The Remittitur was sent on April 3, 2013.

*JeATH*

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

1. Ineffective assistance of counsel.
  - a. "Counsel allowed the attorney he had removed off his case to be assistant during Applicant's trial."
  - b. Counsel failed to have a juror excused who was previously a bail bondsman.
  - c. Counsel referred to Applicant as "being in the drug game."
  - d. Counsel failed to put phone records into evidence.
2. Ineffective evidence of kidnapping.
  - a. Applicant puts forth six (6) enumerated allegations that the evidence was insufficient to sustain a conviction.

The Court interprets Applicant's allegations as ineffective assistance of counsel. 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 on 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 v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

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*, 80 L.Ed.2d 674. The Applicant must overcome this presumption in order to receive relief. *Cherry v. State*, 300 S.C.115, 386 S.E.2d 624 (1989).

The reviewing court applies a two pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625, citing *Strickland*. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a

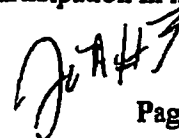
*J. H. Z.*

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.E. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984)).

The Court looks first to Applicant's second ground for post-conviction relief, lack of evidence to support the jury verdict as to kidnapping. The allegation fails to state a claim cognizable under Post-Conviction Procedure Act, S.C. Code 1976, as amended, Section 17-27-10 to -160. Post-conviction relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." (S.C. Code Ann. § 17-27-20(b); see also *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("It is uniformly held that an application for post-conviction relief is not a substitute for an appeal.") Applicant's allegations regarding the sufficiency of the evidence are not appropriately addressed in PCR, therefore, these allegations are dismissed.

The Court will, herein below, address Applicant allegations relating to the claim of ineffective assistance of counsel.

As to ground 1(a), Applicant has presented no evidence that Applicant's relieved counsel, Melinda Knowles, participation in his trial affected him adversely in any way or to any degree. Therefore, he has failed to prove any prejudice whatsoever based on Ms. Knowles participation at his trial. Also, Applicant could have, and should have, objected to Ms. Knowles participation prior to or at least during his trial. Applicant had the assistance of Ms. Knowles, unobjected to at trial, and now claims her participation at his trial was improper. Applicant has, by his failure to do so timely, waived any issue he may have had regarding Ms. Knowles participation in his trial.



As to ground 1(b), it appears a juror, Theron E. Shields, Jr., was a bail bondsman and knew Applicant's brother who worked at the Horry County Detention Center (TR p. 243 L 20 through p. 247 L 2). In a colloquy with the trial judge, the Solicitor and trial counsel, as referenced, Juror Shields affirmed that this fact would not prevent him serving as a fair and impartial juror. (TR p 245 LL 8-15). Trial counsel testifies that he had no reason to strike Juror Shields based on the trial judge's questioning regarding fairness and impartiality. Trial counsel also testified nothing about the juror or his familiarity with Applicant's brother indicated a problem with Juror Shields, and trial counsel felt Juror Shields might be helpful. Trial counsel testified that Juror Shields was honest in relating his knowledge of Applicant's brother and that Applicant did not express any concerns about Juror Shields as a juror. To this latter point, Applicant testified he did not know, at the time of trial, of the juror's relationship with Applicant's brother.

Trial counsel's conduct, regarding his approach to seating Juror Shields, falls in the category of trial strategy. Here, trial counsel articulated a valid reason for employing this trial strategy which I find conforms to the reasonable attorney standard of *Cherry, supra*. See also *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (Sup. Ct. 1992).<sup>1</sup>

As to ground 1(c), trial counsel testified, and the record reflects, that his closing argument placed Applicant in the drug game. (TR p. 989 LL 14-20). This was according to trial counsel, a theory of the case. This theory was that Applicant was present during the events leading up to the charges against Applicant because Applicant was assisting the victim in procuring drugs. Trial counsel testified he simply told the jury the truth, that the events were drug related. Here,

---

<sup>1</sup> It is worth noting that the jury acquitted Applicant of criminal sexual conduct, criminal sexual conduct with a minor, and failure to stop for a blue light.

trial counsel articulated a valid reason for his defense of Applicant, i.e. his trial strategy. See, *Whitehead*.

As to ground 1(d), trial counsel testified he should have put the victim's phone records into evidence. This was brought home when the jury asked to see the phone records. Trial counsel's hindsight and the jury's query do not require a finding of ineffective assistance of counsel. On this issue, hindsight and juror's questions are not, on their face, evidence of ineffective assistance of counsel nor is trial counsel's belief now that the phone records "may have made a difference." The heart of the Court's analysis of this issue is whether or not evidence of the phone calls was placed before the jury during trial. That is, did trial counsel effectively present what was crucial evidence, by all accounts, before the jury for its consideration. The answer to this is, yes he did.

The phone records at issue were those of the alleged victim, Brittany Eberhardt, and their relation to the case arises regarding her use of her phone during the time she was alleged to be kidnapped by Applicant. The Applicant's theory being, the victim had access to her phone, made and/or received calls and did not call 911.

Brittany Eberhardt testified that during the kidnapping episode she had her phone with her and did not call the police (TR p. 576 LL 11-25) but answered her phone when it rang two or three times (TR p. 577 LL 1-7); then quit answering the phone on instruction of Applicant and turned her phone off and handed it to Applicant (TR p. 577 LL 3-25). She testified that after she handed Applicant the phone he did not thereafter let her use it. (TR p. 578 LL 7-9). Ms. Eberhardt also testified that when she was released by Applicant she asked for the return of her phone and Applicant did not return it. (TR p. 591 LL 1-4).

*JA 4/5*

The phone records placed into evidence cover a period of time from 1:58:59 (6-29-09) to 21:45:07 (6-30-09). The time duration of the incident is unclear to the undersigned other than it happened on June 29, 2009 between 1:00 a.m. and 5:00 a.m. (TR p. 596 LL 7-10). The victim did testify that she noticed the time of 3:30 on Applicant's car clock. (TR p. 597 LL 11-12). As noted above, Applicant is alleged to have taken the victim's phone from her and did not return it. There are no outbound calls from the subject phone number (704-224-5099) from 3:17:21 to 3:18:00. After that time, there were three inbound calls over the next approximately three and one half minutes. The victim testified that an inbound call was from a friend at 3:34 a.m. for over a minute and a half (TR p. 601 LL 7-15) and a twenty second call shortly before. (TR p. 602 LL 3-7). Additionally, a third call after the minute and one-half call came in 9 seconds thereafter and was for 8 second duration.

In sum, the telephone records serve only to substantiate the victim's testimony at trial. The record confirms she did not call anyone after 3:18 a.m. and the number she called was not a 911 call or a call to the person who called her at 3:45 a.m. The victim admitted she did not call for help (TR p. 576 LL 13-24), talked to Matthew (TR p. 577 LL 2-21), then cut her phone off and handed it to Applicant (TR p. 577 LL 22-25). The victim's cell phone was in the Applicant's car when a search, pursuant to a search warrant, was executed on Applicant's car after he was apprehended. (TR p. 758 LL 18-21).

The jury's request to see the records does not create ineffective assistance of counsel by trial counsel. The victim's trial testimony, direct and cross examination, established all the phone records would show. Additionally, the phone records would not reflect on the victim's credibility as they are consistent with her testimony.

*John H6*

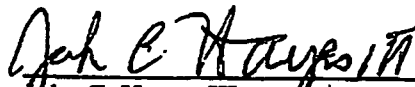
Applying the reasonable attorney test of *Strickland*, supra. I find trial counsel's representation of Applicant relative to the telephone record issue meets the standard of reasonableness.

I find Applicant has failed to carry his burden of proof and failed to prove trial counsel was ineffective in his representation of Applicant in any regard.

The Court finds that trial counsel's representation of Applicant was effective. Therefore, Applicant's application for post-conviction relief is denied and dismissed with prejudice.

Applicant is hereby placed on notice that any petition for certiorari to the South Carolina Supreme Court must be filed within thirty (30) days. See Appellate Court Rules 203, 206, and 227(b).

IT IS SO ORDERED.

  
\_\_\_\_\_  
John C. Hayes, III  
Presiding Judge #7

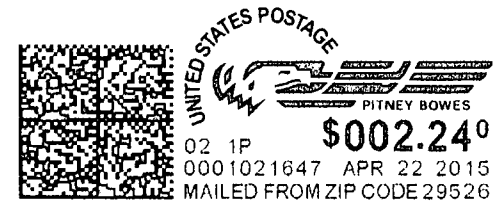
November 14<sup>th</sup>, 2014  
Conway, South Carolina

**MAILED**  
11-26-14 to all  
parties not in  
default for



**DANIEL A. SELWA, II**  
Attorney at Law, L.L.C.

1053 London Street, Suite A  
Myrtle Beach, SC 29577



Daniel E. Shearouse  
Clerk of Court – SC Supreme Court  
Supreme Court  
P.O. Box 11330  
Columbia, SC 29211