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September 20, 2017

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

The Honorable Sharon W. Staggers
Clerk of Court
125 W Main St.
Kingstree, SC 29556

**RE: Toshonda Mickens, #357123, v. State of South Carolina
2016-CP-45-248**

RECEIVED

SEP 22 2017

S.C. SUPREME COURT

Dear Mr. Shearouse and Ms. Staggers:

Enclosed for filing is a Notice of Appeal in the above-referenced case. Also enclosed are the following:

- (1) Proof of Service of the Notice of Appeal;
- (2) A copy of the Order which is to be challenged on appeal; and
- (3) Prior Order of Appointment of Counsel.

As I was appointed to represent Ms. Mickens in her PCR proceeding, I anticipate that the Office of Appellate Defense will represent her in this appeal.

Yours very truly,



Lance S. Boozer

Enclosures

cc: Julie Coleman, AAG
Loriene French, OAD
Toshonda Mickens, #357123

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

The Honorable D. Craig Brown, Circuit Court Judge

Case No. 2016-CP-45-248

RECEIVED
SEP 22 2017
S.C. SUPREME COURT

Toshonda Mickens, #357123,Petitioner,

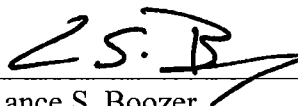
v.

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

NOTICE OF APPEAL

The Petitioner appeals the Honorable D. Craig Brown's Order dated June 15, 2017, and filed June 23, 2017, denying post-conviction relief to the Petitioner. Undersigned counsel was never served with the filed Order. Counsel located the Order on the Clerk of Court website on September 20, 2017. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,



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September 20, 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

The Honorable D. Craig Brown, Circuit Court Judge

RECEIVED

SEP 22 2017

Case No. 2016-CP-45-248

S.C. SUPREME COURT

Toshonda Mickens, #357123,Petitioner,

v.

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

PROOF OF SERVICE

I, Lance S. Boozer, appointed attorney for Petitioner, certify that I have today served within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to Assistant Attorney General Julie Coleman, P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 20th day of September, 2017.



Lance S. Boozer
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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS	
COUNTY OF WILLIAMSBURG)	THIRD JUDICIAL CIRCUIT	
)		
Toshonda Mickens, #357123,)	2016-CP-45-248	
)		
Applicant,)		
)		
v.)	ORDER OF DISMISSAL	
)		
State of South Carolina,)		
)		
Respondent.)		
)		

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on June 16, 2016. Respondent submitted its Return on February 14, 2017. An evidentiary hearing was convened on March 29, 2017, at the Sumter County Courthouse. Applicant was present at the hearing and was represented by Lance S. Boozer, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

Applicant testified on her own behalf at the evidentiary hearing. Applicant's trial counsel, Timothy Griffith, Esquire ("Trial Counsel") also testified. The Court had before it a copy of the trial transcript, the records of the Sumter County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Williamsburg County. Applicant was first indicted by the January 2011 term of the Grand Jury for Williamsburg County for Murder, Armed Robbery, Burglary – 1st Degree, and Criminal Conspiracy (2011-GS-45-016). Applicant

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was later indicted by the July 2013 term of the Grand Jury for Williamsburg County for Criminal Conspiracy, Burglary – 1st Degree, and Armed Robbery (Amended 2011-GS-45-016). Applicant was represented by Timothy L. Griffith, Esq. during trial. Applicant was convicted as indicted of Murder, Burglary – 1st Degree, Armed Robbery, and Criminal Conspiracy. Applicant was sentenced on September 13, 2013 by the Honorable W. Jeffrey Young to thirty years' imprisonment for Murder, thirty years for Burglary – 1st Degree, thirty years for Armed Robbery, and five years for Criminal Conspiracy, to be served concurrently.

Applicant filed a timely notice of appeal. An appeal was perfected and an Anders brief was submitted. The South Carolina Court of Appeals dismissed Applicant's appeal in an opinion filed May 11, 2016. State v. Mickens, Op. No. 2016-UP-209 (S.C. Ct. App. 2016). The Remittitur was returned on May 27, 2016.

II. ALLEGATIONS

In her current application, Applicant alleges that she is being held in custody unlawfully based on the following allegations:

1. Sixth Amendment Violation
 - a. "My attorney was not notified of my [preliminary] hearing and I was forced to represent myself. I wasn't court appointed an attorney nor was I offered a continuance."
2. Ineffective Assistance of Counsel
 - a. "My attorney informed me he was not ready for trial but refused to ask for a continuance."
 - b. I wasn't aware of my new charges until the day my trial started."

On March 7, 2017, Applicant filed an amended application adding the following allegation:

- (i) Ineffective assistance of counsel for failing to investigate, review trial strategy, review discovery and evidence, and failing to review

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and discuss the benefits and risks associated with proceeding with a trial or accept and enter a guilty plea.

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.

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IV. SUMMARY OF RELEVANT TESTIMONY

At the evidentiary hearing, Applicant testified that she was arrested on August 31, 2010. She stated that she hired John Etheridge and Scott Suggs to represent her, and she thought they were retained for the trial, but they were only representing her at her bond hearing. She stated that her bond was set in October, 2010, and she was released on bond in January, 2011.

Applicant stated that her attorneys did not appear at her preliminary hearing, and the judge waited for twenty minutes but had to proceed. She stated that she was not appointed an attorney and had to represent herself. Applicant testified that when Trial Counsel took her case, she met with him at his office to discuss the charges, and she believed he was going to seek a plea offer. She stated that they met for forty-five minutes to discuss her charges when her indictments were amended to include new charges. She stated that at first, she was not charged with the principal crimes, just accessory; when her indictments were amended, she was charged with all of the crimes as a participant, not an accessory. She testified that it was not brought to her attention that her charges were enhanced when she was given a plea offer.

Applicant stated that the State was alleging that she drove a car for three men to help them commit a robbery, and someone was killed in the process of the robbery. She testified that she did not participate in this crime. She stated that she was given a plea offer for burglary, second degree, for a 0-15 year sentence with no recommendation, but she rejected the plea offer and went to trial instead.

Applicant testified that she had no discussion with Trial Counsel about defenses or trial strategy. She testified that she met with Trial Counsel for the third time on September 9, 2013, in the courtroom, where she thought she was appearing for roll call the week before trial, but it was actually the day her trial started, and Trial Counsel told her about the new charges during that

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meeting. Applicant testified that she did not know before the trial that she could be convicted under the "hand of one, hand of all" doctrine, although Trial Counsel explained it to her. She stated that she would have accepted the plea offer if she had understood what that meant.

Applicant testified that she did not feel like Trial Counsel was ready for trial, but he did not request a continuance. She testified that she does not want a new trial; she only wants to take the plea offer that she rejected.

Trial Counsel testified at the evidentiary hearing that he was appointed to Applicant's case on May 17, 2013. He stated that he met with her after he was appointed, and she came to meet with him again on August 22, 2013. He stated that he tries to contact all of his clients at least once a month to catch them up on their case, usually by telephone. Trial Counsel testified that at their initial interview, she was originally charged with murder based on the statement of a codefendant. He testified that she told him she did not know anything about the crime, but she found a man on the side of the road who had been shot, so she took him to the hospital.

Trial Counsel testified that the State's theory was that Applicant conspired with the codefendant to commit the crime, and she drove them to and from the crime scene, and when the codefendant was shot during the robbery, she drove him to the hospital. He stated that they knew that a codefendant was going to testify against her at trial while they were preparing. He testified that they did review and discuss the discovery and evidence before the trial.

Trial Counsel testified that he does not specifically remember discussing with Applicant the "hand of one, hand of all" doctrine, but he knows he explained it to her because he always discusses it with his clients as a general rule. He stated that he would have used the example of going to steal a candy bar with a friend, and if the friend kills somebody while you do it, you can be charged with murder under the "hand of one, hand of all" theory.

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Trial Counsel testified that he explained to Applicant before the trial that a plea offer was pending. He stated that she told him she would accept the offer and plead to burglary, second degree, but she came back the next week and she had decided not to take it. He stated that he discussed with her again, and he had her sign a piece of paper that explained the plea offer and the potential consequences if convicted at trial. Respondent entered this document as Respondent's Exhibit One. Trial Counsel testified that he believes that she discussed the plea offer with a family member and her family talked her into going to trial. He stated that he told Applicant he could not make the decision for her. He stated that Applicant, Trial Counsel, and Solicitor Kimberly Barr all discussed the plea offer together, and she was ready to accept the plea offer until right before they picked the jury.

Trial Counsel testified that he was prepared to go to trial and there was no reason to request a continuance. He stated that he explained "hand of one, hand of all" very carefully to her, and he believed at the time that she understood the discussion. He stated that if he did not feel she understood, he would have explained it further. Trial Counsel stated that it was his opinion that Applicant's family persuaded her to go to trial to prove that she was innocent. He stated that he and the Solicitor explained to her that she was going to trial for murder, not for burglary, second degree.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW¹

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

¹ The Court notes that at the conclusion of the evidentiary hearing, Respondent made a motion on the record for Judgment as a Matter of Law. After the hearing, Respondent withdrew the motion and asked this Court instead to rule on the merits of the case.

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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).

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds Trial Counsel's testimony to be credible and persuasive. These credibility findings have been applied to the Court's findings and conclusions set forth below.

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant raises several allegations arguing that 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)). This Court finds that the testimony presented at the PCR hearing satisfies neither prong of the Strickland test; Applicant can show neither ineffectiveness nor prejudice, thus these allegations should be denied and dismissed with prejudice.

Failure to request continuance

Applicant alleges that Trial Counsel was ineffective for failing to request a continuance before the trial when he was unprepared to go forward. This allegation is meritless. This Court finds very credible Trial Counsel's testimony that he was prepared for trial and there was no reason to request a continuance. Applicant has failed to show that a continuance would have changed the outcome of the trial, thus she can prove no prejudice. Therefore, since neither prong of the Strickland test is met, this allegation is denied and dismissed with prejudice.

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Failure to explain new charges

Applicant alleges that Trial Counsel was ineffective for failing to explain her amended indictments and new charges to her until the first day of her trial, September 9, 2013. This allegation is meritless. Trial Counsel credibly testified that he explained the new charges to Applicant before the trial, and the new charges were part of their discussion in making her decision to reject the plea offer. Respondent's Exhibit One shows that Applicant was advised of all the charges she faced and the potential sentences these charges carried before the trial. Therefore, Trial Counsel was not deficient in advising Applicant of the charges she faced.

Furthermore, Applicant has failed to prove any prejudice resulting from any deficiency regarding the amended indictments or advice about the charges she faced. Therefore, since Applicant has failed to meet either prong of the Strickland test, this allegation is denied and dismissed with prejudice.

Failure to investigate, review trial strategy, and review discovery and evidence

Applicant's allegation that Trial Counsel was ineffective for failing to investigate, review trial strategy, and review discovery and evidence is meritless. Trial Counsel credibly testified that he was fully prepared for trial, and that he reviewed and discussed the discovery and evidence with Applicant during their meetings. Trial Counsel relied on notes from his file indicating the dates that he met with Applicant and the topics they discussed. Applicant has failed to show any deficiency or that any further review of these subjects would have changed the outcome of her trial. Therefore, this allegation is denied and dismissed with prejudice.

Failure to discuss risks and benefits of trial vs. guilty plea

Applicant alleges that Trial Counsel was ineffective for failing to discuss with her the risks of going to trial compared to the benefits of pleading guilty. This allegation is meritless. As

indicated in Respondent's Exhibit One, Trial Counsel reviewed the State's plea offer with Applicant before the trial. He explained to her that she could receive a sentence of more than 30 years if convicted of these charges at trial. Trial Counsel credibly testified that he explained to Applicant the fact that she could be convicted of murder and the other charges under the doctrine of "hand of one, hand of all." This Court finds that Applicant was properly advised of the plea offer from the State and the risks of proceeding to trial rather than pleading guilty. The decision not to plead guilty was Applicant's decision to make, and this Court finds that Applicant knowingly and intelligently made that decision. Therefore, this allegation is denied and dismissed with prejudice.

SIXTH AMENDMENT VIOLATION

Applicant alleges that her Sixth Amendment rights were violated when she was not appointed an attorney for her preliminary hearing. This allegation is meritless.

Applicant testified that she had retained counsel to represent her in her bond hearing. After bond was set, she appeared for her preliminary hearing in October of 2010, and she was not represented by counsel, although she testified she believed at the time that they had been retained to represent her at trial and at all pre-trial hearings, as well. She stated that the court would not appoint her counsel for the hearing and made her represent herself. However, this Court finds that even if Applicant is correct, there can be no Sixth Amendment violation and no prejudice to Applicant.

Although a criminal defendant has a right to request a preliminary hearing, a preliminary hearing in South Carolina is not a critical stage of criminal proceedings against a defendant. State v. White, 243 S.C. 238, 133 S.E.2d 320 (1963). For this reason, the Sixth Amendment right to counsel does not attach to preliminary hearings. In State v. Sanders, the South Carolina Supreme

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Court held that a defendant was not prejudiced by his lack of an attorney to request a preliminary hearing within the time limits. "The fact that defendant was not represented by counsel in time to request a preliminary hearing 'at least ten days before the convening of the next court,' so as to prevent the court of general sessions from obtaining jurisdiction as provided in Section 43-232, in no way prejudiced defendant." State v. Sanders, 251 S.C. 431, 441, 163 S.E.2d 220, 226 (1968). The Court found as follows:

If a defendant is discharged by a magistrate at a preliminary hearing, such is not a final determination of the charge and does not bar subsequent prosecution by the State. Therefore, if counsel had been appointed for defendant in time to have demanded a preliminary hearing ten days before the next court, as allowed under Section 43-232, and the magistrate had discharged the defendant from custody, it would not have ended the prosecution. The defendant could have still been prosecuted.

There is no showing that the failure of defendant to sooner request a preliminary hearing, or the failure to accord him one before indictment, in any way deprived him of a fair and impartial trial.

Id. at 441-42, 163 S.E.2d at 226. Here, like in Sanders, Applicant has failed to show that her lack of representation at the preliminary hearing deprived her of a fair and impartial trial or resulted in a guilty verdict. This Court finds that Applicant's Sixth Amendment rights were not violated, and there was no prejudice resulting from her lack of representation at the preliminary hearing. Therefore, this allegation is 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 Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds Applicant has abandoned any such allegations.

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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 her 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), SCRCP, provides that if Applicant wishes to seek appellate review, post-conviction relief 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:

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. That Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 15 day of June, 2017.


D. CRAIG BROWN
Presiding Judge
Third Judicial Circuit

Flounce, South Carolina

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STATE OF SOUTH CAROLINA

County of Williamsburg

Toshonda Mickens

Petitioner

vs.

STATE OF SOUTH CAROLINA

Defendant

IN THE COURT OF
COMMON PLEAS

Third Judicial Circuit

NOTICE OF APPOINTMENT
FOR LEGAL COUNSEL

Case Number 2016-CP-45- 248

To: Lance Boozer, Attorney at Law

By order of the Chief Administrative Judge and pursuant to Rule 608, SCACR, you are hereby appointed to act as attorney for Toshonda Mickens, the Petitioner, in this action.

This 1st day of November, 2016.

Sharon W. Steggers
Judge/Clerk of Court

THE BOOZER LAW FIRM, LLC

1400 Laurel Street, Suite 4A
Columbia, SC 29201



The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
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