

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Colleton County  
Edgar W. Dickson, Circuit Court Judge

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DERRICK FISHBURNE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

INDEX

INDEX.....1

ISSUES PRESENTED.....2

STATEMENT .....3

ARGUMENT.....8

CONCLUSION .....9

ISSUES PRESENTED

- I. Should this case be remanded pursuant to *Pruitt v. State*, when the circuit court failed to make any findings of fact pursuant to S.C. Code § 17-27-80.

## STATEMENT

Petitioner was indicted by the Colleton County Grand Jury for the offenses of murder and possession of a firearm during a violent crime. App. 433-444. His case was called to trial on July 19, 2010 before the Honorable Perry M. Buckner. David Matthews represented Petitioner. Deputy Solicitor Sean Thornton represented the State.

Colleton County Sheriff's Office was dispatched to a "shooting call" at the Spirit's Lounge in Colleton County on April 10, 2009 at about 1:30 a.m. R. 140, 11. 4-22. Deputy Buchanan recalled that as he attempted to get out of his automobile there were about 250 to 300 people around, and "[t]hey started jumping on me as to fight me or harm me. I got back in my patrol car and backed up until I got some units there to help me." App. 141, ll. 1-8.

Officer Regalado and Officer Edwards arrived and did CPR on the decedent "while the rest of the officers tried to get the crowd under control, back them off of us. They were still wanting to fight us." App. 141, ll. 20-24. Officer Regalado testified that the decedent had "brain matter and blood coming out of his head." App. 148, ll. 1-2.

The State's case came down to two eyewitnesses who claimed they could identify Petitioner as the shooter. They were Fatimah Washington and Sonja Grant.

Washington said Petitioner was a part of a "gang of guys" who was at the club. App. 207, l. 6. Washington did not know Petitioner "personally." App. 207, ll. 10-13. Washington claimed at trial she was "right in front of the club door" when she saw Petitioner shoot the Decedent. App. 208, ll. 11-14.

After her initial statement to law enforcement, Washington wrote the following statement:

On April 10, 2009 I, Fatimah Alea Washington wrote a statement on Derrick Fishburne accusing him of a crime that he did not committ (sic). I went to the [police annex] to try and change but was not able to.

App. 431.

However, by the time she testified at trial, she had denied her recanted statement, and claimed that she had written it for Petitioner's family. App. 231, l. 20 232, l. 20.

Sonja Grant testified that she saw Petitioner, whose nickname was "D-Rock," shoot the decedent. "I saw D-Rock shoot him. I can't remember how many times and then I seen his body fall down to the ground and D-Rock stood over him and continued to shoot him." App. 185 , 11. 9-19. Grant claimed when the shooting started she was "in shock" and just stood there. App. 198, l. 21.

The morning after the shooting, Investigators detained Petitioner for questioning. Petitioner was detained at roll call when he appeared for an unrelated charge. App. 59, ll. 10-17. Petitioner claimed that he was at his girlfriend's house at the time of the shooting. App. 64. ll. 7-11.

Trial Counsel's argument was that Petitioner lied about not being at the club because he did not trust the police. Trial Counsel painted Petitioner as the "usual suspect" highlighting the fact that Petitioner had criminal charges from before the shooting. App. 137, 2-8; App. 374, l. 24—375, l. 5; App. 382, l. 20; App. 469, l. 22—470, l. 15. Trial counsel admitted that this defense was a risk. App. 470, ll. 13-15.

On July 21, 2010 the jury found Petitioner guilty on both counts. App. 421, ll. 14-23. Judge Buckner sentenced Petitioner to forty years imprisonment for murder, and five years imprisonment for possession of a weapon during a violent crime. App. 429, 11. 6-22.

Petitioner filed a timely notice of appeal. For the appeal, Petitioner was represented by Chief Appellate Defender Robert M. Dudek. Mr. Dudek filed an brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). The Court of Appeals dismissed the appeal on June 20, 2012. App. 450-451.

Petitioner filed a PCR application on October 16, 2012. App. 452-458. An evidentiary hearing was held on October 27, 2014 before the Honorable Edgar Dickson. App. 459.

At the hearing, Petitioner moved to amend the PCR to include a claim that Trial Counsel was ineffective for introducing prior bad acts and for arguing that Petitioner was the "usual suspect." App. 464, ll. 2-8. Over the State's objection, Judge Dickson allowed the new allegation. App. 464, ll. 14-23. The exchange went as follows:

MR. SHAFFER: Thank you, your Honor . First, there's failure to properly investigate . Then, ineffective assistance of Counsel for failure to - - or for introducing prior bad acts, essentially, into this trial; and also, for characterizing him as one of the usual suspects.

THE COURT: Okay. Alright.

MS. WILSON: Your Honor, the State would like to object, because Mr. Fishburne didn't enumerate these allegations with specificity in his application , and he solely alleged ineffective assistance of counsel.

THE COURT: The only one I saw was illegal sentence enhancement . So, unless there was an appeal.

MR . SHAFFER : Your Honor , I actually - - this has been called several times previously . This is the third time we 've been here. I emailed Ms. Wilson , probably, in February, concerning this . February of last year, I believe. Maybe not. Was it February of last year? Judge Cooper?

MS. WILSON: Yeah.

MR. SHAFFER: When Judge Cooper was on the Bench , I believe it was February of last year , I emailed Ms. Wilson . I told her about the allegation involving the raising the bad acts and the fact that he was called the usual suspect. That was the third email correspondence.

I could probably pull it up, if your Honor would give me a second.

THE COURT: That' s okay. That's okay.

MR. SHAFFER: And your Honor, and the failure to investigate, I also informed her of previously.

THE COURT: Okay. All right. Ms. Wilson, you have Mr. Matthews here, right?

MS. WILSON: Yes, your Honor. And I'd just like to note for the record that we're just noting his objection.

THE COURT: Okay.

MS. WILSON: Because he didn't fail - - he didn't formally file an amended application to make these a part of the record. Thank you.

THE COURT: Okay. Well, I'll note that it wasn't done formally, but I'm letting him go forward on it. Okay.

App. 463, 1. 7 – 464, 1. 23.

On December 21, 2015, the PCR Court denied Petitioner's Application. App. 485-489.

The findings of fact and conclusions of law states the following:

The 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, 80 L.Ed.2d 674, 692 (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.

This Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. This Court had a copy of the Clerk's records and has read the trial transcript, all of which assists the Court in judging the witnesses' credibility.

The Court finds that Applicant has failed to meet his burden of proof in establishing ineffective assistance of counsel. Applicant did not

provide his alleged alibi witnesses at the evidentiary hearing nor did he locate and/or interview those witnesses within 30 days from the evidentiary hearing as ordered by Judge Dickson. *See Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998) (An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial). Therefore, this application for post-conviction relief is denied.

App. 486-488.

This appeal follows.

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S.C. SUPREME COURT

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CERTIFICATE OF SERVICE

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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Ruston Neely on the date below.



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October 16, 2017

# The Law Office of Tristan M. Shaffer

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Litigation • Injury Law • Criminal Defense

October 16, 2017.

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

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S.C. SUPREME COURT

Re: Fishburne v. State 2016-002385

Dear Mr. Shearouse,

Please find the enclosed Petition for Writ of Certiorari, Appendix, and Certificate of Service in the above referenced case.

Sincerely,



Tristan M. Shaffer

Cc: Ruston Neely