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S.C. SUPREME COURT

Friday, December 15, 2017

SC Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: Notice of Intent to Appeal from Kendeal Jones, #282575, v. State of South Carolina

Dear Sir or Madam:

CHARLES LOGAN ROLLINS WAS COURT APPOINTED TO REPRESENT THIS INDIGENT DEFENDANT, AND WE EXPECT SCCID APPELLATE DEFENSE TO HANDLE THE APPEAL. Enclosed for filing please find the Notice of Appeal, proof of service on the Attorney General's office, and the Order of the Court that is being Appealed. By copy of this letter, I am also serving Counsel for the State.

Thank you for your assistance.

Sincerely,

Charles Logan Rollins

Enclosures-as indicated

CC:

Valerie Garcia Giovanoli
Assistant Attorney General
S.C. Attorney General's Office
Rembert C. Dennis Building
Post Office Box 11549
Columbia, South Carolina 29211

Robert M. Dudek, Chief Appelate Defender
South Carolina Appellate Defense
P.O Box 11433
Columbia, SC 29211-1433

Kendeal Jones, Inmate # 282575
386 Redemption Way
McCormick, SC 29889

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THE SOUTH CAROLINA SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Judge

RECEIVED
DEC 19 2017
S.C. SUPREME COURT

Case No.
(To Be Assigned)

Kendeal Jones, #282575 .... Appellant

v.

State of South Carolina, ... Respondent.

NOTICE OF INTENT TO APPEAL

Appellant appeals the decision of the Honorable Judge J. Derham Cole signed December 12, 2017 which was placed in the mail by Valerie Garcia Giovanoli to appellant's counsel on December 12, 2017, and received by appellant's counsel on December 15, 2017.

Counsel for applicant received written notice of the Order on December 15, 2017, and files this Notice by regular mail today, December 15, 2017.

CHARLES LOGAN ROLLINS, ESQUIRE
HAWKINS LAW FIRM
P.O. Box 5048
Spartanburg, South Carolina 29304
(864) 574-8801
ACTING APPOINTED ATTORNEY FOR PCR PETITIONER

Other Counsel of record:
Valerie Garcia Giovanoli
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Columbia, South Carolina 29211

THE SOUTH CAROLINA SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
J. Derham Cole, Judge

RECEIVED
DEC 19 2017
S.C. SUPREME COURT

Case No.
(To Be Assigned)

Kendeal Jones, #282575 ....Appellant

v.

State of South Carolina, ...Respondent.

PROOF OF SERVICE

I certify that the foregoing was served on the persons listed below by placing same in the U.S. Mail postage prepaid this day, December 15, 2017.

Valerie Garcia Giovanoli
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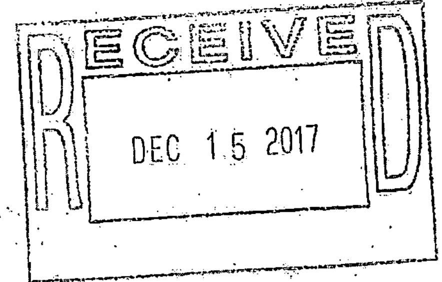
ACTING APPOINTED ATTORNEY FOR PCR PETITIONER

ALAN WILSON
ATTORNEY GENERAL



December 12, 2017

Charles Logan Rollins, II, Esquire
The Hawkins Law Firm
Post Office Box 5048
Spartanburg, South Carolina 29304

Re: **Kendeal Jones, #282575 v. State of South Carolina**
2011-CP-42-5486

Dear Mr. Rollins:

Enclosed please find a copy of the signed and filed **Order of Dismissal Granting White v. State Appeal** in the above mentioned Post Conviction Relief case.

Sincerely,

Valerie Garcia Giovanoli
Assistant Attorney General

VGG/lm
Enclosure(s)

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT
Kendeal Jones, SCDC #282575, Applicant,	)	2011-CP-42-5486
v.	)	**ORDER OF DISMISSAL GRANTING <u>WHITE V. STATE</u>[1] APPEAL**
State of South Carolina, Respondent.	)	

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HOPE BLACKLEY

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by Kendeal Jones (Applicant) on December 9, 2011. The State (Respondent) made its return on November 27, 2012, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened on October 2, 2013 and again on January 22, 2014 at the Spartanburg County Courthouse. Applicant was present and represented by Charles Logan Rollins, II, Esquire. Suzanne H. White, Esquire, represented Respondent. At the hearing, Applicant testified on his own behalf. Applicant's trial counsel, Max B. Singleton, Esquire, also testified. This Court had before it a copy of the Spartanburg County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the records of this PCR action, and the trial transcript, including missing portions that were later submitted by the State.

PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted Applicant at the May 2010 term of General Sessions for first degree burglary (10-

[1] White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

GS-42-2629) and three counts of armed robbery (10-GS-42-2630, counts one, two and three). Applicant was represented by Max B. Singleton, Esquire. Assistant Solicitor Derrick Bulsa represented the State. Applicant proceeded to a jury trial and was convicted on March 9, 2011. The Honorable J. Mark Hayes, II, sentenced Applicant to confinement for a period of twenty-five (25) years for each charge, to run concurrent.

On March 21, 2011, a timely Notice of Appeal was served on Respondent. However, upon information and belief, the Notice of Appeal was never filed properly and an appeal was never perfected.

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

1. Ineffective Assistance of Counsel; in that:
   a. Counsel failed to file a timely Notice of Appeal, and
   b. Counsel failed to investigate.

At the evidentiary hearing, Applicant moved to amend his application to include the following allegations:

1. Ineffective Assistance of Counsel; in that:
   a. Counsel misstated the correct burden of proof twice during opening statements as the "preponderance of the evidence."
   b. Counsel failed to object to inadmissible evidence of an explained flight. See State v. Robinson, 360 S.C. 187 (2004).
   c. Counsel failed to object to inadmissible testimony of Terri Carter who testified she saw three men outside of the victim's residence prior to the burglary and armed robbery, but could not identify any of them. See State v. Cheatam, 349 S.C. 101 (2002).

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FINDINGS OF FACT AND CONCLUSIONS 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).

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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.

A. Failure to file notice of appeal

This Court finds Applicant did not knowingly and intelligently waive his right to a direct appeal. Counsel must ensure that a criminal defendant is made fully aware of his appeal rights. White v. State, 263 S.C. 110, 118, 208 S.E.2d 35, 39 (1974). In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure required by Anders v. California, 386 U.S. 738 (1967). Id. Where the post-conviction relief judge determines that the applicant did not freely and voluntarily waive their appellate rights, the applicant may petition the South Carolina Supreme Court for review of direct appeal issues pursuant to White v. State. See Rule 243(i)(1), SCACR; Davis v. State, 288 S.C. 290, 291 n.1, 342 S.E.2d 60, 60 n.1 (1986) ("Even where the post-conviction relief judge makes this finding, he may not grant relief on this basis. Instead, the applicant must petition this Court for a White v. State review.").

In the present case, the State consents to a belated review of Applicant's trial pursuant to White. Id. As such, the Court finds Applicant did not knowingly and voluntarily waive his appellate rights and is entitled to an appeal from his conviction. Applicant's lack of an appeal shall be remedied pursuant to White v. State. Id.

A. Failure to properly investigate

This Court finds Applicant has not met his burden to prove Counsel was ineffective by failing to properly investigate his case. To show ineffective assistance in this regard, Applicant

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must present evidence to show what counsel could have discovered had he more fully investigated. Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 772 (1998) ("Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial."). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)).

First, Applicant has failed to present evidence to show what Counsel could have discovered had he more fully investigated. To the extent Applicant is alleging he should have investigated the reason Applicant did not cooperate with law enforcement prior to being arrested for the burglary and armed robberies, this Court finds Applicant's testimony contradicts such an allegation. Applicant testified credibly that he told Counsel about his outstanding traffic tickets being the reason he did not come forward to the cops sooner. Furthermore, the record shows Counsel discussed the case with Applicant as Counsel had a full grasp of the evidence and the facts at the time of trial. Counsel understandably cannot recall details almost three years after the trial. Counsel also testified credibly he met with Applicant close to ten times. It is unreasonable to think those meetings were not used to discuss the case and prepare for trial, which are both part and parcel of a defense attorney's investigation.

This Court having found Applicant has failed to prove either prong of Strickland, finds this allegation meritless. Therefore, this claim is denied and dismissed with prejudice.

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B. Stating incorrect burden of proof

This Court finds Counsel was not ineffective for misstating the appropriate burden of proof by which the State had to prove their case. While this Court finds Counsel's mistake was error amounting to deficiency under Strickland, Applicant cannot prove prejudice. Counsel errantly stated twice the State's burden of prove was a "preponderance of the evidence" in his opening statements. I find the error harmless. Not only did the trial judge, the Assistant Solicitor, and Applicant's co-defendant's counsel thoroughly articulate and explain the correct burden of proof, Counsel stated the correct burden of proof in his closing argument. There is no reasonable likelihood Counsel's misstatement affected the outcome of Applicant's trial.

As such, this Court finds that Applicant has failed to meet his burden in proving he was prejudiced by this error as required by Strickland. Therefore, this allegation is denied and dismissed with prejudice.

C. Failure to object to evidence of an explained flight

This Court finds Applicant has failed to meet his burden in proving that Counsel was ineffective for failing to object to evidence presented by the State that Applicant left the scene of the crime and never came forward to cooperate with law enforcement until he was arrested for the crimes. Applicant testified he did not go to law enforcement about the crime because he had four outstanding traffic tickets.[2] He also testified he told Counsel this. Counsel also testified credibly he was aware of Applicant's concern regarding his outstanding warrants for his arrest from his traffic violations. However, he explained he left the decision up to Applicant whether he wanted to testify to present that evidence after advising him of the pros and cons of testifying.

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[2] PCR counsel argued in opening it was an outstanding arrest for distribution of crack and submitted a copy of the indictment as Court's exhibit 1. However, Applicant credibly testified he did not even know about the distribution charge until he got convicted of burglary and armed robbery.

Additionally, Applicant argues State v. Robinson, 360 S.C. 187 (2004) precluded the State from admitting evidence regarding Applicant's failure to come forward to law enforcement after the crime of which he claim to be a victim. However, Robinson is distinguishable because it dealt with a defendant actually fleeing from law enforcement during an investigation. Regardless, Robinson simply reiterated the rule that evidence of flight must be relevant in that there must exist a nexus between the flight and the offense charged. "Evidence of flight should be excluded when the flight is clearly linked to a separate offense for which the defendant is not on trial." Id. 360 S.C. at 195.[3]

In this case, the State established the requisite nexus through witness testimony that he was present during, and likely part of, the crimes. Applicant himself admitted to being present during the burglary and armed robbery, both to Counsel and during the PCR hearing. Therefore, this Court finds he was fully aware of the crime having occurred and the investigation which would flow therefrom when he fled the scene and later never came forward to law enforcement. Additionally, even if Applicant were to have testified at trial regarding his traffic tickets, his testimony still would not have "clearly linked" the flight to "a separate offense for which [he] was not on trial." Id. Not to mention the plethora of risks and consequences associated with a defendant testifying.

The State was entitled to present evidence of flight against Applicant at his trial. Any objection would have been futile and overruled. I find Applicant has failed to meet his burden under Strickland to prove Counsel was either deficient or that his deficiency prejudiced the Applicant's trial, this claim is denied and dismissed with prejudice.

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[3] Although PCR counsel said during his questioning of Counsel at the PCR hearing that there was case law that says if Applicant could explain his flight, then the flight cannot be used by the solicitor in the case against him, this Court finds that to be an incorrect statement of the law.

D. Failure object to testimony from eye witness

This Court finds that Applicant has failed to prove his burden of proving Counsel was ineffective for failing to object to the testimony of an eye witness. At trial, Terri Carter testified she lived in the same apartment complex as the victim. She testified she was leaving her house to go to the store when she saw three men on the porch outside the victim's residence who appeared to be talking. She continued to walk and heard the victim yell, "my baby, my baby!" When she looked back, she saw two of the men come out of the victim's residence and run down the street.

Applicant argues Counsel should have objected to Carter's testimony because she could not identify Applicant as one of the three men she saw outside the victim's residence. Applicant relies on State v. Cheatham, 349 S.C. 101 (2002). However, Cheatham involved the challenge to the actual identification of the defendant by a State's witness. Cheatham is simply inapplicable to the facts of this case. Carter was an eye witness to the moments before, during, and after the alleged crime. Because she could not identify the three men she saw prior to the burglary and robberies did not give rise to a basis to challenge her testimony. To the extent Applicant argues her testimony is irrelevant because she could not identify Applicant as one of the men, this Court finds such a contention meritless. Of course the testimony of a witness who saw and/or heard the crime is relevant, notwithstanding the fact she could not identify the burglars. Once again, any objection by Counsel would have been futile and overruled.

Applicant has failed to show any deficiency on the part of Counsel or that he was prejudiced by any alleged deficiency. Therefore, this Court finds Applicant has failed to meet his burden under Strickland. Therefore, this allegation is denied and dismissed with prejudice.

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CONCLUSION

Based on all the foregoing, this Court grants Applicant a belated review of his conviction pursuant to White v. State. With regard to all other claims, this Court finds Applicant has not established any violations that would require this Court to grant further relief. Counsel is presumed to have rendered effective assistance and Applicant cannot overcome that presumption. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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.

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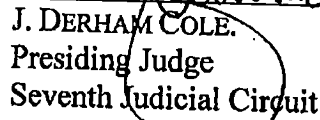
IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;
2. Within **thirty (30) days** of service of this Order, counsel for Applicant must file a notice of appeal to secure the appropriate review of Applicant's conviction. Counsel and Applicant are directed to Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986), and Rule 243(i), SCACR, for the appropriate procedure for securing appellate review; and
3. 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 12th day of December, 2017.



J. DERHAM COLE
Presiding Judge
Seventh Judicial Circuit

_______________, South Carolina

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M. HOPE BLACKLEY

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
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Phone (864) 596-2591
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M. Hope Blackley
Clerk of Court

December 12, 2017

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

7TH JUDICIAL CIRCUIT

Kendal Jones #282575
Applicant

CASE# 2011CP42-5486

CERTIFICATE OF SERVICE

VS

State
Respondent

I certify that, on this date, I served a copy of the Order of Dismissal
In this action dated 12-12, 2017 on 12-12-17

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Valerie Giovanelli
Lindsey McCoy
Charles Rollins

12-12-17
(Date)

[signature]
(Signature)

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
IN THE COURT OF COMMON PLEAS

KENDEAL JONES, #282575 — Applicant,

v.

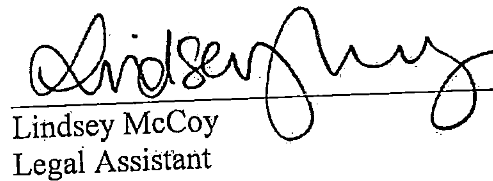
STATE OF SOUTH CAROLINA, — Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Order of Dismissal Granting White v. State Appeal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

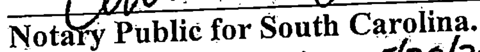
Charles Logan Rollins, II, Esquire
The Hawkins Law Firm
Post Office Box 5048
Spartanburg, South Carolina 29304

This 12th day of December, 2017.



Lindsey McCoy
Legal Assistant

SWORN to before me this 12th day of December, 2017.



Notary Public for South Carolina.
My Commission Expires: 5/20/2023

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