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January 10, 2018

RECEIVED
JAN 17 2018
S.C. SUPREME COURT

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

Re: Quashon Middleton v. State, 2015-CP-15-00311

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Colleton 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: Ruston Neely, Quashon Middleton 347130.

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

RECEIVED

JAN 17 2018

S.C. SUPREME COURT

APPEAL FROM COLLETON COUNTY

Court of Common Pleas

Honorable Thomas A Russo Circuit Judge

Case No.: 2015-CP-15-00311

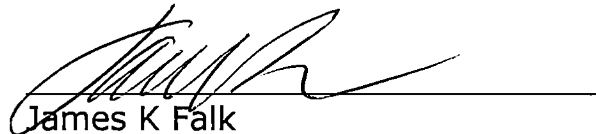
Quashon Middleton 347130..PETITIONER

V.

State of South Carolina..RESPONDENT

NOTICE OF APPEAL

The Petitioner Quashon Middleton appeals the Honorable Thomas A Russo's November 7, 2017 Order of Dismissal. Undersigned counsel received notice of entry of the order on January 10, 2018. A copy of the order on appeal is attached hereto.



James K Falk
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Charleston, SC 29402

January 10, 2018

Ruston Neely, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM COLLETON COUNTY

Court of Common Pleas

Honorable Thomas A Russo, Circuit Judge

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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, Ruston Neely, 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 January 10, 2018.

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

STATE OF SOUTH CAROLINA
COUNTY OF COLLETON

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Quashon Middleton, #347130,

Applicant,

v.

State of South Carolina,

Respondent.

Case No.: 2015-CP-15-0311

ORDER OF DISMISSAL

2018 JAN 10 AM 8:32
PATRICIA C. GRANT
COLLETON COUNTY
COMMON PLEAS

The above-captioned matter is before the court pursuant to a post-conviction relief (PCR) application filed February 18, 2015. This Court convened an evidentiary hearing into this matter on October 10, 2017, at the Beaufort County Courthouse. Applicant was present at the hearing and represented by James Falk, Esquire. Ruston W. Neely, Esquire, of the South Carolina Attorney General's Office, represented Applicant.

Applicant's trial counsel, David Mathews, Esquire, (Counsel) and Applicant were present and testified. This Court also had the opportunity to listen to their testimony and rule on their credibility. This Court had before it a copy of the trial transcript, the records of the Colleton County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the direct appeal records, and the pleadings in this matter.

I. PROCEDURAL HISTORY

In October 2010, the Colleton County Grand Jury indicted Applicant for two counts of attempted murder (2010-GS-15-0960; -0962) and one count of possession of a weapon during the commission of a violent crime (2010-GS-15-0961). Assistant Solicitor Amanda Haselden, Esquire, (the solicitor) of the Fourteenth Circuit Solicitor's Office, prosecuted the case. On July 25-27, 2011, Applicant proceeded to trial before the Honorable Perry M. Buckner, III. The jury

found Applicant guilty as indicted. Judge Buckner sentenced Applicant to imprisonment for concurrent terms of thirty years for each count of attempted murder and five years for possession of a weapon during the commission of a violent crime.

Applicant filed a timely notice of appeal. Susan B. Hackett, Esquire, of the Office of Appellate Defense perfected the appeal. On July 25, 2012, the South Carolina Supreme Court issued an order stating that pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, the appeal is certified for review by the Supreme Court. On February 25, 2014, the South Carolina Supreme Court affirmed Applicant's convictions and sentences. State v. Middleton, 407 S.C. 312, 755 S.E.2d 432 (2014). On March 13, 2014, Applicant filed a Petition for Rehearing. On April 2, 2014, the Supreme Court issued an order denying the petition. The Remittitur was also returned to the lower court on April 2, 2014. On July 1, 2014, Applicant filed a Petition for Writ of Certiorari to the United States Supreme Court. On October 6, 2014, the United States Supreme Court denied the petition.

II. ALLEGATIONS

Applicant alleged the following grounds in his application:

1. Subject Matter Jurisdiction Was Lost
    a. Grand Jury indicted Applicant under wrong statute.
2. Ineffective Assistance of Trial Counsel
    a. Trial Counsel failed to object and quash indictments.
    b. Trial Counsel was ineffective for failing to object the solicitor's mention of juvenile charges during sentencing.
    c. Trial Counsel was ineffective for not objecting to a statement obtained from a person in juvenile custody without parent/counsel.
    d. Failure to challenge for cause Prosecution's use of peremptory strikes.
3. Ineffective Assistance of Appellate Counsel
    a. Appellate Counsel failed to brief invalidity of indictment.
4. Trial Judge Abuse of Discretion
    a. Trial judge failed to direct a verdict of intent to kill.
    b. Trial judge failed to instruct jury of lesser offense.

At the beginning of the hearing, the State made a motion to dismiss several of Applicant's allegations on the basis they were not appropriate for PCR and could be dismissed without testimony. This Court granted the State's motion to dismiss for failing to state a claim on which relief could be granted on the following allegations:

4. Ineffective Assistance of Appellate Counsel
    a. Appellate Counsel failed to brief invalidity of indictment.
5. Trial Judge Abuse of Discretion
    a. Trial judge failed to direct a verdict of intent to kill.
    b. Trial judge failed to instruct jury of lesser offense.

The validity of an indictment may only be attacked before the jury is sworn. S.C. Code Ann. § 17-19-90 (2003). Applicant did not raise this claim before the jury was sworn, so it was not preserved for appellate review. Therefore, Appellate Counsel was not ineffective for failing to brief the issue.

Allegations that can be raised on direct appeal are not proper for PCR. Applicant alleges the trial court's rulings were in error. This is an issue for direct appeal. "[P]ost-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal. Issues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective assistance of counsel." Drayton v. Evatt, 312 S.C. 4, 8–9, 430 S.E.2d 517, 520 (1993) (cites omitted). Accordingly, these allegations are dismissed as a matter of law.

III. SUMMARY OF FACTS

Around three o'clock in the afternoon of September 28, 2010, Stephanie Mack was driving down Brittlebank Road· in Colleton County with Ryan Stephens as her passenger. R. 43 lines 13-23; R. 61 lines 11-20. They came to a stop as a school bus in the on-coming lane stopped to drop off a child. R. 44 lines 2-4; R. 62 lines 10-12. Applicant, riding on a moped,

drove up behind Mack and Stephens and brandished a gun. R. 44 lines 7-22; R. 62 lines 12-14. Applicant then began shooting into Mack's car. R. 44 lines 4-9; R. 62 lines 16-17. Stephens jumped into the driver seat with Mack. R. 47 lines 9-15; R. 55 line 23 - R. 56 line 10; R. 62 lines 19-20; R. 70 lines 20-21; R. 76 lines 12-14. While Applicant continued to shoot, Stephens sped off hitting Applicant's leg. R. 47 lines 16-22; R. 62 lines 22-24. Mack and Stephens then drove to Stephens' home. R. 48 lines 11-12; R. 64 lines 2-4.

The paramedic who arrived at the scene reported Applicant stated he had been run over and the people in the car had been shooting at him. R. 38 lines 2-6. Applicant was in significant pain according to the paramedic. R. 34 lines 6-10. He had a deformity to his right leg indicating a possible fracture. R. 36 lines 22 - R. 37 line 1. Applicant was transported to the emergency room. R. 38 lines 19-21; R. 41 lines 3-4.

When law enforcement arrived at Stephens' home, Mack and Stephens provided statements explaining what happened. R. 49 lines 7-9; R. 63 lines 22-24. Mack testified neither she nor anyone in her car shot at Applicant. R. 50 lines 5-6. Stephens testified he did not have a gun in the car and did not shoot at Applicant. R. 77 lines 16-19.

IV. SUMMARY OF TESTIMONY AT PCR HEARING

Applicant testified he and Counsel spoke about five times and he never received his discovery. He stated Counsel never discussed potential defenses or strategies and Counsel's investigator never spoke with him. He stated his defense was he wasn't near the driver side and he couldn't have attempted to murder someone because he wasn't by the passenger's side. Applicant stated he never told Counsel about his juvenile record. Applicant testified Counsel never interviewed witnesses Applicant told him about.

Counsel testified he withdrew his Batson[1] motion because the State's reasons for striking the jurors were valid. Counsel testified he wasn't sure if he examined the indictment prior to trial. Counsel testified he was ready to go to trial and any motion to quash, if granted, would have only delayed the trial date. Counsel testified he would have asked for a continuance if he felt unprepared. Counsel testified he called the potential witnesses and spoke with them. Counsel testified the Solicitor didn't ask the judge to consider the juvenile record and so there was no basis on which to object.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds Counsel's testimony was credible and Applicant's testimony lacked credibility. This Court finds Applicant has failed to satisfy his burden to prove Counsel's actions were deficient. Applicant also failed to prove he was prejudiced by Counsel's alleged deficiencies. This Court finds Counsel properly prepared for Applicant's trial. This Court finds Counsel elucidated valid trial strategies in defending Applicant and preparing for trial. This Court finds Counsel rendered adequate assistance and exercised professional judgment in his decisions at trial. This Court dismisses Applicant's application for the reasons set forth below:

A. Subject Matter Jurisdiction

Applicant has claimed the trial court lacked subject matter jurisdiction due to defects in his indictment. This Court finds this allegation is meritless. Defects in the indictment do not affect subject matter jurisdiction. See State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). The indictment is a notice document, and any challenges to its sufficiency must be made in accordance with S.C. Code Ann. § 17-19-90 (2003). Subject matter jurisdiction is the power of a

[1] Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

court to hear a particular class of cases, and it has nothing to do with the indictment document. See Gentry.

In post-conviction relief, an applicant wishing to raise challenges to the sufficiency of an indictment must do so in the context of ineffective assistance of counsel, basically alleging his trial counsel failed to properly move to quash the indictment in accordance with S.C. Code Ann. § 17-19-90. An applicant may still challenge the subject matter jurisdiction of the trial court, and such a claim is one that may be raised at any time. However, "circuit courts obviously have subject matter jurisdiction to try criminal matters." Gentry, supra, 610 S.E.2d at 499; See also S.C. Const. Art. V, § 7. Applicant failed to present evidence his case is of some class over which the circuit court does not have the authority to preside. Applicant's conviction involved a criminal charge indicted by the Colleton County Grand Jury for General Sessions Court. Thus, the circuit court had subject matter jurisdiction.

Accordingly, Applicant has failed to prove the circuit court did not have subject matter jurisdiction due to a defect in the indictment and, therefore, this Court dismisses this allegation.

B. Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). "When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove 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 (1984). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making

all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). An applicant must overcome this presumption to receive relief. State v. Cherry, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). "Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made." Id. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove 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. 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." Id.

1. Trial Counsel failed to object and quash indictments.

Applicant alleges Counsel was ineffective for failing to challenge the indictments 2010-GS-15-0962 and 2010-GS-15-0960, each for attempted murder, because the statute in the body of the indictments was incorrect. This scrivener's error was discovered and amended during the trial. Tr. 302. This Court finds the statute on the front of the indictments was correct as were the charge and statutory language contained in the indictments. Tr. 302. "The primary purposes of an indictment are to put the defendant on notice of what he is called upon to answer, *i.e.*, to

apprise him of the elements of the offense and to allow him to decide whether to plead guilty or stand trial, and to enable the circuit court to know what judgment to pronounce if the defendant is convicted." Edwards v. State, 372 S.C. 493, 496, 642 S.E.2d 738, 739 (2007). The indictment properly provided Counsel and Applicant notice of the charges on which the State was attempting to convict Applicant. Tr. 302-303. Counsel testified he had prepared for trial on the correct charges, reflected on the front of the indictment, and did not need any more time to prepare. This was further reflected by Counsel's arguments during trial, which showed he understood the charges to be attempted murder and not assault and battery of a high and aggravated nature. Tr. 300; 302. Accordingly, this Court finds the indictment properly served its function and Applicant was not prejudiced by the scrivener's error. This Court also finds any motion to quash would have been denied and the indictment amended to properly reflect the statute.

Accordingly, this Court finds Counsel's failure to quash was not deficient. This Court also finds Applicant failed to prove he was prejudiced by the scrivener's error in the indictment under Strickland. Accordingly, this Court denies and dismisses this allegation.

2. Counsel was ineffective for failing to object to the solicitor's mention of juvenile charges during sentencing.

At sentencing, the solicitor told the trial judge Applicant's prior charges were juvenile charges and, therefore, not predicate charges. Tr. 375. The trial judge noted the juvenile charges did not apply. Tr. 378. Applicant failed to prove he was prejudiced by his juvenile record being mentioned to the trial judge. The trial judge specifically noted the charges did not apply. Tr. 378. Further, the solicitor did not try to persuade the judge to consider the charges against Applicant. This Court finds any objection by Counsel to the solicitor's comment would have been overruled. The charges were not used by the solicitor's office against Applicant and the judge did

not consider them. Therefore, Counsel was not deficient nor was Applicant prejudiced by the solicitor's mention of his juvenile record.

Further, Applicant has failed to prove the trial judge considered his juvenile record in his sentence. Applicant's allegation is based purely on speculation. Therefore, Applicant failed to prove he was prejudiced by the solicitor's mention of his juvenile record.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for failing to object to the solicitor's mention of Applicant's juvenile record. This Court also finds Applicant failed to prove he was prejudiced by the mention of his juvenile record under Strickland. Accordingly, this Court denies and dismisses this allegation.

3. Trial Counsel was ineffective for not objecting to a statement obtained from a person in juvenile custody without parent/counsel.

This Court finds there was neither evidence nor argument presented by Applicant to support this allegation. Therefore, this Court finds Applicant abandoned this claim. Accordingly, this Court denies and dismisses this allegation.

4. Failure to challenge for cause Prosecution's use of peremptory strikes.

Applicant asserts Counsel should not have withdrawn his Batson motion to preserve the objection for the record. Counsel initiated a Batson motion after the selection of the jury. Tr. 41. The State provided race-neutral reasons for each of the peremptory strikes. Tr. 45-47. For Juror 176, the State asserted their reason was he had been arrested five times and his nephew had a pending CSC charge with the 14th Circuit Solicitor's Office. Tr. 45. For Juror 4, the State asserted he lived a block from the incident location and was a close friend to one of the witnesses. Tr. 47. At the conclusion of the State's explanations, Counsel withdrew the Batson motion. Tr. 48. This Court finds Counsel's withdrawal was not only reasonable, but expected of an officer of the court. As required by Batson, the State provided valid non-racial reasons for

each strike. "Under our Batson jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination." Purkett v. Elem, 514 U.S. 765, 767 (1995). After the State provided sufficient reasons for each strike, there was no basis for continuing the Batson motion. Therefore, Counsel was not deficient for withdrawing the Batson motion. Nor was Applicant prejudiced by the withdrawal where it certainly would have been denied at trial and upheld by any appellate court.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for withdrawing the Batson motion. This Court also finds Applicant failed to prove the withdrawal of the Batson motion prejudiced him under Strickland. Accordingly, this Court denies and dismisses this allegation.

VI. CONCLUSION

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

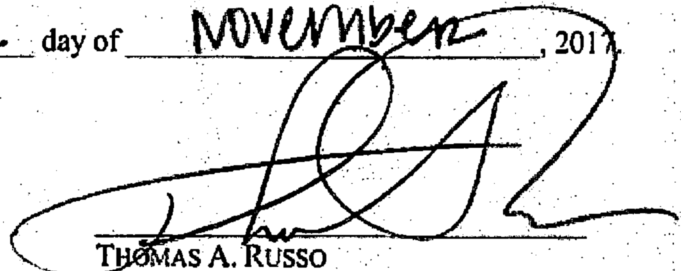
This Court notes Applicant must file and serve a notice of appeal within thirty 30 days from receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate 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, his post-conviction relief attorney must serve and file a notice of appeal on Applicant's behalf. Applicant and his attorney are directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief is denied and dismissed with prejudice; and

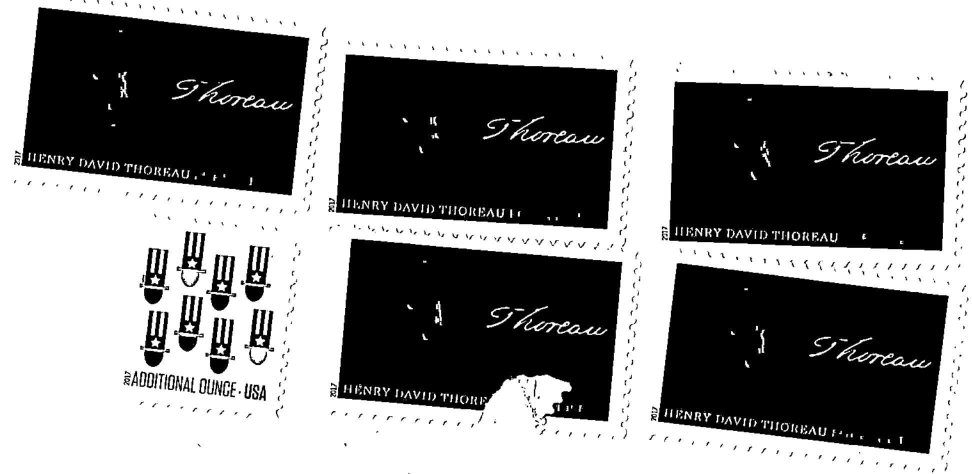
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 7th day of November, 2017.



THOMAS A. RUSSO
Presiding Judge
14th Judicial Circuit

Florence, South Carolina



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