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January 31, 2018

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

RECEIVED

FEB 02 2018

S.C. SUPREME COURT

Re: Forrest Nelson #367870 v. State of South Carolina
2016-CP-26-4891

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

3010-C-113
RE: FORREST NELSON

CLERK OF COURT
SC SUPREME COURT
P.O. BOX 11330
COLUMBIA, SC 29211

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

FEB 02 2018

APPEAL FROM Horry COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Honorable William H. Seals, Jr., Circuit Court Judge

Case No.: 2016-CP-26-4891

Forrest Nelson, Jr., #367870, Petitioner,

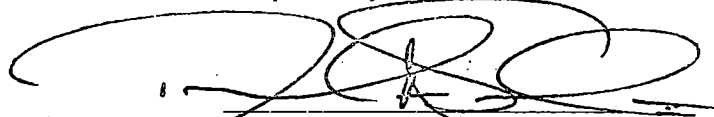
v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable William H. Seals, Jr., January 12, 2018, order, denying the Applicant's Petition for post-conviction relief. Undersigned counsel received notice of entry of the order on January 26, 2018. A copy of the order on appeal is attached to this notice.

Respectfully submitted,



Daniel A. Selwa, II
516 29th Avenue North
Myrtle Beach, SC 29577
Attorney for the PCR Applicant

January 29, 2018

Other counsel of record:

Alan Wilson, Attorney General

Joshua L. Thomas, Assistant Attorney General

Post Office Box 11549

Columbia, SC 29211-1549

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

FEB 02 2018

S.C. SUPREME COURT

APPEAL FROM Horry COUNTY
Honorable William H. Seals, Jr., Circuit Court Judge

Case No.: 2016-CP-26-4891

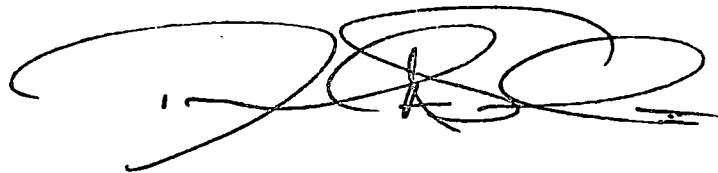
Forrest Nelson, Jr. #367870, Petitioner,

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 31st day of January 2018.




Daniel A. Selwa, II
516 29th Avenue North
Myrtle Beach, SC 29577
Attorney for the PCR Applicant



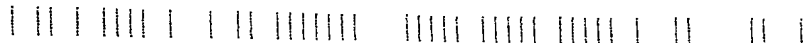
DANIEL A. SELWA, II
ATTORNEY AT LAW, L.L.C.

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





ALAN WILSON
ATTORNEY GENERAL

January 10, 2018

The Honorable Renee N. Elvis
Clerk of Court, Horry County
Post Office Box 677
Conway, SC 29528-0677

FILED
CLERK OF COURT
HORRY COUNTY, SC
2018 JAN 12 PM 2:40

Re: Forrest Nelson, Jr., #367870 v. State of South Carolina
2016-CP-26-4891

Dear Ms. Elvis:

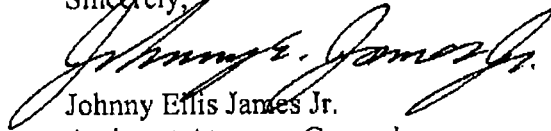
Enclosed please find the original **Order of Dismissal** signed by the Honorable William H. Seals, Jr., in the above-captioned case, for filing in your office.

Pursuant to Rule 71.1(f), of the South Carolina Rules of Civil Procedure, please "provide notice of entry of judgment and serve a copy of the order or judgment to the parties as provided in Rule 77(d), SCRPC."

In addition, please forward proof of service and a time stamped copy back to our office for our file.

Should you have any questions, please do not hesitate to call me at (803) 734-3737.

Sincerely,



Johnny Ellis James Jr.
Assistant Attorney General

JEJ/mm

Enclosure

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	
Forrest Nelson, Jr.,)	Case No.: 2016-CP-26-04891
S.C.D.C. No. 367870,)	
)	
Applicant,)	ORDER OF DISMISSAL
)	
v.)	
)	
State of South Carolina,)	
)	
Respondent.)	
)	

FILED
 HORRY COUNTY
 2018 JAN 12 PM 2:40
 CLERK OF COURT
 HORRY COUNTY, SC

This matter comes before the Court by way of an application for post-conviction relief filed by Forrest Nelson, Jr. ("Applicant") on July 29, 2016. Respondent made its return on or about February 21, 2017. The Court convened an evidentiary hearing into the matter on Wednesday, September 20, 2017, at the Horry County Courthouse in Conway, South Carolina. Applicant was present at the hearing and represented by Daniel A. Selwa, II, Esquire. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, J. Eric Fox, Esq. ("Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Horry County Clerk of Court regarding the subject convictions, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the November 2015 term of the Horry County Grand Jury for armed robbery (2015-GS-26-04618). J. Eric Fox,

Esq. represented Applicant, and Thomas G. Terrell, III, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On April 18, 2016, Applicant pled guilty as indicted. The Honorable Steven H. John sentenced Applicant to imprisonment for a term of 10 years. Applicant did not appeal his plea or sentence.

Present Application

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

1. Ineffective assistance of counsel, in that:
 - a. "Trial counsel was ineffective for failing to properly investigate and prepare for trial."
 - b. "Trial counsel was ineffective by failing to advise Applicant of his right to appeal from his guilty plea."
 - c. "Trial counsel was ineffective for failing to explain the nature of the offense and the consequence of Applicant's plea, thereby making Applicant's plea not knowingly and voluntarily entered."

At the evidentiary hearing, Applicant proceeded forward on the first and third allegations set forth above, conceding the second allegation entitled him to no relief. See Turner v. State, 380 S.C. 223, 224-25, 670 S.E.2d 373, 374 (2008) ("[T]here is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea.").

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; 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.” Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

“[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Butler at 442, 334 S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 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 an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). “[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Courts use 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, attorney performance is measured by its "reasonableness under professional norms." Cherry at 117, 386 S.E.2d at 625 (citing Strickland at 688). 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 at 117-18, 386 S.E.2d at 625 (citing Strickland at 694). The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 696-97. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 (1985).

IAC Allegation #1 – Failure to Investigate and Prepare

Applicant alleges Counsel was ineffective by failing to adequately investigate his case and prepare for trial. In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as

to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

At the evidentiary hearing, Applicant testified that he met with Counsel three to four times, with each meeting lasting just a few minutes each. Applicant testified that he reviewed the victim's statement with Counsel, but asserted that the video from the convenience store shows he never pantomimed possessing a weapon. Applicant alternately suggested the video seemed edited. Applicant readily admitted to robbing the store, but asserted he had no weapon. Applicant told the plea court he had no gun, but went ahead with the plea after the judge explained the representation of a weapon was enough, as Applicant was afraid of getting 25 years.

Counsel testified he met with Applicant eight to ten times. Counsel tried to arrange a plea to strong-arm robbery, but Applicant was unwilling to cooperate. Counsel recalled the video from the Circle K clearly showed at least a strong-arm robbery, as Applicant "manhandled" the victim. Counsel also noted the video did not show any obvious gesture on the part of Applicant that would indicate he possessed a weapon, nor was any object visible. However, the victim clerk told law enforcement that Applicant represented possessing a weapon. Counsel testified that he reviewed the evidence provided by the State and visited the store where the robbery took place. Counsel admitted his investigator was unable to speak to the victim clerk. Counsel had no doubt Applicant would be convicted if he went to trial.

The Court finds no deficiency on the part of counsel, nor prejudice therefrom. Counsel's credible testimony demonstrated then-existing thorough familiarity with the facts of the case and the key evidence of the robbery—namely the Circle K video and statements from the victim.

Additionally, Applicant presented no evidence as to what, if anything, Counsel would have discovered had he spent more time investigating or preparing the case. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

IAC Allegation #2 – Failure to Explain Offense and Consequences

Applicant also alleges Counsel was ineffective by failing to explain to him the nature of the offense of armed robbery and the potential consequences he faced, thereby rendering his guilty plea involuntarily entered. At the plea proceeding, the plea court told Applicant his range potential sentencing and that armed robbery is a violent and most serious offense; Applicant affirmed that he understood. Tr. 3-4. When asked by the Court if he had discussed with Counsel the impact of the violent classification, Applicant affirmed that he had. Id. Applicant denied needing any additional time with Counsel. Tr. 6-7. Applicant did not dispute Counsel's representation that they had discussed Applicant's constitutional rights, defenses available, and the information and evidence in the possession of the State. Tr. 7, ll. 19-24. After the State's brief recitation of facts, Applicant informed the court that he presented no handgun. Tr. 8-9. At that time, the court reviewed the indictment against Applicant and explained "[i]t doesn't necessarily mean you had to have a gun but by your actions you indicated or your Codefendant indicated to the clerk that there was a weapon which a person of reasonable – ordinary, reasonable person would believe to be a deadly weapon." Tr. 9, ll. 7-25. Applicant indicated that he understood the explanation and agreed to the facts as presented by the State. Tr. 9-10.

At the evidentiary hearing, testified that Counsel did not explain the elements of armed robbery, but then testified that Counsel did explain the difference between strong-arm robbery and armed robbery. Applicant testified Counsel showed him no caselaw. Applicant claimed he did not learn about parole eligibility until the judge talked about it with him at the plea.

Applicant claimed that he still did not understand the elements of armed robbery after the judge's explanation at the plea, but proceeded anyway because he was afraid of receiving 25 years. Applicant testified did not learn of his parole ineligibility until after he was sentenced.

Counsel testified 75-80% of his conversations with Applicant were about the elements of armed robbery. Counsel further testified that he explained parole eligibility to Applicant, the minimum and maximum possible sentences, and idea of a "strike." Counsel testified that Applicant indicated to him no learning disabilities and appeared to be competent throughout his representation; Applicant asked him thoughtful questions.

The Court finds no deficiency on the part of counsel, nor prejudice therefrom. The Court finds Applicant's testimony as to this allegation inconsistent and entirely not credible. Counsel's credible testimony shows that he repeatedly and thoroughly explained the elements, details, and consequences of armed robbery to Applicant, including the classifications of the crime and the impact they would have on potential parole eligibility. Furthermore, the Court additionally explained those same matters during the plea hearing. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

[Conclusion and signature on following page]

III. 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 his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

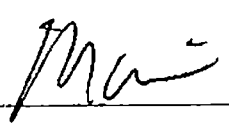
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention 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 must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 2 day of Jan, 2018


WILLIAM H. SEALS, JR.
Presiding Judge
Fifteenth Judicial Circuit


_____, South Carolina