

The Supreme Court of South Carolina

Justin O. Byers,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable J. Derham Cole
Cherokee County
Trial Court Case No. 2009-CP-11-01232

ORDER

For good cause shown, the request for an extension until April 27, 2012 to serve and file the Petition for Writ of Certiorari and Appendix is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

March 29, 2012

cc: Chief Appellate Defender Robert M. Dudek.
Assistant Attorney General Suzanne H. White

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Cherokee County

J. Derham Cole, Circuit Court Judge

RECEIVED

MAR 28 2012

S.C. Supreme Court

JUSTIN O. BYERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

(2)

PETITION FOR EXTENSION TO FILE
PETITION FOR WRIT OF CERTIORARI
AND ACCOMPANYING APPENDIX

The undersigned counsel respectfully requests a thirty day extension in which to file the petition for writ of certiorari and accompanying appendix in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following extraordinary circumstances:

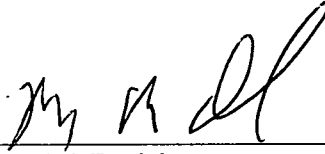
1. The petition for writ of certiorari and accompanying appendix in this case are due to be served and filed today.
2. Counsel has an oral argument tomorrow, March 29, 2012, in State v. Randy Vickery before the Court of Appeals. Counsel filed the initial reply brief in the death penalty case of State v. Stephen Christopher Stanko with this Court today, March 26, 2012. Counsel filed the initial brief of respondent and designation of matter in State v. Robert Jolly #2 with the Court

of Appeals on Friday, March 23, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Matthew Taylor Hinton with the Court of Appeals on Thursday, March 22, 2012. Counsel filed the petition for writ of certiorari to the Court of Appeals and accompanying appendix in State v. Terrell McCoy with this Court on March 16, 2012. Counsel had an oral argument in State v. Christopher Heller before the Court of Appeals on March 13, 2012. Counsel filed the petition for rehearing in State v. Garvin Duvall with the Court of Appeals on March 15, 2012. Counsel also filed the initial brief of appellant and designation of matter in State v. Donald Petty with the Court of Appeals on March 15, 2012. Counsel and co-counsel also had a further meeting on State v. Richard Gagnon on March 15, 2012. Counsel filed the return to the petition for writ of certiorari in Michael A. Hough v. State with this Court on March 8, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Charles Berlin Pennell with the Court of Appeals on March 5, 2012. Counsel also filed the brief of petitioner in State v. Miama Kromah with this Court on March 5, 2012. Counsel is currently working on the death penalty case of Richard Bernard Moore v. State with co-counsel Susan B. Hackett. Counsel also is working on the brief of petitioner with co-counsel in the death penalty case of State v. Brad Sigmon. In addition to the above, counsel has very extensive administrative duties on a daily basis as the Chief Appellate Defender.

3. This request is made in good faith, and not for purposes of delay. Counsel intends to continue to work on the cases with more than three extensions first so that the caseload will hopefully become more manageable in the near future, and less extensions will need to be requested.

WHEREFORE, the undersigned counsel would respectfully request a thirty day extension. Counsel respectfully requests that the time limits for filing the petition for writ of certiorari and accompanying appendix be held in abeyance pending a ruling on this motion.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

March 28, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Cherokee County
J. Derham Cole, Circuit Court Judge

JUSTIN O. BYERS,

PETITIONER,

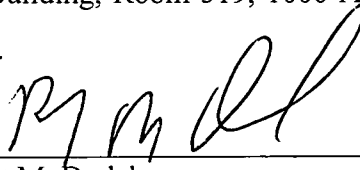
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

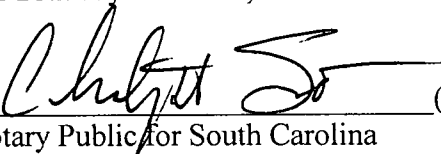
The undersigned attorney hereby certifies that a true copy of the petition for extension to file petition for writ of certiorari and accompanying appendix in the above referenced case has been served upon Karen Ratigan, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 28th day of March, 2012.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 28th day of March, 2012.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: May 16, 2021.

The Supreme Court of South Carolina

Justin O. Byers,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable J. Derham Cole
Cherokee County
Trial Court Case No. 2009-CP-11-01232

ORDER

The request for an extension until March 28, 2012 to serve and file the Petition for Writ of Certiorari and Appendix is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

February 28, 2012

cc: Chief Appellate Defender Robert M. Dudek
Assistant Attorney General Suzanne H. White



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

February 27, 2012

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
P.O. Box 11330
Columbia, SC 29211

RECEIVED

FEB 27 2012

S.C. Supreme Court

Re: Justin O. Byers v. State

Dear Mr. Shearouse:

The petition for writ of certiorari and accompanying appendix is due to be served and filed with the Court today. However, because of my heavy workload at this time, I am requesting a thirty day extension in which to serve and file the petition.

By copy of this letter, I am informing Karen Ratigan, Esquire, of the Attorney General's Office, of my request.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD/cms

cc: Karen Ratigan, Esquire



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
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Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

January 3, 2012

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
Post Office Box 11330
Columbia, SC 29211

RECEIVED

JAN - 3 2012

S.C. Supreme Court

Dear Mr. Shearouse:

The following case falls under the 60 day rule for appeals, and the date we received the transcript is listed to the side.

Justin O. Byers v. State of South Carolina

12/29/2011

I would appreciate you beginning our time limits from the above date, and if you need additional information, or have any questions please contact me.

Thank you for your assistance in this matter.

Sincerely,

Loriene French
Legal Services Coordinator



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

November 2, 2011

Ms. Linda D. Moffitt
Circuit Court Reporter
800 Belcher Road
Spartanburg, SC 29316

Dear Ms. Moffitt:

RECEIVED

NOV - 2 2011

S.C. Supreme Court

Please provide us with the following transcript:

Justin O. Byers v. State of South Carolina Case #: 09-CP-11-01232

County: Cherokee Date of Trial: April 8, 2011

Presiding Judge: J. Derham Cole

To ensure prompt payment, please sign and complete the enclosed CID FORM 3500 and include the original criminal case number (Indictment number) where the space is provided.

Please number the lines on the paper from 1-25, and include any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments.

If you are aware of any co-defendants or if the Attorney General's Office has already requested a transcript, please let us know.

Sincerely,

Lorie French
Legal Services Coordinator

cc: S.C. Supreme Court
Attorney General's Office

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

JUDGMENT IN A CIVIL CASE
CASE NO: 2009CP1101232

Justin O. Byers vs. The State of South Carolina

CHECK ONE:

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2011 SEP 31 12:28
BRANDY W. McBEE

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**
 - Rule 12(b), SCRPC;
 - SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):**
 - Rule 40(j) SCRPC; Bankruptcy;
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 - Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 - Affirmed; Reversed; Remanded;
 - Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

Order of Dismissal

Dated at Gaffney, South Carolina, this 13th day of September, 2011.

Court Reporter:

s/ J. DERHAM COLE

PRESIDING JUDGE - J. DERHAM COLE

This judgment was entered on the 12th day of September, 2011, and a copy mailed first class this 13th day of September, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Duane Alan Lazenby
Lazenby Law Firm
215 Magnolia St
Spartanburg, SC 29306

Suzanne H. White
PO Box 11549
Columbia, SC 29211-11549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Brandy W. McBee

Brandy W. McBee - Clerk of Court

STATE OF SOUTH CAROLINA)

COUNTY OF CHEROKEE)

Justin O. Byers, #310267,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2009-CP-11-1232

ORDER OF DISMISSAL

FRANK W. MCBEE

2011 SEP 12 A 9:00

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.

This matter comes before the Court by way of an Application for Post-Conviction Relief filed December 23, 2009. The Respondent made its Return on or about March 31, 2010. An evidentiary hearing into the matter was convened on April 8, 2011, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by D. Alan Lazenby, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Don A. Thompson, Esquire, also testified. This Court also had before it a copy of the records of the Cherokee County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, and the plea transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. The Applicant was indicted at the March 2008 term of the Cherokee County Grand Jury for armed robbery (08-GS-11-0183), murder (08-GS-11-0184), burglary - 1st degree (08-GS-11-0185), and possession of a

firearm during commission of a violent crime (08-GS-11-0186). He was represented by Donald A. Thompson, Esquire. On March 20, 2009, the Applicant pled guilty as indicted to all charges. He was sentenced by the Honorable J. Mark Hayes II to confinement for a term of life for murder and for burglary – 1st degree, thirty (30) years for armed robbery, and five (5) years for possession of a weapon during the commission of a violent crime, all sentences to run concurrent. The Applicant did not appeal his guilty plea or sentence.

ALLEGATIONS

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

1. Ineffective assistance of counsel, in that;
 - a. “Counsel informed me that I could receive the death penalty for the crimes. But the State did not seek that penalty;
2. In custody in violation of Art. 12 §2 S.C. Constitution; and
3. Coerced guilty plea, in that;
 - a. “Guilty plea not freely and intelligently made because of coerced threat of receiving the death penalty.

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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

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), SCRCPP). 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

Applicant testified that he met with Counsel and discussed the charges as well as reviewed the discovery materials, including the statements from each of the three co-defendants and eyewitnesses. However, Applicant testified that Counsel never discussed any defenses with

Applicant or discussed going to trial. Applicant also testified that Counsel never discussed seeking a lesser-included offense with Applicant. However, Applicant also acknowledged that he told Counsel that he was the one who entered the home with the shotgun and shot the victim in the head. Applicant also acknowledged that he gave police a statement in exchange for cigarettes in which he stated that it had been an accident because he did not know the shotgun was loaded. Applicant also acknowledged that none of the three co-defendants entered the home. However, Applicant testified that the police had no physical evidence against him. Applicant entered into evidence the evidence key of the police, indicating the evidence recovered from the scene, which included photos of bloody shoe prints. (Exhibit #1). Applicant also introduced a page from Counsel's case file notes following a meeting with Applicant in June 2008 (Exhibit #2).

Counsel testified that he had been practicing law for over thirty years with over twenty years in criminal defense work. Counsel testified that he met with the Applicant at least six times and reviewed all discovery materials with Applicant. Counsel agreed that there was no physical evidence against Applicant, but there was the Applicant's voluntary statement and the statements of the three co-defendants. Counsel also testified that one of the co-defendants called police following the murder and confessed and named the other co-defendants. Counsel testified that although he discussed the difficult facts and defense with Applicant, had the case proceeded to trial, Counsel would have raised the issue of the lack of physical evidence at that time. Counsel also testified that it was damaging because the Applicant's story had changed in that in an earlier statement he stated that they were going to rob the home, but then later said they were going to buy drugs. However, Counsel said that he would have argued at trial for a lesser-included offense. Counsel testified that he had attempted negotiations with the State and they

were not willing to offer a lesser-included offense or the minimum sentence for murder.

This Court finds that Applicant has failed to meet his burden of proof as to any claim of ineffective assistance of counsel. This Court finds that Counsel is an experienced attorney who met with the Applicant and reviewed the charges and discovery with Applicant, discussing all potential options. This Court finds that the extensive guilty plea record speaks for itself as to the competency of counsel. When an ineffectiveness claim is presented the defendant must show that counsel's representation was deficient. Deficient representation amounts to conduct that is not objectively reasonable under the circumstances. Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052 (1984). In addition, the Applicant must show that the outcome of his proceeding was prejudiced and it is reasonably probable that the outcome would have been different had counsel's performance not been deficient. Strickland, 466 U.S. at 694. This Court finds that the Applicant's attorney demonstrated a normal degree of skill, knowledge and professional judgment that is expected of an attorney who practices criminal law. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, supra; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Therefore, this Court finds that this claim should be denied and dismissed.

Involuntary Guilty Plea

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. U.S., 519 F.2d 317 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993).

Applicant alleges that he only pled guilty because his Attorney advised him that the State intended to seek the death penalty, but promised that if he pled guilty, they would take the death penalty off the table. Applicant testified that he would have gone to trial if he knew that the death penalty was off the table and never would have pled guilty if he knew that life was an option. However, Applicant later acknowledged that Counsel did tell him that a life sentence was a possibility. Counsel testified that he did tell Applicant that the State intended to seek the death penalty because that was what he was told by the prosecutors; however, he also told the Applicant when the State did not file the Notice and it was clear that they were not seeking the death penalty. Counsel testified that he always believed that Applicant should go to trial because there was nothing to lose. Counsel testified that he had advised Applicant that he felt fairly

certain that if he pled guilty he would receive a life sentence; however, Counsel testified that Applicant informed him that if he had to gamble either way, he would rather plead and receive a "number."

This Court finds Counsel's testimony to be more credible than Applicant's as to this issue. Counsel presented all options to the Applicant and Applicant chose to plead freely and voluntarily, as the record reflects. The Applicant testified that he was not under the influence of any alcohol or drugs. Judge Hayes informed Applicant of the maximum penalty of the charges he faced and informed him of his right to remain silent as well as his right to a jury trial and other associated jury trial rights. Applicant subsequently affirmed that he was guilty and that no one promised him anything or threatened or mistreated him in order to get him to plead guilty. Applicant stated that he was pleading guilty freely and voluntarily and that he was satisfied with the services of his lawyer.

This Court further finds that Applicant has failed to carry his burden of proving that his guilty plea was not freely and voluntarily entered. The overwhelming evidence in the record and presented through the testimony of the witnesses at the hearing reflects that the plea was knowingly and voluntarily entered. Boykin v. Alabama, 395 U.S. 238 (1969); Vickery v. State, 258 S.C. 33, 186 S.E.2d 827 (1972).

Summary

This Court finds in regards to the allegation of ineffective assistance of counsel, the Applicant's testimony has failed to establish any meritorious claim sufficient to grant his application. This Court further finds the record reflects that counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in their representation, and that counsel's conduct does not fall below the objective standard of

reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, this allegation is denied.

CONCLUSION

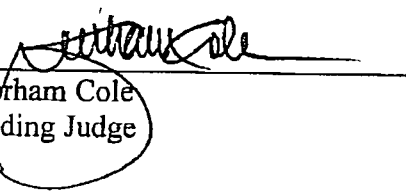
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court cautions 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 Respondent.

AND IT IS SO ORDERED this 8 day of September, 2011.



J. Derham Cole
Presiding Judge

PCR

LAZENBY LAW FIRM, LLC

D. ALAN LAZENBY
ATTORNEY AT LAW

POST OFFICE BOX 6099 (29304)
134 OAKLAND AVENUE
SPARTANBURG, SC 29302
PHONE: 864-804-5050
FAX: 864-804-5051

ALAN@LAZENBYLAWFIRM.COM

October 6, 2011

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: *Justin O. Byers v. State of South Carolina*
In the Court of Common Pleas for Cherokee County
C.A. No.: 2009-CP-11-1232

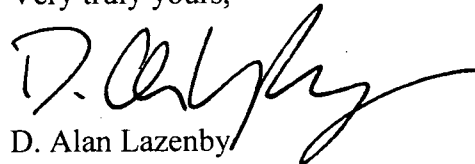
Dear Mr. Shearouse:

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

- (1) Proof of service of the Notice of Appeal on the Respondent.
- (2) A copy of the Order which is to be challenged on appeal.

Because this is an appeal on a post-conviction relief matter, I understand that no filing fee is required in this matter.

Very truly yours,



D. Alan Lazenby

DAL:jeh
Enclosure
cc: Suzanne H. White, Esquire

RECEIVED

OCT 11 2011

S.G. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2009-CP-11-1232

Justin O. Byers

Appellant

v.

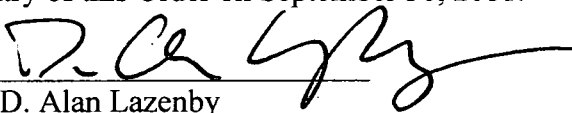
State of South Carolina

Respondent

NOTICE OF APPEAL

Justin O. Byers appeals the Order of the Honorable J. Derham Cole, dated September 13, 2011. Appellant received written notice of entry of this Order on September 30, 2011.

October 6, 2011


D. Alan Lazenby

LAZENBY LAW FIRM LLC
PO Box 6099
Spartanburg, SC 29304
(864) 804-5050
Attorney for Appellant

Other Counsel of Record:
Suzanne H. White, Esquire
S.C. Attorney General's Office
P.O. Box 11549
Columbia, SC 29211
Attorney for Respondent
(803) 734-4127

RECEIVED

OCT 11 2011

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2009-CP-11-1232

Justin O. Byers

Appellant

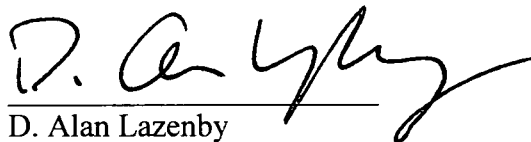
v.

State of South Carolina

Respondent

I certify that I have served the Notice of Appeal on Suzanne H. White by depositing a copy of it in the United States Mail, postage prepaid, on October 6, 2011, addressed to its attorney of record, Suzanne H. White, PO Box 11549, Columbia, South Carolina 29211

October 6, 2011


D. Alan Lazenby

LAZENBY LAW FIRM LLC
PO Box 6099
Spartanburg, SC 29304
(864) 804-5050
Attorney for Appellant

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

JUDGMENT IN A CIVIL CASE
CASE NO: 2009CP1101232

Justin O. Byers vs. The State of South Carolina

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a decision rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 11(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other: _____

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2011 SEP 31 12:28
BRANDY W. MCBEE

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

Order of Dismissal

Dated at Gaffney, South Carolina, this 13th day of September, 2011.

Court Reporter:

s/ J. DERHAM COLE

PRESIDING JUDGE - J. DERHAM COLE

This judgment was entered on the 12th day of September, 2011, and a copy mailed first class this 13th day of September, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Brandy W. McBee

Brandy W. McBee - Clerk of Court

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHEROKEE)
)
 Justin O. Byers, #310267,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2009-CP-11-1232

ORDER OF DISMISSAL

FILED IN OFFICE OF
 CLERK OF COURT
 CHEROKEE COUNTY, S.C.
 2011 SEP 12 A 9:00
 BRANDI W. MCBEE

This matter comes before the Court by way of an Application for Post-Conviction Relief filed December 23, 2009. The Respondent made its Return on or about March 31, 2010. An evidentiary hearing into the matter was convened on April 8, 2011, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by D. Alan Lazenby, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Don A. Thompson, Esquire, also testified. This Court also had before it a copy of the records of the Cherokee County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, and the plea transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. The Applicant was indicted at the March 2008 term of the Cherokee County Grand Jury for armed robbery (08-GS-11-0183), murder (08-GS-11-0184), burglary – 1st degree (08-GS-11-0185), and possession of a

firearm during commission of a violent crime (08-GS-11-0186). He was represented by Donald A. Thompson, Esquire. On March 20, 2009, the Applicant pled guilty as indicted to all charges. He was sentenced by the Honorable J. Mark Hayes II to confinement for a term of life for murder and for burglary – 1st degree, thirty (30) years for armed robbery, and five (5) years for possession of a weapon during the commission of a violent crime, all sentences to run concurrent. The Applicant did not appeal his guilty plea or sentence.

ALLEGATIONS

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

1. Ineffective assistance of counsel, in that;
 - a. "Counsel informed me that I could receive the death penalty for the crimes. But the State did not seek that penalty;
2. In custody in violation of Art. 12 §2 S.C. Constitution; and
3. Coerced guilty plea, in that;
 - a. "Guilty plea not freely and intelligently made because of coerced threat of receiving the death penalty.

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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

Applicant testified that he met with Counsel and discussed the charges as well as reviewed the discovery materials, including the statements from each of the three co-defendants and eyewitnesses. However, Applicant testified that Counsel never discussed any defenses with

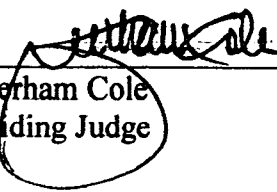
Applicant or discussed going to trial. Applicant also testified that Counsel never discussed seeking a lesser-included offense with Applicant. However, Applicant also acknowledged that he told Counsel that he was the one who entered the home with the shotgun and shot the victim in the head. Applicant also acknowledged that he gave police a statement in exchange for cigarettes in which he stated that it had been an accident because he did not know the shotgun was loaded. Applicant also acknowledged that none of the three co-defendants entered the home. However, Applicant testified that the police had no physical evidence against him. Applicant entered into evidence the evidence key of the police, indicating the evidence recovered from the scene, which included photos of bloody shoe prints. (Exhibit #1). Applicant also introduced a page from Counsel's case file notes following a meeting with Applicant in June 2008 (Exhibit #2).

Counsel testified that he had been practicing law for over thirty years with over twenty years in criminal defense work. Counsel testified that he met with the Applicant at least six times and reviewed all discovery materials with Applicant. Counsel agreed that there was no physical evidence against Applicant, but there was the Applicant's voluntary statement and the statements of the three co-defendants. Counsel also testified that one of the co-defendants called ~~police~~ following the murder and confessed and named the other co-defendants. Counsel testified that although he discussed the difficult facts and defense with Applicant, had the case proceeded to trial, Counsel would have raised the issue of the lack of physical evidence at that time. Counsel also testified that it was damaging because the Applicant's story had changed in that in an earlier statement he stated that they were going to rob the home, but then later said they were going to buy drugs. However, Counsel said that he would have argued at trial for a lesser-included offense. Counsel testified that he had attempted negotiations with the State and they

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 Respondent.

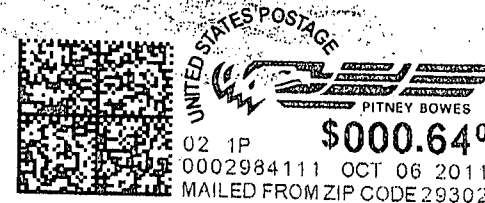
AND IT IS SO ORDERED this 8 day of September, 2011.



J. Derham Cole
Presiding Judge

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Justin O. Byers



THE HONORABLE DANIEL E. SHEAROUSE
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