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April 2, 2018

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

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APR 05 2018

S.C. SUPREME COURT

Re: James Eddie Bailey v. State of South Carolina
Case No: 2017-CP-23-3295

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and an affidavit of service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Please clock and file the copies and return them to me. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,



Rodney Richey

RWR/
enclosures

cc: DeShawn H. Mitchell, Esquire

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

HONORABLE ROBIN B. STILWELL

2017-CP-23-3295

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APR 05 2018

S.C. SUPREME COURT

JAMES EDDIE BAILEY, SCDC# 114196

APPELLANT,

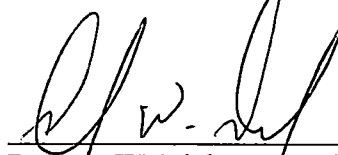
against

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

James Eddie Bailey appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Robin B. Stilwell, Circuit Judge on December 15, 2017 an Order issued on March 21, 2018 and filed on March 26, 2018. The Appellant received notice of the judgment on April 2, 2018.



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Other Counsel of Record:
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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

HONORABLE ROBIN B. STILWELL

2017-CP-23-3295

JAMES EDDIE BAILEY, SCDC# 114196

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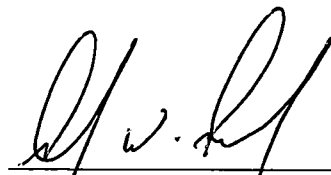
APR 05 2018

S.C. SUPREME COURT

AFFIDAVIT OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on April 2, 2018, addressed to their attorney of record, DeShawn Mitchell, Esquire Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: April 2, 2018



Rodney W. Richey, Esquire
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Attorney for Applicant

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

James Eddie Bailey, #114196,)
Applicant,)

v.)

State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS)
THIRTEENTH JUDICIAL CIRCUIT)

2017-CP-23-3295)

ORDER OF DISMISSAL)

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This matter comes before the Court by way of an application for post-conviction relief filed on May 22, 2017 by James Eddie Bailey (Applicant). Respondent made its Return on or about September 1, 2017. An evidentiary hearing into the matter was convened on December 15, 2017, at the Greenville County Courthouse in Greenville, South Carolina. Applicant was present and represented by Rodney W. Richey, Esquire. Respondent was represented by DeShawn H. Mitchell, Esquire of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Applicant's Trial Counsel Symmes W. Culbertson, Esquire also testified. This Court had before it a copy of the records of the Greenville County Clerk of Court regarding the Applicant's convictions, the transcript from Applicant's trial, the PCR application, Respondent's Return, Applicant's records from the Department of Corrections and Applicant's appellate records. After reviewing the record and everything presented, this Court finds Applicant has failed to establish any constitutional deprivations entitling him to post-conviction relief and denies this application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenville County Clerk of Court. In October 2013, the Greenville County Grand Jury indicted Applicant for armed robbery, kidnapping, possession of a

weapon during the commission of a violent crime, and resisting arrest (2013-GS-23-9292). Symmes W. Culbertson, Esquire, represented Applicant. Allen Fretwell, Esquire, of the Thirteenth Circuit Solicitor's Office prosecuted the case. On October 8-10, 2014, Applicant proceeded to trial before the Honorable Steven H. John. The jury found Applicant guilty as indicted. Judge John sentenced Applicant to imprisonment for life for armed robbery and kidnapping, five years for possession of a weapon during the commission of a violent crime, and one year for resisting arrest.

Applicant filed a timely notice of appeal. LaNelle Cantey DuRant, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on March 1, 2016. State v. Bailey, Op. No. 2016-UP-278 (S.C. Ct. App. filed June 8, 2016). The remittitur was returned to the circuit court on June 24, 2016.

FACTUAL HISTORY

On the evening of April 14th, 2013, Sharon Taylor, the manager of a Greenville Dollar General, was preparing to close the store for the night. (T2. p. 13, line 2 – p. 14, line 14.) Taylor had not been scheduled to work and was on vacation, but she agreed to come in around 6:30 pm, when the manager who was scheduled that evening quit suddenly. (T2. p. 13, lines 12-19.) Because she was not expecting to be called in to work, and she lived a long distance away, Taylor was accompanied to the store by her boyfriend, Tom Nash, who would wait for her until the end of her shift. (T2. p. 14, lines 5-10.) Also working that evening was Karen Nartowicz, a cashier at the Dollar General. (T2. p. 8, lines 21-25.)

At around 8:55 pm, Taylor noticed a few customers still shopping in the store, including Appellant, who entered and asked Nartowicz about pet food. (T2. p. 15, lines 18-20.) Her boyfriend Nash was helping another female shopper carry her bags to her car outside. (T1. p. 61,

lines 2-6.) Appellant lingered in the back corner of the store, which Taylor found unusual because the pet food was located in a different area. (T2. p. 15, lines 18-20.) Taylor asked Appellant if he needed any help, but he declined, so she stepped into the office for a few minutes. (T2. p.15, lines 21-25.) As she exited the office, she heard Appellant ask Nartowicz where "the other lady was." (T2. p. 16, line 14.) Taylor asked him how she could help him, and he responded he needed help with some snacks. (T2. p. 16, lines 17-20.)

Taylor was immediately uncomfortable with Appellant's request, because the snacks were clearly visible. (T2. p. 16, lines 19-23.) Taylor stayed behind Appellant as she directed him down the aisle, but he turned and grabbed her by the hair, held a knife to her side, and dragged her to the back hall. (T2. p. 17, lines 1-3.) Appellant threw Taylor to the floor and held her down at knifepoint, telling her "this is a robbery and I'll kill you." (T2. p. 17, lines 3-5.)

Nartowicz heard the commotion and told Nash, who had just returned inside from helping the customer to her car. (T1. p. 61, lines 2-14.) Nash saw Appellant on the floor with Taylor, with one arm wrapped around her side, and the other holding her head back. (T1. p. 62, lines 6-10.) Taylor attempted to grab a can of soup to hit Appellant, but Nash told her to stop for fear of angering Appellant. (T1. p. 63, lines 10-17.) Appellant told Nash he wanted money and told him to go to the cash register to get it or he would kill Taylor. (T2. p. 17, lines 20-24.) Appellant began to cut Taylor across her throat. (T2. p. 17, lines 22-23.)

Nash took twenty- two dollars from the cash register. (T1. p. 65, lines 5-9.) Nartowicz was speaking to the 911 operator and handed Nash the phone. (T1. p. 65, lines 10-14.) The operator told Nash the police were on the way. (T1. p. 65, lines 13-14.) When Nash returned to Appellant and Taylor, he gave Appellant the money and told him the police were coming. (T2. p. 18, lines 5-7.) Appellant released Taylor but told her to stay on the floor. (T2. P. 18, lines 8-10.)

As he walked to the front of the store, he noticed Nartowicz on the phone and motioned toward her. (T1. p. 66, lines 6-10.) Nash told him to leave and held open the front door. (T1. p. 66, line 11.)

As Appellant stepped out of the front door, he noticed the police car that had just arrived on the scene. (T1. p. 66, lines 17-18.) Master Deputy Nathaniel Emily, of the Greenville County Sheriff's Department, was approximately two miles away when the call went out from dispatch, so he was able to arrive at the Dollar General within thirty or forty-five seconds. (T2. p. 53, lines 1-2 and p. 54, lines 5-7.) Emily parked the patrol car facing the store, with his blue lights and siren extinguished. (T2. p. 55, lines 13-22.) A spotlight over the front door of the Dollar General shone down and illuminated the entrance. (T2. p. 56, lines 14-19.) As Emily exited his vehicle, he noticed Appellant, who matched the description given by dispatch, and Nash at the front door of the store. (T2. p. 56, lines 2-13.) Emily drew his sidearm and shouted at Appellant to put his hands up. (T2. p. 56, lines 6-7.) Emily was able to see the knife in Appellant's left gloved hand and what appeared to be wadded up paper or cash in his right gloved hand. (T2. p. 58, lines 6-13).

Appellant ran away, and Emily followed in foot pursuit. (T2. p. 58, lines 19-21.) Emily's dashboard camera recorded his approach to the Dollar General and continued to record after he parked his patrol car. (T2. p. 65, lines 12-19.) The video was entered into evidence at trial. (T2. p. 66, line 24.) As Emily chased Appellant, he radioed the suspect's description to dispatch. (T2. p. 59, lines 8-10.) Emily chased Appellant through several parking lots, and kept the other responding units apprised of their location. (T2. p. 59, lines 8-25 and p. 60, lines 1-12.) Emily used his flashlight to illuminate Appellant running ahead of him. (T2. P. 60, lines 15-17.)

Deputy Giovanni, also with the Greenville County Sheriff's Department, heard the call go out from dispatch and aided in the pursuit. (T2. p. 84, lines 22-25.) Giovanni's dashboard camera activated at the same time as his blue lights, and recorded his drive to the scene. (T. p. 85, lines 17-25 and p. 86, lines 1-5.) When Deputy Giovanni parked his car, however, Appellant was already behind a nearby church, and Giovanni lost sight of him for a few seconds. (T2. p. 88, lines 9-13.) Giovanni spotted Appellant walking away, and called out to him. (T2. p. 88, lines 16-22.) Appellant continued to walk away after Giovanni repeated his calls, so the deputy deployed his taser on Appellant. (T2. p. 89, lines 4-7.) Giovanni later reviewed his dashboard camera with his Sergeant, and because Appellant was never in view of the camera, he determined the video had no evidentiary value and it was erased. (T2 p. 86, lines 6-16.)

Deputy Mathew May was also on scene to assist in the arrest. (T2. p. 112, lines 24-25.) Appellant fell to the ground when Deputy Giovanni tased him. After the five second cycle finished, Giovanni and May attempted to take custody of him. (T2. p. 90, lines 2-7.) While Appellant was on the ground, Giovanni and Deputy May struggled to pull his hands out from under him to place him in handcuffs. (T2. p. 91, lines 4-19.) Appellant resisted, and refused to put his hands behind his back. (T2. p. 92, lines 12-14.) Eventually the deputies were able to pull his hands from underneath him, and they discovered Appellant was still holding the knife. (T2. p. 92, lines 20-22.) During the search incident to Appellant's arrest, deputies found twenty two dollars in cash in his front right pocket, gloves, a piece of black cloth with string attached, and his wallet in his rear right pocket. (T2. P. 116, lines 1-25 and p. 117, lines 1-25.)

ALLEGATIONS

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

1. "Ineffective Assistance of Counsel"
 - a. "Trial counsel failed to request jury instruction."
 - b. "Trial counsel gave erroneous advice which caused [Applicant] not to testify on my own behalf."
 - c. "Requested mental health therapist at trial, never called him (for history and medication effects)"
 - d. "Requested motion of discovery to prepare for trial, only give half."
 - e. "Never showed [Applicant] incriminating pictures which could of swayed a plea."

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTARY HEARING

Applicant's Testimony

Applicant testified he was represented by Trial Counsel for his charges and that he only met with him a couple of times. He testified Trial Counsel did not do a proper investigation into his case. Applicant testified he requested that his mental health therapist be available for trial to testify about his history and the medications he was taking. He testified he believed his mental status should have been presented at trial as he believed he suffered from mental illness. Applicant testified Trial Counsel only gave him half of his discovery and he never received the other half. He testified Trial Counsel presented him with a plea offer of thirty years but he turned it down. Applicant testified Trial Counsel attempted to request a spoliation charge but was unsuccessful. He also testified he believed he should have testified at his trial.

Trial Counsel's Testimony

Trial Counsel testified he was appointed to represent Applicant in this case. He testified he received all the discovery from the State and reviewed it. Trial Counsel testified he provided all of the discovery to Applicant and went over it with him. As part of his further investigation, Trial Counsel testified he drove by the scene of the incident. Trial Counsel testified he met with Applicant several times. He testified based upon his initial impression of meeting Applicant, he decided to have him evaluated. Trial Counsel testified Applicant was found competent to stand trial. He testified he discussed the plea offer he received from the State with Applicant but that

Applicant rejected it on June 26, 2014. Trial Counsel testified Applicant wanted a fifteen year plea offer. Trial Counsel testified he attempted to make a request for a spoliation jury charge as one of the in-car video from the police was not provided to the defense in discovery.

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 can weigh their testimony and credibility accordingly. These credibility findings have been applied to the Court's findings and conclusions set forth below. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017).

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel 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 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that

counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland v. Washington, 466 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, 300 S.C. at 117-18, 386 S.E.2d at 625. 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).

After careful review of the entire record, including the testimony presented at the evidentiary hearings, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action regarding any of his allegations of ineffective assistance of counsel discussed below.

Failure to Request Jury Charge

Applicant alleged in his application ineffective assistance of counsel for failure to request a spoliation jury charge. This Court notes that current South Carolina jurisprudence does not support a spoliation charge in criminal cases absent extraordinary circumstances. In a criminal case, the State does not have an absolute duty to preserve potentially useful evidence, and a defendant must demonstrate either: 1) the State destroyed evidence in bad faith; or 2) the evidence's exculpatory value was readily apparent before the evidence was destroyed, and the defendant cannot obtain other evidence of comparable value by other means. State v. Moses, 390 S.C. 502, 702 S.E.2d 395, 404 (Ct. App. 2010) (citing State v. Mabe, 306 S.C. 355, 412 S.E.2d 386 [1991]). The bad faith requirement limits the extent of the State's obligation to preserve evidence to reasonable bounds, and confines it to cases in which the police conduct indicates the

evidence could form a basis for exonerating the defendant. Arizona v. Youngblood, 488 U.S. 51, 58 (1988); Moses, 702 S.E.2d at 403. This Court notes Trial Counsel testified he attempted to make a request for a spoliation jury charge as one of the in-car videos from the police was not provided to the defense in discovery. However, Trial Counsel made the request after the trial judge had given its charge to the jury and the jury received the case for consideration. (T2. p. 194). Notwithstanding, this Court finds as the trial court did a spoliation charge was not proper. In its ruling the trial court ruled “in this particular case, clearly, there’s no evidence in this case, certainly none produced by the defendant and none that’s been set forth in this trial, that the state destroyed evidence in bad faith. There’s just no evidence, zero evidence, of that in this case.” This Court joins in that analysis as the record reflects the evidence that was destroyed that the Applicant alleged required a spoliation charge was a dash cam video of one of the officers as he approached the scene and showing only that. (T2 p.197.) Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test – that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms.

Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland – that he was prejudiced by Trial Counsel’s performance. Specifically, Applicant failed to present any credible evidence regarding any bad faith on the part of the police or that the video tape in question had “readily apparent” exculpatory value before it was deleted. See Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (holding that, since the contents of challenged documents were not presented at the PCR hearing, the Applicant could not demonstrate how the failure of counsel to obtain these documents prejudiced the defense). As a result, this Court finds

Applicant failed to meet either prong of the spoliation analysis. The allegation is denied and dismissed.

Advice not to testify

Applicant presented testimony in a cursory fashion concerning Trial Counsel's advice not to testify. Applicant has failed to show deficiency or prejudice with respect to this allegation. The trial judge fully advised Applicant of his right to testify at trial. The record indicates clearly that the Applicant made a choice, of his own free will and volition, not to testify after having been fully advised of his rights and ramifications of testifying or, in the alternative, not testifying. Applicant chose not to testify. Accordingly, he has also failed to show prejudice with respect to this allegation, and it is denied and dismissed.

Failure to Present Evidence of Mental Health Issues

Applicant alleged in his application ineffective assistance of counsel for failure to present his mental health therapist at trial. Applicant testified he requested that his mental health therapist be available for trial to testify about his history and the medications he was taking. He testified he believed his mental status should have been presented at trial as he believed he suffered from mental illness. Trial Counsel testified he met with Applicant several times. He testified based upon his initial impression of meeting Applicant he decided to have him evaluated. Trial Counsel testified Applicant was found competent to stand trial. This Court finds Applicant has failed to demonstrate that a competency evaluation or any evidence of mental treatment or evaluation was available, admissible, or exculpatory. Further this Court finds Applicant has not presented any evidence or called any witness at his evidentiary hearing to substantiate his allegation. The Supreme Court has repeatedly held a PCR applicant *must produce the testimony* of a favorable witness *or otherwise offer the testimony in accordance with*

the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. The allegation is denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any violations 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 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. Refer to Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;
2. Applicant shall remain in the custody of the South Carolina

Bailey v. State of South Carolina
2017-CP-23-03295

Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 21st day of March, 2018.



ROBIN B. STILWELL
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina

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The Honorable Daniel E. Shearouse
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