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"Success is all that matters"

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April 20, 2015

RECEIVED

APR 24 2015

Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

S.C. Supreme Court

RE: Curtis Nealey v. State of South Carolina
Case No.: 2012-CP-16-0070

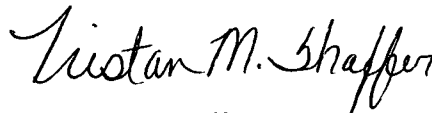
Dear Clerk of Court:

Enclosed please find an original and one copy of a Notice of Appeal, along with the Orders we are appealing in the above referenced matter. If you would, please file the Notice of Appeal and return a clocked copy to me in the envelope provided.

Please be advised that I have been court appointed to represent Mr. Nealey in this matter.

Thank you for your assistance in this matter. If you have any questions or concerns, please feel free to contact my office.

With kind regards,



Tristan M. Shaffer

TMS/dke
Encl.

cc: Karen C. Ratigan, Esquire
Darlington County Clerk of Court
Kimberly McCall
Curtis Nealey

SUPREME COURT OF SOUTH CAROLINA

RECEIVED

APR 24 2015

S.C. Supreme Court

APPEAL FROM DARLINGTON COUNTY
In The Court of Common Pleas

Honorable R. Ferrell Cothran, Jr.,
Common Pleas Judge of the Fourth Judicial Circuit

Case No.: 2012-CP-16-0070

Curtis Nealey,

Petitioner,

v.


State of South Carolina,

Respondent.

NOTICE OF APPEAL

Petitioner appeals the Order of Dismissal of the Honorable R. Ferrell Cothran, Jr. dated August 20, 2013, filed September 9, 2013, and received by Petitioner on or about September 11, 2013 and the Order denying Petitioner's Motion to Reconsider and of the Honorable R. Ferrell Cothran, Jr. dated March 19, 2015, filed March 23, 2015 and received by Petitioner on March 26, 2015.

April 20, 2015



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Attorney for Petitioner

Respondent's Attorney:
Karen C. Ratigan, Esquire
S.C. Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

SUPREME COURT OF SOUTH CAROLINA

RECEIVED

APR 24 2015

APPEAL FROM DARLINGTON COUNTY
In The Court of Common Pleas

S.C. Supreme Court

Honorable R. Ferrell Cothran, Jr.,
Common Pleas Judge of the Fourth Judicial Circuit

Case No.: 2012-CP-16-0070

Curtis Nealey,

Petitioner,

v.

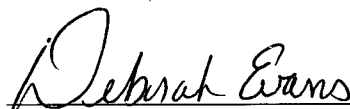
State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

I, Deborah Evans, do hereby certify that I am an employee of Axelrod & Associates, P.A., in Myrtle Beach, South Carolina, and that I have this date served the Petitioner's Notice of Appeal upon the Respondent, by depositing a copy of same in the United States Mail, postage prepaid, addressed as follows:

| | |
|---|--|
| Karen C. Ratigan, Esquire S.C. Office of the Attorney General Post Office Box 11549 Columbia, SC 29211 | Curtis Nealey #337988 LCI RIC-C-118 990 Wisacky Highway Bishopville, SC 29010 |
| Darlington County Clerk of Court 1 Public Sq., Rm B4 Darlington, SC 29532-3213 | Kimberly McCall Appellate Defense 1330 Lady Street Columbia, SC 29201 |



Deborah Evans
Paralegal to Tristan M. Shaffer

April 20, 2015
Myrtle Beach, South Carolina

JFB

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF DARLINGTON) FOUTH JUDICIAL CIRCUIT

Curtis Nealey,)
)
Applicant,)
)
vs.)
)
The State of South Carolina,)
)
Respondent.)

ORDER
C/A NO. 2012-CP-16-0070

This matter is before the Court pursuant to Rule 59 (e) SCRCP. The Applicant seeks an Order of this Court amending or altering its previous Order.

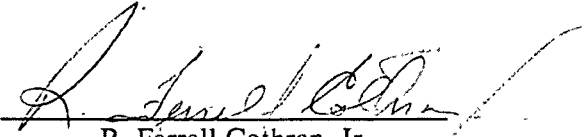
Pursuant to Rule 59 (f) SCRCP, this Court determines that the motion to alter or amend may be decided on briefs filed by the parties and without oral argument.

Having duly considered the motion to alter or amend of the Plaintiff, this Court has determined that its original Order is fully supported by the law and the evidence and is hereby ratified and reconfirmed. The motion to alter or amend the earlier Order is therefore DENIED.

AND IT IS SO ORDERED.

Manning, South Carolina

Dated: March 19, 2015


R. Ferrell Cothran, Jr.
Judge, Third Judicial Circuit

TRUE CERTIFIED COPY,
Scott B. Suggs
CLERK OF COURT/RMC
DARLINGTON COUNTY, SC

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SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

FILED

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MAR 26 2015
BY: _____

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DARLINGTON)
)
 Curtis Ray Nealey,)
 S.C.D.C. No. 337988,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS

2012-CP-16-0070

ORDER OF DISMISSAL

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 CLERK OF COURT/RMC
 DARLINGTON COUNTY, S.C.

COPY

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 17, 2012. The Respondent made its return on May 8, 2012. An evidentiary hearing into the matter was convened on July 15, 2013 at the Darlington County Courthouse. The Applicant was present at the hearing and represented by Tristan M. Shaffer, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying were Wendy Bell and the Applicant's trial counsel, Tonya Copeland-Little, Esquire. The Court had before it the trial transcript, the Darlington County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application and amendment, the return, and the appellate records.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Darlington County Clerk of Court. The Applicant was indicted at the June 2009 term of the Darlington County Grand Jury for two counts of assault and battery

TRUE CERTIFIED COPY,
Scott B. Suggs
**CLERK OF COURT/RMC
 DARLINGTON COUNTY, S.C.**

with intent to kill (ABWIK) (2009-GS-16-0869, -0874), two counts of possession of a weapon during commission of a violent crime (2009-GS-16-0870, -0871), criminal domestic violence of a high and aggravated nature (CDVHAN) (2009-GS-16-0872), and kidnapping (2009-GS-16-0873). He was represented by Tonya Copeland-Little, Esquire.

The State brought the case to trial before the Honorable J. Michael Baxley. Judge Baxley granted trial counsel's motion for a directed verdict on one of the counts of possession of a weapon during commission of a violent crime (2009-GS-16-0871). The jury found the Applicant guilty of the remaining charges. On November 10, 2009, Judge Baxley levied concurrent sentences of twenty years on each count of ABWIK, ten years for CDVHAN, and thirty years for kidnapping. Judge Baxley levied a consecutive five year sentence for possession of a weapon during commission of a violent crime (2009-GS-16-0870).

A notice of appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. Joseph L. Savitz, III, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the form of an Anders¹ brief. The Court of Appeals dismissed the appeal. State v. Nealey, Op. No. 2011-UP-574 (S.C. Ct. App. filed Dec. 20, 2011).

ALLEGATIONS

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

1. Ineffective assistance of trial counsel:
 - a. "[F]ailed to present developed medical reports for impeaching testimony factually refuted by the medical reports."
 - b. "[F]ailed to present evidence and/or testimony from a Forensic Toxicologist to establish the physical and mental condition of State Witness Dorothy Perkins – WHEN WITNESS PERKINS WAS DOUCMENTED TO HAVE BEEN UNDER THE INFLUENCE OF ALCOHOL AND PRESCRIPTION MEDICATION."

¹ Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967).

- c. “[F]ailed to adequately cross-examine State Witness Dorothy Perkins.”
- d. Failed to “object to the States improper eliciting of detrimental character evidence involving criminal domestic violence against Applicant at Applicants trial.”
- e. “[F]ailed to adequately cross-examine State Witness Victoria Perkins, and law enforcement Officers, for the purpose of establishing inconsistent and contradicting testimonies which proved damaging and prejudicial to Applicants defense.”

In a document captioned “Supplemental Grounds for Post-Conviction Relief” and dated July 15 2013, the Applicant made the following allegations:

- 1. Ineffective assistance of trial counsel:
 - a. Objected to the Applicant’s statement.
 - b. Failed to argue Dorothy Perkins’s blood alcohol level and drug use should come into evidence for the purposes of establishing that she would have been likely to fall off the motorcycle.
 - c. Failed to call a witness to explain Dorothy’s blood alcohol level and drug use.
 - d. Failed to impeach Victoria Perkins when she testified she had been hit with a vase but told police that she was unable to identify what she was hit with.
 - e. Failed to adequately impeach Victoria Perkins on whether she had a knife.
 - f. Failed to call a nurse to testify that Dorothy and Victoria were in contact with each other at the hospital.
 - g. Failed to adequately question the Applicant about the impossibility of Dorothy’s motorcycle story.
 - h. Failed to object to the Belcher charge.
 - i. Failed to argue that a motorcycle cannot be used as a deadly weapon.
- 2. Ineffective assistance of appellate counsel:
 - a. Failed to argue that the blood alcohol level and drug use should have come into evidence to prove it is likely Dorothy would have fallen off the motorcycle.

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).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). “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 v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

Wendy Bell, an assistant lab director at SLED, was qualified as an expert in forensic toxicology. Bell stated she reviewed Dorothy Perkins’s medical records from after the incident and found the blood and urine tests indicated the presence of alcohol and tricyclic antidepressants. Bell stated Perkins’s blood serum level was 0.175 but admitted this was usually higher than the blood alcohol level used to determine the legal blood alcohol concentration. Bell stated impaired balance and memory were a likely result of the combination of alcohol and

tricyclic antidepressants. Bell admitted, however, that she was not aware of the prescribed dosage of the tricyclic antidepressants and that the body could develop a tolerance of a drug.

The Applicant stated he had several meetings with trial counsel and that they reviewed: the discovery materials, his version of events, the charges, the possible sentences, and what the victims and witnesses would testify about at trial. The Applicant stated he never received a ten-year plea offer but that he rejected a fifteen-year offer (because he wanted a seven-year offer). The Applicant stated plea counsel did not discuss hiring an expert such as a toxicologist. The Applicant stated plea counsel should have had Dorothy Perkins's medical records admitted at trial. The Applicant stated Dorothy Perkins's story was impossible and that she changed her story between her statement and trial testimony. The Applicant stated the trial strategy was to argue the victims lied in order to stay out of trouble with DSS and the Applicant admitted he testified at his trial in order to explain his version of events.

Trial counsel testified she filed discovery motions and had several meetings with the Applicant. Trial counsel testified they discussed: the discovery materials, the State's version of the facts, the Applicant's version of events, the elements of the charges, and the sentence ranges for those charges. Trial counsel testified there was a plea offer from the State for a fifteen-year sentence where the kidnapping charge would be dropped and the Applicant would plead guilty to the two ABWIK charges. Trial counsel testified the Applicant rejected this offer and had her make a counter-offer of three years suspended to one year imprisonment and two years probation, which was rejected. Trial counsel testified the Applicant later directed her to make an offer to the State that he would plead guilty to two counts of assault and battery of a high and aggravated nature in exchange for a seven-year sentence, but that the State countered with an offer for a ten-year sentence in exchange for pleading guilty to two counts of ABWIK. Trial

counsel testified she spoke to both victims, the pathologist, and the emergency room doctor. Trial counsel testified the truck driver's statement made the Applicant's story less believable. Trial counsel testified the trial strategy was to argue the victims had a motive to lie because Dorothy Perkins lost custody of her children to DSS due to her problems with alcohol. Trial counsel testified the emergency room doctor testified Dorothy Perkins was intoxicated. Trial counsel testified the Applicant wanted to testify that Dorothy was drunk and fell off the motorcycle and that, while he testified to this at trial, he was not a good witness because he seemed threatening. Trial counsel confirmed Dorothy Perkins's medical records indicated the presence of alcohol and tricyclic antidepressants but stated she did not consult an expert. Trial counsel testified, however, that the emergency room doctor testified Dorothy Perkins was intoxicated. Trial counsel testified she did not impeach Victoria Perkins's testimony that she was hit with a vase (because in her statement she said she could not recall what hit her) but that her story did not change. Trial counsel testified the victims shared a hospital room but she did not recall whether she considered calling the nurse as a witness to testify about a possible argument between the victims. Trial counsel admitted she did not object to the jury charge on the inference of malice from the use of a deadly weapon. Trial counsel testified she told the Applicant she was very concerned about the strength of the State's case.

This Court finds the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court further finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in her representation.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have retained an expert witness. Based upon the testimony and evidence before this Court, there

was no error in trial counsel's decision not to consult an expert toxicologist. Wendy Bell testified about the results of Dorothy Perkins's lab tests – indicating the presence of alcohol and tricyclic antidepressants. Bell admitted, however, that she did not know the prescribed dosage of the antidepressants. Bell also admitted one's body can develop a tolerance of a drug. Bell merely opined the combination of the alcohol and antidepressants made impaired balance and memory "likely." This Court does not find such speculative testimony would have changed the outcome of the Applicant's trial – especially as trial counsel cross-examined both Dorothy Perkins and the emergency room doctor (who testified Dorothy Perkins was intoxicated upon her admission). (Trial transcript, pp.121-28; pp.172-73). Similarly, this Court finds that the admission of Dorothy Perkins's medical records at trial would not have changed the outcome of the case.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not discuss the ten-year counteroffer received from the State. Trial counsel testified she discussed the ten-year counteroffer with the Applicant and he declined, as he was adamant about not entering a guilty plea to violent offenses. This Court finds trial counsel's testimony is credible. This Court finds trial counsel fulfilled her obligations and responsibilities in conveying and discussing the plea offer. Cf. Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (holding counsel's failure to convey the State's plea offer to defendant constituted deficient performance). This Court notes trial counsel's testimony was corroborated by the Applicant's own admission that he was not sure he would even have accepted a ten-year offer.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not properly impeach Dorothy Perkins with inconsistencies in her description of how she was thrown from the Applicant's bike (as to whether the front or back wheel came off the ground). Dorothy

Perkins testified the Applicant “popped one wheeie [sic]” and that he then “kicked it up one more time and reached and shoved me off of it.” (Trial transcript, p.111). This Court finds Dorothy Perkins did not give a specific enough description of the act such that trial counsel should have been alerted that it differed from the description in her statement. Regardless, the Applicant cannot prove he suffered any prejudice because the State presented overwhelming evidence of guilt. Dorothy Perkins testified the Applicant beat her and then hit her mother (Victoria) before threatening her and forcing her onto his motorcycle at knifepoint. Dorothy Perkins then testified the Applicant pushed her off the back of the moving motorcycle then chased her and said he would kill her. (Trial transcript, pp.103-21). Victoria Perkins testified consistently with her daughter. Victoria Perkins stated the Applicant hit her in the head, beat and threatened Dorothy, and was brandishing a knife. (Trial transcript, pp.131-42). A truck driver testified he came upon an^l accident scene and saw a male chasing a female, grabbing her, and attempting to keep her quiet. The truck driver testified the male tried to pull the female off of the side of his truck and the female told him the male threw her off the motorcycle and tried to kill her. (Trial transcript, pp.176-87). A responding officer testified the victim was “hysterical” at the accident scene and said she had been forced onto the back of a motorcycle and then thrown off. (Trial transcript, pp.190-97). This Court finds the Applicant has failed to prove he suffered any prejudice. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel’s deficient performance could have reasonably affected the result of defendant’s trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

This Court finds the Applicant failed to meet his burden of proving trial counsel should

have impeached Victoria Perkins because her statement indicated she did not know what hit her and she testified she was hit with a vase. Victoria Perkins's trial testimony indicated the Applicant hit her with a vase and she identified a photograph of the object. (Trial transcript, pp.134-37). Officer Jackie Catoe testified she responded to the victims' residence and Victoria Perkins told her the Applicant "struck her with an object. She couldn't tell me what it was." (Trial transcript, p.201). Officer Catoe identified a photograph of an object – the same object identified by Victoria Perkins – as a "porcelain whatnot" that she found on the couch and was chipped and covered in blood. (Trial transcript, p.202; p.204). This Court finds the conflicting descriptions were before the jury who weighed this information in their deliberations. See State v. Pipkin, 359 S.C. 322, 327, 597 S.E.2d 831, 833 (Ct. App. 2004) (noting the jury is "the finder of fact and weigher of credibility"); Craven v. Cunningham, 292 S.C. 441, 443, 357 S.E.2d 23, 25 (1987) ("The credibility of witnesses is for the triers of fact."). This Court finds trial counsel did not err in specifically impeaching Victoria Perkins and that the Applicant cannot prove any resulting prejudice because of the State presented overwhelming evidence of guilt. See Franklin v. Catoe, 346 S.C. at 570 n. 3, 552 S.E.2d at 722 n. 3; Geter v. State, 305 S.C. at 367, 409 S.E.2d at 346.

This Court finds the Applicant failed to meet his burden of proving trial counsel was ineffective in failing to call the hospital nurse as a witness at trial to recount an alleged conversation between Dorothy and Victoria Perkins. As this alleged witness did not testify at the evidentiary hearing, any discussion regarding what she would have testified about at trial is purely speculative. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina 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.”) (emphasis in original).

This Court finds the Applicant failed to meet his burden of proving trial counsel did not properly challenge the jury charge about the inference of malice from the use of a deadly weapon. The trial judge charged the jury that “[i]nferred malice may also arise when the deed is done with a deadly weapon.” (Trial transcript, p.293). This Court notes the opinion in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) was published approximately one month earlier. While trial counsel admitted she did not object to the jury charge, this Court finds there was no resulting prejudice because the State presented overwhelming evidence of the Applicant's guilt. See Franklin v. Catoe, 346 S.C. at 570 n. 3, 552 S.E.2d at 722 n. 3; Geter v. State, 305 S.C. at 367, 409 S.E.2d at 346.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in her representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations.

Accordingly, this Court finds the Applicant has abandoned any such allegations.

CONCLUSION

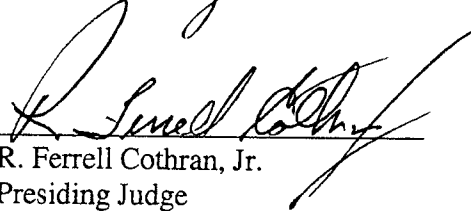
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 20 day of Aug, 2013.


 R. Ferrell Cothran, Jr.
 Presiding Judge

Manning, South Carolina.

TRUE CERTIFIED COPY.
Scott B. Suggs
CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

2013 SEP -9 PM 2:44
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