



ALAN WILSON  
ATTORNEY GENERAL

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MAY 09 2018

S.C. SUPREME COURT

May 9, 2018

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

**Re: Dale Gould, #335171 v. State of South Carolina**  
**Case No. 2016-CP-10-1651**

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. The PCR transcript is being requested on today's date. Enclosed are the following:

1. A copy of the order which is to be challenged on appeal.
2. Proof of service of notice of appeal on the Respondent.

Sincerely,

Megan Harrigan Jameson  
Senior Assistant Deputy Attorney General

MHJ/jaj

cc: Rodney D. Davis, Esquire  
South Carolina Department of Corrections  
Charleston County Clerk of Court  
Honorable Scarlett A. Wilson  
Office of Appellate Defense  
Victim Advocacy Division

STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

CERTIORARI TO CHARLESTON COUNTY  
Court of Common Pleas  
Maite Murphy, Circuit Court Judge

MAY 09 2018

S.C. SUPREME COURT

Case No. 2016-CP-10-1651

Dale Gould, #335171 ..... Respondent,

v.

State of South Carolina, ..... Petitioner.

**NOTICE OF APPEAL**

The State of South Carolina appeals the Honorable Maite Murphy's order granting post-conviction relief filed April 9, 2018, and received by the State on April 11, 2018. A copy of the order is attached hereto.


May 9, 2018

Respectfully submitted,

ALAN WILSON  
Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General  
S.C. Bar No. 100108

P.O. Box 11549  
Columbia, S.C. 29211  
(803) 734-3737

By:   
Attorneys for the Petitioner

Other counsel of record:  
Rodney D. Davis, Esquire  
101 Meeting Street, 5th Floor  
Charleston, SC 29401  
Attorney for Respondent  
(843) 958-1850

STATE OF SOUTH CAROLINA )

COUNTY OF CHARLESTON )

Dale Gould, #335171 )

Plaintiff, )

vs. )

STATE OF SOUTH CAROLINA )

Defendant. )

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT

CASE NO: 2016-CP-10-1651

MOTION AND ORDER INFORMATION  
FORM AND COVERSHEET

Plaintiff's Attorney:  
Rodney D. Davis, Esquire  
Address: Lowcountry Law Office  
4000 Faber Place Drive, Suite 300  
Charleston, SC 29405  
Phone: \_\_\_\_\_ Fax \_\_\_\_\_  
E-mail: \_\_\_\_\_ Other: \_\_\_\_\_

Defendant's Attorney:  
Rasheeda Cleveland, Esquire  
Address: South Carolina Attorney General's Office  
PO Box 11549  
Columbia, SC 29211  
Phone: \_\_\_\_\_ Fax \_\_\_\_\_  
E-mail: \_\_\_\_\_ Other: \_\_\_\_\_

- MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
- FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
- PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: \_\_\_\_\_

Estimated Time Needed: \_\_\_\_\_

Court Reporter Needed:  YES /  NO

SECTION II: Motion/Order Type

Written motion attached

Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

*Rasheeda N. Cleveland*

Signature of Attorney for  Plaintiff /  Defendant

March 14, 2018

Date submitted

SECTION III: Motion Fee

PAID - AMOUNT: \$ \_\_\_\_\_

EXEMPT:

(check reason)

- Rule to Show Cause in Child or Spousal Support
  - Domestic Abuse or Abuse and Neglect
  - Indigent Status  State Agency v. Indigent Party
  - Sexually Violent Predator Act  Post-Conviction Relief
  - Motion for Stay in Bankruptcy
  - Motion for Publication  Motion for Execution (Rule 69, SCRPC)
  - Proposed order submitted at request of the court; or,  
reduced to writing from motion made in open court per judge's instructions
- Name of Court Reporter: \_\_\_\_\_
- Other: \_\_\_\_\_

JUDGE'S SECTION

Motion Fee to be paid upon filing of the attached order.

Other:

JUDGE CODE \_\_\_\_\_

Date: \_\_\_\_\_

CLERK'S VERIFICATION

Collected by: \_\_\_\_\_ Date Filed: \_\_\_\_\_

MOTION FEE COLLECTED: \$ \_\_\_\_\_

CONTESTED - AMOUNT DUE: \$ \_\_\_\_\_

Cc  
AT  
GS

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT

Dale Gould, #335171,  
Applicant,

2016-CP-10-1651

v.

Order

State of South Carolina,  
Respondent.

FILED  
2018 APR -9 PM 3:11  
JULIE J. ARMSTRONG  
CLERK OF COURT  
BY: [Signature]

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on April 1, 2016 by Dale Gould ("Applicant"). Respondent submitted its Return on June 23, 2016. An evidentiary hearing was convened on January 30, 2018 at the Charleston County Courthouse. Applicant was present at the hearing and represented by Rodney Davis, Esquire. Assistant Attorney General Rasheeda N. Cleveland, Esquire of the South Carolina Attorney General's Office, represented Respondent.

Before this Court were the Charleston County Clerk of Court records, South Carolina Department of Corrections' records, the appellate records, the trial transcript, Respondent's Return, and the application. Based on these records and the testimony presented at the hearing, the Court finds as follows:

**I. PROCEDURAL HISTORY**

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Charleston County Clerk of Court's orders of commitment. Applicant was indicted by the January 2014 term of the Charleston County Grand Jury for one (1) count of Distribution of Cocaine, Third Offense (2014-GS-10-00320). Melissa Gay, Esquire, represented him. On November 19, 2014, Applicant proceeded to a jury trial pursuant to which he was found guilty as

indicted. Honorable Deadra L. Jefferson sentenced the Applicant to confinement for ten (10) years.

A notice of appeal was filed on Applicant's behalf and an appeal perfected pursuant to Anders v. California, 378 U.S. 738, 87 S. Ct. 1396 (1967). However, Applicant submitted an affidavit requesting his petition to be withdrawn and dismissed. The South Carolina Court of Appeals issued an order affirming the withdrawal of his appeal. The Remittitur was sent down on October 22, 2015.

### Summary of Facts

On October 10, 2013, the Charleston County Police Department conducted a control buy operation at the Joe Pasta Restaurant on King Street in downtown Charleston. The entire operation was recorded on video. The undercover detective and the confidential informant arranged a meeting with Applicant at the restaurant. (R. 47). When the detective and the confidential informant returned from that meeting, they both had in their possession a quantity of cocaine. (R. at 48).

## II. ALLEGATIONS

In his current *pro se* Application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Defense counsel failed to obtain the video recording from the restaurant."
2. "Defense counsel failed to interview the employee that entered the office during the undercover CI's visit."
3. "Is it the duty of the judge to appoint the jury foreman? (See transcript, page 234, Lines 3-6)"
4. "Defense counsel failed to request/obtain text message claimed by the state and testified to by the witness' used to set a "buy."
  - a. "No text message was ever received or sent pertaining to a drug buy. Proving the statement false."
5. "Defense counsel refused to have "baggie" the state claimed I dropped, tested for fingerprint evidence."
  - a. "Defense counsel's reason for not ordering the fingerprint evidence was that "it's

- to (sic) expensive. Questioning her "due diligence"
6. "Defense counsel neglected to depose state witness' for possible impeachment evidence."
    - a. "Without conducting a deposition from the undercover or the confidential informant, defense counsel had no physical evidence at trial to challenge their testimony on the stand."
  7. "Defense counsel refused my continuous requests to cross examine the undercover officer. Allowing her to testify without a single challenge."
    - a. "Defense counsel's failure to cross examine allowed the state an unbalance testimony. A total of 74 mins and 40 seconds of state's testimony. A total of 1 min and 44 seconds of cross examine (sic)."
  8. "Defense counsel neglected to explain the possible sentencing. As evidenced in transcript. Pages 270-271. Lines 1-6."
    - a. If counsel had explained what a plea bargain (sic) entailed. I may have considering accepting the 4 year deal from the state."
  9. "Defense counsel was reprimanded by Judge Jefferson for failure to have me obtain bond during the trial."
    - a. "Defense counsel's negelect (sic) to have me obtain a bond prior to the start of trial forced Judge Jefferson to have me taken into custody the first nighth (sic) of trial therefore elimanting (sic) any possible chance to review my options for the remainder of the trial."
  10. "Defense counsel failed/refused/neglected to obtain my record to argue the sentence. Even after explaining to her that I plead to a possible first offense years earlier. As evidenced in the transcript. Page 270, lines 13-24."
    - a. "This statement exposes counsel's unwilling to perform a fair and honest effort to repersent (sic) me."
  11. "Defense counsel refused to visit the scene of the alledged (sic) transaction."
    - a. "Without knowledge of the location of the office, counsel could not accurately discribe (sic) the access the staff and guess had to open door of the office. Anyone of 350 people could have dropped any bag hear the office door. It is adjacent to the servers beverage station, both first floor bathrooms and read entry station, both first floor bathrooms, and the read entry dor. Allowing access to everyone throughout the day."
  12. "Defense counsel neglected to have any discovery evidence in the court room during the trial."
    - a. "By failing to have proper documents on hand, counsel was unable to refer back to properly cross examine witness'.
  13. "Defense counsel failed to object the term "drug buy," allowing the state and the witness' to repeat it 27 times during questioning."
    - a. "My charge was distribution. Defense counsel allowed the state and the state's witness' to use the term "drug buy" 27 times setting the thought of a sale in the minds of the jury."
  14. "Defense counsel refused to present a single witness in my defense. There were at least 9 employees and 75 guests in the restaurant at the time of the CI and UC's visit."
    - a. "Any employee could have testified to having been in the office during the corse (sic) of the evening. As well as having any number of guests accompany them."
  15. "In an effort to show defense counsel's state of mind during the trial, she was in dire

financial stress having to borrow \$500.00 dollars from a friend you came to support me. Her excuse was to keep from having her phone service disconnected.”

a. “Pervented (sic) counsel from providing the information.”

Applicant filed an amended application on November 27, 2017, to including the following allegations:

1. "Ineffective assistance of counsel by failing to investigate the case prior to the guilty trial."
2. "Applicant's attorney provided ineffective assistance of counsel by failing to meet with the Applicant a sufficient amount to adequately advise the Applicant and prepare for a resolution."
3. "Applicant's attorney provided ineffective assistance of counsel by failing to properly cross-examine witnesses at trial."
4. "Applicant's attorney provided ineffective assistance of counsel by failing to properly advise the Applicant concerning the consequences of conviction versus a plea offer from the State."
5. "Applicant's attorney provided ineffective assistance of counsel by failing to object to the jury charge mentioning "strong evidence".

### **III. SUMMARY OF RELEVANT TESTIMONY PRESENTED**

At the evidentiary hearing, Applicant testified on his own behalf. Trial Counsel Melissa Gay, Esquire, also testified.

Applicant testified that he was fifty-six years old and lived in South Carolina for eleven years before the incident. In regards to his educational background, Applicant testified that he had completed "some" college but did not graduate. He further testified that he retained Trial Counsel to represent him following his arrest. Applicant attested that Trial Counsel failed to appear at pre-trial conference on his behalf, and failed to discuss any of the elemental requirements of the charged offenses. He also testified that he was told by Trial Counsel that the

charged offenses carried a potential sentence of ten to thirty years, but that they never discussed the percentage of his sentence he would be required to serve or if he would be parole eligible.

Applicant further testified that on the morning of his trial, the State offered him a plea deal of four years but there was no discussion of what charge he would be pleading guilty to. Applicant also stated that he only found out that the ten year sentence was as "85%" at the conclusion of his trial. Applicant recalled reviewing the video surveillance tape captured by the confidential informant at Trial Counsel's office prior to trial but the two did not discuss any potential defenses. Applicant also stated that he and Trial Counsel never discussed his right to not testify at trial because Trial Counsel told him he would not testify because she did not feel that he was a valuable witness. He also alleged that Trial Counsel did not conduct any investigation in his case. Regarding his appeal, Applicant testified that he decided to withdraw his appeal after Trial counsel filed an Anders<sup>1</sup> brief.

On cross-examination, Applicant testified that he met with Trial Counsel four times, and did not take the plea offer because Trial Counsel had advised him not to plea. However, he would not take the plea if offered to him again. Applicant also indicated that he gave Trial Counsel a list of witness names but did not provide her with contact information for the named witnesses.<sup>2</sup>

Trial Counsel testified that she has been in the practice of criminal law for twenty-eight years. She also testified that she had met with Applicant maybe four to six times before trial, and had spoken with him on the phone and written him several times. Trial Counsel further testified that during those meetings she and Applicant discussed the facts of his case, plea offers, and Applicant's prior record. She recalled that Applicant was already on probation for a similar

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<sup>1</sup> Anders v. California, 386 U.S. 738 (1967)

<sup>2</sup> Applicant's potential witnesses were not present during the PCR hearing.

charge at the time of the arrest. Trial Counsel testified that it was her belief that Applicant should have pleaded guilty because four years would have been great. However, Applicant would not plea and wanted to go to trial on the charges against him.

Concerning her investigation, Trial Counsel testified that Applicant never provided her with names of any witnesses but that she and Applicant had many discussions about potential witnesses who were present at the restaurant. In regards to her defense strategy, Trial Counsel testified that their strategy was to prove that Applicant did not place the drugs on the floor in the restaurant.

Regarding her decision to not cross examine the State's witnesses during trial, Trial Counsel recalled that it is her strategy to not cross examine a witness if the testify rendered would not be helpful to the defense. Trial Counsel also recalled that the testimony of the undercover police officer during direct examination gave all that was needed for the defense. However, Trial Counsel further recalled that she should have objected to the jury instruction but did not do so during the trial.

#### IV. APPLICABLE LAW

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, 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. 441, 334 S.E.2d 813.

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. 668. Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, Petitioner must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced Petitioner 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.

#### **V. 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 further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (1985).

#### **INEFFECTIVE ASSISTANCE OF COUNSEL**

Applicant alleges Trial Counsel was ineffective in her representation of him at trial. This Court finds Trial Counsel was not ineffective in her handling of Applicant's trial or appeal. Trial Counsel's actions were reasonable given the circumstances of this case. Strickland requires this Court to presume Trial Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C.

115, 386 S.E.2d 624 (1989). This Court finds Applicant has not done so. Applicant has failed to meet his burden of proving that Trial Counsel was deficient in the handling of his trial or appeal.

However, this Court further finds that Trial Counsel was ineffective in failing to object to the trial judge's 'strong evidence' charge. The Supreme Court of South Carolina instructed the bench in State v. Cheeks, 401 S.C. 322, 727 S.E.2d. 480 (2013) to no longer use the 'strong evidence' charge. Applicant was therefore prejudiced by Trial Counsel's failure to object to the trial judge's use of the term "strong evidence" in his instruction to the jury. Based upon the above, there is a reasonable probability that the result of the trial would have been different.

*{Conclusion and signature on the following page.}*

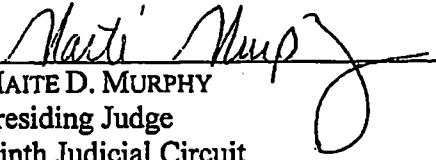
## VI. CONCLUSION


Based upon the foregoing, the Court finds and concludes that Applicant's trial counsel was not ineffective in her representation of him at trial or in the handling of his appeal. However, this Court finds and concludes that Applicant's trial counsel was ineffective in failing to object to the use of the 'strong evidence' charge by the trial judge and that, but for said ineffectiveness, there is a reasonable probability that the result of trial would have been different. As such, Applicant was thereby prejudiced. I therefore hereby order that Applicant's post-conviction relief application is **GRANTED** and that Applicant is entitled to and hereby granted a new trial.

### IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief be granted; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections pending a new trial in this case.

AND IT IS SO ORDERED this 29 day of March, 2018.

  
MAITE D. MURPHY  
Presiding Judge  
Ninth Judicial Circuit

, South Carolina

STATE OF SOUTH CAROLINA  
In The Supreme Court

CERTIORARI TO CHARLESTON COUNTY

Court of Common Pleas  
Maite Murphy, Circuit Court Judge

Case No. 2016-CP-10-1651

Dale Gould, #335171 ..... Respondent,

v.


State of South Carolina, ..... Petitioner.

**PROOF OF SERVICE**

I, Megan Harrigan Jameson, Counsel for the Petitioner, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

**Rodney Duane Davis, Esquire**  
**Lowcountry Law Office**  
**101 Meeting Street, 5th Floor**  
**Charleston, SC 29401**

I further certify that all parties required by Rule to be served have been served this 9th day of May, 2018.

  
MEGAN HARRIGAN JAMESON  
S.C. Bar. No. 100108  
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Post Office Box 11549  
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**Attorney for the Petitioner**