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May 8, 2018

The Honorable Daniel E. Shearhouse
 Clerk, Supreme Court of South Carolina
 P.O. Box 11330
 Columbia, SC 29211

RECEIVED
 MAY 11 2018

RE: Benjamin Jackson v. State of South Carolina, Case No.: 2016-CP-08-1738 ^{SC} SUPREME COURT

Dear Mr. Shearhouse:

Enclosed for filing is the Notice of Appeal (original and clocked copy) in the above Post Conviction Relief (PCR) case. Also enclosed are the following:

- (1) Proof of service of the Notice of Appeal on the respondent;
- (2) The Order of Dismissal &
- (3) A Request for Representation on Appeal.

The Applicant-Appellant was represented by me as an indigent pursuant to my contract with the South Carolina Commission on Indigent Defense (SCCID) to handle PCR cases. By copy of this letter, I am forwarding a duplicate set of documents to the SCCID.

The Request for Representation on Appeal and the Affidavit in Support thereof are signed by me as attorney for Applicant-Appellant. If you need anything further, do not hesitate to contact me. Thank you for your time and attention to this matter.

Sincerely,

Rodney D. Davis
 South Carolina Bar #: 12396
 101 Meeting Street, 5th Floor
 Charleston, SC 29401
 (843) 882-5065
Davis@LowcountryLawOffice.com

CC: Rasheeda Cleveland
 Assistant Attorney General

Paula Murdoch
 Appellate Division, SCCID

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Thomas Russo, Circuit Court Judge

Case No.: 2016-CP-08-1738

Benjamin Jackson,

Appellant,

v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

Benjamin Jackson appeals the denial of his Post Conviction Relief application in this case. The Application for relief was denied, following an evidentiary hearing before the Honorable Thomas Russo on February 26, 2018.

May 9, 2018



Rodney D. Davis
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Attorney for Appellant

Other Counsel of Record:
Rasheeda Cleveland, Assistant Attorney General
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P.O. Box 11549
Columbia, SC 29211-1549
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
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APPEAL FROM BERKELEY COUNTY
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Thomas Russo, Circuit Court Judge

Case No.: 2016-CP-08-1738

Benjamin Jackson,

Appellant,

v.


State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State by mailing a copy of it to the address of record, Rasheeda Cleveland, P.O. Box 11549, Columbia, South Carolina 29211-1549, on 5/9, 2018.

5/9, 2018


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Other Counsel of Record:
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Columbia, SC 29211-1549
Attorney for Respondent

MARY B. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

18 MAY -9 PM 12:03

FILED

[Handwritten initials]

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)
Benjamin J. Jackson, #338036,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2016-CP-08-1738

ORDER OF DISMISSAL

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

2018 MAY -3 AM 9:11

FILED
DJD

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed on August 1, 2016 by Benjamin J. Jackson (“Applicant”). Respondent submitted its Return on July 6, 2017. An evidentiary hearing was convened on Monday, February 26, 2018, at the Berkeley County Courthouse. Applicant was present at the hearing and represented by Rodney Davis, Esquire. Rasheeda Cleveland, Esquire of the South Carolina Attorney General’s Office, represented the State. Applicant testified at the hearing. Applicant’s trial counsel, Patricia Kennedy, Esquire was also present and testified at the hearing.

Before the Court are the records of the Berkeley County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, and the post-conviction relief application.

I. PROCEDURAL HISTORY

Benjamin Jackson (“Applicant”) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. In October 2010, the Berkeley County Grand Jury indicted Applicant for possession of a weapon during the commission of a violent crime (2010-GS-08-1692), burglary, second degree (2010-GS-08-1693), grand larceny (2010-GS-08-1694), kidnaping (2010-GS-08-1695), armed robbery

(2010-GS-08-1696), and failure to stop for a blue light (2010-GS-08-1697). Patricia Kennedy, Esquire, represented Applicant. On March 5-8, 2012, Applicant proceeded to trial before the Honorable J.C. Nicholson, Jr. The jury found Applicant guilty as indicted on all charges. Pursuant to the State's recommendation, Judge Nicholson sentenced Applicant to imprisonment for concurrent terms of five years of imprisonment for possession of a weapon during the commission of a violent crime, fifteen years for burglary, second degree, ten years for grand larceny, thirty years for kidnapping, thirty years for armed robbery, and three years for failure to stop for a blue light.

Applicant filed a timely notice of appeal. Lanelle Durant, Esquire, of the South Carolina Commission of Indigent Defense—Office of Appellate Defense, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on July 29, 2015. State v. Jackson, Op. No. 2015-UP-389 (S.C. Ct. App. filed July 29, 2015). The remittitur was returned to the circuit court on September 28, 2015.

SUMMARY OF FACTS

On May 19, 2010, Appellant entered a church and held Hazel Dunning ("Victim") at gun point. (Tr. p. 139; Tr. p. 144.) Appellant told Victim that he "wanted [her] f'ing key or [he will] blow [her] head off." (Tr. p. 144.) Appellant took Victim's keys and stole her vehicle. (Tr. pp. 144-145; Tr. p. 147.) According to Victim, her vehicle was a White Eddie Bauer Expedition with tan on the bottom. (Tr. p. 142.) Victim described the assailant as a black male, who was approximately 5'11 to 6'2 and 150 to 180 pounds. (Tr. p. 134.)

On May 28, 2010, Investigator Rick Ollic saw a vehicle fitting the description of Victim's stolen vehicle. (Tr. p. 187.) Investigator Ollic was able to see the driver's face. (Tr. p. 189.) Initially, the vehicle stopped when Investigator Ollic activated his blue lights in order to

pull over the vehicle. (Tr. p. 190). But when Investigator Ollic approached the vehicle, the vehicle took off. (Tr. pp. 192-193.) At that point, the backup officers began chasing the vehicle. (Tr. p. 193.) Eventually, the vehicle crashed and the driver fled the vehicle. (Tr. pp. 195-196.) The officers found a wallet with multiple credit cards that listed Appellant's name as the owner and Appellant's student identification. (Tr. pp. 196-197.) According to Investigator Ollic, the person on the student identification card resembled the person he saw driving the vehicle that night. (Tr. pp. 197-198.) The officers determined that the vehicle was in fact Victim's stolen vehicle. (Tr. p. 198.)

On June 2, 2010, the officers executed a search warrant of Appellant's house. (Tr. p. 241.) The officers found Victim's luggage rack and a palmetto tree sticker from her vehicle in Appellant's yard. (Tr. p. 199.) Further, the officers found a prescription medicine bottle belonging to Victim in Appellant's home and a check with Victim's name on it in Appellant's home. (Tr. p. 199.) In addition, the officers found Victim's vehicle registration, roadside hazard kit, cell phone, and other miscellaneous documents belonging to Victim in Appellant's home. (Tr. p. 199; Tr. pp. 244-250; Tr. pp. 264-266.)

At trial, Investigator Michael Cortte testified that Victim reported that the assailant used some sort of long gun or rifle during the commission of the armed robbery. (Tr. p. 257.) When the officers executed the search warrant of Appellant's home, they found numerous .410 shotgun shells. (Tr. p. 267.) However, the officers never found a firearm. (Tr. p. 267.) According to Officer Cortte, the shotgun shells the officers found in Appellant's home were consistent with Victim's description of the type of weapon used during the commission of the armed robbery. (Tr. p. 267.)

Later, on the day of the execution of the search warrant, Investigator Cortte asked

Appellant specifically about the armed robbery that occurred on May 18, 2010. (Tr. p. 269.) According to Investigator Cortte, Appellant "said he did it. He said that he was sorry for what he put the victim through. He said that she was never a target. He wanted the vehicle. He said he wanted to apologize to her. He said that someone had left the gun for him to use. He said that someone helped him dispose of some of the victim's property, including her purse and the license plate from her vehicle. He told [the officers] that those items were disposed of at a car wash in Orangeburg County." (Tr. p. 273.) Appellant refused to tell the officers the name of the person who provided him the gun. (Tr. p. 273.) On June 3, 2010, Appellant confessed once again to the armed robbery. He wrote a note apologizing to Victim and asking for her forgiveness. (Tr. pp. 277-278; State's Exh. 2.) According to Dean Kokinda, an expert in the field of forensics and fingerprint analysis, Appellant's fingerprints matched certain items found in Victim's stolen vehicle. (Tr. pp. 330-331.)

II. ALLEGATIONS

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

1. "Defense counsel failed to place the grounds for her objection to the testimony on the record, the issue assert on appeal is not preserved."
 - a. "Defense counsel didn't properly represent me, or raise the correct issues in my case"
 - b. "Never consult with me on my case on trail"
2. "Trial counsel was ineffective for failing to place the grounds for her objection to the more prejudicial the probative testimony of Inv. Cortte, where counsel should of specify that the testimony was more prejudicial than probabtive."
3. "Ineffective assistance of Appellate Defense"¹
 - a. "Lawyers fail to object to the relevancy, leaning on relevancy obscure the merit of what your lawyer did object to prejudicial effect. Appellate lawyer should of left relevancy out and go for prejudicial effect or should of argued that the objection was specific enough

¹ Applicant did not go forward with his claim of ineffective assistance of appellate defense.

where 'the trial judge admitted the testimony but excluded the actual shell casing and photographs. Testimony of mere speculation, where prejudice of appellant being convicted of mere speculation instead of beyond reasonable doubt outweighs any probative value.'

III. SUMMARY OF RELEVANT TESTIMONY PRESENTED

Applicant's testimony

Applicant testified that his trial counsel was Patricia Kennedy, Esquire. He recalled that the two of them had ten meetings, each lasting on average 20-30 minutes. Applicant further recalled that the meetings took place at the jail and in the courthouse. Applicant testified that he did not recall discussing the elements of the charges against him but he recalled discussing the evidence. Applicant recalled receiving a copy of the Rule 5 discovery from his plea counsel. Applicant also testified that trial counsel discussed with him the max punishments he could receive for the charges against him. Applicant did not recall having any discussion of the trial process, and testified that he never had a trial before. Applicant testified that he and trial counsel discussed Jackson v. Denno² briefly but had no discussion of his testimony or what he might be asked during trial.

Applicant recalled that trial counsel advised him not to testify because of his background³. Applicant also recalled Judge Nicholson allowing him to think about his decision to testify or not overnight, and allowed him additional time to speak with trial counsel. Regarding the charges against him, Applicant testified that he did not commit the armed robbery and kidnapping but that he had paid someone named Johnny \$2,500 dollars to steal the vehicle. He further testified that he knew the vehicle was stolen two days before he was stopped. Applicant testified that he never had a gun and a gun was never found.

² 378 U.S. 368, 84 S.Ct. 1774 (1964).

³ Applicant had a prior felony and drug charges in Berkeley County.

Applicant attested that there was never a discussion about the terms "most serious", strike offenses, or parole. However, Applicant recalled having a discussion with trial counsel about a plea offer of ten to twenty years, but he rejected the offer. Applicant further recalled trial counsel had advised him to take the deal because it was good deal. Applicant testified that he could not see himself pleading guilty to armed robbery and kidnapping, and he would not have considered taking a ten to twenty year sentence. Applicant attested that he did not understand when he would be parole eligible if he accepted the plea. He also testified that he did not understand the risks associated with going to trial. However, Applicant further testified that if given the option again to testify or still go to trial, he would go to trial because he is not guilty.

On cross-examination by the State, Applicant testified that he provided a written statement to officers stating that he apologized to the victim for what happened. However, he never informed the police that he had paid someone to steal the vehicle. Applicant recalled that no gun was found at his residence during the search of his home, but bullets that were consistent with the type of weapon used were found at the scene.

Trial Counsel's Testimony

Trial Counsel testified that she has been in the practice of law for thirty-two years, and that 85% of that time was spent practicing criminal law. She recalled that she was appointed to the case. Trial Counsel, after referring to her file and notes, testified that she and Applicant had at least fifteen or more meetings. Trial Counsel further recalled that Applicant's wife was also involved in the case, and that she had discussed the case with Applicant and his wife several times. Trial Counsel testified that she discussed the charges, elements, and potential punishments with Applicant several times before the plea hearing before Judge Dennis occurred. Trial Counsel also read into evidence a letter she had written to Applicant.

Trial Counsel recalled that Applicant had given three statements while in custody including a written statement. Trial Counsel testified that she negotiated with the State for a twenty-year cap; however, Applicant said he would take ten years. During her testimony, Trial Counsel read a letter from her file that she had written to Applicant addressing what happened in court, the charges, classification, and potential punishments.⁴ The letter also addressed what a plea offer was and the consequences of Applicant's decision to accept or reject it. In the letter, Trial Counsel also advised Applicant of the pros and cons of going to trial versus accepting a plea deal. Trial Counsel recalled, however, that it was solely Applicant's decision to reject the offer.

Regarding her trial strategy, Trial Counsel testified that they intended to concede to possession of the vehicle but believed they could attack the armed robbery based on the quality of the investigation. She recalled that she discussed with Applicant the weak points in the case, and his right to testify. Trial Counsel testified that it was Applicant's decision to not testify. Trial Counsel also recalled making a motion for directed verdict at the conclusion of the trial.

On cross-examination, Trial Counsel testified that a Denno hearing was held because there were issues regarding the credibility of officers and how Applicant's statements were taken. Trial Counsel stated that she did not perform mock testimony with Applicant because he did not want to testify. She further recalled that Applicant wrote a letter stating that he did not want a speedy 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

⁴ A copy of the letter from Trial Counsel to Applicant is attached to this order.

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

After reviewing the issues, this Court finds that Applicant did not carry his burden of showing deficiency on the part of Trial Counsel. Applicant offered no evidence to prove or show that Trial Counsel was deficient. This Court also finds that because Applicant did not carry his burden, there is no need to assess the prejudice prong.

Based on Trial Counsel's testimony, her advice regarding whether or not Applicant should testify was well within her discretion, and, in this Court's opinion, sound advice. Trial Counsel performed admirably as defense counsel. Similarly, this Court finds that Trial Counsel's advice was not based so much on Applicant's prior record as it was on her concern for subjecting client to cross-examination in regard to statements Applicant made. There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The record reflects that Applicant was advised of his 5th Amendment right to remain silent. (Tr. p. 341). When asked by the trial court if he understood that no one could compel him to testify, and that it was his "personal privilege", Applicant replied that he understood. (Tr. p. 341). The trial court allowed Applicant time to think about his decision, and to further consult with Trial Counsel before deciding whether or not to testify. (Tr. p. 343). On March 8, 2012, at the beginning of the proceedings, the trial court asked Applicant if he had made a decision regarding whether or not he would testify. Applicant informed the court that he did not want to testify. (Tr. p. 346, lines 4-16). An on-the-record waiver of a constitutional or statutory right is but one method of determining whether the defendant knowingly and intelligently waived that

right. Brown v. State, 453 S.E.2d 251, 252, 317 S.C. 270, 272 (1994). Additionally, Trial Counsel testified that it was Applicant's decision to not testify, and, as his counsel, she advised him of the weak points in his case. Therefore, the Court finds that the record reflects Applicant voluntarily, knowingly, and intelligently waived his right to testify.

Lastly, this Court finds that, based on the record and the testimony presented, Trial Counsel performed admirably. Therefore, after hearing oral argument and reviewing all documentation provided, this Court finds no deficiency on the part of counsel.

{Conclusion and signature on the following page.}

VI. CONCLUSION

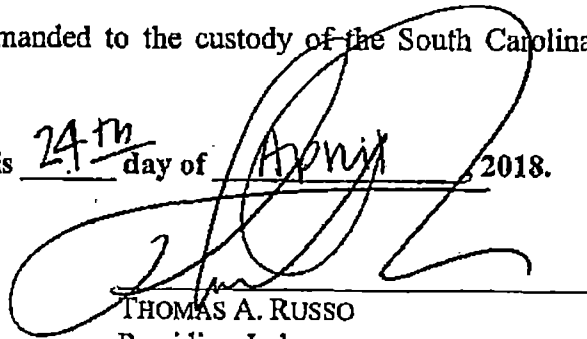
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 24th day of April, 2018.



THOMAS A. RUSSO
Presiding Judge
Ninth Judicial Circuit

Florence

, South Carolina

STATE OF SOUTH CAROLINA) IN THE SUPREME COURT OF SOUTH CAROLINA
)
 COUNTY OF BERKELEY)
) Case No.: 2016-CP-08-1738
)
 BENJAMIN JACKSON,)
 Applicant.)
)
 -versus-) REQUEST FOR REPRESENTATION ON APPEAL
)
 STATE OF SOUTH CAROLINA,)
)
 Respondent.)

On behalf of the request of the above-named Applicant, to be represented by the South Carolina Commission of Indigent Defense, Appellate Division (SCCID), the undersigned attorney would show unto this Honorable Court that:

1. He is the attorney for the Applicant-Appellant in the above captioned case. The Applicant-Appellant was in custody during and taken into custody immediately following the Post Conviction Relief (PCR) hearing and was not available to personally sign this request;
2. The Applicant-Appellant was represented by the undersigned attorney as an indigent, pursuant to a contract with the SCCID;
3. The Applicant-Appellant has been informed that he may request assistance from the SCCID Appellate Division in perfecting his appeal;
4. A timely Notice of Intent to Appeal has been filed on the Applicant-Appellant's behalf;
5. The Applicant-Appellant has been informed that nothing requires SCCID Appellate Division to pursue this appeal unless that office's Chief Attorney is satisfied that there is arguable merit to this appeal and that he cannot afford to hire an attorney.

At this time, the Applicant-Appellant requests the aid of the SCCID Appellate Division in perfecting his appeal to the South Carolina Court of Appeals.

Respectfully Submitted,



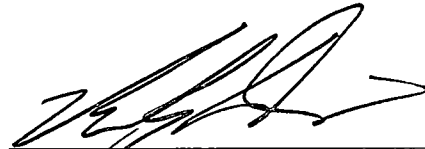
 Rodney D. Davis
 South Carolina Bar #: 12396

5/9, 2018
 Charleston, South Carolina.

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)


VERIFICATION

PERSONALLY appeared before me, Rodney D. Davis, being first duly sworn, deposes and says that he has read the foregoing *Request for Representation on Appeal* on behalf of Benjamin Jackson and the same is true of his knowledge except those matters alleged on information and belief, and as to those matters, he believes them to be true.

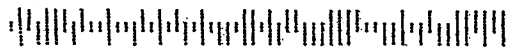


Rodney D. Davis
South Carolina Bar #: 12396

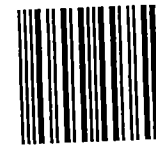
SWORN to and subscribed to me
this 9th day of May, 2018.



Notary Public for South Carolina
My Commission expires 6/17/2025



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The Honorable Daniel E. Shearhouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
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