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May 05, 2016

RECEIVED
MAY 11 2016
S.C. SUPREME COURT

Via US Mail
Daniel Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

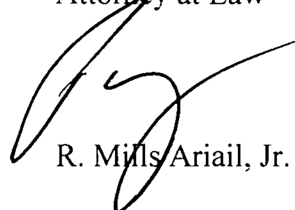
Re: ***Notice of Intent to Appeal from Bobby Joe Barton vs. State of South Carolina C.A. No.: 2014-CP-23-5047***

Dear Mr. Shearouse:

I was Court Appointed in the above referenced matter, and I expect that appellate defense will handle the appeal and petition for certiorari. On behalf of my client, enclosed for filing please find the Notice of Appeal and proof of service. I've enclosed a copy of the Honorable Daniel D. Hall's Order of Dismissal and Form 4 Order of Dismissal to be challenged on appeal. By copy of this letter, I am also serving my client, counsel for the State of South Carolina, the South Carolina Commission of Indigent Defense - Appellate Defense Division and the Greenville County Clerk's Office.

Thank you for your assistance in this matter and if you have any questions, please feel free to contact me.

Sincerely,
LAW OFFICE OF R. MILLS ARIAIL, JR.
Attorney at Law



R. Mills Ariail, Jr.

RMAjr/dl
Enclosures (as stated)

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
MAY 1 1 2016
S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

Case No. 2014-CP-23-05047

Bobby Joe Barton,.. Appellant,

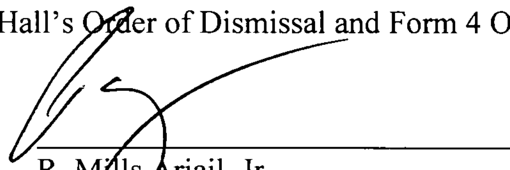
v.

State of South Carolina .... Respondent.

NOTICE OF APPEAL

Appellant appeals the Honorable Daniel D. Hall's Order of Dismissal dismissing Appellant's application for post-conviction relief. On March 14, 2016, the Honorable Daniel D. Hall signed an order dismissing Appellant's application for post-conviction relief with prejudice. Appellant's previous counsel, Caroline Horlbeck, received written notice of entry of this order on April 5, 2016 and she was relieved as Appellant's counsel on April 7, 2016.

On April 8, 2016, R. Mills Ariail, Jr. was appointed as Appellant's counsel and received a copy of the Order of Dismissal on that date. On April 18, 2016, Appellant's counsel filed a Rule 59(e) Motion for Reconsideration which was denied by the Honorable Daniel D. Hall on April 28, 2016. Applicant's counsel received notice of the dismissal of the Motion to Reconsider on April 29, 2016. A copy of the Honorable Daniel Hall's Order of Dismissal and Form 4 Order of Dismissal are attached.



R. Mills Ariail, Jr.
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Greenville, SC 29601
Telephone (864) 232-9390
Attorney for Bobby Joe Barton

Greenville, South Carolina
May 05, 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

Case No.2014-CP-23-05047

Bobby Joe Barton,.. Appellant,

v.

State of South Carolina .... Respondent.

CERTIFICATE OF SERVICE

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this May 05, 2016, I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

Karen C. Ratigan, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211
Attorney for the State of South Carolina

Greenville County Clerk's Office
Greenville County Courthouse
305 East North Street
Greenville, SC 29601

Bobby Joe Barton SCDC# 163629
Perry Correctional Institution
430 Oaklawn Road
Pelzer, SC 29669

SC Commission of Indigent Defense
Division of Appellate Defense
PO Box 11433
Columbia, SC 29211-1433

Denise Tanner LaBeck
Denise Tanner LaBeck

May 05, 2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. No. 2014-CP-23-5047
COUNTY OF GREENVILLE	)	
	)	
Bobby Joe Barton,	)	
S.C.D.C. No. 163629,	)	
	)	
Applicant,	)	
	)	**ORDER OF DISMISSAL**
v.	)	
	)	
State of South Carolina,	)	
	)	ENTERED COMPUTER
Respondent.	)	
	)	

2016 MAR 30 PM 2 25
PAUL B. WICKENSIMER
CO. S.C.

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed September 12, 2014. The Respondent made its return on February 12, 2015. An evidentiary hearing was held on February 18, 2016 at the Greenville County Courthouse. The Applicant was present and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

Prior to the commencement of the PCR hearing, counsel for the Applicant requested a continuance. This Court denied that motion. Counsel for the Respondent also noted the Applicant had filed a pro se "Motion to Relieve Counsel" on December 23, 2015. The Applicant chose to withdraw this motion and the case proceeded to a hearing.

The Applicant testified on his own behalf at the PCR hearing. Also testifying were assistant solicitor Mark Moyer, Aaron L. Jones, Jr., and the Applicant's trial counsel, Susannah C. Ross, Esquire. The Court had before it the trial transcript, the Greenville County Clerk of Court records, the South Carolina Department of Corrections records, the PCR application, the return, the appellate records, and Applicant's Exhibits 1-8.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the February 2010 term of the Greenville County Grand Jury for armed robbery (2009-GS-23-10018, count 1) and possession of a weapon during the commission of a violent crime (2009-GS-23-10018, count 2). He was represented by Susannah C. Ross, Esquire.

After the State called the case to trial, the Applicant was found guilty only of armed robbery. On August 10, 2010, the Honorable Edward W. Miller sentenced the Applicant to 25 years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. LaNelle C. DuRant, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's conviction and sentence. State v. Barton, Op. No. 2013-UP-058 (S.C. Ct. App. filed Jan. 30, 2013). The South Carolina Supreme Court denied the Applicant's subsequent petition for writ of certiorari on July 11, 2014. The remittitur was sent on July 25, 2014.

ALLEGATIONS

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

1. Ineffective assistance of trial counsel:
    a. Failed to fully communicate the formal plea offer.
    b. Failed to keep the Applicant reasonably informed of the status of the plea offer.
    c. Failed to explain the plea offer for the Applicant to make informed decision.
    d. Failed to comply with reasonable requests for information.
    e. "[O]pened the door" to prior bad acts between the Applicant and the witness.

f. Failed to object to inadmissible character evidence regarding prior bad acts.

g. Failed to make contemporaneous objection to improper testimony or request a curative instruction.

2. Ineffective assistance of appellate counsel:

a. Failed to request tape recordings of the preliminary hearing.

b. Failed to point out statements in trial transcript where trial counsel admitted to volunteering confidential information.

c. Failed to argue the trial judge failed to do an in camera questioning of the four witnesses in the courtroom.

3. Procedural Due Process.

4. Prosecutorial Misconduct:

a. Misled and confused the jury concerning the difference between robbery and armed robbery.

b. Misled and confused the jury concerning the burden of proof.

c. Stated the victim and witness had no reason to lie.

d. Made statements intended to incite or inflame the jury.

e. Stated the Applicant attempted to evade police.

f. Denied the Applicant an impartial jury trial.

In a pro se "Motion to Amend and Supplemental Pleadings" filed December 14, 2014, the Applicant raised the following issues:

1. Ineffective assistance of trial counsel:

a. Failed to object to testimony.

b. Failed to object to the trial judge's appointment and use of an interpreter based on the failure to comply with the statute.

c. Failed to object to the use of an unsworn interpreter during the Neil v. Biggers hearing.

d. Advised the Applicant not to testify.

e. Failed to have the trial judge rule on whether the robbery conviction could be used against the Applicant to impeach him.

f. Advised the Applicant to terminate the services of an identification expert.

g. Failed to investigate.

h. Failed to cross-examine the victim as to the amount of alcohol he had consumed.

i. Failed to cross-examine the victim as to whether he had an alcohol problem.

j. Failed to cross-examine the victim as to whether he had been arrested for an alcohol-related offense.

k. Failed to cross-examine the victim as to the location of his brother.

l. Failed to cross-examine the victim as to whether he solicited the witness and the Applicant for prostitution.

m. Failed to cross-examine the witness about her background and character.
n. Failed to request the witness be treated as hostile.
o. Failed to cross-examine the witness as to whether she went to the victim's trailer for prostitution purposes.
p. Failed to cross-examine the witness as to whether she knew how much time she faced.
q. Failed to cross-examine the witness about whether she lied.
r. Failed to cross-examine the witness as to whether her charge would be dismissed.
s. Failed to cross-examine the witness as to whether she met with the Applicant and bought drugs with him.
t. Failed to argue a motion for evidentiary hearing and motion for suppression.
u. Failed to enter into evidence the 911 tapes and police reports.
v. Failed to refrain from using the word "mugshot" and failed to object when the State used this word.
w. Created a conflict of interest between herself and the Applicant.
x. Failed to properly cross-examine Edward Perez or Investigator Jarvis.
y. Misled the jury in closing argument.
z. Failed to request a cautionary instruction jury charge.

2. Prosecutorial misconduct:
a. Knowingly allowed police to use the exact same arrest photo to be used in the photo line-up when he knew the victim had the exact photo in his possession."
b. Proceeded to trial upon the possession of a weapon during the commission of a violent crime charge.
c. Used perjured testimony.

3. Judicial misconduct:
a. Made prejudicial and condescending remarks to trial counsel.

In an "Amended Petition for Post Conviction Relief" filed by counsel on February 16, 2016, the Applicant raised the following issues:

1. Ineffective assistance of trial counsel:
a. Failed to fully and adequately communicate the State's plea offer.
b. Failed to keep the Applicant reasonably informed of the plea offer.
c. Failed to object to the wording and testimony of the mug shot magazine evidence.
d. Failed to object to the prosecution's failure to notify police that victim had the Applicant's photograph in his possession.
e. Failed to request a cautionary instruction charge.
f. Failed to request a missing witness instruction.

g. Failed to object to the prosecution's use of perjured testimony in order to obtain a conviction and denied the Applicant a fair trial.
h. Failed to object to testimony and denied the Applicant his right to confront witnesses at trial.

This Court finds the only issues properly raised to this Court were the issues raised at the PCR hearing. This Court finds all other issues are deemed abandoned.[1]

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

[1] This Court also notes the Applicant filed a pro se "Motion to Amend and Supplemental Pleading" on March 17, 2015. This Court cannot consider this pleading, however, as it was filed after counsel was appointed. See Rule 11(a), SCRCP; Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002) (holding there is no constitutional right to hybrid representation either at trial or on appeal).

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).

Plea offer

The Applicant stated trial counsel brought him a 15-year plea offer in January 2010. The Applicant stated trial counsel never discussed the terms of the offer with him and never explained the offer was for the Applicant to plead to the lesser charge of strong arm robbery.

Trial counsel testified she received a plea offer (which was dated January 11, 2010) in which the State would reduce the armed robbery charge to strong arm robbery and recommend either a sentence of 15 years suspended to 8 years or a plea without a recommendation. Trial counsel testified she visited the Applicant on January 29, 2010 to explain the plea offer and that she told him the plea was for strong arm robbery. Trial counsel testified, however, that the Applicant argued with her at that meeting. Trial counsel testified the Applicant later refused to be transported on March 25, 2010 so that they could discuss the case. Trial counsel testified she had explained the sentence ranges to the Applicant for both armed robbery and strong arm robbery. Trial counsel testified the Applicant never told her either that he wanted to accept this plea offer or that he wanted to plead guilty.

This Court finds the Applicant failed to meet his burden of proving plea counsel did not adequately convey and discuss the plea offer. Trial counsel testified she conveyed the plea offer and explained its terms to the Applicant. Trial counsel testified, however, that the Applicant rejected the offer and then refused to see her for several months. This Court finds trial counsel's testimony is more credible than the Applicant on this issue. This Court notes trial counsel's file

contained both the plea offer letter from the State and her notes about her meeting with the Applicant. This Court also notes trial counsel had a specific recollection of relaying the offer to the Applicant and the Applicant opting to refuse it. This Court finds trial counsel fulfilled her responsibilities in this regard. See 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).

Status of case

The Applicant stated trial counsel failed to keep him reasonably informed of the status of his case. The Applicant stated trial counsel stopped visiting him at the jail.

Trial counsel testified the Applicant refused to see her for several months. Trial counsel testified it was her practice to make notes if a client requested a jail visit and she did not indicate her file had any such notes.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not keep him informed about the status of the case. Trial counsel testified the Applicant refused to see her for several months after he rejected the plea offer. Trial counsel testified it was difficult to interact with the Applicant and that it was difficult to explain things to the Applicant that he did not want to hear. This Court finds trial counsel's testimony is credible. This Court finds that, if there was any breakdown in communication between the Applicant and trial counsel in this case, it was due to the Applicant's conduct. See United States v. Pellerito, 878 F.2d 1535, 1543 (5th Cir. 1989) ("If counsel was ineffective in any sense, it was only because the client rendered him so, first by keeping [counsel] in the dark, and then, by refusing to heed his advice. That is not the sort of 'ineffectiveness' for which relief can be granted.").

Discovery materials

The Applicant stated he requested a copy of the discovery materials prior to trial and did

not receive all of it.

Trial counsel testified she filed discovery motions, received those materials, and reviewed them with the Applicant on October 5, 2009. Trial counsel testified she made a copy of the discovery materials and sent it to the Applicant on October 16, 2009.

This Court finds the Applicant failed to meet his burden of proving he was not provided discovery materials in this case. Trial counsel testified she reviewed the discovery materials with the Applicant and then sent him a copy of the materials shortly thereafter. This Court finds trial counsel's testimony is more credible. This Court finds that, even assuming arguendo that the Applicant did not receive the discovery materials, he failed to demonstrate he suffered any prejudice as a result. See Johnson v. State, 325 S.C. at 186, 480 S.E.2d at 735.

Patricia Rice's prior conviction

The Applicant stated trial counsel should have objected to testimony regarding Patricia Rice's prior conviction for providing a false statement. The Applicant stated the assistant solicitor violated the rules by eliciting this testimony and that he was prejudiced as a result.

The assistant solicitor testified he ran a RAP sheet for Rice and provided it to trial counsel.

Trial counsel testified there was no reason to object to testimony that Rice had a prior conviction because this was helpful to the defense case.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to Rice's prior conviction. On direct examination, Rice admitted she had a 2008 conviction "for lying to police about [her] name." (Trial transcript, p.158). On cross-examination, trial counsel questioned Rice about this prior conviction and had her admit she gave a false name to police to avoid trouble. (Trial transcript, pp.174-75). This Court agrees

with trial counsel's testimony that there was no basis to object to this line of questioning. This line of questioning was helpful to the defense case, as it clearly placed Rice's credibility at issue. As such, the Applicant failed to meet his burden of proof on this issue. See Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (finding in a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application).

Confrontation clause

The Applicant stated the victim only spoke Spanish and the victim's brother interpreted for him to the police officers. The Applicant stated trial counsel should have called the victim's brother as a witness at trial.

Trial counsel noted the victim's brother was on the State's witness list but did not know why he was not called. Trial counsel testified she did not believe the victim's brother would have helped the defense case.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have argued a violation of the Confrontation Clause. This Court finds that, however, that there was no violation of the Confrontation Clause in this case. See, e.g., Crawford v. Washington, 541 U.S. 36, 68, 124 S. Ct. 1354, 1370 (2004) ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law. . . . Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."). As such, this Court finds trial counsel was not deficient in failing to raise a Confrontation Clause argument. Regardless, this Court has examined the trial transcript and finds credible trial counsel's testimony that she did not believe the victim's brother's testimony would have had an impact on the defense case. This Court finds the Applicant failed to

demonstrate he suffered any prejudice from the lack of a Confrontation Clause argument. See Johnson v. State, 325 S.C. at 186, 480 S.E.2d at 735.

Perjured witness

The Applicant stated the assistant solicitor met with Rice at the jail. The Applicant stated trial counsel should have objected because Rice perjured herself at trial. The Applicant stated Rice was with him the night of the robbery – contrary to her trial testimony – and that he provided trial counsel with the names of witnesses who could support his story.

The assistant solicitor testified he had no concerns that Rice perjured herself and that he had no doubt she was telling the truth.

Aaron L. Jones, Jr. stated he recalled seeing the Applicant and Rice around 1:15 a.m. on July 25, 2009. Jones stated he saw them together for 30 minutes that night. Jones admitted he was on drugs at the time. When asked on cross-examination why he could recall that day in particular, Jones responded "that's a good question."

Trial counsel testified the Applicant told her the assistant solicitor met with Rice and that she confirmed this. Trial counsel testified there was a letter in her file from the assistant solicitor to Rice's attorney.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected because Rice perjured herself at trial. This Court initially notes there is no prohibition against the prosecutor meeting with a co-defendant in a criminal case. Regardless, this Court finds the Applicant has failed to demonstrate Rice offered incorrect or perjurious testimony. While Jones testified he recalled seeing the Applicant and Rice together for a 30 minute period on a specific date more than 6 years ago, this Court does not find this testimony to be credible. As such, the Applicant failed to present any credible evidence to support his

allegation that trial counsel should have objected to rice's testimony about her whereabouts after the armed robbery. See Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814.

Inadmissible testimony

The Applicant stated trial counsel should have objected to inadmissible testimony when Rice testified about dismissing a CDV charge. The Applicant also stated Rice's testimony that he was incarcerated was inadmissible.

Trial counsel testified Rice's comment was very quick and she did not object because she did not want to draw attention to it.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to Rice's testimony. During redirect examination, Rice admitted she called she previously called police because the Applicant had committed domestic violence. (Trial transcript, p.175). Rice explained she chose not to prosecute because "[h]e had already been incarcerated for something else. He had made time for that. That was in the past. Let it go." (Trial transcript, p.175). This Court finds trial counsel articulated a valid strategic reason that she did not object to Rice's testimony – that she did not want to draw further attention to it. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel); see also Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) ("Courts must be wary of second-guessing counsel's trial tactics."). This Court finds the Applicant also failed to demonstrate he suffered any prejudice as a result of this testimony. See Johnson v. State, 325 S.C. at 186, 480 S.E.2d at 735.

State's closing argument

The Applicant stated trial counsel should have objected when the assistant solicitor

caused the jury to be inflamed during closing argument.

Trial counsel testified there was no reason to object because (1) the assistant solicitor was referring to the victim, not the Applicant and (2) this was not a Golden Rule violation.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected during the assistant solicitor's closing argument. The assistant solicitor stated:

> Don't you think if anyone would stand up and say, no, police, you got it wrong, it's really a much younger guy, it's not him, [the victim] has that incentive? If you've been robbed, you want the real robber to be caught. You don't want somebody you are not sure about. You're not going to be flippant about that. You want the real robber, the real person who put the knife against your throat, you want that person caught. You don't want the real robber out there running around doing who knows what in a neighborhood right next to yours. He, I would argue to you, has more incentive than anyone.

(Trial transcript, p.227, line 22 – p.228, line 9). This Court agrees with trial counsel that this was not an objectionable argument because it was not a Golden Rule argument. Rather, it was merely commentary about the victim's motivations in this case. <u>See</u> <u>State v. Huggins</u>, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997) (finding a solicitor's argument must stay within the record and its reasonable inferences); <u>see also</u> <u>State v. Cooper</u>, 334 S.C. 540, 553, 514 S.E.2d 584, 591 (1999) (noting a solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony). This Court finds the Applicant failed to prove either that trial counsel was deficient or that he was prejudiced as a result.

Missing witness instruction

The Applicant stated trial counsel should have requested a "missing witness" instruction because the victim's brother was not a witness at trial.

Trial counsel testified she did not contemplate asking for such a jury instruction and that she did not believe such an instruction would have been helpful to the defense case.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have requested a "missing witness" jury charge in this case. Initially, this Court does not believe such an instruction would have been merited in this case. See, e.g., State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001) (holding the law to be charged must be determined from the evidence presented at trial). Regardless, this Court finds the Applicant failed to articulate the nature of such an instruction, the basis upon which trial counsel should have argued for its inclusion, or how the lack of this instruction prejudiced his case. See Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814.

Mug shot magazine

The Applicant stated the trial judge ruled in the Biggers hearing that the mug shot magazine could not be admitted at trial. The Applicant argued trial counsel was ineffective because the assistant solicitor mentioned the magazine 8 times at trial and trial counsel mentioned it 25 times.

The assistant solicitor testified he did not know about the mug shot magazine until 1-2 weeks before trial. The assistant solicitor testified the victim did not tell him about the mug shot magazine until after the Applicant had already been arrested (based on Rice's statement). The assistant solicitor testified the Applicant was arrested in August 2009.

Trial counsel testified they litigated the admissibility of the mug shot magazine during the Biggers hearing. Trial counsel testified she mentioned the magazine during trial because it as central to the defense in attempting to discredit the lineup and the victim's identification.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to mention of the mug shot magazine during his trial. Trial counsel testified the existence of the mug shot magazine was a key part of the defense case. This Court finds trial

counsel's testimony is credible. This Court has examined the trial transcript and finds trial counsel articulated a valid strategic reason for mentioning the mug shot magazine, as she clearly argued to the jury that the victim only identified the Applicant as the assailant in a photographic lineup because he had previously seen the Applicant's photograph in a mug shot magazine. See Roseboro v. State, 317 S.C. at 294, 454 S.E.2d at 313. This Court finds the Applicant failed to prove either that trial counsel was deficient or that he was prejudiced as a result.

Investigator Jarvis

The Applicant stated trial counsel should have objected when Investigator Jarvis' testimony at the trial differed from that at the preliminary hearing. The Applicant stated trial counsel should have argued Jarvis perjured himself.

Trial counsel testified she was present at the preliminary hearing but did not recall if Jarvis's testimony was the same at the preliminary hearing and the trial.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to Jarvis' trial testimony and argued he committed perjury. This Court finds the Applicant failed to prove Jarvis' testimony at trial differed from that at the preliminary hearing. Without such, the Applicant cannot demonstrate trial counsel was deficient in not making an objection. See Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814. Further, even assuming arguendo that trial counsel should have objected, this Court finds the Applicant failed to demonstrate he suffered any prejudice as a result. See Johnson v. State, 325 S.C. at 186, 480 S.E.2d at 735.

Cautionary instruction charge

The Applicant stated trial counsel should have requested a "cautionary instruction charge" because – as she was an accomplice to the crime – Rice had motivation to testify against

him. The Applicant stated the jury should have been advised her testimony should be taken "with some form of caution."

Trial counsel testified she did not request this jury charge and did not believe there was any value in such a charge.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have requested a "cautionary instruction" jury charge in this case. Initially, this Court agrees with trial counsel that such an instruction would not have been merited in this case. See, e.g., State v. Knoten, 347 S.C. at 302, 555 S.E.2d at 394. Regardless, this Court finds the Applicant failed to articulate the nature of such an instruction, the basis upon which trial counsel should have argued for its inclusion, or how the lack of this instruction prejudiced his case. See Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814.

Prosecutorial misconduct

The Applicant stated trial counsel should have objected to prosecutorial misconduct because the State's photographic lineup was fundamentally unfair. The Applicant stated the assistant solicitor should have told the police not to use the same photograph in the lineup as was seen in the mug shot magazine.

The assistant solicitor testified the Applicant was arrested in August 2009. The assistant solicitor testified he told Jarvis to do a photographic lineup in November 2009 and that the lineup was done in January 2010. The assistant solicitor testified he did not know about the mug shot magazine when the lineup was put together.

Trial counsel testified there was no prosecutorial misconduct in this case. Trial counsel testified the assistant solicitor was not aware of the mug shot magazine before the photographic lineup was made.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have made an argument about prosecutorial misconduct. The crux of the Applicant's argument is his contention that the assistant solicitor should have instructed law enforcement to use a different photograph for the photographic lineup than the one that was used in the mug shot magazine. Both the assistant solicitor and trial counsel, however, testified the assistant solicitor did not know about the mug shot magazine when the photographic lineup was created. This Court finds their testimony is credible. This Court finds trial counsel was not deficient for failing to argue prosecutorial misconduct because the Applicant has failed to demonstrate the existence of any such misconduct in this case. See United States v. Chorman, 910 F.2d 102, 103 (4th Cir. 1990) ("[T]he test for reversible prosecutorial misconduct generally has two components: that (1) the prosecutor's remarks or conduct must in fact have been improper, and (2) such remarks or conduct must have prejudicially affected the defendant's substantial rights so as to deprive the defendant of a fair trial."); Darden v. Wainwright, 477 U.S. 168, 180-81, 106 S. Ct. 2464, 2471 (1986) (holding that, in order to establish prejudicial misconduct on the part of the prosecutor, the alleged misconduct must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process.") (internal quotation omitted).

Conclusion

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 his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by 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.

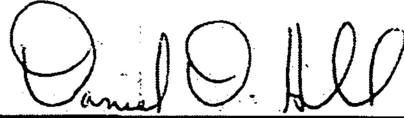
This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate 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 14th day of March, 2016.



Daniel D. Hall
Presiding Judge
Thirteenth Judicial Circuit

York, South Carolina.

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2014CP2305047

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2016 MAR 30 PM 2 26

Bobby Joe Barton *vs.* **South Carolina State Of**

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard a decision rendered.

☐ **ACTION DISMISSED** (***CHECK REASON***): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: __________

☐ **ACTION STRICKEN** (***CHECK REASON***): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: __________

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other: __________

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

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

Dated at Greenville, South Carolina, this .

Court Reporter:

____

PRESIDING JUDGE - Daniel D Hall

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

Caroline M.W. Horlbeck 101 Whitsett Street Greenville, SC 29601

ATTORNEY(S) FOR THE PLAINTIFF(S)

Karen Christine Ratigan PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

____

Paul B. Wickensimer Greenville County Clerk Of C
- Clerk of Court

CPFORM4M
SCCA SCRCP Form 4 Revised 06/2008

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2014 CP-23-5047

ENTERED COMPUTER

Bobby Joe Barton

PLAINTIFF(S)

State of South Carolina

DEFENDANT(S)

Submitted by: R. Mills Ariail, Jr.	Attorney for : ☒ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

FILED - GREENVILLE CO. CLERK OF COURT

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☒ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☒ Other Motion to Reconsider denied

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Motion to Reconsider is denied

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge	2753 Judge Code	4-28-16 Date

For Clerk of Court Office Use Only

This judgment was entered on the 29 day of Apr., 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 29 day of Apr. 2016 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

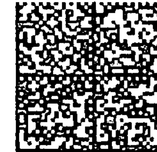
Paul B. Wickensimer

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.



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Daniel Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211