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June 12, 2018

RECEIVED

JUN 13 2018

S.C. SUPREME COURT

The South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

RE: DaQwan Johnson #351891 v. State of South Carolina
Docket No.: 2015-CP-40-05213

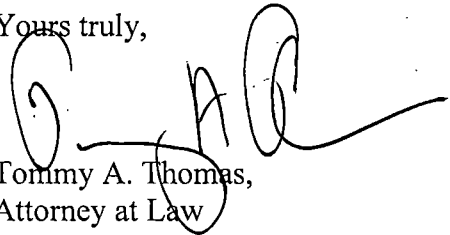
Dear Sir or Madam:

Enclosed please find for filing an original and a copy of a Notice of Appeal and Certificate of Service regarding the above referenced matter.

Please note that I have not been retained to represent Mr. Johnson in this matter. I am forwarding the Office of Appellate Defense Mr. Johnson's Affidavit of Indigency by copy of this letter.

Kindly return a clocked copy of the Notice to me in the enclosed envelope.
Thank you.

Yours truly,


Tommy A. Thomas,
Attorney at Law

TAT/jem

cc: Megan Harrigan Jameson, Esq.
DaQwan Johnson #351891
Appellate Defense

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Post-Conviction Relief

Brooks P. Goldsmith, Circuit Court Judge

Case No.: 2015-CP-40-05213

RECEIVED

JUN 13 2018

S.C. SUPREME COURT


Daqwan Johnson #351891,..... Appellant,

vs.

State of South Carolina,Respondent.

NOTICE OF APPEAL

Daqwan Johnson #351891 appeals the Order of the Honorable Brooks P. Goldsmith, dated May 7, 2018 and filed on May 14, 2018. Appellant received written notice of entry of this order on May 25, 2018.



TOMMY A. THOMAS
Attorney for Appellant
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(803) 732-5507

Other Counsel of Record:
Megan Harrigan Jameson, Esq.
Assistant Attorney General
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Columbia, SC 29211
Attorney for Respondent

Irmo, South Carolina
June 12, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Post-Conviction Relief

Brooks P. Goldsmith, Circuit Court Judge

Case No.: 2015-CP-40-05213

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JUN 13 2018

S.C. SUPREME COURT

Daqwan Johnson #351891,..... Appellant,


vs.

State of South Carolina,Respondent.

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for the Appellant hereby certify that I placed in the United States Mail, a copy of a Notice of Appeal, with postage prepaid and the return address clearly shown on said envelope to Megan Harrigan Jameson, Esq. of the Attorney General's Office, at:

Megan Harrigan Jameson Esq.
Attorney General's Office
P.O. Box 11549
Columbia, SC 29211-1549



Jacquelyn E. Miller
Secretary to Tommy A. Thomas
Attorney for Applicant
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

June 12, 2018

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

DaQwan, Johnson, #351891

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2015-CP-40-5213

ORDER OF DISMISSAL

2018 MAY 14 AM 11:06
DEPARTMENT OF CORRECTIONS
FILED
RICHLAND COUNTY

This matter is before the Court by way of application for post-conviction relief (PCR) filed August 25, 2015 by Da'Quan Johnson ("Applicant"). Respondent submitted its Return on December 3, 2015. An evidentiary hearing was held on Monday, March 19, 2018 at the Richland County Courthouse. Applicant was present at the hearing and represented by Tommy Thomas, Esquire. Assistant Attorney General Jessica E. Kinard, Esquire, represented the State. Applicant testified on his behalf. Gregory Collins, Esquire, was also present and testified.

Also before the Court were the records of the Richland County Clerk of Court regarding the subject conviction(s), the transcript from Applicant's trial hearing, Applicant's records for the Department of Corrections, and Applicant's appellate records.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Applicant was indicted at the February 2011 term of the Court of General Sessions for Richland County for murder (2011-GS-40-0863) and attempted murder (2012-GS-40-0885). Applicant was represented by Gregory B. Collins, Esq and John C. Newton, Esq. Applicant proceeded to trial on July 26, July 30-August 3, and August 8, 2012, before the Honorable R. Knox McMahon and a jury. He was

convicted as indicted. Judge McMahon sentenced Applicant to a term of fifty (50) years' imprisonment for murder and a term of thirty (30) years' for attempted murder. These sentences were to be served concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Robert M. Dudek, Esq. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences. State v. Johnson, No. 2015-UP-192 (filed April 8, 2015). The Remittitur was issued on April 29, 2015.

CURRENT APPLICATION

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

1. Ineffective Assistance of Trial Counsel, in that;
 - a. "Trial Counsel failed to put the State's case through the adversarial process"
 - b. "Trial Counsel failed to investigate"
2. Ineffective Assistance of Appellate Counsel, in that;
 - a. "Appellate counsel denied applicant the right to fair process and the opportunity to obtain an adjudication on the merits of his voluntary manslaughter request that was denied by the trial courts"
3. Due Process Violation of 5th and 14th Amendment[s], in that;
 - a. "Appellate Counsel denied applicant effective assistance in violation of the South Carolina Constitution Article one Sections three and fourteen and the United States Constitution's sixth and fourteenth amendments.

SUMMARY OF RELEVANT TESTIMONY PRESENTED

Counsel's testimony

Counsel testified he worked for the Richland County Public Defender's office at the time he was appointed to represent Applicant. Counsel recalled the facts of the case were a shooting

occurred in Gable Oaks Apartments, and there was night vision video of five people running. Counsel further recalled it was the State's theory the shooting occurred as a result of gang violence, and two prior shootings which also took place at the Gable Oaks Apartments the day before. Counsel testified he met with Applicant once every month or two before trial. He also recalled the case was called for trial and then there was a discovery dump. Counsel asserted he asked for a continuance of the case because the discovery that was dump on him contained DNA evidence he had not seen before.

Counsel testified he developed a defense theory. The overall theory of defense was that the other co-defendants were placing the blame on Applicant because they were protecting another individual. Counsel testified he had an investigator assigned to the case. Counsel recalled filing pre-trial motions in regards to the request for continuance. He testified his reason for the request was to test the DNA swabs that were taken from Applicant unbeknownst to him. Counsel recalled this occurred on July 12th, and the trial was set to start on July 30th. Counsel further recalled receiving over 400 pages of discovery from the Richland County Gang Unit three to four days before trial. Counsel testified he reviewed all of the discovery but may not have digested it to the point that someone who was going to trial would have.

Counsel recalled his intuition was that wiretap tapes existed from the night of the shooting but he was never able to obtain the information. Regarding the number of objections he made during trial, Counsel testified he made several discovery objections because he had trouble getting information from the Solicitor. Counsel recalled sending several emails to the Solicitor requesting discovery. Counsel testified ultimately the pre-trial motions were denied. Counsel recalled issues continued to come up regarding discovery. Counsel testified one of the main issues with reviewing the evidence was all of the evidence was spread out on a table and there

was no custodian present. Counsel recalled not wanting to go through the discovery without the presence of an evidence custodian. Counsel testified the trial court ordered a custodian to be present, and then they reviewed the discovery but it was after the trial had already started. Counsel contended that it is his practice to not touch evidence if a custodian is not present.

Regarding the DNA swabs that were taken, Counsel testified he never saw and believed they were destroyed during the testing. However, he testified he would have asked for a finding for independent testing of the swabs or to at least get a higher level of testing. Counsel further testified touch DNA was important in the case because there were two bullet cartridges which required someone to touch each one in order to load the gun. Counsel asserted it was their intent to argue if the DNA did not match Applicant, it would've matched one of the co-defendants. Counsel testified he had a good guess about who fired the gun, and it was not Applicant because no shell casings for the caliber of gun used were found in Applicant's possession.

Counsel recalled there was an out of court identification problem involving the night vision video. Counsel testified he requested a Bigger's hearing on the video but got around the issue by some of the co-defendants making in court identifications. Counsel further recalled he objected to the calling of witnesses that were not on the original witness list but the trial court still allowed those witnesses to testify. Additionally, Counsel recalled the Solicitor attempted to give one witness immunity in exchange for their testimony. Counsel further testified the problems with discovery impacted his ability to represent Applicant and he believed those issues interfered with Applicant's constitutional rights to a fair trial.

On cross-examination, Counsel testified the case was originally going to be handled as a joint trial but he moved to sever. He recalled meeting with Applicant to discuss potential defenses and discovery prior to trial.

Applicant's testimony

Applicant testified he was sentenced to fifty years for murder and attempted murder. Applicant recalled the case was first called to trial in July 2012 and for the second time in August 2012. He further recalled Counsel came on in January 2012, roughly about six to seven months before trial. Applicant testified he had doubts about Counsel's ability to be ready for trial due to all of the discovery issues. Applicant recalled he was concerned with the complexity of the case and the length of time Counsel was on the case. Applicant testified he and Counsel discussed an alibi defense being he was not present at the crime scene. Applicant contends he was with a girlfriend that day and was not driving the Buick.

Applicant did not recall going over the ballistics report. He also recalled receiving evidence during trial but did not review the evidence during trial. Applicant testified he voiced concerns with discovery issues, but the issues got worse. Applicant further testified it was during the first trial when he received notice of DNA swab testing. Applicant asserted Counsel did not represent him to the extent he could have because of the complexity of the case.

On cross-examination, Applicant testified Counsel represented him to the best of his abilities. He recalled discussing a defense strategy, and felt he could communicate freely with Counsel. Applicant testified he and Counsel did not have time to discuss the DNA evidence because it came through during trial.

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.

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

This Court finds Applicant is attempting to frame a claim of Brady violation on the part of the prosecution as a claim of ineffective assistance of counsel. However, Applicant made no

allegation of prosecutorial misconduct in his application, and did not submit any amendments to include such a claim. Furthermore, Counsel cannot be incompetent for failing to receive materials from prosecution that they had no reason to know existed. Judge v. State, 321 S.C. 554 (1996). Counsel testified to a number of disclosure failures on the part of prosecution. Counsel testified that he learned of the DNA testing on swabs taken from Applicant on the morning of trial, and therefore was unable to independently test them. Counsel further testified that when the case was called to trial there was a "discovery dump", and he requested a continuance because he had received evidence that he had never seen before. However, the trial judge denied his request.

Additionally, this Court finds Counsel's performance was not deficient in any way. Counsel took action to ensure that he had received all discovery and reviewed all discovery that he knew existed before trial. He testified that he sent various emails regarding the discovery request and made several motions and objections each time an issue regarding discovery would come up. Counsel testified that he went over every piece of discovery that he received. Moreover, Applicant testified he believed Counsel represented him to the best of his abilities.

Finally, Applicant has failed to show how he was prejudiced by trial counsel's performance in the handling of his trial. To establish the prejudice prong an Applicant must show specific prejudice resulting from counsel's lack of time to prepare. U.S. v. Cronin, 466 U.S. 648 (1984). Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

CONCLUSION

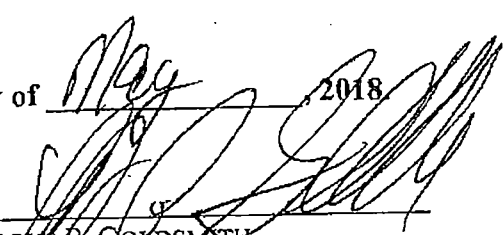
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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), SCRCP 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 7 day of May, 2018



BROOKS P. GOLDSMITH
Presiding Judge
Fifth Judicial Circuit


_____, South Carolina

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

DAQWAN JOHNSON, #351891,

Applicant,

v.

STATE OF SOUTH CAROLINA,

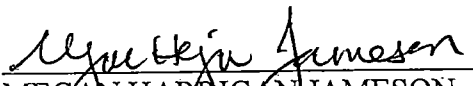
Respondent.

CERTIFICATE OF SERVICE

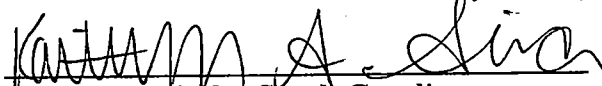
The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

**Mr. Tommy Arthur Thomas
Post Office Box 88
Irmo, South Carolina 29063**

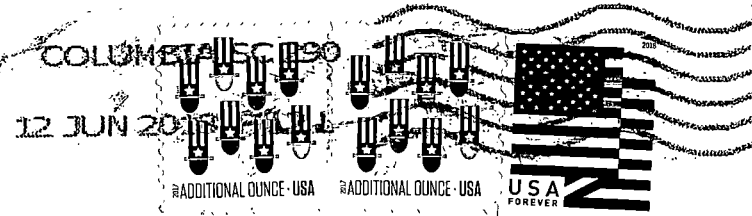
This 23rd day of May, 2018.


MEGAN HARRIGAN JAMESON
Attorney for Respondent

SWORN to before me this 23rd day of May, 2018.


Notary Public for South Carolina
My Commission Expires: 10/4/2025

Tommy A. Thomas, P.C.
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