

Law Office of Leah B. Moody, LLC

Leah B. Moody
Lbmatty@comporium.net

235 East Main Street, Suite 115
Post Office Box 1015 (29731)
Rock Hill, South Carolina 29730
Telephone (803) 327-4192
Facsimile (803) 329-1344

June 21, 2018

RECEIVED

JUN 26 2018

The Honorable Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29221

S.C. SUPREME COURT

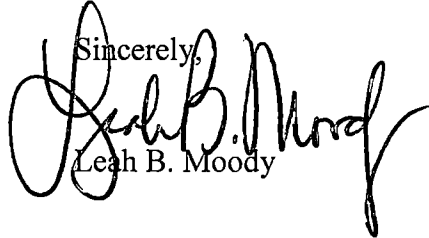
RE: Johnny Wilkins v. State of South Carolina
Case No.: 2013-CP-42-2657

Dear Mr. Shearouse:

The York County Court of Common Pleas appointed my office to represent Johnny Wilkins in his Post-Conviction Relief action. Please find enclosed for filing the original and two (2) copies of the **Notice of Appeal, Proof of Service**, and one (1) copy of the **Order of Dismissal** in the above-referenced case. Please return the clocked copies to me in the enclosed self-addressed, stamped envelope.

Thank you for your assistance with this matter.

Sincerely,



Leah B. Moody

Enclosure

cc Johnny Wilkins
Megan Jameson, Esquire, SC Attorney General's Office
Sharon Graham, SCCID
Hope Blackley, Clerk of Court, Spartanburg County

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JUN 26 2018

S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Roger L. Couch, Presiding in Spartanburg County

C.A. No.: 2013-CP-42-2657

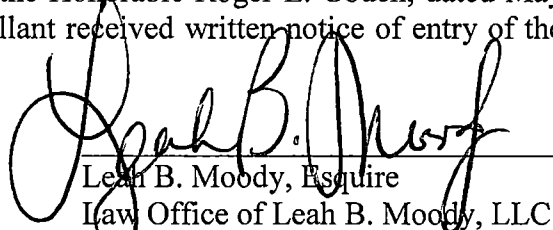
Johnny Wilkins, Appellant,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Johnny Wilkins appeals the order of the Honorable Roger L. Couch, dated May 17, 2018 and mailed on May 18, 2018. Appellant received written notice of entry of the final order on May 21, 2018.



Leah B. Moody, Esquire
Law Office of Leah B. Moody, LLC
239 E. Main Street, Suite 115
Post Office Box 1015
Rock Hill, South Carolina 29731

Other Counsel of record:
Megan Jamieson, SC Attorney General's Office
Rembert C. Dennis Building
Post Office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-3970

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**IN THE STATE OF SOUTH CAROLINA
In The Supreme Court**

JUN 26 2018

S.C. SUPREME COURT

**APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas**

The Honorable Roger L. Couch, Presiding in Spartanburg County

C.A. No. 2013-CP-42-2657

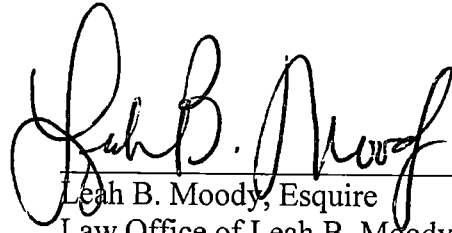
Johnny Wilkins, Appellant,

v.

State of South Carolina, Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Megan Jamieson by depositing a copy of it in the United States Mail, postage prepaid, on June 21, 2018 addressed to its attorney of record, Suzanne White, Post Office Box 11549, Columbia, South Carolina, 29211-1549.



Leah B. Moody, Esquire
Law Office of Leah B. Moody, LLC
235 E. Main Street, Suite 115
Post Office Box 1015
Rock Hill, South Carolina 29731

June 21, 2018

cc Johnny Wilkins
Sharon A. Graham, SCCID
Hope Blackley, Clerk of Court, Spartanburg County
Megan Jamieson, Esquire, SC Attorney General

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS)
FOR THE SEVENTH JUDICIAL CIRCUIT)

Johnny Ray Wilkins, #244320)
Applicant,)

2013-CP-42-2657

v.)

State of South Carolina,)
Respondent.)

ORDER OF DISMISSAL

CLERK OF COURT
SPARTANBURG COUNTY
2018 MAY 18 AM 10:10
M. HOPE BLAKEY

This matter comes before the Court by way of an application for post-conviction relief filed on June 13, 2013, and amended on July 3, 2013 by Johnny Ray Wilkins (Applicant). Respondent made its Return on or about March 28, 2014. An evidentiary hearing into the matter was convened on March 25, 2015, at the Spartanburg County Courthouse in Spartanburg, South Carolina. Applicant was present and represented by Leah B. Moody, Esquire. Respondent was represented by Suzanne H. White, Esquire of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Applicant's trial counsel Timothy M. Ray, Esquire testified on behalf of the Respondent. No other witnesses testified at the evidentiary hearing, but the record was left open to reconvene for the testimony of a subsequent witness on behalf of the Applicant. Applicant later withdrew his request to call any other witnesses and the record was closed. This Court had before it a copy of the records of the Spartanburg County Clerk of Court regarding Applicant's conviction, the transcript from Applicant's trial, the PCR application, Respondent's Return, Applicant's records from the Department of Corrections and Applicant's appellate records. After reviewing the record and everything presented, this Court finds the Applicant has failed to establish any constitutional deprivations entitling him to post-conviction relief and denies this application.

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PROCEDURAL HISTORY

Applicant is presently incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted Applicant at the February 2008 for charges of armed robbery (2008-GS-42-1183). The Applicant was represented by Timothy M. Ray, Esquire.

On March 10, 2009, Applicant was tried before the Honorable J. Derham Cole and a jury. The jury convicted Applicant of armed robbery as indicted. Judge Cole sentenced Applicant to confinement for life.

On behalf of the Applicant, a timely notice of appeal and Anders brief were filed on May 3, 2010 by Katherine H. Hudgins, Esquire. The South Carolina Court of Appeals dismissed the Applicant's appeal. State v. Wilkins, Op. No. 2011-UP-482 (filed October 28, 2011). Resettlement was returned on November 15, 2011.

FILED
SOUTH CAROLINA COURT
SPARTANBURG COUNTY
M. J. JOHNSON, CLERK
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FACTUAL HISTORY

The charge against Applicant resulted from an incident taking place on the evening of January 13, 2008 in Mayo, South Carolina. (Tr. p. 33, lines 3-5). Applicant entered a Lil' Cricket convenience store wearing a mask and camouflaged pants, while his co-defendant Mr. Robert Benson waited outside in a parked vehicle. (Tr. p. 33, lines 6-12). Armed with a gun, Applicant robs the convenience store and leaves the scene with Mr. Benson. (Tr. p. 33, lines 13-16). This incident was captured on video and was presented at trial as evidence against the Applicant. (Tr. p. 39, lines 6-25). Later that evening, Applicant's vehicle was pursued by a Spartanburg County Sheriff's Deputy, eventually attempting to flee the officer on foot. (Tr. p. 50, line 22-p. 51, line

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11). Applicant was placed in custody following a K-9 search of a nearby neighborhood. (Tr. p. 65, lines 3-21).

At trial, Applicant was identified as the suspect fleeing law enforcement and as having worn the same camouflaged pants admitted into evidence. (Tr. p. 73, lines 1-11). Applicant's co-defendant testified at trial and identified Applicant as the person who robbed the Lil' Cricket convenience store. (Tr. p. 49, lines 1-9). Trial counsel for Applicant moved for a directed verdict, claiming a lack of evidence to support the identification of Applicant as the perpetrator of the armed robbery. (Tr. p. 81, lines 1-11). The motion was denied. Applicant did not testify at trial and presented no defense witnesses. The jury convicted Applicant of armed robbery and the trial Judge sentenced him to confinement for life.

ALLEGATIONS

Applicant filed for post-conviction relief originally on June 13, 2013 and subsequently filed an amended application on July 3, 2013. In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel
 - a. Failure to call Defense witnesses
2. Violation of Due Process and Equal Protection, in that:
 - a. "Identification"

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M. HOPE BLACKLEY
CLERK OF COURT
MARIETTA COUNTY

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

Applicant's Testimony

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Applicant testified that Timothy Ray, Esquire represented him at trial on the armed robbery charge. Applicant testified that he could provide an alibi witness in order to refute the allegations against him. He informed his trial counsel of the witness and the witness's ability to provide his whereabouts the night of the armed robbery. Applicant testified that he gave his trial counsel a phone number and address in order for counsel to contact the witness, but that his trial counsel never contacted the witness. This witness never testified at trial, nor was any evidence of a potential alibi presented at trial.

Applicant testified that had his trial counsel called his alibi witness, then he would not have been identified as the one who committed the armed robbery. At the hearing, Applicant disputed the trial testimony that the clothes he was wearing when he was arrested matched those of the suspect on the armed robbery video.

Trial Counsel's Testimony

Timothy Ray, Esquire testified that he represented Applicant at this trial for armed robbery. Trial counsel testified that he was appointed to represent after a conflict arose with Applicant's original counsel. Trial Counsel testified that he discussed the strategy of calling Applicant's witness at trial and advised against it. Trial counsel testified that he spoke to the witness on multiple occasions, including before trial when the witness provided clothing for Applicant to wear during trial. Trial Counsel did not believe the witness would provide alibi testimony, but had an alibi defense been available, Trial Counsel would have called the witness.

As to the identification of the Applicant, Trial Counsel testified that there were issues surrounding Applicant's pants and those found on the admitted video. Trial Counsel's strategy was to avoid discussing the pants, as he believed they would easily identify the Applicant as the suspect.

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He testified that there were discussions with the Applicant about the video and Trial Counsel's belief that the video showed the Applicant as the suspect.

Trial Counsel testified that a plea offer was made to avoid a life sentence, but Applicant would have to plead guilty to all pending charges against him. He testified that this was discussed with Applicant and he advised Applicant to plead guilty. These discussions were held up until the week of trial, according to Trial Counsel's testimony.

Testimony of Miranda Allen

Following Applicant's testimony at the evidentiary hearing, Applicant requested the record remain open to allow for the testimony of Miranda Allen. This witness never appeared before this Court and her testimony was never provided for review. Applicant has conceded that this witness is no longer needed and the record for the evidentiary hearing was closed.

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 had the opportunity to observe the witnesses presented at the hearing, and can weigh their testimony and credibility accordingly. These credibility findings have been applied to the Court's findings and conclusions set forth below. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017).

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the

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trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. 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. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel’s performance was deficient. Id. Under this prong, the court measures an attorney’s performance by its “reasonableness under professional norms.” Id. (quoting Strickland v. Washington, 466 at 688). Second, counsel’s deficient performance must have prejudiced the applicant 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.

After careful review of the entire record, including the testimony presented the evidentiary hearing, based on the standard discussed above, this Court finds Applicant has failed to carry his burden of proof and had not established any ineffectiveness of counsel. Below are the findings in regards to each specific allegation of ineffective assistance of counsel raised by

Applicant:

Allegation: Ineffective assistance of counsel for failing to call an alibi witness

Applicant asserts counsel was ineffective for failing to call an alibi witness, Miranda Allen, in Applicant’s defense. Counsel testified credibly that he met with Applicant’s proposed witness,

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CLERK OF SUPERIOR COURT
COUNTY

but the witness was unable to provide an alibi for the Applicant. The Applicant failed to produce Ms. Allen, or any other alibi witnesses, at the evidentiary hearing. Therefore, this Court finds this allegation must be denied and dismissed. See Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (where witnesses applicant claimed could have provided an alibi defense did not testify at the PCR hearing, he could not establish any prejudice from counsel's failure to contact these witnesses); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (where applicant did not offer witnesses at PCR hearing but merely alleged they would have provided him with alibi defense and testified victims had recanted their trial testimony, he failed to establish prejudice).

Allegation: Violation of due process and equal protection based on "Identification."

Applicant asserted in his application for post-conviction relief that his custody was in violation of due process and equal protection, but states "identification" as his only reasoning. At the evidentiary hearing, Applicant never presented evidence of a violation to his due process or equal protection rights, therefore this claim is denied and dismissed.

During the evidentiary hearing, Applicant asserted that had trial counsel called his alibi witness, then the State would not have been able to properly identify him as the suspect. This appears to be his "identification" claim found in his application for post-conviction relief. Trial Counsel testified that Ms. Allen was not called as a witness, because she would not have been able to provide an alibi defense. Trial Counsel also testified that based on the video and clothing evidence admitted by the State, Applicant would have been identified. Trial Counsel testified that Applicant was identifiable from the video, alone.

This Court finds that counsel's performance was ^{not} deficient in any regarding the identification of the Applicant. This Court finds this allegation must be denied and dismissed.

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K. ROPE CLERK
CLERK OF COURT

CONCLUSION


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

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record 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 post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

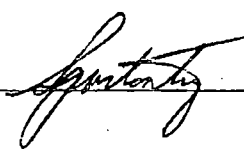
IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 17th day of May, 2018.



ROGER L. COUCH
Presiding Judge
Seventh Judicial Circuit

 _____, South Carolina

MAY 18 2018 10:10 AM
CLERK OF COURT
SOUTH CAROLINA

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O. Box 3483
Spartanburg, SC 29304-3483

Phone (864) 596-2591
Fax (864) 596-2239



M. Hope Blackley
Clerk of Court

May 18, 2018

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

7TH JUDICIAL CIRCUIT

CASE # 2013CP42-2057

Applicant

VS

CERTIFICATE OF SERVICE

Respondent

I certify that, on this date, I served a copy of the
In this action dated 5-17 2018 on

Order of Dismissal
5-18-18

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Megan Jamison
Sherry Watkins

5-18-18
(Date)

Corrie Steef
(Signature)

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

JOHNNY RAY WILKINS, #244320

Applicant,

v.

STATE OF SOUTH CAROLINA,

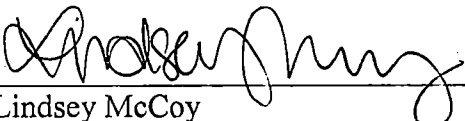
Respondent.

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:

Leah B. Moody
Law Office of Leah B. Moody, LLC
Post Office Box 1015
Rock Hill, South Carolina 29730

This 18th day of May, 2018.


Lindsey McCoy
Legal Assistant

SWORN to before me this 18th day of May, 2018.


Notary Public for South Carolina.

My Commission Expires: 5/20/2025

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MAR 13/2018
11549

FIRST-CLASS MAIL

904 29730



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Jordan A. Cox, AAG
South Carolina Attorney General's Office
Seventh Circuit PCR
Post Office Box 11549
Columbia, South Carolina 29211-1549



Leah B. Moody, Esquire
Law Office of Leah B. Moody, LLC
Post Office Box 1015
Rock Hill, South Carolina 29730

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Leah B. Moody
Lbmatty@comporium.net

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June 21, 2018

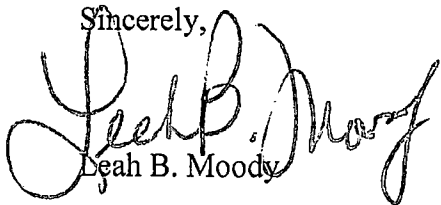
The Honorable Hope Blackley
Spartanburg County Clerk of Court
Post Office 3483
Spartanburg, South Carolina 29304

RE: Johnny Ray Wilkins, #244320, v. South Carolina
C.A. No.: 2013-CP-42-2657

Dear Ms. Blackley:

Please find enclosed the Notice of Appeal and the Proof of Service in the above-referenced matter.

Sincerely,



Leah B. Moody

Enclosures

cc Johnny Wilkins
Megan Jamieson, Esquire, SC Attorney General's Office
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court
Sharon Graham, SCCID

Law Office of Leah B. Moody, LLC

Leah B. Moody
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235 East Main Street, Suite 115
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Rock Hill, South Carolina 29730
Telephone (803) 327-4192
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June 21, 2018

Megan Jamieson, Esquire
South Carolina Attorney General's Office
Post Office Box 11549
Columbia, South Carolina 29211

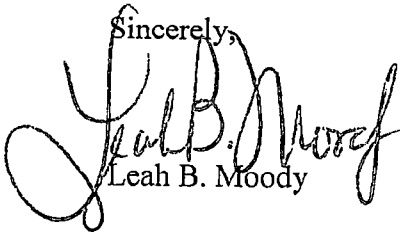
RE: Johnny Wilkins v. State of South Carolina
C.A. No.: 2013-CP-42-2657

Dear Ms. Jamieson:

The Spartanburg County Court of Common Pleas appointed my office to represent Johnny Wilkins in his Post-Conviction Relief action. Please find enclosed a copy of the Notice of Appeal and Proof of Service in this matter.

If you have any questions or concerns, please feel free to contact my office. Thank you.

Sincerely,



Leah B. Moody

Enclosures

Cc Johnny Wilkins
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court
Hope Blackley, Clerk of Court, Spartanburg County
Sharon Graham, SCCID

Law Office of Leah B. Moody, LLC

Leah B. Moody
Lbmatty@comporium.net

235 East Main Street, Suite 115
Post Office Box 1015 (29731)
Rock Hill, South Carolina 29730
Telephone (803) 327-4192
Facsimile (803) 329-1344

June 21, 2018

Ms. Sharon A. Graham
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11433
Columbia, South Carolina 29211-1433

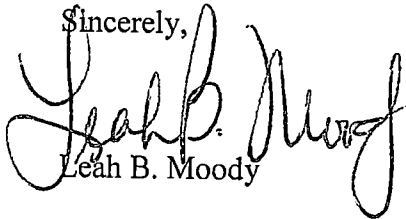
RE: Johnny Wilkins v. State of South Carolina
Case No.: 2013-CP-42-2657

Dear Ms. Graham:

The York County Court of Common Pleas appointed my office to represent Johnny Wilkins in his Post-Conviction Relief action. Please find enclosed the Notice of Appeal and Proof of Service the above-referenced matter.

Thank you for your attention in this matter.

Sincerely,



Leah B. Moody

Enclosures

cc Johnny Wilkins

Megan Jamieson, Esquire, SC Attorney General's Office
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court
Hope Blackley, Clerk of Court, Spartanburg County

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29730 JUN 21 2018



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Law Office of Leah B. Moody, LLC
Post Office Box 1015
Rock Hill, South Carolina 29730

TO:

The Honorable Daniel E. Shearouse
The Supreme Court of South Carolina
PO Box 11330
Columbia SC 29211-1330