

Tommy A. Thomas

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January 8, 2013

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

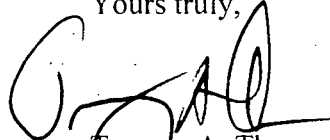
RE: Lewis Addis #95373 v. State

Dear Sir or Madam:

Enclosed please find an original and a copy of a Notice of Appeal and Certificate of Service in the above matter.

Kindly return a clocked copy to me in the enclosed envelope. Thank you and should you have any questions, please feel free to contact me.

Yours truly,



Tommy A. Thomas,
Attorney at Law

TAT/jem

cc: Robert D. Corney, Esq.
Lewis Addis #95373
Appellate Defense

RECEIVED

JAN 09 2013

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Post Conviction Relief

Clifton B. Newman, Circuit Court Judge

Case No.: 2011-CP-40-8096

Lewis Addis #95373,Appellant,

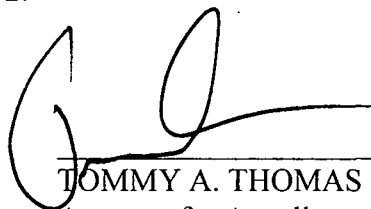
vs.

State of South CarolinaRespondent.

NOTICE OF APPEAL

Lewis Addis #95373 appeals the Order of the Honorable Clifton B. Newman,
dated December 5, 2012 and filed on December 12, 2012.

January 8, 2013



TOMMY A. THOMAS
Attorney for Appellant
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Other Counsel of Record:

Robert D. Corney, Esq.
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

Attorney for Respondent

RECEIVED

JAN 09 2013

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Post Conviction Relief

Clifton B. Newman, Circuit Court Judge

Case No.: 2011-CP-40-8096

Lewis Addis #95373,Appellant,

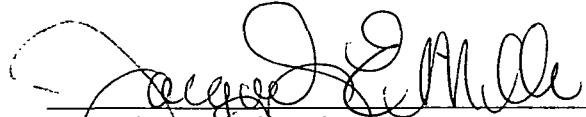
vs.

State of South CarolinaRespondent.

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 Notice of Appeal with postage prepaid
and the return address clearly shown on said envelope to:

Assistant Deputy Attorney General
Robert D. Corney
P.O. Box 11549
Columbia, SC 29211-1549



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

Irmo, SC
January 8, 2013

5 Cam
12/12/12

CASE NUMBER: 2011CP4008096

Lewis #95373 Addis

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

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 and heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonpart); Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; 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 _____

JEANETTE W. McBRIDE
C.P. & S.S.
2012 DEC 12 PM 12:20
RICHLAND COUNTY
FILED

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:

ORDER INFORMATION

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

INFORMATION FOR THE PUBLIC 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 |
|---|---------------------------------------|--------------------------------|
| | | \$ |
| | | \$ |
| | | \$ |

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 _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 12 December 2012 to attorneys of record or to parties (when appearing pro se) as follows:

Lewis #95373 Addis

Tommy Arthur Thomas

Robert Daniel Corney

Lewis #95373 Addis

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court _____

Jeanette W. McBride

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
Lewis Addis, Jr., #095373,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

2011-CP-40-08096

ORDER OF DISMISSAL

JENNIFER W. MURPHY
C.P. & G.S.
2012 DEC 11 AM 11:02
RICHLAND COUNTY
FILED

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed November 28, 2011. An evidentiary hearing into the matter was convened on Thursday, October 18, 2012, at the Richland County Courthouse. The Applicant was present at the hearing and was represented by Tommy Thomas, Esquire. The Respondent was represented by Robert D. Corney of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Also testifying was Applicant's former plea counsel, Jennifer Davis, Esquire (hereafter "counsel"). This Court also had before it a copy of the transcript of the proceedings against Applicant, the records of the Richland County Clerk of Court, and Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was true bill indicted at the July 2010 term of the Richland County Grand Jury for Burglary – First Degree and Petit Larceny (\$1,000 or Less) (2010-GS-40-0875, -0876). On April 14, 2011, Applicant appeared with counsel before the Honorable James R. Barber, III, where he pled guilty to Burglary as indicted and the lesser included Simply Larceny;

sentencing was deferred at that time. On May 24, 2011, Applicant came back before Judge Barber, at which time he was sentenced to fifteen (15) years imprisonment for Burglary and thirty (30) days imprisonment for Simple Larceny. The sentences were set to run concurrently. No direct appeal was filed.

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

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective Assistance of Counsel
- (b) Guilty plea "was not" intelligently or voluntarily made
- (c) _____

But the alleged victim said that she had not been a victim of any crime and she refuse to press any charges.

At my first bond hearing at the Richland County jail 2-4-10 I did not have counsel the bond hearing judge only said that General Sessions had to set bond on my charges. But about a week or so later I spoke with Renee Liptson, although I waived that up coming bond hearing. I told her what

had happen at my first bond hearing. Which she said that she would check into it. Although at Sept. 2010 bond hearing in front of judge Barber the solicitor change and said that my ex-wife Rebecca Addis was the victim.

1) Some 8-9 months later at a hearing in front of judge Thomas Cooper to dismiss Ms. Liptson - judge Cooper told Ms. Liptson to get the transcript and tape of my first bond hearing. Which Ms. Liptson came back later saying that the tape had been deposed of after 6 months.

Council never informed me that I could request a "mere presence" and or "accessory after the fact" charges. Where I did not have a mens rea that my alleged co-defendant was going to commit this alleged crime.

Counsel never inform me or investigate the State's potential witnesses or my alleged co-defendant per. SCRE 607, 608 and or 609 to see if they had been convicted of impeachment crimes - to attack their credibility or for potential bias for their statement(s) and or testimony against me.

- 1) Here, the Mexican girl was not even charged with any crime, where she gave me and this alleged co-defendant a ride to and from the home.
- 2) Counsel never inform me that I had a right to an expert per. S.C. Code Ann 17-3-50 where the I.D. process was unduly suggestive - where the police stated that after awhile was able to I.D. me. Here, the officers did not speak any Spanish
Nor did Mexican girl, who is Mexican spoke good English. Thereby, any in-court I.D. would not

have been reliable independent of this unduly suggestive out of court alleged I.D. of me.

where she had only seen me once.

1) Therefore, I argue that counsel should have hired a translator to interview her and for trial per. unduly suggestive Neil v Biggers 409 U.S. 188.

2) Moreover, an expert in the area of identification, specifically in face recognition, perception and cross racial I.D. should have been hired.

3) Counsel further misinform. me that the State can still try me without a victim, "corpus delicti". She never told me that burglary was a crime against possession, not against property. And the State did not have a victim who wanted to press any charges. Nor was the State the victim.

Further counsel failed to inform me that since my ex-wife was the caretaker of said home of this alleged burglary - my ex-wife had lawful possession of this home. Thus, she had the RIGHT to request that the charges be dismissed against me, or anyone else.

Counsel never told me or the court that my ex-wife even had written a letter to her requesting that the charges be dismissed against me.

Moreover, counsel never did tell me in South Carolina, in "all" burglary the State is required to prove I entered or one entered without consent. Which the State could not have done so without a victim or one willingly to press charges, as burglary is a crime against possession, not against property.

10(b) GUILTY PLEA "WAS NOT" INTELLIGENTLY OR VOLUNTARILY MADE

And further argue that counsel told me to go along with the State and what she told the judge to get a sup. sentence. And, if I did

not plea guilty the State was seeking a life sentence against me. Although, counsel stated that I told her I had committed the crime. I never told counsel that. A matter of fact counsel never even ask me if I had committed the crime. And, I strongly contend that if it was not for counsel prejudicial acts and or omissions I've argued, I would not have pled guilty but would have insisted on going to trial see:

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).

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption 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, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). 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. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

Involuntary Guilty Plea

Applicant contends his guilty plea was involuntarily entered as a result of counsel's ineffective representation on the current charges. Specifically, Applicant testified counsel

“threatened” him by saying he would receive a life sentence at trial if he did not enter a guilty plea and that, but for those threats, he would not have pled. Applicant also alleged his charge for Burglary – First Degree was premised upon a criminal history of two prior housebreaking convictions, but stated the rap sheet setting forth those convictions was incorrect as he only had one prior housebreaking conviction. The others, Applicant alleged, were merely his release to parole and subsequent probation revocation for the same housebreaking conviction. Applicant said he tried to explain this to counsel, but was unsuccessful in doing so. Applicant finished by saying he pled guilty under the impression he was going before Judge Barber to receive a fifteen (15) year term of imprisonment suspended to some sort of probationary term, as he believed Judge Barber was the only judge who would suspend the mandatory minimum fifteen year sentence for Burglary – First.

Counsel testified she took over Applicant’s representation from former public defender Renee Lipson when the office was restructured. She stated she met with Applicant about six (6) times during which she reviewed the indictments outlining the charges with Applicant, as well as the facts giving rise to the charges. She recalled there was a weapon stolen from the house during the incident so the “first degree” classification was proper even if Applicant was correct in stating he did not have two prior housebreaking convictions. Counsel stated she did recall Applicant alleging the additional “housebreaking” convictions on his rap sheet were actually just probation revocations for the same charge, but reiterated that the state was able to premise the first degree charge on the weapon stolen anyway.

Counsel testified she reviewed the potential sentencing range for the charges with Applicant including the potential life sentence for the Burglary, and noted Applicant had rejected a plea offer from the state for fifteen (15) years imprisonment as he said he did not want it.

Counsel said Applicant initially said he wanted a trial, but ultimately made the decision to plead guilty of his own will as she left that decision entirely up to Applicant. She said the state made it clear they intended to pursue a life sentence at trial which she relayed to Applicant. Counsel went on to say she and Applicant were hopeful Judge Barber would impose a suspended sentence upon entry of the plea, but said she never promised Applicant such a result and actually advised Applicant it “would be a long shot” for him to receive a suspended sentence for alcohol rehab. Counsel finished direct examination by stating she believed she gave Applicant all the advice and information necessary to make a voluntary and informed decision whether to plead guilty or continue to trial to challenge the charges.

On cross-examination, counsel reiterated the state was “standing by” the use of a weapon as the basis for the “first degree” classification of the Burglary, but said she would have presented an argument against the sufficiency of the charge at trial had Applicant proceeded. She again noted this independent basis for the charge was the reason she didn’t conduct any further independent investigation into the alleged errors on Applicant’s rap sheet. Counsel agreed they tried to get Applicant’s plea before Judge Barber as he was the one judge known to suspend Burglary sentences below the mandatory minimum; however, counsel stressed Applicant was well aware it was a “long shot” for him to receive a suspended sentence as they discussed the risks of pleading guilty in depth prior to the hearing. Counsel noted Applicant’s codefendant was prepared to testify against Applicant at trial.

After a thorough review of the record and the testimony presented at the evidentiary hearing, this Court finds Applicant has failed to carry his burden in proving his plea was entered involuntarily or unintelligently as a result of counsel’s alleged ineffectiveness. As a preliminary

matter, this Court finds counsel's testimony to be **very** credible, while conversely finding Applicant's testimony to be **not** credible.

Based on the credible evidence presented and the record of the plea hearing, this Court finds Applicant entered his guilty plea voluntarily and intelligently after being fully and adequately advised of all relevant issues involved with the charges by competent counsel acting within the range of reasonableness demanded based on professional norms. Applicant was fully advised of the potential risks and benefits of entering the plea without negotiations or recommendations from the state, including the realistic possibility of receiving a life sentence for the Burglary charge, after which he openly told the plea judge he wished to plead guilty as he believed doing so was in his best interest. (Plea Tr. p. 6, l. 9). Contrary to Applicant's assertion, counsel's advisement of the realistic potential life sentence he was facing on the charge and the state's intention to pursue such a sentence at trial is not tantamount to coercion, duress or an improper "threat" rendering the plea involuntary. Therefore, this Court finds Applicant has failed to prove counsel's performance was deficient such that it rendered the subsequent guilty plea involuntary.

Further, Applicant has failed to sufficiently prove resulting prejudice as he has not convinced this Court that, but for the alleged deficiencies of counsel, he would not have pled guilty but rather insisted on going to trial to challenge the charges. The credible evidence reflects the state was prepared to seek a life sentence at a trial where Applicant's codefendant was going to present critical testimony against Applicant to help secure a conviction. With the remaining evidence against Applicant as reflected in the record, this Court cannot find any reasonable probability that, but for counsel's alleged "errors", Applicant would not have pled guilty but rather insisted on going to trial. See Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d

203 (1985) (*With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial*). Therefore, this allegation is without merit and must be denied.

Ineffective Assistance of Counsel

Applicant also set forth two additional instances in which he alleged counsel was ineffective in her representation. First, Applicant contended counsel was ineffective for failing to further investigate and present victim's request not to pursue the charges against him. Second, Applicant said counsel was ineffective for failing to further investigate and prepare a motion to suppress his confession to police due to the severe alcohol withdrawals he was suffering at the time.

Victim

Applicant alleged counsel was ineffective for failing to further investigate and/or present the plea court with information on victim's desire for the state not to pursue the charges Applicant. Counsel testified she did investigate this lead after discussing this allegation with counsel, but victim was diagnosed dementia and under the supervision of a guardian ad litem. That guardian, counsel said, refused to allow counsel to speak with victim about Applicant's case. Counsel noted the solicitor was "not of the opinion" that victim did not wish to pursue the charges based on their discussions.

This Court finds this allegation to be without merit. First, counsel's credible testimony reflects she did attempt to undertake a reasonable and diligent investigation into Applicant's contention, but was hindered by victim's mental incapacity. Applicant has failed to establish what further "reasonable" action counsel should have taken that she did not. Further, Applicant

has failed to provide this Court with any evidence to substantiate the claim that victim did, in fact, desire the charges against him not be pursued, or that such a desire would have made any difference in the state's decision to prosecute Applicant. This Court finds Applicant's self-serving testimony in this regard to **not** be credible. Therefore, Applicant has failed to prove resulting prejudice as he has merely presented this Court with mere speculation, wholly unproven by credible, admissible evidence. Accordingly, this allegation is denied.

Applicant's Statement to Police

Counsel testified she was aware Applicant was an alcoholic and had discussed with Applicant his allegation that he was suffering from severe withdrawals at the time he gave his statement to police. Counsel stated she gathered all of Applicant's medical records necessary to support this contention in preparation of a pretrial motion to exclude the statement, which counsel noted she would have made had Applicant decided to proceed to trial. She also stated she would have argued the unreliability of the statement to the jury at trial on these same grounds had the statement be admitted by the trial judge. On cross-examination, counsel noted suppression of Applicant's statement would have beneficial to his chances at trial, but would not have significantly weakened the state's case as Applicant's codefendant was prepared to testify to the same information at trial.

Based on the testimony above and a review of the record, this Court finds Applicant was not ineffective in this regard. Counsel's credible testimony reflects she undertook a diligent and objectively reasonable investigation to develop a motion to suppress Applicant's statement to police based on his alleged alcohol withdrawal symptoms. It was Applicant's own voluntary decision to plead guilty that prevented counsel from presenting the motion she fully contended she was/would have been prepared to present in pretrial on Applicant's behalf. Therefore, this

Court finds no deficiency in counsel's performance. Further, as stated by counsel, suppression of the statement was not the only high hurdle Applicant had to overcome if he had gone to trial; Applicant's codefendant's purported testimony was equally a concern in evaluating Applicant's chances of success at trial. This Court finds Applicant has failed to prove that, even if his statement to police were suppressed from consideration by a jury at trial, a trial would have resulted in something less than a full conviction of the charges as indicted. Therefore, this allegation is without merit.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the 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.

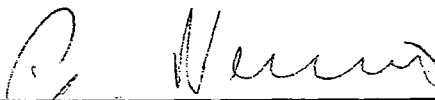
Except as discussed above, this Court finds that the Applicant failed to raise all additional allegations raised in his application at the hearing and has, thereby, waived them. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

This Court notes Applicant 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 Respondent.

AND IT IS SO ORDERED this 5th day of December, 2012.

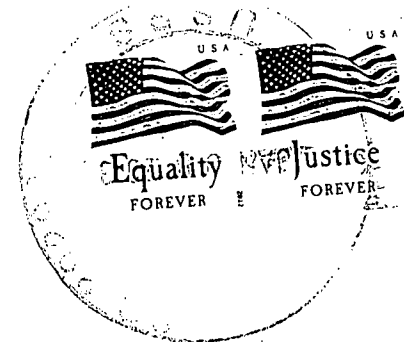


Clifton B. Newman
Presiding Judge
Fifth Judicial Circuit

Kingstree, South Carolina.

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