DANIEL A. SELWA, II
Attorney at Law, L.L.C.

RECEIVED
APR 23 2018
S.C. SUPREME COURT

LITIGATION OFFICE
516 29th AVENUE NORTH
MYRTLE BEACH, S.C. 29577
OFFICE: (843) 492-5449
FAX: (843) 353-0683
MOBILE: (843) 450-7566

REAL ESTATE OFFICE
302 MAIN STREET
N. MYRTLE BEACH, S.C. 29582
OFFICE: (843) 281-2156
FAX: (843) 281-2159
SELWA@SCLAWYERS.NET

WWW.SCLAWYERS.NET

April 18, 2018

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

Re: Billy L. Alford v. State of South Carolina
2017-CP-26-0729

Dear Mr. Shearouse:

Enclosed please find the original Notice of Appeal in the above-entitled action and one copy. Please file and return the copy to me in the self addressed stamped envelope enclosed.

If you should have any questions or concerns, please do not hesitate to contact me.

Sincerely,

Daniel A. Selwa, II

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
APR 23 2018
S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Steven H. John, Circuit Court Judge

Case No.: 2017-CP-26-0729

Billy L. Alford, ... Petitioner,

v.

State of South Carolina,..... Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable Steven H. John, March 21, 2018 order, denying the Applicant's Petition for post-conviction relief. Undersigned counsel received notice of entry of the order on April 8, 2018. A copy of the order on appeal is attached to this notice.

Respectfully submitted,

Daniel A. Selwa, II
516 29th Avenue North
Myrtle Beach, SC 29577
Attorney for the PCR Applicant

April 18, 2018

Other counsel of record:
Alan Wilson, Attorney General
Joshua L. Thomas, Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Honorable Steven H. John, Circuit Court Judge

Case No.: 2017-CP-26-0729

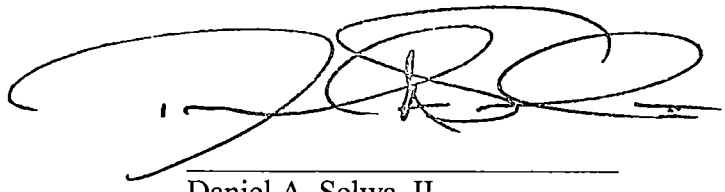
Billy L. Alford, ... Petitioner,

v.

State of South Carolina, ... Respondent.

PROOF OF SERVICE

I, Daniel A. Selwa, II, certify that I have served the within Notice of Appeal on the Respondent, the State of South Carolina, by depositing a copy of the same in the United States Mail, postage prepaid, addressed to his attorney of record, Alan Wilson, Attorney General, Post Office Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this 18th day of April 2018.



Daniel A. Selwa, II
516 29th Avenue North
Myrtle Beach, SC 29577
Attorney for the PCR Applicant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
Billy L. Alford,	)	Case No.: 2017-CP-26-00729
Applicant,	)	
v.	)	**ORDER OF DISMISSAL**
State of South Carolina,	)	
Respondent.	)	

2018 MAR 26 PM 2:01
HORRY CLERK OF COURT SC

This matter comes before the Court by way of an application for post-conviction relief filed by Billy L. Alford ("Applicant") on February 3, 2017. Respondent made its return on or about December 15, 2017. The Court convened an evidentiary hearing into the matter on Thursday, February 22, 2018, at the Horry County Courthouse in Conway, South Carolina. Applicant was present at the hearing and represented by Daniel A. Selwa, II, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Kenneth Moss, Esq. ("Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant was previously confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the April 2014 term of the Horry County Grand Jury for a sex offender registry violation

MAILED
3/27/18 gpc

(2014-GS-26-01587). Kenneth Moss, Esq. represented Applicant on the charges. Scott Hucks and Travis Hyman, both of the Fifteenth Circuit Solicitor's Office, prosecuted the case. Applicant proceeded to trial before the Honorable Edward B. Cottingham and a jury on May 14, 2014. The jury found Applicant guilty as indicted on May 15, 2014. Judge Cottingham sentenced Applicant for his third offense to imprisonment for a term of five years, provided that upon service of four years, the balance would be suspended with probation for three years.

Applicant filed a timely notice of appeal and a direct appeal was perfected by LaNelle Cantey DuRant, Esq., who raised to the appellate courts the following issue:

> Did the trial court err in allowing the state to charge [Applicant] with failure to register with the Sex Offender Registry as a third offense when the S.C. Code Section 23-3-460 and 23-3-470 (A) (B) (3) do not require that out of state convictions for failure to register be counted for enhancement purposes in South Carolina?

Final Brief of Appellant at 3, State v. Alford, App. Case No. 2014-001202. The South Carolina Court of Appeals affirmed Applicant's convictions by unpublished opinion. State v. Alford, Op. No. 2016-UP-364 (S.C. Ct. App. filed July 20, 2016). The Remittitur was issued on August 8, 2016.

Present Application

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

1. "Unlawful conviction"
    a. "I was never charged or convicted for a 2nd offense Therefore I can't be convicted w/ a 3rd Offense"
2. "Due Process of Law 14th Amendment Violation"
3. "Ineffective Assistance of Counsel"

At the evidentiary hearing, Applicant, during his testimony, attempted to raise new allegations of ineffective assistance of appellate counsel and proffered testimony to that claim.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "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." Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler at 442, 334 S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). "Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at

689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

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 at 117, 386 S.E.2d at 625 (citing Strickland 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 at 117-18, 386 S.E.2d at 625 (citing Strickland at 694).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 696-97.

1. Failure to Challenge Enhancement

Applicant alleges Counsel was ineffective in failing to adequately challenge the use of a Virginia conviction as a basis for enhancement under S.C. Code Ann. § 23-3-470. Under that statute, "[a] person convicted for a second offense is guilty of a misdemeanor and must be imprisoned for a mandatory period of three hundred sixty-six days," but "[a] person convicted for a third or subsequent offense is guilty of a felony and must be imprisoned for a mandatory

period of five years, three years of which shall not be suspended nor probation granted." S.C. Code Ann. § 23-3-470(B)(2), (3).

During pre-trial motions, Counsel argued the indictment charging Applicant with a third offense was invalid as a matter of law:

> MR. MOSS: My position is he can't be charged with a third offense in South Carolina.
>
> COURT: Why?
>
> MR. MOSS: This statute regulates what has to happen in South Carolina, and it defines what's criminal in South Carolina.
>
> [. . .]
>
> Our State has no business defining what's required in other states. Now, the evidence in this case is going to deal with State of Virginia conviction. Okay. Virginia laws are different than South Carolina laws, and whether or not he violated the law in Virginia is for Virginia to prosecute and punish not South Carolina. What this article requires, and the contents of this statute, is what you have to do in South Carolina, and it's clear you have to register in South Carolina if you have an out-of-state conviction, not for failure to register, but an out-of-state conviction for one of the laundry list of sex offenses.

(Pre-Trial Tr. 7-9). Judge Cottingham denied Applicant's pre-trial motion to quash the indictment. (Pre-Trial Tr. 10-12). Counsel renewed the motion at the close of the State's case-in-chief, arguing the State had only proven one prior conviction for failure to register, at which time Judge Cottingham renewed his denial. (Trial Tr. 118-19). Counsel renewed again at the close of all evidence, at which time Judge Cottingham again renewed his denial. (Trial Tr. 169, ll. 2-6). The issue was thereafter raised to the South Carolina Court of Appeals, which affirmed Applicant's conviction in the unpublished opinion previously noted.

At the evidentiary hearing, Applicant argued that the Virginia conviction that provided the basis for his enhancement was not "failure to register," but "providing false information."

See Va. Code Ann. § 18.2-472.1. Applicant argued that the elements of the Virginia violation were not the same as the South Carolina violation and, therefore, reliance upon the Virginia conviction for enhancement purposes was inappropriate. Furthermore, Applicant argued, the South Carolina statute did not provide for the use of out-of-state registry violations for enhancement purposes

Counsel testified he raised the issues regarding the validity of the indictment to the trial court. Counsel recalled arguing the Virginia conviction could not be used to enhance Applicant's South Carolina registry violation.

The Court finds no deficiency on the part of counsel. Counsel clearly and completely raised Applicant's arguments to the trial court before, during, and after his trial. Counsel secured rulings from Judge Cottingham in each instance. Applicant's arguments offered to this Court are, where they are at all distinguishable, no more compelling than those offered by Counsel at trial. Accordingly, Applicant has failed to meet his burden under Strickland, and as such his request for relief by way of this allegation is **DENIED**.

2. Failure to Successfully Introduce Evidence of Applicant's Efforts to Comply

Applicant alleges Counsel was ineffective in failing to successfully introduce evidence of Applicant's efforts to comply with the sex offender registry.

At trial, during the cross-examination of Sgt. Loraine Avant, Counsel first attempted to introduce evidence that Applicant tried to comply with both South Carolina and Florida registry laws. (Trial Tr. 54-72). In the course of that effort, Counsel navigated a litany of objections from the State on hearsay and relevance grounds, with mixed success, to elicit testimony to argue that Applicant called the Horry County Sheriff's Office, followed their instructions, and repeatedly attempted to register in Florida. Counsel attempted to introduce documents from the

State of Florida to show Applicant's efforts in registering in that State, but was firmly rebuffed by the trial court. Counsel similarly attempted to elicit testimony from Applicant himself to establish that Applicant did what he was told to do by the Horry County Sheriff's Office, but was constrained by sustained objections to hearsay. (Trial Tr. 137-42).

At the evidentiary hearing, Applicant testified the trial judge did not allow him to present substantial evidence that he tried to comply with the requirements of the law to the best of his ability. Applicant recalled Counsel argued for the admission of evidence showing Applicant did what he was told to do, but that the Judge would not admit the evidence. Counsel similarly recalled attempting to admit the Florida records, but that Judge Cottingham kept them out.

The Court finds no deficiency on the part of Counsel. For whatever the Florida records were worth, Counsel attempted repeatedly to have them admitted to the trial court, argued diligently for their admission, and received rulings from the bench. There was no more that Counsel could have done. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

B. Ineffective Assistance of Appellate Counsel

At the evidentiary hearing, Applicant alleged for the first time that appellate counsel was ineffective in her argument that out-of-state convictions for failure to register pursuant to a sex-offender registry do not count for enhancement purposes under S.C. Code Ann. §§ 23-3-460 and 23-3-470. Respondent promptly objected that no notice was given of the issue, that the issue was not raised in the original application, and that the State consequently had not subpoenaed appellate counsel to appear as a witness in response to any claims against her. Applicant argued in reply that the application's broad allegation of "ineffective assistance of counsel" was not specific to trial or appellate counsel, that the names of both trial and appellate counsel were listed

in the contents of the application, and thus the application should be read to raise a broad allegation of ineffective assistance of both trial and appellate counsels.

Trial courts have broad discretion on procedural matters to find reasonable ways, within the flexibility of Court rules, to reach the merits of *substantial* issues. Mangal v. State, 421 S.C. 85, 99-100, 805 S.E.2d 568, 576 (2017). As such, in the interest of justice and due caution, this Court permitted Applicant to proffer testimony in support of his allegation. Upon consideration of that proffered testimony and the record as a whole, the Court finds the interests of justice would not be meaningfully advanced by extraordinary action of excusing Applicant from his procedural default. See Mangal, 421 S.C. at 97, 805 S.E.2d at 574 (The courts have, in most cases, refused to excuse the pleading and issue-preservation requirements that apply in all civil cases). Applicant's arguments are unpersuasive as a matter of law. Accordingly, Applicant's request to amend his application mid-hearing and be excused of his procedural default is **DENIED.** As such, any issues regarding the performance of appellate counsel are not properly before this Court, and the Court declines to rule upon their merits.

C. Due Process

Applicant alleges he was denied due process of law. "The procedural component of the state and federal due process clauses requires the individual whose property or liberty interests are affected to have received adequate notice of the proceeding, the opportunity to be heard in person, the opportunity to introduce evidence, the right to confront and cross-examine adverse witnesses, and the right to meaningful judicial review." Dangerfield v. State, 376 S.C. 176, 179, 656 S.E.2d 352, 354 (2008). However, an application for post-conviction relief does not serve as a substitute for direct appeal, and an issue that could have been raised at applicant's trial or on appeal is not cognizable in an application for PCR. S.C. Code Ann. § 17-27-20(b); Simmons v.

State, 264 S.C. 417, 215 S.E.2d 883 (1974). Trial court error is not a cognizable claim for PCR. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001); Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997); Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973).

Review of the entirety of the record before this Court indicates that Applicant appeared at trial with Counsel who was fully prepared to defend his liberty interest, testified in his own defense, had the opportunity to introduce evidence, cross-examined adverse witnesses, and enjoyed meaningful judicial review. To the extent that Applicant might argue he was not afforded adequate notice due to the late provision of a true billed indictment, Counsel timely objected to the indictment on that basis and thus that issue was raised to the trial court, ruled upon, and preserved for appeal—accordingly any error in that judgment is not cognizable in this action. That Applicant's efforts in defending himself were circumscribed by the adverse rulings of the trial judge does not amount to a denial of due process, but rather reflects the procession of due process in its regular course. All the matters complained of were raised by trial counsel and ruled upon by the trial judge. Applicant is entitled to no more than that. Accordingly, Applicant has failed to meet his burden, and his request for relief by way of this allegation is **DENIED.**

III. 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 21st **day of** March, **2018.**

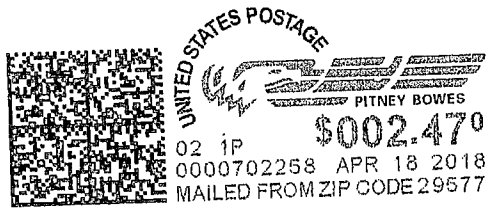
STEVEN H. JOHN
Presiding Judge
Fifteenth Judicial Circuit

Conway, South Carolina

MAILED
3/27/18 - SHJ

DANIEL A. SELWA, II
ATTORNEY AT LAW, L.L.C.

516 29th Avenue North
Myrtle Beach, SC 29577



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