



ALAN WILSON
ATTORNEY GENERAL

April 20, 2017

RECEIVED

APR 20 2017

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: Jabari Linnen v. State of South Carolina
2016-CP-07-0570

Dear Mr. Shearouse:

Enclosed are the following:

1. Notice of Appeal
2. Proof of Service of the notice of appeal on the Respondent
3. A copy of the order which is to be challenged on appeal.
4. A letter ordering the PCR transcript from the court reporter

Sincerely,

Ruston W. Neely
Assistant Attorney General

RWN/ah
Enclosures

cc: James K. Falk, Esquire
Jared S. Newman, Esquire
The Honorable Jerri Ann Roseneau, Clerk of Court of Beaufort County
The Honorable Isaac McDuffie Stone, III, Fourteenth Circuit Solicitor
SCCID, Division of Appellate Defense
Vincent J. Barton, Esquire
Trisha Allen, Victims Services

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS

RECEIVED

APR 20 2017

The Honorable Frank R. Addy, Jr., Circuit Court Judge

S.C. SUPREME COURT

Case No. 2016-CP-07-0570

JABARI M. LINNEN, #352550,

Respondent,

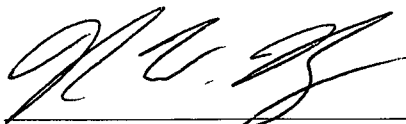
v.

STATE OF SOUTH CAROLINA

Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable R. Scott Sprouse's order dated March 9, 2017 and filed March 17, 2017 granting post-conviction relief to the Respondent. The State received notice of entry of the order on March 21, 2017. A copy of the order on appeal is attached to this notice.



Ruston W. Neely
Assistant Attorney General
South Carolina Bar No. 100192
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

April 20, 2017

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL TO BEAUFORT COUNTY
COURT OF COMMON PLEAS

The Honorable Frank R. Scott Sprouse, Circuit Court Judge

Case No. 2016-CP-07-0570

RECEIVED

APR 20 2017

S.C. SUPREME COURT

JABRI M. LINNEN, #352550,

Respondent,

v.

STATE OF SOUTH CAROLINA

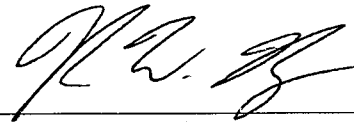
Petitioner.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on April 20, 2017, to James K. Falk, Esquire, and Jared S. Newman, Esquire, his attorneys of record, to the address below.

Mr. James Kristian Falk, Esquire
Falk Law Firm, LLC
Post Office Box 1058
Charleston, SC 29402

Mr. Jared Sullivan Newman, Esquire
Jared S. Newman, P.A.
Post Office Box 515
Port Royal, SC 29935



Ruston W. Neely
Assistant Attorney General

SWORN to before me this 20th day of April, 2017.

Notary Public for South Carolina.
My Commission Expires: 3-18-2023

IN THE COURT OF COMMON PLEAS

CASE NO. 2016-CP-07-00570

Jabari M. Linnen, SCDC # 352550
PLAINTIFF(S)

State of South Carolina
DEFENDANT(S)

Submitted by: Court

Attorney for : Plaintiff, Defendant
 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 or heard and a decision rendered. See Page 2 for additional information
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); 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
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)**
 Affirmed; Reversed. Remanded; Other

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

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

ORDER INFORMATION

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

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge

2752
Judge Code

3-10-17
Date

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
P.C.R. APPLICATION FOR RELIEF
Case No.: 2016-CP-07-0570

JABARI M. LINNEN,)
SCDC No.: 352550)
)
Applicant,)

-vs-)

STATE OF SOUTH CAROLINA,)
)
Respondent.)

ORDER GRANTING P.C.R. RELIEF

2017 MAR 17 PM 12:41
CLERK OF COURT

After a full evidentiary hearing, a thorough review of the materials submitted and the testimony, This Court grants Mr. Linnen's Application for Post Conviction Relief.

I. FACTUAL BACKGROUND:

The basic facts in the trial of this case were not seriously disputed. The evidence presented showed that the Applicant and the alleged victim had prior altercations. There was no dispute that either the Applicant confronted or was confronted by the alleged victim. As a result of the confrontation, the Applicant shot the alleged victim. The primary issue in the Applicant's case was self-defense. The witnesses as to the issue of self-defense or not self-defense were the Applicant and the alleged victim. If the jury believed the Applicant, the jury could find self-defense or at least reasonable doubt that the State failed to disprove self-defense. On the other hand, if the jury believed the alleged victim, the jury would have had evidence of substance to convict the Applicant of assault. The credibility of each was central to a jury's determination.

RSS

on this issue.

Extensive pretrial proffers of evidence of prior altercations between the alleged victim, the Applicant and past "bad" acts of the victim on others were conducted *in camera* by the Trial Court. The Court ruled on the matters which resulted in admitting some of the matters defense counsel proffered and specifically excluded other matters, particularly the victim's arrest on two charges of sexual assault. During the Applicant's testimony, he blurted out something about, "the two sexual assault charges," referring to the alleged victim. In response, the State immediately objected.

Once the jury was sequestered, the State moved for a mistrial. The State recognizing that the victim's credibility was a key factor in its case took the unusual step of moving for a mistrial as the State believed that the Applicant violated the Court's prior order prohibiting such testimony and that the credibility of the alleged victim was likely irreparable. The Trial Court stated its strong inclination to grant the State's motion. The Applicant's counsel strongly resisted a mistrial and moved for a curative instruction and that the trial proceed. The Trial Court clearly telegraphed the problem with a curative instruction under these circumstances. The problem was that in order to attempt to undo the prejudice to the State and the victim, the Court would have to "go too far." in its instruction which would necessarily prejudice the Applicant.

The curative instruction which was given to the jury was devastating to the Applicant in

several respects. The Trial Court, in its instruction, referred to the victim as a "gentleman."¹ The instruction specifically commented/instructed on the facts and incorrect facts about the alleged victim's prior criminal record. The instruction had the effect of bolstering the victim's credibility and was damaging to the Applicant's credibility. The instruction was given while the Applicant was on the witness stand. Applicant's counsel made no objection at all to the instruction and continued examining the Applicant in front of the jury. Applicant's counsel gave no strategic reasons for not objecting to the jury instruction. Counsel testified that he did not consult with the Applicant about the ramifications of accepting a mistrial or going forward. Counsel admitted that he had "personal reasons" for going forward, which in retrospect clouded his judgment.

II. DISCUSSION OF THE APPLICANT'S GROUNDS FOR A NEW TRIAL:

The Applicant raised three grounds for Post Conviction Relief.² The issues are discussed herein below:

1. FAILURE TO PETITION FOR AN IMMUNITY HEARING:

Applicant claimed that his trial counsel was ineffective for failing to request an Immunity Hearing under the Protection of Persons and Property Act provided for in Section 16-11-410 *et seq.* of the South Carolina Code of Laws, as

¹ As will be discussed *infra* this Court believes that the Trial Judge generally refers to any male as, "gentleman." Applicant's counsel did not object to this term.

² The Applicant submitted a Pre-trial Brief outlining his issues.

amended. Trial counsel admittedly did not request such a hearing pursuant to *State v Duncan*, 392 S.C. 404, 709 S.E.2d 662 (S.C. 2011). The Applicant's argument on this ground fails for several reasons. The Applicant made no showing that he likely would have prevailed at a *Duncan* hearing. While it is possible a court may have granted immunity, the outcome of any such hearing cannot be classified as likely or probable. Trial counsel gave credible testimony that he had strategic reasons to forego an immunity hearing. Trial counsel testified that he had been through a lengthy immunity hearing in another case which was denied. Counsel further testified that he did not want to give the State a preview of his case during such a hearing.

I find that trial counsel gave valid strategic reasons for not opting to have an immunity hearing, that the strategic reasons given did not fall below the average competency range for defense counsel and the Applicant failed to show any prejudice as a result of trial counsel's performance. I find, therefore, that the Applicant failed to meet his burden of proof on this ground.

2. FAILURE TO OBJECT TO THE STATE'S REFERENCE TO "GANG SIGNS:"

Next, the Applicant claimed that his trial counsel was deficient by not objecting to the Solicitor's reference to the Applicant making "gang signs" in a video which was not entered by the State as reply evidence at trial. The trial court allowed the State to offer this evidence, in reply, to impeach the Applicant's

testimony about being “a family man.” Trial counsel negotiated with the State to keep the video out of evidence and limit the State’s proffer of evidence to two still photographs taken from the video, in exchange for the Defense not objecting to the reference of “gang signs.” Although there was no evidence that the Applicant had been in gang, trial counsel further negotiated as part of the deal that the Applicant would not object to the Solicitor’s reference of “gang signs” in exchange for the State not calling an expert in gang signs/activity to explain the hand gestures made by the Applicant in the two photographs.

I find that trial counsel gave valid strategic reasons for limiting the evidence proffered against the Applicant. I find that the strategic reasons given did not fall below the average competency range for defense counsel and the Applicant failed to show any prejudice as a result of trial counsel’s performance. I find, therefore, that the Applicant failed to meet his burden of proof on this ground.

3. FAILURE TO CONCEDE TO A MISTRIAL MOTION / FAILURE TO OBJECT TO CURATIVE INSTRUCTIONS:

The Trial Court conducted an extensive pre-trial hearing on evidence the Applicant sought to use to impeach the alleged victim. The alleged victim had pending criminal sexual charges that were ruled inadmissible as evidence in the case. When the Applicant took the stand later in the case, he blurted out

testimony about the alleged victim's "sexual assault charges" in violation of the Court's pre-trial rulings on the matter. The State immediately moved for a mistrial. The Applicant's counsel did not consent to a mistrial.

The Trial Court made every reasonable effort to fully inform and warn the Applicant's counsel that any curative instruction that was required would not be favorable to the Applicant. Nonetheless, trial counsel persisted in his objection to the grant of a mistrial and demand for a curative instruction.

The Trial Court, in order to prevent "vilification" of the alleged victim, gave a curative instruction that referenced the alleged victim as "this gentleman." While this Court believes that the reference to "this gentleman," is merely the way in which the judge refers to parties in her courtroom and not any attempt to bolster the alleged victim, use of the term "gentleman" in referring to the alleged victim while said victim's character was being impeached by the Applicant invited an objection from the Applicant's trial counsel. No such objection was made. Applicant's counsel gave no reason, strategic or otherwise, in failing to object to this reference.

Further, the Trial Judge gave the jury erroneous factual information, charging that the alleged victim had not been "convicted of anything," in contradiction to the facts. Undoubtedly, the Trial Judge was attempting to correct the problem with the Applicant's testimony regarding the pending criminal sexual conduct charges, but the charge came out as a blanket denial of any record on the

part of the alleged victim - - - an inaccurate statement of fact. The curative instruction involved the Trial Court commenting on the facts in contravention of Article V, Section 21 of the South Carolina Constitution ("Judges shall not charge juries in respects to matters of fact, but shall declare the law."). No objection was made to the trial court's comment on the facts. Applicant's counsel gave no reason, strategic or otherwise, in failing to object to this constitutional error and the curative instruction as a whole.

Applicant's trial counsel failed to give any reasons as to why he did not object to the curative instruction as given, and failed to articulate any strategic reasons for resisting a mistrial motion by the State at this point. From the testimony of the Applicant's trial counsel, it appears that he was irritated with the trial court and this jaded his judgment. Applicant's trial counsel testified that, in hindsight, he did have personal reasons for not acquiescing in the State's mistrial motion³ and for not objecting to the prejudicial curative instruction.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Under the facts of this case, I find trial counsel's representation was deficient under prevailing professional norms. I further find that the deficient performance prejudiced the

³ The Trial Court repeatedly announced its intention of granting the motion, stating that such motion was proper and that any curative instruction necessarily would be prejudicial to the Applicant.

Applicant's case. *See, Strickland v Washington*, 466 U.S. 668 (1984). The Court does not take this matter lightly, especially considering that the Applicant's testimony was in violation of the Trial Judge's previous rulings and that testimony caused the State to move for a mistrial in the first place.

In a credibility case such as this one, where the two principal actors in the dispute had different versions of how the incident unfolded, with the jury having to decide which version was correct, the curative instruction given by the Court was devastating to the Applicant's case. The Trial Judge was put in the nearly impossible position of protecting the rulings of the Court and the rights of the victim, while at the same time protecting the Applicant's rights.

There simply was no way to give a curative instruction in these circumstances without prejudicing the Applicant severely. The Trial Court specifically warned defense counsel of this dilemma. Defense counsel failed to render reasonably effective assistance under prevailing professional norms for not recognizing the very damaging situation that was unfolding with the curative instruction. Further defense counsel was deficient for not objecting to the Trial Court's curative instruction as an unconstitutional charge on the facts and the overall prejudice of bolstering the victim's credibility and undermining the Applicant's credibility.


I find that the Applicant has established that counsel's performance, for the reasons outlined above, fell below a professional norm and that the Applicant has shown by a preponderance of the evidence that his counsel's unprofessional errors caused him prejudice. To show prejudice, a P.C.R. applicant must establish that the deficient performance prejudiced the applicant to the extent that "there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “A reasonable probability is less than a preponderance of the evidence but still sufficient to undermine confidence in the outcome.” *Weik v. State*, 409 S.C. 214, 233, 761 S.E.2d 757, 767, (SC 2011). I find that the Applicant has met his burden in proving prejudice in this case.


IV. CONCLUSION & ORDER:

WHEREFORE IT IS THE ORDER of this Court that the Applicant, JABARI M. LINNEN, be granted a NEW TRIAL.

SO ORDERED.



R. Scott Sprouse,
Judge, Tenth Judicial Circuit
(Presiding Judge, 14th Circuit P.C.R. Term)


_____, South Carolina

March 9, 2017.