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November 29, 2016

VIA U.S. POSTAL

Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RECEIVED

DEC -2 2016

Re: Bryan Keith Byrd vs. State of South Carolina
Case No.: 2014-CP-23-4924

S.C. SUPREME COURT

Dear Supreme Court Clerk:

I am writing to you regarding the above referenced case. Please find enclosed the Notice of Appeal, Proof of Service, and Order of Dismissal.

If you wish to discuss the foregoing or need additional information please contact me at 864-331-1630.

Thank you.

Sincerely,



Brian P. Johnson

BPJ/lf
cc: Patrick Schmeckpeper, Esquire
Bryan Keith Byrd

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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DEC -2 2016

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
HONORABLE JOHN C. HAYES, III

S.C. SUPREME COURT


Case No.: 2014-CP-23-4924

BRYAN KEITH BYRD)
)
PETITIONER,)
)
vs.)
)
STATE OF SOUTH CAROLINA)
)
RESPONDENT.)
)

NOTICE OF APPEAL

The Petitioner, Bryan Keith Byrd, hereby appeals the Honorable John C. Hayes, III's October 31, 2016, order denying post-conviction relief to the Petitioner. A copy of the order on appeal is attached to this notice.

Respectfully submitted,



Brian P. Johnson, Esq.
522 North Church Street
Greenville, SC 29601
Attorney for Petitioner
SC Bar: 73996

Date: November 29, 2016
Other counsel of record: Patrick Schmeckpeper
P.O. Box 11549/Columbia, SC 29211

STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
HONORABLE JOHN C. HAYES, III

DEC -2 2016

S.C. SUPREME COURT

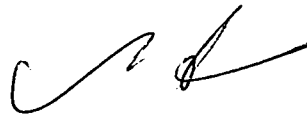
Case No.: 2014-CP-23-4924

BRYAN KEITH BYRD,)
)
 PETITIONER,)
)
 vs.)
)
 STATE OF SOUTH CAROLINA)
)
 RESPONDENT.)

PROOF OF SERVICE

I, Brian P. Johnson, Esq., certify that I have today served the within notice of appeal upon the Respondent by depositing a copy in the United States Mail, postage prepaid, addressed to the attorney of record, Patrick Schmeckpeper, at P.O. Box 11549 Columbia, SC 29211.

Respectfully submitted,



Brian P. Johnson, Esq.
522 North Church Street
Greenville, SC 29601
Attorney for Petitioner
SC BAR: 73996

Greenville, SC
November 29, 2016

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Bryan Keith Byrd,)
 #305294,)
)
 Applicant,)
)
 vs.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2014-CP-23-4924

FILED
 GREENVILLE CO. S.C.
 PAUL B. WICKENSIMMER
 2016 SEP 18 AM 11 33

ORDER

ENTERED COMPUTER

Applicant filed this application for Post-Conviction Relief September 8, 2014. The matter was heard October 25, 2016. Applicant was represented by Brian P. Johnson, Esq. The State was represented by Patrick Schmeckpeper, Esq.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the October 2011 term of General Sessions for first-degree burglary (2011-GS-23-3835). Randall L. Chambers, Esquire represented the Applicant.

After the State called the case to trial, the Applicant was found guilty. On November 15, 2012, the Honorable Letitia H. Verdin sentenced the Applicant to twenty (20) years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. K. Jay Anthony, Esquire perfected the Applicant's appeal. The Court of Appeals dismissed the appeal – pursuant to the Applicant's request – by order filed September 23, 2014. The remittitur was sent November 11, 2014.

*Jc H
Hc*

In his application for post-conviction relief, the Applicant alleges he is being held in custody unlawfully for the following reasons¹:

1. Ineffective assistance of counsel:
 - a. Failed to study a recording of alleged incident with the Applicant.
 - b. Failed to challenge 911 recording of alleged incident.
 - c. Failed to object to improper testimony regarding 911 recording.
 - d. Failed to tell jurors the 911 recording was staged and that the victim and witness were the ones who should be on trial.
 - e. Failed to object to the "redacted version of the 911 call."
 - f. Failed to admit a picture of victim's arm into evidence.
 - g. Failed to object to Officer Metcalf's testimony regarding the Applicant's alleged confession.

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 on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. *See Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney

¹ In his application, Applicant lists a number of reasons which were not developed at trial and are therefore deemed abandoned.

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H

performance is measured by its “reasonableness under prevailing professional norms.” *Cherry v. State*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065). 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. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

While Applicant’s testimony was creative and involved, same does not warrant the Court addressing each of the numerous theories of Applicant. What the Court will do is isolate the main thrust of Applicant’s presentation as best the court has been able to digest it.

Applicant postures that an audio recording of a 911 call was an edited/redacted version of the actual 911 call on the incident in question. Applicant has presented no credible evidence as to how, if at all, the 911 tape introduced differs from what he claims to be the correct, complete version. This, of course, is a failure of proof upon which the Court can rely to make a finding that the tape of the 911 call introduced at trial differed at all from some other CD. Therefore, Applicant has failed to carry his burden of proof as to any of his allegations of ineffective assistance of counsel on the 911 call issue.

Applicant testified that trial counsel was ineffective for not putting into evidence a picture of the victim’s arm.² Applicant placed in the record a black and white picture of an arm, supposed to be that of the victim in Applicant’s case. Trial counsel testified he had no recollections of any

² The victim allegedly had sustained an injury to his arm during the burglary. (Trial Record p. 100, l. 25 through p. 101, l. 1).

picture of the victim's arm. However, he testified if there had been a picture that showed no injury, he would have put it into evidence.

Applicant also asserts that trial counsel was ineffective for not investigating Officer Metcalf's statement. The heart of this argument seems to be that Officer Metcalf resigned four days after Applicant's arrest and that Metcalf lied in his testimony. In sum, Applicant did not present any evidence that Officer Metcalf's resignation was related to the arrest of Applicant and Applicant presented no evidence to support his claim that Officer Metcalf's testimony was anything but truthful. I find Applicant's allegations that trial counsel's representation of Applicant was ineffective to be of no avail on the grounds of Officer Metcalf's testimony.

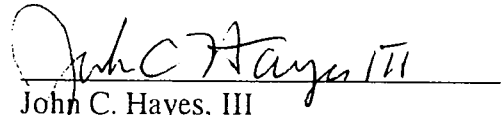
Applicant's trial counsel testified for the State. Trial counsel testified that the 911 tape was an issue with Applicant from the day of their first meeting. Trial counsel testified he believed there was merit in Applicant's defense that he was the victim of a staged event. Trial counsel testified he knew of no discrepancies between the tape played at trial and some other tape.

I find that trial counsel provide to Applicant representation well within the range of competence required in criminal cases, rendered adequate assistance to Applicant, and made all significant decisions in the exercise of reasonable professional judgment. Therefore, Applicant is not entitled to Post-Conviction Relief. Applicant's Application is therefore denied and dismissed with prejudice.

This Court hereby advises Applicant that he must file and serve a Petition for Writ of Certiorari within thirty (30) days of the service of this Order to secure appellate review. See Rules 203 and 243, South Carolina Appellate Court Rules (SCACR). The Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the Petition.

IT IS SO ORDERED.

October 31st, 2016
Greenville, South Carolina


John C. Hayes, III
Presiding Judge

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF GREENVILLE

CASE NO: 2014CP2304924

IN THE COURT OF COMMON PLEAS

FILED - CLERK OF COURT
GREENVILLE CO., S.C.
PAUL B. WICKENSIMER
2016 NOV 18 AM 11:33

Bryan Keith Byrd vs. South Carolina State Of

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.
- 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: _____
- 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:

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE - John C Hayes, III

This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

Brian P. Johnson 522 North Church Street
Greenville, SC 29601

Karen Christine Ratigan PO Box 11549 Columbia.
SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

Law Office of Brian P. Johnson

522 North Church Street
Greenville, SC 29601



Supreme Court of South Carolina

P.O. Box 11330

Columbia, SC 29211