

**RICHEY AND RICHEY**  
ATTORNEYS AT LAW

*A PROFESSIONAL ASSOCIATION*

RODNEY W. RICHEY  
LOLA S. RICHEY

POST OFFICE BOX 10916  
GREENVILLE, SOUTH CAROLINA 29603

(864) 467-0503  
(864) 467-0646 FAX

August 23, 2018

Daniel E. Shearouse,  
Clerk of Supreme Court  
1231 Gervais Street  
Post Office Box 11330  
Columbia, SC 29211

**RECEIVED**

AUG 28 2018

RE: DeAndre Tyshun Foster vs. The State  
Case No: 2018-CP-42-0612

S.C. SUPREME COURT

Dear Sir/Madam:

Please find enclosed a Notice of Appeal, Affidavit of Service and the Order. Please file these documents in your office. I have enclosed a self-addressed stamped envelope for you to return the copies to me.

If you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,

  
Rodney Richey

RWR/tlg  
Enclosure

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT  
APPEAL FROM SPARTANBURG COUNTY

Court of Common Pleas

HONORABLE GRACE G. KNIE

2018-CP-42-0612

DeAndre Tyshun Foster, SCDC# 372302

APPELLANT,

vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RECEIVED

AUG 28 2018

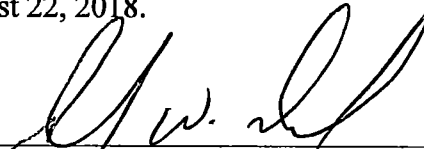
S.C. SUPREME COURT

---

**NOTICE OF APPEAL**

---

DeAndre Tyshun Foster appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Grace G. Knie, Circuit Judge on June 21, 2018 and Order issued on August 20, 2018 and filed on August 21, 2018. The Appellant received notice of the judgment on August 22, 2018.



Rodney Richey, Esquire  
Attorney for the Appellant  
33 Market Point Drive  
Post Office Box 10916  
Greenville, SC 29603  
(864) 467-0503  
(864) 467-0646 fax

Other Counsel of Record:  
Jordan A. Cox, Esquire  
Office of Attorney General State of SC  
Post Office Box 11549  
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT  
APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas  
HONORABLE GRACE G. KNIE  
2018-CP-42-0612

DeAndre Tyshun Foster, SCDC# 372302  
APPELLANT,  
vs.  
STATE OF SOUTH CAROLINA,  
RESPONDENT.

RECEIVED  
AUG 28 2018  
S.C. SUPREME COURT

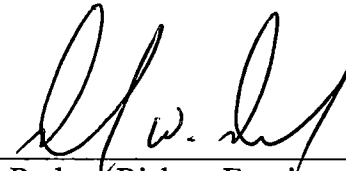
---

**AFFIDAVIT OF SERVICE**

---

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on August 23, 2018, addressed to their attorney of record, Jordan A. Cox, Esquire Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: August 23, 2018



---

Rodney Richey, Esquire  
Attorney for the Appellant  
33 Market Point Drive  
Post Office Box 10916  
Greenville, SC 29603  
(864) 467-0503  
(864) 467-0646 fax

STATE OF SOUTH CAROLINA  
COUNTY OF SPARTANBURG

DeAndre Tyshun Foster, #372302  
Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS  
FOR THE SEVENTH JUDICIAL CIRCUIT

2018-CP-42-0612

ORDER OF DISMISSAL

FILED  
CLERK OF COURT  
SPARTANBURG COUNTY  
M. HOPE BLACKLEY  
2018 AUG 21 AM 9:29

This matter comes before the Court by way of an application for post-conviction relief filed on February 20, 2018, by Mr. DeAndre T. Foster (Applicant). Respondent made its Return on or about April 23, 2018, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened on June 21, 2018, at the Spartanburg County Courthouse in Spartanburg, South Carolina.

Applicant was present and represented by Rodney W. Richey, Esquire. Respondent was represented by Jordan A. Cox, Esquire, of the South Carolina Attorney General's Office. At the evidentiary hearing, Applicant testified on his own behalf. Applicant also called his mother, Tanya Valentine, and his grandmother as witnesses. Applicant's plea attorney, Mr. Richard Warder, Esquire, testified at the hearing. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies the application.

**PROCEDURAL HISTORY**

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was indicted at the July 2016 term of the Spartanburg County Grand Jury for attempted murder (2016-GS-42-04101), attempted murder and possession of a weapon during a deadly crime (2016-GS-42-04100 & -04100A), and discharge of a firearm into a vehicle (2006-GS-42-04102). Richard H. Warder, Esquire,

Q1

represented Applicant. Assistant Solicitor Spenser H. Holloran of the Seventh Circuit Solicitor's Office, prosecuted the case.

On April 26, 2017, Applicant appeared in the Spartanburg County Court of General Sessions before the Honorable J. Mark Hayes, II, circuit court judge, where he pled guilty to two counts of the lesser included offenses of assault and battery of a high and aggravated nature (ABHAN). The remaining charges were dismissed. Judge Hayes sentenced Applicant to imprisonment for Concurrent terms of twenty years on each of the ABHAN charges.

Applicant filed a timely notice of appeal challenging his guilty plea and sentences. By order dated July 12, 2017, the South Carolina Court of Appeals dismissed Applicant's appeal pursuant to Rule 203(d)(1)(B)(iv), SCACR, for failure to provide a sufficient explanation for his appeal. The Remittitur was issued on July 28, 2017.

### FACTUAL HISTORY

On April 1, 2016, Applicant was the front seat passenger in a dark colored vehicle traveling on Valley Falls Rd., Spartanburg County, South Carolina. At the same time and place, another vehicle pulled out of a driveway and began traveling away from Applicant's vehicle. Applicant's vehicle approached the rear of the second vehicle and multiple shots were fired into the second vehicle. The passenger of the second vehicle was grazed in her face by a bullet fired from Applicant's vehicle. The incident was related to a personal matter between the victim's and one of the passengers in Applicant's vehicle.

A nearby deputy with the Spartanburg County Sheriff's Department immediately began pursuing Applicant's vehicle and attempted a traffic stop. Applicant's vehicle fled and the deputy pursued. Firearms were thrown from the vehicle, including from the passenger-side window where Applicant was seated. The chase ended at an apartment complex nearby and Applicant remained

FILED  
CLERK OF COURT  
SPARTANBURG COUNTY  
2016 AUG 21 AM 9:29  
M. HOPE BLACKLEY



with the vehicle. Within the vehicle, two .40 caliber magazines, a loaded AR-15 magazine, and one AR-15 round were recovered from the vehicle. After retracing the route of the chase, deputies recovered an AR-15 rifle and a pistol. A second pistol was recovered later. Applicant was found with gun residue and claimed to have been armed with the .40 caliber pistol.

### ALLEGATIONS

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

1. Ineffective Assistance of Counsel
  - a. "Counsel failed to make motion"
  - b. "Ineffective assistance of counsel"
  - c. "Counsel failed to inform of potential defense"

At the evidentiary hearing, PCR Counsel informed the Court that Applicant would be proceeding on the following allegations:

1. "Failure to investigate"
2. "Failed to inform of defenses"
3. "Failed to present plea offers"

The additional allegations were a continuation of Applicant's original allegation of ineffective assistance of counsel. Applicant requests relief in the form of "reduce sentencing time/new trial."

### SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

*Richard Warder, Esq.*

Richard H. Warder, Esquire, testified at the evidentiary hearing. Mr. Warder represented Applicant during his guilty plea. Mr. Warder testified that the case against Applicant was strong. Mr. Warder testified that there was no question of identification or whether Applicant had fired a pistol at some point during the day. Mr. Warder testified that Applicant tested positive for gunshot residue, but claimed that he had fired a gun earlier in the day. Mr. Warder testified that Applicant

FILED  
CLERK OF COURT  
SPARTANBURG COUNTY  
2018 AUG 2  
AM 9:29  
M. HOPE BRACKLEY

21

wanted to enter a guilty plea from the start of his representation. Mr. Warder testified that Applicant was facing sixty years, but the judge sentenced Applicant to the recommendation by the Solicitor's office.

Mr. Warder testified that he received all of the information about the case from the Applicant. Since there was no denying that Applicant was present at the scene and gunshot residue was found on Applicant, Mr. Warder testified that there was not much left to investigate. Mr. Warder testified that he reviewed all discovery with Applicant and discussed any possible defenses he may have at trial, but Applicant was clear that he wanted a plea deal. Mr. Warder testified that he never promised Applicant anything in regards to his sentence and that he explained to Applicant that even though the State was recommending a twenty year sentence, the judge did not have to accept it. Mr. Warder did not remember any other plea offers from the State besides twenty years, but Mr. Warder testified that he communicated all offers to Applicant.

*Applicant's Mother and Grandmother*

Applicant called his mother and grandmother as witnesses on his behalf. Both testified individually, that they were present for Applicant's guilty plea. Applicant's grandmother and mother both testified that it was their belief Applicant was going to receive a ten year sentence.

*Applicant*

Applicant testified that he asked his attorney to get him the best deal possible. Applicant testified that Mr. Warder told him the offer was for twenty years. Applicant discussed the facts of his case and "tried to bring up defense that he never pulled the trigger, but did shoot earlier." Applicant wanted ten years and testified that he didn't want to plea, because his co-defendant received a lesser sentence than twenty years. Applicant testified that Mr. Warder guaranteed him a ten year sentence.

*QA*

FILED  
CLERK OF COURT  
SPARTANBURG COUNTY  
2018 AUG 21 AM 9:29  
M. HOPE BLANKLEY

Applicant admitted that he was placed under oath prior to entering his guilty plea. Applicant testified that Judge Hayes asked him if he understood he could get twenty years, even though the recommendation was for "up to twenty." Applicant testified that even though he said he agreed with the Solicitor's recitation of the facts, he "had to go with the flow and didn't want to mess it up." Applicant testified that he hoped to get ten years, but he knew he could get up to twenty. Applicant testified that he remembered saying "sorry for everything that happened; would take it all back if I could" at the plea proceeding.

**FINDINGS OF FACTS 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).

FILED  
CLERK OF COURT  
PABANBURG COUNTY  
2018 AUG 29 AM 9:29  
T. HOPPE & ASSOC. PC  
LAWYERS

*Ineffective Assistance of Counsel*

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 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, 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. With respect to guilty plea counsel, an applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Ill v. Lockhart, 474 U.S. 52 (1985).

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

*"Counsel failed to investigate"*

Applicant alleges his attorney failed to investigate his case. To show ineffective assistance in this regard, Applicant must present evidence to show what counsel could have discovered had he more fully investigated. Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 772 (1998) ("Respondent failed to present any evidence of what counsel could have discovered or what other



FILED  
CLERK OF COURT  
SPARTANBURG COUNTY  
SOUTH CAROLINA  
AUG 21 AM 9:29  
HOPE BLACKKEY

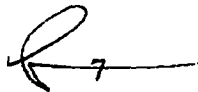
defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial.”). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)).

During the evidentiary hearing, Applicant’s trial counsel testified credibly and in detail that he received most of his information for the case from Applicant. There was nothing left to investigate, as Applicant was at the scene of the crime and tested positive for gunshot residue. Mr. Warder testified that it was Applicant’s wish to enter a guilty plea and to receive an offer from the State. Applicant has failed to present any evidence of further investigation that Mr. Warder would have been able to perform and in what way would that investigation would have benefitted his defense. Applicant has failed to meet his burden of proof and the allegation is denied and dismissed with prejudice.

*“Failed to inform of defenses and failure to present plea offers”*

Applicant alleges that it was ineffective assistance of counsel when his attorney failed to inform him of any defenses and failed to present plea offers to him. These allegations contradict the record and the testimony presented at the evidentiary hearing. Applicant admitted during his testimony that he was aware of the plea offer from the State for a recommended sentence. Applicant admitted he understood that recommendation would be for up to twenty years of imprisonment for his charges. Applicant admitted that he wanted a ten year sentence and was just trying to get the best deal possible.

Mr. Warder testified at the hearing credibly and in detail as to the facts surrounding Applicant’s case. It is clear from the record that Applicant was at the scene of the crime, possessed



FILED  
CLERK OF COURT  
SPARTANBURG COUNTY  
2018 AUG 21 AM 9:29  
M. HOPE BLANKLEY

a firearm, and had fired the weapon that was recovered by police. Applicant admitted during his guilty plea to the facts as presented by the Solicitor, which included Applicant being involved in the shooting. Mr. Warder testified that he informed Applicant of the plea offer of twenty years and would have informed Applicant of any other offers, had there been any made.

Applicant had failed to meet his burden of proof. The allegation is denied and dismissed with prejudice.

FILED  
CLERK OF COURT  
SPARTANBURG COUNTY  
2018 AUG 21 AM 9:29  
M. HOPE BLACKLEY

**CONCLUSION**


Based on all the foregoing, this Court finds Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, the allegations are 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.

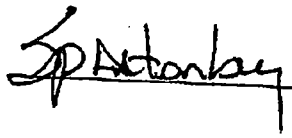
**IT IS THEREFORE ORDERED:**

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

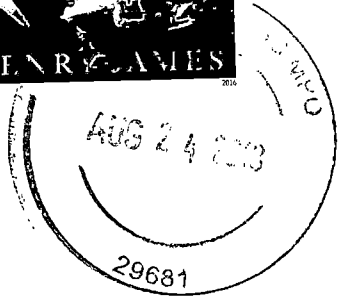
AND IT IS SO ORDERED this 30 day of August

  
GRACE G. KNIE  
Presiding Judge  
Seventh Judicial Circuit

FILED  
CLERK OF COURT  
SPARTANBURG COUNTY  
2018 AUG 21 AM 9:29  
M. HOPE BLACKLEY

  
Sp. Attorney, South Carolina

R  
A  
P  
E  
G



Daniel E. Shearouse,  
Clerk of Supreme Court  
1231 Gervais Street  
Post Office Box 11330  
Columbia, SC 29211