

# The Law Office of Tristan M. Shaffer

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Litigation • Injury Law • Criminal Defense

August 8, 2016

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

**RECEIVED**

AUG 10 2016

Re: Matthew Frazier v. State 2014-CP-07-0592


**S.C. SUPREME COURT**

Dear Mr. Shearouse,

Please find the enclosed Notice of Appeal, Certificate of Service, and Order of Dismissal in the above referenced case.

Please Contact me if you have any questions or concerns regarding this matter.

Sincerely,



Tristan M. Shaffer

CC: Beaufort County Clerk of Court  
Rutledge Johnson  
Loriene French (Via Email)  
Matthew Frazier # 346254

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Case No. 2014-CP-07-0592

**RECEIVED**

AUG 10 2016

Matthew Frazier, # 346254,

Petitioner,

**S.C. SUPREME COURT**

v.

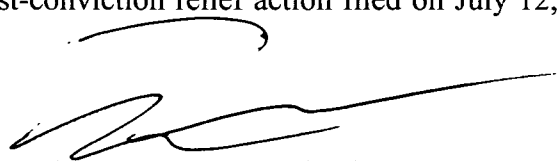
The State of South Carolina,

Respondent.

NOTICE OF APPEAL

Petitioner appeals the order dismissing his post-conviction relief action filed on July 12, 2016.

August 8, 2016



Tristan M. Shaffer (SC Bar 77565)  
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Attorney for Petitioner

Other Counsel of Record:  
Rutledge Johnson  
South Carolina Attorney General's Office  
P.O. Box 11549  
Columbia, South Carolina 29211  
Attorney for Respondent

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM BEAUFORT COUNTY  
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**S.C. SUPREME COURT**

Matthew Frazier, # 346254,

Petitioner,

v.

The State of South Carolina,

Respondent.

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PROOF OF SERVICE

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I certify that I have served the Notice of Appeal on The State of South Carolina by mailing a copy to the Attorney General's Office at P.O. Box 11549, SC 29211 on the date listed below.

August 8, 2016



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Attorney for Petitioner

Other Counsel of Record:  
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Columbia, South Carolina 29211  
Attorney for Respondent

STATE OF SOUTH CAROLINA )  
COUNTY OF BEAUFORT )

IN THE COURT OF COMMON PLEAS  
FOURTEENTH JUDICIAL CIRCUIT

JERRI ANN ROSENEAU  
CLERK OF COURT  
BEAUFORT COUNTY, S.C.

Matthew Frazier, #346254,

2014-CP-07-0592

Applicant,

**ORDER OF DISMISSAL**

v.

State of South Carolina,

Respondent.

This matter comes before the Court by way of an Application for Post-Conviction Relief filed March 12, 2014. The Respondent made its Return on February 6, 2015. An evidentiary hearing into the matter was convened on May 19, 2016, at the Beaufort County Courthouse in Beaufort, SC. Tristan Shaffer, Esquire, represented the Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Ian Deysach, Esquire, also testified. This Court had before it a copy of the records of the Beaufort County Clerk of Court, records from the South Carolina Department of Corrections, the trial transcript, and the appellate records.

**PROCEDURAL HISTORY**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. The Applicant was indicted at the May 2011 and December 2011 terms of the Beaufort County Grand Jury for trafficking cocaine 10-28 grams- first offense (2010-GS-07-2189) and possession with intent to

distribute crack (PWID)(2010-GS-07-2191)<sup>1</sup>. The Applicant was represented by Ian Deysach, Esquire.

On May 26, 2011 the Applicant proceeded to trial and was found guilty. The Applicant was sentenced by the Honorable Thomas A. Russo, to confinement for a period of fifteen (15) years for PWID and ten (10) years with a \$25,000 fine for trafficking cocaine. The Applicant's convictions are to be served consecutively.

The Applicant filed a timely Notice of Appeal. His appeal was perfected by Dayne Phillips, Esquire, of the Office of Appellate Defense. The Applicant's convictions and sentences were affirmed by the Court of Appeals. State v. Frazier, No. 2013-UP-280 (S.C. Ct. App. June 26, 2013). The Remittitur was issued on July 15, 2013.

In his Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
  - a. Counsel failed to show that CI was not shown to be reliable or credible by making them come to court and take the stand at trial.
  - b. Counsel failed to present all evidence at trial.
2. 4<sup>th</sup>, 5<sup>th</sup>, and 14<sup>th</sup> amendment violations.
  - a. Due process violated.
  - b. Search warrant was invalid on false and unreliable information and out of time frame.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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<sup>1</sup> The Applicant was also convicted of possession of marijuana (2010-GS-07-2190) and sentenced to  
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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 witness presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

### SUMMARY OF TESTIMONY

At the evidentiary hearing, Counsel testified that he was appointed as a public defender. Counsel testified this case was based upon a search warrant of a car premised upon prior drug buys with a confidential informant. Counsel articulated that his trial strategy was to show that Applicant was merely present. Counsel also articulated that he attacked the search warrant based on the time frame in the search warrant. Counsel discussed this with Applicant prior to trial. Counsel stated there was a plea offer, which Applicant rejected, of three years for a single trafficking charge. Counsel further stated it was Applicant's choice to pursue a trial. Counsel lastly testified that while he could not remember the specifics of the officer's testimony, he knew the car was not registered to Applicant.

Applicant testified that he and Counsel discussed the case including the evidence against him. Applicant claimed the search warrant was not like the officer said it was, but the officers were in the

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confinement for 30 days. It does not appear the Applicant's is challenging this conviction in his application.



woods watching; the audio/video recordings were not consistent with the search of the vehicle. Applicant claimed Counsel did not attack the officer's statements. Applicant then claimed his 4<sup>th</sup> and 14<sup>th</sup> U.S. Constitutional amendment rights were violated. While Applicant then attempted to testify concerning deficiencies in the search warrant procedure, Respondent objected as this subject was the basis of the direct appeal, and thus was not proper for the PCR forum.<sup>2</sup> Applicant then claimed the car did not belong to him and told Counsel how he came to be in possession of the vehicle. Applicant lastly testified that he did not know when his cousin bought vehicle, but knew it was a couple months before; however, he did not discuss this with Counsel.

#### **Ineffective Assistance of Counsel**

The Applicant alleges he is entitled to post-conviction relief on the basis that he received ineffective assistance of trial counsel. In a PCR action, "[t]he burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002). To be entitled to post conviction relief, the Applicant must prove both of the following: (1) his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) the Applicant suffered prejudice by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). Under this standard, counsel's deficient performance must have prejudiced the Applicant to the extent that "there is a reasonable probability that, but for

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<sup>2</sup> This Court sustained the objection.



counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989).

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 v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

First, this Court finds Applicant's testimony concerning Counsel's alleged ineffectiveness not credible while finding Counsel's testimony credible.

**A. Trial counsel's failure to research the issue of the ownership of the vehicle**

Applicant contends that Counsel was ineffective for failing to research the ownership of the vehicle in which law enforcement found drugs. This argument is without merit.

Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the

PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

Further, "a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." State v. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985) (emphasis added), citing Strickland v. Washington, 104 S.Ct. 2052, 890 L.E.2d 674(1984). Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the range of reasonable professional assistance. Id. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information." Strickland, 466 at 691, 104 at 2066.

In this case, Applicant failed to produce any witnesses to show how Counsel's alleged failure to research the ownership of the vehicle prejudiced his case. Further, Applicant testified that he did not discuss the issue that his cousin bought the car a few months again with Counsel. Counsel cannot be held clairvoyant of information only known to Applicant.

Under Strickland and Bannister, Counsel's representation of Applicant in this regard was not ineffective based Applicant's failure to alert Counsel to his cousin's existence. Thus, this allegation is denied.

**B. Search Warrant invalid**

Applicant claims Counsel ineffectively try to show the search warrant was invalid.

This allegation raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). This was the exact issue raised on Applicant's direct appeal. Therefore, the Court dismisses this allegation.

**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.

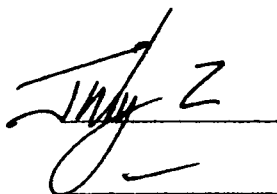
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCPC, 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.

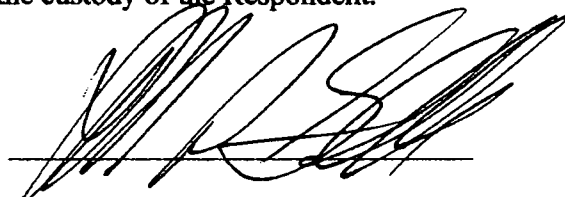


**IT IS THEREFORE ORDERED:**

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.

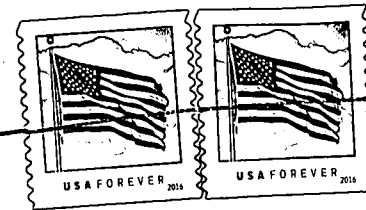
**AND IT IS SO ORDERED!**

 \_\_\_\_\_, 2016  
\_\_\_\_\_, South Carolina

  
\_\_\_\_\_  
Brooks P. Goldsmith  
Presiding Circuit Court Judge  
Fourteenth Judicial Circuit

2014-CP-07-0592

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