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September 12, 2018

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

RECEIVED

SEP 17 2018

S.C. SUPREME COURT

RE: Notice of Appeal and Proof of Service for:
Ivan Williams, #357781 vs. State of South Carolina
2018-CP-25-001

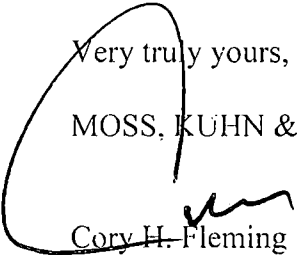
Dear Mr. Shearouse:

Under cover of this letter, please find enclosed for filing in your court a Notice of Appeal (NOA) and Proof of Service (POS) in the above-referenced matter. Also enclosed please find copies of the Order of Dismissal denying the application for post-conviction relief. Please contact me if you have any questions.

With kindest regards, I am,

Very truly yours,

MOSS, KUHN & FLEMING, P.A.


Cory H. Fleming

CHF/tk

cc: Hampton County Clerk of Court, w/ NOA and POS
Christian Saville, Office of the Attorney General, w/ NOA and POS

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

SEP 17 2018

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Diane Schafer Goodstein, Circuit Court Judge

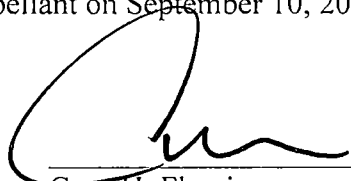
Case No. 2018-CP-25-001

The State,Respondent,
v.
Ivan Williams, #357781.....Appellant.

NOTICE OF APPEAL

Ivan Williams appeals the judgment of the Circuit Court, the Honorable Diane S. Goodstein, presiding, denying Applicant's request for post-conviction relief. The Order was signed on August 8, 2018, and received by counsel for Appellant on September 10, 2018.

September 13, 2018



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Attorney for Appellant
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Opposing Attorney of Record:
Christian Saville

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

SEP 17 2018

Honorable Diane S. Goodstein

S.C. SUPREME COURT

Case Number: 2018-CP-25-001

State of South Carolina,Respondent

v.

Ivan Williams, #357781,Appellant.

PROOF OF SERVICE

Counsel for Ivan Williams hereby certifies that he has prepared and served a Notice of Appeal on this 13th day of September, 2018, upon the State, as specified in S.C. Code Section 203 (b) (1) , by depositing a copy, postage pre-paid, in the United States Mail, addressed to Attorney for Respondent, Christian Saville, Office of the Attorney General, PO Box 11549, Columbia, SC 29211-11549.



September 13, 2018

Cory H. Fleming
Attorney for Appellant

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STATE OF SOUTH CAROLINA
COUNTY OF HAMPTON

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Ivan Williams, #357781,

FILED
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2018-CP-25-001

Applicant,

v.

MYLINDA D NETTLES
CLERK OF COURT
HAMPTON COUNTY, SC

ORDER OF DISMISSAL

State of South Carolina,

Respondent.

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on January 2, 2018. Respondent submitted its return on April 30, 2018. An evidentiary hearing into the matter was convened on June 6, 2018, at the Beaufort County Courthouse. Applicant was present at the hearing and was represented by Cory H. Fleming, Esquire. Respondent was represented by Assistant Attorney General Christian Saville of the South Carolina Attorney General's Office.

Before this Court were the records of the Hampton County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the record on appeal, Applicant's appellate records, the State's return, and the application. Based on these records and the testimony presented, the Court finds as follows:

I. PROCEDURAL HISTORY

The records before this Court indicate that Ivan Williams ("Applicant") is incarcerated with the South Carolina Department of Corrections pursuant to orders of commitment of the Hampton County Clerk of Court. The April 2012 term of the Hampton County Grand Jury indicted Applicant for first-degree burglary (2012-GS-25-0071). Stephanie Smart-Gittings, Esquire ("Trial Counsel"), represented Applicant at trial. Assistant Solicitor Richard A.

Murdaugh prosecuted the case. On November 4, 2013, Applicant proceeded to a jury trial before the Honorable Michael G. Nettles. The jury found Applicant guilty as indicted. On November 5, 2013, Judge Nettles sentenced Applicant to imprisonment for fifteen years for first-degree burglary, the statutory minimum for first-degree burglary.

Applicant filed a timely notice of appeal. James Arthur Brown, Jr., Esquire, filed a brief on Applicant's behalf pursuant to Anders v. California, 386 U.S. 738 (1967). In the Anders brief, appellate counsel conceded the trial court correctly admitted evidence identifying Applicant because the identity of the Applicant was already known to the victim, nothing in the six-photo array was unduly suggestive, and the evidence of identification was sufficiently reliable for consideration due to the victim's previous knowledge of Applicant. The South Carolina Court of Appeals affirmed Applicant's conviction in an unpublished opinion filed January 11, 2017. State v. Williams Op. No. 2017-UP-027 (Ct. App. 2017). The remittitur was returned on January 27, 2017.

II. ALLEGATIONS

Applicant filed a PCR application alleging the following:

1. Ineffective Assistance of Counsel
 - a. "The trial attorney failed to conduct a thorough Neil v. Biggers hearing."
 - b. "The trial attorney failed to object and/or renew the objection to the in-court identification thus not preserving the issue for appeal."
 - c. "The trial attorney failed to object to Solicitor's improper and prejudicial closing argument."

At the June 6, 2018, hearing, Applicant expressly withdrew his allegation that Trial Counsel failed to object to an improper and prejudicial closing argument by the Solicitor.

III. SUMMARY OF TESTIMONY PRESENTED

Applicant was present at the evidentiary hearing, but only Trial Counsel testified.

Trial Counsel

Trial Counsel testified she spoke to various witnesses in preparation for the trial, including the Victim. Trial Counsel explained Victim actually knew Applicant before he burglarized her home. In fact, Trial Counsel recalled Applicant's family and Victim's family knew each other. Her recollection of Victim's identification was that Victim came home to find Applicant and a codefendant burglarizing her home, at which time she told them to leave and she would not call the police. Trial Counsel recalled Victim first told police she knew Victim from around town but did not know his name, as Victim testified she only knew him by the name "Buck" at the time. Tr. p. 69, l. 14. It was Trial Counsel's recollection that Victim went on Facebook with some family members in the hours following the burglary to learn Applicant's real name, which she gave to law enforcement. Victim then identified Applicant in a photo lineup as well as in court. Trial Counsel testified she knew what Victim was going to testify to as a result of their pre-trial conversations, and Victim remained adamant that she knew Applicant and he was the one she caught burglarizing her home.

As Trial Counsel recalled from the Neil v. Biggers hearing, she did not challenge the suggestiveness of the photo lineup on the basis that the six photos themselves were suggestive, as the lineup featured six photos of similar-looking African-American males and she saw no problem with the pictures. She did, however, argue suggestiveness on the basis that Detective Perry Singleton instructed Applicant to "pick out Ivan 'Buck' Williams." Trial Counsel recalled that although the identification was admitted after the Biggers hearing, she was later able to raise this issue on cross-examination. Trial Counsel also asserted there were some questions related to Victim's identifications of Applicant she strategically did not ask of Victim during the Biggers

hearing because they would not have been helpful for purposes of the hearing and she also did not want Victim to know everything she was going to be asked at trial.

Trial Counsel recounted she was able to challenge Victim's identification of Applicant at trial as well as address discrepancies in Victim's descriptions such as height and full name of Applicant. However, it was Trial Counsel's opinion Victim made an adamant and credible witness for the State. Trial Counsel she knew everything Victim was going to say due to their pretrial discussions and was selecting her questions accordingly. Moreover, Trial Counsel recalled was strategically trying to minimize the amount of times the jury heard Victim repeat, "[Applicant] did it."

IV. APPLICABLE LAW

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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 upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

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, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). 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.

V. FINDINGS OF FACT 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 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 facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

INEFFECTIVE ASSISTANCE OF COUNSEL

This Court finds Applicant has failed to prove he is entitled to post-conviction relief on any of his allegations of ineffective assistance of counsel. This Court finds Trial Counsel rendered thorough and calculated representation before and during Applicant's trial, and her performance regarding Victim's identification of Applicant was both a result of sound strategic reasoning and a set of factual circumstances which simply do not evidence suggestiveness regardless of her zealous representation. Furthermore, after observing the testimony of Trial Counsel, the only witness presented at the hearing, this Court finds Trial Counsel's testimony to be credible and well-articulated.

Failure to Conduct a Thorough Neil v. Biggers Hearing.

Applicant alleges Trial Counsel was ineffective for failing to conduct a thorough Neil v.

Biggers hearing. This Court finds this allegation to be meritless.

First, Applicant has failed to satisfy the first prong of Strickland by proving Trial Counsel was deficient in her performance during the Biggers hearing. Due process requires courts to assess, on a case-by-case basis, whether an out-of-court identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Biggers, 409 U.S. at 198, 93 S.Ct. 375. In this case, a Biggers hearing was held regarding the photo lineup presented to the Victim, who actually walked in on Applicant burglarizing her home and already knew Applicant from the community. Trial Counsel credibly testified at the PCR hearing she did not see an issue of suggestiveness with the photos in the lineup themselves, as they all looked similar in hair type, complexion, and facial features. This is corroborated by the trial judge's finding that the photos were "remarkably similar" and not unconstitutionally suggestive. Tr. p. 36, ll. 14-17. Therefore, Trial Counsel attempted to have the photos suppressed on the basis that the presenting officer instructed Victim to "pick out Ivan 'Buck' Williams" from the lineup. Trial Counsel raised this issue on cross-examination at the Biggers hearing and argued this was "severely suggestive." The trial judge found this issue goes to the weight of the evidence rather than the suggestiveness of the lineup and gave Trial Counsel wide latitude on cross-examination. Tr. p. 36, ll. 18-25. At the PCR hearing, Trial Counsel credibly testified she strategically did not ask select questions regarding Victim's prior descriptions of Applicant at the hearing because she did not want Victim to know everything she was going to ask at trial. Where trial counsel articulates a valid reason for employing certain trial strategy, such conduct should not be deemed ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995). Trial Counsel was able to raise the issue that Victim was not able to give officers Applicant's name when they

first responded. Tr. p. 33, l. 4. As Victim would later explain at trial, she simply knew Applicant by his nickname "Buck" at the time, but learned of his full name the next morning.

It is clear from Trial Counsel's credible testimony at the PCR hearing as well as the record before this Court that Trial Counsel rendered adequate representation at the Biggers hearing and raised the challengeable issues in an attempt to suppress Victim's photo lineup identification of Applicant. This Court finds Applicant has failed to prove she was deficient for failing to sufficiently challenge a photo lineup in which the photos all looked substantially similar and Victim, as well as Victim's family, knew Applicant before the crime occurred. Furthermore, this Court finds Trial Counsel had thorough discussions with Victim prior to the trial, indeed knew how she was prepared to testify, and strategically tailored her representation accordingly.

Furthermore, Applicant has failed to satisfy the second prong of Strickland, which requires him to prove that but for Trial Counsel's alleged deficiency, there is a reasonable probability the outcome of the proceeding would have been different. This Court notes the record as well as testimony from the PCR hearing reveals the source of Victim's identification of Applicant and lack of suggestibility in the photo lineup. First the record is clear that Victim had already told law enforcement that Applicant was the individual, along with a codefendant, she found burglarizing her home. When law enforcement initially responded to the incident, Victim informed them she knew Applicant from the community, but only gave them a description and not his name. Tr. p. 69, ll. 14-23. As explained in the record and by Trial Counsel's testimony at the PCR hearing, Victim only knew Applicant by his nickname "Buck" at the time. Tr. p. 69, l. 14. Trial Counsel recalled Victim learned his real name by consulting with family members and finding Applicant's Facebook page. Victim then gave another statement to Detective Singleton

in which she informed him of Applicant's full name. Tr. p. 88, ll. 18-24. This all occurred prior to the presentation of the photo lineup. Clearly, Victim possessed independent knowledge of Applicant's identity. Taken in conjunction with the lack of any suggestiveness in the photos themselves, Applicant cannot prove the result of the proceedings would have been any different had Trial Counsel performed any differently. Therefore, Applicant also fails to satisfy the second prong of Strickland.

Even assuming arguendo the lineup had been suggestive, there was no escaping the exceptional reliability of Victim's identification of Applicant in this case. Even when identification resulted from unnecessary and unduly suggestive police procedures, courts must then consider if the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Biggers, 409 U.S. at 198. Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are:

- (1) the witness's opportunity to view the perpetrator at the time of the crime,
- (2) the witness's degree of attention,
- (3) the accuracy of the witness's prior description of the perpetrator,
- (4) the level of certainty demonstrated by the witness at the confrontation, and
- (5) the length of time between the crime and the confrontation.

Biggers, 409 U.S. at 199.

The facts of this case demonstrated an exceptionally reliable identification of Applicant by Victim. First, Victim actually watched Applicant burglarize her home for a few minutes before intervening, and Applicant slowly walked out after being told she would not call the police if he left. Tr. p. 56, ll. 1-18. Again, this was an individual who Victim and her family already knew before the crime, albeit by his nickname. After giving multiple statements to law enforcement implicating Applicant, Victim was presented a lineup and recognized Applicant from the lineup

and no one else. Tr. p. 64, ll. 9-18. Victim testified she was able to see Applicant's face fully and the light was on during the encounter in her home. Tr. p. 71, ll. 1-6. Victim also identified Applicant in court as the man inside her home. Tr. p. 65, ll. 15-25. Therefore, this Court finds that even if Trial Counsel was deficient in her performance regarding the Biggers hearing, and even if the photo lineup would have been suggestive, there was still ample circumstances justifying the admission of the photo identification. For these reasons, Applicant has failed to prove both deficiency and prejudice regarding this allegation. Accordingly, this allegation is denied and dismissed with prejudice.

"Failure to object and/or renew the objection to the in-court identification"

Applicant also alleges Trial Counsel was ineffective for failing to object and/or renew the objection to the in-court identification thus not preserving the issue for appellate review. This Court finds this allegation to also be meritless.

First, Applicant has failed to show Trial Counsel was deficient for not objecting to the in-court identification because there was nothing objectionable to render the in-court identification inadmissible. The South Carolina Supreme Court has concluded, as the majority of courts have concluded, that Neil v. Biggers does not apply to in-court identifications, and the remedy for any alleged suggestiveness is cross-examination and argument. State v. Lewis, 363 S.C. 37, 42, 609 S.E.2d 515, 518 (2005). In its analysis, the Court considered the Georgia Supreme Court's reasoning that procedural safeguards in place for pre-trial identifications are not applicable to in-court identifications because the witness' testimony is subject to the same rules of evidence, witness credibility, and cross-examination as all other testimony in a criminal trial. Lewis, 363 S.C. at 43 (citing Ralston v. State, 251 Ga. 682, 309 S.E.2d 135 (1983)). In the present case, the record reveals nothing improper or objectionable about the in-court identification to begin with.

Victim was asked if she saw individual she identified from the photo lineup in the courtroom, to which she replied she did and directed the solicitor to Applicant. Tr. p. 65, ll. 12-25. Of course, this in-court identification took place after testimony revealing Victim knew Applicant from the community before the crime even occurred. Trial Counsel subsequently cross-examined Victim about discrepancies in the descriptions Victim had provided to law enforcement and also raise the issue that law enforcement suggested who she should identify by instructing her to pick out "Ivan 'Buck' Williams." Trial Counsel convincingly and credibly testified at the PCR hearing that she knew how Victim was going to testify at trial and therefore wanted to challenge her identifications but minimize the amount of times the jury heard Victim say Applicant did it. Furthermore, and unfortunately for Applicant, Trial Counsel testified that Victim made an adamant and credible witness for the State. The in-court identification was not improper or suggestive. For these reasons, this Court finds Applicant has failed to satisfy his burden of proving Trial Counsel's performance was deficient for failing to object or renew objections to an identification which was proper and admissible.

Furthermore, Applicant has failed to satisfy his burden of proving prejudice from Trial Counsel's alleged deficiency of not objecting or renewing objections to the identification. Applicant cannot prove that but for Trial Counsel's lack of objection to the in-court identification, the result of the proceedings would have been different. As previously noted in this Order, the record reveals nothing unduly suggestive about the in-court identification. Moreover, the record contains ample testimony that Victim knew Applicant completely independent of the burglary, as Victim knew him from the community and their families knew each other. Notwithstanding the in-court identification, Victim, who knew Applicant, had already implicated Applicant in multiple statements to law enforcement and identified him in a

photo lineup before trial. Applicant has failed to present any evidence objections to the identification would have been sustained or resulted in a reversal on appeal. For these reasons, Applicant has failed to satisfy either prong of Strickland, and this allegation is denied and dismissed with prejudice.

"Failure to object to Solicitor's improper and prejudicial closing argument"

Applicant expressly withdrew this allegation at the PCR hearing. This allegation is therefore dismissed with prejudice.

[Conclusion and signature on following page]

VI. CONCLUSION

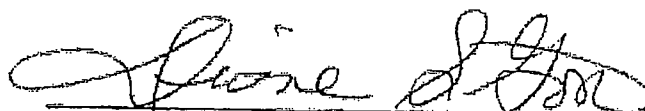
Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of appeal within thirty 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 post-conviction relief. Rule 71.1(g), SCRCP, provides that 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.

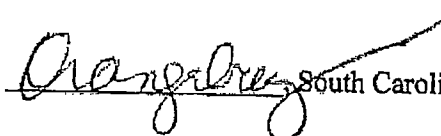
IT IS THEREFORE ORDERED:

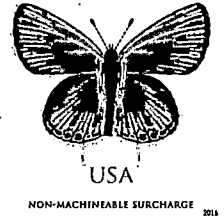
1. That the application for Post-Conviction Relief is denied and dismissed with prejudice in regard to all allegations; and
2. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 8 day of August, 2018.



DIANE SCHAFER GOODSTEIN
Presiding Judge
Fourteenth Judicial Circuit

 South Carolina



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