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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Jean H. Toal, Circuit Court Judge

MARVIN XAVIER PORCHER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000734

APPENDIX

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

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ATTORNEYS FOR RESPONDENT

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she must prove "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. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume 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. 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.

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 in this action in regards to his allegations of ineffective assistance of counsel. Below are the findings in regards to each specific allegation of ineffective assistance of counsel raised by Applicant.

Allegation: Trial counsel failed to investigate

Applicant asserts trial counsel was ineffective for failing to fully investigate his case. However, Applicant failed to establish what specifically counsel could have or should have done to more fully investigate the case. Moreover, Applicant failed to present any additional evidence or information that would have resulted from additional investigation. Therefore, this Court finds Applicant has failed to meet his requisite burden of proof. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (holding failure to conduct an independent investigation is not per se ineffective assistance of counsel, especially where an investigation would not have uncovered any helpful information); Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (“Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial.”); See also Strickland, 466 U.S. at 691 (“[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel’s failure to pursue those investigations may not later be challenged as unreasonable.”).

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 This Court finds counsel’s performance was reasonable according to professional standards and his allegation counsel was ineffective for failing to investigate must be denied and dismissed with prejudice.

Allegation: Trial counsel failed to hire necessary experts

Applicant asserts trial counsel was ineffective for failing to hire experts to analyze the fingerprints on the door and computer and for failing to hire a crime scene expert to analyze the door damage. Counsel testified Applicant adamantly denied any involvement in the crimes and

therefore, he did not believe any such experts would have been beneficial to his case. Moreover, Applicant has failed to present any such experts at the evidentiary hearing. I

This Court finds this allegation must be denied and dismissed because Applicant failed to present either such expert. See Lorenzen v. State, 376 S.C. 521, 530, 657 S.E.2d 771, 776-77 (2008) ("First, Lorenzen failed to present evidence that would show a reasonable probability that, but for counsel's failure to call expert witnesses, the result of his trial would have been different. Aside from his testimony and his trial counsel's testimony, Lorenzen did not offer any other witnesses to testify on his behalf at the PCR hearing. Therefore, it is merely speculative that these allegedly favorable expert witnesses would have aided in his defense."); See also Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence."); Porter v. State, 368 S.C. 378, 386, 629 S.E.2d 353, 358 (2006) ("Mere speculation of what a witness' testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for PCR."). Therefore, this Court finds Applicant has failed to meet his requisite burden of proof and this allegation must be denied and dismissed with prejudice.

Allegation: Trial counsel failed to strike a juror who knew the victim

Applicant asserts trial counsel was ineffective for failing to strike a juror who knew the victim. Counsel testified he did not recall any juror indicating they knew the victim and that if a member of the jury pool had indicated he or she knew the victim, he would have struck the potential juror. This Court finds counsel's testimony to be credible to this issue and finds Applicant's testimony not credible as to this issue. The record supports counsel's testimony, as

#13
8/5/17

there is no indication any member of the jury pool knew the victim and no member of the panel responded when the trial court inquired as to whether anyone knew the victim. This allegation is denied and dismissed with prejudice.

Allegation: Trial counsel failed to address the destroyed tools or move for a spoliation charge

Applicant asserts trial counsel was ineffective for failing to address the destroyed tools or request a spoliation charge. This Court finds this allegation is without merit, as such an instruction is improper and would not have been given. See State v. Reaves, 414 S.C. 118, 128, 777 S.E.2d 213, 218 (2015), cert. denied, 136 S. Ct. 855, 193 L. Ed. 2d 754 (2016) (“Heretofore, an adverse inference charge based on missing evidence, sometimes referred to as a spoliation of evidence charge, has been limited to civil cases in South Carolina.”) (citing Stokes v. Spartanburg Reg’l Med. Ctr., 368 S.C. 515, 522, 629 S.E.2d 675, 679 (Ct.App.2006) (holding spoliation instruction was warranted in medical malpractice action where two pieces of evidence initially collected by hospital were missing); Kevin R. Eberle, Spoliation in South Carolina, 19 S.C. Law. 26 (2007) (“The courts of South Carolina have long recognized that a party is entitled to favorable presumptions [in civil cases] about the contents of missing evidence when an opponent is responsible for the destruction of evidence that might otherwise be expected to have been relevant.”)). Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

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 is 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 must be denied and dismissed with prejudice; and
2. Applicant Marvin Porcher shall remain in the custody of the State.

AND IT IS SO ORDERED this 22^o day of Jan., 2018



 JEAN H. TOAL
 Presiding Judge
 Ninth Judicial Circuit

Columbia, South Carolina

#15

TAS20110805683

WITNESSES

North Charleston Police Department

AGENCY CASE NUMBER

2011029488

ARREST WARRANT NUMBER

M613172

DATE OF ARREST

August 23, 2011

ACTION OF GRAND JURY

TRUE BILL

Leslie J. Schultz
Foreperson of Grand Jury
Date: APR 10 2012

VERDICT

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2012GS1001910

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

April Term 2012

THE STATE

vs.

MARVIN XAVIER PORCHER

DOB: [REDACTED]

B/M

Indictment for

Breaking And Entering A Motor Vehicle

FILED

4/30/2012 2:41:08 PM

JULIE J. ARMSTRONG

CLERK OF COURT

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

INDICTMENT

At a Court of General Sessions, convened on April 9, 2012 the Grand Jurors of Charleston County present upon their oath:

Breaking And Entering A Motor Vehicle

That in Charleston County, South Carolina, on or about August 9, 2011, the Defendant, MARVIN XAVIER PORCHER, did break or attempt to break into a motor vehicle belonging to James Wilson, at [REDACTED] North Charleston, South Carolina, with intent to steal the same or anything of value therefrom; in violation of Section 16-13-160 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



TYLER S. WHITAKER
ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Charleston
STATE VS.

INDICTMENT/CASE#: 2012GS1001910

Marvin Xavier Porcher

A/W#: M613172

AKA:

Date of Offense: 8/9/2011

Race: BLACK Sex: M Age: 47

S.C. Code §: 16-13-0160(1)(2), (B)

DOB: SS#:

CDR Code #: 0258

Address:

City, State, Zip: Summerville, SC 29483

DL#: SID#: SC01330906

SENTENCE SHEET

*CDL Yes No CMV Yes No Hazmat Yes No

In disposition of the said indictment comes now the Defendant who was TO: Breaking & Entering a Motor Vehicle

CONVICTED OF or PLEADS

in violation of § 16-13-0160(1)(2), (B) of the S.C. Code of Laws, bearing CDR Code # 0258

NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC w/minor 1st or Lewd Act) §17-25-45

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury.

The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST: Whitaker, Tyler S. SC Bar# 74906 Defendant; W. Ted Smith Attorney for Defendant SC Bar# 70744

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center, for a determinate term of 5 days/months/years or under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on: 2013-GS-10-411; 4867
The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. Concurrent to probation restrictions of
The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135. 7/19/13

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP
Total: \$ plus 20% fee: \$
Payment Terms:
Set by SCDPPPS

Recipient:

Table with 3 columns: Description, Amount, Total. Includes items like § 14-1-206 (Assessments 107.5%), § 14-1-211(A)(1) (Conv. Surcharge) \$100, § 14-1-211(A)(2) (DUI Surcharge) \$100, § 56-5-2995 (DUI Assessment) \$12, § 56-1-286 (DUI Breath Test) \$25, Proviso 47.9 (Public Def/Prob) \$500, § 14-1-212 (Law Enforce. Funding) \$25, § 14-1-213 (Drug Court Surcharge) \$150, § 50-21-114(BUI Breath Test Fee) \$50, § 56-5-2942(J) (Vehicle Assessment) \$40/ea, Proviso 90.5 (SCCA Surcharge) \$5, 3% to County (if paid in installments) \$3.90, TOTAL \$133.90

days/hours Public Service Employment
Obtain GED
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning
Substance Abuse Counseling
Random Drug/Alcohol testing
Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ beginning
\$ paid to Public Defender Fund
Other:
Attu if available

Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk: Whitney Spivey
Court Reporter: Phyllis Nease
SCCA/217 (03/2011)

Presiding Judge: [Signature]
Judge Code: 2128
Sentence Date: 7-19-13

STATE OF SOUTH CAROLINA)

INDICTMENT


COUNTY OF CHARLESTON)

At a Court of General Sessions, convened on January 8, 2013 the Grand Jurors of Charleston County present upon their oath:

Breaking And Entering A Motor Vehicle

That in Charleston County, South Carolina, on or about September 5, 2011, the Defendant, MARVIN XAVIER PORCHER, did break or attempt to break into a motor vehicle belonging to Russell Boyd, at [REDACTED] North Charleston, South Carolina, with intent to steal the same or anything of value therefrom; in violation of Section 16-13-160 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



TYLER S. WHITAKER
ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Charleston
STATE VS.

INDICTMENT/CASE#: 2013GS1000411

AKA: Marvin Xavier Porcher

A/W#: M728037

Race: BLACK Sex: M Age: 47

Date of Offense: 9/5/2011

DOB: SS#: [redacted]

S.C. Code §: 16-13-0160(1)(2), (B)

Address: [redacted]

CDR Code #: 0258

City, State, Zip: Summerville, SC 29483

DL#: SID#: SC01330906

SENTENCE SHEET

*CDL Yes No CMV Yes No Hazmat Yes No
In disposition of the said indictment comes now the Defendant who was
TO: Breaking & Entering a Motor Vehicle

CONVICTED OF or PLEADS

in violation of § 16-13-0160(1)(2), (B) of the S.C. Code of Laws, bearing CDR Code # 0258
NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC §17-25-45 w/minor 1st or Lewd Act)

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury.
The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST: Whitaker, Tyler S. SC Bar# 74906 Defendant
W. Ted Brute Attorney for Defendant SC Bar# 70744

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,
for a determinate term of 5 days/months/years or under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
of \$, plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on: 2012-GS-10-1910; 2013-GS-10-4867
The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.
The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP
Total: \$ plus 20% fee: \$
Payment Terms:
Set by SCDPPPS

Recipient:

Table with 2 columns: Description and Amount. Includes items like § 14-1-206 (Assessments 107.5%), § 14-1-211(A)(1) (Conv. Surcharge) \$100, § 14-1-211(A)(2) (DUI Surcharge) \$100, § 56-5-2995 (DUI Assessment) \$12, § 56-1-286 (DUI Breath Test) \$25, Proviso 47.9 (Public Def/Prob) \$500, § 14-1-212 (Law Enforce. Funding) \$25, § 14-1-213 (Drug Court Surcharge) \$150, § 50-21-114 (BUI Breath Test Fee) \$50, § 56-5-2942(J) (Vehicle Assessment) \$40/ca, Proviso 90.5 (SCCJA Surcharge) \$5, 3% to County (if paid in installments) \$3.90, TOTAL \$133.90

days/hours Public Service Employment
Obtain GED
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning
Substance Abuse Counseling
Random Drug/Alcohol testing
Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ beginning
\$ paid to Public Defender Fund
Other:
str if available

Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Clerk of Court/ Deputy Clerk
Court Reporter:

Presiding Judge
Judge Code: 2128
Sentence Date: 7.19.13

TAS20111107543

WITNESSES

Charleston County Sheriff

AGENCY CASE NUMBER

2011018795B

ARREST WARRANT NUMBER

DIRIND1963

DATE OF ARREST

July 8, 2013

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury - JUL - 9 2013
Date:

VERDICT

Guilty

Linda J. Brown 7-19-13
Foreperson of Petit Jury Date:

INDICT

DOCKET NO. 2013GS1004867

The State of South Carolina
County of Charleston

COURT OF GENERAL SESSIONS

July Term 2013

THE STATE

vs.

MARVIN XAIVER PORCHER
DOB: [REDACTED]
B/M

Indictment for
Burglary First Degree

Vertical text on the left margin, possibly a stamp or filing mark.

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Charleston
STATE VS.

MARVIN XAIVER PORCHER

AKA:

Race: BLACK Sex: M Age: 47

DOB: SS#:

Address:

City, State, Zip:

DL#: SID#: SC01330906

*CDL Yes No CMV Yes No Hazmat Yes No

In disposition of the said indictment comes now the Defendant who was TO: Burglary, 1st degree

INDICTMENT/CASE#: 2013GS1004867

A/W#: DIRIND1963

Date of Offense: 11/3/2011

S.C. Code §: 16-11-0311

CDR Code #: 0079

SENTENCE SHEET

CONVICTED OF or PLEADS

in violation of § 16-11-0311 of the S.C. Code of Laws, bearing CDR Code # 0079

NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC w/minor 1st or Lewd Act) §17-25-45

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury. (defendant's initials)

The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST: Whitaker, Tyler S. Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center, for a determinate term of 15 days/months/years or under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on: 2012-05-10-1910; 2013-05-10-411

The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.

The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP

Total: \$ plus 20% fee: \$ days/hours Public Service Employment

Payment Terms: Obtain GED

Set by SCDPPPS Attend Voc. Rehab. or Job Corp.

Recipient: May serve W/E beginning

*Fine: Substance Abuse Counseling

§ 14-1-206 (Assessments 107.5 %) \$

§ 14-1-211(A)(1) (Conv. Surcharge) \$100 \$100.00

§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$

§ 56-5-2995 (DUI Assessment) \$12 \$

§ 56-1-286 (DUI Breath Test) \$25 \$

Proviso 47.9 (Public Def/Prob) \$500 \$

§ 14-1-212 (Law Enforce. Funding) \$25 \$25.00

§ 14-1-213 (Drug Court Surcharge) \$150 \$

§ 50-21-114(BUI Breath Test Fee) \$50 \$

§ 56-5-2942(J) (Vehicle Assessment) \$40/ea \$

Proviso 90.5 (SCCA Surcharge) \$5 \$5.00

3% to County (if paid in installments) \$3.90

TOTAL \$133.90

Clerk of Court/ Deputy Clerk Presiding Judge

Court Reporter: Judge Code: 2128

SCCA/217 (03/2011) Sentence Date: 7.19.13