

R. MILLS ARIAIL, JR.
ATTORNEY AT LAW

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November 12, 2018

Via US Mail

Daniel Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RECEIVED

NOV 15 2018

S.C. SUPREME COURT

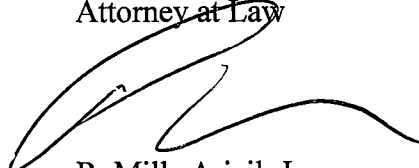
Re: Notice of Intent to Appeal from John Mark Cureton, III vs. State of South Carolina C.A. No.: 2017-CP-23-7117

Dear Mr. Shearouse:

I was Court Appointed in the above referenced matter, and I expect that appellate defense will handle the appeal and petition for certiorari. On behalf of my client, enclosed for filing please find the Notice of Appeal and proof of service. I've enclosed a copy of the Honorable's Order of Dismissal to be challenged on appeal. By copy of this letter, I am also serving my client, counsel for the State of South Carolina, the South Carolina Commission of Indigent Defense - Appellate Defense Division and the Greenville County Clerk's Office.

Thank you for your assistance in this matter and if you have any questions, please feel free to contact me.

Sincerely,
LAW OFFICE OF R. MILLS ARIAIL, JR.
Attorney at Law



R. Mills Ariail, Jr.

RMAjr/dl
Enclosures (as stated)

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Alex Kinlaw Jr., Circuit Court Judge

Case No. 2017-CP-23-07117

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S.C. SUPREME COURT

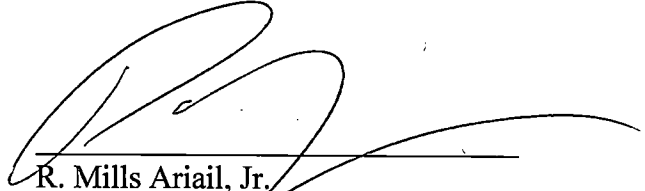
John Mark Cureton, III,..... Appellant,

v.

State of South Carolina Respondent.

NOTICE OF APPEAL

Appellant appeals the Honorable Alex Kinlaw Jr.'s Order of Dismissal dismissing Appellant's application for post-conviction relief. On November 5, 2018, the Honorable Alex Kinlaw Jr. signed an order dismissing Appellant's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on November 9, 2018. A copy of the Honorable Alex Kinlaw Jr.'s Order of Dismissal is attached.



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Telephone (864) 232-9390
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Attorney for John Mark Cureton, III

Greenville, South Carolina
November 12, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Alex Kinlaw, Jr., Circuit Court Judge

Case No.2017-CP-23-07117

John Mark Cureton, III,..... Appellant,

v.

State of South Carolina Respondent.

CERTIFICATE OF SERVICE

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this November 12, 2018, I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

DeShawn Mitchell, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211
Attorney for the State of South Carolina

Greenville County Clerk's Office
Greenville County Courthouse
305 East North Street
Greenville, SC 29601

John Mark Cureton, III SCDC# 312745
McCormick Correctional Institution
386 Redemption Way
McCormick, SC 29889

SC Commission of Indigent Defense
Division of Appellate Defense
PO Box 11433
Columbia, SC 29211-1433

Denise Tanner LaBeck
Denise Tanner LaBeck

November 12, 2018

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenville County Clerk of Court. In August of 2016, the Greenville County Grand Jury indicted Applicant for murder and possession of a weapon during the commission of a violent crime (2016-GS-23-2374) and attempted murder (2016-GS-23-2373). Thomas J. Quinn, Esquire, represented Applicant. Elizabeth C. Major, Esquire prosecuted the case. On December 12, 2016, Applicant proceeded to trial before the Honorable Edward W. Miller and a jury. After the trial started Applicant decided to plead guilty to voluntary manslaughter and assault and battery first degree. The possession of a weapon during the commission of a violent crime was dismissed. Judge Miller sentenced Applicant to ten years imprisonment for the assault and battery first degree charge and fifteen years for the voluntary manslaughter charge.

Applicant filed a timely notice of appeal on December 14, 2016. The South Carolina Court of Appeals dismissed the appeal for failure to provide a sufficient explanation as required by SCACR Rule 203(d)(1)(B)(iv) by order filed March 2, 2017. State v. Cureton, App. Case No. 2016-002548. The remittitur was returned on February 13, 2017.

ALLEGATIONS

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

1. Ineffective Assistance of Counsel; U.S. v. Cronie 104 SCT (1986) Deficiency of Plea Counsel so extreme prejudice showing is not required.
 - a. To be amended per Rule 71.1(d) (Attached pages 1-7)
2. Denied Immunity under SC State Statutes Protection of Persons and Property Act and Castle Doctrine 16-11-410
 - a. Defendant only acted to protect his family and castle. Defendant acted within guidelines of 16-11-140 (Attached pages 1-7)
3. Brady Rule 5 Violations Render Plea

a. PCR Counsel to properly I.D. and amend cogent Factual Basis per Rule 11
(Attached pages 1-7)

On September 24, 2018, Applicant also filed a document entitled complaint for declaratory relief further alleging he was entitled to Immunity pursuant to SC State Statutes Protection of Persons and Property Act and Castle Doctrine

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

Applicant's Testimony

Applicant testified Plea Counsel represented him on his charges. Applicant testified after he was arrested he posted bond and was released from jail. He testified Plea Counsel discussed his case with him but that they only met twice during the course of Plea Counsel's representation. Applicant testified he wanted to discuss the case more with Plea Counsel and felt as though he did not get a chance to properly discuss his case. He testified once they entered trial, Plea Counsel misstated the law regarding his stand your ground rights. Applicant testified when the incident occurred he was at his brother's residence and a fight broke out and people started to attack his brother. He testified he did not provoke the fight and was minding his own business. Applicant testified he was charged with murder but there was no malice and that Plea Counsel should have made a motion to dismiss the indictments because of this. He testified he wanted a preliminary hearing but Plea Counsel failed to have one for him. Applicant testified prior to pleading guilty once his trial started he wanted Plea Counsel to impeach the State's witnesses. He testified Plea Counsel talked to his brother who was willing to testify in Applicant's defense.

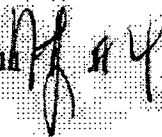
On cross-examination, Applicant testified he only met with Plea Counsel twice during the course of the representation. He testified during these meetings they discussed possible defenses they could use at trial. Applicant testified he wanted Plea Counsel to talk to his brother which

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Plea Counsel did because his brother could help with his defense.

Plea Counsel's Testimony

Plea Counsel testified he had practiced law for almost forty years and thirty-five of those years had been devoted to criminal law. He testified he was retained to represent Applicant and during the course of his representation he met with Applicant based on his notes seven or eight times and may have met with him more times than that. Plea Counsel testified during those meetings he discussed the indictments and the possible punishments Applicant was facing. He testified he discussed Applicant's constitutional rights with him and also the State's burden of proof. Plea Counsel testified he never had any indication Applicant did not understand their conversations about the charges or his rights. He testified in terms of investigation he spoke with Applicant's brother and the brother's girlfriend. Plea Counsel testified Applicant's charges centered around a shooting that took place at Applicant's brother's residence. He testified Applicant told him he shot the victim to protect Applicant's brother and his family after a large group of people had gathered next to his brother's residence. Plea Counsel testified both Applicant's brother and his brother's girlfriend gave statements to police about what happened that night. He testified these statements did not match up with Applicant's story and potentially showed Applicant or his family was not in imminent danger. Plea Counsel testified he did not think the statements helped Applicant's case. He testified Applicant's case proceeded to trial where he made a motion and argued Applicant was entitled to immunity based on stand your ground. Plea Counsel testified he raised this issue but ultimately the trial judge denied his motion and the case continued. He testified Applicant ended up pleading guilty. Plea Counsel testified he waived Applicant's preliminary hearing and that he received a letter from Applicant thanking him for not making him go to the preliminary hearing. He testified he saw no issue with the



indictment as it contained sufficient facts and the State had witnesses who could testify to the facts.

On cross-examination, Plea Counsel testified he choose not to call Applicant's brother because his statement was not helpful to Applicant's defense. He testified he discussed Applicant's brother's statement and the brother's girlfriend's statement with Applicant prior to trial starting. Plea Counsel testified Applicant understood the information in his case and there were no other statements or witnesses that could have helped Applicant's case.

Justin Cureton's Testimony

Justin Cureton testified he was Applicant's brother and was present the night of the incident in which Applicant was charged with murder. He testified he gave a statement to police in which he stated his neighbors were having a birthday party. Mr. Cureton testified he opened his sliding back door to his home because of loud noise coming from the group outside and they started cussing at him. He testified the group started to approach his front porch so he went back inside. Mr. Cureton testified he went back outside and confronted the group and soon thereafter his brother fired a gun.

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 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).

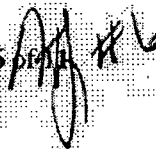
In a post-conviction relief action, the applicant bears the burden of proving the

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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 v. Washington, 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, 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. Hill v. Lockhart, 474 U.S. 52, 106 (1985).

After careful review of the entire record, including the testimony presented at the evidentiary hearings, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action regarding any of his allegations of ineffective assistance



of counsel. This Court finds as follows on the following grounds presented by Applicant at the evidentiary hearing:

Ineffective Assistance of Counsel

Failure to Properly Argue Immunity Statute

Applicant alleges Plea Counsel was ineffective in failing to argue that he was entitled to immunity from his prosecution under the Protection of Persons and Property Act. Whether a defendant is entitled to immunity under the Protection of Persons and Property Act ("Act") must be decided prior to trial if either party moves for a determination regarding the Act's application to a defendant's case. State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011).

"[W]hen a party raises the question of statutory immunity prior to trial, the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence." Id. at 411, 709 S.E.2d at 665. S.C. Code § 16-11-440(C) states:

A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

S.C. Code Ann. § 16-11-440(C).

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which this court reviews under an abuse of discretion standard of review." State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). "Section 16-11-450 [2015] provides immunity from prosecution if a person is found to be justified in using deadly force under the Act." Id. "Such immunity is predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court. . . ." Id. at 372, 752 S.E.2d at 267. If a defendant fails to make such a showing, then his claim of self-defense

“presents a quintessential jury question, which, most assuredly, is not a situation warranting immunity from prosecution.” Id.

Thus, a defendant seeking immunity under the Act must prove he was acting in self-defense by demonstrating: (1) he was not without fault in bringing on the difficulty of the situation; (2) he was in imminent danger of death or serious bodily injury, or believed he was in such danger; (3) if the defense is based on an actual belief of imminent danger, a reasonable person of ordinary firmness and courage would have held the same belief. Id. at 374, 752 S.E.2d at 268, n.8. However, the fourth element of self-defense—the duty to retreat—is excused under the Act. Id.

Here Applicant argues plea counsel was ineffective for failing to argue he was entitled to immunity. This court finds this allegation to be without merit. A review of the record shows during pre-trial, plea counsel indicated to the trial judge he had a motion regarding the stand-your-ground issue. (Tr.p.35). Plea counsel then proceeded to call Applicant to testify about the incident that night and the State cross examined Applicant. (Tr.p.36-77). The State then called the investigating officer who was also cross examined by plea counsel. (Tr.78-84). Ultimately, the trial judge decided Applicant had failed to meet his burden for immunity. (Tr.p.87). It is clear from the record plea counsel made a motion to have the trial judge decide whether Applicant was entitled to immunity pursuant to the statute. The trial judge after hearing the evidence ultimately decided to deny Applicant’s motion for immunity. Furthermore, plea counsel testified both Applicant’s brother and his brother’s girlfriend gave statements to police about what happened that night. Plea counsel testified these statements did not match up with Applicant’s story and potentially showed Applicant or his family were not in imminent danger. Plea counsel testified he did not think the statements helped Applicant’s case. This court finds plea counsel made a

strategic decision to not call Applicant's brother during the pretrial hearing. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Therefore, this court finds Applicant has failed to meet his burden to prove plea counsel was deficient or that he suffered prejudice from this alleged deficiency. This allegation is denied and dismissed with prejudice.

Failure to Conduct Preliminary Hearing

Applicant alleges plea counsel was ineffective in failing to conduct a preliminary hearing for him. Applicant testified he wanted a preliminary hearing but plea counsel failed to have one for him. Plea counsel testified he waived Applicant preliminary hearing and that he received a letter from Applicant thanking him for not making him have the preliminary hearing. This court finds credible plea counsel's testimony regarding this issue and finds plea counsel was not deficient for failing to conduct a preliminary hearing on Applicant's behalf. Further this court finds Applicant has not demonstrated sufficient prejudice for plea counsel failing to have a preliminary hearing as Applicant was later directly indicted for the charges he was facing. Therefore, this court finds Applicant has failed to meet his burden to prove plea counsel was deficient or that he suffered prejudice from this alleged deficiency. This allegation is denied and dismissed with prejudice.

Failure to File Motion to Dismiss Indictment

Applicant testified in a cursory fashion that plea counsel was ineffective for failing to file a motion to dismiss his indictment. Applicant testified he was charged with murder but there was no malice and that plea counsel should have made a motion to dismiss the indictment because of

this. Plea counsel testified he saw no issue with the indictment as it contained sufficient facts and the State had witnesses who could testify to the facts. This court finds plea counsel was not ineffective for failing to file a motion to dismiss this indictment. In post-conviction relief, an Applicant wishing to raise challenges to the sufficiency of an indictment must do so in the context of ineffective assistance of counsel, basically alleging that his trial counsel failed to properly move to quash the indictment in accordance with S.C. Code Ann. § 17-19-90 (2003). Upon a review of the indictment, this court finds no issue with the indictment and further finds it to contain sufficient facts. Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. The allegation is denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that 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), SCRPC 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 THAT:

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 South Carolina Department of Corrections.

AND IT IS SO ORDERED this 5 day of November, 2018.

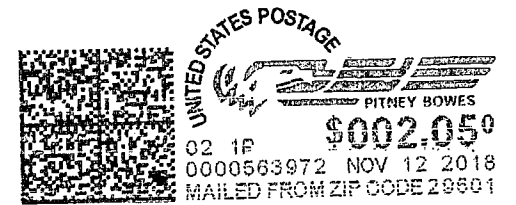

ALEX KELLY, JR.
Presiding Judge
Thirteenth Judicial Circuit


Alex Kelly, South Carolina

Copy mailed to

Attorney: Arnal and A.G.

on 11, 7, 2018




R. MILLS ARIAIL, JR.

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