

The Applicant is currently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Spartanburg County Clerk of Court. The Applicant was indicted at the at the September 2008 term of the Court of General Sessions for Spartanburg County for armed robbery (2008-GS-42-5631). He was represented by Beverly Jones, Esquire. The Applicant and a Co-defendant were tried before a jury on July 6th and 7th and the trial was presided over by the Honorable J. Derham Cole. The Applicant and the Co-defendant were found guilty of armed robbery. Judge Cole sentenced the Applicant to confinement in the South Carolina Department of Corrections for a term of twenty eight (28) years.

The Applicant filed a timely Notice of Appeal and the appeal was perfected. Appellate Counsel filed an Anders v. California, 386 U.S. 738 (1967), and after review, the South Carolina Court of Appeals dismissed the appeal. State v. Norris, No. 2012-UP-226 (filed April 18, 2012). The Remittitur was issued on June 19, 2012. This Application for Post Conviction relief was filed timely. The Applicant raised numerous claims for Ineffective Assistance of Counsel through his application and amendments.

ALLEGATIONS

The Applicant alleged through his application and amendments the following ineffective assistance of counsel claims:

- I. Ineffective assistance of counsel, in that:
 - a. Counsel failed to put the state's case through adversarial testing.
 - b. Counsel labored under a conflict of interest,
 - c. Counsel failed to challenge the outside influence by the bailiff,



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- d. Counsel abandoned her professional duties of loyalties to the applicant.
- e. Counsel failed to motion for arrest of judgment.
- f. Counsel failed to object to trial court's erroneous jury charge and supplemental jury charge.
- g. Counsel agreed to trial court's response to the jury's inquiry.
- h. Counsel failed to object to trial court's burden shifting instructions.
- i. Counsel failed to object Applicant's Due Process rights being violated.
- j. Counsel failed to object to reasonable doubt charge.
- k. Counsel failed to object to trial court's constructive amendment of the indictment.
- l. Counsel failed to object to the material variance in indictment due process.
- m. "Due process verdict"
- n. Counsel partially argued to the jury a theory without any evidence to support it with all evidence clearly contrary to that theory.
- o. Counsel failed to request/propose a jury instruction on the theory of defense.
- p. Counsel allowed the alleged co-defendant's counsel to deprive the applicant of a fair trial.
- q. Counsel failed to object to solicitor's argument, pitting, vouching, blistering.

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- r. Counsel failed to consult with the applicant about appeal process/post trial.
 - s. Counsel abandoned her duties of loyalty when she impeached the defendant with a 1995 burglary second and a 1996 common law robbery conviction when it had been established that those particular convictions were inadmissible.
 - t. Counsel failed to exclude the name and basic nature of the Applicant's prior felony convictions.
 - u. Counsel used the rules of evidence against the applicant.
 - v. Trial Counsel was ineffective for failing to object to the joinder of the co-defendant's trials.
 - w. Trial Counsel was ineffective for failing to move to sever the trials of the defendants.
2. Trial court abuse of discretion, in that;
- a. Trial court failed to exclude the name and basic nature of the Applicant's felony convictions.
 - b. Trial court erred in dismissing Applicant's post trial motion for reconsideration motion as untimely.
3. Ineffective assistance of appellate counsel, in that;
- a. Appellate counsel failed to raise applicant's preserved issues on appeal.
 - b. Appellate counsel failed to comply with the mandates of Anders.
4. Sentence clarification correction, in that:

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- a. Applicant requests to be awarded 358 days to his present sentence starting from July 16, 2008, to July 9, 2009.

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 and arguments presented at the PCR hearing. This Court has had the opportunity to weigh the testimony of the witnesses, review the transcript, and review and weigh the evidence in this case pursuant to S.C. Code Ann. § 17-27-80 (2003).

INEFFECTIVE ASSISTANCE OF COUNSEL

The Applicant alleges he received ineffective assistance of counsel. For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced 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). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for 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). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052). Additionally, in a PCR action, "[t]he

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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).

The Applicant presented evidence through his testimony and exhibits. The State of South Carolina called Ms. Jones in response and she testified that she gave competent advice and represented the Applicant properly both before and during the trial. The Court has reviewed the allegations of the Applicant thoroughly and finds that each of the previously listed allegations fail except for his claim that his counsel failed to render reasonably effective assistance regarding the improper introduction of portions of the applicant's prior record. The Applicant has met his burden of proof regarding his claim that trial counsel was ineffective in failing to prevent the introduction of the Applicant's prior convictions before the jury for reasons described below.

At trial, the prosecution, through the testimony of the alleged victim and witnesses from the scene, alleged the following evidence: Several teenagers, including the alleged victim, were playing Frisbee golf in downtown Spartanburg on July 16th, 2008. The Applicant and the Co-defendant were watching the teenagers and saw the opportunity to rob them. The prosecution alleged that the Applicant approached the teenagers and informed one of them, the alleged victim in this case, that he was a security guard and produced a knife and robbed the alleged victim.

The police were called, and a responding officer, Bradford James, found the Applicant on top of the alleged victim holding the alleged victim down. Officer James testified that the Applicant and the Co-defendant began walking away from the scene when he arrived. Other officers and the alleged victim testified that the Applicant and the Co-defendant left the scene and crossed the street once they saw the police arriving. The

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Applicant and his codefendant consented to a search of their clothing, and the police found items belonging to the alleged victim as well as knife allegedly used in the alleged armed robbery.

The Applicant and the Co-defendant testified on their own behalf. The testimony of the Applicant alleged the following: The Applicant was walking down the street in the evening on the date in question when he noticed individuals on top of the St. Luke's Free Medical Clinic in downtown Spartanburg. The Applicant testified that he went and knocked on the window of the Co-Defendant, who lived nearby, and woke the Co-defendant that something was going on at the clinic and they needed to investigate it. The Applicant testified that he told the Co-Defendant to bring his cell phone and to call the police because he believed that they were witnessing a possible break-in. The Applicant testified that he did not intend to rob the alleged victim, but that he intended to find out who he was. The Applicant testified that the alleged victim produced credit cards and his cell phone, and shortly thereafter the police arrived. The Applicant testified that contrary to the testimony of the prosecution witnesses, he was not standing over the alleged victim, and that he was asked, along with the Co-Defendant, to wait across the street and was eventually escorted across the street by the police. The Applicant testified that he never pulled a knife on the alleged victim, and that the knife found on him pursuant to consent search was a knife he had previously used to clean fish that day.

It is clear from the transcript that the jury was given two competing stories of what happened that night. It is also clear that the credibility of the witnesses, and particularly the credibility of the Applicant, was crucial for the jury to make a determination of guilt in this case. Both the prosecution and the respective defense

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counsel sought to attack the credibility of the respective opposing witnesses. The introduction of the Applicant's prior record was a large part of the prosecution's attack on the credibility of the Applicant.

At trial, and after the State rested, the Applicant was asked by the Court if he intended to testify. When he announced he would testify, the State informed the Court that it intended to impeach the Applicant with two prior convictions which occurred within ten years of the trial. Those convictions were common law robbery and burglary, second degree. The Court asked the Applicant's trial counsel if she contended that the two convictions the State intended to use for impeachment were not admissible. The Applicant's trial counsel agreed with the State that the two prior convictions, specifically a 1996 common law robbery, and a 1995 burglary, second degree (nonviolent) were admissible to impeach the Applicant. Additionally, when the Applicant testified, the Applicant's trial counsel introduced the convictions on direct examination. Trial counsel's consent to the introduction of the prior convictions, and her introduction of the prior convictions during her direct examination of the Applicant was error. This error was not harmless, and calls into question the outcome of the jury trial. *I find that this undermines the confidence of this court in the outcome of the trial as per Cherry + Packer id.*
(Under the South Carolina Rules of Evidence, Rule 609(a)(1) and Rule 609 (a)(2), and State v. Bryant, 369 S.C. 511 (2006), these prior convictions were more likely than not inadmissible. As indicated in Bryant, the Supreme Court has held that a trial judge must conduct a balancing test to determine whether remote convictions are admissible under Rule 609(b) creates a presumption that remote convictions are inadmissible and places the burden on the State to overcome this presumption. When considering whether to admit prior convictions, a trial judge should consider the following factors:

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- (1) The impeachment value of the prior crime;
- (2) The point in time of the conviction and the witness's subsequent history;
- (3) The similarity of the past crime and the charged crime;
- (4) The importance of the defendant's testimony; and
- (5) The centrality of the credibility issue.

After the trial court conducts the balancing test, the judge must make a determination and articulate, on the record, the specific reasons for his ruling. Specifically, the trial judge must articulate why the probative value of the prior conviction outweighs its prejudicial effect. Under Rule 609(a)(2), SCRE, if a crime is viewed as one involving dishonesty, the court must admit the prior conviction because prior convictions involving dishonesty or false statement must be admitted regardless of their probative value or prejudicial effect. State v. Bryant, 369 S.C. 511 (2006). (internal citations omitted).

The pertinent text of South Carolina Rules of Evidence, Rule 609 is as follows:

Rule 609. Impeachment by Evidence of a Criminal Conviction

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the

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witness's admitting — a dishonest act or false statement.

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it,

whichever is later. Evidence of the conviction is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

The Applicant's trial counsel failed to submit the prosecution's use of the prior convictions to any adversarial testing and failed to move the court to disallow the use of the prior convictions under the Bryant test. The trial judge would have been required to analyze the Bryant factors had the Applicant's trial counsel properly placed the issue regarding the prior convictions before the court. It is probative to review those factors set forth in the Bryant decision and the South Carolina Rules of Evidence Rules 609(a) and 609(b) as they would have been applied in this case.

The first factor is the impeachment value of the prior crime. Under State v. Bryant, "a conviction for robbery, burglary, theft, and drug possession, beyond the basic crime itself, is not probative of truthfulness." State v. Bryant, 369 S.C. 511, 633 S.E.2d 152, 156 (2006). The Applicant's two prior convictions, on their face, did not involve crimes of dishonesty. No additional evidence was given by the prosecution when those convictions were proffered that there was anything about the facts surrounding the convictions that showed any dishonesty.

The second factor that the court would have had to consider is the point in time of the conviction and the witness's subsequent history. The two previous convictions dates

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from 1995 and 1996 and no other evidence was proffered by the prosecution to show any subsequent criminal history. Those conviction dates were well in excess of ten years before this case. These two prior convictions were also unduly prejudicial under South Carolina Rule 609 (B)(2)(b) in that they were not supported by specific facts and circumstances as required by the Rule. The use of those convictions therefore could not substantially outweigh its prejudicial effect.

The third factor the court would have been required to consider is the similarity of the past crime and the charged crime. The prior conviction for common law robbery is similar to the charged crime of armed robbery. Armed robbery includes all the elements of strong arm robbery. Armed robbery is commission of common law robbery while armed with a deadly weapon. State v. Muldrow 348 S.C. 264, 559 S.E.2d 847 (2002).

The fourth and fifth factors the court would have had to consider is the importance of the defendant's testimony; and the centrality of the credibility issue. In this case the defendant's testimony was crucial to his defense against the charge of armed robbery, and therefore, his credibility was central to this case. As discussed earlier, this case had two competing and diametrically opposed narratives, one for the prosecution and one for the defense. The use of the prior convictions harmed undoubtedly the Applicant's ability to have the jury fairly consider his version of events.

Turning to the determination of whether the Applicant's trial counsel was ineffective, the factors established by Strickland v. Washington must be applied. For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective

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performance. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for 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). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052). Additionally, 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).

The Applicant has met his burden of proof by a preponderance of the evidence. Based upon the analysis of the Bryant factors with the facts of this case, there is a reasonable probability that but for counsel's unprofessional errors, the result of the trial would have been different. Trial counsel's errors in failing to oppose the introduction of the prior convictions, and worse, trial counsel's introduction of the prior convictions during the direct examination of the Applicant, create a probability sufficient to undermine confidence in the outcome of the trial.

If trial counsel had opposed the introduction of the two prior convictions, it is more likely than not that the trial judge would have excluded the use of those convictions. Absent the knowledge of these prior convictions, the jury would have been confronted with two competing versions of the event in question. The jury would not be focused on speculation about the Applicant's character, but would have instead have been required to determine whether the prosecution's version of events was sufficient to prove to them that the Applicant committed an armed robbery in this case beyond a reasonable doubt.

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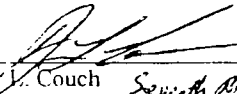
CONCLUSION

Based on the foregoing, the Court finds and concludes that the Applicant has met his burden of proof in this matter and has established a constitutional violation that would require this Court to grant his application. Applicant's trial counsel's performance was unreasonable under prevailing professional norms. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be granted; and
2. That the Applicant's convictions be vacated and his charges remanded for a new trial.

AND IT IS SO ORDERED this 6th day of Sept, 2017.


 Roger J. Couch *Sovereign*
 Presiding Judge, ~~Thirteenth~~ *Sovereign* Judicial Circuit

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Dear Clerk,

This is the order that was
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Bond. It was inadvertently left
out.

I, Carrie Morris #227226 certify and
verify under the penalty of perjury
that the foregoing is true and
correct.

Carrie Morris

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