

# FALK LAW FIRM, LLC.

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May 19, 2019

Clerk of Court  
Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211

RECEIVED

MAY 23 2019

Re: Travis Hair 283042 v State, 2016-CP-25- 0289

S.C. SUPREME COURT

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, in the above Hampton County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,



James K Falk

Thank you for your assistance.

Cc:

Benjamin Limbaugh, Esq

Travis Hair 283042

Hampton County Circuit Court Clerk

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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MAY 23 2019

APPEAL FROM HAMPTON COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

Honorable Thomas A Russo, Circuit Judge

Case No.: 2016-CP-25-0289

Travis Hair 283042.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Travis Hair appeals the Honorable Thomas A Russo's April 25, 2018 Order of Dismissal. Undersigned counsel received notice of entry of the order on May 16, 2019. A copy of the order on appeal is attached hereto.



James K Falk  
Falk Law Firm  
PO Box 1058  
Charleston, SC 29402

May 19, 2019

Benjamin Limbaugh, Esq.  
Office of S.C. Attorney General  
PO Box 11549  
Columbia, SC 29211-1549

Clerk of Court- Hampton CP  
PO Box 7  
Hampton, SC 29924

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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MAY 23 2019

APPEAL FROM HAMPTON COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

Honorable Thomas A Russo, Circuit Judge

Case No.: 2016-CP-25-0289

Travis Hair 283042.....PETITIONER

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State of South Carolina.....RESPONDENT

CERTIFICATE OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Benjamin Limbaugh Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549 and the Hampton County Clerk of Court. I further certify that all parties required by Rule to be served have been served this May 19, 2019.



James K Falk  
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found guilty as indicted for first degree burglary. Judge Goldsmith sentenced Applicant to prison for fifteen years.

Applicant filed a timely notice of appeal. Kathrine H. Hudgins, Esquire, was later retained to represent Applicant, and an appeal was perfected. On December 23, 2015, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Hair, Op. No. 2015-UP-565 (S.C. Ct. App., Filed December 23, 2015). The Remittitur was returned on February 10, 2016.

## **II. ALLEGATIONS**

Applicant alleged the following grounds in his application:

1. Ineffective Assistance of Counsel
  - a. Failure to properly move for a directed verdict
  - b. Failure to properly cross-examine a prosecution witness
  - c. Trial counsel should have requested that the judge grant a continuance in order to investigate when the solicitor did not call the only witness claiming that Applicant did not commit the crime of burglary
  - d. Failure to advise and properly prepare Applicant to testify in his defense
2. Trial Judge erred
  - a. In failing to grant Applicant's directed verdict motion

In an amended Application filed on September 24, 2017 through PCR counsel, Applicant amended his allegations to:

1. Ineffective Assistance of Trial Counsel
  - a. Failing to call Lt. Cook as a defense witness and the eye-witness who gave a statement to Lt. Cook.
  - b. Failure to seek motion to sever Applicant's trial from codefendant's trial.
  - c. Failure to object to the solicitor's closing argument.
2. Ineffective Assistance of Appellate Counsel
  - a. Failure to raise on appeal the trial court's failure to charge the jury on Burglary 3<sup>rd</sup> degree as was requested by trial counsel.

## **III. SUMMARY OF FACTS**

On the evening of November 23, 2013, the Hampton Police Department received a complaint regarding a burglary in progress at the home of Charles DeLoach located at 108



Plywood Street in Hampton, South Carolina. (R. pp. 144, 149). DeLoach had passed away in September, 2013 and his daughter and other family members frequently stayed at the home while tending to DeLoach's affairs and closing his estate. (R. pp. 19-22, 128-29). Lt. Cook from the Hampton Police Department completed an incident report and listed that multiple suspects were seen leaving the home with bags. (R. p. 149). The following morning, November 24, 2013, law enforcement with the Hampton Police Department received another complaint regarding a home invasion at the DeLoach residence. (R. p. 21). Sergeant Bradford Drowdy responded to the home and heard movement inside. (R. p. 21). Drowdy requested backup from the Vamville Police Department. (R. p. 21). When back-up arrived, Drowdy let the occupant of the home know that law enforcement was on the scene and would be gaining entry into the home. (R. p. 22). One of the officers noticed that a rear door was open and law enforcement made entry through the opened door. (R. p. 22). Once inside, law enforcement found Tonya McAlhaney in a rear bedroom. (R. p. 22). She was taken into custody, read her rights, and placed in handcuffs. (R. pp. 22-23). As she was being cuffed, a men's watch fell out of her pocket. (R. p. 23). She was transported to the police station. (R. pp. 22-23). Once at the station, McAlhaney was interviewed by Assistant Chief James Bolton. (R. p. 143). Bolton read McAlhaney her rights and she signed a waiver of rights acknowledgment. (R. pp. 143-44). Bolton noticed a bottle of prescription medication sticking out from McAlhaney's blouse and asked her what it was. (R. p. 144). McAlhaney replied that it was her medication, but upon closer inspection, Bolton noted that the medicine was cough syrup prescribed to DeLoach. (R. p. 144).

Bolton asked for permission to search McAlhaney's home and she gave consent. (R. p. 144). She memorialized her consent in by signing a consent to search form. (R. p. 144). After receiving McAlhaney's consent, law enforcement proceeded to her home at 510 Bobwhite Trail.

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(R. p. 145). McAlhaney accompanied law enforcement and unlocked the door. (R. p. 145). Applicant and Ricky Sauls were present at McAlhaney's home. (R. p. 145). Law enforcement asked Sauls where the items taken from DeLoach's residence were located. (R. p. 145). Sauls assisted law enforcement in recovering a bag, which contained mail addressed to DeLoach, jewelry, medication prescribed to DeLoach, Christmas decorations, and other household items. (R. pp. 145-46). Sauls also showed law enforcement where knives and liquor taken from DeLoach's home was located. (R. p. 146). Law enforcement also found more of DeLoach's mail that had been burned or attempted to be burned. (R. p. 52). Thereafter, Applicant, McAlhaney, and Sauls were charged with first-degree burglary in connection with the November 23, 2013, home invasion.

Applicant and McAlhaney proceeded to a joint trial before the Honorable Brooks P. Goldsmith and a jury. Sauls testified as a State's witness against his two codefendants. Sauls testified he was with Applicant, McAlhaney, and Larry Crosby on the evening of November 23, 2013. (R. p. 80). Applicant and Crosby worked for DeLoach's daughter and had been helping her move items out of the 108 Plywood Street residence. (R. pp. 81, 129-31). Larry Crosby informed the group that there were pills in the home and asked them to go into inside to retrieve prescription medications. (R. p. 81). Sauls testified he was romantically involved with McAlhaney and asked her not to participate. (R. p. 81). However, Applicant, McAlhaney, and Sauls all entered DeLoach's home at approximately 7 p.m. (R. pp. 81-82, 101). Sauls testified Applicant went to sleep inside the home, but testified that all three took items from the home. (R. pp. 83, 89-90, 124).

He elaborated that all three, including Applicant, were "plundering" the home for items to take. (R. p. 124). He testified they took knives, liquor, medications, Christmas ornaments, documents, and other sundries from the home. (R. p. 83). Sauls testified that they knew they did not have permission to be in the home. (R. p. 126). After the "plundering" concluded, the three

called Crosby to pick them up. (R. p. 89). DeLoach's daughter, Amanda DeLoach Brown, also testified for the State. She testified that she and her children had been primarily living at her father's home since his passing so that she could manage his business and other affairs while closing his estate. (R. pp. 128-29, 134). She testified that the house was fully furnished with operation utilities and there was food in the refrigerator and clothing in the closets. (R. p. 132). She testified that she had been moving some of her grandmother's things out of the home, but the house was not being vacated. (R. p. 130). She testified that she left the home on Tuesday, November 19, 2013 to take her son to a dental appointment in Greenville and let employees, including Applicant and Crosby, know she would be out of town for a few days. (R. pp. 129-30). She testified she intended to return to the home shortly. (R. p. 129).

She did not give Applicant, McAlhaney, Sauls, Crosby, or anyone else permission to be in the home. (R. p. 131). She testified that she secured the home as she always did when leaving. (R. p. 132). DeLoach's sister, Roma Muller, also testified for the State. She testified that the 108 Plywood Street home was originally her mother's home and DeLoach had lived there alone after her mother's passing. (R. pp. 48-50). She testified that the house was used by various members of the family, but as of recent, was primarily used by DeLoach's daughter Amanda. (R. pp. 49-50). She testified that the house was currently in probate and she was a partial owner. (R. pp. 48-50). She was able to identify various belongings taken from the DeLoach home. (R. pp. 52-53, 57-60). She testified that she did not give any of the co-defendants permission to be in the home. (R. p. 63).

At the conclusion of the State's case, Applicant moved for a directed verdict, arguing that the State failed to establish that Applicant had the intent to commit a crime when he entered the residence. (R. pp. 160-61). The State replied that intent can be inferred from his entry into the

home at nighttime through a closed door without permission. (R. pp. 161-63). The Court denied Applicant's motion and submitted the case to the jury. (R. pp. 163-64). Applicant elected not to present a defense. The jury convicted Applicant and McAlhancy of first degree burglary as indicted.

#### IV. SUMMARY OF TESTIMONY

Applicant claimed Counsel said they would offer him ten years and he would have accepted if it was a 65% offense. Applicant claimed Counsel met with him only once for ten minutes. Applicant claimed Counsel did not review discovery with him, discuss trial strategy, or advise him of the legal theory hand of one is the hand of all. Applicant claimed he sent a letter to Appellate Counsel with eight pages of issues he wanted her to dispute.

Counsel testified she made a motion to sever prior to trial, it was discussed in chambers with the trial judge and he denied her motion. Counsel testified the trial strategy was to allege Applicant did not have intent to commit a crime inside the residence because he did not personally take anything. She testified there was no conflict with the co-defendant being represented by the public defender's office because her office created a Chinese wall to avoid information exchange on their respective clients. Counsel testified she visited Applicant several times, relayed the ten-year plea deal, went over discovery, and discussed his co-defendant testifying against him at trial. She testified counsel and the judge had a conference and discussed the possibility of severing the codefendant's trials. She testified Judge Goldsmith made it clear such a motion would be denied. She testified she did not believe the closing argument of the Solicitor was improper and, thus, did not object to it.

Appellate Counsel testified she does not raise frivolous issues in merits briefs. She testified that disbelieving the State's evidence is not enough to legally obtain a charge for a lesser-included

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offense; there must be evidence to show the lesser-included offense occurred. Even if the house was deemed a building, the charge would not have been burglary third degree because the fact that the burglary occurred at night was undisputed. Therefore, it was not a meritorious issue and not proper for a merits brief.

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

This Court finds that Applicant has failed to satisfy his burden to prove that either Counsel were deficient or that he was prejudiced by either Counsels' alleged deficiencies. Applicant bears the burden of proving the 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, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 1984. The proper measure of performance is whether Counsels provided representation within the range of competence required in criminal cases. Id.

This Court finds Applicant's testimony lacked credibility and Counsel and Appellate Counsel's testimony were credible. This Court finds that Applicant has failed to satisfy his burden to prove that Counsels' actions were deficient. Applicant also failed to prove he was prejudiced by Counsels' alleged deficiencies. This Court finds Trial Counsel properly prepared for Applicant's trial. This Court finds Trial Counsel elucidated valid trial strategies in defending Applicant and preparing for trial. This Court finds Trial Counsel rendered adequate assistance and exercised professional judgment in his decisions at trial. This Court dismisses Applicant's application for the reasons set out below:

#### **A. Ineffective Assistance of Trial Counsel**

In evaluating allegations of ineffective assistance of counsel, the court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117, 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. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, Counsels' deficient performance must have prejudiced 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. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 1992.

**1. Failure to call Lt. Cook as a defense witness and the eye-witness who gave a statement to Lt. Cook.**

Applicant failed to show what the testimony of the witnesses Applicant alleged Counsel failed to call would have been or that it would have benefited Applicant at trial. Applicant's assertion Counsel should have called Lt. Cook and the witness, who Applicant alleged said Applicant was not at the scene, was based on pure speculation. Applicant did not prove what Lt. Cook or the unknown witness would have testified to. A court need not first determine whether

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counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668. "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." State v. Glover, 318 S.C. 496, 498–499, 458 S.E.2d 538, 540. "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998). The only evidence Applicant presented regarding witness testimony or further investigation was speculation on the part of Applicant, whose testimony was found to lack credibility.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for failing to call witnesses. This Court also finds Applicant failed to prove he was prejudiced by Counsel's failure to call witnesses such that there was a reasonable probability the result of the trial would have been different had the witnesses been called. Accordingly, this Court denies and dismisses this allegation.

**2. Failure to seek motion to sever Applicant's trial from codefendant's trial.**

Applicant argued Counsel erred by failing to put the motion to sever on the record to preserve it for appeal. "A severance should be granted only when there is a serious risk that a joint trial would compromise *a specific trial right* of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt." State v. Spears, 393 S.C. 466, 475, 713 S.E.2d 324, 329 (Ct. App. 2011).

Counsel testified herself, defense counsel, and the judge had a pre-trial conference and discussed the possibility of severing the co-defendant's trials. Counsel further testified Judge Goldsmith denied the motion to sever. This was not put on the record.

Here, Applicant was unable to show why Applicant's trial rights were specifically compromised by the judge's failure to grant a motion to sever. This Court finds there was no legal reason to sever the case. Therefore, Counsel was not deficient for failing to preserve the motion to sever for appeal because there was no legal reason to sever the case.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for failing to make a motion to sever Applicant's trial from his codefendant's trial. This Court also finds Applicant failed to prove he was prejudiced by Counsel's failure to make a motion to sever the trial on the record such that there was a reasonable probability the result of the trial would have been different had the witnesses been called. Accordingly, this Court denies and dismisses this allegation.

**3. Failure to object to the solicitor's closing argument.**

Applicant argued Counsel was ineffective by failing to object to the following portion of the solicitor's closing argument. "You're going to be an independent person, look at the facts, and make a decision and decide do you want people in the community to go in people's houses at night time and then get charged with a lesser charge, or do you want them to be found guilty of what the statute says they did, go into a house without consent and at night time with the intent to commit a crime therein." (R. pp. 305-306). Counsel testified she did not believe the statement was objectionable or improper. This Court agrees.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for failing to object to a statement that was not objectionable. This Court also finds Applicant failed to prove

he was prejudiced by Counsel's failure to object to the solicitor's closing argument such that there was a reasonable probability the result of the trial would have been different had she made the objection. Accordingly, this Court denies and dismisses this allegation.

**B. Ineffective Assistance of Appellate Counsel**

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

Applicant must show appellate counsel's performance was deficient and he was prejudiced by the deficiency. Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

**1. Appellate Counsel failed to brief the trial court's failure to charge the jury on Burglary 3rd degree as requested by trial counsel.**

Appellate Counsel testified that disbelieving the State's evidence is not enough to legally obtain a charge for a lesser-included offense; there must be evidence to show the lesser-included offense occurred. This Court agrees. "The possibility that the jury might have disbelieved the State's evidence... did not entitle him to have the lesser offense submitted to the jury where all the evidence admitted at trial pointed to the appellant's guilt of assault and battery of a high and

aggravated nature.” State v. Geiger, 370 S.C. 600, 609, 635 S.E.2d 669, 674 (Ct. App. 2006). Even if the house was deemed a building instead of a residence as argued by the State, the charge could not have been reduced to burglary 3<sup>rd</sup> degree because it was undisputed that the burglary occurred at night. Tr. 256 – 258. If a building is burgled with an aggravating factor the correct charge is burglary 2<sup>nd</sup> degree, non-violent. See S.C. Code Ann. 16-11-312(B). Therefore, it was not a meritorious issue and Appellate Counsel did not err by failing to brief the issue.

Accordingly, this Court finds Applicant failed to prove Appellate Counsel was deficient for not briefing the judge’s ruling. Applicant also failed to prove he was prejudiced by Appellate Counsel’s failure to raise the judge’s ruling on denying the lesser-included jury charge of Burglary 3<sup>rd</sup>. Accordingly, this Court denies and dismisses this allegation.

#### VI. CONCLUSION

Based on 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 Applicant must file and serve a notice of appeal within thirty 30 days from receipt 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, 409 S.E.2d 395 1991, Applicant has a right to appellate counsel’s assistance in seeking review of the denial of post-conviction relief. Rule 71.1g, SCRCPP, provides that if Applicant wishes to seek appellate review, his post-conviction relief attorney must serve and file a notice of appeal on Applicant’s behalf. Applicant and his attorney are directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

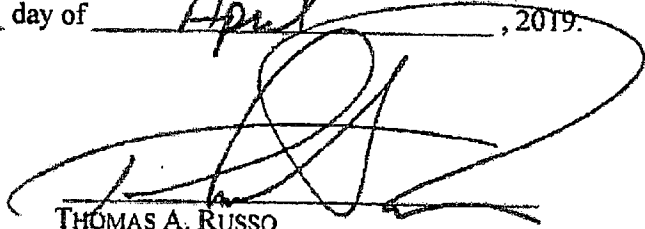
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**IT IS THEREFORE ORDERED THAT:**

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 25<sup>th</sup> day of April, 2019.



THOMAS A. RUSSO  
Presiding Judge  
14<sup>th</sup> Judicial Circuit

Florence, South Carolina

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