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AUG 4 2019

S.C. SUPREME COURT

July 12, 2019

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

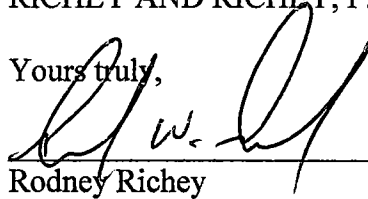
RE: Rashaad Thomas vs. The State of South Carolina
Case No: 2018-CP-42-00703

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and an affidavit of service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Please clock and file the copies and return them to me. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,


Rodney Richey

RWR/
Enclosures
cc: Johnny Ellis James, Jr., Esquire

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM SPARTANBURG COUNTY

Court of Common Pleas
HONORABLE THOMAS RUSSO
2018-CP-42-00703

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AUG 14 2019
S.C. SUPREME COURT

RASHAAD THOMAS, SCDC# 344003

APPELLANT,

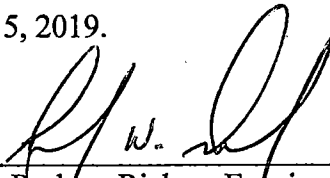
vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Rashaad Thomas appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Thomas Russo, Circuit Judge on March 7, 2019 an Order issued on June 28, 2019 and filed on July 12, 2019. The Appellant received notice of the judgment on July 15, 2019.



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Other Counsel of Record:
Johnny Ellis James, Jr, Esquire
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Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT
APPEAL FROM SPARTANBURG COUNTY

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AUG 14 2019

Court of Common Pleas

HONORABLE THOMAS RUSSO S.C. SUPREME COURT

2018-CP-42-00703

RASHAAD THOMAS, SCDC# 344003

APPELLANT,

vs.

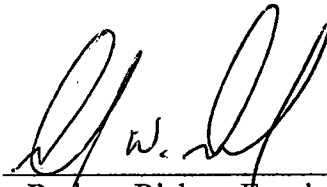
STATE OF SOUTH CAROLINA,

RESPONDENT.

AFFIDAVIT OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on July 12, 2019, addressed to their attorney of record, Johnny Ellis James, Jr., Esquire Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: July 12, 2019



Rodney Richey, Esquire
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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Rashaad Thomas,
S.C.D.C. No. 344003,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2018-CP-42-00703

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ORDER OF DISMISSAL

S.C. SUPREME COURT

This matter comes before the Court by way of an application for post-conviction relief filed by Rashaad Thomas ("Applicant") on February 26, 2018. Respondent made its return on or about May 8, 2018. The Court convened an evidentiary hearing into the matter on Thursday, March 7, 2019, at the Spartanburg County Judicial Center in Spartanburg, South Carolina. Applicant was present at the hearing and represented by Rodney W. Richey, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, Travis A. Moore, Esq. ("Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original plea transcript, the records of the Spartanburg County Clerk of Court regarding the subject convictions, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to order of commitment of the Spartanburg County Clerk of Court. Applicant was indicted at the June 2017 term of the Spartanburg County Grand Jury for armed robbery (2017-GS-42-02883), and

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burglary, second degree (2016-GS-42-02884).¹ Travis A. Moore, Esq. represented Applicant, and Spenser H. Smith, Esq., of the Seventh Circuit Solicitor's Office, prosecuted the case. On February 7, 2018, Applicant pled guilty to as indicted. The Honorable Roger L. Couch sentenced Applicant to imprisonment for concurrent terms of 20 years for armed robbery and 15 years for burglary. Applicant did not appeal his plea or sentence.

Present Application

In his post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:

1. "Ineffective Counsel"
 - a. "I informed my counsel of evidence I possessed proving my innocence"
 - b. "Counsel refused to call and subpoena witnesses and other evidence (pictures, video, and phone messages) while pushing me into a guilty plea. If evidence had been obtained, my alibi could have been verified and a not guilty verdict could have been made in a trial."

Applicant filed a *pro se* amendment on February 22, 2019, raising the following additional grounds for relief (excerpted verbatim):

1. "Plea was entered based upon Travis Moore's failure to investigate."
 - a. "In the motion of discovery State prosecutor Spenser Smith admitted that investigator Michael Walsh lacked probable cause based on the sole testimony of a codefendant that lied twice to authorities and then was not charged as a principal proving he lacked personal knowledge."
 - b. "Travis Moore did not investigate the state admitted to lacking probable cause in my arrest and admitted to telling appellant he was guilty; proven by court transcripts page 17 lines 7-9."
 - c. "Travis Moore contested facts and appellant's participation proven by court transcripts page 18 lines 9-12; line 25; page 19 lines 1-2."
 - d. "Travis Moore never objected to the lies the state was caught in by the judge on page 21 lines 5; liens 13-16; lines 19-21."
2. "Travis Moore did not explain to appellant what a no contest plea was proving ineffective assistance of counsel according to [North Carolina v. Alford]."

¹ Applicant was additionally indicted for attempted murder (2017-GS-42-02882). That indictment was dismissed *nolle prosequi* as part of the plea.

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2019 JUL 12 PM 3:16

Applicant requests relief as follows:

- "I request either a trial or charges dismissed."

At the evidentiary hearing, Applicant proceeded forward on the *pro se* amended allegations.²

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or 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." Butler, 286 S.C. at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 690). The applicant must overcome this

² Respondent moved to strike the *pro se* filing at the outset of the evidentiary hearing as impermissible hybrid representation. Applicant, through PCR counsel, moved to continue the matter, to which Respondent also objected. This Court denied the motion to continue, and denied the motion to strike, proceeding on the *pro se* amendments over Respondent's objections.

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SPARTANBURG COUNTY
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presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

“Judicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). “[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

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, 386 S.E.2d at 625 (citing Strickland, 466 U.S. 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 (citing Strickland, 466 U.S. at 694).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696. A court need not first determine whether 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. Id. at 696-97.

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1. Failure to Investigate

The Court finds no merit in Applicant's claim that Counsel was ineffective in failing to adequately investigate the circumstances and probable cause for his initial arrest. In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

At the evidentiary hearing, Applicant testified to his belief that the State lacked probable cause to arrest him, and asserted that the lead investigator on his case admitted he lacked probable cause. Applicant expressed his belief the prosecution was engaged in misconduct. Applicant declared he pled guilty only because Counsel told him he was guilty, but Applicant claimed he was factually innocent. Applicant testified Counsel told him that his presence was tantamount to guilt, and did not tell Applicant that he had to aid or abet. On cross-examination Applicant denied being at the scene of the robbery, denied standing outside, and denied acting as a look out. Applicant denied touching anybody. Applicant admitted Counsel never told him that he could not have a trial, and that he was aware of his trial rights. Confronted with his admission

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to the plea court that he was pleading guilty because he was in fact guilty, Applicant testified that he lied to the plea court.

Counsel testified that at one point in the course of the investigation, Investigator Walsh lacked probable cause, but subsequently developed facts to establish probable cause and issued an arrest warrant. Counsel recalled that the victims knew two of the co-defendants, who were arrested and gave law enforcement information leading to Applicant's involvement and arrest. Counsel opined that Applicant, like many of his clients, had difficulty understanding accomplice liability. Counsel testified his client at times would deny his presence, and at other times would acknowledge his presence at the scene. Counsel also testified that a co-defendant, William Meadows, at one point wrote a letter denying Applicant's presence at the scene; Meadows' attorney subsequently reported to Counsel that Meadows recanted the letter, indicating he wrote it out of fear of Applicant. Counsel explained that witnesses who could have exonerated Applicant became witnesses for the State, and that the State reported one victim indicated he would be able to identify Applicant.

On cross-examination, Counsel testified he filed motions pursuant to Rule 5, SCRCrimP, and Brady. Counsel affirmed he received materials responsive to the motions, reviewed the materials with Applicant, and gave him a copy. Counsel explained the original trial strategy was that Applicant was not identified because he was not present at the scene, but the co-defendants flipping to the State's favor defeated that strategy. Counsel recalled following up on Meadows becoming a State's witness, and that when he reported Meadows noble perfidy to Applicant, Applicant revealed an alibi witness for the first time in the form of an individual named Nick Cash. Counsel could find no notes of a conversation with Cash, but could not imagine failing to contact him. Counsel recalled going to Holden's Ranch, the scene, for lunch, and that he had

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S.C. 313, 338 S.E.2d 329 (1985)). The Court is aware of no authority to provide that defense attorneys are compelled to explain the concept of a *nolo contendere* or Alford plea. Further, because such please are treated as a guilty plea, any advice regarding them *per se* could not have changed the outcome of Applicant's plea. Still further, there is no evidence the State would have been willing to negotiate the dismissal of the charge for attempted murder had Applicant been only willing to enter a *nolo contendere* plea. For all of these reasons, Applicant cannot show any ineffectiveness of Counsel by way of this allegation, and his request for relief is **DENIED**.

[Conclusion and signature on following page]

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III. CONCLUSION

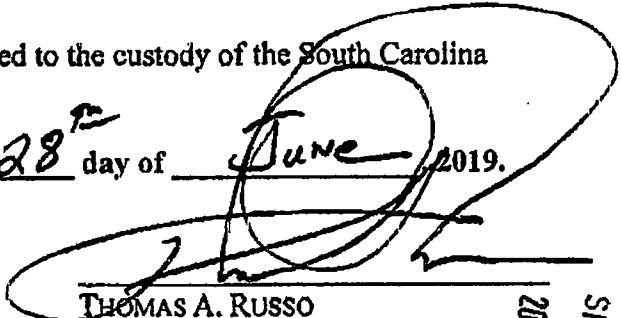
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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, 409 S.E.2d 395 (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:

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 28th day of June, 2019.



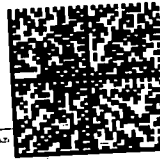
THOMAS A. RUSSO
Presiding Judge
Seventh Judicial Circuit

Florene, South Carolina

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The Honorable Daniel E. Shearouse
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