

The Law Office of Tristan M. Shaffer

Litigation • Injury Law • Criminal Defense

November 22, 2016

Daniel E. Shearouse
The Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED

NOV 28 2016

S.C. SUPREME COURT

Re: Derrick Fishburne v. State 2012-CP-15-0814

Dear Mr. Shearouse,

Please find the enclosed Notice of Appeal, Certificate of Service, and Order of Dismissal in the above referenced case.

Sincerely,



Tristan M. Shaffer

CC:
Ruston Neely
Colleton County Clerk of Court

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NOV 28 2016

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Edgar Dickson, Circuit Court Judge

Case No. 2012-CP-15-0814

Derrick Fishburne # 341860,

Petitioner,

v.

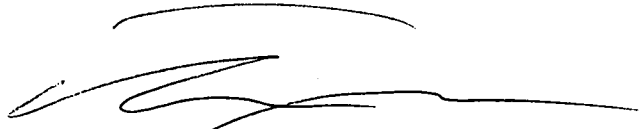
The State of South Carolina,

Respondent.

NOTICE OF APPEAL

Petitioner appeals the Order of the Honorable Edgar Dickson dismissing his post-conviction relief action filed on December 21, 2015. Petitioner received this Order on October 24, 2016.

November 22, 2016



Tristan M. Shaffer (SC Bar 77565)
225 Columbia Ave.
Chapin, South Carolina 29036
(803) 941-7514
tristan@shafferlawsc.com
Attorney for Petitioner

Other Counsel of Record:
Ruston Neely
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM COLLETON COUNTY
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Case No. 2012-CP-15-0814

Derrick Fishburne # 341860,

Petitioner,

v.


The State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on The State of South Carolina by mailing a copy to the Attorney General's Office at P.O. Box 11549, SC 29211 on the date listed below.

November 22, 2016



Tristan M. Shaffer (SC Bar 77565)
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Attorney for Petitioner

Other Counsel of Record:
Ruston Neely
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211
Attorney for Respondent

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NOV 28 2016
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
COUNTY OF COLLETON)

IN THE COURT OF COMMON PLEAS)
FOURTEENTH JUDICIAL CIRCUIT)

Derrick Fishburne, #341860,)

2012-CP-15-0814)

Applicant,)

ORDER OF DISMISSAL)

v.)

State of South Carolina,)

Respondent.)

PATRICIA C. GRANT
COLLETON COUNTY
COMMON PLEAS
2015 DEC 21 AM 9:42

This matter comes before the Court by way of an Application for Post-Conviction Relief filed October 16, 2012. Respondent made its Return on July 15, 2013. An evidentiary hearing into the matter was convened on October 27, 2014, at the Beaufort County Courthouse. Tristan M. Shaffer, Esquire represented the Applicant. Ashleigh Wilson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, Applicant testified on his own behalf. David Matthews, Esquire also testified. This Court had before it a copy of the records of the Colleton County Clerk of Court, records from the South Carolina Department of Corrections, and the trial transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Colleton County Clerk of Court. The Applicant was indicted at the June 2009 term of the Colleton County Grand Jury for murder (2009-GS-15-0256) and possession of a weapon during the commission of a violent crime (2009-GS-15-0255). The Applicant was represented by David Matthews, Esquire.

The Applicant proceeded to trial and was found guilty as indicted. The Applicant was sentenced by the Honorable Perry M. Buckner to confinement for a period of forty (40) years for murder and five (5) years for possession of a weapon during the commission of a violent crime. The sentences are to be served concurrently.

A timely Notice of Appeal was filed on behalf of the Applicant. The appeal was perfected by Robert M. Dudek, Esquire, of the South Carolina Office of Appellate Defense. The South Carolina Court of Appeals dismissed the appeal. State v. Fishburne, No. 2012-UP-363 (S.C. Ct. App. June 20, 2012). The Remittitur was issued on July 6, 2012.

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

1. Ineffective Assistance of Counsel
2. "Illegal Sentence Enhancement in Violation of S.C. Code Ann. § 16-3-10."

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 further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. 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) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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.

This Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. This Court had a copy of the Clerk's records and has read the trial transcript, all of which assists the Court in judging the witnesses' credibility.

The Court finds that Applicant has failed to meet his burden of proof in establishing ineffective assistance of counsel. Applicant did not provide his alleged alibi witnesses at the evidentiary hearing nor did he locate and/or interview those witnesses within 30 days from the evidentiary hearing as ordered by Judge Dickson. See Bannister v. State, 333 S.C. 298, 509 S.E.2d

807 (1998) (An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial). Therefore, this application for post-conviction relief is denied.

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), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on Applicant's behalf. Applicant's 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 Respondent.

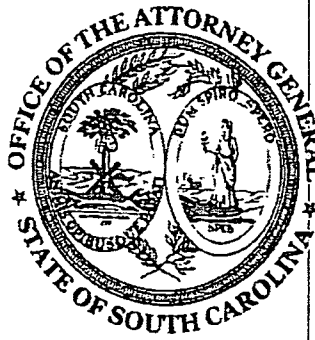
AND IT IS SO ORDERED!



Edgar W. Dickson
Presiding Circuit Court Judge
Fourteenth Judicial Circuit

Dec. 15, 2015

Orangeburg, South Carolina



ALAN WILSON
ATTORNEY GENERAL

December 16, 2015

The Honorable Patricia C. Grant
Clerk of Court, Colleton County
PO Box 620
Walterboro, SC 29488-0028

Re: Derrick Fishburne #341860 v. State of South Carolina
2012-CP-15-0814

Dear Ms. Grant:

Enclosed please find the signed original **Order of Dismissal** in the above captioned case for filing in your office. If you have any questions or concerns, please contact me at (803) 734-3737.

Sincerely,

J. Rutledge Johnson
Assistant Deputy Attorney General

JRJ/em

cc: Tristan M. Shaffer, Esq.

STATE OF SOUTH CAROLINA
COUNTY OF COLLETON
IN THE COURT OF COMMON PLEAS

DERRICK FISHBURNE, #341860,

Applicant,

v.

STATE OF SOUTH CAROLINA,

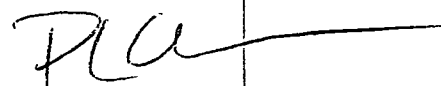
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Order of Dismissal**
(2012-CP-15-0814) has been served upon the applicant by mailing one (1) copy in the United
States mail, postage prepaid, addressed to:

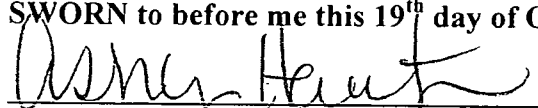
Mr. Tristan Michael Shaffer
Shaffer Law Firm
225 Columbia Ave.
Chapin, SC 29026

This 19th day of October, 2016.



Ruston W. Neely
Attorney for Respondent

SWORN to before me this 19th day of October, 2016.



Notary Public for South Carolina.
My Commission Expires: 3-18-2023

Law Office of Tristan M. Shaffer
225 Columbia Ave.
Chapin, SC 29036



Daniel E. Shearouse
The Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211