

# The Law Office of Tristan M. Shaffer

Litigation • Injury Law • Criminal Defense

January 17, 2017

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

**RECEIVED**

JAN 20 2017

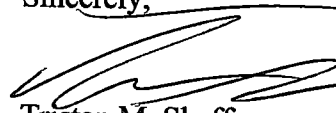
S.C. SUPREME COURT

Re: Kristopher Berry v. State 2013-CP-16-1002

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:  
Caitlin Hastings  
Darlington County Clerk of Court

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Roger E. Henerson, Circuit Court Judge

Case No. 2013-CP- 16-1002

Kristopher Berry,

Petitioner,

v.

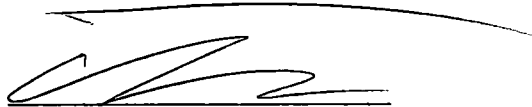
The State of South Carolina,

Respondent.

NOTICE OF APPEAL

Petitioner appeals the order dismissing his post-conviction relief action filed on November 28, 2016. This order was received by Petitioner on December 15, 2016.

January 17, 2017



Tristan M. Shaffer (SC Bar 77565)  
225 Columbia Ave.  
Chapin, South Carolina 29036  
(803) 626-0188  
tristan@shafferlawsc.com  
Attorney for Petitioner

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

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM Horry COUNTY  
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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 January 17, 2017.

January 17, 2017



Tristan M. Shaffer (SC Bar 77565)  
225 Columbia Ave.  
Chapin, South Carolina 29036  
(803) 626-0188  
tristan@shafferlawsc.com  
Attorney for Petitioner

Other Counsel of Record:  
Caitlin Hastings  
South Carolina Attorney General's Office  
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Columbia, South Carolina 29211  
Attorney for Respondent

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JAN 20 2017

S.C. SUPREME COURT

*Shay*

STATE OF SOUTH CAROLINA  
COUNTY OF DARLINGTON

) IN THE COURT OF COMMON PLEAS  
) FOR THE FOURTH JUDICIAL CIRCUIT

Kristopher W. Berry, #347006,

) Case No. 2013-CP-16-1002  
)  
)  
)

Applicant,

v.

**ORDER OF DISMISSAL**

State of South Carolina,

Respondent.

This matter came before the Court by way of an Application for Post-Conviction Relief ("PCR") filed December 19, 2013. Respondent filed a return on or about November 19, 2014. The Court convened an evidentiary hearing into the matter on January 11, 2016 at the Darlington County Courthouse. Applicant was present and represented by Tristan M. Shaffer, Esquire. Jessica E. Kinard, Esquire, of the South Carolina Attorney General's Office, represented respondent.

Applicant and Applicant's trial counsel, Paul V. Canarella, testified at the hearing. The Court had before it a copy of the trial transcript, the records of the Darlington County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, and the pleadings.

Prior to the beginning of the presentation of the cases in chief, Applicant moved for a motion for discovery alleging that, because a prosecutorial misconduct allegation was raised, it was essential to discover what exactly was produced and whether it had been turned over to defense counsel. Applicant expressed a desire to speak to parents of other students, depose Lyle<sup>1</sup> witnesses, and so on. Respondent opposed this motion, arguing that Applicant essentially wished to re-try the facts of the case. This Court denied the motion and order that the hearing proceed because the Applicant was

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CLERK OF COURT  
DARLINGTON COUNTY, S.C.

<sup>1</sup> State v. Lyle, 118 S.E. 803 (S.C. 1923) 125 S.C. 406 (regarding the use of witnesses to establish prior bad acts).

*[Handwritten signature]*

aiming to produce information from witnesses that had already been heard. Applicant also noted for the record that the Honorable Paul M. Burch, Jr. previously recused himself from hearing this case because his daughter was a prosecutor in the matter; Applicant similarly requested that this Court's current clerk not being involved, as he is the son of Judge Burch. This was acknowledged and granted.

## I.

In September 2010, the Darlington County Grand Jury indicted Applicant for criminal solicitation of a minor (2010-GS-16-1364) and lewd act (2010-GS-16-1363). Paul V. Cannarella, Esquire, represented Applicant. On July 18, 2011, Applicant proceeded to trial before the Honorable J. Michael Baxley and a jury. On July 21, 2011, the jury found Applicant guilty as indicted. Judge Baxley sentenced Applicant to ten (10) years imprisonment, suspended upon the service of five (5) years active service and five (5) years of probation.

Applicant filed a timely notice of appeal. Dayne C. Phillips, Esquire, and Carmen V. Ganjehsani, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on October 30, 2013. State v. Berry, Op. No. 2013-UP-396 (S.C. Ct. App. filed October 30, 2013). The remittitur was returned to the circuit court on November 18, 2013.

Applicant filed a Petition for a Writ of Habeas Corpus in the United States District Court for the District of South Carolina on March 18, 2013. On May 22, 2013, the Honorable Richard M. Gergel dismissed the petition without prejudice to allow Applicant to exhaust his state remedies.

## II.



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

1. "Ineffective assistance of counsel"
2. "Rule 5 violations by the State"
3. "Brady and progeny violations by State"

Applicant elaborated on his claims in an eighteen (18) page attachment to his applications.

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

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court finds Counsel's testimony credible and Applicant's testimony less than credible. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003). Furthermore, this Court finds that Applicant abandoned all allegations except for those specifically addressed below.

#### **A. Summary of Testimony**

##### **Kristopher Berry, Applicant**

Applicant testified first, and stated that he was seeking a new trial and was well aware of the potential consequences, including that he could return to prison even though he has served his sentence. He testified briefly about his life before and after his conviction, particularly that he lost his job as a result of it, and was no longer allowed to volunteer at the gymnastics center where the incident occurred. Applicant spoke kindly of trial counsel, and admitted that he was a pushy client who got more worried about his trial as it drew closer. He further testified that he tried to take some of the work off of trial counsel by helping to prepare, and he began to feel like trial counsel did not believe his version of events. He stated that he was unsure of what the trial strategy actually would



be, and felt like it was a conglomeration of many different strategies. Applicant testified regarding many legal points, such as whether the testimony of Lyle, supra, witnesses should have been allowed, and whether this prevented him from exercising his right to face an accuser. He further discussed his thoughts on the investigation into his cell phone, and whether that constituted a Brady<sup>2</sup> violation. Applicant believed that the failure of SLED to analyze the phone in a timely manner, and thus allow the text messages to be erased by an auto-delete feature, kept him from receiving exculpatory evidence; however, he acknowledged that trial counsel tried very hard to get the phone analyzed and his text messages pulled. He further testified that there were several witnesses that he mentioned to trial counsel who were not called, but may have been able to speak to his good character. He also testified that he believed that records were subpoenaed from the gymnastics center, but were not received. Applicant's last complaint was that, during closing argument, trial counsel seemed to be seeking leniency from the jury, and felt that this was counterproductive to the strategy of finding him innocent.

Applicant also testified about some factual issues that he believed were misrepresented in his case. He admitted that the interactions he was undertaking with the victim would have provided probable cause for law enforcement to investigate; however, he characterized his actions as those of a Marine trying to accomplish a mission. The mission, as he understood it, was to remove a dangerous boy from the life of one of his students. To accomplish this, he provided her with a cell phone and digital camera, and requested that she not tell anyone about them. Applicant admitted to discussing this with his daughter, who understood his sometimes crude and sexual sense of humor. He testified that he found that his sense of humor helped his gymnastics students to open up. Separately, Applicant testified that he was unprepared for the fact that his time in the Marine Corps

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<sup>2</sup> Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963).

may be mentioned at trial. Applicant was questioned regarding the indiscretions alleged, such as misappropriating a computer and sleeping with a potential recruit, and admitted to both of these, as well as to receiving an administrative or other than honorable discharge.

Trial counsel

Regarding overall strategy and the facts at hand, trial counsel testified that there was no contesting the facts that Applicant gave the victim the camera and phone, and that her parents did not know about them. He further testified that Applicant wanted the strategy to be that he was doing all of this to help the victim get over a relationship, but trial counsel could not get around the fact that the digital camera contained nude photos of Applicant. Trial counsel believed that he was very successful by keeping out many potentially harmful images, as well as keeping out a Lyle, supra, witness. Part of the strategy involved informing the jury that the victim had already been intimately involved with someone that was legally considered an adult. Overall, however, the strategy was to negate any intent that the jury may have thought Applicant had to commit these crimes.

Trial counsel testified that he felt Applicant did a good job of testifying, as well as that they must have agreed not to call character witnesses, or the Applicant would have forced him to. Trial counsel admitted that a different attorney may have called the character witnesses, but he did not feel that their testimony would be beneficial. Similarly, he did not speak to the parents of other children involved at the gymnastics center because he did not feel it would be beneficial. Trial counsel also testified that some of the witnesses he did contact backed out of testifying because they did not want to become any more involved in the case. However, trial counsel did believe that they received all discovery from the state.

Regarding specific evidence, trial counsel testified that he decided not to play a tape of the victim's forensic interview because it would have been repetitive testimony of the victim. Even

though pieces here and there may have been beneficial, overall it essentially provided the jury another chance to hear from the victim. The text messages sent by the Applicant were characterized by trial counsel as sounding sexual in nature, but there was a theory behind how Applicant worded them. However, when combined with the explicit photos, the fact that Applicant gave a phone and camera to the victim, and the lack of parental knowledge of these occurrences, trial counsel did not believe that a jury would agree that Applicant was only trying to help the victim.

Trial counsel also testified that he "could've walked him out of there," as there was a plea offer that would have allowed Applicant to serve probation only, along with the collateral consequences that most sexual offenses carry, such as monitoring and registries. At trial, trial counsel did not testify as to whether he recommended this offer to Applicant, though he implied at the post-conviction relief hearing that he strongly advised Applicant to plead.

#### Rebecca Berry

Applicant's daughter, Rebecca Berry, was called by the Applicant to testify. PCR counsel began to question her about her father's sense of humor, as well as some factual issues in the case. Respondent objected to all of these questions based on relevance, and this objection was sustained. This Court felt that Applicant was attempting to retry the underlying case rather than to focus on the collateral issues at hand.

#### B. Ineffective Assistance of Counsel

In this post-conviction relief action, 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) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of trial counsel as a ground for relief, Applicant must prove trial 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.” Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether trial counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). 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 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, Applicant must prove trial counsel’s performance was deficient. Id. Under this prong, the Court measures trial counsel’s performance by its “reasonableness under prevailing professional norms.” Id. (citing Strickland, 466 U.S. at 688). Second, trial counsel’s 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.” Id. at 117-18, 386 S.E.2d at 625.

This Court finds Applicant has failed to show Counsel’s performance fell below an objective standard of reasonableness. Counsel’s testimony indicated he was extremely familiar with the facts of Applicant’s case. This Court finds Counsel met with Applicant an adequate number of times and was familiar with the discovery materials. Counsel indicated he explained Applicant’s constitutional rights, and he explained the differences between going to trial and entering a guilty plea, especially in light of the favorable plea that was placed on the record. Counsel indicated he never had trouble

communicating with Applicant, and he never had any concern that Applicant did not fully understand their conversations.

Counsel refuted all allegations that Applicant made in his application as well as during his testimony including, but not limited to, issues regarding Applicant's cell phone and text messages; their differing views of strategy; the fact that, though counsel is hired by Applicant and should respect his wishes, counsel should be trusted to try the case to the best of his or her ability; that trying a case costs money and more money means more resources at hand; issues regarding sentencing; issues regarding prior charges; and discovery matters. This Court finds that, through the presentation of evidence at the post-conviction relief hearing, Applicant has failed to demonstrate both deficiency by trial counsel, as well as any prejudice caused by trial counsel's actions. Therefore, this allegation is denied and dismissed with prejudice.

#### C. Discovery Violations

This Court finds Applicant's allegation that the solicitor failed to turn over any required evidence is without merit. An individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555 (1995). A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., 434 S.E.2d at 268. This Court finds Applicant failed to prove that the State violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to disclose exculpatory material that would indicate that Applicant was not guilty of the crimes with which



he was charged. In fact, Applicant failed to produce any evidence tending to show that that prosecution withheld information that may have helped him or change the outcome of the case. Therefore, this allegation is denied and dismissed with prejudice.

#### D. All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

#### IV. CONCLUSION

Based on the foregoing, the 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. The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's 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 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is 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 IT IS SO ORDERED this 10<sup>th</sup> day of November, 2016.

  
THE HONORABLE ROGER E. HENDERSON  
Presiding Judge  
Fourth Judicial Circuit

, South Carolina

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SCOTT S. SUGGS  
CLERK OF COURT/R.O.D.  
DARLINGTON COUNTY, S.C.

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

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