

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO COLLETON COUNTY
Court of Common Pleas
J. Edgar Dickson, Circuit Court Judge

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Feb 04 2021

S.C. SUPREME COURT

Case No. 2012-CP-15-0814

Derrick Fishburne, #00341860 Respondent,

v.

State of South Carolina, Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable J. Edgar Dickson's order granting post-conviction relief filed January 11, 2021. The State received the order on January 11, 2021. A copy of the order is attached hereto.

February 4, 2021

Respectfully submitted,

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF COLLETON)	
)	
Derrick Fishburne, # 00341860,)	Case No.: 2012-CP-15-0814
)	
)	
Applicant,)	Order Granting Applicant's Motion to Alter
)	or Amend and Order Granting Post-
)	Conviction Relief
v.)	
)	
The State of South Carolina,)	
)	
Respondent.)	

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COLLETON COUNTY
COMMON PLEAS COURT

This matter comes to the Court by way of Applicant's request for post-conviction relief (PCR). An order denying PCR was filed on December 21, 2015, and a supplemental order denying PCR was filed on December 3, 2019. Applicant filed a Motion to Alter or Amend on December 27, 2019. The Court hereby grants Applicant's Motion to Alter or Amend and grants Applicant post-conviction relief by way of a new trial.

PROCEDURAL HISTORY

Applicant was indicted by the Colleton County Grand Jury for the offenses of murder and possession of a firearm during a violent crime. Applicant's case was called to trial on July 19, 2010, before the Honorable Perry M. Buckner. David Matthews, Esq. represented Applicant. Deputy Solicitor Sean Thornton represented the State.

On July 21, 2010, the jury found Applicant guilty on both counts. Judge Buckner sentenced Applicant to forty years imprisonment for murder, and five-years imprisonment for possession of a weapon during a violent crime.

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Applicant filed a timely notice of appeal. Appellate Counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). The Court of Appeals dismissed the appeal on June 20, 2012.

Applicant filed his Application for PCR on October 16, 2012. An evidentiary hearing was held before this Court on October 27, 2014. Applicant was represented by Tristan M. Shaffer, and the State was represented by Ashleigh R. Wilson. The Court initially denied the PCR in an order dated December 21, 2015. Pursuant to order dated July 31, 2019, of the South Carolina Supreme Court, this matter was remanded for a supplemental order. A Supplemental Order was filed on December 3, 2019, denying the PCR application. Pursuant to Rule 59(e), SCRPC, Applicant filed a Motion to Alter or Amend the Supplemental Order.

The State believes the Court lacks jurisdiction to issue this order arguing the Motion to Alter or Amend was not timely filed. The State argues that Applicant acknowledges receiving the Supplemental Order on December 11, 2019, but the Motion to Alter or Amend was not filed until December 27, 2019. Further, the signature date of December 23, 2019, makes the motion untimely, as it was outside of ten days. The State believes that this Court lacked jurisdiction to consider the motion, and the Supplemental Order is the final substantive order in the case. Finally, the State argues that since an untimely motion does not stay the time to appeal, Applicant has missed his time to file a timely Notice of Appeal.

However, this Court finds that Rule 59(e) requires that the motion be “served not later than 10 days after the receipt of written notice of entry of order.” SCRPC, Rule 59(e). The Applicant received the order on December 11, 2019. Normally, the deadline to “serve” the motion would be December 21, 2019. However, December 21, 2019, was a Saturday; therefore, the Rule 59(e) motion must be “served” by December 23, 2019. *See* Rule 6(a), SCRPC. As indicated by the cover

letter provided by counsel, the motion was mailed pursuant to Rule 5(b)(1) on December 23, 2019. Thus, this Court finds that it does have jurisdiction to consider and rule upon this motion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to S.C. Code § 17-27-80, the Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. The Court was able to pass on the credibility of witnesses. The Court makes the following findings.

In order to receive relief for ineffective assistance of counsel, an Applicant must make the following showings: 1) Applicant must show that his trial counsel's performance was deficient; and 2) Applicant must demonstrate that this deficiency prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance occurs when the representation is objectively unreasonable under prevailing professional norms. *See Strickland*, 466 U.S. at 688. To succeed on a claim of ineffective assistance of counsel, deficient performance must be shown by a preponderance of the evidence. *See Hall v. Catoe*, 360 S.C. 353, 358, 601 S.E.2d 335, 338 (2004).

Although articulating a valid reason for employing certain strategy may act as a defense to a finding that counsel was deficient, the defense strategy must be objectively reasonable. *See Sanchez v. State*, 351 S.C. 270, 275, 569 S.E.2d 363, 365 (2002) (finding trial counsel was ineffective when he allowed corroborating hearsay because he wanted the jury to hear that the victim's statements to officers were vague); *see also, Ingle v. State*, 348 S.C. 467, 474, 560 S.E.2d 401, 405 (2002) (finding trial counsel was ineffective for allowing a doctor to testify to hearsay statements concerning the assailant despite the fact trial counsel wanted the jury to hear the doctor characterized the statements as allegations.); *see also, Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) ("counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness.").

This Court finds that Trial Counsel was ineffective in his representation of Applicant. The shooting occurred in the parking lot of a nightclub. In Applicant's statement to law enforcement, Applicant claimed he was at his girlfriend's home at the time of the shooting. The State called Applicant's girlfriend, Lorinda Williams, who claimed that Applicant had been at her house, but left for a few hours around the time of the shooting. Trial Counsel testified that he believed that he needed to explain to the jury why Applicant lied to law enforcement.

The Court finds that Trial Counsel was ineffective in employing a trial strategy that was based upon the belief that Applicant must explain his statement to law enforcement. In a criminal trial, the defendant has absolutely no burden of proof. *See In re Winship*, 397 U.S. 358, 364 (1970) (“[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”). Trial Counsel's belief that he needed to explain Applicant's statement amounted to an unconstitutional shift in the burden of proof. The strategy that resulted from Trial Counsel's belief was objectively unreasonable. *See Ingle, supra*. Therefore, this Court finds that Applicant has established deficient performance under *Strickland*.

Applicant was prejudiced by Trial Counsel's mistaken belief that he must explain Applicant's statement to law enforcement. Trial Counsel's burden shifting belief, lead him to introduce evidence that he would normally try to suppress concerning Applicant's prior run-ins with law enforcement. Trial Counsel let the jury hear that Applicant was arrested at General Sessions roll call on the morning after the shooting. Trial Counsel told the jury that Applicant was one of the “usual suspects” and that “[t]he Fishburnes had trouble.” Considering that the State's case was built almost entirely on the credibility of two witnesses, there is a reasonable likelihood that, but for Trial Counsel's efforts to explain this arrest, the result of the trial would have been

different. Therefore, this Court finds that Applicant has met his burden in establishing the prejudice prong in this case.

CONCLUSION

This Court concludes that the Applicant has met his burden of proving Defense Counsel was ineffective pursuant to the *Strickland* standard. The basis of Defense Counsel's strategy was the unconstitutional belief that Applicant had the burden to prove why Applicant was lying. As such, the defense strategy was objectively unreasonable. Moreover, Applicant was prejudiced by this strategy because it presented Applicant in a negative light. Therefore, Applicant should be granted a new trial. All other claims made by Applicant in the PCR Application are hereby denied.

IT IS THEREFORE ORDERED THAT:

1. Applicant's Motion to Alter or Amend is granted.
2. The Post-Conviction Relief is granted; and
3. The Case shall be remanded to the Colleton County Court of General Sessions for a new trial and remain in custody of the county detention center.

AND IT IS SO ORDERED this 4th day of January, 2020. ES



Edgar W. Dickson
Presiding Judge of the 14th Judicial Circuit



State of South Carolina
The Circuit Court of the First Judicial Circuit

Edgar Warren Dickson
Judge

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January 6, 2012

Honorable Patricia C. Grant
P.O. Box 620
Walterboro, SC 29488-0028

RE: 2012-CP-38-15-00814 Derrick Fishburne, # 00341860 v. The State of South Carolina

Dear: Clerk of Court

Enclosed please find the original Order Granting Applicant's Motion to Alter or Amend and Order Granting Post-Conviction Relief. Please clock, file and send a copy to all attorneys.

Thank you for your assistance in this matter.

Catherine C. Wilson,
Administrative Assistant to
Judge Edgar W. Dickson