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P. O. BOX 460
AUGUSTA, GEORGIA 30903

March 28, 2013

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

RECEIVED

APR - 2 2013

S.C. Supreme Court

Re: *Michael Anthony Allen v. State of South Carolina*
Case No. 2012-CP-02-0852

Dear Mr. Shearouse:

Enclosed for filing is Appellant's notice of appeal from the order denying his application for post-conviction relief. Also enclosed are the following:

1. Proof of service of notice of appeal on the Respondent;
2. A copy of the order to be challenged on appeal;
3. One copy each of the notice of appeal and proof of service; and
4. Self-addressed stamped envelope.

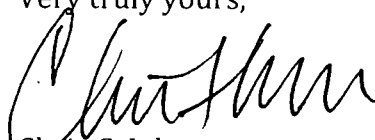
I would appreciate you filing the original notice of appeal and proof of service and returning a stamped copy of same to my office in the self-addressed envelope.

I am filing this notice of appeal with the Supreme Court pursuant to Rule 243(b), SCACR. It is my understanding that the \$100.00 filing fee is waived for this appeal.

Please do not hesitate to contact me should you have any questions or concerns. Thank you in advance for your kind attention to this matter.

With kind regards, I am

Very truly yours,

A handwritten signature in black ink, appearing to read "Chris C. Johnson". The signature is fluid and cursive, with a large initial "C" and "J".

Chris C. Johnson

Attorney for Appellant Michael Anthony Allen

CCJ/

cc: Megan Harrigan, Esquire
South Carolina Commission on Indigent Defense
Michael Anthony Allen

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

APPEAL FROM AIKEN COUNTY COURT OF COMMON PLEAS
DOYET A. EARLY, III, CHIEF ADMINISTRATIVE JUDGE,
SECOND JUDICIAL CIRCUIT

APR - 2 2013

S.C. Supreme Court

CASE NUMBER: 2012-CP-02-0852

Michael Anthony Allen,

Appellant,

v.

The State of South Carolina,

Respondent,

NOTICE OF APPEAL

Michael Anthony Allen appeals the order of the Honorable Doyet A. Early, III, filed March 13, 2013, which order denied his application for post-conviction relief. The undersigned counsel for Appellant received written notice of this order via electronic mail on or about March 13, 2013.

March 28, 2013



Chris C. Johnson
Leland M. Malchow
NIMMONS & MALCHOW, P.C.
460 Greene Street
Augusta, Georgia 30901
(706) 724-8890
Counsel for Appellant Michael Antony Allen

Other counsel of record:

Megan E. Harrigan, Esquire
ASSISTANT ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
Post Office Box 11549
Columbia, South Carolina 29211

IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

**APPEAL FROM AIKEN COUNTY COURT OF COMMON PLEAS
DOYET A. EARLY, III, CHIEF ADMINISTRATIVE JUDGE,
SECOND JUDICIAL CIRCUIT**

CASE NUMBER: 2012-CP-02-0852

Michael Anthony Allen,

Appellant,

RECEIVED

v.

APR - 2 2013

The State of South Carolina,

Respondent,

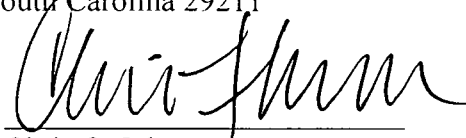
S.C. Supreme Court

PROOF OF SERVICE

I hereby certify that I have this date served a copy of the within and foregoing **Notice of Appeal** upon all counsel of record by depositing a copy of same in the United States mail with proper postage affixed thereto and addressed as follows:

Megan E. Harrigan, Esquire
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 11549
Columbia, South Carolina 29211

March 28, 2013



Chris C. Johnson
Leland M. Malchow
NIMMONS & MALCHOW, P.C.
460 Greene Street
Augusta, Georgia 30901
(706) 724-8890
Counsel for Appellant

PROOF OF SERVICE

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT

Michael Anthony Allen, #155673,)
Applicant,)

Case No. 2012-CP-02-0852

v.)

ORDER OF DISMISSAL

State of South Carolina,)
Respondent.)

FILED 3.13.13
[Signature]
C.P. & C.S.
[Signature] 830
Deputy Clerk

PROCEDURAL HISTORY

This matter comes before the Court by way of an application for post-conviction relief filed April 5, 2012. The Respondent made its Return on May 30, 2012. An evidentiary hearing into the matter was convened on January 23, 2013, at the Aiken County Courthouse. The Applicant was present at the hearing and was represented by Christopher C. Johnson, Esquire. The Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office.

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. Applicant was indicted at the October 2006 term of the Aiken County Grand Jury for Armed Robbery (2006-GS-02-01685) and Carjacking (2006-GS-02-01684), and at the October 2008 term of the Aiken County Grand Jury for Grand Larceny, More than \$1,000 but less than \$5,000 (2008-GS-02-01613). Charles H. S. Lyons III, Esquire, represented the Applicant. On September 22, 2009, during a jury trial before the Honorable R. Markley Dennis, Jr., the Applicant pled guilty as indicted to all three charges. Judge Dennis sentenced Applicant

[Handwritten initials]

to confinement for a period of twenty-four years for armed robbery, twenty years for carjacking, and five years for grand larceny, with all sentences to run concurrently.

A notice of appeal was filed and an appeal was perfected on Applicant's behalf. Following the submission of an Anders¹ brief, the South Carolina Court of Appeals dismissed the appeal. State v. Michael Allen, 2012-UP-315 (filed June 21, 2011). The Remittitur was sent July 7, 2011.

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

1. Ineffective assistance of counsel;
2. Failure to investigate; and
3. "Denial of 6th and 14th Amends. U.S. Const."

At the evidentiary hearing, Applicant proceeded forward on the following allegations of ineffective assistance of counsel:

1. Failure to advise of the constitutional right to a unanimous jury verdict;
2. Failure to advise of the lesser included offense of strong armed robbery;
3. Failure to advise of video evidence; and
4. Failure to interview victims in anticipation of trial testimony.

SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. The State presented testimony from Applicant's counsel, Charles H.S. Lyons, III (herein "Counsel"). This Court also had before it a copy of the Applicant's trial and guilty plea transcript, the records of the Aiken County Clerk of Court, Applicant's appellate records, and the Applicant's records from the South Carolina Department of Corrections.

During the evidentiary hearing, Applicant testified that he only met with Counsel once prior to his trial. He testified that Counsel was court-appointed and was his third attorney.

¹ Anders v. California, 386 U.S. 738 (1967).

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Applicant testified that he reviewed discovery with Counsel or his two previous attorneys. Applicant testified that he watched the video of surveillance footage of the armed robbery with Counsel, but that he did not view surveillance footage of the gas station where the carjacking took place, until the case was called for trial. Applicant testified that if he had seen this footage earlier, he would have pled guilty. Applicant testified that Counsel never reviewed any plea offers made by the State with him. However, Applicant testified that he was aware of a fifteen year plea offer from the State, which he voluntarily turned down because he wanted to proceed to trial.

Applicant read into the record a letter that Counsel sent him on April 22, 2009. The letter stated that Applicant and Counsel had a long discussion regarding the case and reviewed all discovery materials. Counsel advised that the evidence against Applicant was strong, including video surveillance and identifications from two separate witnesses. Counsel also advised that all witnesses, including the Florida police officer who arrested Applicant with the keys belonging to the stolen car, would more than likely appear at trial and testify for the State. Counsel advised that he was prepared to try Applicant's case if Applicant so desired, but that it was against his professional judgment as Applicant was not likely to succeed at trial.

Applicant testified that Counsel did not advise him that he could plead guilty to strong armed robbery. Applicant testified that because he did not have a weapon, he should have been allowed to plead to strong armed robbery. Applicant acknowledged that Judge Dennis reviewed the Armed Robbery statute with him on the record during his guilty plea, including that even if he did not have a weapon but lead the victim to believe he had a weapon, he would still be guilty of armed robbery. Applicant acknowledged that he continued on with guilty plea after Judge Dennis' explanation and that it was his decision to enter a guilty plea.

DATE
[Signature]

Applicant acknowledged that he told Judge Dennis under oath that he had "truthfully responded to all of his questions," including as to whether or not he is guilty of these three crimes. Applicant acknowledged that he apologized to each victim independently, the State of South Carolina "for [his] actions now and previously, because [he's] caused a lot of trouble in this State," and the State of Florida. Applicant also acknowledged that he apologized to his lawyer for the disagreements they had and told the court that he appreciated all Counsel had done for him. Applicant also told the Court he wished he had more time to speak with Counsel, but that despite this, he still wanted to plead guilty. Applicant also testified that he constitutional rights were not reviewed with him prior to his guilty plea.

Following Applicant's testimony, the State presented testimony from Counsel. Counsel testified that he has been practicing law for approximately twenty-six years and that approximately half of his practice is comprised of criminal defense work. Counsel testified that he was appointed to represent Applicant and that he was Applicant's third attorney for these charges. He testified that he met with Applicant "a number of times" and these meetings were "not pleasant." Counsel elaborated that Applicant was "extremely hard headed" and wanted Counsel to pursue a fabricated defense that the carjacking victim was a "crack head" without any evidence to support such a theory. Counsel testified that Applicant also fabricated multiple other stories that were not plausible, such as that another patron at the Florida shopping center where he was arrested, with the keys in his pocket, had stolen the victim's car.

Counsel testified that he discussed the indictment and elements of the charges with Applicant "at length" as well as possible defenses. Counsel testified that he thoroughly reviewed all discovery materials with Applicant and that this was a "slam dunk case" for the State due to the plethora of evidence against Applicant. Counsel elaborated that he felt "handcuffed by the

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evidence" in this case because it was so incriminating to Applicant. Counsel testified that he consistently told Applicant that the evidence against him was strong and that he likely would not be successful at trial. Counsel testified that he advised Applicant against proceeding to trial, but that the decision was ultimately up to Applicant and that he felt "more than prepared" for trial. Counsel testified that he reviewed all witness statements and performed a full investigation in anticipation of trial. Counsel testified that although he did not believe a trial was in his client's best interest, he "wanted to find a way to win."

Counsel testified that Applicant's allegations that not being able to see the second surveillance video until the eve of trial impacted his decision to decline plea offers is without merit. Counsel elaborated that this video "had nothing to do with his decision to plead guilty" as the video "wasn't going to convict him, it was the eye witness testimony and identification from a phone line up."

Counsel testified that Applicant's two previous attorneys also advised Applicant of the strength of the State's case and that he should pursue a guilty plea. Counsel testified that Applicant was offered several favorable plea deals, including for a sentence of ten years imprisonment or for fifteen years imprisonment, but that Applicant declined all of these offers. Counsel testified that he did not advise Applicant that he could plead guilty to strong armed robbery, but this is because the State never made an offer to allow him to plead to this lesser included offense.

Counsel testified that he fully advised Applicant of all of his constitutional rights prior to Applicant's trial and guilty plea, including that the jury's verdict would have to be unanimous. Counsel testified that Applicant was aware of this before his trial and guilty plea. Counsel



testified that it was ultimately Applicant's decision to waive his constitutional rights and enter a guilty plea.

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. Specifically, this Court finds that Counsel's credibility is unquestionable and that Applicant's credibility is lacking. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Ineffective Assistance of Counsel

Applicant alleges that Counsel was ineffective for numerous reasons. In a post-conviction relief action, the Applicant has the burden of proving the allegations in his application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether an 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, 286 S.C. 441, 334 S.E.2d 813. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

ME
BY

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, 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. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985). Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel.

Counsel was ineffective for failing to advise Applicant that a jury verdict must be unanimous

After careful review based on the standard discussed above, this Court finds that the Applicant has failed to prove that Counsel was ineffective in regards to this allegation. Counsel's credible testimony reveals that he advised Applicant prior to his trial and guilty plea that a jury verdict must be unanimous to convict him on each charge. This Court finds that Counsel's performance was "reasonable[] under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, citing Strickland. Additionally, Applicant has failed to show that the result of the proceeding would have been different but for Counsel's alleged deficiency, as Applicant entered guilty pleas in the midst of trial. Therefore, this allegation must be denied and dismissed with prejudice.

A handwritten signature in black ink, appearing to be "Tom C." with a stylized flourish below it.

Counsel was ineffective for failing to advise Applicant of the lesser included offense of Strong Armed Robbery

Applicant alleges that Counsel was ineffective for failing to advise him that he could plead guilty to the lesser included offense of strong armed robbery. After careful review based on the standard discussed above, this Court finds that the Applicant has failed to prove that Counsel was ineffective in regards to this allegation. Counsel's credible testimony reveals that the State never extended a plea offer to Applicant that would allow him to plead guilty to the lesser included offense of strong armed robbery. Applicant presented no evidence or testimony that the State had ever extended an offer to allow Applicant to plead to Strong Armed Robbery. This Court finds that Counsel's performance was reasonable and effective. Therefore, this Court finds that this allegation must be denied and dismissed.

Counsel was ineffective for failing to advise Applicant of video evidence

Applicant alleges that Counsel was ineffective for failing to advise him that there were two surveillance videos that would be used against him at trial; Applicant asserts that had he viewed the second video earlier, he would have accepted a plea offer from the State rather than proceeding to trial. After careful review based on the standard discussed above, this Court finds that the Applicant has failed to prove that Counsel was ineffective in regards to this allegation. Counsel's credible testimony reveals that he reviewed all discovery materials with Applicant and that the evidence was overwhelming. Counsel testified that this second video that Applicant viewed shortly before his trial could not have been dispositive in his decision to proceed to trial, as there was eyewitness testimony and identifications that strongly implicated Applicant was the perpetrator. Counsel testified that he consistently informed Applicant numerous times that the



evidence against him would result in all but certain conviction. This Court finds that Counsel's performance was reasonable and effective.

Additionally, this Court finds that Applicant was not prejudiced by any alleged deficient representation because there was overwhelming evidence of Applicant's guilt. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994) (where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial). Therefore, this Court finds that this allegation must be denied and dismissed.

Counsel was ineffective for failing to interview victims in anticipation of trial

Applicant alleges that Counsel was ineffective for failing to interview witnesses in anticipation of trial. After careful review based on the standard discussed above, this Court finds that the Applicant has failed to prove that Counsel was ineffective in regards to this allegation. Counsel's credible testimony reveals that he reviewed all witness statements and performed a full investigation in anticipation of trial. Counsel also advised Applicant of the overwhelming evidence against him and that all witnesses would be present to testify against him at trial.

This Court finds that Counsel's performance was reasonable and effective.

Additionally, this Court finds that Applicant was not prejudiced by any alleged deficient representation because there was overwhelming evidence of Applicant's guilt. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994) (where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial). Therefore, this Court finds that this allegation must be denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the 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 that that Applicant must file and serve a notice of appeal within thirty 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 post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant 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 this 6 day of March, 2013.



DOYET A. EARLY, III
Presiding Judge
Second Judicial Circuit


_____, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF AIKEN)

Michael Anthony Allen, 155673,
 Plaintiff)

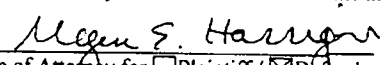
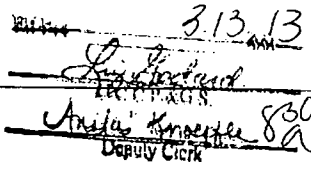
v.)

State Of South Carolina
 Defendant.)

IN THE COURT OF COMMON PLEAS

CASE NO.
2012-CP-02-0852

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: Christopher C. Johnson, Bar No. Address: 460 Greene Street Augusta, GA 30901 phone: (706) 724-8890 fax: e-mail: other:	Defendant's Attorney: Megan E. Harrigan, Bar No. Address: Post Office Box 11549 Columbia SC 29211-1549 phone: (803) 734-3737 fax: (803) 734-4113 e-mail: other:
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input checked="" type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: Estimated Time Needed: Court Reporter Needed: <input type="checkbox"/> YES / <input type="checkbox"/> NO	
SECTION II: Motion/Order Type	
<input type="checkbox"/> Written motion attached <input checked="" type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
 Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant	March 4, 2013 Date submitted
SECTION III: Motion Fee	
<input type="checkbox"/> PAID - AMOUNT: <input checked="" type="checkbox"/> EXEMPT: <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support (check reason) <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input checked="" type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: <input type="checkbox"/> Other:	
JUDGE'S SECTION	
<input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other:	_____ JUDGE CODE: _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____	Date Filed: _____
<input type="checkbox"/> MOTION FEE COLLECTED: _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: _____	3.13.13  Deputy Clerk

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2012CP0200852

Michael Anthony Allen	South Carolina State Of
PLAINTIFF(S)	DEFENDANT(S)

Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant
---------------	-------------------------------------------------------------------------------------------------------------------------------------------

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRCP; Rule 41(a), SCRCP (Vol. Nonsuit);
 Rule 43(k), SCRCP (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON): Rule 40(j) SCRCP; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk:

Nimmons & Malchow
460 Greene Street
A Macon, Georgia 30901

*Michael
Anthony
Allen*

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

