

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

CASE NO:
2011-CP-46-4651

Travis D. Robinson, # 330152. Appellant,

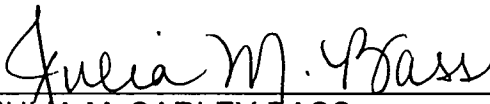
V .

The State of South Carolina..... Respondent.

NOTICE OF INTENT TO APPEAL

Travis D. Robinson appeals the order of the Honorable Edgar W. Dickson dated February 7, 2013. Appellant received written notice of entry of this order on April 3, 2013.

April 17, 2013



JULIA McCARLEY BASS
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1039 44th Avenue North, Suite 102
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Attorney for Appellant

Other Counsel of Record

J. Rutledge Johnson
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YORK COUNTY, SC

THE STATE OF SOUTH CAROLINA
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APPEAL FROM YORK COUNTY
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CASE NO: 2011-CP-46-4651

DAVID HAMILTON
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YORK COUNTY, SC

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Travis D. Robinson, # 330152 Appellant,

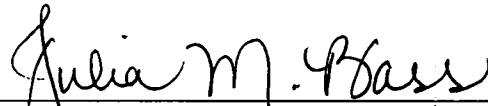
V.

The State of South Carolina.....Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Intent To Appeal on the State of South Carolina by depositing a copy of the Notice in the United States Mail, postage prepaid, on April 17, 2013, addressed to the attorney of record, J. Rutledge Johnson, Post Office Box 11549, Columbia, South Carolina 29211-1549.

April 17, 2013



Julia McCarley Bass
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Attorney for Appellant

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

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JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2011CP4604651

Travis D Robinson	South Carolina State Of DAVID HAMILTON CLERK OF COURT YORK COUNTY, SC
PLAINTIFF(S)	DEFENDANT(S)

Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant
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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), SCRPC;
 - Rule 41(a), SCRPC (Vol. Nonsuit);
 - Rule 43(k), SCRPC (Settled);
 - Other: _____
- ACTION STRICKEN (CHECK REASON):
 - Rule 40(j) SCRPC;
 - 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 OF DISMISSAL

ORDER INFORMATION

This order ends does not end the case. Additional Information for the Clerk:

INFORMATION FOR THE PUBLIC INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

<i>s/ Edgar W. Dickson</i>	2153	2/7/2013
Circuit Court Judge	Judge Code	Date

For Clerk of Court Office Use Only

This judgment was entered on March 1, 2013, and a copy mailed first class or placed in the appropriate attorney's box on March 1, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Julia McCarley Bass
Attorney at Law
P.O. Box 2271
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ATTORNEY(S) FOR THE PLAINTIFF(S)

Rutledge Johnson
Office Of The Attorney General
PO Box 11549
Columbia, SC 29211-1549

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

David Hamilton - Clerk of Court

Court Reporter

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS)
SIXTEENTH JUDICIAL CIRCUIT)

Travis D. Robinson, #330152,)

2011-CP-46-4651)

Applicant,)

ORDER OF DISMISSAL)

v.)

State of South Carolina,)

Respondent.)

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DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

This matter comes before the Court by way of an Application for Post-Conviction Relief filed December 13, 2011. The Respondent made its Return on April 6, 2012. An evidentiary hearing into the matter was convened on October 10, 2012, at the Moss Justice Center in York, SC. Julia M. Bass, Esquire represented the Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

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

PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the York County Clerk of Court's orders of commitment. The Applicant was indicted by the June 2008 term of the York County Grand Jury for Attempted Armed Robbery (2008-GS-46-0856), Assault and Battery with Intent to Kill (ABWIK) (2008-GS-46-0854), and Possession of a firearm during the commission of a violent crime (2008-GS-46-0855). Gary Lemel, Esquire, represented

him, with Melissa Inzerillo, Esquire assisting. On August 6, 2008, the Applicant proceeded to a jury trial pursuant to which he was found guilty of all charges as indicted. The Honorable John C. Hayes, III sentenced the Applicant to confinement for twenty (20) years for Attempted Armed Robbery, twenty (20) years, concurrent, for ABWIK, and five (5) years, concurrent, for Possession of a firearm during the commission of a violent crime.

A notice of appeal was filed on the Applicant's behalf and an appeal perfected. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Robinson, Op. No. 2011-UP-022 (filed January 25, 2011). The Remittitur was issued on February 18, 2011.

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

1. "Ineffective Assistance of Trial Counselor"
 - a. "Trial counsel fail(sic) to properly investigate, as well as review Applicant previous file and history and prepare for trial"
 - b. "Trial counsel failed to call expert witness and lay witness from the crime scene on Applicants behalf"
 - c. "Trial counsel failed to suppress the states(sic) evidence"
 - d. "Trial counsel failed to present exculpatory evidence which was a video that was not clean enough to show the real culprit photograph"
 - e. "Failure to object and challenge the states(sic) eyewitness testimony and credibility of the eyewitness statements"
 - f. "Failure to challenge the Forensic experts(sic) testimony"
 - g. "Failure to properly conduct Discovery."
 - h. "Trial counsel failure and refusal to object to improper malice charge which switched the burden of proof, from State to Defendant"
2. "Violation of Applicant Due Process rights"/ After Discovered Evidence
3. "Ineffective assistance of appellate counsel"
 - a. "Appellate counsel failed to properly research case and present proper issues."
4. "Applicant Request an Evidentiary Hearing to bring forth Exculpatory Evidence to be presented to the Court."

At the hearing, the Applicant proceeded on his claims of ineffective assistance of trial counsel.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. The Court also has read the trial transcript, all of which assists the Court in judging their credibility. The Court finds the testimony of Gary Lemel, Applicant's trial counsel, very credible. This Court finds the Applicant's testimony concerning ineffectiveness of trial counsel is not credible.

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 (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.

Failure to request a continuance

The Applicant alleges Counsel was ineffective for failing to request a continuance in his case.

At the PCR hearing, the Applicant testified Counsel (Lemel) failed to request a continuance to investigate a "mugshot" of the "actual shooter." The Applicant testified he met with the investigator for the Public Defender's office one or two days before the beginning of his trial and identified a booking photo of the "actual shooter." He also stated he spoke with Counsel on the morning of his trial concerning this picture.

Counsel testified this picture of the "actual shooter" was obtained by one of the Applicant's co-defendants and showed a person who was processed in the Charlotte-Mecklenburg County jail system. Counsel testified the Applicant discussed this photo with him on the morning of the trial, prior to jury selection. Counsel also stated he wished he was given this picture with more advance notice. Counsel testified this picture could have been an important item in the case. Counsel did admit he did not request a continuance. However, Counsel testified, although he has witnessed Judge John C. Hayes, III grant continuances, in his experience, Judge Hayes was unlikely to grant a continuance in this case so close to trial.

To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. *Jackson v. State*, 329 S.C. 345, 495 S.E.2d 768 (1998); *Skeen v. State*, 325

S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

In this case, the only evidence presented at the PCR hearing was the Applicant's testimony that he viewed the "mugshot" of the "actual shooter" with Counsel's investigator the day before trial, and Counsel's testimony that he received this picture and discussed it with the Applicant on the morning of trial. However, the Applicant failed to produce this "mugshot," any testimony from the co-defendant who gave him this picture, or, most importantly, any testimony from the "actual shooter" in this case. Furthermore, although Counsel testified he would have liked to have this picture for use at trial, he also testified, in his experience, Judge Hayes was unlikely to grant a continuance in this case, especially on the eve before or the morning of trial.

This Court finds the Applicant has failed to show that the outcome of his case would have been different had Counsel requested a continuance to further investigate this "mugshot." *Skeen, supra*. Moreover, there were three independent witnesses that identified the Applicant as the shooter in this case; further eliminating any effect this "mugshot" would have had on the Applicant's trial. Further, the Applicant failed to produce this photo or any other testimony of his co-defendant or the "actual shooter," and thus, no prejudice can be shown. Therefore, the Applicant has failed to prove any resulting prejudice from Counsel's failure to request a continuance in this case. Accordingly, this allegation is denied.

Failure to request an enhanced version of the video/surveillance tape

The Applicant also alleges Counsel was ineffective for not requesting an enhanced version of the surveillance tape from the gas station where this crime occurred.

The Applicant testified he asked Counsel several times to request an enhanced version of the

surveillance tape which the Applicant claimed would have proven he was not the shooter in this incident. Counsel testified the video was pixelated and one could not make out the faces of those involved. Counsel admitted he did not request a "enhanced" copy of this video. However, Counsel also testified had the video been enhanced and clearly shown the Applicant as the shooter, it would have been very detrimental to the Applicant's defense.

This Court finds Counsel was not ineffective for not ordering an enhanced copy of the surveillance video. Counsel testified had he ordered the video and it clearly showed the Applicant as the shooter, it would have been devastating to the defense. Further, as stated above, there were three independent witnesses that identified the Applicant as the shooter in this case. This Court finds the Applicant has failed to meet his burden of proving the outcome of his trial would have been different had Counsel ordered the enhanced version of this video. *Cherry, supra*. This Court further finds no resulting prejudice in this case as the Applicant failed to produce the video at the hearing or any testimony concerning the contents of the video. Accordingly, this allegation is denied.

Failure to call witnesses

Additionally, the Applicant alleges Counsel was ineffective for not calling certain witnesses on his behalf at trial.

The Applicant testified Counsel did not call Todd Gardner (fingerprint expert), a DNA analyst, or Detective Strait at trial. The Applicant stated had Counsel called Mr. Gardner at trial, he would have testified the State did not attempt to match DNA samples/fingerprints found on the steering wheel of the getaway car. However, the transcript reflects Mr. Gardner testified there were no identifiable fingerprints found inside the victim's car, on the getaway car, and around the gas station which matched the Applicant. (Tr. p. 466 lines 8-22). The transcript also reflects Counsel

thoroughly cross-examined Mr. Gardner concerning fingerprints and other forensic evidence in this case. (Tr. pp. 462-480). The Applicant further testified Counsel should have called all three of these witnesses on his behalf. On cross-examination, the Applicant admitted he did not bring these witnesses to testify at the PCR hearing.

Counsel testified he hired and interviewed expert witnesses on the Applicant's behalf, including Jeff Hollifield, a gun-shot residue expert and Dr. Lori Van Wallendael, an expert on eyewitness psychology. Both of these witnesses testified at the trial. Counsel also testified had DNA evidence been tested and positively matched the Applicant, it would have been detrimental to the defense. Counsel, further, stated he was in a better position not knowing the results of any DNA testing as he could use this lack of testing as a tactical attack on the State's case.

Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief hearing. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995).

This Court finds the Applicant's claim on this issue meritless. First, Counsel would not have called Mr. Gardner on the Applicant's behalf as he was a State's witness. Additionally, Counsel thoroughly and artfully cross-examined Mr. Gardner about his testimony on direct examination, getting Mr. Gardner to admit there was no DNA/fingerprint evidence, found either at the scene or on either of the cars, that matched the Applicant. So, calling another witness to refute the fingerprint analysis would be futile and/or redundant. Second, Counsel interviewed and called other witnesses

on the Applicant's behalf ^{who} ~~which~~ attacked the State's case, attempting to illustrate (Hollifield) the Applicant was not the shooter because there was no gun-shot residue found on the Applicant. (Tr. p. 618 lines 3-4). Also, Counsel called Dr. Van Wallendael to explain how the identification process used by the State and police in this case was inherently flawed. See Tr. pp. 576-604. Further, the Applicant failed to produce any testimony from any other witnesses he claimed Counsel failed to call at trial. This Court finds Counsel did not render ineffective assistance of counsel on this issue. Further, the Applicant cannot prove resulting prejudice because the witnesses did not testify at the PCR hearing. Accordingly, this allegation is denied.

Failure to discuss 'Hand of one, Hand of all'

The Applicant further alleges Counsel is ineffective for failing to advise him concerning the 'Hand of one, Hand of all' theory of accomplice liability.

The Applicant testified Counsel never discussed with him accomplice liability. On cross-examination, the Applicant admitted there were three witnesses that identified him as the shooter in this case. Counsel testified he did not discuss this theory with the Applicant because accomplice liability was not part of the State's theory of the case.

"Under accomplice liability theory, 'a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.'" State v. Mattison, 388 S.C. 469, 479-80, 697 S.E.2d 578, 584 (2010) (quoting State v. Langley, 334 S.C. 643, 648-49, 515 S.E.2d 98, 101 (1999)).

This Court finds this allegation is wholly meritless. Because the State's theory of the case was that the Applicant was the shooter and thus, the principal actor, accomplice liability is

completely inapplicable. Therefore, not only is Counsel not ineffective for not discussing accomplice liability with the Applicant, but also the Applicant can prove no resulting prejudice by Counsel's lack of advice.

Accordingly, this allegation is denied.

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 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 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 Respondent.

AND IT IS SO ORDERED!



Edgar W. Dickson
Presiding Circuit Court Judge
Sixteenth Judicial Circuit

2/7, 2013

Orangeburg, South Carolina

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Julia McCarley Bass



Attorney at Law
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April 19, 2013

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APR 22 2013

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Post Office Box 11330
Columbia, South Carolina 29201

RE: Travis D. Robinson #330152 vs. The State of South Carolina
Case No: 2011-CP-46-4651

Dear Mr. Shearouse:

Enclosed please find in triplicate the Notice of Intent To Appeal, Proof of Service on the Respondent and Order in the above-referenced Post-Conviction Relief action.

I would appreciate your filing the Notice of Intent To Appeal, Proof of Service, and Order and returning the date-stamped copies to me in the enclosed envelope. If you should have any questions concerning this matter, you may reach me at (843) 839-2501. Thank you for your assistance in this matter.

Sincerely,

Julia Bass

Julia McCarley Bass

Enclosures

JMB/jc

cc: J. Rutledge Johnson, Assistant Attorney General
Travis D. Robinson #330152



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