

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
Honorable W. Jeffrey Young, Circuit Court Judge

Case No: 2010-CP-43-0976

Harold Jamar Wilson.....Appellant
S.C.D.C. 306094
v.
The State.....Respondent

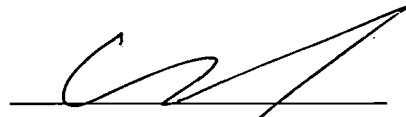
NOTICE OF APPEAL

Harold Jamar Wilson, appeals his Denial for Post Conviction Relief in this case. The order of Dismissal was imposed and signed by the Honorable W. Jeffrey Young, November 13, 2012, which I, Charles T. Brooks, III, received on April 18, 2013.

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APR 22 2013

S.C. SUPREME COURT



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STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
2012 NOV 27 PM 2:25

Harold Jamar Wilson, #306094,

Case No. 2010-CP-43-0976

Applicant,

v.

ORDER OF DISMISSAL

State of South Carolina,

Respondent.

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OF ORIGINAL FILED

Shawn H. How
DEPUTY CLERK OF COURT
SUMTER COUNTY
SOUTH CAROLINA

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed May 10, 2010. The Respondent made its Return on February 17, 2011. An evidentiary hearing into the matter was convened on September 19, 2012, at the Sumter County Courthouse. The Applicant was present at the hearing and was represented by Charles T. Brooks, III, 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 Sumter County Clerk of Court. The Applicant was indicted during the September 2003 term of the Sumter County Grand Jury for (1) Murder; (2) Assault and Battery with Intent to Kill; (3) Attempted Armed Robbery; and (4) Possession of Firearm during Commission of Crime of Violence (2003-GS-43-0763). Richard Blackmon, Esquire, represented him. Applicant proceeded to a jury trial before the Honorable Howard P. King, where he was found guilty as indicted. On November 18, 2004, Judge King sentenced him to life imprisonment for Murder, a consecutive term of twenty years for Assault and Battery with Intent to Kill, a consecutive term



of twenty years for Attempted Armed Robbery, and a consecutive term of five years for Possession of Firearm during Commission of Crime of Violence.

A notice of appeal was filed and an appeal perfected. The conviction and sentence were affirmed. State v. Wilson, Op. No. 2009-UP-588 (S.C. Ct. App. filed December 14, 2009).

In Applicant's post-conviction relief application, he alleged that he is being held in custody unlawfully based on the following claims:

1. Ineffective assistance of counsel.
 - a. "Failed to object to solicitor's statement in his closing that '...witness, Ms. Earp. The girl that stayed next door and her testimony and quite frankly she made a good impression on me...' See Trial Transcript p. 545, lines 4-6, in effect vouching for the credibility of the State's witnesses."
 - b. "Failed to object to solicitor's statement in his closing introducing into the trial assertions which were not introduced or proven by evidence during trial, that all casings (bullets) were found. See Trial Transcript p. 547, lines 15-24."
 - c. "Failed to object to trial judge's instruction to the jury, 'so if you have a reasonable doubt as to whether or not the defendant has made out his defenses...', See Trial Transcript p. 559, lines 16-18, in effect shifting the burden of proof to Applicant to prove his innocence."
 - d. "Failed to object to trial judge's instruction to the jury, the elements of the crime of larceny. See Trial Transcript p. 571, lines 9-23. Applicant was not charged or indicted for the crime of Larceny, and nor was Larceny presented to the jury as a lesser included offense of Attempted Armed Robbery. ..."
 - e. "Failed to request the trial court to instruct the jury that the evidence which was introduced of Applicant's prior juvenile convictions, was admissible only for impeachment purposes."
 - f. "Failed to properly acquaint (investigate) himself with the current and correct law and Facts surrounding Applicant's case, and as a result Applicant's trial counsel made a prejudicial error in the assessment of both the law and the facts concerning the admissibility of Applicant's prior juvenile records (convictions) as evidence during his trial. See Trial Transcript p. 446, lines 2-23; p. 453, line 25; and p. 454, lines 1-10. ... trial counsel was not aware of these changes in S.C. Law, and relied upon outdated and repealed S.C. Code of Law to argue against the admissibility of Applicant's prior juvenile records..."
 - g. "Failed to challenge the sufficiency of Count One - Murder of the Indictment No. 2003-GS-43-0763, wherein it fails to state the section of the S.C. Code of Law that was violated."

2. "Denial of a Fair Trial."

- a. "The trial judge instructed the jury 'So if you have a reasonable doubt as to whether or not the defendant has made out his defenses...' See Trial Transcript p. 559, lines 16-18, shifting the burden of proof to Applicant to prove his innocence."
- b. Trial court erred in instructing jury on "hand of one, hand of all" because Applicant was tried as a principal.
- c. Trial court erred in instructing the jury on larceny because Applicant was not charged with larceny.
- d. Trial court failed to give limiting instructions on admissibility of prior juvenile record.

At the evidentiary hearing, the Applicant testified on his own behalf. The State presented testimony from trial counsel, Richard Blackmon, Esquire ("Counsel"). This Court also had before it a copy of the Applicant's trial transcript, the records of the Sumter County Clerk of Court, and Applicant's appellate records, and Applicant's records from the South Carolina Department of Corrections.

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 (1985).

Ineffective Assistance of Counsel

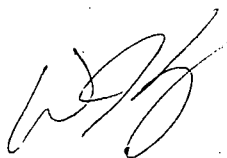
In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's 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, 80 L.Ed.2d 674, 692 (1984); Butler, 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, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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.

After careful review based on the standard discussed above, Applicant has failed to carry his burden in this action. Specifically, this Court finds that Counsel's testimony is credible while Applicant's testimony is not credible. Applicant has failed to prove that Counsel was ineffective in his representation of the Applicant and that he was prejudiced by any of Counsel's alleged deficiencies. Below are the following findings of this Court regarding Applicant's specific allegations of ineffective assistance of counsel:

A handwritten signature in black ink, appearing to be the initials 'WJ' followed by a stylized flourish.

"Failed to object to solicitor's statement in his closing that '...witness, Ms. Earp. The girl that stayed next door and her testimony and quite frankly she made a good impression on me...' See Trial Transcript p. 545, lines 4-6, in effect vouching for the credibility of the State's witnesses."

Applicant alleged that Counsel was ineffective for failing to object to Assistant Solicitor Conner's statement during the State's closing argument regarding State's witness Alexis Earp, a neighbor who heard the shooting and called the police. Applicant asserts that Assistant Solicitor Conner's comments that "quite frankly she made a good impression on me" amounted to improper vouching and Counsel was ineffective for not objecting to such a comment.

At the evidentiary hearing, Counsel testified that he did not believe that Assistant Solicitor Conner's statement amounted to vouching for the credibility of the State's witness and that is why he did not object. Specifically, Counsel stated that the comment did not sound prejudicial or improper at the time of the trial and that he does not think that the comment is improper or prejudicial now as well. See Trial Tr. p. 545, lines 4-6.

In regards to this allegation of ineffective assistance of counsel, this Court finds that Counsel's performance was reasonable and effective. Counsel testified that in his professional opinion, he did not think that this passage from the State's closing argument were objectionable or prejudicial to his client. Additionally, this Court finds that the Applicant has failed to establish any prejudice resulting from plea counsel's alleged ineffective assistance of counsel. Vouching occurs when a Solicitor attempts to bolster the credibility of a witness by "placing the government's prestige behind a witness by making explicit personal assurances of a witness' veracity," or by "implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony." Gilchrist v. State, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2002), quoting State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001). This



Court finds that the comment made by Assistant Solicitor Conner did not amount to improper vouching. Furthermore, the jury was charged by the trial court that determinations of credibility were solely within the province of the jury. Therefore, this Court finds that this allegation of ineffective assistance of counsel must be denied and dismissed.

"Failed to object to solicitor's statement in his closing introducing into the trial assertions which were not introduced or proven by evidence during trial, that all casings (bullets) were found. See Trial Transcript p. 547, lines 15-24."

This Court finds that Applicant abandoned this allegation, as he did not present sufficient evidence or testimony in its regard. Therefore, this Court finds that this allegation of ineffective assistance of counsel is denied and dismissed with prejudice.

"Failed to object to trial judge's instruction to the jury, 'so if you have a reasonable doubt as to whether or not the defendant has made out his defenses....' See Trial Transcript p. 559, lines 16-18, in effect shifting the burden of proof to Applicant to prove his innocence."

Applicant alleges that Counsel was ineffective for failing to object to this portion of the trial court's jury instruction, which amounted to impermissible burden shifting and prejudiced him. At the evidentiary hearing, Counsel testified that although the specific passage noted by Applicant could be read as placing a burden on the defendant, jury instructions must be read as a whole, and that when he looked at the jury charge as a whole, the trial court did not shift the burden to the defendant or confuse the jury. Counsel testified that the jury charge clearly instructed the jury that the State had the burden of proof. Counsel stated that he did not and does not believe that the jury charge was objectionable or prejudicial to his client.

This Court finds that Counsel was not deficient for not objecting to this portion of the jury charge, as the passage was not objectionable when viewed together with the entirety of the



trial court's instructions to the jury. South Carolina law dictates that jury instructions, when analyzed, must be considered in their entirety. See Todd v. State, 355 S.C. 396, 585 S.E.2d 305 (2003). Additionally, Applicant failed to prove that he was prejudiced by any alleged deficiency in this regard, as the jury charge when viewed as a whole does not impermissibly shift the burden away from the State. Therefore, this Court finds that this allegation of ineffective assistance of counsel must be denied and dismissed.

"Failed to object to trial judge's instruction to the jury, the elements of the crime of larceny. See Trial Transcript p. 571, lines 9-23. Applicant was not charged or indicted for the crime of Larceny, and nor was Larceny presented to the jury as a lesser included offense of Attempted Armed Robbery. ..."

Applicant asserts that Counsel was ineffective for failing to object to the trial court's jury instructions on the elements of larceny within the Court's charge of attempted armed robbery, as he was not charged with larceny and larceny is not a lesser included offense of attempted armed robbery. At the evidentiary hearing, Counsel testified that the attempted armed robbery charge given by the trial Court is the widely used charge given by courts across the state. Counsel elaborated that he did not object to this charge as it correctly instructs the jury as to the law regarding attempted armed robbery and was not prejudicial to his client. Counsel stated that if he felt that this instruction to the jury was improper, he would have objected as is his general practice. Counsel testified that the jury was properly instructed on attempted armed robbery, as was supported by the facts developed throughout the trial.

This Court finds that Counsel was ~~no~~^{not} deficient for not objecting to this portion of the jury charge, as the passage was not objectionable when viewed together with the entirety of the trial Court's instructions to the jury. See State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (S.C. 2003) (holding the facts must support a jury instruction for it to be proper). Additionally, Applicant



failed to prove that he was prejudiced by any alleged deficiency in this regard, as the jury charge when viewed as a whole does not impermissibly shift the burden away from the State. Therefore, this Court finds that this allegation of ineffective assistance of counsel must be denied and dismissed.

“Failed to request the trial court to instruct the jury that the evidence which was introduced of Applicant’s prior juvenile convictions, was admissible only for impeachment purposes.”

Applicant alleges that Counsel was ineffective for not objecting to trial court’s instructions to the jury, as it failed to include instruction that Applicant’s prior juvenile conviction was only admissible for impeachment purposes. Counsel testified that he did not feel his client was prejudiced by this omission, or else he would have objected as is his standard practice when a jury instruction is prejudicial to his clients. Applicant presented no evidence or testimony as to how this was prejudicial to him or how it impacted his trial.

This Court finds that Counsel was not ineffective in regard to this allegation, as Applicant was not prejudiced by any alleged deficient representation because there was overwhelming evidence of the Applicant’s guilt. Where there is overwhelming evidence of guilt, a trial counsel’s deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); See also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001), Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (S.C. 1991). In Ford, trial counsel failed to request an alibi instruction and his representation was found deficient as a result. However, the evidence of the applicant’s guilt in Ford was overwhelming and this Court held that the applicant failed to prove the second prong of Strickland, which requires that an Applicant show prejudice by the deficient representation. Here, there is overwhelming evidence of Applicant’s guilt, as he and Counsel both testified that Applicant never denied his involvement in the incident or that he discharged a



firearm. Therefore, this Court finds that Applicant was not prejudiced by this omission of a limiting jury instruction regarding Applicant's prior juvenile record and this allegation must be denied and dismissed.

"Failed to properly acquaint (investigate) himself with the current and correct law and Facts surrounding Applicant's case, and as a result Applicant's trial counsel made a prejudicial error in the assessment of both the law and the facts concerning the admissibility of Applicant's prior juvenile records (convictions) as evidence during his trial. See Trial Transcript p. 446, lines 2-23; p. 453, line 25; and p. 454, lines 1-10. ...trial counsel was not aware of these changes in S.C. Law, and relied upon out outdated and repealed S.C. Code of Law to argue against the admissibility of Applicant's prior juvenile records..."

This Court finds that Applicant abandoned this allegation, as he did not present sufficient evidence or testimony in its regard. Therefore, this Court finds that this allegation of ineffective assistance of counsel is denied and dismissed with prejudice.

"Failed to challenge the sufficiency of Count One – Murder of the Indictment No. 2003-GS-43-0763, wherein it fails to state the section of the S.C. Code of Law that was violated."

This Court finds that Applicant abandoned this allegation, as he did not present sufficient evidence or testimony in its regard. Therefore, this Court finds that this allegation of ineffective assistance of counsel is denied and dismissed with prejudice.

"Denial of a Fair Trial"

Applicant asserts that he is being held in custody unlawfully based on various allegations of "denial of a fair trial" that all purport that the trial court erred in a certain regard. Below are the specific findings in regards to each allegation.



"The trial judge instructed the jury 'So if you have a reasonable doubt as to whether or not the defendant has made out his defenses...' See Trial Transcript p. 559, lines 16-18, shifting the burden of proof to Applicant to prove his innocence."

This Court finds that Applicant abandoned this allegation, as he did not present sufficient evidence or testimony in its regard. Therefore, this Court finds that this allegation of "denial of fair trial" is denied and dismissed with prejudice.

Trial court erred in instructing jury on "hand of one, hand of all" because Applicant was tried as a principal.

This allegation raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Applicant could have raised this issue on appeal. His failure to do so has waived this allegation as a ground for relief. Therefore, this Court find this allegation should be denied and dismissed with prejudice.

Trial court erred in instructing the jury on larceny because Applicant was not charged with larceny.

This Court finds that Applicant abandoned this allegation, as he did not present sufficient evidence or testimony in its regard. Therefore, this Court finds that this allegation of "denial of fair trial" is denied and dismissed with prejudice.

Trial court failed to give limiting instructions on admissibility of prior juvenile record.

This Court finds that Applicant abandoned this allegation, as he did not present sufficient evidence or testimony in its regard. Therefore, this Court finds that this allegation of "denial of fair trial" is denied and dismissed with prejudice.



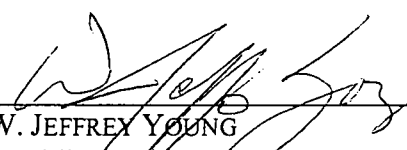
CONCLUSION

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.

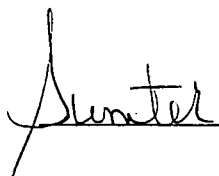
IT IS THEREFORE ORDERED:

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 13 day of Nov, 2012.



W. JEFFREY YOUNG
Presiding Judge
Third Judicial Circuit

 _____, South Carolina.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SUMTER COUNTY

Court of Common Pleas
Honorable W. Jeffrey Young, Circuit Court Judge

Case No: 2010-CP-43-0976

Harold Jamar Wilson.....Appellant

S.C.D.C. 229165

v.

The State.....Respondent

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this 18th day of April 2013, I served the foregoing **Notice of Appeal, Order of Dismissal** , as well as **Certificate of Service** in this matter by depositing a true copy of it in the United States Mail, postage prepaid, on April 18, 2013, addressed to the following as indicated below:

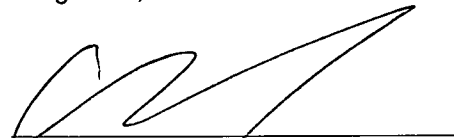
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Dated: April 18, 2013



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fcr

April 18, 2013

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South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

S.C. SUPREME COURT

RE: **Harold Jamar Wilson v State of South Carolina**
Case No. 2010-CP-43-0976

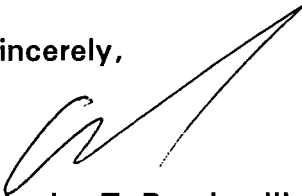
Dear Sir or Madam:

Enclosed herewith you will find the Notice of Appeal, Order of Dismissal, along with a Proof of Service in reference to the above named Applicant.

If you have any questions or concerns, please contact my office at the number stated above.

With kind regards, I am

Sincerely,



Charles T. Brooks, III
CTB/jlb

Enclosed as stated

Cc: **Megan Harrigan, Office of Attorney's General**
South Carolina Office of Appellate Defense
Harold Jamar Wilson, 306094

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