



LAW OFFICE OF
JEREMY A. THOMPSON
LLC

April 24, 2013

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APR 26 2013

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211-1330

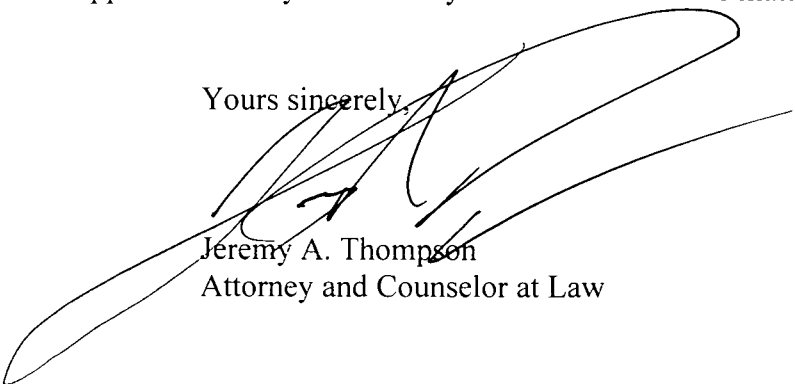
S.C. SUPREME COURT

RE: Brooke Jewell, #279898 v. State of South Carolina; 2011-CP-10-4234

Dear Mr. Shearouse:

Enclosed please find the original and two (2) copies of my Notice of Appeal in the above-captioned action. I would appreciate your filing the original, clocking the copies, and returning the two (2) clocked copies to me in the envelope provided. I would note that Judge Young issued a written Order of Dismissal in this case which was filed with the Charleston County Clerk of Court's Office on March 27, 2013. A copy of that Order is also enclosed. Although I was retained to represent Mr. Jewell on his PCR action, he is seeking court-appointed counsel for this appeal. In accordance with Rule 608, SCACR, I will be providing Appellate Defense with my client's completed affidavit of indigency so that Appellate Defense can determine whether or not they will represent him on this appeal. With my thanks for your assistance in this matter and my best regards, I am,

Yours sincerely,


Jeremy A. Thompson
Attorney and Counselor at Law

JAT/

Enclosures

cc: The Honorable Julie J. Armstrong (w/ Notice of Appeal)
Ashleigh R. Wilson, Assistant Attorney General (w/ Notice of Appeal)
Sharon Graham, South Carolina Office of Appellate Defense (w/ enclosures)
Brooke Jewell, #279898 (w/ Notice of Appeal)
Joan Snyder (w/ Notice of Appeal)

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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Roger M. Young, Presiding Judge

APR 26 2013

11-CP-10-4234

S.C. SUPREME COURT

BROOKE JEWELL, #279898

Petitioner,

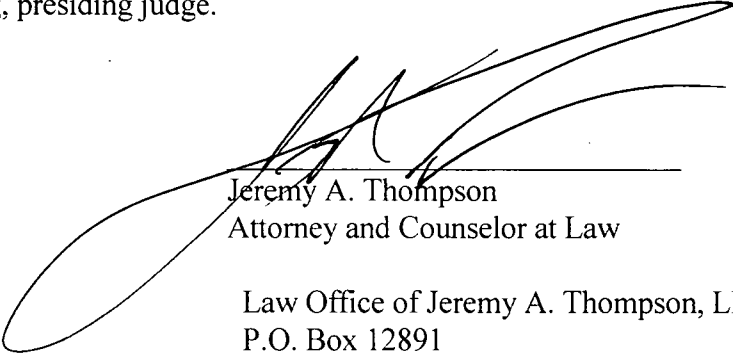
v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Brooke Jewell, #279898, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed March 27, 2013, and received by counsel on April 1, 2013, issued by the Honorable Roger M. Young, presiding judge.



Jeremy A. Thompson
Attorney and Counselor at Law

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ATTORNEY FOR PETITIONER

This 24th day of April, 2013.

Other Counsel of Record:
Ashleigh R. Wilson, Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
Attorney for Respondent
(803) 734-3737

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Presiding Judge

11-CP-10-4234

RECEIVED

APR 26 2013

S.C. SUPREME COURT

BROOKE JEWELL, #279898,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

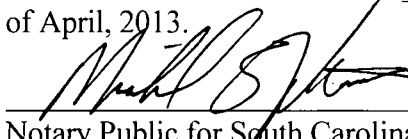
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Petitioner's Notice of Appeal in the above-entitled case has been served upon opposing counsel, Ashleigh R. Wilson, Assistant Attorney General, P.O. Box 11549, Columbia, SC 29211, by mailing in an envelope properly addressed with postage prepaid on this 24th day of April, 2013.


Jeremy A. Thompson
Attorney and Counselor at Law

SWORN TO BEFORE me this 24th day
of April, 2013.


Notary Public for South Carolina

(L.S.)

My Commission Expires: 7/10/2022

CC
AG
AT
SC
GS

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
Brooke Jewell, #279898,)
)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
)
Respondent.)

IN THE COURT OF COMMON PLEAS

2011-CP-10-4234

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ORDER OF DISMISSAL

FILED
2013 MAR 27 AM 7:57
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed June 15, 2011. The Respondent made its Return and Motion to Dismiss on October 24, 2011. A hearing was held on July 23, 2012 at which the Applicant was present and represented by Jeremy Thompson, Esquire. Respondent was represented by Karen C. Ratigan, Esquire, of the South Carolina Office of the Attorney General. By order dated July 31, 2012, the Honorable Stephanie P. McDonald denied the Respondent's motion to dismiss as to the issue of newly discovered evidence and granted the Respondent's motion to dismiss as to all other allegations.

An evidentiary hearing into the newly discovered evidence allegation was convened on December 6, 2012 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Jeremy Thompson, Esquire. Ashleigh R. Wilson, Esquire, of the South Carolina Office of the Attorney General represented the Respondent.

Testifying at the evidentiary hearing were the Applicant, Andrew Savage, Dr. David T. Kurtz, and Elana Peletskaya. This Court had before it the guilty plea transcript, the records of the Charleston County Clerk of Court, the Applicant's records from the South Carolina

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Department of Corrections, the PCR application, Respondent's Return thereto, the Applicant's appellate documents, and the Applicant's exhibits.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Charleston County. The Applicant was indicted at the October 2000 term of the Charleston County Grand Jury for burglary- first degree (00-GS-10-6747) and criminal sexual conduct- first degree (00-GS-10-6748). Andrew Savage, Esquire, represented the Applicant. The Applicant pled guilty as indicted. On November 15, 2001, the Honorable Edward Cottingham sentenced the Applicant to confinement for 15 years for burglary and 21 years for criminal sexual conduct. The sentences were to run concurrently.

A timely Notice of Appeal was filed on the Applicant's behalf and an appeal was perfected. William J. LaLima, Esquire, represented the Applicant on appeal. Following the following of an Anders brief, the South Court of Appeals dismissed the Applicant's appeal. State v. Jewell, Op. No. 2005-UP-296 (S.C. Ct. App. filed April 25, 2005). The Applicant then filed a Petition for Writ of Certiorari to the South Carolina Supreme Court. The Applicant subsequently filed a Motion to Dismiss, in which he indicated that he wished to voluntarily dismiss the Petition for Writ of Certiorari. The motion was granted by Order dated April 21, 2006.

The Applicant subsequently filed his first application for post-conviction relief on May 24, 2006, in which he raised the following grounds for relief:

1. Ineffective assistance of counsel.
 - a. Counsel did not prepare for trial and failed to advise Applicant that evidence seized might be successfully suppressed at a trial by jury on the basis of Fourth Amendment claims.



- b. Counsel did not prepare for trial and failed to advise Applicant that statements made to authorities might be successfully suppressed at a trial by jury on the basis of Fifth Amendment claims.
 - c. Counsel did not prepare for trial due to conflicts of interest which prejudiced the criminal defense.
2. Involuntary guilty plea.
 3. Ineffective assistance of appellate counsel in that.
 - a. Counsel failed to investigate and claim relevant issues for direct appeal of conviction and sentence.

The State made its Return on July 27, 2006. After hiring a private investigator and working with counsel in preparation for the case, Applicant elected to withdraw his PCR application with prejudice. The Honorable Deadra L. Jefferson, Tricia Blanchette, Esquire, and the Applicant each signed a Consent Order of Dismissal with Prejudice, which was filed on October 29, 2009.

ALLEGATIONS

In his current and second application for post-conviction relief, the Applicant asserts the following grounds for relief:

1. Newly discovered evidence in that Applicant had his blood tested on June 17, 2010 and the results demonstrate that Applicant is a "poor metabolizer" of prescription drugs, which means he is "at increased risk of drug-induced side effects due to diminished drug elimination."

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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon his or her credibility. This 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).

Summary of the Testimony

First to testify at the evidentiary hearing was Elana Peletskaya. Peletskaya testified she is a senior scientist at Genelex and supervises the performance of the drug sensitivity testing. She testified that Genelex does genetic testing of drug sensitivity. Peletskaya testified the report issued in this case was a standard report issued by Genelex and the reports are kept in the regular course of business. She testified further she did not perform the test on the cheek sample provided by the Applicant.

The Applicant then called Dr. David T. Kurtz to testify. Dr. Kurtz testified he is a professor of pharmacy at the Medical University of South Carolina. He testified his work includes molecular biology research and teaching pharmacology. He testified he has been called as an expert witness once before in Beaufort for the defense. Dr. Kurtz testified he has never done DNA drug sensitivity testing, but he has worked indirectly in a lab where the testing was done. He testified further he was familiar with the lab requirements for the State where the Applicant's testing was done and he keeps up with drug sensitivity testing procedures and methods. The Court qualified Dr. Kurtz as an expert witness in pharmacology.

Dr. Kurtz testified he reviewed the Applicant's report from Genelex and his opinion is solely based on the test results from Genelex. He testified the applicant has a gene mutation that affects how his liver metabolizes drugs. He testified this mutation results in a much slower break down of prescription drugs in the Applicant's body. He testified prescription drugs peak at a higher level in the Applicant's bloodstream and stay in his body longer. He testified the test cannot determine how high above normal the Applicant peaks. Dr. Kurtz testified that in low metabolizers, acute side effects manifest quickly and chronic side effects manifest more slowly.



He testified that oftentimes low metabolizers never get rid of the first dose of a medication before they take the second dose.

Dr. Kurtz testified further it was his conclusion that because the Applicant breaks down drugs more slowly he has an increased likelihood of experiencing all side effects. He testified that he is aware of two peer articles that state violence is a chronic side effect of Paxil. He testified that while violence is a chronic side effect of Paxil, the drug sensitivity testing does not indicate which acute and chronic side effects the Applicant is more likely to experience. Dr. Kurtz testified he could not say for certain that the Applicant did or did not suffer from violence as a chronic side effect simply because he is a low metabolizer of Paxil.

Dr. Kurtz also testified that DNA drug sensitivity testing is a widely accepted area of DNA testing and is offered by testing labs across the country. He testified 2D6 testing became widely available around 2008 or 2009. He testified it wasn't until recently that labs were able to identify specific mutations of drugs. Dr. Kurtz testified that in 2000, while DNA drug sensitivity testing was known in the scientific community, it was not routine and widely known to the public. He testified further that routine testing was not available because techniques for testing did not exist.

Also testifying was Andrew Savage, Esquire. Counsel testified he has practiced mostly criminal law since 1975. He testified he recalls his representation of the Applicant and was hired shortly after the Applicant was arrested. He testified he immediately began searching for an explanation for the Applicant conduct. He testified he first wanted to find out about any emotional or psychological problems the Applicant was having. Counsel testified he learned that the Applicant was on SSRI drugs unsupervised. Counsel testified he was aware of the problems associated with SSRI drugs. He testified he considered not guilty by reason of insanity as a legal

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defense, but concluded that use of Paxil was not a legal defense and he advised his client of such.

Counsel testified his focus then shifted to the development of a strong case for mitigation. He testified he presented evidence relating to the Applicant's Paxil use to the Court in mitigation after the Applicant's plea. He testified on July 25, 2000 he retained Dr. Pat Gerald, a psychologist to determine if the Applicant suffered from any sexual aberrance. He testified in September 2000 he retained Dr. Bill Burke and in December 2000, he retained Dr. Jenkins. Counsel testified he also spoke to Wendy Cooper Samuel and Dr. Jack Booth. Counsel testified he retained Randy Wade in July 2001 to review the evaluations of all the other experts he retained. Counsel testified he retained Dr. Peter Breggin, a national expert on how SSRI medications affect users, and has phone consultations with many other experts.

Counsel testified he hired several experts who testified at the Applicant's guilty plea proceeding. Counsel testified their testimony was effective because the Applicant was given the minimum sentence for burglary. He testified that when consulting various experts, no one mentioned DNA sensitivity testing. He testified had the testing been available at the time, he would have presented the test during the guilty plea. However, counsel testified it would not have changed his advice to the Applicant about pleading guilty. Lastly, counsel testified he could not speculate on whether the DNA drug sensitivity testing would have made a difference during sentencing.

Last to testify was the Applicant Brooke Jewell. The Applicant testified he started taking Paxil three weeks prior to the crime. He testified he started taking 20 milligrams and could not recall if his dosage was increased. He testified his girlfriend convinced him that he was not energetic enough, so he went to a psychiatrist and was prescribed Paxil. He testified that after he was prescribed Paxil he did not notice any improvement. The Applicant testified that he

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committed the crime and has been looking for an expert to explain why for some time. He testified that three years ago he found out that Genelex did DNA drug sensitivity testing.

Newly Discovered Evidence

The Uniform Post-Conviction Relief Act states that a person may institute a post-conviction relief action if “there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.” S.C. Code Ann. § 17-27-20(4). If the applicant contends there is evidence of material fact not previously presented, the post-conviction relief application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(c). In order for an Applicant to obtain a new trial on the basis of newly discovered evidence, the party requesting the new trial must show that the evidence (1) is such as would probably change the result if a new trial was had; (2) has been discovered since the trial; (3) could not by the exercise of due diligence have been discovered before the trial; (4) is material to the issue of guilt or innocence; and, (5) is not merely cumulative or impeaching. Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983).

This Court finds the Applicant’s second application for post-conviction relief alleging newly discovered evidence was timely filed in accordance with S.C. Code Ann. §17-27-45(c). However, this Court finds that in light of the extensive mitigation evidence presented by counsel during the sentencing portion of the plea proceeding, it is unlikely the results of the DNA drug sensitivity testing would have resulted in a different sentence for the Applicant.

The record reflects counsel presented evidence of the Applicant’s educational background and his reputation in the community (Plea T. 8:12-13, 33:19-35:11). Counsel

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presented evidence to the court of his emotional and mental health background. (Plea T. 35:11-36:5). Counsel also presented testimony from several medical professionals who discussed the impact that SSRI medications like Paxil had on the Applicant. Present to testify as mitigation were Dr. Jenkins, a psychiatrist, Dr. Booth, a psychologist, Dr. Waid, and Dr. Breggin, a national authority on SSRI medications. (Plea T. 46-69). Along with his testimony, Dr. Breggin presented case law from other jurisdictions where the defendant's SSRI medication use precipitated an abrupt change in their behavior. (Plea T. 70-73).

The record also reflects the plea court took into consideration all mitigating circumstances presented by counsel during the plea. The plea judge states on the record "I am persuaded that the Paxil may have been a contributing factor to this unusual behavior on your behalf. I regard that as not an excuse, but perhaps as some mitigating circumstances. Nothing else in your record explains this horrible behavior". (Plea T. 94:7-9). This Court finds the plea court took all mitigating circumstances presented by the defense into consideration when sentencing the Applicant including the adverse effect the Applicant's Paxil use may have had on his behavior. This Court also finds the positive effect of the mitigation evidence presented by counsel is reflected in the Applicant being sentenced to the minimum sentence for burglary-first degree.

This Court also finds the DNA drug sensitivity test results as interpreted by Dr. Kurtz during the PCR are merely cumulative to the testimony presented by several experts who testified for the defense during the plea proceedings. The Applicant's DNA drug sensitivity test results indicated that he is a "poor metabolizer" and is at an "increased risk of drug-induced side effects". After analyzing the results of the Applicant's DNA drug sensitivity testing, Dr. Kurtz concluded that because the Applicant breaks down drugs more slowly he has an increased

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likelihood of experiencing the side effects of prescription drugs. Dr. Kurtz also concluded the Applicant's DNA drug sensitivity test results do not indicate which acute and chronic side effects the Applicant is more likely to experience.

This Court finds that during the Applicant's plea proceeding several medical professionals testified the Applicant had negative reactions to the Paxil he was prescribed during the time of the incident. Dr. Waid testified that "from a variety of agents, not just Paxil, [the Applicant] has a disturbing response to it, that it was driving him, making him more agitated". (Plea T. 51:11-14). Dr. Waid also testified that SSRI drugs "are not benign agents, and often induce people to do things that are atypical of their behavior, and can even induce psychosis and even more serious, malignant disorders." (Plea T. 55:23-56:3). Dr. Breggin testified that the Applicant's activities at the time of the incident were very consistent with the ups and downs of SSRI drugs. He testified "on the day that he's going from compulsive suicidality to compulsive aggression and compulsive sexuality, is very consistent with the ups and downs of the drugs." (Plea T.66:3-6). This Court finds that the Applicant has failed to carry his burden of proving the results of a DNA drug sensitivity test are newly discovered evidence warranting resentencing. This Court also finds that there is no evidence or material fact, not previously presented and heard, that requires vacation of the Applicant's sentence.

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, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

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CONCLUSION

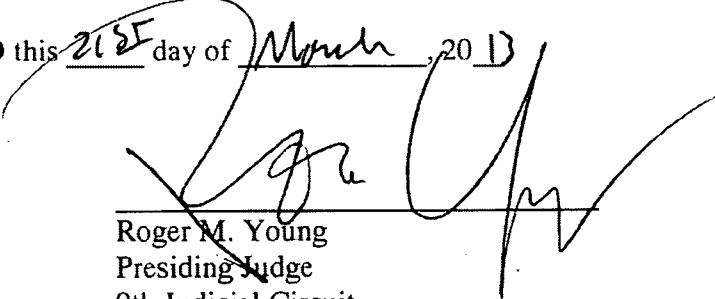
Based on all the foregoing, this Court finds and concludes the Applicant has not met his burden of proving that the results of the DNA drug sensitivity testing would have resulted in a different sentence for the Applicant in light of the extensive mitigation evidence presented by counsel during the sentencing portion of the plea proceeding. Therefore, this application for PCR must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of written notice of entry of this Order to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely served and filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 21st day of March, 2013



Roger M. Young
Presiding Judge
9th Judicial Circuit

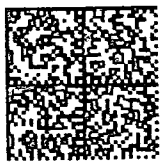
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