

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

HONORABLE G. EDWARD WELMAKER

2011-CP-23-8177

Tawan O. Johnson, SCDC # 220256,

APPELLANT,


against

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Tawan Johnson appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable G. Edward Welmaker, Circuit Judge on April 18, 2013 and Order issued on April 30, 2013 and filed on May 3, 2013. The Appellant received notice of the judgment on May 9, 2013.



Rodney W. Richey
Attorney for the Appellant
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(864) 467-0503

Other Counsel of Record:
Karen Ratigan, Esquire
Office of Attorney General State of SC
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9th
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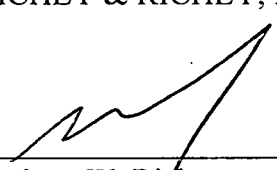
RESPONDENT.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on May 13, 2013, addressed to their attorney of record, Karen Ratigan, Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: May 13, 2013

RICHEY & RICHEY, P.A.



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RICHEY AND RICHEY

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S.C. Supreme Court

May 9, 2013

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The Honorable Daniel E. Shearouse
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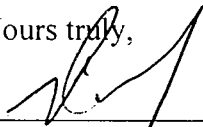
Re: Tawan O. Johnson, SCDC # 220256 vs. The State of South Carolina
Case No: 2011-CP-23-8177

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and a Proof of Service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,



Rodney Richey

RWR/tlg
enclosures

cc: Karen Ratigan, Esquire

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF GREENVILLE

CASE NO: 2011CP2308177

IN THE COURT OF COMMON PLEAS

2013 MAY -3 PM 4:14
CLERK OF COURT
GREENVILLE, SC

Tawana O Johnson 220256 vs. South Carolina State Of

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: Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this 3rd day of May, 2013.

Court Reporter:

PRESIDING JUDGE - G Edward Welmaker

This judgment was entered on the 3rd day of May, 2013, and a copy mailed first class this 3rd day of May, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Rodney Wade Richey PO Box 10916 Greenville, SC 296030916

Karen Christine Ratigan PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court - Clerk of Court

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
C.A. No. 2011-CP-23-8177

Tawana Ojlya Johnson,)
S.C.D.C. No. 220256,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

ORDER OF DISMISSAL

2013 MAY -3 PM 4:35
CLERK OF COURT
GREENVILLE SC
MAIL ROOM

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed December 9, 2011. The Respondent made its return on June 5, 2012. An evidentiary hearing into the matter was convened on April 18, 2013 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Rodney W. Richey, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. The Court had before it the trial transcript, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, the return, and the appellate records.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the September 2007 term of the Greenville County Grand Jury for first-degree burglary (2007-GS-23-7639). Daniel J. Farnsworth, Esquire represented the Applicant.

After the State called the case to trial, the Applicant was found guilty. On June 3, 2008,

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the Honorable Larry R. Patterson sentenced the Applicant to fifteen (15) years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. J. Falkner Wilkes, Esquire perfected the appeal. The Court of Appeals affirmed the Applicant's conviction and sentence. State v. Johnson, Op. No. 2010-UP-437 (S.C. Ct. App. filed Oct. 12, 2010). The Applicant filed a Petition for Writ of Certiorari at the South Carolina Supreme Court, which was denied by order dated January 11, 2012.

ALLEGATIONS

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

1. Ineffective assistance of counsel.
 - a. Failed to object to the racial composition of the jury.
 - b. Failed to object to the "burden-shifting Jury instructions with regard to intent element of the burglary charge."
 - c. Failed to request a lesser charge.
 - d. Failed to subpoena Janice Jackson.
2. Trial court error.
3. "Prosecution Misconduct."

The Applicant, through counsel, submitted an amendment to his application filed January 25, 2013, in which he alleged the following:

1. Ineffective assistance of counsel:
 - a. Failed to conscientiously discharge professional responsibilities.
 - b. Failed to effectively challenge search and seizure.
 - c. Failed to act as a diligent and conscientious advocate.
 - d. Failed to give complete loyalty.
 - e. Did not have Applicant's best interest in mind.
 - f. Failed to serve the cause in good faith.
 - g. Neglected necessary investigations and preparation.
 - h. Did not do necessary factual investigations.
 - i. Did not do necessary legal research.
 - j. Did not conscientiously gather information to protect rights.
 - k. Did not try to have the case settled in a manner that would have been to my best advantage.

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- l. Did not advise me of all my rights or take any of the actions that were necessary to protect and preserve them.
- m. Never properly ascertained whether or not I actually understood or comprehended all of the issues involved in the case.
- n. Never properly consulted with me or kept me informed.
- o. Never explained to me or discussed with me any of the elements.
- p. Never made any attempt to ascertain whether or not I actually knew the elements of the crime charge or whether or not I understood exactly what "criminal element" meant.
- q. Never explained or discussed with me how the elements of the crime charged and the evidence that the prosecution planned to introduce into evidence against me related to one another and did not discuss how the sentencing would be done especially as it related to the elements of the crime as in State v. Boyd.
- r. Never informed me of any of the defenses that were available to me.
- s. Never intended to offer any defense to the court on my behalf.
- t. Never explained to me or discussed with me any kind of defense strategy.
- u. Never explained to me or discussed with me any of the tactical choices that were made or planned to be made.
- v. Dictated to me exactly how my case was going to be handled and offered no alternative options.
- w. Failed to properly acquaint herself with the law and facts surrounding my case and, as a result, there was a very serious error in the assessment of both the law and the facts.
- x. No defense at all was put in issue for me during the Court proceedings.
- y. Did not subject the prosecution's case to any adversarial testing.
- z. Failed to oppose the prosecution's case with any adversarial litigation.
- aa. Failed to function as the government's adversary in any sense of the word.
- bb. Failed to pursue any of the legal recourse that was available.
- cc. Failed to function as the counsel that the Constitution's Sixth Amendment guarantees.
- dd. Failed to call alibi witnesses on my behalf.
- ee. Failed to appeal my case.

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 the witness who testified at the hearing, and to closely pass upon his 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).

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).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

The Applicant stated trial counsel did not properly represent him. The Applicant said he had no intent to commit a crime but admitted on cross-examination that he kicked in the door of a residence at 3:00 a.m. The Applicant stated trial counsel should have objected to the racial composition of the jury. The Applicant stated trial counsel should have asked for a second-degree burglary jury charge. The Applicant stated trial counsel should have objected to a

burden-shifting jury charge because the State had not shown evidence of intent. The Applicant stated trial counsel should have subpoenaed Janice Jackson to testify at trial. The Applicant stated trial counsel discussed a five year plea offer with him and that he thought he was in court that day to plead guilty. The Applicant stated he did not mention this to the judge because he did not want to cause any conflict. The Applicant admitted trial counsel argued his version of events at trial – that he was intoxicated and being chased by someone when he entered the residence.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have challenged the racial composition of the jury. The trial transcript does reflect there were eleven white jurors and one black juror in the panel. The transcript also reflects trial counsel struck six white jurors and the State struck one black juror. (Trial transcript, pp.7-14). The Applicant has failed to articulate upon what basis trial counsel could have made a Batson¹ motion and argued the State discriminated in making its jury strike. As such, the Applicant did not meet his burden of proving there was discriminatory intent in the State's jury strike.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have requested a jury charge for second-degree burglary and then objected to an alleged burden-shifting jury instruction about intent. This Court finds that, based upon the facts of this case, a jury charge for second-degree burglary would not have been warranted. See State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001) (finding the law to be charged must be determined from the evidence presented at trial). This Court further finds there was no burden-shifting jury charge in this case. The Applicant appears to be arguing that the State never proved he had the intent to commit a crime when he kicked in the door of the residence. This issue, however, was raised on direct appeal and the Court of Appeals affirmed his conviction and

¹ Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712 (1986).

sentence. State v. Johnson, Op. No. 2010-UP-437 (S.C. Ct. App. filed Oct. 12, 2010).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have subpoenaed Janice Jackson. As this alleged witness did not testify at the evidentiary hearing, any discussion regarding what she would have testified about at trial is purely speculative. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme Court “has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness’ failure to testify at trial.”) (emphasis in original).

This Court finds the Applicant failed to meet his burden of proving he was misled into believing he would be pleading guilty in exchange for a five year plea offer. The Applicant stated trial counsel relayed this offer to him. This Court finds trial counsel fulfilled his responsibilities in this regard. See Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (holding counsel’s failure to convey the State’s plea offer to defendant constituted deficient performance). The Applicant also stated, however, that he believed he had accepted this offer and planned to plead guilty. This Court does not find the Applicant’s testimony is credible. The Applicant presented no evidence or documentation that he had accepted the plea offer. Further, there is no mention in the trial transcript either that such an offer had been made or that the Applicant believed he was in court that day to plead guilty. This Court does not find credible that, in such a situation, the Applicant would have simply proceeded to trial instead of telling the judge of his intent to plead guilty.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under

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prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel’s performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

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.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel’s representation. Therefore, this PCR application must be denied and dismissed with prejudice.

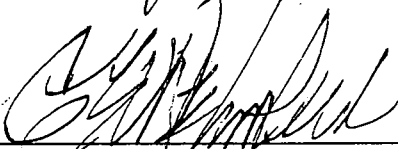
This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate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

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JWB

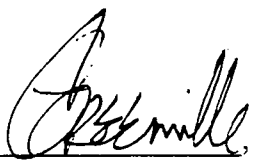
IT IS THEREFORE ORDERED:

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 30 day of April, 2013.



G. Edward Welmaker
Presiding Judge
Thirteenth Judicial Circuit


_____, South Carolina.