NOTICE OF APPEAL FROM A PCR DENIAL BY THE COURT OF COMMON PLEAS

THE STATE OF SOUTH CAROLINA
In Supreme Court of SC

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr, Circuit Court Judge

Case #2018-CP-15-0039

The State, Respondent,

v.

Tequan L. Brown Appellant.

NOTICE OF APPEAL

Tequan L. Brown, appeals the decision of the Court, in the order filed on 9/22/22, received by counsel on 9/22/22, where Mr. Brown was denied his request for Post-Conviction Relief. Mr. Brown was represented at the hearing by Timothy L. Griffith, Attorney at Law who files this notice on behalf of the Appellant. The order herein attached and a copy of which is also forwarded to the SCCID Appellate Division.

Dated 9/22/22

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STATE OF SOUTH CAROLINA COUNTY OF COLLETON	)	IN THE COURT OF COMMON PLEAS FOR THE FOURTEENTH JUDICIAL CIRCUIT
Tequan L. Brown, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2018-CP-15-39 **ORDER OF DISMISSAL**

This matter comes before this Court by way of an application for post-conviction relief filed by Tequan L. Brown ("Applicant") on January 16, 2018. The State's ("Respondent") return to the application included a motion for a more definite statement. An evidentiary hearing in this matter was held before the undersigned at the Beaufort County Courthouse on August 8, 2021. Applicant was present and was represented by Timothy L. Griffith, Esquire. Assistant Attorney General Taylor Z. Smith of the South Carolina Attorney General's Office represented Respondent. Following a thorough review of the record in its entirety and the testimony and evidence presented at the evidentiary hearing, this Court finds that Applicant has failed to prove that he is entitled to post-conviction relief, and denies the application with prejudice.

PROCEDURAL HISTORY

Applicant is currently imprisoned in the South Carolina Department of Corrections. During its December of 2013 term, the Colleton County Grand Jury indicted Applicant for murder (2013-GS-15-1041), obstruction of justice (2013-GS-15-1040), and possession of a weapon during the commission of a violent crime (2013-GS-15-1042). On June 22-25, 2015, Applicant proceeded to a jury trial with the Honorable Perry Buckner ("the trial court") presiding. Matthew Lee Walker ("trial counsel"), Esquire, represented Applicant at trial. Assistant Solicitor Tameaka A. Legette

of the Fourteenth Circuit Solicitor's Office prosecuted Applicant. At the beginning of trial, the trial court denied Applicant's motion for immunity from prosecution under the Protection of Persons and Property Act of the South Carolina Code of Laws. At the conclusion of trial, the jury found Applicant guilty of voluntary manslaughter, which is the lesser-included offense of murder, and of obstruction of justice and possession of a weapon during the commission of a violent crime. The trial court sentenced Applicant to an aggregate term of thirty years' imprisonment.

Trial counsel filed a timely notice of appeal. Appellate Defender John Harrison Strom of the South Carolina Commission on Indigent Defense represented Applicant on appeal initially. Strom raised the following arguments on Applicant's behalf: (1) that the trial court erred in denying Applicant's motion for immunity because Applicant was without fault in bringing on the difficulty, Applicant shot the victim while trying to remove the victim from Applicant's property, and Applicant reasonably believed that he was in imminent danger; and (2) that the trial court erred in denying Applicant's motion for a directed verdict. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences in an unpublished opinion. State v. Brown, Op. No. 2017-UP-315 (Ct. App. filed July 26, 2017) (per curiam). Strom petitioned for rehearing; however, the Court of Appeals denied the petition in an order issued on October 19, 2017.

Appellate Defender David Alexander, also of the Commission on Indigent Defense, began representing Applicant. Alexander asked for an extension of time from the South Carolina Supreme Court to file a petition for a writ of certiorari. Afterwards, Alexander then informed the Supreme Court that he would not file a petition. As a result, the Supreme Court issued an order dismissing the appeal. The remittitur was issued on December 15, 2017.

Applicant's application for post-conviction relief followed.

CURRENT PROCEEDING

In his application, filed on January 16, 2018, Applicant raised multiple claims, which this Court interprets as follows: (1) trial counsel was constitutionally ineffective; (2) one or both of Applicant's appellate lawyers were constitutionally ineffective; (3) Applicant's due process rights were violated; and (4) Applicant has newly discovered evidence. At the start of the evidentiary hearing before this Court, Respondent noted that it had received from Applicant's counsel by email on August 2, 2021, an amended set of claims, which were: (1) trial counsel was constitutionally ineffective for not going over discovery with and giving a copy thereof to Applicant; (2) trial counsel was constitutionally ineffective for failing to object to hearsay of a deceased woman from a law enforcement officer; (3) trial counsel was constitutionally ineffective for failing to investigate adequately; (4) trial counsel was constitutionally ineffective for not cross-examining the pathologist who testified during the State's case-in-chief; (5) Strom was constitutionally ineffective for not filing a petition for a writ of certiorari in the South Carolina Supreme Court;[1] (6) Alexander was constitutionally ineffective for not filing a motion for rehearing according to Rule 29(b), SCRCrimP; and (7) Applicant has newly discovered evidence that a witness who alleges that the victim possessed a weapon has sworn out an affidavit[2]. This Court finds that Applicant abandoned or waived all claims other than those addressed substantively in this order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety. Before this Court are: the records of the Colleton County Clerk of Court for Applicant's convictions and sentences;

[1] During Applicant's case-in-chief before this Court, he abandoned this claim against Strom, testifying that he was satisfied with Strom's representation of him. This Court finds that this claim is abandoned and will not address it in this order.

[2] Applicant presented no evidence or argument as to the seventh claim listed here, so this Court finds that Applicant has abandoned the claim, and this Court will not address it in this order.

Applicant's records from the South Carolina Department of Corrections; and Applicant's direct appeal records, including the notice of appeal, the order transferring the appeal to the Court of Appeals, the record on appeal, the parties' final briefs, the Court of Appeals' opinion, Alexander's request for an extension to file the petition for a writ of certiorari, the Supreme Court's order granting the extension, Alexander's letter indicating that he would not file a petition, the Supreme Court's order of dismissal, and the remittitur. Set forth below are the relevant findings of facts and conclusions of law with regards to the claims that Applicant advanced at the evidentiary hearing, as required by S.C. Code Ann. §17-27-80 (1985).

Applicant's claim that trial counsel was constitutionally ineffective for not going over discovery with and giving a copy to Applicant.

Applicant raises a claim that trial counsel was constitutionally ineffective for not going over discovery with Applicant and for not giving a copy of the things in discovery to Applicant. Applicant testified that he did not see full discovery before trial. He testified that he only saw police reports and a couple of other things. He testified that he never possessed a full copy of discovery.

Trial counsel testified about his background, and said that he was appointed to represent Applicant. He testified that he did not remember the exact number of times that he met with Applicant before trial, but he felt that they met on enough occasions for him to understand the issues that Applicant wanted to raise and for him to communicate to Applicant the State's allegations. He testified that the frequency of his meetings with Applicant increased as the trial date drew near. He testified that he communicated with Applicant by mail, too, and that he sometimes met with Applicant at the jail after receiving letters from Applicant. He testified that he received a discovery disclosure from the State, which included, according to his memory, video recordings of law enforcement interviews, police reports, a gunshot reside report, and an autopsy

report. Trial counsel did not feel that the case was complicated. He testified that he described the things in discovery to Applicant and asked Applicant what Applicant wanted to review; he gave hard copies of all the reports that he described as "major" to Applicant. He testified that Applicant gave him no reason to believe that Applicant did not understand what was in the discovery disclosure or the significance thereof.

Applicant, like all defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Applicant has the burden of proving the allegations in the post-conviction relief action, and when alleging that his lawyers were constitutionally ineffective, he must prove that the conduct of his lawyers "so undermined the proper functioning of the adversarial process that [that conduct] cannot be relied upon as having produced a just result." Strickland, at 686. In evaluating allegations of ineffective assistance of counsel, the post-conviction relief court applies the two-pronged test outlined in Strickland. First, Applicant must prove that the performance of his lawyers was deficient. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. 668). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, at 117, 386 S.E.2d at 625 (quoting Strickland, at 690). In order for a post-conviction relief applicant to successfully prove that his defense attorney's performance was deficient, the applicant must prove "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quotation omitted). "The proper measure of counsel's performance remains whether he has provided representation within the range of competence required of attorneys in criminal cases." Id. (citations omitted). The "preeminent authority for all"

courts when they are considering an applicant's claim of constitutional ineffectiveness requires that the courts be highly deferential to a defense lawyer's performance because:

> [I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable . . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Id. at 444-45, 334 S.E.2d at 815-16 (quoting Strickland). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, the deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for [the lawyer'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.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether a lawyer's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, at 670. Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney. Id. at 690.

This Court finds that Applicant has failed to prove that trial counsel's performance was deficient in any way with respect his handling of Applicant's discovery. Applicant's testimony that trial counsel did not discuss the discovery with him and show it to him is not credible. Trial counsel's testimony that he discussed the discovery with Applicant, explained to Applicant the significance of the things in discovery, gave Applicant the chance to request further explanation or review of anything in discovery, and gave hard copies of at least some of the things in discovery to Applicant is credible.

This Court finds that Applicant has failed to prove that there is a reasonable likelihood that the outcome of trial would have been different had trial counsel spent more time reviewing discovery with him. Applicant has not proven that more discovery review would have enhanced his defense at trial or that any new evidence or defenses would have been uncovered with more review.

This Court finds that Applicant has failed to prove that trial counsel was constitutionally ineffective for not going over discovery with Applicant and for not giving a copy of the things in discovery to Applicant because Applicant has failed to prove that trial counsel's performance with respect to discovery was deficient and has failed to prove any resulting prejudice. The more credible evidence shows that trial counsel did do these things. This claim is denied and dismissed with prejudice.

Applicant's claim that trial counsel was constitutionally ineffective for not objecting to hearsay.

Applicant raises a claim that trial counsel was constitutionally ineffective for not objecting to hearsay when a law enforcement officer testified as to what Courtney Boulware told him. There was some evidence at trial that Boulware may have been in some sort of romantic relationship with the victim, and that the victim went to Applicant's home on the night of the victim's death

because he was looking for Boulware, who was either at Applicant's or in the apartment next to Applicant's. Tran. 18, 26, 34-37, 46, 52, 60-61, 70. Boulware died in a car crash before Applicant's trial began. Tran. 177, 438. Nyle Eltzroth, an investigator at the Colleton County Sheriff's Department, testified during the pre-trial immunity hearing that he had talked with Boulware during the course of his investigation after Boulware had been arrested for probation violations in another county. Tran. 176. Investigator Eltzroth testified that Boulware told him the following:

> [S]he stated that [Applicant] was the one who came down the sidewalk with the gun in his hand. That's when [the victim] saw the gun in [Applicant's] hand. Got out, exited the vehicle, and basically, went, as [Applicant] was coming down, [Boulware] specifically stated that [the victim] put his hands out and said, "If you're going to pull it, use it." Several times. She then stated that she witnessed from the vehicle, that [Applicant] then started firing. At one point, she could even tell that the gun jammed or something was wrong, because no shot was fired and she saw his hand jump forward and he continued to fire. At that point, she tried to flee the scene.

Tran. 176. Trial counsel did not raise a hearsay objection to that testimony, although he did instruct Investigator Eltzroth later in the hearing not to repeat what Boulware said because trial counsel did not think it was admissible, at which point the trial court instructed trial counsel not to tell a witness what is or is not admissible. Tran. 192. Investigator Eltzroth testified again during the State's case-in-chief, testifying that he had spoken with Boulware, and others, when he arrived at Applicant's home on the night of the shooting, and that he had spoken with Boulware twice before she died; however, Investigator Eltzroth did not testify as to what Boulware told him about the details of the shooting. Tran. 420, 425, 438.

Trial counsel testified before this Court about Investigator Eltzroth's testimony concerning Boulware. He testified that he had no independent recollection of Investigator Eltzroth's testimony and trial counsel's in-trial thoughts on it and his decision not to object, but he testified that it was his position that, in a pre-trial hearing, the trial court knows when to disregard hearsay testimony

without needing a defense lawyer to object. He testified that he does not typically object to hearsay in pre-trial hearings because he believes that our appellate courts have drawn distinctions between the admissibility of such evidence in motions hearings and in a party's case-in-chief.

This Court finds that Applicant has failed to prove that trial counsel's performance with regard to this testimony was deficient. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801, SCRE. "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE. In this case, Investigator Eltzroth's testimony during the pre-trial hearing as to what Boulware told him was hearsay. However, trial counsel's practice of not making hearsay objections during pre-trial hearings is a reasonable one. The trial court was able to discount the hearsay when making its ruling on Applicant's motion for immunity. The hearsay was not repeated during the State's case-in-chief, so Applicant has failed to prove that there was any reason for trial counsel to make a hearsay objection when Investigator Eltzroth testified during that portion of trial.

This Court finds that Applicant has failed to prove that there is a reasonable likelihood that the outcome of his trial would have been different had trial counsel made a hearsay objection during the pre-trial hearing. As noted already, the jury never heard what Boulware told the investigator. Even with regards only to the immunity hearing, Applicant has not proven that the lack of objection to the relevant testimony likely affected the trial court's ruling on immunity. The fact that the jury, without hearing of Boulware's statement, still gave no credit to Applicant's assertion of self-defense is another indication that a hearsay objection to Boulware's statement in the pre-trial hearing would have had no effect on the trial court's ruling.

Furthermore, Lawrenzer Walker told Investigator Eltzroth the same thing that Boulware had. Applicant testified that Walker was in the duplex apartment with him when the victim arrived. Tran. 32-34, 62. Applicant testified that Walker was in the yard with him outside the apartment when the final confrontation with the victim occurred. Tran. 36, 68. A gunshot residue test sample was collected from Walker on the night of the shooting, and gunshot residue was detected on both of Walker's hands. Tran. 115-16, 121. Investigator Eltzroth questioned Walker as part of his investigation; in fact, Investigator Eltzroth secured an arrest warrant for Walker because, in part, he learned after speaking with Walker that Walker and Applicant had concealed from Investigator Eltzroth the fact that Boulware had been present at the apartment at the time of the shooting. Tran. 169, 170-71, 439-40. Investigator Eltzroth testified that Walker told him that Applicant walked out of the duplex with a pistol in his hand, that the victim exited the victim's vehicle, and that Applicant then shot the victim multiple times. Tran. 176-77. Walker also took Investigator Eltzroth to the murder weapon, which he said that he had hid after Applicant shot the victim. Tran. 440. Trial counsel had the transcript of Walker's guilty plea hearing, and the parties stipulated to the admission of the entire transcript during the defense's case-in-chief. Tran. 80, 522.[3] During the guilty plea hearing, Walker alleged that the victim told those present in Applicant's yard on the night of the shooting that the victim was going to kill Applicant, and that the victim then charged at Applicant, although Walker stated that he had not seen a weapon on the victim's person. Tran.

[3] Both Investigator Eltzroth and trial cousnel's investigator testified that Walker was serving a prison sentence in Maryland at the time of Applicant's trial. Tran. 73, 572. The trial court memorialized for the record some things that had happened off the record: trial counsel wanted to introduce Walker's guilty plea transcript into evidence, the trial court had not wanted to admit the transcript because the State would be deprived thereby of the opportunity to cross-examine Walker, but the parties agreed that trial counsel would be able to introduce the transcript as long as Investigator Eltzroth was allowed to testify in reply about the discrepancies between Walker's testimony at the guilty plea hearing and his statements to law enforcement officers. Tran. 576.

546, 549. In the State's case-in-reply, Investigator Eltzroth testified that Walker's statement at the guilty plea hearing differed from Walker's previous statements. Tran. 566. Trial counsel wanted Walker's statements in evidence at trial because some of them supported Applicant's assertion that he was acting in self-defense when he shot the victim. Boulware's statement to Investigator Eltzroth was not too different in substance from Walker's ultimate statement to Investigator Eltzroth.

This Court finds that Applicant has failed to prove that trial counsel was constitutionally ineffective for not raising a hearsay objection to Investigator Eltzroth's testimony about what Boulware told him because Applicant has not proven that trial counsel was performing deficiently when he did not object during the pre-trial immunity hearing and because Applicant has not shown that there is a reasonable likelihood that the outcome of trial would have been different had trial counsel done so. This claim is denied and dismissed with prejudice.

Applicant's claim that trial counsel was constitutionally ineffective for not conducting an adequate pre-trial investigation.

Applicant raises a claim that trial counsel's pre-trial investigation was inadequate. Applicant testified before this Court that, as far as he was aware, trial counsel did not do any investigation before trial. He testified that he was aware that the Public Defender's Office has an investigator on staff.

Trial counsel testified before this Court about this claim. He testified that he was not sure of the exact number of his meetings with Applicant during the course of the representation, but he felt that they met enough times for him to understand the issues that Applicant wanted him to raise at trial and for him to inform Applicant of the State's allegations. He testified that the frequency of his meetings with Applicant increased as the date of trial got closer. He testified that Applicant contacted him by mail, too. He testified about the things that he received from the State in its

discovery disclosures. He did not feel that Applicant's case was a complicated one. He testified that he and his investigator went to the crime scene on multiple occasions and took measurements there, and tried to get an idea of where the victim had been located at the time of the shooting and where the victim was located when he was approaching Applicant. He testified that the investigator was on staff at the Public Defender's Office, and he called the investigator as a witness at trial in order to elicit testimony about some aspects of their pre-trial investigation. He testified that the investigator also went out and talked to people and potential witnesses.

A defense attorney has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. Strickland, at 691. Thus, "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). A defense attorney's "[f]ailure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (citing Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976)). An applicant alleging that his attorney failed to prepare for the case must show how additional preparation would have resulted in a different outcome. Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997). Moreover, counsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006). "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690; Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 633-34 (Ct. App. 2014).

This Court finds that Applicant has failed to prove that there was any deficiency in trial counsel's performance with respect to his pre-trial investigation. Trial counsel believed, with good reason, that Applicant's case was not complex; rather, it involved a factual dispute over the victim's and Applicant's actions immediately before Applicant killed the victim. This Court is convinced after reviewing trial counsel's advocacy on Applicant's behalf at trial and considering trial counsel's testimony before this Court that trial counsel's pre-trial investigation was more than adequate. Trial counsel and his investigator went so far as to visit the crime scene more than once and take measurements in an effort to support Applicant's ultimate allegation that he killed the victim in an act of self-defense. Applicant did not identify anything that trial counsel should have done during his pre-trial investigation that he did not do.

This Court finds that Applicant has failed to prove that there is a reasonable likelihood that the outcome of trial would have been different had trial counsel done some further investigation. Applicant presented this Court with no evidence that trial counsel would have uncovered had he done some further investigation. Mere speculation on Applicant's part as to how the trial would have come out differently had trial counsel done further investigation would not have served to satisfy Applicant's burden with regard to this claim, but Applicant did not even offer such speculation.

This Court finds that Applicant has failed to prove that trial counsel was constitutionally ineffective for allegedly conducting an inadequate pre-trial investigation because Applicant has failed to prove that there was any deficiency in trial counsel's investigation and has failed to prove that he suffered any resulting prejudice. This claim is denied and dismissed with prejudice.

Applicant's claim that trial counsel was constitutionally ineffective for not cross-examining the pathologist who testified during the State's case-in-chief.

Applicant raises a claim that trial counsel was constitutionally ineffective for not cross-examining the State's pathologist about gunshot residue. He contends that trial counsel should have questioned the pathologist about the gunshot residue evidence because, without any supporting evidence, Applicant alleges that the pathologist stated after trial that the shooting in which the victim was killed was not a close-distance shooting. Applicant referred to this as newly discovered evidence. Trial counsel testified about the claim before this Court. Trial counsel did not remember specifically why he did not question the State's forensic pathologist about whether there was any stippling or soot on the victim's body, but he noted that the State's forensic pathologist testified before the State's gunshot residue expert testified. He testified that it would have had no effect on his defense theory whether or not the victim had stippling or soot on his body. He testified that the defense theory was that the victim was on Applicant's property and was threatening Applicant. He testified that, under that theory, it did not matter exactly how close the victim was from Applicant because the victim's being in Applicant's yard while making threats against him was enough to justify Applicant's acting in self-defense.

Doctor Susan Erin Presnell, a forensic pathologist, testified at trial as an expert without objection from the defense about her autopsy of the victim. Tran. 291-95. Dr. Presnell testified that one bullet went through the center of the victim's forehead and into his brain; this was the bullet that killed the victim. Tran. 297-99. Dr. Presnell testified that another bullet entered the right side of the victim's abdomen. Tran. 298. Dr. Presnell concluded that the cause of the victim's death was a gunshot wound. Tran. 307. Later on during the State's case-in-chief, crime scene investigator James Davis of the Colleton County Sheriff's Department testified that he took a gunshot residue sample from the victim's body. Tran. 407-08. Whitney Berry, a gunshot residue analyst from the

South Carolina Law Enforcement Division ("SLED") testified as an expert in gunshot residue testing and analysis without objection from the defense. Tran. 479-81. Berry testified about the ways that gunshot residue can get on someone's hands and the length of time that the residue would remain on that person's hands. Tran. 482-83, 492. Berry's testing and analysis led her to conclude that gunshot residue was present on both of the victim's hands. Tran. 488-89, 493. Berry testified that she would not have expected the gunshot residue in this case to travel for more than two to three feet because the fatal shot was fired by a .32-caliber handgun. Tran. 489. Berry testified that shooting victims usually have gunshot residue on them. Tran. 489. Berry did not know exactly how gunshot residue scatters at a distance. Tran. 495. Berry testified that, due to the shape of the gunshot residue particles that she found on the victim's hands, she believed that it was more probable that the residue came to be on the victim's hands from gunfire rather than from the victim's handling of a firearm. Tran. 494-98.

This Court finds that Applicant has failed to prove that there was any deficiency in trial counsel's performance with respect to his cross-examination of Dr. Presnell. Applicant has offered this Court no reliable evidence of what the defense would have gained had trial counsel asked Dr. Presnell about any gunshot residue on the victim's body. Applicant has offered this Court no reliable or credible evidence that Dr. Presnell believed that the shooting was not one that took place with only a short distance between Applicant and the victim. Furthermore, trial counsel, though he could not specifically remember the reason that he did not question Dr. Presnell about gunshot residue, gave an explanation for his not doing so in light of his theory of the case, which was reasonable under the circumstances. Trial counsel argued during the defense's closing argument: that Applicant was acting in self-defense; that it was not possible for the jury to know every detail of the night's events; that Applicant had no obligation to run from the victim; that

Applicant had no duty to retreat from the victim's advances; that it should not have been surprising that both Applicant and the victim had gunshot residue on them considering the circumstances of the shooting; that Applicant was lucky to have killed the victim before the victim closed the distance between them considering that the victim was with a few feet of Applicant, was such a large-bodied person, and was "drunk, high on cocaine, and manic"; that the victim was a threat to Applicant at the time of the shooting; that one of the witnesses had said that the witness saw the victim brandish a firearm; and that Applicant knew of the victim's reputation for dangerousness. Tran. 581, 588, 590, 592, 599-601. Indeed, trial counsel turned around the evidence about the short distance between the victim and Applicant so as to use it in argument to try to add weight to Applicant's assertion of self-defense.

This Court finds that Applicant has failed to prove that there is a reasonable likelihood that the outcome of his trial would have been different had trial counsel questioned Dr. Presnell about gunshot residue on the victim's body. An "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." Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998)); see also Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (holding that the PCR court's finding that Dempsey was prejudiced by trial counsel's failure to call an expert at trial to rebut the State's expert was merely speculative when Dempsey failed to have an expert testify at his PCR hearing), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). Applicant could have called Dr. Presnell as a witness at his hearing in order to give testimony in support of his claim, but he did not do so. Applicant has produced no evidence of prejudice.

This Court finds that Applicant has failed to prove that trial counsel was constitutionally ineffective for not questioning the forensic pathologist who conducted the autopsy of the victim about gunshot residue because Applicant has not proven that trial counsel should have questioned the witness about the matter and because Applicant has not proven that he suffered any resulting prejudice. This claim is denied and dismissed with prejudice.

Applicant briefly referred to his claim as one of newly discovered evidence. Applicant did not refer to it that way after his brief reference and did not provide any argument on the point. Nevertheless, this Court finds that Applicant has failed to prove that he has newly discovered evidence. "Any person who has been convicted of, or sentenced for, a crime and who claims . . . [t]hat there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice" may raise the claim in an application for post-conviction relief. S.C. Code Ann. § 17-27-20(A)(4). The "traditional five-factor test" in South Carolina for one seeking a new trial on the basis of newly discovered is that "the party [seeking a new trial] must show that the evidence: (1) would probably change the result if a new trial is had; (2) has been discovered since trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching." Jamison v. State, 410 S.C. 456, 467, 765 S.E.2d 123, 128 (2014) (quotation omitted). As noted above, Applicant has failed to identify for this Court what evidence is the subject of the claim or what evidence would have been produced had trial counsel questioned Dr. Presnell about gunshot residue. Applicant has failed to prove that any testimony from Dr. Presnell that would have resulted from questioning about gunshot residue would probably have changed the outcome of trial. Applicant has not proven that any such evidence could not have been discovered before trial. Applicant has failed to prove that any such evidence would have been material to the issue

of his guilt or innocence; as trial counsel noted, the defense's theory was that the victim's relative closeness to Applicant at the time of the shooting is evidence that Applicant was justifiably in fear for his life. This claim is denied and dismissed with prejudice.

Applicant's claim that Alexander was constitutionally ineffective for not filing a motion for rehearing according to Rule 29(b), SCRCrimP.

Applicant raises a claim that Alexander was constitutionally ineffective for not moving for rehearing pursuant to Rule 29(b), SCRCrimP. Applicant testified before this Court that Alexander, once he took over the representation of Applicant from Strom, was not willing to pursue Applicant's claims on appeal. He testified that Alexander did not follow through on filing a motion under Rule of Criminal Procedure 29(b).

Alexander testified before this Court. He began practicing law in 2000 and has devoted his work exclusively to criminal appellate work since 2012. He began representing Applicant when Strom took an outside position. He testified that Strom, who had represented Applicant before the South Carolina Court of Appeals up until that point, had filed a petition for rehearing in the Court of Appeals on August 10, 2017. He testified that he sent a letter to Applicant on October 16, 2017, notifying Applicant that the appeal had been re-assigned to him from Strom. He testified that the Court of Appeals issued an order denying the petition for rehearing on October 19, 2017. He requested an extension from the South Carolina Supreme Court for the filing and service deadline for a petition for a writ of certiorari so that he could have time to review the case. He testified that he then notified the Supreme Court that he had decided not to file a petition for a writ of certiorari. He testified that he decided to take the appeal no further because he believed that it had no merit. He notified Applicant of his decision by letter and by phone.

Alexander testified that Applicant had asked him to file a motion under Rule of Criminal Procedure 29(b) on the basis that Applicant believed that he had newly discovered evidence. He

testified that he thought that, under the circumstances, it would have made no sense for Applicant to move for relief under the rule, and that Applicant would be better served by raising a newly discovered evidence claim in an application for post-conviction relief. He testified that a lawyer who regularly practices in the field of post-conviction relief would have been the proper person to raise the issue for Applicant. He testified that he also notified Applicant of his decision not to file a motion for a new trial. He testified that there were notes in the file indicating that Strom had had conversations with Applicant about Applicant's request that a motion be filed. He testified that he had discussed the matter with Strom when considering the issue. He testified that he did not file the motion.

This Court finds that Applicant has failed to prove that Alexander's performance was deficient with regard to his decision not to file a motion pursuant to Rule 29(b), SCRCrimP. Applicant has not proven that it is customary or usual for an appellate lawyer representing an appellant in a criminal appeal to file such a motion in the circuit court, nor has he proven that such is required as a constitutional matter. Applicant's failure to prove that Alexander was required "under prevailing professional norms" to file the motion means that Applicant has failed to meet the first prong of Strickland. See Cherry, at 117, 386 S.E.2d at 625 (instructing that a post-conviction relief court evaluates the first prong of Strickland by weighing a lawyer's performance against prevailing professional norms). Alexander was under no obligation to file the motion, particularly because he could have done so only after being granted leave of the appellate courts. See Rule 29(b), SCRCrimP (prohibiting the filing of the motion while a case is on appeal, except in situations in which the appellate court grants the filing party's motion for leave to file the motion, and suspends the appeal). Alexander rejected Applicant's request that he file the motion, in part, because Alexander felt that Applicant's motion would be better served if advanced by a

lawyer appointing during the post-conviction relief process. Alexander's judgment in this regard seems to have been made in the best interests of Applicant. Additionally, Strom must have shared Alexander's opinion about the advisability of suspending the appeal in order to file the motion because, although Strom was aware of Applicant's desire that the motion be made, he, too, did not comply.

This Court finds that Applicant has failed to prove that there is a reasonable likelihood that the outcome of the proceeding would have been different had Alexander filed the motion at Applicant's request. The "traditional five-factor test" in South Carolina for one seeking a new trial on the basis of newly discovered is that "the party [seeking a new trial] must show that the evidence: (1) would probably change the result if a new trial is had; (2) has been discovered since trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching." Jamison, at 467, 765 S.E.2d at 128. As noted above, Applicant has failed to prove that he is entitled to relief due to newly discovered evidence. As such, it would have been a fruitless endeavor for Alexander to have filed the motion. Applicant has been able to raise his claim of newly discovered evidence before this Court, which proves true Alexander's belief that his decision not to move under Rule 29(b) would not deprive Applicant of the chance to raise his claim.

This Court finds that Applicant has failed to prove that Alexander was constitutionally ineffective for not moving for a new trial under Rule of Criminal Procedure 29(b) because he has failed to prove that there was any deficiency in Alexander's decision not to do so and because Applicant has failed to prove any resulting prejudice. This claim is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds that Applicant has not proven any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application is denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt of this order to secure the appropriate appellate review. See Rule 203 and 243, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to the assistance of appellate counsel 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, he must serve and file a notice of appeal. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 19th day of August, 2022.

Eugene C. Griffith, Jr.
Presiding Judge

Aiken, South Carolina

ALAN WILSON
ATTORNEY GENERAL

September 7, 2022

The Honorable Rebecca Hill
Clerk of Court - Colleton County
Post Office Box 620
Walterboro, SC 29488-0028

2022 SEP 22 PM 8:35

COLLETON COUNTY
CLERK OF COURT

Re: **Tequan L. Brown, #341915 v. State of South Carolina**
Case No.: 2018-CP-15-00039

Dear Ms. Hill:

Enclosed is the original Order of Dismissal in the above-referenced matter, which was signed by the Honorable Eugene C. Griffith, Jr., on August 19, 2022. On September 2, 2022, Judge Griffith's office hand-delivered it to me so that I could forward it to you for filing. Please file it and serve the parties with a file-stamped copy.

Thank you for your help.

Sincerely,

Taylor Z. Smith
Assistant Attorney General

TZS/vh
Enclosure(s)

cc: Timothy L. Griffith, Esquire (with enclosure)
The Honorable Eugene C. Griffith, Jr. (with enclosure)