

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM BEAUFORTCOUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

Case No. 2011-CP-07-5302

Jose Angel Herrera

Appellant,

v.

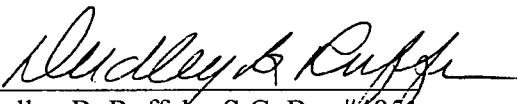
State of South Carolina,

Respondent.

NOTICE OF APPEAL

Jose Angel Herrera appeals the order of the Honorable Perry M. Buckner dated April 30, 2013, denying post conviction relief. The evidentiary hearing was held on April 2, 2013. Appellant received written notice of entry of this order on May 13, 2013.

May 28, 2014


Dudley B. Ruffalo, S.C. Bar #4851
Post Office Box 7911
Hilton Head Island, South Carolina 29938
(843) 842-2833
Attorney for Appellant

Other Counsel of Record:
Assistant Attorney General Ashley Wilson
Post Office Box 11549
Columbia, South Carolina 29211
Attorney for Respondent
(803) 734-3737

RECEIVED

MAY 30 2013

S.C. Supreme Court

PROOF OF SERVICE OF A NOTICE OF APPEAL

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

Case No. 2011-CP-07-53-2

Jose Angel Herrera,

Appellant,

v.

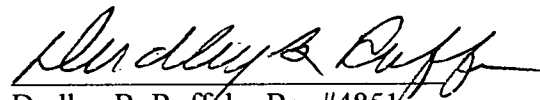
State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on May 28, 2013, addressed to Assistant Attorney General Ashely Wilton, Post Office Box 11549, Columbia, South Carolina 29211

May 28, 2013



Dudley B. Ruffalo, Bar #4851
Post Office Box 7911
Hilton Head, South Carolina 29938
(843) 842-2833
Attorney for Appellant

RECEIVED

MAY 30 2013

S.C. Supreme Court

**LETTER TO THE APPELLATE COURT CLERK
FILING THE NOTICE OF APPEAL**

May 28, 2014

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RECEIVED

MAY 30 2013

S.C. Supreme Court

cc; Office of Appellant Defense

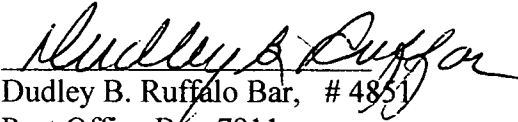
RE: Jose Angel Herrera, Appellant v. State of South Carolina as Respondent,
Case No. 2011-CP-07-5302

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above post conviction relief case. Counsel was appointed to represent Applicant and by copy of this letter requests that the South Carolina Commission on Indigent Defense, Appellate Division, represent Applicant for the appeal. Also enclosed are the following:

- (1) Proof of service of the notice of appeal on the respondent.
- (2) A copy of the order which is to be challenged on appeal.

Sincerely,


Dudley B. Ruffalo Bar, # 4851
Post Office B6x 7911
Hilton Head, South Carolina 2938
(843) 842-2833
Attorney for Appellant

cc: Assistant Attorney General Ashley Wilson
Post Office Box 11549
Columbia, South Carolina 29000
(803) 734-3737
Attorney for Respondent

South Carolina Commission on Indigent Defense, Appellate Division
P.O. Box 11589
Columbia, SC 29211

FORM 4

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

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2011CP0705302

Jose Angel Herrera	South Carolina State Of
PLAINTIFF(S)	DEFENDANT(S)

Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant
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DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other:
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

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

Circuit Court Judge	Judge Code	Date
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For Clerk of Court Office Use Only

This judgment was entered on the **2nd day of May, 2013**, and a copy mailed first class or placed in the appropriate attorney's box on the **9th day of May, 2013**, to attorneys of record or to parties (when appearing pro se) as follows:

Jose Angel Herrera Lieber Correctional Inst Po Box 205
Ridgeville, SC 29472
Dudley B. Ruffalo PO Box 7911 Hilton Head Island, SC
29938

Ashleigh Rayanna Wilson PO Box 11549 Columbia, SC
29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Lynn Geren-Staff

Jerri Ann Roseneau - Clerk of Court

Court Reporter

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BEAUFORT)
)
)
 Jose Angel Herrera, #333836,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 2011-CP-07-5302

BEAUFORT COUNTY, S.C.
 CLERK OF COURT
 13 MAY -2 PM 3:03

ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief (PCR) dated December 14, 2011. The Respondent made its Return on February 21, 2013. An evidentiary hearing on the matter was convened on April 2, 2013 at the Beaufort County Courthouse. The Applicant was present at the hearing and represented by Dudley B. Ruffalo, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

Also present and testifying was Lauren Carroway, Esquire. The Court had before it the trial transcript, the Beaufort County Clerk of Court records, and the Applicant's records from the South Carolina Department of Corrections, the Applicant's application, the Respondent's Return, and the appellate records.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Beaufort County Clerk of Court. The Applicant was indicted at the October 2007 term of the Beaufort County Grand Jury for murder (2007-GS-07-

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1921) and possession of a weapon during the commission of a violent crime (2007-GS-10-1922). He was represented by Lauren Carroway, Esquire.

After the state called the case to trial, the Applicant was found guilty. On March 18, 2009, the Applicant was sentenced by the Honorable G. Thomas Cooper to life imprisonment for murder and five years for possession of a weapon. The sentences are to be served concurrently.

A Notice of Appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. Robert Dudek, Esquire of the South Carolina Office of the Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed the Applicant's convictions and sentences. State v. Herrera, Op. No. 2011-UP-354 (filed June 30, 2011).

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ALLEGATIONS

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

1. Ineffective assistance of counsel.
 - a. Counsel failed to argue Applicant's first and second version of events as a basis for requesting involuntary manslaughter and preserving the issue for appellate review.
 - b. Counsel failed to object to certain portions of the Solicitor's closing argument.
 - c. Counsel failed to move for a change of venue.
 - d. "Doyle violation."
2. The State failed to produce all the necessary ingredients for the conviction of murder as defined in Sec. 16-3-10.
3. The Court erred in admitting photographs.
4. The Court erred in denying requests for jury instructions.

At the hearing, Applicant ~~proceeding~~ *Proceeded* solely on the allegations of ineffective assistance

for the following reasons:

1. Failure to request a change in venue.
2. Failure to object to the State's comment about the Applicant's lack of remorse.
3. Failure to object to a bad malice instruction.
4. Failure to request an involuntary manslaughter charge.
5. Failure to call character witnesses.

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 their 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. Sec. 17-27-80 (2003).

Summary of the Testimony

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The Applicant, Jose Angel Herrera, was present and testified. The Applicant testified he met with his attorney two or three times prior to trial. He testified he vaguely remembers reviewing discovery with his attorney, but did not recall discussing possible defenses. The Applicant testified he gave his attorney several character witnesses to call on his behalf and she refused to do so.

He testified because his trial was held in Beaufort and jurors in the county knew the victim, he did not receive a fair trial. The Applicant testified his attorney should have objected to a portion of the State's closing. The Applicant testified further his attorney should have objected to the sentence he received and to the State saying he showed no remorse.

The Applicant testified his attorney should have requested an involuntary manslaughter charge. He testified further his attorney should have objected to the erroneous malice instruction. The Applicant testified that a directed verdict was warranted because the State did not prove malice. Lastly, the Applicant testified it was his decision to proceed to trial.

At the end of the Applicant's testimony, the State made a motion to dismiss all of the Applicant's allegations related to the sufficiency of the evidence and trial court errors. This

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Court granted the State's motion ~~of~~ the following basis. The post-conviction relief court cannot consider the sufficiency of the evidence against a convicted defendant. S.C. Code Ann. § 17-27-20(a)(6) (1985). The Uniform Post-Conviction Procedure Act is not a substitute for remedies that were available before and during the original trial or by review on motion for a new trial or on appeal. Irick v. State, 264 S.C. 632, 216 S.E.2d 545 (1975); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975).

Trial counsel, Lauren Carroway, was also present and testified she has been a public defender since 2004. She testified she met with the Applicant approximately ten times prior to trial and had phone conversations with the Applicant. Counsel testified she filed Brady and Rule 5 motions on the Applicant's behalf. She testified that prior to trial she discussed with the Applicant the elements of the charges against him and what the State was required to prove.

Counsel testified she discussed with the Applicant his version of the facts and possible defenses. She testified her trial strategy was to argue the State's failure to prove malice. Counsel testified the State had a strong case. She testified the Applicant wanted her to present evidence of his good character, but she did not because it would not have been admissible. Counsel testified her investigation of the Applicant's case included hiring a firearms expert who was unable to help.

Counsel testified she had ample time to prepare for trial and the Applicant wanted to proceed to trial. She testified she did not ~~motion~~ ^{*PMB move*} for a change in venue since the trial judge excused all jurors who said they had heard something about the case. Counsel testified she did not object to the State's comments about the defendant's lack of remorse. She testified further she did not object to the Court's malice instruction because it was not objectionable. Lastly,

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counsel testified she requested an involuntary manslaughter charge and the Court denied her request.

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "the burden of proof is on the applicant to prove his allegation by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

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For the 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, 117-118, 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).

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This Court finds the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court finds counsel has extensive experience in the practice of criminal law and has been practicing law since 2004. This Court finds counsel met with the Applicant numerous times prior to trial and fully investigated the Applicant's case. This Court finds counsel filed Brady and Rule 5 motions on the Applicant's behalf and reviewed the received discovery with the Applicant. This Court finds counsel discussed with the Applicant the

elements of the charges against him and what the State was required to prove. This Court finds counsel discussed the Applicant's version of the facts and possible defenses with the Applicant.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have motioned for a change in venue. Counsel gave credible testimony and the record reflects that the trial judge excused all jurors who had heard, read, or discussed the case around town. Mere exposure to pretrial publicity does not automatically disqualify a prospective juror. State v. Manning, 329 S.C. 1, 7, 495 S.E.2d 191, 194 (1997) (citing State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990)). "[T]he relevant question is not whether the community remembered the case, but whether the jurors ... had such fixed opinions that they could not judge impartially the guilt of the defendant." State v. Manning, 329 S.C. 1, 8, 495 S.E.2d 191, 194 (1997).

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This Court finds the trial court exercised caution by excusing the jurors who had heard or discussed the case prior to trial which prevented counsel's need to motion for a change in venue. This Court finds counsel's failure to request a change in venue did not result in deficient performance and prejudice did not result from counsel's performance.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the trial court's malice jury instruction. This Court finds and the record reflects that the malice instruction given by the Court was the standard malice charge given in South Carolina and was not objectionable. This Court finds this allegation is without merit.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have requested an involuntary manslaughter jury instruction. This Court finds and the record reflects counsel requested an involuntary manslaughter charge (T.341:6-7, 341:23-342:1) and her request was denied by the Court. (T. 349:16-18). The Court's denial of counsel's request was reviewed on appeal and affirmed. State v. Herrera, Op. No. 2011-UP-354 (filed June 30, 2011).

This Court finds the Applicant's allegation is without merit and counsel's performance was not deficient.

This Court finds the Applicant failed to call character witnesses on his behalf. This Court finds trial counsel's performance was not deficient. This 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. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." Glover v. State, supra 318 S.C. at 498-99, 458 S.E.2d at 540. This Court finds the Applicant failed to produce any testimony of character witnesses at the evidentiary hearing. This Court finds this allegation is without merit and counsel's performance was not deficient.

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This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the State's comments about the Applicant's lack of remorse. This Court finds and the record reflects the State made no improper comments about the Applicant's lack of remorse during its closing argument. Counsel for the Applicant presented evidence of the Applicant's remorse as mitigation during the sentencing phase of the trial. This Court finds this allegation is without merit and counsel's performance was not deficient.

Accordingly, this Court finds the Applicant failed to prove the first prong of the Strickland test- that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in their 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 at the hearing in this matter and not specifically addressed in this Order, this Court finds 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 forgoing, 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 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.

[Signature on the following page.]

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



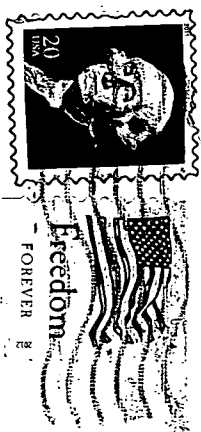
Perry M. Buckner
Presiding Judge
14th Judicial Circuit

Walterboro, South Carolina.

Law Office Dudley Bradstreet Ruffalo, LLC
PO Box 7911
Hilton Head Island, SC 29938

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The Honorable Daniel E. Shearhouse
Clerk of the Supreme Court
P. O. Box 11330
Columbia, SC 29211

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