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RECEIVED

June 17, 2013

JUN 19 2013

S.C. SUPREME COURT

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

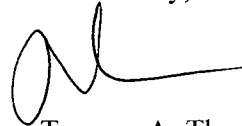
RE: Jhune Harris #312568 v. State of South Carolina
Docket No.: 2010-CP-40-2995

Dear Sir or Madam:

Enclosed please find and Original and a copy of the Notice of Appeal for filing in the above matter.

Kindly return a clocked copy to me in the enclosed envelope. Thank you and should you have any questions, please feel free to contact me.

Yours truly,



Tommy A. Thomas,
Attorney at Law

TAT/jem
cc: Megan E. Harrigan, Esq.
Jhune Harris #312568
Appellate Defense

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Post Conviction Relief

G. Thomas Cooper, Jr., Presiding Judge

Case No.: 10-CP-40-2995

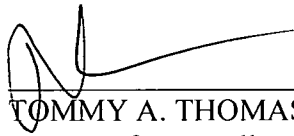
Jhune Harris #312568Appellant,

vs.

State of South CarolinaRespondent.

NOTICE OF APPEAL

Jhune Harris #312568 appeals the Order of Dismissal of the Honorable G. Thomas Cooper, Jr., signed February 2, 2011 and filed on February 3, 2012. A timely Motion to Alter or Amend was filed and an Order Dismissing Applicant's Motion to Alter or Amend was signed by The Honorable G. Thomas Cooper, Jr. on June 7, 2013, recorded on June 11, 2013 and received on June 17, 2013.


TOMMY A. THOMAS
Attorney for Appellant
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Other Counsel of Record:

Megan E. Harrigan, Esq.
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
Attorney for Respondent

RECEIVED

JUN 19 2013

S.C. SUPREME COURT

Irmo, South Carolina
June 17, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Post Conviction Relief

G. Thomas Cooper, Jr., Presiding Judge

Case No.: 10-CP-40-2995

Jhune Harris #312568Appellant,

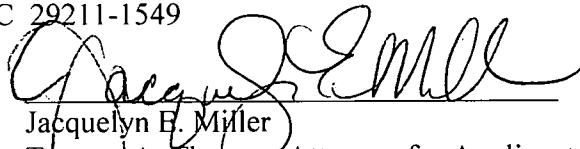
vs.

State of South CarolinaRespondent

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, Secretary to Tommy A. Thomas, Attorney for the Applicant, hereby certify that I placed in the United States Mail, a copy of a Notice of Appeal, with postage prepaid and the return address clearly shown on said envelope to:

Office of the Attorney General
Atten: Megan E. Harrigan, Esq.
P.O. Box 11549
Columbia, SC 29211-1549



Jacquelyn E. Miller
Tommy A. Thomas, Attorney for Applicant
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Irmo, South Carolina
June 17, 2013

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 Harris, Jhune, 00312568,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 C/A No.: 2010-CP-40-2995

ORDER OF DISMISSAL

RICHLAND COUNTY
 FILED
 2012 FEB - 3 AM 10:19
 JEANETTE W. HARRIS
 C.C.P. & G.S.

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed May 6, 2010. The Respondent made its Return on July 23, 2010. An evidentiary hearing into the matter was convened on October 4, 2011 at the Richland County Courthouse. The Applicant was present at the hearing and was represented by Tommy A. Thomas, Esquire. Brian T. Petrano of the South Carolina Attorney General's Office represented the Respondent.

At the hearing, the Applicant testified on his own behalf. The Applicant's trial counsel, Jack Swerling, Esquire testified. The Applicant's appointed appellate counsel, Ms. Katherine Hudgins, also testified. This Court had before it the records of the Richland County Clerk of Court, the transcript of the proceedings against the Applicant, and the Applicant's records from the South Carolina Department of Corrections.

The Applicant is presently incarcerated following a November 10, 2005 jury trial with the Honorable Reginald I. Lloyd presiding. He was convicted and sentenced to the following:

GL

Grand Jury Term	Indictment Number	Charge / Offense	Potential Sentence	Offense Description	Sentence Received	Sentence to Lesser Offense
11-03	2003GS4005275	0116 16-03-0020 * 30 - L/D * Murder / Murder			40	No
11-03	2003GS4005276	0014 16-03-0620 * 20 * Assault / Assault and battery with intent to Kill (ABWIK)			20	No
NOTES					TOTAL	POSSIBLE
					40	Life+20

After the Applicant's conviction, the parties appeared before the trial court on November 21, 2005 and explained that there was an insufficient prior record to support the application of S.C. Code § 17-25-45 (LWOP). The Applicant appealed his conviction. The South Carolina Court of Appeals denied the appeal. State v. Harris, 382 S.C. 107 (S.C. Ct. App. filed March 4, 2009). Certiorari to the South Carolina Supreme Court was denied on April 8, 2010. The Remittitur was dated April 12, 2010. The summary from the Court of Appeals' opinion is as follows:

In this criminal case, Jhune Harris (Harris) argues the trial court erred in refusing to charge the jury on the law of self-defense and accident. Harris also contends the trial court improperly refused to grant a mistrial. We affirm.

FACTS

Leopold Pierre (Pierre) was at the residence of Angela Gilmore (Gilmore) helping her children clean an upstairs bedroom in anticipation of a family reunion. While Pierre was helping the children, Gilmore was in the kitchen cooking. Harris, a former boyfriend of Gilmore, walked to the back door of the house and asked if he could come inside. Gilmore informed Harris she had company and perhaps he should return at a different time. Harris responded he had watermelon for the children.

Based on Harris's representation, Gilmore allowed him to enter the house so he could bring the watermelon inside. Harris entered the house without a watermelon and immediately asked Gilmore to call Pierre downstairs. In response, Gilmore unsuccessfully asked Harris to leave her house.

Harris went upstairs several times and confronted Pierre and at least once asked Pierre to go outside and settle the matter like men. Pierre did not comply with Harris's requests. Shortly after this exchange, Pierre came downstairs to retrieve a broom. Harris told Pierre he wanted to talk to him. Pierre refused to speak with Harris and returned upstairs. Harris continued to call Pierre to come downstairs. Eventually Pierre complied and proceeded down the stairs.

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As Pierre reached the bottom step or the second to the last step, Harris pulled a gun from his jacket pocket and shot Pierre twice, resulting in his death. Harris next turned his gun toward Gilmore and chased her through her home. During the chase, Gilmore took hold of her son, and they both fell to the floor. Subsequently, Harris shot Gilmore while she was lying underneath her son. Gilmore survived the incident. Consequently, Harris was charged with murder and assault and battery with intent to kill (ABWIK). At trial, Harris employed a combination of self-defense and accident to justify the shootings. Specifically, Harris testified he saw something "flicker from the back where [Pierre] had his hand," and Pierre lunged at him as Pierre made his way down the stairs.

With respect to Gilmore's injury, Harris stated that after he shot Pierre, he was backing up and tripped, which caused the gun to accidentally discharge. The trial court charged the jury with the law of self-defense and accident. Harris took exception to the given charges and submitted specific requests. The trial court denied these requests.

Following the trial, the jury returned verdicts of guilty for both counts. The trial judge sentenced Harris to forty years for the murder charge and twenty years for the ABWIK charge, with the sentences to run concurrently.

State v. Harris, 382 S.C. 107, 111-13, 674 S.E.2d 532, 534-35.

In the PCR application, the Applicant made the following allegations:

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) *ineffective assistance of trial counsel*

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) *see initial brief, facts affixed for all grounds*

(b) _____

(c) _____

¹ Presumably, the "initial brief" referenced is the one from the direct appeal as there is no other "initial brief" within the PCR materials.

19. State clearly the relief you seek in filing this application:

*conviction and sentence vacated, set aside, or
new trial granted*

At the evidentiary hearing, Applicant proceeded, for the most part, on the allegations stated in the application for post-conviction relief.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (1985).

The Applicant testified that he retained trial counsel and that he remained locked up throughout the trial (no bond). He explained that he and trial counsel discussed self-defense, accident, voluntary manslaughter, etc. The Applicant testified that he was offered thirty (30) years but he rejected that offer because he felt that thirty (30) years was not applicable considering the facts of this case. The Applicant claimed that he was married to one of the victims via a common law marriage; however, his testimony at trial was that he was not married. (Trial transcript, p. 520 L. 24). The Applicant testified that he did not consider the children to be competent to testify and criticized trial counsel for failing to object to their testimony and that they should have been subject to some sort of pediatric examination prior to their testimony.² The Applicant did not present any sort of evidence beyond his bare criticism to establish that the

² But see, Rule 601(a), SCRE.

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children were anything but competent.³ The Applicant claimed that the jury was not properly instructed regarding accident.⁴ The Applicant explained though, that trial counsel did a good job cross examining the children to reveal the Applicant's positive character and to establish his paternal role. However, the Applicant explained that although trial counsel had a private investigator, the investigator did not do a complete job. For example, the Applicant claimed that he was still paying some of the bills for the home. The Applicant claimed that the gun accidentally went off. The Applicant admitted that he fled the scene after he "accidentally" shot two people, firing a total of three (3) shots.

Trial counsel testified that he recalled his representation of this Applicant.⁵ Trial counsel had ample notes and explained the exact dates he met with the Applicant, at least thirteen (13) times himself, and at least five (5) times with his associate (Mr. Steven Hisker). Trial counsel explained that there was an offer to plead guilty to murder with a minimum of thirty (30) years. Trial counsel explained that he and his team looked into every angle that the Applicant's case supported and that they interviewed multiple people. Trial counsel explained that the defense, as he saw it, was going to be an attempted explanation that it was self-defense for the male victim and accident as to Ms. Gilmore. Trial counsel explained that the Applicant was not lawfully armed. Trial counsel explained that although the female victim contested the common law marriage between her and the Applicant they were able to demonstrate that he did have an active role with the children and a fatherly/husband type relationship. Trial counsel explained though,

³ The main child eye-witness was twelve (12) at the time of the trial, the other children were the same age or older. (Trial transcript, p. 259).

⁴ *But see*, trial transcript, p. 680 – 681; 688 – 691.

⁵ This Court notes that trial counsel is a criminal defense attorney with decades of experience with an excellent reputation amongst both the bench and the bar – he also presents continuing legal education programs. Rule 201, SCRE.

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that the problem was her testimony that she ended the relationship because the Applicant was sleeping with other women. Trial counsel explained that there was no evidence, except from the Applicant, that the relationship with her continued – they were able to show that a relationship with the children continued. Trial counsel explained that the children were competent and that the Applicant went upstairs for a confrontation with the male victim. Trial counsel explained that he did not open the door to character, regarding the hitting of the children (as to temper), he explained he was extremely careful and was attempting to demonstrate only an ongoing relationship with the children. Trial counsel explained that he saw nothing defective about the indictment. Also, trial counsel explained that the issue(s) with the gun were not helpful to the Applicant.⁶ The remaining issue is related to State v. Belcher, 385 S.C. 597 (2009) (holding that a jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide). Trial counsel explained that at the time of the trial, an inference of malice by use of a deadly weapon was still good law because the trial was years before the decision in Belcher.⁷

Appellate Counsel explained that she recalled her representation of the Applicant in his direct appeal. Appellate counsel explained that originally the case was set for an oral argument but that because of a medical issue there was a continuance and ultimately the Court of Appeals decided the case on the briefs without any oral argument.

⁶ The problem with the weapon was not an accidental discharge issue, it was the opposite; the Applicant's gun had a potential reliability problem revolving around the cylinder's ejector rod being bent and potentially impacting the rotation of the cylinder - meaning it would not fire. (Trial transcript, p. 479).

⁷ Belcher was decided on October 12, 2009, the Applicant's trial was in November of 2005.

GT 26

The relevant dates are as follows:

Jury trial	November 10, 2005
Sentencing	November 21, 2005
Decision by the Court of Appeals	March 4, 2009
Petition for Rehearing Denied	May 5, 2009
Decision in <u>State v. Belcher</u>	October 12, 2009
Certiorari Denied by our Supreme Court	April 8, 2010
Remittitur	April 12, 2010

Importantly, the decision in Belcher contains an applicability clause. " Because our decision represents a clear break from our modern precedent, today's ruling is effective in this case and for all cases which are pending on direct review or not yet final where the issue is preserved." State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009).

Appellate counsel explained that the Belcher issue was not preserved at trial and/or at the Court of Appeals and could not properly be advanced on certiorari to the Supreme Court. Appellate counsel explained that there was no real mechanism to advance the Belcher argument with the Applicant's case because it was not preserved at trial.

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel

rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. As discussed above, the Applicant has failed to carry his burden in this action. Therefore, this Court finds that the application must be denied and dismissed.

Beyond his review of the undisputed procedural history, this Court finds Applicant's testimony is not credible. Trial counsel's testimony is credible. Accordingly, this Court finds Applicant has failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. This Court also finds

Applicant has failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance.

To be clear, the Applicant's claim that the gun accidentally discharged was absolutely not credible. The Applicant was evasive during his testimony and his demeanor was before this Court and this Court did not find his claims credible. Because the standard now on PCR is prejudice from a Strickland perspective (not an "any evidence" jury instruction direct appeal analysis), this Court cannot associate any prejudice with the accident claim simply because his claim (that the shootings were an accident) is not credible.⁸ The same analysis and conclusion from this Court exists for the self-defense claim – the Applicant was not credible at all. It is clear to this Court (and it must have also been clear to the jury) that this Applicant intentionally shot the two victims, his attempts to discount the murder and attempted murder as self-defense and/or accident were not credible.

As to the Belcher issue and the implied/inferred malice because of the Applicant's use of a deadly weapon, the Applicant has failed to satisfy his burden of proof and demonstrate any deficient performance on the part of either trial counsel or appellate counsel. The Court's ruling in Belcher declares it inapplicable to the Applicant's case because it was not preserved. Trial counsel was not deficient because the law argued in the Applicant's case was valid at that time, Belcher did not exist until years later.⁹ Even, for the sake of argument, had a Belcher type

⁸ In any event, the weapon required that the shooter either affirmatively cock the hammer (to switch the Applicant's revolver into single action mode for the next shot only) or the trigger would require over fifteen (15) pounds of force to fire the weapon – neither of which support an accident scenario. (Trial transcript, p. 483). The weapon was fired at least three (3) times. (Trial transcript, p. 486).

⁹ The Court stated, "[w]e have never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial." Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999). See also Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993); see also Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992); Arnette v. State, 306 S.C. 556, 413 S.E.2d 803 (1992); Kirkpatrick v. State, 306 S.C. 359, 412 S.E.2d 389 (1991).

argument been preserved in the Applicant's trial, there is no prejudice because his case is not like Belcher. In Belcher, the Court explained that a harmless error analysis would be applicable except that "[i]t is entirely conceivable that the only evidence of malice was Belcher's use of a handgun." State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009).¹⁰ In the Applicant's case, there was ample other evidence of the Applicant's malice – it was expressed. "Harris went upstairs several times and confronted Pierre and at least once asked Pierre to go outside and settle the matter like men." State v. Harris, 382 S.C. 107, 112, 674 S.E.2d 532, 535 (Ct. App. 2009), cert. denied (Apr. 8, 2010), reh'g denied (May 5, 2009). At the time of the murder, the Applicant was described as acting rough and angry towards his victim. (Trial transcript, p. 99). Even after the murder and attempted murder, the Applicant continued to brag to his friend that "he shot the house up." (Trial transcript, p. 419 L. 16). Accordingly, even assuming the Belcher issue was properly preserved, there is no prejudice because the Applicant's malice was not solely established by an inference associated with the use of his weapon.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Counsel was not deficient in any manner, nor was Applicant prejudiced by counsel's representation. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

¹⁰ See also, Belcher, n. 8.

Except as discussed above, this Court finds that the Applicant failed to raise the remaining allegations set forth in his application at the hearing and has, thereby, waived them. As to any and all allegations that were or could have been raised in the application or at the hearing in this matter, but were not specifically addressed in this Order, this Court finds Applicant failed to present any probative evidence regarding such allegations. Accordingly, this Court finds that Applicant waived such allegations and failed to meet his burden of proof regarding them. Accordingly, they are dismissed with prejudice. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issue at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

This Court cautions the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant and counsel are directed to Rules 203, 206, and 243 of the South Carolina Appellate


G. L.

Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

February 2nd, 2011
Columbia, South Carolina



G. Thomas Cooper, Jr.
Judge, Fifth Judicial Circuit

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Jhune Harris, #312568,
Applicant,

Case No. 2010-CP-40-02995

v.

**ORDER DISMISSING APPLICANT'S
MOTION TO ALTER OR AMEND**

State of South Carolina,

Respondent.

RICHLAND COUNTY
FILED
2013 JUN -7 11:12 AM
JEANNETTE M. MORRIS
CLERK OF COURT

This matter comes before the Court by way of Applicant's "Motion to Alter or Amend the Judgment" this Court's Order of Dismissal, denying and dismissing his application for post-conviction relief. On February 3, 2012, this Court issued an Order denying and dismissing Applicant's application for post-conviction relief with prejudice. This Order was received by Applicant's counsel on February 9, 2012.

On February 20, 2012, Applicant filed a "Motion to Alter or Amend a Judgment" in which he asks the Court to alter or amend its Order dismissing his Application for post-conviction relief. Respondent made its Return to this motion on or about April 25, 2013, asking that the motion be denied. This Court has reviewed Applicant's motion, Respondent's return and the record in this

matter and finds the following:

The Order of Dismissal dated February 3, 2012, contains the required findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (1976), and Rule 52(a) SCRPC. See also, McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991).

Based upon careful reconsideration of all of the evidence in this case and upon full consideration of the Applicant's motion and supporting testimony, this Court is not persuaded to

alter, amend, or reconsider the judgment.

IT IS THEREFORE ORDERED that the Applicant's Motion to Alter or Amend is **DENIED**.

AND IT IS SO ORDERED this 7 day of JUNE, 2013.



G. THOMAS COOPER, JR.
Presiding Judge
Fifth Judicial Circuit

COLUMBIA, South Carolina