

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY S.C. SUPREME COURT
Court of Common Pleas

G.D. Morgan, Circuit Court Judge

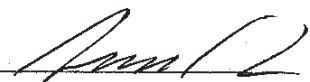
2019-CP-42-01305

Brittany Pearson..... Appellant,
v.
The State, Respondent.

NOTICE OF APPEAL

Brittany Pearson appeals the Honorable G.D. Morgan's Order of Dismissal filed April 3, 2023.

This 10 day of April, 2023.


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STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)
)
)
Brittany Pearson, #368453,)
Applicant,)
)
v.)
)
State of South Carolina,)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-42-01305

ORDER OF DISMISSAL

This matter comes before this Court by way of Applicant's post-conviction relief application filed April 5, 2019. Respondent made its return on July 8, 2019, requesting an evidentiary hearing be convened. An evidentiary hearing was held at the Spartanburg County Courthouse. Susannah C. Ross, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto represented Respondent.

Applicant testified on her own behalf at the evidentiary hearing. Counsel Thomas Quinn, Esquire, also testified. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet her requisite burden of proof of establishing she is entitled to post-conviction relief and denies and dismisses this application with prejudice. Findings of fact and conclusions of law are set forth below.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In February 2015, the Spartanburg County Grand Jury indicted Applicant for murder (2015-GS-42-00796). In March 2015, the Spartanburg County Grand Jury indicted Applicant for possession of firearm or knife during commission of or attempt to commit a violent crime (2015-GS-42-00795). Thomas J. Quinn, Esquire represented Applicant. Timi Poulos, Russell D. Ghent, and Casey B. Anthony,

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Esquires, prosecuted the case. On May 23-25, 2016, Applicant proceeded to trial before the Honorable J. Derham Cole, circuit court judge, and a jury. On May 25, 2016, Applicant was found guilty of the lesser-included offense of voluntary manslaughter and as indicted for the weapons possession. Judge Cole sentenced Applicant to twenty-four years' imprisonment for voluntary manslaughter and five years' imprisonment for weapons possession, sentences running concurrently.

Applicant filed a timely notice of appeal, and a direct appeal was perfected by Lara M. Caudy, Esquire, who raised the following issue:

Did the court abuse its discretion by failing to grant Appellant immunity from prosecution pursuant to the Protection of Persons and Property Act where the decedent attacked Appellant in her occupied vehicle and Appellant shot the decedent in self-defense after the decedent continually beat Appellant in the head and repeatedly slammed her head into the car window?

By unpublished opinion decided July 18, 2018, the South Carolina Court of Appeals affirmed Applicant's convictions. *State v. Pearson*, Op. No. 2018-UP-324 (S.C. Ct. App. filed July 18, 2018). The remittitur was issued on August 10, 2018.

Summary of Relevant Facts

The Shower and the Shooting

On November 8, 2014, Applicant and the victim, Myah Cole, who were living together and dating, attended a baby shower. (Tr. 26). Cole grabbed Applicant's butt in front of everyone at the shower, and then became upset with how Applicant reacted negatively. (Tr. 27). This sparked a verbal argument that continued throughout the day. (Tr. 28). The couple went out to a bar and grill later that evening and were with another couple who kissed in public. (Tr. 29). After Cole made a comment, Applicant left and went out to the parking lot. (Tr. 29). Applicant tried to

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leave in her car, but Cole blocked the car and beat on the window until Applicant unlocked the door, let Cole in, and drove to their apartment. (Tr. 30).

When the two reached the parking lot of the complex, Applicant told Cole to get out of the car, pushed her out, and handed her the apartment keys. (Tr. 30, 215-16). Cole initially exited the car, but then got back in and began striking Applicant. (Tr. 30). Applicant offered no testimony that she told Cole she could not re-enter the car, or that she otherwise prohibited re-entry of the vehicle. Cole was in the passenger seat on her knees over Applicant, punching her in the head and beating her head into the window. (Tr. 32). Applicant tried to fend her off by putting her hands up and then reached under the seat for her gun, which she grabbed, cocked, and fired at Cole, killing her. (Tr. 33-34). Applicant opened the car door, threw the gun out, and called 911. (Tr. 34). Cole died from a single gunshot wound that entered where her collarbone joined her breastplate and came out her lower back. (Tr. 161).

The Immunity Hearing

Applicant sought immunity under S.C. Code Ann. § 16-11-440. (Tr. 20). Applicant explained that she had her seat belt on when Cole was punching her and felt like she could not go anywhere and “froze.” (Tr. 32-33, 46-47). However, when asked if she could have pushed the button to release the seat belt, she admitted she could have. Further, Applicant admitted she could have pulled the latch on the door and pushed it open, rolled into the parking lot, and yelled for help. (Tr. 37). Applicant admitted Cole did not have a weapon. (Tr. 38). Applicant testified that after she reached under the seat for the gun, she put it between herself and Cole, then fired. (Tr. 38). Counsel showed Applicant photographs of her arms and hands taken after the incident and asked about any marks, abrasions, cuts, scratches, or bruises. On the photographs, her arms being red, Applicant acknowledged the absence of any injuries on her arms or hands. (Tr. 40-41). Similarly,

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after being shown a photograph, she agreed there were no injuries on her face. (Tr. 42).

Although she claimed at trial that she had a knot on the side of her head, she recalled telling the investigator after the incident that she did not have any visible injuries. (Tr. 52). Applicant testified she cocked the gun as soon as she picked it up from under the car seat and did not tell Cole she had the gun before shooting her. (Tr. 42-43). Applicant testified she remembered telling an investigator she did not tell Cole to stop hitting her, did not tell her to stop because she had a gun, and did not make any attempt to tell her to back away. (Tr. 51). Applicant recalled telling the investigator that she was not in so much fear that she felt she had to shoot someone. (Tr. 53).

The State called Investigator Christopher Banks of the Spartanburg Police Department to testify as to the voluntariness of Applicant's statement. In testifying about his interview with Applicant, which was conducted at 12:45 a.m. on the night of the shooting, he testified she admitted pushing Cole to get her out of the car. (Tr. 60-62). Banks testified he could not see any injuries on Applicant at the time of the interview, nor did she point any injuries out to him. (Tr. 61). Following Banks' testimony, the trial court found the statement was freely and voluntarily made and denied Applicant's motion for immunity. (Tr. 63).

Current Action Before this Court

In her current PCR application, Applicant alleges she is being held in custody unlawfully because of ineffective assistance of counsel in that:

1. Ineffective assistance of trial counsel, in that:
 - a. "Lawyer failed to subpoena SLED toxicologist, his prejudice to do so resulted in jury not hearing relevant testimony as to how victim's alcohol level affected her reactions that night."
 - b. "All evidence wasn't introduced to jury, only evidence relevant to prosecutions case was seen. My attorney failed to introduce critical evidence that showed bruising on me."

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- c. "On several occasions officers and paramedics gave conflicting testimony of the position of the victim's body in the car. Pictures taken of the crime scene conflicts with their testimony."

In her amended application dated April 15, 2022, Applicant alleged:

1. Ineffective assistance of counsel for:
 - a. Failing to effectively argue 16-11-440 & 16-11-450.
 - b. Failing to prepare pretrial brief regarding immunity and request a reasoned ruling under the preponderance of the evidence standard.
 - c. Failing to request jury instructions and object to confusing self-defense instruction p. 321, 1.8; 308-312.
 - d. Failing to argue for parole under S.C. Code Sec. 16-25-90.

At the PCR hearing, Applicant proceeded forward on the following allegations:

1. Ineffective assistance of counsel for:
 - a. Failing to effectively argue 16-11-440 & 16-11-450.
 - b. Failing to prepare pretrial brief regarding immunity and request a reasoned ruling under the preponderance of the evidence standard.
 - c. Failing to request jury instructions and object to confusing self-defense instruction p. 321, 1.8; 308-312.
 - d. Failing to argue for parole under S.C. Code Sec. 16-25-90.
 - e. Failure to enter photographs of injuries and share the photographs with Applicant.
 - f. Failure to address Applicant's military history.
 - g. Failure to enter the toxicology report.
 - h. Failure to enter the 911 call.
 - i. Failure to expand on her head/neck injuries.
 - j. Failure to investigate and present Dustin Lawson's witness statement.
 - k. Failure to make a formal object to the voluntary manslaughter instruction.
 - l. Failure to clarify the victim's position in the car.

All other allegations raised in his initial application and amendments are deemed waived and abandoned and, accordingly, will not be addressed in this order.

Summary of the Testimony

Applicant Testimony

Applicant testified that she understood the proceeding. She stated she thought she should have been afforded immunity. She stated she was numb from the shooting and that she did "have any feelings after that" because she lost her best friend. She stated that her head had been beaten

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by the victim prior to the shooting. She stated that photographs of her head and neck injuries were not entered at trial and that she did not recall seeing them in discovery. She stated that at the immunity hearing, Applicant talked about being frozen and how she thought the victim would have killed her if she did not fire first. She stated that she did not think she had another choice regarding the shooting. She testified that though she said at the immunity hearing and trial that she thought she could have handled the situation differently, she now believes that is not the case. She stated that the victim's military experience was not brought out at trial. Applicant testified that she wanted the victim's toxicity report in at trial, but that this was not permitted into evidence. She stated she never talked to Counsel about parole. She stated that there had been no prior physical altercations between her and the victim, but that the abuse she suffered at the hands of the victim was more emotional. She testified that she called 911, but never listened to the call. She stated that her head injuries were never expanded upon at trial. She stated that Dustin Lawson's witness statement was not brought out at trial but thought it would have been helpful because it would substantiate her side of the story. She stated that she feared for her life and had a license to carry. She stated she never would have used the weapon unless she feared for her life.

On cross-examination, Applicant stated she testified at trial. She stated she testified at trial that she had a knot on the side of her head. Even with this testimony elicited at trial, Applicant testified that the jury found her guilty. She stated that she and the victim were about the same size. She testified that there was no history of physical violence between the two of them before the incident. She stated that she testified to having one beer the day of the incident because she was the driver. She stated that she testified that she had her seat belt on and could not have done anything else in the moment. She testified that the victim was drinking that day

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and that this was a contributing factor to her aggression. She testified that Counsel went over all questions she had regarding the discovery.

Counsel Testimony

Counsel testified that he received the witness statement from Dustin Lawson as a part of the discovery. Counsel testified that the trial occurred in 2016 and that he met with Applicant before trial. He stated he went over her statements given to law enforcement with her. He stated that the immunity was denied at the immunity hearing. He stated he did not object to the ruling. He stated that there was a heated verbal argument in chambers between himself and the State when the State requested a lesser-included offense instruction to voluntary manslaughter. He stated he did not recall the 911 call being published to the jury. Counsel testified he did not remember talking about the banging of Applicant’s head against the car window during closing arguments. He stated that he did not offer any pictures of Applicant’s face into evidence at trial. He stated he did not recall exactly what the State admitted into evidence at trial. Counsel testified that he could see how the jury charge could be somewhat confusing. He stated that Applicant had no duty to retreat but that the jury was charged that an element of danger existed. He testified that the State argued at trial that Applicant could have left the trial. He stated that he did not make a formal object to the voluntary manslaughter charge on the record. He stated that there was not an objection made to the self-defense charge. He stated that because no objections were made, nothing was preserved for appellate review on this ground. Counsel testified that the victim did not have any bruising or signs of injury beyond the gunshot wound.

On cross-examination, Counsel testified that chances of Judge Cole granting immunity at the immunity hearing were slim. He stated that, to the best of his knowledge, Judge Cole had never granted immunity in any case before. He testified that the State’s argument had always

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been that Applicant overreacted and brought a gun to a fist fight. He testified that he received a copy of the State's potential witness list, but that the State ultimately decided to call about half the people on the list. He testified that the toxicologist was on the potential witness list. Counsel testified that it was widely accepted that the victim was drinking the day of the incident. He testified that he would not consider Applicant a battered woman. He stated he did not see anything improper with the jury charges and that he did not think an objection to the jury charge would have made a difference on the outcome at trial. He stated that a plea offer to voluntary manslaughter was made but was rejected. Counsel testified that the State's request for a voluntary manslaughter charge was a surprise by the State. He stated he objected to the charge in chambers, but Judge Cole overruled the objection. Counsel stated he spoke to some potential witnesses. He stated that he thought the 911 call could have made a difference at trial and was unsure why he did not enter it into evidence, because it could have backed up Applicant's testimony. Counsel stated he was unsure whether the position of the victim in the car after being shot made a difference at trial. Counsel testified that Applicant presented as a good witness but had wished she had done some things differently while on the stand at both the immunity hearing and the trial. On re-direct, Counsel testified he thought the 911 call and witness statement would have been helpful at trial.

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. Before this Court are the Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the trial transcript, direct appeal records, and this PCR action's records. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon

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their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show “counsel’s conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel’s performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel’s actions fell outside of the zone of “reasonableness under prevailing professional norms.” *Strickland*, 466 U.S. at 688. *See also* Rule 71.1(e), SCRPC (“The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence.”). Reasonableness is determined by the “variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant,” and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.”

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Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel’s performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually “countless” ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel’s deficient performance must have prejudiced the applicant so 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. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters “only in the rarest case” because “[t]he likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

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. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel’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. *Id.* at 696-97.

Failing to Effectively Argue 16-11-440 & 16-11-450

Applicant claims Counsel was ineffective for failing to effectively argue for immunity under the Protection of Persons and Property Act. Counsel argued much of what Applicant alleges she wanted raised and pursued an immunity hearing before the trial. The fact that Counsel was unsuccessful in his argumentation should not render him deficient. Additionally,

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this Court declines to find that any additional argumentation presented at the PCR hearing would have changed the outcome. This is particularly true because of Counsel’s credible testimony that as an experience attorney, he was under the impression that Judge Cole had never granted immunity before and preferred sending things to the jury. Accordingly, relief is denied.

Failing to Prepare Pre-Trial Brief

Applicant claims Counsel was ineffective for failure to prepare a pre-trial brief regarding immunity. This Court finds Counsel acted reasonably in electing to present his immunity argument orally instead and fails to see how Applicant was in any way prejudiced on this ground. Accordingly, relief is denied.

Failure to Request Reasoned Ruling on Record

Applicant claims Trial Counsel was ineffective for failure to object to the Trial Court’s failure to make full and complete findings of fact and conclusions of law for the elements of self-defense as applied under a claim pursuant to the Protection of Persons and Property Act. “[T]he trial court must necessarily consider the elements of self-defense in determining a defendant’s entitlement to the Act’s immunity. This includes all elements of self-defense, save the duty to retreat.” *State v. Curry*, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013). Though determining each element was analyzed by the Court when conducting appellate or post-conviction review and would have been made simpler if conducted explicitly on the record, this requirement was not clarified until several years after the immunity hearing was conducted. *State v. Glenn*, 429 S.C. 108, 123, 838 S.E.2d 491, 499 (2019) (finding that the circuit court should at least make specific findings on the elements on the record).; *see also Thornes v. State*, 310 S.C. 306, 310, 426 S.E.2d 764, 766 (1992). The relevant time frame for analysis is when the alleged ineffectiveness occurred, not several years later when a witness modifies her original

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statements.”).

Counsel has never been required “to be clairvoyant or anticipate changes in the law which were not existent at the time of trial.” *Gilmore v. State*, 314 S.C. 453, 456, 445 S.E.2d 454, 457 (1994), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999). *See generally e.g. Thornes v. State*, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765-66 (1993) (citations omitted); *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).

This Court finds Counsel acted reasonably. There was no requirement that explicit findings be placed on the record at the time of trial and Counsel was not expected to anticipate this change in the law. Additionally, there has been no showing that failure to make specific findings impacted appellate court proceedings. Specifically, in the Court of Appeals’ order, the court did not find that the issue of immunity was not properly preserved for appellate review. Rather, it simply chose to affirm the findings of the lower court. Accordingly, there has been no showing that any failure to make specific findings of fact and conclusions of law in any way impacted Applicant’s success on direct appeal. Thus, because this Court declines to find any error on the part of Counsel that impacted circuit or appellate court proceedings concerning the denial of immunity, no prejudice is found, and relief denied accordingly.

Failure to Request Jury Instructions/Object to the Self-Defense Charge

Applicant claims Counsel was ineffective for failure to request jury instructions and for failing to object to the self-defense charge. Concerning deficiency, Counsel must articulate a valid reason for employing a certain strategy, which is measured under an objective standard of reasonableness. *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1992). In

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determining whether a defendant was prejudiced by improper jury instructions, the court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the improper instruction in a way that violates the Constitution. *Battle v. State*, 382 S.C. 197, 203, 675 S.E.2d 736, 740 (2009). The law to be charged must be determined from the evidence presented at trial. *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001).

A self-defense jury instruction was given at trial. (Tr. 307-08). Counsel did not object. Though he stated he could see how the charge was confusing, he declined to see anything erroneous in the instruction. This Court declines to find Counsel deficient on this ground and declines to find prejudice, as there is no evidence that the charge was applied improperly. Accordingly, relief is denied.

Failure to Argue for Parole

Applicant claims Counsel was ineffective for failing to argue for parole. Section 16-25-90 states:

[A]n inmate who was convicted of . . . an offense against a household member is eligible for parole after serving one-fourth of [her] prison term when the inmate at the time [she] . . . was convicted of an offense against the household member, or in post-conviction proceedings pertaining to the plea or conviction, presented credible evidence of a history of criminal domestic violence, as provided in Section 16-25-20, suffered at the hands of the household member.

S.C. Code § 16-25-90 (2004).

Applicant candidly testified that all abuse she suffered from the victim was verbal and emotional. Counsel credibly testified that he did not perceive Applicant to be a battered woman. This Court concurs and find that Counsel was reasonable in not making a frivolous argument and finds that even if he had argued this, it would not have been successful. Accordingly, relief is denied.

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Failure to Enter/Share Photographs

Applicant claims Counsel was ineffective for failure to enter the photographs of Applicant's injuries and for failure to share this discovery with her. Applicant testified that she was injured at trial. Her narrative of the victim beating her before she grabbed her gun was also exhausted at trial. This Court finds that the photographs were duplicative with this testimony and concludes that Counsel's alleged failure to enter them was non-prejudicial. Additionally, this Court finds that even if Applicant was never shown the photographs, she was aware of the injuries sustained after the altercation. This Court fails to find any failure to share these photographs with Applicant prejudicial. Accordingly, relief is denied on this ground.

Failure to Address Military History

Applicant claims Counsel was ineffective for failure to address the victim's military history. This Court declines to find this relevant and, accordingly, declines to find Counsel deficient for failing to explore this issue. Additionally, this Court declines to find that making this fact known to the jury would have impacted the trial results. Accordingly, relief is denied on this ground.

Victim's Position

Applicant claims Counsel was ineffective for failure to clarify the victim's position in the car. Counsel credibly testified that he did not think this issue mattered. This is a reasonable conclusion and Counsel is not deficient as a result. This Court concurs with Counsel's recognition that this did not matter and, accordingly, declines to find Applicant met their burden of proof in establishing prejudice. Relief is denied on this ground.

Failure to Enter Toxicology Report

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Applicant claims Counsel was ineffective for failure to enter the victim's toxicology

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report. Counsel credibly testified he did not subpoena and plan to call the toxicologist because they were on the State's witness list. This is reasonable and Counsel is not deficient for failing to subpoena them themselves. Additionally, there was ample testimony at the trial supporting the fact that victim had been drinking that day. This Court declines to find that the report would have added anything to the trial that would have led to a different result. Accordingly, relief is denied.

Failure to Enter 911 Call

Applicant claims Counsel was ineffective for failure to enter the 911 call. This Court finds that the call would not have affected the outcome at trial because the trial ultimately boiled down to a matter of Applicant's credibility to the jury. A 911 call from Applicant does not impact that determination of credibility. Accordingly, relief is denied.

Failure to Expand on Head/Neck Injuries

Applicant claims Counsel was ineffective for failure to expand upon her head and neck injuries. However, Applicant testified that she had marks on her head the next day. (Tr. 214). This Court declines to find Counsel deficient for failing to present this to the jury an additional time and finds that Applicant was not prejudiced, because this testimony was already before the jury. Accordingly, relief is denied on this ground.

Dustin Lawson's Witness Statement

Applicant claims Counsel was ineffective for failure to present Lawson's witness statement. Applicant has failed to meet his burden of proving prejudice. *See Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (To show counsel was ineffective by failing to call a witness, the witness(es) must be produced at the PCR evidentiary hearing or their testimony must otherwise be presented, consistent with the rules of evidence); *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993) (Merely speculation regarding the witness's testimony is insufficient to

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establish prejudice). Accordingly, relief is denied.

Failure to Formally Object to Voluntary Manslaughter Charge

Applicant claims Counsel was ineffective for failure to formally object to the voluntary manslaughter jury instruction. Counsel credibly testified that this was dealt with extensively in chambers and that he objected in the back. Counsel also requested this charge not be given to the jury once the State rested. (Tr. 178). Though Counsel likely should have renewed his objection on the record, there has been no showing of prejudice. The Judge would have denied the request had it been renewed. Additionally, to the extent that Applicant argues a formal objection was needed for issue preservation on appeal, Applicant has failed to prove to this Court that an appeal of this issue would have been successful. Accordingly, relief is denied.

Conclusion

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant her application. Therefore, this PCR application must be denied and dismissed with prejudice.

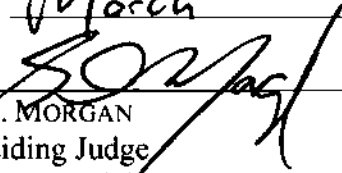
This Court notifies Applicant that she must file and serve a notice of appeal within thirty days of receipt by counsel of the judgment entry's written notice to secure appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has the right to appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

IT IS THEREFORE ORDERED:

1. The PCR application be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

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AND IT IS SO ORDERED this 16th day of March, 2023.



G.D. MORGAN
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina.

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