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STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse, Circuit Court Judge

Case No. 2019-CP-36-00368

Anthony Maurice Wise, #372713, ... Petitioner,

v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

Applicant, Anthony Maurice Wise, appeals the order of the Honorable R. Scott Sprouse, filed on or about April 6, 2023, and received by the undersigned on April 21, 2023.

April 21, 2023

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STATE OF SOUTH CAROLINA COUNTY OF NEWBERRY	IN THE COURT OF COMMON PLEAS FOR THE EIGHTH JUDICIAL CIRCUIT
Anthony Maurice Wise, #372713, Applicant, v. State of South Carolina, Respondent.	Case No.: 2019-CP-36-00368 **ORDER OF DISMISSAL**

FILED
NEWBERRY COUNTY
2022 DEC -6 P 12:52
ELIZABETH P. COLA
CLERK OF COURT

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by Anthony Maurice Wise (Applicant) on July 22, 2019. On November 28, 2022, an evidentiary hearing convened before the Honorable R. Scott Sprouse. Applicant was present and represented by Ashley A. McMahan, Esquire. Assistant Attorney General Danielle Dixon represented Respondent. Following a review of the trial transcript and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant did not meet his burden of proof. Thus, this Court denies relief and dismisses this application with prejudice.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections serving a twenty-two-year-sentence. In December 2016, the Newberry County Grand Jury indicted Applicant for kidnapping (2016-GS-36-706) and first-degree burglary (2016-GS-36-709). In May 2017, the Newberry County Grand Jury indicated Applicant for first-degree assault and battery (2017-GS-36-201). These charges arose from a home invasion and kidnapping of Beneza Wicker (Victim), which occurred on September 21, 2016.

On May 15-18, 2017, Applicant proceeded to a jury trial before the Honorable Donald B. Hocker. Charles Verner represented Applicant, and Dale Scott and Tayler Daniel represented the State. The jury convicted Applicant of kidnapping, first-degree burglary, and first-degree assault

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and battery but acquitted him of armed robbery. Judge Hocker sentenced Applicant to concurrent terms of twenty-two years each for kidnapping and burglary, and ten years for assault and battery.

Applicant filed a direct appeal, which was perfected by Susan Barber Hackett. On April 17, 2019, the Court of Appeals dismissed his appeal pursuant to Anders. The remittitur was sent May 3, 2019.

Summary of Trial Testimony

At trial, Victim testified she returned home and parked her Cadillac next to her truck; as she was moving items from her Cadillac to her truck, someone "lunge[d] up out of . . . the seat of the car," hit her in the chest, and kicked her. (Tr. 159). The assailant drug her inside her house, tied her hands and feet with a telephone cord, and demanded money. (Tr. 159-70). He then put a pillowcase over her head, drug her to the backseat of her truck, and drove to the ATM, where he demanded her pin-number. (Tr. 170-71, 174-77). After returning Victim to her home, the assailant put duct tape around her hands and feet and left with her televisions and her Cadillac. (Tr. 177-84). Although Victim could not see the assailant's face because he was wearing a mask, she noticed he had dreadlocks and believed he was someone she had seen in her neighborhood. (Tr. 191-94). She testified the assailant knew details about her such as the fact her husband was deceased and she cared for her elderly mother. (Tr. 191-92). After the assailant left, Victim ran to her neighbor's home and they called 911. (Tr. 186, 259-61).

Law enforcement entered Victim's description of the assailant into Law Track, and Applicant's name "popped up" as living in the same neighborhood and matching the description provided by Victim. (Tr. 299-300). Police later arrested Applicant and recovered his girlfriend's phone from his pocket; the GPS data on the phone showed it was in the general vicinity of Victim's home at the time of the home invasion, Victim's ATM machine at the time her ATM card was used, and the lumber yard where her Cadillac was subsequently recovered. (Tr. 301-02, 322, 325-28, 333-35, 341, 384, 412-13, 434-35). Victim later listened to a recording of Applicant's voice and identified him as the assailant based on his voice. (Tr. 345-46).

Current Application

Applicant timely commenced this PCR application on July 22, 2019, asserting trial counsel was ineffective for failing to prepare Applicant's case, and appellate counsel was ineffective for

submitting an Anders brief. Applicant also raised due process violations related to the jury charge. Prior to the hearing, Applicant filed an amended application asserting trial counsel was ineffective for the following:

> a. While trial counsel objected to information being presented to the jury that Applicant was on probation (ROA pg. 123 ln.. 21-124 ln. 8); testimony that the Applicant was on probation was not objected to in the ROA pg. 385 ln. 20-21.
>
> b. Trial counsel did not object to the foundation for the hospital and phone records.
>
> c. No objections from trial counsel to hearsay from Kathy Tapia ROA pg. 259 ln. 13 – pg. 260 ln. 15); Deputy Michael Claytor ROA pg. 298, ln. 5 – pg. 299 ln. 16); and Ryan Dickert ROA pg. 316 ln. 21 – pg. 317 ln. 22).
>
> d. Gives in to 911 call coming in, ROA pg. 269 ln. 21-25.
>
> e. Failed to object to a 'voice lineup' that only included one person's voice as unduly suggestive. See ROA pg. 63 ln. 25 – pg. 66 ln. 5; pg. 196 ln. 23-pg. 198 ln. 9; pg. 345 ln. 6 – pg. 246 ln. 8.
>
> f. Did not object to references to "Law Track through the trial, particularly ROA pgs. 322 & 377.
>
> g. Failed to object to the state's closing mentioning victim impact evidence (ROA pg. 652 & 662) as well as the State's Golden Rule violation in closing (ROA pg. 655).

At the hearing, Applicant proceeded on the allegations in the amended application. Before this Court are the records of the Newberry County Clerk of Court regarding the underlying convictions, the trial transcript, the records from Applicant's direct appeal, and Applicant's records from the Department of Corrections.

Testimony Presented at the Evidentiary Hearing

During the PCR hearing, Applicant testified trial counsel was appointed when Applicant was first arrested, but counsel did not meet with him until two weeks before trial. Applicant

acknowledged they reviewed discovery, and the information presented at trial was consistent with the discovery they reviewed. When asked about defenses, Applicant responded that trial counsel wanted him to plead guilty, but Applicant didn't want to plead because he didn't do anything. He averred his trial was based on the voice identification and cell phone GPS locations.

Trial counsel testified he was appointed in October 2016; he recalled Applicant was not very talkative at first and did not engage in conversations until a month or two before trial. Trial counsel did not recall if he moved to suppress the phone records; however, he testified law enforcement can use cell phone records to track an individual and recalled a SLED expert testified about the cell phone records and the phone records were certified. Trial counsel stated the phone belonged to Applicant's girlfriend rather than Applicant, but he would have raised a 4th Amendment argument anyway if he believed the phone had been illegally searched.[1]

Findings of Fact and Conclusions of Law

This Court has had the opportunity to review the plea transcript in its entirety and has heard the testimony at the PCR 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. After a careful review based on the Strickland standard set forth below, this Court finds Applicant has failed to carry his burden of proof. Below are this Court's findings of facts and conclusions of law as required by section 17-27-80 of the South Carolina Code (2017).

Ineffective Assistance of Counsel

In a PCR action, an applicant bears the burden of proving the allegations. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). An applicant alleging ineffective assistance of counsel must prove "counsel's conduct so undermined the proper functioning of the

[1] Other portions of the PCR testimony are included where relevant below.

adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813. "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." Watson v. State, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. at 441, 334 S.E.2d at 813. An applicant must overcome this presumption to received relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

To establish ineffective assistance of counsel, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Strickland, 466 U.S. at 687–88; Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625.

Failed to object to testimony regarding probation

Applicant asserts trial counsel was ineffective for failing to object to a reference that he was on probation during Captain Robert Dennis's trial testimony. This Court finds Applicant has failed to prove counsel was ineffective in this regard.

During direct examination, Captain Dennis testified law enforcement learned that Applicant used a 404-phone number that belonged to his girlfriend. (Tr. 383-84). According to Captain Dennis, SLED plotted the GPS coordinates of the phone and learned it was in the general vicinity of Victim's home at the time of the home invasion, Victim's ATM machine at the time her ATM card was used, and the lumber yard where Victim's Cadillac was subsequently recovered. (Tr. 384-85). The solicitor then asked, "And armed with that information on September 23rd, what did you do?" (Tr. 385). Captain Dennis explained SLED tracked the location of the

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phone while law enforcement attempted to locate Applicant; law enforcement ultimately found Applicant walking with his girlfriend near the probation office and arrested him. (Tr. 385-86).

At the PCR hearing, trial counsel recalled raising the issue of probation pretrial. Trial counsel further testified that objecting sometimes does more damage than good.

This Court finds Applicant did not prove trial counsel was deficient for not objecting to the passing mention of probation during Captain Dennis's testimony. Initially, trial counsel *did* successfully object to information about Applicant's probation being entered into evidence. (Tr. 123-24). Further, this Court finds counsel articulated a valid reason for not objecting to the passing reference of the probation office here in that an objection may have caused more damage than good. During Captain Dennis's direct examination, nothing about the question posed by the solicitor—"And armed with that information on September 23rd, what did you do?"—would have alerted trial counsel that Captain Dennis was about to mention the probation office. Once Captain Dennis unexpectedly mentioned that Applicant was near the probation office, trial counsel's only remedy was to move to strike the testimony—which would have further highlighted the testimony to the jury—or to move for a mistrial—which this Court finds would likely *not* have been granted. Due to the unexpected nature of this testimony and the fact an objection may have highlighted the testimony to the jury, this Court finds trial counsel's failure to object did not fall below prevailing professional norms, and Applicant failed to prove deficiency. See Strickland, 466 U.S. at 589 ("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.").

Further, Applicant did not prove prejudice. Captain Dennis did not testify Applicant was on probation; he merely testified law enforcement found Applicant walking with his girlfriend near

the probation office. Even if the jury concluded from this passing statement that Applicant was on probation, this Court finds it is not reasonably likely this affected the outcome of the trial. Notably, the State's evidence against Applicant included the GPS data from his girlfriend's phone showing it was in the area of Victim's home near the time of the home invasion; the area of Victim's ATM machine near the time it was used; and the area where Victim's Cadillac was subsequently recovered. When confronted with the fact his girlfriend's phone was in the area of Victim's ATM machine, Applicant initially stated he was getting his girlfriend Chinese food in that area. However, when police indicated they could check surveillance cameras to verify his story, Applicant changed his story and indicated he never went inside to purchase food. (Tr. 336). Finally, Victim identified Applicant's voice from a recording. Based on the evidence presented by the State, it is not reasonably likely the outcome would have been different had trial counsel objected to Captain Dennis's brief mention that Applicant was walking near the probation office when he was arrested. Thus, Applicant has not shown prejudice.

Failed to object to lack of foundation for hospital and phone records

Next, Applicant avers counsel was ineffective for not objecting to the lack of foundation for Victim's hospital records and Applicant's girlfriend's phone records. This Court finds Applicant has failed to prove counsel was ineffective in this regard.

First, this Court finds Applicant failed to prove counsel was ineffective for failing to object to the foundation of Victim's hospital records.[2] Trial counsel explained the hospital records were not material to the primary issue before the jury, which was whether Applicant was the person who assaulted and kidnapped Victim. This Court finds counsel articulated a valid reason for not

[2] At trial, the State submitted an affidavit from a records custodian at the hospital, and counsel indicated he did not plan to object to foundation. (Tr. 122).

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objecting to the lack of foundation for the hospital records and thus was not deficient in this regard. Likewise, Applicant has failed to prove prejudice. At the PCR hearing, Applicant did not attempt to enter the hospital records into evidence, leaving this Court to merely speculate about the records themselves and whether the outcome would have been different had counsel objected to the foundation of the records. Cf. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (providing an applicant must produce witnesses at a PCR hearing to support a claim that counsel was ineffective for failing to interview or call potential witnesses). This Court thus finds Applicant failed to prove counsel was ineffective in this regard.

Likewise, Applicant failed to prove counsel was ineffective for failing to object to the foundation of the cell phone records. At trial, the State submitted an affidavit from an AT&T records custodian for the phone records; trial counsel explained he did not intend to object to the foundation. At the PCR hearing, Applicant failed to set forth a valid, viable challenge to the foundation or to otherwise show that the information in the affidavit (and what the witness would have been available to testify to) was insufficient to establish the low threshold for authenticity. See State v. Hall, 437 S.C. 107, 117, 876 S.E.2d 328, 333-34 (Ct. App. 2022) ("The authentication standard is not high, and a party need not rule out any possibility the evidence is not authentic."). Had the affidavit itself been insufficient to establish foundation, for example, Applicant could have introduced the affidavit into evidence at the PCR hearing to show this Court what argument counsel could have raised. Although it was the State's burden at trial to establish the foundation for the records, it was Applicant's burden at the PCR hearing to overcome the presumption that counsel rendered effective assistance. See Strickland, 466 U.S. at 689 ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances,

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the challenged action might be considered sound trial strategy."). Applicant has offered no viable argument to support any challenge to the foundation of the cell phone records and has failed to overcome the presumption that counsel was effective. Thus, Applicant has not shown deficiency.

Likewise, in the absence of something more, this Court is left to speculate about what argument counsel could have raised to challenge the foundation of the phone records, especially when the threshold for establishing foundation is so low. Again, it is Applicant's burden to prove his case. Applicant did not show reasonable likelihood exists that the outcome would have been different had counsel challenged the foundation for these records and thus did not prove prejudice.

Failed to object to hearsay testimony

In his amended application, Applicant highlighted three instances of alleged hearsay that he believed counsel should have objected to. First, during the testimony of Victim's neighbor Kathy Tapia, Applicant averred counsel should have objected to the following:

> Q: And what is [Victim] saying at this point?
>
> A: That she had been kidnapped and drove around Newberry for quite a while and they had took her TVs and ATM card and went and got money out of her account and that he had really pulled o her. She went for a struggle with him. I mean, even some of her hair was missing in her head.
>
> Q: Did she identify this perpetrator to you?
>
> A: Well, me and her did sit there and talk, because I tried to calm her down. And I asked her did she know him and she said, it seemed like the young fellow that was walking the street. Because, I'm outside all the time. So I see people walking the street. . . . . I know a lot of people on our road. . . . And so I told her, I asked her, I said, do you know who did this. And she said, I think it was the young boy that me and you just seen the other day with the dreadlocks. He had long dreadlocks and about this far going down those dreadlocks all around his head is like a blonde, but it's not a blond like would be in my hair. It's just a light darker blond like. And I said, do you think it's the young fellow then. And she said, yes. She said but I can't swear to it. I can't swear to it And I'm like, okay. That's all

> I'm asking. I'm not going to keep on, because she wasn't herself. She couldn't tell me form one minute to the next really. I mean, she was to pieces.

(Tr. 259-60). Next, Applicant asserted counsel should have objected to the following during Deputy Michael Claytor's testimony:

> Q: What physical description [of the perpetrator] did you get form [Victim]?
>
> A: The actual physical description was she told me he was about five-six or shorter with dreadlocks, a black male with a white plastic mask over his face is what she told me. During the interview, she also gave me a couple of other indicators of ways that we may could find the identity of him. She told me that she, I asked her who he, who he was and if she knew him. She actually said, you know, I think he lives right down the street. And I said, okay, but what makes you think this. And she said, she says, well, he knew my routine. You know, he knew that I was going to go to that truck, get in that truck to go to church on Wednesday, because I do every Wednesday about the same time. She also said another think that made her think that, you know, he was from the neighborhood and that she knew him, was he told her that he was not going to hurt her. I'll actually read her exact words . . . . He says, I'm not going to hurt you because I know your mother is a hundred years old and you have to take care of her. And then he stated to her that his mother gave him away. While I was there at the house, I also learned that the guy that they were thinking who it was, which ended up being [Petitioner], was possibly adopted. I learned that while I was there at the house as well.
>
> Q: Okay. So part of his identity was she thought he was somebody that lived in the neighborhood—
>
> A: Yes, sir.
>
> Q: —and also made statements. The perpetrator made statements to [Victim] that indicated a familiarity with her?
>
> A: Yes, sir.

(Tr. 298-99). Finally, Applicant asserted counsel should have objected to the following during Investigator Ryan Dickert's testimony:

> [Victim] gave me the story, which is very similar to what you've heard, that she had been with her mother all day . . . . Come back home and was getting ready for church. Got out of her vehicle, which is a Cadillac, walked around. There is a ramp. I believe you've seen the photograph of that. Walked around the ramp to the back of the house and was attempting to put the items inside the passenger or the rear-driver's side door, she opened the door. At that point in time, a male or a subject appeared and startled her and she was kicked, struck in the chest and she fell back against the railing of the ramp that leads to the back porch. She attempted to start screaming. She said the subject got out of the truck, grabbed her by the mouth area. Indicated that she knew he had on gray leather gloves, which she though were like a driving-type glove just due to the glove being in her mouth. She said a struggle was ensued outside. That she was drug to the back porch area, she was held down, he took her keys, opened up the house, took her inside. Once inside, she kind of broke free from him, ran towards, I guess, the front of the house, which would be the living room area. He ended up tripped her or somehow or another knocking her down or she may have fallen down, but she knew she fell down ad, she was fighting for her life. That's what she indicated. She was fighting for her life. She was in fear of her life.

(Tr. 316-17). This Court finds Applicant failed to prove counsel ineffective in this regard.

Initially, this Court finds trial counsel articulated a valid reason for not objecting to the foregoing testimony and thus was not deficient. When questioned about why he did not object, trial counsel stated he did not consider all of it hearsay. He further averred the "hearsay" testimony about Victim identifying the assailant was cumulative and did not help the State establish the assailant's identity. He explained a description of "a young black guy with dreads" was not meaningful because there were a lot of African-American guys with dreads in Newberry County. This Court finds the foregoing testimony is credible and constitutes a valid reason for not objecting.

Further, this Court finds the testimony fit the excited utterance exception to the general rule prohibiting hearsay. See Rule 803(2) (providing "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not excluded by the hearsay rule). All three witnesses testified to statements made

by Victim immediately after her abduction and kidnapping, which was undoubtedly a startling event. Further, the testimony indicates Victim was still under the stress of excitement caused by the kidnapping when she made these statements. For example, Tapia testified Victim was "beating on [Tapia's] front door" and "was whiter than white" and "to pieces." (Tr. 258). Tapia further testified Victim "still had duct tape, still had some electric tape on her" and "wasn't herself at all." (Tr. 258). Tapia stated she "tried to calm her down" but Victim "wasn't herself," "couldn't tell me from one minute to the next really," and "was to pieces." (Tr. 259-60). Deputy Claytor testified Victim was "really upset" and it "took [him] a second to get her calmed down a little bit to let her know everything is okay." (Tr. 295). Likewise, Investigator Dickert stated Victim was "kind of slumped on the couch" when he arrived and "[a]ppeared to be very distraught, in pain." (Tr. 316). He stated he assisted in removing the duct tape from her. (Tr. 316). Investigator Dickert testified Victim "was fighting for her life" and "was in fear of her life" during the attack. (Tr. 317). Because these statements fit the excited utterance exception, counsel was not deficient in not objecting. Further, and for the same reason, Applicant has failed to prove prejudice from counsel's failure to object to this testimony based on hearsay. This claim is thus denied.

"Gives in" to 911 call coming in

In his application, Applicant asserts trial counsel "gives in" to the 911 call coming in to evidence. At the PCR hearing, trial counsel testified he objected to the 911 call, but the trial court disagreed with him and allowed the call into evidence. Trial counsel averred the 911 call was ultimately cumulative and not material.

This Court finds Applicant has failed to show trial counsel was ineffective in this regard. First, as trial counsel testified, trial counsel *did* challenge the admissibility of the 911 call both prior to trial and when the State moved to enter it into evidence. (Tr. 123, 263-71). Counsel argued

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the call was hearsay, not relevant, and unfairly prejudicial pursuant to Rule 403, SCRE. (Tr. 263-71). After sending the jury out, the Court listened to the call and overruled counsel's objections. (Tr. 263-71). This Court finds counsel's objection to the 911 call did not fall below prevailing professional norms; thus, Applicant has not shown deficiency.

Likewise, Applicant has not shown prejudice. Specifically, it is Applicant's burden to prove his allegations. Applicant has not set forth an objection or argument counsel should have raised that would make it reasonably likely the outcome would have been different. Likewise, Applicant did not enter the 911 call into evidence at this PCR hearing, leaving this Court to speculate about how prejudicial the call actually was. Thus, Applicant has not shown prejudice.

Failed to object to voice lineup as unduly suggestive

At the PCR hearing, Applicant averred counsel was ineffective for not objecting to the voice lineup, which had only one voice. Trial counsel, however, recalled raising that issue pretrial. He stated he disagreed with the trial court's finding that the voice identification did not raise a Neil v. Biggers issue. This Court finds Applicant has failed to prove counsel was ineffective.

"In Neil v. Biggers, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification." State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012). "Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Id.

Here, counsel raised this issue pre-trial during a Neil v. Biggers hearing, but the trial court disagreed with him that the voice identification raised a Neil v. Biggers issue. This Court finds counsel's objection in this regard was within prevailing professional norms and was not deficient.

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Further, at the PCR hearing, Applicant did not set forth what additional argument counsel should have raised. Thus, Applicant did not prove deficiency. See Strickland, 466 U.S. at 689 ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy."). Likewise, Applicant did not set forth any argument that would have made it reasonably likely the outcome would have been different and thus did not prove prejudice.

Failed to object to references to "Law Track"

In his application, Applicant asserted counsel was ineffective for not objecting to references to Law Base throughout trial. At trial, Captain Dennis, Lieutenant Claytor ,and Investigator Dickert all testified law enforcement entered Victim's description of the assailant into Law Track, and Applicant's name "popped up" as living in the same neighborhood and matching the description provided by Victim. (Tr. 299-300, 321-22, 377). At the PCR hearing, trial counsel explained Law Track is a program used by law enforcement that has information about individual's addresses and other information. He explained it is not limited to criminal arrests; rather, it is a more broad database.

This Court finds Applicant did not prove counsel was ineffective in this regard. First, this Court finds the references to Law Base were made in passing, and counsel's failure to object to these passing references did not fall below prevailing professional norms. Thus Court further finds Applicant did not articulate what argument counsel should have raised and thus did not meet his burden of proving deficiency. See Strickland, 466 U.S. at 689 ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances,

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the challenged action might be considered sound trial strategy."). Finally, Applicant did not set forth any argument counsel could have raised and thus failed to prove a reasonable likelihood exists that the outcome would have been different had counsel objected. Thus, this allegation is denied.

Failed to object to victim impact evidence and
Golden Rule violation during closing argument

In his application, Applicant asserted counsel was ineffective for not objecting to the victim impact evidence and Golden Rule arguments during the State's closing argument. Trial counsel explained he would object during an opening statement and closing argument if it became objectionable, but he believed the State's closing argument was a fair inference of the facts and was not inflammatory or objectionable.

"A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Brown v. State, 383 S.C. 506, 515, 680 S.E.2d 909, 914 (2009). "The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Id. "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Id. at 516, 680 S.E.2d at 915. "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id.

This Court finds Applicant has failed to prove counsel was ineffective in this regard. First, counsel articulated a valid reason for not objecting in that he believed the closing argument was a fair inference of the facts and not inflammatory or objectionable. Applicant did not meet his burden in overcoming the presumption that counsel rendered effective assistance. Although

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Applicant cited to three pages in the thirty pages of the State's closing argument, he did not indicate with specificity *which* statements he believed were inflammatory or objectionable. Thus, Applicant did not meet his burden of proving counsel was deficient.

Further, Applicant failed to prove prejudice. This Court finds, upon reviewing the State's closing argument as a whole, that any statements on the three pages listed in Applicant's amended applicant did not so infect Applicant's trial with unfairness as to make the resulting conviction a denial of due process. This Court notes the State's closing spanned thirty pages of the transcript; Applicant only cited to three pages in the first third of the closing argument to support his argument that the State made improper arguments. Viewed as a whole, nothing in these three pages so infected Applicant's trial with unfairness as to make the resulting conviction a denial of due process. Further, this Court finds it is not reasonably likely the outcome would have been different had counsel objected to these statements. Here, the State submitted compelling evidence of Applicant's guilt, which included the GPS data from his girlfriend's phone showing it was in the area of Victim's home near the time of the home invasion; the area of Victim's ATM machine near the time it was used; and the area where Victim's Cadillac was subsequently recovered. Overall, this Court finds Applicant did not prove any resulting prejudice from counsel's failure to object to the States' closing argument; thus, this claim is denied.

Conclusion

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. Thus, this application is denied and dismissed with prejudice.

Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty days of receipt by counsel of written notice of entry of judgment. See Rule 203,

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SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an applicant has the right to an appellate counsel's assistance in seeking review of the denial of PCR. Pursuant to Rule 71.1(g), SCRCP, if an applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on applicant's behalf. Attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for PCR is denied and dismissed with prejudice; and

2. Applicant must be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED THIS 4 **day of** April **, 2022.**

R. SCOTT SPROUSE
Presiding Judge
Eighth Judicial Circuit

Walhalla, South Carolina