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(1919 – 1968)

Hubert E. Long  
(1921 – 2000)  
**RECEIVED**  
Since 1961

◊ American Board of Trial Advocates  
Δ Certified Circuit Court Mediator  
‡ Certified Circuit Court Arbitrator

July 3, 2013

JUL 08 2013

The Honorable Daniel E. Shearhouse  
Supreme Court  
PO Box 11330  
Columbia SC 29211


S.C. SUPREME COURT

RE: The State v. Todd M. Bussey  
Docket No.: 2011-ES-32-2118

Dear Mr. Shearhouse:

I am a **court-appointed attorney in the referenced PCR case**. Enclosed for filing are an original and three copies of a notice of appeal in the above case. Also enclosed are copies of the proof of service of the notice of appeal on the respondent and the Order which is to be challenged on appeal.

Sincerely,

  
Ryan M. Wingard

Enclosures

cc: J. Walt Whitmire, Esquire  
S.C. Attorney General's Office  
Post Office Box 11549  
Columbia, South Carolina 29211-1549

Ms. Loriene P. French  
Division of Appellate Defense  
PO Box 11433  
Columbia, SC 29211-1433

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

APPEAL FROM LEXINGTON COUNTY  
COURT OF COMMON PLEAS

Frank R. Addy, Jr., Circuit Court Judge

Case No. 2011-CP-32-2118

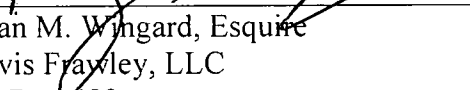
Todd Maurice Bussey ..... Appellant,

vs.

The State of South Carolina ..... Respondent.

**NOTICE OF APPEAL**

Todd Maurice Bussey appeals the June 13, 2013 Order of Dismissal of the Honorable Frank R. Addy, Jr., which Order the attorney for the Appellant received June 26, 2013. A copy of the Order is attached hereto.

  
\_\_\_\_\_  
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Davis Frayley, LLC  
PO Box 489  
Lexington, South Carolina 29071-0489  
(803) 359-2512  
ATTORNEY FOR THE APPELLANT

Lexington, South Carolina  
July 3, 2013

Other counsel of record:  
John Walter Whitmire, Esquire  
SC Attorney General's Office  
Post Office Box 11549  
Columbia, South Carolina 29211  
ATTORNEY FOR RESPONDENT

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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APPEAL FROM LEXINGTON COUNTY  
COURT OF COMMON PLEAS

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Frank R. Addy, Jr., Circuit Court Judge

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Case No. 2011-CP-32-2118

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Todd Maurice Bussey ..... Appellant,

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The State of South Carolina ..... Respondent.

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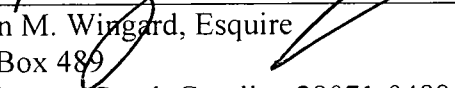
**PROOF OF SERVICE**

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I certify that I have served the foregoing NOTICE OF APPEAL on the Respondent by depositing copies of same in the United States Mail, postage prepaid, on July 3, 2013, to the attorney for the respondent:

John Walter Whitmire, Esquire  
SC Attorney General's Office  
Post Office Box 11549  
Columbia, South Carolina 29211

DAVIS FRAWLEY, LLC



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STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

FILED IN THE COURT OF COMMON PLEAS  
ELEVENTH JUDICIAL CIRCUIT

2013 JUN 05 4:05 PM Case No: 2011-CP-32-2118

Todd Maurice Bussey,  
S.C.D.C. No. 334871

BETH J. CARROLL  
CLERK OF COURT  
LEXINGTON, SC

Applicant,

**ORDER OF DISMISSAL**

v.

State of South Carolina,

Respondent.

This matter comes before the Court pursuant to an Application for Post-Conviction Relief (PCR) filed June 8, 2011. Respondent made its Return and Motion to Dismiss on January 10, 2012. Applicant filed a response on February 21, 2012. An evidentiary hearing into the matter was convened on April 17, 2013, at the Lexington County Courthouse. Applicant was present at the hearing and was represented by Ryan W. Wingard, Esquire. Respondent was represented by Walt Whitmire, Esquire, of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. William F. Gorski, ("trial counsel") Esquire, testified. Lanelle C. Durant, Esquire, and Robert M. Pachak, Esquire, of the Office of Appellate Defense, testified. This Court also had before it the records of the Lexington County Clerk of Court, the transcript of the proceedings against the Applicant, and the Applicant's records from the South Carolina Department of Corrections.

**I. PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Applicant was indicted at the March 2007 term of the Lexington County Grand Jury for Armed Robbery (2007-GS-32-710).

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Applicant was represented by William F. Gorski, Esquire. On May 8-9, 2009, Applicant underwent trial pursuant to which he was found guilty as charged. The Honorable R. Knox McMahon sentenced the Applicant to confinement for a period of fifteen years.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. Lanelle C. Durant, Esquire, represented Applicant on appeal. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Bussey, Op. No. 2011-UP-139 (S.C. Ct. App. filed April 5, 2011). The Remittitur was issued on April 22, 2011.

At the evidentiary hearing, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
  - a. failure to make timely objections at trial
  - b. failure to investigate and present exculpatory evidence
2. Ineffective Assistance of Appellate Counsel
  - a. failure to prepare
  - b. failure to present all briefed issues at the oral argument

### III. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable

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professional judgment. Strickland, 466 U.S. at 668, 104 S.Ct. at 2064. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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CLERK OF COURT  
LEXINGTON, SC

The reviewing court applies 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, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, *supra*. 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.

**IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

**A.**

This Court finds Applicant has failed to meet his burden to prove trial counsel was ineffective for failing to object to inadmissible testimony and evidence at trial. This Court finds trial counsel's testimony credible. Applicant alleges the trial was replete with instances where trial counsel was ineffective for failing to make a timely objection to inadmissible hearsay

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testimony (Trial Tr. 117; 118; 132; 135; 191; 192; 195; 198). "Evidence is not hearsay unless it is an out of court statement offered to prove the truth of the matter asserted." State v. Brown, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994). "A ruling on the admissibility of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). "Erroneous admission of hearsay evidence is subject to harmless error analysis." State v. Davis, 371 S.C. 170, 181, 638 S.E.2d 57, 63 (2006).

Applicant alleged trial was deficient for not objecting during Detective Prestigiacomio and Medford's testimonies. Counsel testified he did not object to Detective Prestigiacomio and Medford's testimonies regarding their investigations of the armed robbery of the Kangaroo convenience store because the testimony was admissible. This Court agrees with trial counsel. See Caprood v. State, 338 S.C. 103, 111, 525 S.E.2d 514, 518 (2000) (citing State v. Brown, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994) ("Evidence is not hearsay unless it is an out of court statement offered to prove the truth of the matter asserted. An out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken.")).

Applicant alleged trial counsel was deficient for not objecting when the solicitor referenced items seized during a search of Applicant's residence. Trial counsel testified there was no reasonable ground to object to officer testimony regarding items obtained from Applicant pursuant to a valid search warrant. This Court agrees with trial counsel.

Applicant alleged trial counsel was deficient for failing to object to numerous other instances of inadmissible hearsay testimony. Trial counsel testified he did not object to testimony regarding the victim's account of the armed robbery, the surveillance recordings, or the stolen

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lottery tickets because the testimony was cumulative. This Court finds the decision to not object does not warrant a finding of deficiency. First, the victim testified. Second, Applicant's statement and the surveillance recordings were admitted during the State's case. See State v. Price, 368 S.C. 494, 500, 629 S.E.2d 363, 366 (2006) (citing State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (any error in admission of evidence cumulative to other unobjected-to evidence is harmless)). Furthermore, this Court finds trial counsel's decisions not to object here were grounded in reasonable trial strategy. Trial counsel testified it was not his practice to object to cumulative and foundational testimony. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (counsel must articulate an objectively reasonable strategy to avoid a finding of ineffectiveness).

Applicant alleges trial counsel was deficient for failing to object to Detective Medford's hearsay testimony that occurred during trial counsel's cross-examination of the witness. (Trial Tr. 185). This Court finds this allegation is without merit. Trial counsel's cross-examination of Detective Medford was sound and beneficial to Applicant's defense. See State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994) (State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994) citing State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991) ("Specifically included in a defendant's Sixth Amendment right to confront the witness is the right to meaningful cross-examination of adverse witnesses.")).

Applicant alleges trial counsel failed to object to the admission of Applicant's statement as inadmissible hearsay. Trial counsel testified the voluntary statement did not constitute inadmissible hearsay. This Court agrees with trial counsel. See State v. Gilchrist, 342 S.C. 369, 372-73, 536 S.E.2d 868, 870 (2000) (Pursuant Rule to 801(d)(2)(A), SCRE, as an admission by a party opponent is admissible).

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Applicant alleges trial counsel was deficient for failing to object to the admission of the surveillance recordings of the offense as inadmissible hearsay. This Court finds the surveillance recordings did not constitute inadmissible hearsay. This Court finds Applicant failed to show any reason why the admission of the evidence should have been precluded.

Applicant alleges trial counsel was ineffective for failing to object to improper opinion testimony from Detective Prestigiacommo because the witness was not qualified as an expert. (Trial Tr. 132; 133). Detective Prestigiacommo's testified he recognized Applicant's Bronx accent because from previously being employed as a police officer in New York City and that he had limited to no contact with Puerto Rican nationals during police service in Lexington County, South Carolina. Trial counsel testified the testimony and did not warrant an objection. This Court agrees with trial counsel. See State v. Douglas, 380 S.C. 499, 502, 671 S.E.2d 606, 608 (2009) (citing Rule 701, SCRE; State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996) ("Lay witnesses are permitted to offer testimony in the form of opinions or inferences if the opinions or inferences are rationally based on the witness' perception, and will aid the jury in understanding testimony, and do not require special knowledge.")).

This Court finds Applicant has failed to meet his burden to prove trial counsel was ineffective for failing to make a motion for mistrial after Detective Prestigiacommo testified that the suspected co-defendant fled to New York after the commission of the armed robbery. (Trial Tr. 136-7). Trial counsel testified he made a timely objection and was uncertain if the inadmissible testimony warranted a motion for a mistrial. This Court finds Applicant failed to prove deficiency here. The trial judge sustained the objection and the testimony was stricken from the record. Furthermore, a curative charge was issued. See State v. Coleman, 301 S.C. 57, 389 S.E.2d 659 (1990) ("A new trial will not be granted unless the prosecutor's comments so

infected the trial with unfairness as to make the resulting conviction a denial of due process.”).

Therefore, this Court finds trial counsel did not fall below the level reasonable norms in making strategic decisions on objecting during Applicant’s trial. This Court finds trial counsel diligently made numerous timely objections during Applicant’s trial. This Court finds any possible error surrounding the allegations of ineffective assistance of counsel for failing to object constituted harmless error. Therefore, these allegations are denied and dismissed.

**B.**

This Court finds Applicant failed to prove trial counsel was ineffective for failing to conduct a reasonable investigation of allegedly exculpatory evidence. Applicant testified trial counsel was deficient for not investigating and presenting gel footprints taken from the scene of the offense and the Applicant’s sweatshirt seized during the search of his residence. Trial counsel testified he received discovery and reviewed it with Applicant. Trial counsel testified he developed his defense based upon Applicant’s version of the offense and his voluntary statement. Trial counsel testified Applicant claimed an alibi defense. This Court finds trial counsel more credible than Applicant. This Court finds trial counsel conducted a reasonable investigation. Trial Counsel’s attacked the lack of matching footprint and the generic make of the sweatshirt during cross-examination and in the closing argument. See Roseboro, 317 S.C. at 294, 454 S.E.2d at 313 (counsel must articulate an objectively reasonable strategy to avoid a finding of ineffectiveness). Furthermore, Applicant failed to present evidence at the PCR of what counsel should have but did not investigate. See Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) (“Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result.”). Therefore, these allegations are denied and dismissed.



## C.

This Court finds Applicant failed to prove Durant was ineffective for substituting a colleague to argue the case on appeal. "A defendant is entitled to effective assistance of appellate counsel." Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). This Court finds Durant's testimony credible. Durant testified she represented Applicant subsequent to trial counsel filing a timely notice of appeal. Durant testified she reviewed the trial record and filed a brief on behalf of Applicant. Durant testified that her colleague at the Office of Appellate Defense, Pachak, handled Applicant's oral argument. Durant testified Pachak argued the case because she was scheduled to be out-of-state on the date the Court of Appeals scheduled the matter. Durant testified the substitution for oral argument was not an uncommon practice. This Court finds Durant's necessity to have a colleague argue her brief did not constitute deficiency.

This Court finds Applicant failed to prove Pachak was ineffective in preparing for the argument. Pachak testified he read Applicant's trial transcript and reviewed his file. This Court finds Pachak's testimony credible. This Court finds Pachak is a seasoned criminal appellate attorney that adequately prepared Applicant's case for oral argument. See Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) ("The brevity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation.").

This Court finds Applicant failed to prove Pachak was ineffective for declining to argue the first two briefed issues. Pachak testified he abandoned Durant's first two issues on appeal in order to focus the appellate court's attention on the strongest issue, failure to grant Applicant's motion for a mistrial resulting from the solicitor's improper closing argument. Durant testified this was by far the strongest issue on appeal. Durant's testimony corroborated Pachak's appellate strategy. This Court finds Pachak's strategy at oral argument was reasonable. See

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Roseboro, 317 S.C. at 294, 454 S.E.2d at 313 (counsel must articulate an objectively reasonable strategy to avoid a finding of ineffectiveness). Therefore, these allegations are denied and dismissed.

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D.

BEVERLY A. CARROLL  
CLERK OF COURT  
LEXINGTON, SC

Accordingly, this Court finds Applicant failed to prove Strickland's first prong on the above allegations. Furthermore, this Court finds Applicant failed to prove Strickland's second prong on the above allegations. Overwhelming evidence of guilt supported Applicant's conviction. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994). The victim identified Applicant as the culprit. Trial Counsel testified the identification was the most detrimental evidence against Applicant. A search of Applicant's residence produced evidence that further circumstantially linked Applicant to the commission of the offense. Applicant's admitted to possessing lottery tickets stolen during the armed robbery. Applicant explained he obtained the tickets from an unknown actor hours prior to the tickets being stolen during the armed robbery.

#### All Other Claims

Except as discussed above, this Court finds that the Applicant affirmatively waived the remaining allegations set forth in his application at the hearing. 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 issues 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.

**V. CONCLUSION**


Based on all the forgoing, 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 for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. *See* Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice 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. Applicant must be remanded to the custody of Respondent

**AND IT IS SO ORDERED** this 13<sup>th</sup> day of June, 2013.

  
 \_\_\_\_\_  
 FRANK R. ADDY, Jr.,  
 Presiding Judge  
 Eleventh Judicial Circuit

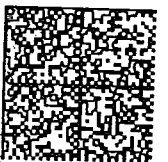
Laurens, South Carolina

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The Honorable Daniel E. Shearhouse  
Supreme Court  
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