

THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas

G.D. Morgan, Jr., Circuit Court Judge

Case No. 2017-CP-23-07692
Appellate Case No: 2023-

James Michael Johnson,

Respondent,

v.

State of South Carolina,

Petitioner.

NOTICE OF APPEAL

The State of South Carolina hereby appeals from the Order of the Honorable G.D. Morgan, Jr. *Granting Post-Conviction Relief* dated and filed June 27, 2023. The State received a copy of the filed Order on June 27, 2023. The State has also already received a copy of the transcript.

July 26, 2023.



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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE)	
)	C. A. No.: 2017-CP-23-07692
James Michael Johnson, #340206)	
)	
Applicant)	
)	
v.)	ORDER GRANTING POST
)	CONVICTION RELIEF
)	
State of South Carolina,)	
)	
Respondent.)	

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 CLERK OF SUPERIOR COURT
 GREENVILLE, SOUTH CAROLINA

The parties appeared before the Court at the Greenville County Courthouse on January 31, 2023, through February 2, 2023, for an evidentiary hearing on James Michael Johnson’s (“Applicant”) application for post-conviction relief, which was filed through counsel on December 4, 2017. At the evidentiary hearing, J. Falkner Wilkes, Esquire, and Robert Clyde Childs, III, Esquire, represented Applicant, and Taylor Zane Smith, Esq. represented the State (“Respondent”). At the conclusion of the hearing, the Court took the matter under advisement and granted the parties’ joint request that they be allowed to submit post-hearing briefs in lieu of closing argument. After receiving the post-hearing briefs and having considered all of the evidence, testimony and matters of record the Court makes the following findings of fact and conclusions of law.

Applicant is presently confined in the South Carolina Department of Corrections pursuant, to orders of commitment of the Greenville County Clerk of Court. In March of 2014, the Greenville County Grand Jury indicted Applicant for two counts of murder and two counts possession of a weapon during the commission of a violent crime (2014-GS-23-2201) and (2014-GS-23-2203).

Zachery D. Ellis, Esquire, represented Applicant at trial. Lucas Merchant, Esquire and Katrina Salisbury, Esquire, prosecuted the case. On July 13, 2015, Applicant proceeded to trial before the Honorable J. Derham Cole and a jury. The Applicant was found guilty of both counts of murder and both counts of possession of a weapon during the commission of a violent crime. Judge Cole sentenced Applicant to thirty years imprisonment for each count of murder and five years' imprisonment for each count of possession of a weapon during the commission of a violent crime.

Applicant filed a timely notice of appeal. J. Falkner Wilkes, Esquire, filed a motion to stay Applicant's appeal on December 9, 2016. The South Carolina Court of ordered Applicant's appeal to be held in abeyance on January 5, 2017. On February 6, 2017, Applicant requested the Court to dismiss his appeal. The South Carolina Court of Appeals dismissed Applicant's appeal per his request by order filed February 23, 2017. The remittitur was returned to the circuit court on March 13, 2017.

Applicant timely filed an Application for Post Conviction Relief which was entered on December 4, 2017. The Respondent filed its Return on May 18, 2018. A hearing was held beginning on January 31, 2023. Appearing on behalf of the Applicant were J. Falkner Wilkes and Robert C. Childs, III both of Greenville. The Respondent was represented by Taylor Zane Smith of the Office of the Attorney General. After the hearing the matter was taken under advisement to allow the Court to receive post-trial briefs. Having considered the issues raised, and based on the testimony, evidence and all matters of record the Court makes the following findings of fact and conclusions of law:

In his application for post-conviction relief, Applicant alleged that he is being held in

custody unlawfully for the following reasons:

I. Ineffective Assistance of Counsel

- a. Failure to properly prepare and investigate the case, (Including the failure to investigate and obtain evidence, surveillance video, cell phone records, cell phone video recordings, etc .. that would establish a defense in the case.
- b. Failure to obtain transcripts from court proceedings wherein potential witnesses had given previous testimony.
- c. Failure to follow instructions or requests of the applicant.
- d. Failure to properly present an adequate defense based on the facts and circumstances of the case.
- e. Failure to properly conduct discovery in the case.
- f. Failure to properly subpoena and call witnesses and present evidence in the case.
- g. Failure to raise proper objections during the trial to present and preserve evidentiary issues. Making improper stipulations or giving consent on issues during the trial which were adverse to the defense of the case.
- h. Failure to move for appropriate suppression hearings and properly object to the testimony of witnesses and evidence in a timely manner.
- i. Failure to properly and effectively cross-examine the State's witnesses.
- J. Failure to raise and properly argue and preserve record and issues for appeal.
- k. Failure to make a proffer of evidence when warranted by the circumstances of the case and properly present and preserve issues for appeal.
- l. Failure to make and preserve the record in cases of conferences at the bench and in chambers.
- m. Failing to call co-defendant as a witness where the co-defendant had in his guilty plea indicated that the Applicant was not involved in the crime or otherwise provide favorable testimony.
- n. Failure of counsel to communicate all plea offers to the Applicant and to adequately discuss same.
- o. Failure to properly discuss the case and advise the Applicant on the applicable law and procedure and facts known or believed to exist. (Including the failure to meet with the applicant adequately and the failure to, in a timely manner, fully review and discuss the discovery material, evidence, law, and procedure so that the applicant would fully understand the charges, consequences and choices, including plea options).
- p. Failure to fully and timely explain the advantages of a guilty plea and the plea offers.

After the hearing the parties submitted post-trial memorandum on the allegations on which the Court was being asked to rule upon. Those allegations were as follows:

1. Applicant's counsel was ineffective for failing to take reasonable steps to understand and evaluate exculpatory evidence contained in cellular phone records.
2. Applicant's counsel was ineffective for failing to present exculpatory evidence proving the identity of perpetrator.
3. Trial counsel was ineffective for failing to object to prosecutor's improper and prejudicial opening statements.
4. Trial counsel was ineffective for failing to use all available matters to impeach state's key witness.

In a post-conviction relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441,442,334 S.E.2d 813,814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process" that the proceeding "cannot be relied upon as having produced a just result." *Id.* (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Id.* (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The court strongly presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* (citing Strickland, 466 U.S. at 687). The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. *Id.* at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. *Id.* Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Id.* (citing Strickland, 466 U.S. at 687).

688). 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." *Id.* at 117-18, 386 S.E.2d at 625.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" [397 S.C. 43] Butler, 286 S.C. at 442, 334 S.E.2d at 814 (*quoting Strickland*, 466 U.S. at 686, 104 S.Ct. 2052). As such, courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (*citing Strickland*, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687-88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (*quoting Strickland*, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

I. Applicant's claim that trial counsel was constitutionally ineffective for failing to

present evidence in support of the defense of alibi.

Applicant alleged counsel failed to take reasonable steps to understand, evaluate, and present exculpatory evidence contained in cellular phone records. The Court agrees. Criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case. Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). Prior to the Applicant's trial, defense counsel was provided with pre-trial discovery material. Discovery material included the cell phone records for James Johnson (Applicant), Manuel Nicholas Granados (the inside man), Christopher Porcoro (victim), Coroner's reports, 911/EMS reports. Greenville County 911/EMS records showing a fire call to the murder scene was received at 10:13 am. The record from Applicant's trial shows that Manuel Nicholas Granados (Nick) was the 'inside man' at the victim's house waiting for the victim's to go to sleep so he could let Scott Lowe in the house so Lowe could steal the victim's drugs and money. Cell phone records show that last call was made from victim Christopher Porcoro's phone at 8:22 a.m. that morning. Granados' cell phone records show a sudden gap between 9:37 to 10:17 a.m. in Granados' otherwise constant cell phone usage. The coroner's reports which showed the time of death for both victims as 10:00 a.m. There was evidence known to defense counsel prior to trial that established the time of the murders between 9:37 and 10:00 a.m. Applicant's cell phone records show Applicant's phone was sending and receiving texts throughout the day of the murders including texts at 8:52, 9:03, 9:14, 9:33, 9:56, 10:07, and 10:46 a.m. Location data from the cell phone records show that all of those text messages were sent or received through the cell tower servicing the Applicant's home. Despite its potential exculpatory value, none of this was shown to the jury.

Former Greenville County Homicide Investigator and licensed private investigator Paul Silvaggio testified at the PCR hearing on behalf of the Applicant that the round trip drive between the Appellant's house and the murder scene, on the route testified to by co-defendant Scott Lowe at Applicant's trial, was approximately 14 minutes. Evidence from the Applicant's trial also shows that after the murders there was an attempt to set the house on fire and stage the murder scene to look like a meth lab explosion, all of which would have necessarily added a significant amount of time that the perpetrators would have had to remain at the murder scene.

At the PCR hearing, Ben Levitan was qualified as an expert in cell phone technology, including interpretation of data location information from cellular records. Levitan explained the basic operation of cell phones and how cell phones accessed cellular service through a network of towers. Levitan explained how and why cell phones always connect to their service providers' nearest tower and that service areas for towers are mutually exclusive. The murder scene and the Applicant's home are in different cell tower coverage areas and that service for those areas are mutually exclusive. Identifying 25,958 text messages, Levitan testified that the Applicant was an obsessive cell phone user. Records for the day of the murders were consistent with Applicant's overall obsessive phone usage showing a high volume of calls and texts. This included a series of calls or texts made or received within just minutes of the murders. All of these calls and texts, including those within just a few minutes of the murder connected through the tower servicing the Applicant's home. The records show that on the day of the murders the Applicant's cell phone never once connected to the tower servicing the scene of the murders. Because the tower service areas are mutually exclusive, Levitan concluded and opined that there was no evidence from cell phone records that the Applicant was at or even near the scene of the murders when the murders

occurred, or at anytime on the day of the murders. Levitan's testimony was based on the same records that were provided to defense counsel through pre-trial discovery.

At trial the chief police investigator testified that the phone records provided nothing of value. (Tr. Day 2, p.141,19-17).

At the hearing Applicant's mother Patricia Fuller and his father Donald Johnson both testified that the Applicant was home on the morning of the murders. Fuller testified that to get to the laundry room she had to go through the Applicant's room at 6:30 and again at 7:00 a.m. on the morning of the murders. When she did the Applicant was asleep on the couch. Fuller never saw the Applicant leave the house that day. Applicant's trial counsel was aware of what Fuller's testimony would have been, and although she was present at the trial, he did not call her as a witness. Appellant's father, Don Johnson testified that between 9:30 and 9:45 that morning he also went through the Applicant's room and that the Applicant was still asleep on the couch. Trial counsel was aware of what Johnson's testimony would be and although Johnson was present at trial he was not called as a witness. Trial counsel had ample discovery showing that the murders occurred at approximately 10:00 a.m. Johnson testified that he was "shocked" when he was not called as a witness. Despite knowing what the testimony of Fuller and Johnson may be, Counsel failed to file or serve notice of alibi.

Applicant's trial counsel testified that he had the cell phone records showing text messages to and from Applicant's phone, including texts at 9:37 and 9:39 and 10:16 on the morning of the murders. Counsel also had the coroner's report and other discovery material that showed the time of deaths to be approximately 10:00 a.m. Records provided to trial counsel through discovery showed the Applicant's phone was not at or near the murder scene when those texts were sent or

received or at any time during the day of the murders. Counsel also had phone records of Nick Granados, who pled guilty for his role as the inside man at the murder scene who let Scott Lowe in the victim's house by leaving a door unlocked. Those records showed a stream of calls and texts by Granados from victim's house up to 9:37 that morning. Granados suddenly stopped sending texts and did not resume making calls or sending texts until 10:17. This left a conspicuous forty minute gap in an otherwise constant stream of texts. Counsel admitted that Granados' phone records tended to establish the time of the murders, especially when combined with records from EMS showing when they received and responded to a fire call at the murder scene.

Applicant's trial counsel testified that he had the Applicant's phone records when preparing for trial. Although he had never tried a case involving cell phone location data, he was aware that the phone records contained location data. Counsel testified that he and his staff looked at the phone records for location data but didn't understand how to interpret the information to use it at trial. Despite knowing that the phone records contained location data, counsel failed to obtain an expert to assist in the interpretation of the phone record data that he had or otherwise to educate himself so that he could make an informed decision as to the value of the location data to the Applicant's case. At the PCR hearing counsel admitted that location data could "possibly" have been significant to the defense of the case. Counsel's failure to obtain an expert and use the cell phone information that had been provided through discovery was compounded by the testimony of the investigating officer who testified that all the cell phone data had been analyzed and that it did not contain anything of value. Although counsel testified that he was trying to minimize or mitigate the cell phone evidence as it might be "hurtful" to the Applicant, he was never able to set a complete understanding of the cell phone location data that he knew was contained in the cell

phone records provided in the discovery material. He was therefore unaware of its exculpatory value, and as a result, could not arguably have made an informed decision as to its potential use. Counsel's failure to conduct an independent investigation of the facts and circumstances of the case constitutes a failure to provide reasonably effective assistance under prevailing professional norms. I find that counsel's failure prejudiced Applicant's defense in the case. Both prongs of Strickland having been met. The Applicant is entitled to relief on this issue.

2. Applicant's counsel was ineffective for failing to present exculpatory evidence proving the identity of perpetrator.

Applicant argues that trial counsel should have objected when the prosecution said the following in its opening statement:

In this case, law enforcement did everything they could. Forensics came out and fingerprinted items that were of interest. They swabbed items for potential DNA and none of that information comes back with anything. Just because someone came in and out of that house, doesn't mean that they left a fingerprint or that they left DNA. And just because someone admits to being in that house over an extended period of time doesn't mean that they leave DNA or a fingerprint.

Applicant takes issue with the prosecutor's eliciting testimony that officers found no evidentiary value in the prints collected from the crime scene and that the prints collected did not produce any leads for the investigating officers. Applicant argues that the prejudice to Applicant was compounded when the prosecutor said in closing argument that the fingerprint had been found on an ashtray at the crime scene, when in fact the print was found on a candle jar.

A forensic investigator lifted two fingerprints from a glass candle jar found sitting on an end table at the crime scene; those prints were identified as those of Ryan Wayne according to Applicant's exhibit eighteen. Other exhibits described that the victims' bodies appeared to have

candle wax on them in certain places. Contrary to Applicant's assertions, this is not proof that Waye was in the home at the time of the murders and used the candle in question to try to set the victims' bodies ablaze. Every sentence of the above-quoted opening argument from the solicitor is wholly defensible as proper for opening argument. Applicant has failed to prove that a fingerprint found at the scene had any relation to the crimes, which is fatal to his claim the prosecution committed misconduct. Trial counsel elicited testimony about the print at trial and highlighted the fact that officers did not find any forensic evidence linking Applicant to the crime scene. Trial counsel testified that he considered arguing at trial that Waye was the real killer instead of Applicant and affirmed that he knew officers had ruled out Waye as a suspect during their investigation because he had an alibi. Trial counsel also thought that the prosecution's reference to the jar as an ashtray could have been an accident and that he did not have any concerns about the characterization at the time of trial. Under the circumstances, it was reasonable for trial counsel not to object to the prosecution's opening statement, to the officer's testimony about the lack of value that the forensic evidence provided to the investigation, and to the prosecution's reference to a candle jar as an ashtray.

Applicant has failed to establish that there is a reasonable likelihood that the outcome of trial would have been different even if trial counsel had objected to the prosecution's opening statement and "ashtray" reference and to the officer's testimony about the lack of forensic evidence of value. Trial counsel elicited evidence that Waye's prints were found at the crime scene and that Applicant's were not. Although Waye had died by the time of Applicant's trial, the prosecution was prepared to provide evidence of Waye's alibi through testimony from Laura Hart, if Applicant's defense was to point the finger at Waye. One of Applicant's co-defendants admitted

to killing the two victims and testified about Applicant's participation in the crimes, and Applicant lied to officers about his communications with that co-defendant and tried to falsify an alibi for the time of the murders. One of Applicant's co-defendants, the one who testified against him at trial, testified that he initially told investigating officers that he heard that Wayne had been involved in the murders because he wanted to redirect the officers' attention from himself and said that he did not get along with Wayne. Trial Tran. 84. Under those circumstances, the objections would almost certainly have had no effect.

3. Applicant's claim that trial counsel was constitutionally ineffective for not objecting to improper comments in the prosecution's opening statement.

Applicant argues that trial counsel should have objected in reliance upon Doyle v. Ohio, 426 U.S. 610 (1976), when the prosecution said in its opening statement that Applicant's two co-defendants had accepted responsibility by pleading guilty while Applicant had not accepted responsibility. Applicant's reliance upon Doyle is misplaced, though, because Applicant did give at least one statement to officers after he was given warnings pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), and because the comment would have been one made upon Applicant's decision to plead not guilty rather than his decision not to testify at trial. Trial counsel was not constitutionally ineffective because Applicant has failed to prove that he suffered any prejudice from the comment. There was ample evidence before the jury about the fact that Applicant's two co-defendants had pleaded guilty; one of those two co-defendants was the prosecution's most important witness. The trial court instructed the jury that it could not hold Applicant's decision to exercise his constitutional rights against him, and it was obvious to the jury that Applicant decided to exercise his right to a trial based simply on the fact that there was a trial at all. Trial counsel

argued that the testifying co-defendant was motivated to testify falsely against Applicant because he wanted the benefit of a plea bargain with the prosecution. The prosecution's single comment did not cause Applicant to suffer prejudice, and this Court finds that trial counsel was not constitutionally ineffective for not objecting to it.

4. Applicant's claim that trial counsel was constitutionally ineffective for not using available evidence to impeach the testifying co-defendant.

Applicant argues that trial counsel did not use all available evidence to impeach the credibility of Scott Lowe, who testified against Applicant at trial and admitted to being the one who killed the victims and placed Applicant at the crime scene. The prosecution elicited testimony from Lowe at the outset of his testimony about his prior conviction for manufacturing methamphetamine. Applicant's Exhibit 15 consists of some court records for that conviction. One page of that exhibit shows that Lowe's sentence for manufacturing methamphetamine, which was a probation term, was ended after he was sentenced to imprisonment for the crimes also at issue in Applicant's trial; the records indicate that the probation was ended because Lowe would not be able to comply with the terms of his probation while serving twenty years in prison, so this was of no impeachment value whatsoever. The prosecution testified that the other exhibits for Lowe that Applicant has identified were criminal charges that were resolved by a different prosecutor before Lowe was charged for the victims' deaths. The prosecution elicited testimony from Lowe that he had engaged in drug sales and purchases, had manufactured drugs, and did drugs himself. The prosecution elicited testimony from Lowe that he killed both victims. During cross-examination, trial counsel elicited an affirmation from Lowe that he had a previous conviction and that he had been "driving around with a mobile meth lab" in his car. Trial counsel

elicited testimony from Lowe that he cares more for animals than people.

Applicant has failed to prove that trial counsel's performance was deficient with respect to his impeachment of Lowe. Of the exhibits that Applicant has put before this Court, only one represents an impeachable offense and trial counsel did impeach Lowe with this conviction at trial. Of the remaining exhibits, they lack impeachment value for various reasons. Additionally, trial counsel could not have impeached Lowe by introducing evidence of previous arrests. Even if those additional things had been introduced at trial, they would not have changed the outcome of trial because they are lesser indictments against Lowe's character than the things put in evidence at trial through his own testimony.

WHEREFORE, BASED ON THE FOREGOING the Court grants the Applicant's request for relief based on Issue 1 above and denies relief on Issues 2 through 4. The Applicant's conviction is hereby reversed, and a new trial granted.

IT IS SO ORDERED.


G. D. Morgan, Jr., Circuit Judge

This 27th day of June, 2023,

Greenville, South Carolina.

Copy mailed to Attorney <u>Brown and Wilke</u> on <u>6/28/2023</u>
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