

STATE OF SOUTH CAROLINA  
COUNTY OF BERKELEY

*FILED*  
2023 JUN 22 } PM 12:03

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT

Fred Freeman #235180,

LEAN GUYER DUPREE  
CLERK OF COURT  
BERKELEY COUNTY, SC

Case No.: 2019-CP-08-2558

Applicant,

v.

State of South Carolina,

Respondent.

**ORDER OF DISMISSAL**

**RECEIVED**

**Jul 28 2023**

**SC Court of Appeals**

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by Fred Freeman (Applicant) on October 15, 2019. On April 16, 2021, an evidentiary hearing convened before the Honorable Diane S. Goodstein. Applicant was present and represented by Christopher L. Murphy, Esquire. Assistant Attorney Generals Benjamin H. Limbaugh and Samantha Weidauer represented Respondent. ~~At the trial transcript~~ *based upon the transcript reviewed and presented* and the testimony and evidence ~~presented~~ at the 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 confined in the Department of Corrections serving a forty-five-year sentence. In December 2015, the Berkeley County Grand Jury indicted Applicant for first-degree burglary (2015-GS-08-02183) and possession of a weapon during the commission of a violent crime (2015-GS-08-02184). On August 28-29, 2017, Applicant proceeded to a jury trial before the Honorable Maite Murphy. John Church, Esquire and Keisha White, Esquire, represented Applicant, and Assistant Solicitors Bryan Alfaro and Benjamin Dennis represented the State. The jury convicted Applicant as indicted, and Judge Murphy sentenced him to concurrent terms of forty-five years burglary and five years for the weapon charge.

*C.C. MURPHY; D. DIXON 6/28/2023/10*

Applicant filed a timely notice of appeal, and Appellate Defender Robert Pachak filed a brief pursuant to Anders v. California. The South Carolina Court of Appeals dismissed Applicant's appeal pursuant to Anders, and the remittitur was sent June 21, 2019.

#### SUMMARY OF EVIDENCE PRESENTED AT TRIAL

At trial, Jeremiah Kulas testified he was returning home one evening with his wife and their four-year-old daughter; when he opened the door to the house, "there was a large black man, roughly 12 to 15 feet in front of [him], galloping sideways, barking like a dog, saying I got a gun, and barking like a dog, and heading out of the house." (Tr. 55-57). Kulas pursued the man outside and struck him with a lawn chair. (Tr. 57-59). He stated the man attempted to climb over a fence; Kulas caught him and they "both went over simultaneously." (Tr. 59-60). Kulas stated the man attempted to get up but Kulas grabbed him. He testified his neighbor Jeff approached and took the gun from the man. (Tr. 60-62). Kulas held the man until police arrived. (Tr. 63).

Ashley Kulas recalled returning home that evening and seeing a man in her living room; she ran outside with her daughter and called 911. (Tr. 182-83). During her testimony, the State played her 911 call for the jury. (Tr. 184-85).

Jeffrey Porter, Kulas's neighbor, testified he heard yelling outside his home; he looked outside and saw Kulas fighting another man. (Tr. 103-06). Porter went outside and heard Kulas say the man had a gun; Porter took the gun from the man. (Tr. 106). Porter called 911, and police arrived shortly thereafter. (Tr. 107-09).

Officer Ted Davis testified he was dispatched to the home around 8:30 p.m.; when he arrived, Kulas was restraining Applicant and Porter was standing to the side. (Tr. 117-21). During Officer Davis's testimony, the State played videos from Officer Davis's police car; according to Officer Davis, the video depicted Kulas detaining Applicant. (Tr. 119-21).

Investigator Lindsay Wright testified she was also dispatched to the home; when she arrived, Kulas “was holding down” Applicant and Porter was holding a firearm. (Tr. 132-34). Investigator Wright stated Applicant was arrested and searched; police recovered Kulas’s wallet, a jewelry box, and some jewelry from his pockets. (Tr. 135). Investigator Guy Riccio testified police recovered two guns: the gun that Porter took from Applicant and a second gun in a cloth bag in the area where Applicant had been detained. Both guns belonged to Kulas. (Tr. 151-52).

Donald Snedeker, an employee with Berkeley County EMS, testified he responded to the home. (Tr. 142-43). He stated he transported Applicant to the emergency room because Applicant was complaining of hip pain. (Tr. 144-45).

Following the State’s witnesses, the parties stipulated that Applicant had two prior convictions for burglary. (Tr. 194). Thereafter, the State rested. (Tr. 194). Applicant did not testify or present a defense.

#### CURRENT APPLICATION

Applicant timely filed this PCR application on October 15, 2019, alleging he is being held in custody unlawfully for the following reasons:

1. “Ineffective assistance of counsel”
2. “Conflict of interest”
3. “Obstruction of against administration on justice”
4. “Criminal contempt-conspiracy”
5. “No probable cause”
6. “Brady violation”
7. “Prior convictions”
8. “Mr. Church represented Mr. Kulas and State”

Prior to the PCR hearing, Applicant amended his application. At the hearing, Applicant proceeded on the following allegations:

1. Counsel was ineffective for not objecting to a burden-shifting language in the reasonable doubt charge;

2. Counsel was ineffective for not calling Applicant as a witness or presenting a defense;
3. Counsel was ineffective for not objecting to the stipulation of Applicant's prior convictions.
4. There was not sufficient probable cause for his arrest.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before this Court are Berkeley County Clerk of Court records regarding the subject convictions, the trial transcript, and the records from this PCR action. This Court has had the opportunity to review these records. This Court has further had the opportunity to observe the witnesses presented at the evidentiary hearing, closely pass upon their credibility, and weigh their testimony accordingly.<sup>1</sup> 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), SCRPC; 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 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

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<sup>1</sup> This Court will reference the PCR testimony where relevant below.

at 813. An applicant must overcome this presumption to receive 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 (deficiency) and (2) the applicant was prejudiced by counsel's deficient performance. Strickland, 466 U.S. at 687–88; Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625. Under the deficiency prong, an attorney's performance is measured by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler, 286 S.C. at 442, 334 S.E.2d at 814. The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

In addition to deficiency, a PCR applicant must prove that counsel's deficient performance 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.

*Failed to object to burden-shifting language in reasonable doubt charge*

Applicant asserts counsel was ineffective for not objecting to burden-shifting language during the jury charge. This Court finds Applicant has not met his burden of proof for this ground.

During the jury charge, the trial judge instructed the jury:

If based upon the consideration of the evidence you are firmly convinced the defendant is guilty of the crime as charged, you must find the Defendant guilty. If, on the other hand, there is a real possibility that the defendant is not guilty, you must give the Defendant the benefit of the doubt and find him not guilty.

(Tr. 230). Counsel did not object.

At the PCR hearing, PCR counsel asserted the use of the word “real” shifted the burden of proof and placed a heavier burden on the defendant to prove his innocence. PCR counsel averred the court should have used the word “any” rather than “real.” However, he acknowledged this was “a very common charge” and he did not have any case law to support that it was improper. Trial counsel testified this was a standard jury charge, and he did not object because he had never heard anything to suggest it was improper.

This Court finds counsel articulated a valid reason for not objecting in that he did not find the language objectionable. This Court further finds Applicant has not submitted anything to show this language was objectionable and thus has not met his burden of proving deficiency. Likewise, Applicant has not shown a reasonable probability the outcome would be different had counsel objected to this language. Notably, our appellate courts have examined identical language and determined it does not shift the burden of proof. See, e.g., State v. Darby, 324 S.C. 114, 116, 477 S.E.2d 710, 711 (1996) (“Courts specifically addressing whether the “real possibility” language lessens the government's burden of proof have held it does not in the context of the preceding language requiring that the juror be “firmly convinced” of the defendant's guilt.”); State v. Simmons, 384 S.C. 145, 682 S.E.2d 19 (Ct. App. 2009) (finding trial court’s instruction that jury must find defendant not guilty if it thought there was “a real possibility that he is not guilty” did not shift the burden of proof). Because this language is not objectionable, Applicant has not met his burden of proof, and this claim is denied.

*Failed to call Applicant as a witness or present a defense*

Applicant contends trial counsel was ineffective for not calling him as a witness or presenting a defense. Applicant has not met his burden of proof in this regard.

At the PCR hearing, Applicant maintained he was innocent. He recalled meeting with trial counsel "more than three times" before trial. Although Applicant testified counsel never discussed the State's witnesses or evidence, he acknowledged reviewing affidavits and police reports about his case. Applicant stated he did not have any witnesses he could call to support his innocence other than himself. However, he stated he did not want to testify because he did not want to be impeached. Applicant recalled the judge asking if counsel had sufficient time to discuss whether Applicant should testify. Applicant reiterated he did not testify because he was afraid of being impeached. He stated he told trial counsel "repeatedly" he was not going to take the witness stand. Applicant agreed it was ultimately his decision not to testify. He also agreed he had an opportunity to testify or present evidence, but he wanted to maintain his right to remain silent because he knew he could be impeached. Applicant testified he was innocent and he told trial counsel he did not commit the crime. Applicant claimed he did not commit the crime because he was not wearing a white shirt; he had on a dark shirt. He stated his family lived on the street where the victim lived, and he was walking down the street when somebody came running by and hit him pretty hard. He stated one of the guys was the victim. Applicant also claimed he smelled drugs, looked over, saw barrels of drugs coming out of a boat, and saw the victim. When asked whether he gave trial counsel any evidence that he could present to prove his innocence, Applicant replied, "Just that I did not commit no crime." He agreed it was fully his decision not to testify, and he was not pressured to not testify.

Trial counsel testified Applicant maintained his innocence and claimed he was walking down the street when some guy attacked him and held him until police arrived. When asked if there was anything to corroborate Applicant's story, counsel stated the video from the police car showed the victim laying on top of Applicant in the street as police arrived. Counsel did not recall

Applicant providing any evidence or witnesses to present in his defense. Trial counsel stated his investigator spoke with Applicant to “work up whatever she could work up” but did not recover anything significant. Trial counsel stated he believed Applicant would likely be convicted, especially because police recovered the victim’s items from Applicant’s pockets. He stated Applicant averred those items had been planted there, but counsel had concerns about how to get around that. Trial counsel stated he discussed with Applicant his right to take the stand; however, on at least two occasions—March 22, 2017, and July 19—counsel notated that Applicant said he did not want to testify. Counsel stated Applicant was adamant that he did not want to testify.

This Court finds Applicant has not met his burden of proof. This Court finds credible Applicant’s testimony that he did not want to testify. Likewise, this Court finds credible trial counsel’s testimony that he discussed with Applicant his right to testify, and Applicant did not want to testify. This Court further finds credible counsel’s testimony that Applicant did not present him with any witnesses or evidence to investigate or present at trial. In fact, counsel’s testimony

here was consistent with Applicant’s PCR testimony that he did not have anyone to present to ~~prove his innocence~~ <sup>in</sup> <sup>9</sup> ~~Applicant’s defense~~. Ultimately, trial counsel did not have any witnesses to present to support a defense and thus was not deficient. Likewise, as Applicant admitted, it was Applicant’s decision not to testify. Applicant was advised of this right by the trial court and told the trial court he did not wish to testify. (Tr. 199-201). Because it was Applicant’s decision to not testify, trial counsel was not deficient in this regard. Finally, this Court finds Applicant’s testimony that (1) he was merely walking down the street when he was attacked and (2) he saw the victim unloading drugs from a boat was not credible. Applicant did not present any testimony—through himself or another witness—at the PCR hearing that would have been reasonably likely to change the outcome of trial. Thus, Applicant did not prove prejudice, and this claim is denied.

*Stipulated to prior convictions*

Applicant asserts counsel was ineffective for not objecting to a stipulation that he had two prior burglary convictions. Applicant has not met his burden of proof in this regard.

At trial, the solicitor relayed he had presented to trial counsel a stipulation concerning Applicant's prior convictions. (Tr. 189). He stated, "In lieu of having someone from the clerk's office testify to the conviction, we have agreed just to have that stipulation used. If Your Honor can read it to the jury, we're fine with that if the defense has no objection." (Tr. 190). Trial counsel did not object. (Tr. 190). Thereafter, the trial court read the following stipulation to the jury:

The defendant is on trial for burglary in the first degree. One of the statutory elements that the State may elect to prove beyond a reasonable doubt to convict the Defendant of burglary in the first degree, is that the Defendant has two or more convictions for burglary on his record.

In this case, rather than seeking to have each of the Defendant's prior convictions admitted into evidence, the State and the defense have agreed to stipulate that this Defendant's prior record does, in fact, contain two prior convictions for burglary; therefore, you, the jury, may find that this specific element has been proven beyond a reasonable doubt.

(Tr. 193-94).

At the PCR hearing, trial counsel testified he agreed to the stipulation as part of his trial strategy. He stated he would rather have the prior convictions read off a piece of paper than have the State bring in witnesses to testify about them. Trial counsel explained he hoped "it might just get lost in the shuffle and maybe the jury wouldn't pay that much attention to it versus if they brought witnesses in from the Clerk's office with certified prior convictions and all of that." Trial counsel stated he believed it would be worse for the defense if the State brought in witnesses as opposed to reading a stipulation, and his strategy was to draw less attention to the prior convictions.

This Court finds counsel articulated a valid strategy in stipulating to the prior convictions in lieu of having someone from the clerk's office testify to the prior convictions in that he believed it would draw less attention to the prior convictions for the jury. This Court further notes that at trial, the State indicated it wanted to do the stipulation in lieu of calling witnesses, indicating the State would have called witnesses to establish this element if necessary. Ultimately counsel articulated a valid strategy for stipulating to this information, and Applicant has failed to show counsel was deficient. Likewise, it is not reasonably likely the outcome would have been different if counsel had objected to this stipulation because the State would have been able to call a witness from the clerk's office to testify to these prior convictions. Thus, Applicant has not shown prejudice, and this claim is denied.

*Arrest warrant lacked probable cause*

Applicant claims there was not probable cause for his arrest warrant. Applicant has not shown he is entitled to relief based on this allegation.

At the PCR hearing, PCR counsel explained that Applicant did not believe probable cause existed for the arrest warrant. He explained the initial arrest warrant was dismissed at the preliminary hearing because the supporting affidavit had the wrong name; thereafter, it was amended and presented to the grand jury. PCR counsel further explained that Applicant believed the testimony supporting the warrant was untrue. Applicant, however, offered no testimony at the PCR hearing on this issue. Trial counsel recalled making a pretrial motion to challenge the arrest warrant, although he explained he did not have any hope that it would be successful.

This Court finds Applicant has not shown he is entitled to relief on this claim. As a threshold matter, Applicant did not frame this as a claim of ineffective assistance of counsel. Nevertheless, this Court notes counsel *did* raise this issue pretrial and renewed his motion to

dismiss the charges based on a faulty warrant at the close of the State's case. (Tr. 197). Thus, counsel challenged this issue and preserved it for appeal, and Applicant has not shown he was ineffective in this regard. Cf. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) (“[T]he post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal.”).

Further, this Court has <sup>had for its review</sup> ~~reviewed~~ the arrest warrant and supporting affidavit—which was submitted to this Court by Respondent as part of the Clerk of Court records—and finds <sup>there</sup> ~~the affidavit~~ <sup>was</sup> ~~contained~~ sufficient probable cause to support the arrest warrant. Ultimately, this Court finds no basis to grant relief based on Applicant's claim that the arrest warrant lacked probable cause. Thus, this claim is denied and dismissed with prejudice.

[Conclusion and signature page follows]

CONCLUSION

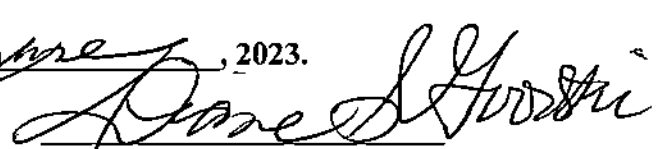
Based on the foregoing, this Court concludes Applicant has not established any constitutional violations that would require this Court to grant relief. Thus, this application is denied and dismissed with prejudice.

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, 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. If an applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on applicant's behalf. Rule 71.7(g), SCRPC. 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 5 day of June, 2023.



DIANE S. GOODSTEIN  
Presiding Judge  
Ninth Judicial Circuit

at Charleston, South Carolina



State of South Carolina  
The Circuit Court of the First Judicial Circuit

DIANE SCHAFFER GOODSTEIN  
JUDGE

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June 19, 2023

Berkeley County Clerk of Court  
PCR Department  
Post Office 219  
Moncks Corner, SC 29461

Re: Fred Freeman #235180 v. State of SC  
Case No.: 2019CP0802558

FILED  
2023 JUN 22 PM 12:03  
LEA...  
CLERK OF COURT  
BERKELEY COUNTY, SC

Dear Sir or Madam:

I have enclosed the original Order of Dismissal in regards to the above referenced PCR matter. Her Honor has requested that you serve all parties a stamped copy for their notice.

Thank you for your assistance in this matter. Please do not hesitate to give me a call should you have any questions.

Sincerely,

Karen "Kaye" M. Parker  
Administrative Assistant to  
Judge Diane S. Goodstein

Enclosure