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RECEIVED
AUG 08 2013
S.C. SUPREME COURT

July 25, 2013

The Hon. Daniel E. Shearouse
Clerk
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Re: Christopher C. Woody, 309141 v. State
10-CP-46-1279

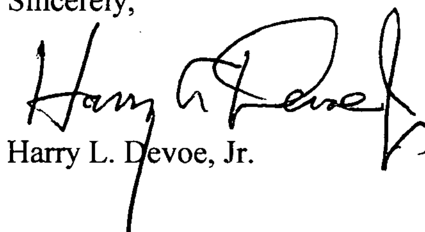
Dear Mr. Shearouse:

Enclosed for filing is a Notice of Appeal in the above referenced case. Also enclosed are the following:

1. Proof of Service of the Notice of Appeal on the respondent.
2. A copy of the Order of Dismissal which is to be challenged on appeal.

Thanking you for your attention to this matter, I remain

Sincerely,



Harry L. Devoe, Jr.

cc: James Rutledge Johnson, Assistant Attorney General
The Honorable David Hamilton, Clerk of Court for York County

Enclosures

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2010-CP-46-1279

RECEIVED
AUG 08 2013
S.C. SUPREME COURT

Christopher C. Woody, 309141..Appellant,

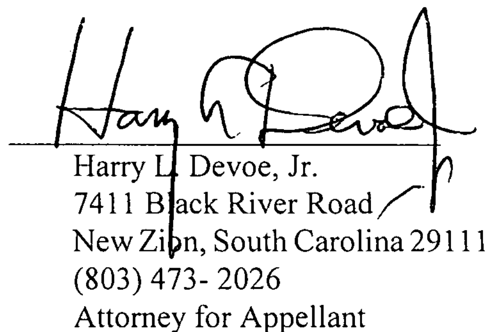
v.

The State,..Respondent.

NOTICE OF APPEAL

Christopher C. Woody appeals the Order of the Honorable John C. Hayes, III dated July 15, 2013 Appellant received written notice of entry of this Order on July 18 2013.

August 6, 2013



Harry L. Devoe, Jr.
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Other Counsel of Record:

James Rutledge Johnson, Assistant Attorney General
Post Office Box 11549
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Attorney for Respondent
(803) 734-3970

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2010-CP-46-1279

Christopher C. Woody, 309141,..Appellant,

v.

The State,..Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal by depositing same in the United States mail, postage prepaid, on July 25, 2013 addressed to the State's attorney of record, James Rutledge Johnson, Assistant Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549.

July 25, 2013

Harry L. Devoe, Jr.
7422 Black River Road
New Zion, South Carolina 29111
(803) 473- 2026
Attorney for Appellant

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2010CP4603279

Christopher A Woody	South Carolina State Of
PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: ____________

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: ____________

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case. ORDER

Additional Information for the Clerk: ____________

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	N/A

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

s/ John C. Hayes III — **Circuit Court Judge**

2049 — **Judge Code**

7/16/2013 — **Date**

For Clerk of Court Office Use Only

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

This judgment was entered on **July 16, 2013**, and a copy mailed first class or placed in the appropriate attorney's box on **July 16, 2013**, to attorneys of record or to parties (when appearing pro se) as follows:

Harry Leslie Devoe Jr.
7411 Black River Rd.
New Zion, SC 29111

ATTORNEY(S) FOR THE PLAINTIFF(S)

James Rutledge Johnson
PO Box 11549
Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

David Hamilton

David Hamilton - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Christoper A. Woody, 309141,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
Case No.: 2010-CP-46-3279

ORDER

FILED-RECEIVED
2013 JUL 16 PM 3: 32
DAVID HAMILTON
C.C.C.P. & G.S.
YORK COUNTY, SC

By Order dated May 23, 2013, this Court denied and dismissed Applicant's application for Post-Conviction Relief. Applicant has timely filed a Rule 59(e) Motion asking the Court to alter or amend said Order.

Applicant alleges the State was guilty of prosecutorial misconduct in the prosecution of Applicant on three grounds. The Court addresses the grounds for the motion in reverse order.

The first ground is related to the State not presenting, at trial, a "Defense of Indigent Act Form Subtitle of Indigence and Application for Counsel." Applicant argues this form was "suppressed" by the State. This assertion is without evidentiary support.

First, this claim was never raised or presented at the PCR hearing and therefore, is not proper for review. Second, prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issues that is procedurally barred by S.C. Code Ann. § 17-27-20(B) (2003) and could have been raised on appeal. Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215, S.E.2d 883, 885 (1974). In his testimony at the hearing, Applicant stated he asked for an attorney at his bond hearing. The failure to appeal has waived this allegation as grounds for relief. Thus, this allegation must be dismissed.

Additionally, a review of the Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 (1964), hearing reflects that the Applicant, after being mirandized, did freely, voluntarily, knowingly, and intelligently give a statement affirmatively waiving his right to remain silent and his right to counsel. There is no testimony to support an argument that Applicant was unaware of his right to counsel, regardless of whether or not Applicant signed a form requesting counsel. The Trial Transcript reflects Applicant appeared to understand what the interviewer was saying, was read his rights, and was neither threatened nor promised anything. Applicant had fifteen years of "schooling," did not appear to be under the influence at the time of the giving of the statement, and was free to, "at any time," stop answering questions. Applicant reviewed the written statement before he signed and was given the opportunity to make changes to the statement. (See Trial Transcript p. 99, L 9 through p. 124, L 14).

In regard to the issue, further observations are warranted, the trial judge asked questions of the interviewer as to Applicant's request for an attorney and any request to stop the interview by Applicant. (TR 112, LL 8-14). These questions were both answered in the negative. Also, the record reflects that Applicant's request for an attorney was presented to the trial judge at the Jackson vs. Denno, supra, hearing. While the actual form was not produced, Applicant testified he asked for an attorney on the night of his arrest and that he had asked for an attorney appointment from the bond judge. (TR p. 114, L 13 through p. 115, L 16). Applicant also testified he asked for an attorney at the time of his interrogation, but that he understood his rights as read to him from a "statement form."[1] (TR p. 99, LL 18-25). Applicant, during the Jackson v. Denno, supra, hearing, repeatedly asserted he wanted to talk to an attorney, but acknowledged that he signed the "statement of rights" form, that he understood the form, that he gave his

[1] His statement form was State's Exhibit 5 and placed in the record. (TR p. 94, LL 18-25)

statement "voluntarily," and that he was in a hurry to "tell them what happened" in hopes he would get to go home. (TR p. 113, L 10 through p. 121, L 7).

Applicant's position that the State suppressed his form from the bond hearing is without merit and if it did have merit would not have been prejudicial to Applicant based on his testimony at the Jackson v. Denno hearing. Prosecutorial misconduct is not a reviewable issue in a post-conviction relief proceeding.

Applicant's second ground for his motion is simply a rehashing of his argument regarding trial counsel's failure to investigate and employ a gunshot residue expert. The May 23, 2013 Order fully addresses and disposes of this ground.

Applicant's remaining ground for his motion is that trial counsel was ineffective for not requesting the Court submit to the jury the lesser included offense to murder of voluntary manslaughter. As discussed hereafter, this issue was not presented to the Court.

Applicant states in the instant motion that this issue was presented by his Amended Application filed April 29, 2013, fourteen days before the Court heard this case. This Amended Application was not in the package of file material presented to the Court at the hearing and the Court was unaware of its existence until the instant motion referenced it. If it was called to the Court's attention at the PCR hearing, the Court does not recall.

Applicant's motion states the issue was raised at the PCR hearing. The Court has not reviewed the Transcript of the hearing, but the Court's notes on the response of counsel as to the issues the Court was being asked to address reflect this:

1. Jackson v. Denno – Discovery
2. Gunshot residue – mishandled – no expert to counter State.
3. Pathology

Applicant's Amended Application, filed April 29, 2013, does state that trial counsel should have requested an instruction on voluntary manslaughter.[2]

As to the issue of ineffective assistance regarding the failure to request a charge or voluntary manslaughter, Applicant cites two cases, Battle v. State, 305 S.C. 460, 409 S.E.2d 400 (S.Ct. 1991) and State v. Stone, 294 S.C. 286, 363 S.E.2d 903 (S.Ct. 1988).

Battle, supra, addresses trial counsel's ineffectiveness, where self-defense was charged, for not requesting a more detailed self-defense charge based on the facts of the case. Based on the facts in Battle, trial counsel was found ineffective for not requesting a charge that Battle could have acted on appearances and a charge on retreat.

Frazier, supra, does not address counsel's effectiveness regarding a charge; rather, it addresses trial counsel's effectiveness regarding failing to file a timely appeal. The issue regarding the trial judge's charge was addressed as a direct appeal issue.

In Stone, supra, trial counsel was found ineffective for failing to request a charge on self-defense. Trial counsel testified, in Stone, that he did not request a self-defense charge as it did not cross his mind. In Stone, the Court found that Stone was entitled to a charge of self-defense on the facts and that trial counsel was ineffective for failing to request such a charge.

Looking, first, at the record before the Court, including the post-conviction relief hearing, there is no evidence addressing a charge on voluntary manslaughter. The trial record reflects that trial counsel did offer to the Court some requests to charge (TR p. 826, L 7 through p. 827, L 16) and that an in chambers charge conference took place. (TR p. 727, L 24 through p. 723, L 2). However, nothing regarding the charge was reflected on the record.

[2] The paragraph Applicant references also mentions self-defense. The trial judge charged the jury on self-defense. (TR p. 805, L 23 through p. 813, L 8)

The Court's post-conviction relief hearing notes do not reflect trial counsel being asked any questions by Applicant's counsel regarding the charge of voluntary manslaughter. Therefore, the Court is unable to assess trial counsel's effectiveness regarding whether or not he was ineffective for failing to request such a charge. However, trial counsel did testify that the self-defense defense was "an imperfect self-defense." Trial counsel testified that Applicant was not without fault in bringing on the difficulty that resulted in the victim's death. Trial counsel testified that Applicant went to the scene with a loaded pistol, had been drinking, knew that a drug deal was to take place, knew of bad blood between his co-defendant and the deceased, knew his co-defendant was armed, and exited a car to place himself on the scene of the murder. Trial counsel also testified that Applicant told him the victim reached for a gun which precipitated Applicant's shooting the victim, who was facing away from Applicant at the time. Applicant testified that his co-defendant shot first and that the victim had gone for his gun first but never got his gun. Applicant testified he actually never saw victim with a gun. There is no testimony establishing that the victim reached for a gun, and no gun was found at the scene of the shooting.

As to voluntary manslaughter, our Supreme Court has held that a defendant is entitled to a charge on voluntary manslaughter where the facts warrant. State v. Starnes, 388 S.C. 590, 698 S.C.2d 604 (S.Ct. 2010).

Starnes set forth that at the time of the killing there must be both heat of passion and sufficient legal provocation. In his statement Applicant described the incident thusly:

> "I drunk to where I was overly intoxicated. I felt like I was ready to hurl and I was like, let's ride out so we can get some air. So the three of us left and I was driving at first, but then I was too drunk to drive and I pulled over and either Desmond or Debrezio drove. I don't know which one. I think I got in the back seat. I don't remember getting in or out of the car. 'Brezio stated, there goes the nigger that snucked me. I had my gun in my pants pocket. It was a .45 Auto. Whoever was driving did a U-turn and then we

> got out of the car and all I saw was the nigger reaching and pulling out. He was like reaching in his back and was like, no, and he was backing up and then my gun came out and I fired three shots. We jumped back in the car and I started drinking more liquor that I had in my car, because I thought that I had killed somebody. We went back to the crib and I went to sleep. When I woke up, the police was there. "Brezio called me like a couple of days before and told me about this nigger snucking him and I was like, do I know the nigger? And he told me that I had seen him one time in Stone Haven. I thought that this was, like, going to be a fight, but they told me that the dude was a drug dealer and he had bad boys." (TR p. 364, L 17 through p. 370, L 14).

The trial transcript reflects that the individuals involved in the shooting saw the victim reach toward his back before shots were fired. (See testimony of Desmond Campbell regarding what he was told by co-defendant Debrezio Campbell).

Based on the above, at the time of the charge, if requested, the trial judge may have charged voluntary manslaughter, but it is hard to conceive of any action by the victim rising to the level of legal provocation since Applicant was expecting a "fight." Starnes, supra, however, postdates Applicant's trial and so its analysis would not have been available to the trial judge. A review of the pre-Starnes cases exhibit a very fact specific analysis regarding whether or not a defendant is entitled to a charge of the lesser included offense of voluntary manslaughter in a murder trial.

The undersigned's analysis is of little, if any, value in judging what Applicant's trial judge would have done if requested to charge voluntary manslaughter. The most the Court, at this time, can say is that the trial judge very well may have afforded Applicant a charge on voluntary manslaughter, as the evidence supports a jury finding that the victim reached behind his back, as if for a weapon, prior to Applicant's co-defendant firing the first shot. On the other hand, where two armed men confront a third, expecting a fight and knowing the victim was a drug dealer with "bad boys," the trial judge may have refused the charge.

Because this issue was not presented to the Court at the post-conviction relief hearing, the allegation as it reflects on trial counsel was not addressed. As indicated above, references solely to the record do not allow the Court the opportunity to analyze whether or not, as to this issue, Trial Counsel performed effectively or not. This being the case, the Court must find, as to the lesser included charge issue, that Applicant has failed to establish by a preponderance of the evidence that Trial Counsel was ineffective in his representation of Applicant.

Trial counsel was not given an opportunity to address the charge issue as he was asked no questions about it at the post-conviction relief hearing. Therefore, it would be difficult for the Court to find trial counsel's failure to request a voluntary manslaughter charge to constitute ineffective assistance of counsel. The burden is on Applicant to prove his allegations, and neither Applicant nor the Court may rely on an absence of evidence on an issue to support a ground for ineffective assistance of counsel.

Assuming trial counsel was ineffective for failing to request a charge on voluntary manslaughter, Applicant has failed to show he was prejudiced thereby. In addition to being charged and tried for murder, Applicant was charged and tried for criminal conspiracy. The criminal conspiracy indictment reads:

> Christopher Woody did in York County, South Carolina on or about June 26, 2004, willfully and unlawfully unite, combine, conspire, confederate, agree and/or have tacit understanding with Debrezio Campbell and/or others for the purpose of committing the crime of Murder against Arvell Bagley, in violation of Section 16-17-410, Code of Laws of South Carolina, (1976, as amended).

The jury found Applicant guilty of conspiring to commit Murder. Therefore, a finding that Applicant was guilty of voluntary manslaughter would have been inconsistent with the conspiracy verdict.

JC#7

The trial judge charged the jury that they could convict Applicant on a charge only if the State has established guilt beyond a reasonable doubt. (TR p. 792, LL 24-25). Further, as to conspiracy, the trial judge charged:

> To establish conspiracy it is necessary first that an agreement to commit the offense alleged in the Indictment be established. (TR p. 814, LL 14-16) (Emphasis added).
>
> XXX
>
> The State must prove further that one or more of the parties engaged in the agreement committed some act to effect the object of the conspiracy as alleged in the Indictment. (TR p. 814, LL 22-25).
>
> XXX
>
> . . . before any person can be found guilty of the charge of conspiracy, it must appear beyond a reasonable doubt that the conspiracy was found, in this instance, to commit murder and that the particular person was an active party to it. (TR p. 815, LL 19-23) (Emphasis added).

From the trial judge's charge to the jury on the law regarding what findings of fact are required to find a person guilty of criminal conspiracy, and based on the jury's return of a guilty verdict on that charge of conspiring to commit murder, it appears to the Court that a finding of guilt of voluntary manslaughter would have been inconsistent with the guilty conspiracy verdict.

Based on the above discussion and analysis, the Court finds that Applicant has not presented any issues to the Court in his Motion to Reconsider that would necessitate the Court's reversal of its previous order and granting of Applicant's petition for post-conviction relief. Therefore, Applicant's Motion to Reconsider is denied.

IT IS SO ORDERED.

John C. Hayes, III #9
Presiding Judge

July 15th, 2013
York, South Carolina

Harry L. Devoe, Jr., Esq.
Attorney at Law
7411 Black River Road
New Zion, SC 29111

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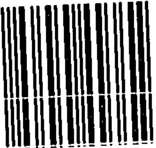

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