STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT
Terrell McCoy, #256070, Applicant, v. State of South Carolina, Respondent.	)	2013-CP-10-1994 **ORDER OF DISMISSAL**

Presiding Judge:	Hon. Deadra L. Jefferson
Applicant's Attorney:	Rodney D. Davis, Esquire
Respondent's Attorney:	J. Rutledge Johnson, Esquire
Trial Counsel:	Lorelle Proctor, Esquire (standby counsel)
Appellate Counsel:	Robert M. Dudek, Esquire
Date of Hearing:	December 14, 2015
Court Reporter:	Denise Lauder

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed April 4, 2013. The Respondent made its Return on May 15, 2014 and filed on May 19, 2014. An evidentiary hearing into the matter was convened on December 14, 2015, at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Rodney D. Davis, Esquire. J Rutledge Johnson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

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At the hearing, Applicant testified on his behalf. Bob Dudek, Esquire, also testified.[1] This Court had before it a copy of the records of the Charleston County Clerk of Court, records from the South Carolina Department of Corrections, the Applicant's PCR application, the State's Return, the trial transcript and the appellate records.

PROCEDURAL HISTORY

The Applicant is presently confined to the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the July 2006 term of the Charleston County Grand Jury for murder[2] (2006-GS-10-4987).

The Applicant proceeded to trial for the first time on July 15, 2008 with Lorelle D. Proctor, Esquire as counsel. The jury was unable to reach a verdict and the Court declared a mistrial. On January 27, 2009, the Honorable R. Markley Dennis heard the Applicant's motion to relieve Ms. Proctor as counsel and to proceed *pro se*. Judge Dennis granted the motion and requested Ms. Proctor be available as standby counsel. A second jury trial was held on February 2-6, 2009, before the Honorable Roger M. Young. The Applicant represented himself with Ms. Proctor as standby counsel. The jury convicted the Applicant of murder. The Applicant was sentenced by Judge Young to fifty (50) years imprisonment. On March 5, 2009, Ms. Proctor filed a Motion to Reconsider the Applicant's sentence. Judge Young reduced the Applicant's sentence to forty (40) years imprisonment.

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[1] Robert M. Dudek, Esquire of the Office of Appellate Defense testified by telephone without objection.
[2] Murder is a violent, most serious felony punishable by death, imprisonment for life, or by a mandatory minimum term of imprisonment for thirty (30) years. See S.C. CODE ANN. §§ 16-3-10, -20 (2003), 16-1-60 (2003), 17-25-45 (2003).

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The Applicant filed a timely Notice of Appeal. His appeal was perfected by Robert M. Dudek, Esquire, of the South Carolina Office of Appellate Defense. The Applicant's conviction and sentence were affirmed by the S.C. Court of Appeals. State v. McCoy, No. 2011-UP-471 (S.C. Ct. App. filed October 26, 2011). The Applicant filed a Petition for Rehearing which was denied on December 19, 2011. The Applicant then filed a Petition for Writ of Certiorari in the S.C. Supreme Court which was denied on March 6, 2013. The Remittitur was issued on March 8, 2013.

ALLEGATIONS

In his applications, the Applicant alleges that he is being held in custody unlawfully for the following reasons:[3]

1. Conviction is in violation of U.S. Constitution
   a. Due Process Violation- Malice instruction given by the trial judge was similar to malice charge given in Yates v. Evatt.
2. Ineffective Assistance of Counsel
   a. Trial counsel gave Applicant erroneous legal advice leading to Applicant's self-representation.
   b. Trial counsel failed to object to Judge Jefferson declaring a hung jury during the Applicant's first trial when the jury did not decide whether the Applicant was innocent or guilty.
   c. Trial counsel failed to send the Applicant to have a mental health evaluation after suggested by Judge Jefferson that the Applicant may suffer from bi-polar disorder.
3. Ineffective Assistance of Appellate Counsel

Life imprisonment means until death of the offender without the possibility of parole. See S.C. CODE ANN. §§ 16-3-20 (2003).

[3] The Applicant has filed several amended applications since the filing of his original application for post-conviction relief. Since counsel has been appointed to represent the Applicant and our State does not recognize hybrid representation, the Respondent will not consider or respond to the *pro se* filings of the Applicant. See State v. Stuckey, 333 S.C. 56, 57, 508 S.E.2d 564 (1998). However, the Applicant was allowed and did proceed on all claims he deemed viable supporting his application for relief.

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a. Failure to raise issue that trial judge erred by not instructing the jury with voluntary manslaughter when there was evidence supporting the requested charge.

b. Failure to raise whether trial judge erred by not finding a Batson violation during jury selection.

c. Failure to raise whether trial judge erred by denying the Applicant's motion to dismiss the indictment for the State's violation of his speedy trial right when the issue was raised and ruled on.

d. Failure to raise the issue of whether the trial judge erred in ruling the State's witness identification of Applicant was not unduly suggestive.

e. Failure to raise the issue of whether the trial judge erred by allowing Brandon Cuttino's statement into evidence.

f. Failure to raise the trial court erred by denying the Applicant's motion to dismiss indictment on grounds that exculpatory evidence was withheld before trial and that evidence was tampered with.

g. Failure to raise the trial court erred by denying Applicant's motion to allow unavailable witness, Cierra Witness, statement into evidence.

h. Failure to raise the trial court erred by ruling Applicant was not allowed to comment on the destruction of evidence during his opening statement.

i. Failure to raise the issue whether Judge Young abused his discretion by not warning Detective Angela Bunker about committing perjury at trial when the Applicant raised the issue outside the presence of the jury.

4. Subject Matter Jurisdiction

a. Fraudulent indictment because grand jury never empaneled and court reporter not present.

5. Prosecutorial Misconduct

a. Prosecutor failed to correct false testimony given by Detective Angela Bunker concerning the collection of DNA evidence for testing.

b. Prosecutor presented inconsistent theories which were withheld from Applicant during the second trial.

c. Prosecutor vouched for witness Carinda Williams, expressing and implying her personal opinion during closing argument.

d. Police failure to preserve potentially useful evidence was in bad faith in violation of the fundamental fairness of the due process clause of the U.S. Constitution.

6. Double Jeopardy

a. The first trial jury was impaneled, heard prosecutor's case, and prosecutor failed to prove his case beyond a reasonable doubt.

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7. Newly Discovered Evidence
   a. Evaluated by mental health counselor at SCDC and it's been discovered that the Applicant suffers from mental illnesses such as bi-polar disorder and depression.
   b. Applicant did not finish school.
   c. Applicant's mother suffers from mental illness.
8. Actual innocence

After the conclusion of the evidentiary hearing on September 9, 2015, Judge Hyman filed an Order granting the State's motion for summary judgment as to Ineffective Assistance of Trial Counsel on September 15, 2009. Applicant proceeded on the issues of ineffective assistance of appellate counsel and prosecutorial misconduct.

SUMMARY OF TESTIMONY

At the evidentiary hearing, Appellate Counsel testified he appealed Applicant's case on the grounds that Applicant was not allowed to represent himself because he did not fully understand the advantages and disadvantages of self-representation. Counsel stated he received a letter on March 30, 2011 from Applicant, but the Applicant did not request and he does not recall the Applicant requesting that he argue the failure of a voluntary manslaughter charge as a basis for the appeal. Counsel then stated if Applicant requested an issue be raised and he did not raise it, it was because Counsel believed it was not the best issue to raise on appeal. Counsel stated he did not recall an issue about a 911 tape. Concerning a dispatch log, Counsel stated the State objected and if Defendant objected, then it was preserved for appeal. Counsel also testified he did not recall evidence of blood or DNA testing.

Additionally, Counsel testified about items which would be required for disclosure by the State. Counsel then stated it was his practice to highlight and review issues that have the most merit,

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but he did not review all of the exhibits. Counsel then articulated that he is aware of cases being reversed for pro se defendants, for Brady violations, failure to give proper jury instructions, prosecutorial misconduct, Batson issues, witness statements, and unduly suggestive identifications.

On cross-examination, Counsel testified he's been practicing for 26 years and has handled thousands of cases. Counsel stated he read the transcript and prepared which issue he was going to raise on appeal. In his professional opinion, counsel testified the best chance to win this case was to attack the self-representation issue; he based this opinion on his experience as an attorney and the facts of the case. Counsel stated he is also bound by issue preservation and has a duty that if an issue is not preserved at the trial level, he cannot raise it on appeal. Counsel reiterated that he raises issues that give his client the best chance of prevailing. Counsel then stated if the State has evidence in its possession, it must be turned over; but if the evidence does not exist, it is impossible for the State to turn it over. Counsel lastly stated that if there is no evidence of a lesser included charge, then the trial court is not required to give the jury a lesser included option. He further testified that his review of the record supported his assessment that there was no evidence "whatsoever" to support the court instructing a lesser included offense.

Applicant testified that he requested discovery and that there were issues with what was omitted from the appeal. Applicant argued that appellate counsel failed to argue his Brady claim because, as applicant claims, there was a 911 tape not turned over to his attorney and that there was blood evidence never sent to SLED. Applicant stated there were certain items that were collected and tested and other items that were not collected. Applicant then testified that Victim testified at both the first and second trials, giving different statements during the second trial.

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Applicant testified that Appellate Counsel did not raise the jury instruction for voluntary manslaughter even though he requested the charge and was denied by the trial court. Applicant testified that he received a lesser included charge of voluntary manslaughter at his first trial because of evidence of voluntary manslaughter. Applicant lastly stated that the trial judge erred in striking a black juror, but not two (2) white similarly situated jurors pursuant to Batson.

On cross-examination, Applicant admitted that he was fully aware of the victim's testimony and that there were three (3) different statements given by the victim, which he used to cross-examine the victim's credibility.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. The Court also has read the trial transcript and the appellate records, all of which assists the Court in judging their credibility.

Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

Ineffective Assistance of Appellate Counsel

In a PCR action, "[t]he burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged 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, 686, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 441, 334 S.E.2d 813, 814 (1985).

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The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, Id. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

First, the Applicant must prove that counsel's performance was deficient. Cherry, 300 S.C. at 117, 385 S.E.2d at 625. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing* Strickland. 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.

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). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 749, 103 S. Ct. 3308, 3311 (1983). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy. . . ." Jones, 463 U.S. at 754, 103 S. Ct. at 3314. The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift v. State, 302 S.C. at 537, 397 S.E.2d at 525; Gilchrist v. State, 364 S.C. 173, 178, 612 S.E.2d 702, 705 (2005); Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

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This Court had the opportunity to observe the witnesses on the witness stand and hear their testimony. This Court also has read the trial transcript, all of which assists the Court in judging the witnesses' credibility. This Court finds the Applicant's testimony regarding Appellate Counsel's ineffectiveness is not credible while also finding Counsel's testimony persuasive and very credible.

This Court finds Appellate Counsel's representation of Applicant in this case was well above the professional norms. Counsel fully investigated potential preserved issues on appeal and assisted Applicant in his defense. Counsel testified that he has been in the legal profession for 26 years and has handled thousands of cases. Counsel also testified he reviewed the entire record and briefed the most meritorious issue, giving his client the best chance of prevailing. Further, Counsel testified that he has a duty not to raise non-preserved or frivolous issues on appeal. Counsel explained that he pursued the only "winnable" issue on appeal, which was proceeding to trial pro se. Further, Counsel stated he strategically decided to "weed out" issues that would not prevail. This Court finds that Counsel was not ineffective by not raising the involuntary manslaughter charge objection on appeal. Counsel explained that there must be sufficient legal provocation for such a charge and there was no evidence that the victim provoked the Applicant. Further, this Court finds the decision to not proceed on an appeal for the Batson challenge was proper under Counsel's strategy to concentrate on the strongest issue. Also, the State articulated race-neutral reasons for their strikes and Court ruled against the Defendant (Tr. 39: 10-25; 40-44). The Defendant failed to meet his burden at trial. Thus, this Court finds the Applicant has failed to meet his burden of proving counsel's performance was deficient or that he was prejudiced thereby. Accordingly, this allegation is denied.

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Prosecutorial Misconduct

Prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). 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). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). The failure to do so has waived this allegation as grounds for relief.

Regardless, it is applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). "To establish that a *Brady* violation undermines a conviction, a convicted defendant must make each of three showings: (1) the evidence at issue is 'favorable to the accused, either because it is exculpatory, or because it is impeaching'; (2) the State suppressed the evidence, 'either willfully or inadvertently'; and (3) 'prejudice ... ensued.'" Skinner v. Switzer, 562 U.S. 521, 536, 131 S. Ct. 1289, 1300 (2011).

First, there was an affidavit introduced at the evidentiary hearing which showed that SLED does not possess the alleged 911 tape. Second, Applicant has failed to produce any blood evidence which he claims was part of the Brady violation. "Under Brady, the State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment." Smith v. Cain, 132 S. Ct. 627, 628 (2012). It is not a Brady violation to not test evidence if they do not find it necessary. This Court finds absolutely no evidence of prosecutorial

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misconduct or wrongdoing in this case. The Applicant has not carried his burden of proving actual prosecutorial misconduct; therefore, this allegation is dismissed.[4]

CONCLUSION

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

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant's attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the Respondent.

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[4] Assistant Solicitor Burns M. Wetmore, Esquire was present to testify. However, after considering the lack of additional information in the record the Applicant withdrew the witness.

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AND IT IS SO ORDERED!

Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

May 5, 2016
Charleston, South Carolina

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

TERRELL MCCOY, #256070,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

Melisa W. Gay, Esquire
Melissa W. Gay, LLC
PO Box 2144
Mt. Pleasant, SC 29465-2144

This 12th day of May, 2016.

J. RUTLEDGE JOHNSON
ATTORNEY FOR RESPONDENT

SWORN to before me this 12th day of May, 2016.

Notary Public for South Carolina.
My Commission Expires: 12/16/2024