

FILED

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CALHOUN) FOR THE FIRST JUDICIAL CIRCUIT

2024 APR -8) PM 3:51

Bryant McKnight, SCDC #304720,) Case No. 2018-CP-09-00035

Applicant,) **ORDER OF DISMISSAL**

v.)

State of South Carolina,)

Respondent.)

This matter is before the Court pursuant to an application for post-conviction relief (“PCR”) filed by Bryant McKnight (“Applicant”) on March 22, 2018. On February 6, 2024, an evidentiary hearing convened before the Honorable Paul M. Burch. Applicant was present and represented by Arthur K. Aiken, Esquire, and Mark Hardee, Esquire. Assistant Attorney General Bryan T. Hall represented Respondent. At the hearing, counsel for Applicant and Respondent gave legal arguments on the record. Respondent called as a witness Martin R. Banks, Esquire (“Counsel”). Following a thorough review of the trial transcript and the testimony and evidence presented at the evidentiary 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 presently confined in the South Carolina Department of Corrections serving a life sentence. In September 2014, the Calhoun County Grand Jury indicted Applicant for murder (2014-GS-09-0059) and kidnapping (2014-GS-09-0060). The case arose from an incident in which Applicant and his co-defendant/brother, Jerry McKnight (“Jerry”), took Kymara Randolph (“the victim”) to a remote road and shot her several times, resulting in the victim’s

death. Between March 2-6, 2015, Applicant proceeded to a jury trial before the Honorable Maite Murphy. Solicitor David Pascoe, Deputy Solicitor Donald Sorenson, and Assistant Solicitor Kyle Ward prosecuted the case on behalf of the First Circuit Solicitor's Office. Applicant was represented by Martin R. Banks, Esquire. Applicant was convicted as indicted, and Judge Murphy sentenced him to life imprisonment.

On March 16, 2015, a notice of appeal was filed on Applicant's behalf. On appeal, Applicant was represented by David J. Miller, Esquire, who filed an *Anders*¹ brief raising the following issue:

Should the Appellant's sentence for kidnapping be vacated pursuant to S.C. Code Ann. § 16-3-910 (2003) and *State v. Vick*, 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009)?

The South Carolina Court of Appeals affirmed Applicant's convictions for murder and kidnapping but vacated Applicant's sentence for kidnapping pursuant to *State v. Vick*, 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009). The Remittitur was sent on November 3, 2017.

CURRENT APPLICATION

Applicant timely commenced this PCR action on March 22, 2018, alleging he is being held in custody unlawfully for the following reasons:

Ineffective Assistance of Counsel

- a. "I had right to remain silent"
- b. No objection to the "perjury eyewitness." No in camera inspection on eyewitness.
- c. No objection to the closing argument to the improper charges.
- d. No equal protection, violation of due process by charges.

Respondent filed a return. Applicant amended his application to add the following allegations:

Ineffective Assistance of Counsel

- a. Failure to properly prepare and investigate.

¹ *Anders v. California*, 386 U.S. 738 (1967).

- b. Failure to make objections to testimony and evidence.
- c. Failure to make proper argument to jury and object to State's argument to jury.
- d. Failure to propose proper jury instructions.
- e. Failure to object to erroneous jury instructions.

Prosecutorial Misconduct

- a. Withholding documents and information favorable to applicant.
- b. Withholding information containing deals with witnesses that testified at applicant's trial.
- c. Withholding information concerning impeachment material for critical state witnesses.

Applicant amended his application a second time to raise the following allegations:

Ineffective Assistance of Counsel

- a. Failure to object to the trial court's failure to include the permissive inference jury instruction in its jury instructions on malice inferred from use of a deadly weapon.
- b. Failure to object to the trial court's statements in her preliminary statements and jury charge that the jury's role was to determine the true facts.

At the hearing, Applicant proceeded solely on the allegations contained in his second amended application, and only those issues are for this Court's consideration. Before this Court are the Calhoun County Clerk of Court records of the subject conviction; Applicant's records from the South Carolina Department of Corrections; the trial transcript; appellate records, and the records of the current PCR action.

TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Martin R. Banks ("Counsel") testified he met with Applicant numerous times during his representation. Counsel testified that during meetings, Counsel and Applicant reviewed discovery together and discussed trial strategies. Counsel testified that he did not believe there was a basis to object to truth seeking language in the trial judge's preliminary statements and jury charge as the truth-seeking comments were given in the context of the jury's

role in determining witness credibility. Counsel further testified he did not object to the inferred malice charge, and testified there was other evidence of malice presented at trial from the testimonies of several witnesses.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the trial transcript in its entirety² and has heard the testimony and legal arguments at the PCR hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony. 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

² For citations to the trial transcript, this Court cites to Applicant's record on appeal. (R.)

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 at 813. An applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). The court is to evaluate counsel's decisions at the time they were made and "every effort be made to eliminate the distorting effects of hindsight." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011).

To establish ineffective assistance of counsel, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland*, 466 U.S. at 687-88; *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. Applicant must prove prejudice by showing "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. Failing to object does not automatically constitute ineffective assistance of counsel. *See Millidge v. State*, 422 S.C. 366, 374, 811 S.E.2d 769, 800-01 (2018) (stating an applicant must prove both deficiency and prejudice to establish ineffective assistance of counsel for failing to preserve an issue).

Failure to Object the Trial Judge's Omission of Permissive Inference Language in the Jury Charge on Malice Inferred from Use of a Deadly Weapon

This Court finds Applicant failed to prove he was prejudiced by Counsel's failure to object to the trial judge omitting permissive inference language in the court's jury charge on malice inferred from use of a deadly weapon. This Court is required to evaluate Counsel's conduct by the law available at the time of Applicant's trial. *See Edwards*, 392 S.C. at 456, 710 S.E.2d at 64 ("evaluate counsel's decisions at the time they were made"). The law available at the time of Applicant's trial was *State v. Belcher*, 421 S.C. 622, 809 S.E.2d 423 (2009) (holding a

jury may not be charged that malice may be inferred from use of a deadly weapon where evidence was presented that would reduce, mitigate, excuse, or justify the homicide), *overruled by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019). Applicant and Respondent agree that under *Belcher*, the trial court was permitted to charge the jury on malice inferred from use of a deadly weapon because there was no evidence presented at trial that would reduce, mitigate, excuse, or justify the homicide.

Applicant cites *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983), *overruled by Burdette*, 427 S.C. 490, 832 S.E.2d 575 and *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). In *Elmore*, the Supreme Court held the jury charge on the presumption of malice from the use of a deadly weapon constitutes a permissive inference rather than a mandatory presumption. *Id.* The Court suggested trial judges use language stating the inference from use of a deadly weapon is simply an evidentiary fact to be considered by the jury along with other evidence, given the weight the jury determines it should receive. *Id.* at 421, 308 S.E.2d at 784. The Court cautioned the bench that only slight deviations from the charge will be tolerated. *Id.*

Respondent concedes the trial judge in Applicant's trial did not include a permissive inference charge consistent with *Elmore*. (R. 821:18-20). This Court does not think it is necessary to address the deficiency prong for Counsel's failure to object to the trial judge's omission as Applicant did not meet his burden of proving he was prejudiced by Counsel's conduct. *Strickland*, 466 U.S. at 670 ("[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed"). Both Applicant and Respondent cite *Gibson v. State*, 416 S.C. 260, 786 S.E.2d 121 (2016), *overruled by Burdette*,

427 S.C. 490, 832 S.E.2d 575. Although decided after Applicant's 2015 trial, this Court finds *Gibson* is pertinent to the appellate court's analysis and rationale in applying *Elmore* around the time of Applicant's trial.

In *Gibson*, the South Carolina Supreme Court held a defendant was entitled to PCR relief when (1) the trial judge's jury charge on malice inferred from use of a deadly weapon did not include the permissive inference language from *Elmore* and (2) there was no evidence of malice presented at trial other than the defendant's use of a deadly weapon. *Id.* 416 S.C. at 265-66, 786 S.E.2d at 124. The defendant shot a gun into the air several times before fleeing the scene and testified that he did not remember seeing the victim or aiming at him. *Id.* at 262, 786 S.E.2d at 122. There was no other evidence of malice present at trial except the defendant's firing of the gun in the air. *Id.* at 265-66, 786 S.E.2d at 124. In reaching its holding, the Court analyzed whether the trial court's omission of the permissive inference instruction contributed to the verdict *based on all the evidence presented to the jury*. *Id.* (emphasis added). The Court stated that it "must weigh the significance of the presumption to the jury *against the other evidence of malice considered by the jury* without the erroneous malice charge." *Id.* (emphasis added). The Court determined the erroneous jury charge contributed to the verdict, and the defendant was prejudiced by counsel's failure to object because there was no evidence of malice other than the defendant's use of a deadly weapon. *Id.* (citing *State v. Fennell*, 340 S.C. 266, 531 S.E.2d 512 (2000) (defining malice as hatred, ill-will or hostility toward another person; a wrongful intent to injury another person...)).

This Court finds Applicant failed prove he was prejudiced because there was evidence of malice presented at trial other than Applicant's use of a deadly weapon. Stephon Green,

Applicant's friend, testified that shortly before the murder, Applicant told Green that he was thinking about killing the victim because he believed the victim was involved in a burglary that occurred at Applicant's mother's house weeks prior. (R. 290:6-17; 293:14-23). Jonathan McKnight, Applicant's cousin and an eyewitness to the murder, testified that Applicant and his co-defendant (Jerry McKnight) told Jonathan they would kill whoever was involved in the burglary. (R. 229:21-25). Derrick Sumter, Applicant's friend, testified that Applicant told Sumter he would "do harm" to the person that broke into his mother's house. (R. 332:6-19).

This Court finds Applicant's statements, as spoken through the testimonies of several witnesses, evidenced hatred, ill-will, and intent to kill the victim. Applicant's comments were evidence of express malice that was considered by the jury, irrespective of Applicant's use of a deadly weapon and the erroneous inferred malice charge. Based on all of the evidence considered by the jury, Applicant failed to show he was prejudiced by Counsel's failure to object to the inferred malice charge because the jury considered evidence of express malice without the erroneous charge. Thus, Applicant failed to meet his burden on this allegation.

Failure to Object to the Trial Judge's use of Truth-Seeking Language in Charging the Jury and Preliminary Statements

This Court finds Applicant failed to prove he was prejudiced by Counsel's failure to object to trial judge's use of truth-seeking language in charging the jury. Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error. *State v. Aleksey*, 343 S.C. 20, 26-27, 538 S.E.2d 248, 251-52 (2000).

In *Aleksey*, the Supreme Court held a trial court's jury charge that the jury's "one single objective" was "to seek the truth regardless of from what source that truth may be derived" did

not violate a defendant's due process rights when the charge was given in the context of the jury's role in determining witness credibility. *Id.* The Court stated that jury instructions *on reasonable doubt* which charge the jury to seek the truth are disfavored because of the risk of unconstitutionally shifting the burden of proof to a defendant. *Id.* (emphasis added). The Court reasoned that the trial court's truth-seeking jury charge was not prejudicial because it did not appear in either the reasonable doubt or circumstantial evidence charges and was prefaced by a full and proper instruction on reasonable doubt. *Id.* at 27-29, 538 S.E.2d at 251-53. The Court determined there was not a reasonable likelihood that the jury applied the judge's charge to convict the defendant on less than proof beyond a reasonable doubt because the instruction as a whole properly conveyed the law to the jury. *Id.* at 28-29, 538 S.E.2d at 252-53.

This Court finds Applicant failed to prove he was prejudiced by Counsel's failure to object to the truth-seeking language because the trial judge's jury charge was (1) prefaced by a full and proper instruction on reasonable doubt, (2) was not given in either the reasonable doubt or circumstantial evidence charges, and (3) was given in the context of the jury's role as fact finder and determiner of witness credibility. In charging the jury on its role, the trial judge stated as follows:

The law does not allow me to have an opinion about the facts in the case. This is a matter solely for you, the jury to determine. As jurors, it is your duty to determine the effect, value weight and truth of the evidence presented during this trial.

...

Necessarily, you must determine the credibility of witnesses who have testified in this case. Credibility means believability. It becomes your duty as jurors to analyze and to evaluate the evidence and to determine which evidence convinces you of its truth.

(R. 811:21-25; 812:20-24). The jury charges in question were prefaced by a complete and proper charge on reasonable doubt, in which the trial judge charged the jury that the State has the burden of proving the defendant's guilty beyond a reasonable doubt which is "proof that leaves you firmly convinced of a defendant's guilt." (R. 808:18-810:14). The trial judge did not mention "truth" in either the reasonable doubt or direct and circumstantial evidence jury charges. (R. 812:1-19; 808:18-810:14). Reviewing the jury charges as a whole, Applicant failed to prove he was prejudiced by the charge because the trial judge gave an extensive and proper charge to the jury on reasonable doubt and direct and circumstantial evidence, which rendered any isolated portions that could have been misleading a non-reversible error.

Applicant cites *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012). However, this Court finds Applicant's case is distinguishable. In *Daniels*, the Supreme Court held the trial court's jury charge was improper when the charge instructed the jury that its verdict will represent "truth and justice for *all parties involved*." *Id.* (emphasis added). The Court reasoned the "all parties involved" language was misleading and could alter the jury's perception of the burden of proof. *Id.* In holding, the Court instructed trial judges to remove any suggestion of the jury's duty to return a verdict that is just or fair to "all parties" from general sessions jury charges. *Id.* at 256, 737 S.E.2d at 475.

The trial judge in Applicant's trial did not charge the jury that its verdict should seek truth or justice for "all parties." As a result, it is unlikely that the jury was misled or their perception of the burden of proof was altered. Thus, Applicant has failed to meet his burden of proving he was prejudiced.

Based on review of the entire record, this Court finds Applicant failed to show he was prejudiced by Counsel's failure to object to the trial judge's preliminary statements to the jury that they would render a "true and just verdict."³ The trial judge prefaced the opening remarks by stating to the jury the state's burden of proving the elements of the indictments beyond a reasonable doubt, and it would be the jury's duty to decide if the state met its burden. (R. 60:17-21). The trial judge later stated the following:

I cannot tell you what the facts are and you cannot disagree with me about what the law is or what it should be. Your job is to take the law as I give it to you and apply it to the facts as you find them from the testimony of the witnesses and any other evidence that is introduced.

After doing that, you will render your verdict, a true and just verdict under the solemn oath that you just took as jurors.

(R. 61:14-21). The trial judge further stated that "at the end of all testimony, after all the arguments of counsel and the charge on the law by the [c]ourt, you will be in a position to determine what the true facts are and to apply the facts to the law and render a true and just verdict." (R. 65:7-12).

This Court finds the trial judge's opening remarks do not warrant reversal because the comments did not violate due process as burden shifting under the precedents of *Aleksey* and *Daniels*. The trial judge prefaced the truth-seeking opening remarks by properly conveying to the jury the law on reasonable doubt. *Aleksey*, 343 S.C. at 29, 538 S.E.2d at 252-53 (determining the trial judge's truth-seeking charge did not warrant reversal when the trial judge prefaced the statements by properly conveying to the jury the law on reasonable doubt). Further, this Court

³ Decided after Applicant's trial, *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018) held although a trial judge's opening remarks that jury was to "search for truth" and render a "just verdict" were improper, it did not warrant reversal because appellant did not show prejudice based on a review of the entire record.

distinguishes the trial judge's comments in Applicant's trial from *Aleksey* because the statements were made in the court's opening remarks, not the court's charge to the jury on the law. Applicant failed to show a reasonable probability that the result of his trial would have been different but for Counsel's failure to object to the charge. Thus, Applicant has failed to meet his burden.

[Space left blank intentionally. Conclusion follows on next page.]

CONCLUSION

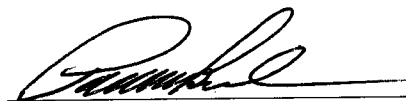
Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. Thus, this application is denied and dismissed with prejudice.

Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty (30) days of receipt by counsel of written notice of entry of judgment. *See* Rule 203, SCACR. Applicant has the right to an appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on applicant's behalf. Rule 71.1(g), SCRCR. 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 27th day of March, 2024.



PAUL M. BURCH
Presiding Judge
First Judicial Circuit

Christyford, South Carolina

