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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Paul M. Burch, Circuit Court Judge

Case No. 2022-CP-18-00712

Damon Riley, ...Petitioner,

v.

State of South Carolina, ...Respondent.

NOTICE OF APPEAL

Petitioner, Damon Riley, appeals the order of the Honorable Paul M. Burch, dated April 21 2024, and filed May 3, 2024. Petitioner received written notice of entry of this order on May 5, 2024.

5/13, 2024

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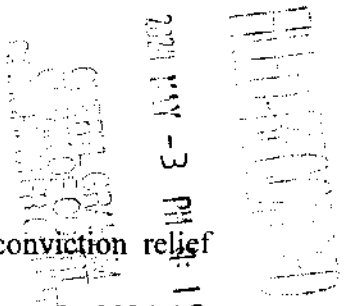
STATE OF SOUTH CAROLINA COUNTY OF DORCHESTER	)	IN THE COURT OF COMMON PLEAS FOR THE FIRST JUDICIAL CIRCUIT
Damon Riley, SCDC #381176, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2022-CP-18-00712 **ORDER OF DISMISSAL**



This matter is before the Court pursuant to an application for post-conviction relief ("PCR") filed by Damon Riley ("Applicant") on April 29, 2022. On February 8, 2024, an evidentiary hearing convened before the Honorable Paul M. Burch. Applicant was present and represented by Michael H. Lifsey, Esquire. Assistant Attorney General Bryan T. Hall represented Respondent. At the hearing, Applicant testified on his own behalf. Respondent called as a witness Chad D. Shelton, 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 ("SCDC") serving a thirty (30) year sentence. In November 2016, the Dorchester County Grand Jury indicted Applicant for two counts of attempted murder (2016-GS-18-1105; -1106) and possession of a weapon during the commission of a violent crime (2016-GS-18-1107). The indictment arose form an incident in which Applicant shot his cousin and her husband at a traffic light. On August 19-21, 2019, Applicant proceeded to a jury trial before the Honorable Maite Murphy. Assistant Solicitor Michael Spears prosecuted the case, and Applicant was represented by Chad D. Shelton,

Esq. ("Counsel"). Applicant was convicted as indicted. Judge Murphy sentenced Applicant to thirty (30) years for each count of the attempted murder, ordered to be served consecutively to each other and concurrent to a five (5) year sentence for possession of a weapon during the commission of a violent crime. On October 7, 2019, Judge Murphy denied Applicant's motion to reconsider the sentence.

On October 24, 2019, a notice of appeal was filed on Applicant's behalf. Applicant was represented on appeal by Appellate Defender Joanna K. Delany, who raised the following issue:

> Whether the court erred, in Appellant's trial for attempted murder and possession of a weapon during the commission of a violent crime, where it admitted video footage and photographs of Appellant posing with a gun in a moving car in violation of § 16-23-20, since the prior bad act evidence should have been excluded pursuant to Rules 404 and 403, SCRE?

On April 6, 2022, following briefing and without oral argument, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences, determining the trial court properly found the evidence was offered to show identity and the danger of unfair prejudice did not outweigh the probative value of the evidence. *State v. Riley*, 2022-UP-165 (S.C. Ct. App. filed April 6, 2022). The Remittitur was sent on April 25, 2022.

CURRENT APPLICATION

Applicant timely commenced this PCR action on April 29, 2022, alleging he is being held in custody unlawfully for the following reasons:

> Ineffective Assistance of Counsel
> a. Failure to investigate the chain of custody for bullet fragments Detective Hirsch found at the crime scene.
> b. Failure to request Rule 5 and *Brady* material.
> c. Failure to adequately prepare for trial.
> d. Failure to object to the jury being charged on two (2) counts of attempted murder.

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

Ineffective Assistance of Counsel

c. Failure to meet a sufficient number of times to be adequately prepared to try the case.
f. Failure to share with Applicant a copy of Rule 5 material received from the State.
g. Failure to object to and argue effectively against the second (2nd) count of attempted murder in which the alleged victim failed to testify.
h. Failure to object to the trial judge charging the jury on the "hand of one, hand of all" when the State proceeded on a theory that Applicant was the shooter.
i. Failing to request a jury charge on circumstantial evidence in conformity with *State v. Logan*.

Before this Court are the Dorchester County Clerk of Court records of the subject conviction; Applicant's records from SCDC; the appellate records; the trial transcript; and the records of the current PCR action.

TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant testified he was initially represented by Ashley D. Chisolm ("Chisolm"), Esquire, of the Public Defender's Office. Applicant testified he proceeded with Chisolm to a jury trial that resulted in a mistrial. After which, Applicant moved to relieve Chisholm, and Chad Shelton ("Counsel") was then appointed. Applicant testified he met with Counsel once at the courthouse. Applicant testified Counsel did not discuss with Applicant the elements of the offenses and did not provide Applicant with a copy of Rule 5 materials and transcript from his first trial. Applicant testified he wanted Counsel to get a copy of the transcript but the court reporter either retired or quit. Applicant testified Counsel questioned him about what happened at Applicant's first trial.

Applicant averred there were lots of issues with investigations in the case such as no gunshot residue, fingerprints, or gun tests. Applicant testified he believed there was no evidence to support the charges and averred Counsel should have objected to the second count of attempted murder since the victim did not testify at trial. Applicant averred Counsel should have objected to the "hand of one, hand of all" charge since the State argued Applicant was the shooter. Applicant

testified he believed Counsel did not do a good job representing him. On cross-examination, Applicant testified he knew of the State's evidence from his prior mistrial. Applicant also testified he knew the victims in this case: his cousin and her husband.

Counsel testified he was appointed to represent Applicant after a conflict arose between Applicant and his previous attorney. Counsel testified he met with Applicant eight (8) to ten (10) times prior to trial. Counsel testified he requested and received discovery materials from the State and reviewed those materials with Applicant. Counsel testified the State's evidence included testimony from the victim who identified Applicant as her cousin and the shooter, and law enforcement found a .9mm gun in a car with Applicant that matched the shell casings found at the crime scene. Counsel testified he discussed trial defenses with Applicant. Regarding investigations, Counsel testified Applicant gave witness names regarding the character of the victim, and an investigator did not find any helpful information after speaking to the witnesses. Counsel testified he did not investigate DNA evidence because there was no reason to investigate DNA evidence in Applicant's case as there was no DNA evidence presented at trial. Counsel testified he discussed a plea offer with a thirty (30) year range, but Applicant was uninterested in a plea.

Counsel testified he did not object to testimony on shell casings because Counsel did not believe there were any concerns regarding chain of custody. Counsel testified he did not know why he did not object to the "hands of one, hands of all" charge but believed it was unlikely an objection would have made a difference. Counsel testified he wishes he would have made more of an argument on the second count of attempted murder but believed the victim's testimony was sufficient for the second count to reach the jury. Counsel further testified it was unlikely an objection would have been successful if he had argument more on the second attempted murder

charge. Regarding the *Logan* charge, Counsel testified he did not request a *Logan* charge because Applicant's case was not a circumstantial evidence case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the trial transcript in its entirety and has heard the testimony 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), SCRCP; *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 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 (i.e. deficient performance) 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.

Failure to Investigate

This Court finds Applicant failed to prove counsel was ineffective for failing to investigate the case, DNA and ballistics evidence, and shell casings. A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State. *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). While the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. *Ard v. Catoe*, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007). Counsel's duty to investigate is limited to reasonable investigations. *Id.*, 372 S.C. at 331, 642 S.E.2d at 597.

This Court finds Counsel conducted reasonable investigations in accordance with prevailing professional norms. This Court finds **credible** Counsel's testimony that he did not believe investigations into DNA evidence were necessary. This Court finds **credible** Counsel's testimony that an investigator interviewed the witnesses Applicant provided, and such investigations proved unhelpful to Applicant's case. Further, this Court finds Applicant failed to prove he was prejudiced by failing to present evidence of information Counsel could have discovered that would have resulted in a different outcome. Thus, Applicant has failed to meet his

burden.

Failure to Spend Adequate Time and Adequately Prepare for Trial

This Court finds Applicant failed to prove Counsel was ineffective for failing to spend adequate time on the case and failing to adequately prepare for trial. "[B]revity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation." *Smith v. State*, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (2012). Applicant must prove prejudice by showing evidence of how additional preparation or communication would have resulted in a different outcome. *Id.*; *see Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (applicant failed to show counsel was ineffective based on lack of preparation by neglecting to show evidence of what counsel failed to discover or what defenses counsel could have pursued had he more fully prepared for the case).

This Court finds Counsel's preparation was sufficient in accordance with prevailing professional norms. This Court finds **credible** Counsel's testimony that met with Applicant a number of times prior to trial. This Court finds **credible** Counsel's testimony that he reviewed discovery materials with Applicant and discussed trial defenses. Further, this Court finds Applicant failed to prove prejudice by presenting evidence of what Counsel could have discovered or what defenses could have been developed had Counsel prepared more. Thus, Applicant failed to meet his burden.

Failure to Request and Share Rule 5 and Brady Materials

This Court finds Applicant failed to prove Counsel was ineffective for failing to request and share with Applicant Rule 5, SCRCrimP, and *Brady*[1] materials. This Court finds **credible** Counsel's testimony that he requested and received Rule 5 and *Brady* materials from the State.

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

This Court also finds **credible** Counsel's testimony that he reviewed those materials with Applicant. Thus, Applicant has failed to meet his burden.

Failure to Object to Testimony Regarding Shell Casings

This Court finds Applicant failed to prove Counsel was ineffective for failing to investigate and object to shell casings Detective Hirsch, and other officers, found at the crime scene. At trial, Det. Hirsch testified that he was briefed on the situation and shown where some of the shell casings were found. (R. 98). At trial, Sergeant Wade Rollings testified that the shell casings he collected from the crime scene were the same ones presented to him by the State, and the package containing the shell casings was not materially altered in any way. (R. 138-39; 141). This Court finds **credible** Counsel's testimony that he did not object to the testimony because he did not have any concerns regarding chain of custody for the shell casings. Further, this Court finds Applicant failed to prove he was prejudiced by showing a reasonable probability the result of trial would have been different but for Counsel's failure to investigate and object to the shell casings for chain of custody concerns. Thus, Applicant failed to meet his burden.

Failure to Object to the Jury Charge on Two (2) Counts of Attempted Murder

This Court finds Applicant failed to prove Counsel was ineffective for failing to object to the trial judge charging the jury on two (2) counts of attempted murder. 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 object). The proper inquiring for determining prejudice is whether there is evidence in the record to support the trial court's finding, such that "an appellate court would necessarily have affirmed the trial court's ruling." *See id.* at 380, 811 S.E.2d at 800.

At trial, Kimberlee Felder ("Felder" or "the victim"), Applicant's cousin, testified she saw Applicant pull up to her car at a traffic light and shoot at her and her husband, Carsheme Dinkins ("Dinkins"). (R. 61-63). Felder testified that she was shot in the face. (R. 64). Officer Kevin Dutrieux, who responded to the medical center after the shooting, testified that he observed Dinkins had been shot in the arm. (R. 92). The trial judge charged the jury on two counts of attempted murder. (R. 297).

This Court finds **credible** Counsel's testimony that testimony presented at trial was sufficient to permit the trial judge to charge the jury on two (2) counts. This Court finds **credible** Counsel's testimony that although he wished he had argued against the second count of attempted murder more, it is unlikely the objection would have been successful. Further, this Court finds Applicant failed to prove he was prejudiced by Counsel's failure to object because there is evidence in the record to support a charge on two (2) counts of attempted murder, such that an appellate court would have affirmed the trial court's ruling. *Cole*, 338 S.C. at 101, 525 S.E.2d at 512 ("the law to be charged must be determined from the evidence presented at trial"). Thus, Applicant failed to meet his burden.

Failure to Object to the Trial Judge's "Hand of One, Hand of All" Charge

This Court finds Applicant failed to prove he was prejudiced by Counsel's failure to object to the trial judge's jury charge on the "hands of one, hands of all' theory of accomplice liability. This Court finds **credible** Counsel's testimony that although he did not know why he did not object to the "hands of one, hands of all charge," it is unlikely an objection would have made a difference in the case since the victim identified Applicant as the shooter. This Court finds Applicant failed to prove he was prejudiced by showing a reasonable probability the result of trial would have been different but for Counsel's failure to object. Thus, Applicant failed to meet his burden.

Failure to Request a Logan Charge on Circumstantial Evidence

This Court finds Applicant failed to prove Counsel was ineffective for failing to request a jury charge in conformity with *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013). In *Logan*, the Supreme Court held that criminal defendants *may* request the trial court to charge the jury that "to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, must point conclusively to the guilt of the accused beyond a reasonable doubt." *Id.* 405 S.C. at 99, 747 S.E.2d at 452 (emphasis added). The Court stated while its holding does not prevent the trial court from issuing a circumstantial evidence charge pursuant to *State v. Grippon*, 327 S.C. 79, 489 S.E.2d 462 (1997), a trial court could not prevent a defendant from requesting the *Logan* circumstantial evidence charge if he chose to do so. *Logan*, 405 S.C. at 99-00; 747 S.E.2d at 452-53.

In Applicant's trial, Counsel did not request a *Logan* charge, and the trial judge charged the jury on circumstantial evidence as follows:

> Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes absolutely no distinction between the weight, or value given to either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than direct evidence.
>
> You should weigh all of the evidence in this case. After weighing all of the evidence, if you're not convinced of the guilt of the Defendant beyond a reasonable doubt, you must find the Defendant not guilty.

(R. 300). This Court finds **credible** Counsel's testimony that he did not request a *Logan* charge because Applicant's case was not a circumstantial evidence case. This Court also finds the State did not have to rely on circumstantial evidence because there was direct evidence presented through the testimony of the victim. (R. 61-63). Further, this Court finds Applicant failed to prove he was prejudiced by Counsel's failure to request a *Logan* charge because the trial court's circumstantial evidence charge conforms to *Grippon*. *Grippon*, 327 S.C. 79, 489 S.E.2d 462

(holding while direct and circumstantial evidence carry the same value, a jury cannot accurately analyze the two types of evidence the same; circumstantial evidence requires the jurors to connect the collateral facts to prove defendant's guilt beyond a reasonable doubt). Thus, Applicant failed to meet his burden.

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), SCRCP. 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 21st **day of** April **, 2024.**

PAUL M. BURCH
Presiding Judge
First Judicial Circuit

Pinckney, South Carolina