

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
J. Derham Cole, Presiding Judge

2010-CP-42-5368

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S.C. Supreme Court

ISAIAH WALKER, 322149

Applicant,

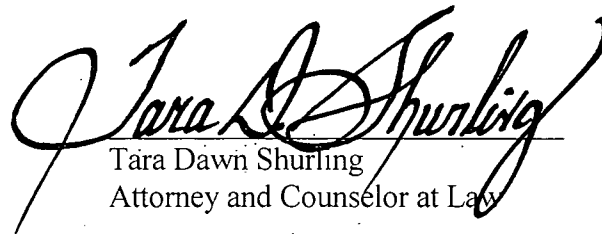
v.

THE STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

NOW COMES the Applicant in the above-captioned Post-Conviction Relief matter, acting by and through his undersigned counsel, giving notice of his appeal from the Order of Dismissal denying his Post-Conviction Relief filed July 15, 2013.



Tara Dawn Shurling
Attorney and Counselor at Law

3614 Landmark Drive, Suite A
Columbia, South Carolina 29204
(803)738-8622
(803)738-1600 FAX

ATTORNEY FOR APPLICANT

This 19th day of August, 2013.

Other Counsel of Record:
Suzanne H. White, Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211
Attorney for Respondent
(803) 734-3737

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
J. Derham Cole, Presiding Judge

2010-CP-43-5368

ISAIAH WALKER, 322149

Applicant,


v.

THE STATE OF SOUTH CAROLINA,

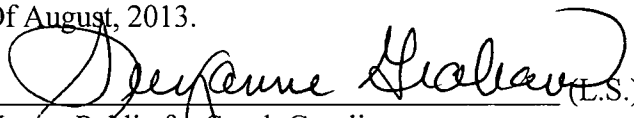
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Applicant's Notice of Appeal in the above-entitled cause has been served upon opposing counsel, Suzanne H. White, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 19th day of August, 2013.


Sharon McCollister
Paralegal to Tara Dawn Shurling

SWORN TO BEFORE me this 19th day
Of August, 2013.


Notary Public for South Carolina
My Commission Expires: 2/28/2023

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2010- CP-42-5368

Isaiah Walker

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Court

Attorney for : Plaintiff Defendant
 or
 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), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; 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:

Plaintiff/Applicant Isaiah Walker's application for post-conviction relief should be **denied** and dismissed with prejudice.

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ORDER INFORMATION

This order ends does not end the case.

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)
		\$
		\$
		\$

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.

Circuit Court Judge

[Handwritten signature]

2053

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Tara D. Shurling, Esq.
3614 Landmark Drive, Suit D
Columbia, SC 29204
ATTORNEY(S) FOR THE PLAINTIFF(S)

Suzanne White, Esq.
P.O. Box 11549
Columbia, SC 29211
ATTORNEY(S) FOR THE DEFENDANT(S)
[Handwritten signature]
CLERK OF COURT

Court Reporter:

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.

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STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)
Isaiah Walker, #322149,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2010-CP-42-5368

ORDER OF DISMISSAL

This matter comes before the Court by way of an Application for Post-Conviction Relief filed October 6, 2010. The Respondent made its Return on or about April 27, 2011. An evidentiary hearing into the matter was convened on September 6, 2012, at the Spartanburg County Courthouse. The Applicant was present and represented by Tara D. Shurling, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

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At the hearing, the Applicant testified on his own behalf, along with his mother, Elizabeth Walker; former girlfriend, Amanda Murphy; and friends, Cynthia Tacke and Kenneth Foster. Rodney W. Richey, Esquire, also testified. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, the trial transcript, Applicant's appellate records, and exhibits placed into evidence by Applicant.

PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted the Applicant at the February 2007 term of General Sessions for

murder (07-GS-42-0625). Mr. Rodney W. Richey, Esquire, represented the Applicant on the charge. On May 31, 2007, the Applicant was convicted of this charge by a jury. The Honorable Roger L. Couch sentenced the Applicant to confinement for life.

A timely Notice of Appeal was filed and an Anders brief was filed on Applicant's behalf. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Walker, Op. No. 2010-UP-114 (filed February 11, 2010). The Remittitur was returned on March 4, 2010.

ALLEGATIONS

In the current application, the Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel, in that;
 - i. Counsel failed to recognize errors during trial and failed to make appropriate objections and supporting legal arguments related to those errors; and
2. Ineffective assistance of appellate counsel, in that;
 - i. Counsel was retained to represent Applicant, but filed a no merit brief pursuant to Anders v. United States on Applicant's behalf.

Applicant's Counsel filed an amendment to the application on the day of the hearing,

raising the following additional allegations:

1. Ineffective assistance of trial counsel, in that;
 - i. Counsel failed to object to hearsay testimony offered from Captain Jackie Kellett regarding the fact that the her conclusion concerning the match of a latent palm print to the Applicant had "been verified by a second latent print examiner in my office,"
 - ii. Counsel failed to call Applicant's former girlfriend, Amanda Murphy, as a witness, where her testimony would have refuted Brent Gentry's contention that the victim was killed by the Applicant because the victim had been "messing with Amanda,"
 - iii. Counsel failed to call Cynthia Thacker as a witness, where her testimony could have refuted testimony of Applicant's co-defendant regarding his whereabouts and activities on the morning of the shooting,
 - iv. Counsel was ineffective for failing to call Kenneth Foster as a

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witness, where his testimony would have refuted claims by Raymond Annas,

- v. Counsel failed to fully and accurately advise the Applicant on the issue of whether or not he should testify in his own defense at trial,
- vi. Counsel neglected to convey and discuss two plea offers made by the State prior to trial,
- vii. Counsel misled the Applicant regarding the strength of the State's case regarding the palm print that could have either been in the victim's blood or a palm print with blood splattered on top,
- viii. Counsel was ineffective for leading the Applicant to believe that the DNA evidence in the case was inconclusive,
- ix. Counsel was ineffective for failing to fully cross-examine the co-defendant, Brent Gentry, regarding all of his pending charges at the time of his testimony at trial.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pay up on the credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

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Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of 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), SCRPC). 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

not intend to call additional witnesses on his behalf and the Applicant acknowledged that he knew that and was in agreement with that decision. (PCR p. 56-7). The Applicant testified that he had told Counsel about all of the people in Ms. Thacker's trailer and gave him the names and numbers of other witnesses. (PCR p. 104-5). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

Amanda Murphy

Counsel testified that he was aware of the Applicant's girlfriend, Amanda Murphy, as a potential witness; however, testified that he did not interview her. Counsel testified that based on discovery materials, Counsel determined that Amanda would not be a good witness for the defense. (PCR p. 21). Counsel explained further that an issue had occurred prior to trial where Amanda was accused of threatening a girl at Spartanburg Tech by saying she would "put up Isaiah on her." (PCR p. 22). Counsel testified that Amanda had supposedly written these threats on the walls also at school. (PCR p. 44). Counsel testified that he did not want to risk bringing that issue or statement anywhere in the case and further testified that it was not an isolated statement or individual. (PCR p. 22). Counsel testified that he spoke with the State and although she had been listed as a State witness, the State agreed to not call Amanda as a witness. (PCR p. 22). Counsel testified that his recollection regarding the situation was that Amanda did not dispute writing threats on the wall. (PCR p. 60-1). In addition, Counsel testified that he also had information about the situation from the prosecutors and was under the belief that Amanda had spoken with them about the incident. (PCR p. 61).

Counsel acknowledged sending a letter to the Applicant, in which he requested that

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Applicant not be in contact with Amanda because of the statements she was alleged to have made. (PCR p. 42-3). Applicant introduced the letter as Applicant's Exhibit #3. (PCR p. 46). Finally, Counsel testified that he did not believe that Amanda offered anything of value to the case, but had the potential to hurt. (PCR p. 61).

Amanda testified at the hearing that she was never interviewed by either Counsel or anyone from his office prior to Applicant's trial. (PCR p. 69). Amanda testified that at the time of the shooting, she and the Applicant had been dating approximately eight months. (PCR p. 68-9). Amanda acknowledged that she had previously been arrested for simple possession, but the charge was dropped. Amanda's SLED record was introduced as Applicant's Exhibit #5. Amanda, when asked about the altercation with someone at school, testified that she could not even tell the name now, but then testified regarding the graffiti, that "[she] had no idea that [she] did that." (PCR p. 70). Amanda also testified that she was never questioned by law enforcement about any statement or threats, but then testified that law enforcement did come to question her in Myrtle Beach, but claimed they did not list her because she was trying to support the Applicant. (PCR p. 71). Amanda further testified that she had never met the victim in this case, nor had she ever had any conversations with him on the phone. However, she did testify that she went to school with the victim's brother. (PCR p. 71-2).

The Applicant testified that he talked with Counsel about his relationship with Amanda. Applicant also testified that Counsel asked him if there was anything between the victim and Amanda and Applicant testified that he was not aware of anything. (PCR p. 104). Applicant also testified that he made sure Counsel had Amanda's contact information. (PCR p. 105).

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Cynthia Thacker

Counsel testified that he did not personally interview anyone who would have been present at the trailer, referenced to by Mr. Gentry; rather his investigator met with and interviewed witnesses. (PCR p. 28). Counsel testified that he could not recall the name Cynthia Thacker, but the investigator talked with whoever was provided to Counsel as a potential witness. (PCR p. 28).

Cynthia Thacker testified that she has known the Applicant since he was a child, but she also knows him from the Applicant visiting her trailer. (PCR p. 82). Ms. Thacker testified that on the day the victim was killed, the Applicant, along with Sheryl Miller, Brent Gentry, and herself, were at the trailer, along with "Laddie," who owned the trailer¹. (PCR p. 82). Ms. Thacker testified that Jeffery ("the victim") arrived first, with Applicant and Gentry coming several hours later. Then Ms. Thacker testified that the Applicant and Gentry left with the victim leaving soon after talking with Chavez Miller. Ms. Thacker denied that the Applicant stepped outside of the trailer to use the phone. (PCR p. 87). Ms. Thacker testified that she would have been willing to testify on behalf of the Applicant, had she been asked by Counsel (PCR p. 84).

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Kenneth Foster Scott²

Kenneth Scott testified that he was 57, but knew the Applicant from the neighborhood. (PCR p. 76). Mr. Scott testified that he had no criminal convictions, but did have various traffic violations and a failure to pay child support. (PCR p. 77). Mr. Scott's SLED report was entered into evidence as Applicant's Exhibit #6. Mr. Scott testified that he knows Mr. Raymond Annus

¹ This Court notes that the transcript reflects that Ms. Thacker originally said "Sheryl" Miller, but when asked by PCR Counsel if she said "Chavez" Miller, she agreed. (PCR p. 82). The name "Sheryl" Miller as a witness was also later testified to by Applicant's mother, Elizabeth Walker. (PCR P. 117).

² PCR Counsel refers to the witness as Mr. Foster.

and has seen Mr. Annus trade his prescription medicine for crack cocaine numerous times. (PCR p. 78). Mr. Scott testified that he had never seen Mr. Annus complete any transactions with Brent Gentry or Chavez Miller, but he was able to testify that he had seen Mr. Annus trade with the victim several times. (PCR p. 79). Mr. Scott testified that he would have been willing to speak with Counsel or his investigator, or testify at trial about the relationship between Mr. Annus and the victim. (PCR p. 79).

Chavez Miller

Counsel also testified that Chavez Miller was a potential witness for both the State and the defense. Counsel testified that the Applicant and his mother suggested that Chavez might have had access to the Applicant's clothing from Applicant's home. (PCR p. 23). Counsel testified that in order to try and show that Chavez Miller had access to the Applicant's clothes, Counsel would have put up the Applicant's mother as a witness. Counsel testified that Applicant's mother could have been a good witness for the defense. (PCR p. 24). Bringing in Chavez as a witness was a risk because Chavez had given a statement to police that was damaging for the Applicant's case. (PCR p. 23-4). Additionally, Counsel testified that because the statement indicated that the Applicant told Chavez (Applicant's cousin) that Applicant had killed the victim, Counsel did not want Chavez on the stand at all. (PCR p. 25). Counsel testified that although he considered that he could have attempted to impeach Chavez, he thought the risks were too great. (PCR p. 25).

The statement of Chavez Miller was introduced as Applicant's Exhibit #4. Mr. Miller's statement had his phone number listed. Counsel acknowledged that from the victim's phone records that were evidence at trial, it appeared that the victim called the number for Mr. Miller twice on the morning of February 17, 2006, which was the day he was ultimately shot. (PCR p.

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63-4). Counsel testified that he did not consider using those phone records to attempt to show that Miller had been in contact with the victim on the day of the shooting. (PCR p. 64).

This Court has reviewed the testimony presented by each of the witnesses and finds Counsel's testimony to be more credible than Ms. Murphy's testimony. This Court finds that the testimony offered by Ms. Murphy was inconsistent and would not have affected the outcome of the trial. Ms. Murphy could only claim that she did not know nor did she have any interactions with the victim, but then also testified that she was aware that she went to school with the victim's brother. This Court believes that Counsel had a legitimate reason for not calling Ms. Murphy as a witness and recommending that his client refrain from communicating with her based on the allegations raised during her altercation with a girl at school. Although the Applicant offered Ms. Murphy's testimony at the hearing, this Court finds that he suffered no prejudice from Counsel's strategic decision to not call her.

As it relates to Mr. Scott, this Court does not find his testimony credible. The fact that one of the three names mentioned, Mr. Scott only testified that he knew Mr. Annus traded for drugs with the victim, rather than any of the others draws the credibility of his testimony into question, especially when the testimony was already presented that all of the names mentioned dealt in drugs. The testimony offered simply maligned the victim's character rather than offer any substantive support for the defense. While it is possible that Counsel could have asked Mr. Annus about his drug trading, testimony was already presented to indicate that Mr. Annus smoked marijuana and had purchased it on occasion. Therefore, this Court can find no prejudice in Counsel's failure to call Mr. Scott in an attempt to either malign the victim's character or in an attempt to attack the credibility of Mr. Annus.

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As it relates to Ms. Thacker, this Court finds her testimony to lack credibility. In addition to her criminal charges, testimony presented by the Applicant indicated that the people in the trailer were all smoking weed, which could call into question her ability to accurately recall the events six years earlier.

Counsel expressed a valid strategic decision for not calling Chavez Miller as a witness, in particular because of the written statement Mr. Miller gave to police indicating that the Applicant had confessed to the crime to Mr. Miller. Following the review of the testimony presented and the evidence, including the written statement, this Court finds that it was a reasonable strategic decision on behalf of Counsel to not call Mr. Miller as a witness.

Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 835 (2005). McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003).

This Court is well aware of the established case law that an Applicant must proffer testimony of a favorable witness or otherwise offer the testimony in accordance with the evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). However, this Court finds that the testimony offered by each of the witnesses is not sufficient to establish prejudice from their failure to testify at the trial. Therefore, this claim is denied and dismissed.

Failure to Object to Hearsay

Applicant alleged that Counsel should have objected to a portion of the testimony of Captain Jackie Kellett³, witness for the State, as hearsay. Captain Kellett, when testifying about her conclusion regarding the match of a latent palm print to Applicant, indicated in her last

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statement on direct examination, that the conclusion “had been verified by a second latent print examiner in [her] office.” After reviewing the testimony of Kellett, Counsel testified that he did not know why he did not object to that statement by Captain Kellett. However, he testified that there was never a dispute as to whose print it was, although he acknowledged that a bloody print in the car was one of the strongest pieces of evidence against his client and he should have objected to the statement. (PCR p. 27-8).

Kellett was qualified as an expert in latent fingerprint identification, but Counsel cross-examined her as to the procedure of comparing the prints to prints given to her by the local police of a suspect, as well as how a print in a substance might differ from that on clean surface. This Court does not find that the brief statement affected the outcome of the trial, based upon the other evidence and testimony offered. Although Counsel may have been deficient in his failure to object to this statement, this Court finds that the Applicant suffered no prejudice as a result of the alleged deficiency.

Failure to Effectively Cross-Examine Witnesses

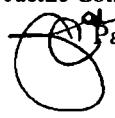
Applicant alleged that Counsel was ineffective for failing to effectively cross-examine witnesses, in particular, Mr. Brent Gentry and Mr. Raymond Annus. An attorney's performance is not deficient if it is reasonable under professional norms. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989).

Brent Gentry

Applicant alleged that Counsel was ineffective for failing to properly cross examine Brent Gentry during trial. Counsel testified that his main trial strategy was to throw the blame on Gentry, but there was no real evidence that Gentry was present at the house or actually shot the victim. (PCR p. 51). Counsel testified, as the transcript was reviewed, that he asked Gentry

³ PCR transcript references the witness as Jackie Collett.

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questions about the fact that he was in jail at the time of the trial and had been out on bond, but had done something to have that bond revoked. (PCR p. 36). Counsel also asked Gentry about potential animosity between himself and the victim, had Gentry admit that he carried a gun sometimes because of drug involvement, and that he occasionally sold drugs. (PCR p. 51-2). Counsel further testified that he was able to get Gentry to say that he was hoping for his murder charge to be dismissed, even though he claimed nothing had been promised by the State. (PCR p. 36). Counsel also testified that he cross-examined Gentry regarding his testimony that when he showed up at Applicant's home, he saw no blood or evidence of the shooting, when the police found a great deal of blood and shell casings. (PCR p. 59).

Counsel acknowledged receiving a copy of Gentry's SLED record in discovery, but did not recall why he did not ask additional questions as to what charge specifically caused Gentry's bond to be revoked. (PCR p. 37). Applicant's Counsel introduced Gentry's SLED record as Applicant's Exhibit #2. (PCR p. 40). Further, Counsel testified that he did not, but would have been proper cross examination for him to ask Gentry about the pending murder charge, as well as the probation revocation proceeding for a four year drug charge that was pending. (PCR p. 38).

Counsel testified that he did not further cross-examine Gentry on his relationship with the Applicant, because although Gentry testified that he had seen the victim only a few times, but knew the Applicant for about ten years, the fact that Gentry had known the Applicant was about ten years was not disputed. Rather, Counsel testified that the Applicant knew Gentry and knew his reputations and had even had some dealings with him, but did not consider Gentry a close friend. (PCR p. 65-6). Counsel acknowledged that he did cross-examine Gentry on his

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2013 JUL 15 PM 4:38
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relationship with Chavez Miller, but only did that because he had received assurances from the State that they were not calling Chavez Miller as a witness. (PCR p. 66-7).

Raymond Annus

Applicant also alleged that Counsel failed to cross examine Mr. Annus on various issues. Counsel agreed that he did not ask Mr. Annus any questions about Brent Gentry or his connection to Gentry and did not remember that his investigator did anything to investigate that particular connection. (PCR p. 30). Additionally, Counsel acknowledged that he did not ask Mr. Annus about the alleged habit of trading pills for marijuana. (PCR p. 40). However, Counsel also testified that Mr. Annus had no criminal record and there was no concrete evidence regarding any exchanging of pills or drugs. (PCR p. 52).

Regarding Counsel's cross-examination of Mr. Gentry, this Court finds no deficiency. Although Counsel failed to ask Mr. Gentry about a potential four year probation revocation he faced, Counsel did raise the question as to the murder charge that Mr. Gentry faced, which is much more significant and has much more bearing on any motivation to testify. Furthermore, Counsel was able to bring out Mr. Gentry's drug sales, gun possession, and other prior convictions. Additionally, Counsel cross-examined Gentry on the fact that the victim and Applicant had a friendly relationship and there had been no animosity. In regards to his relationship with the Applicant, although Mr. Gentry testified that he had known the Applicant for ten years, he only briefly stated, when asked if they were friends, "you could say that." (Tr. p. 523). However, this Court does note that Mr. Gentry testified that he knows the Applicant through his (Mr. Gentry's) cousin, Byron Lowder and he and the Applicant spent part of the day of the shooting at Mr. Lowder's home. (Tr. p. 523-4). Similarly, the Applicant testified at the PCR hearing that on the day of the shooting, he and Mr. Gentry went to his (Applicant's) cousin

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Byron's house following the disposal of the body. (PCR p. 97). Applicant continued to testify about his and Mr. Gentry's visit at his (Applicant's) cousin Byron's house as well. (PCR p. 113-5). This Court finds that the fact that both the Applicant and Mr. Gentry were related in some sort of fashion, further calls into question the credibility of the Applicant's testimony.

As to any questions regarding Mr. Annus' relationship with Mr. Gentry, Applicant's own witness Mr. Scott, testified that he had never seen Mr. Annus trade pills for drugs with Mr. Gentry. Therefore, the Applicant failed to show that if Counsel had asked any questions regarding any alleged relationship between the two would have provided any additional information.

The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation and of showing 'whether such information would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1449, 1459 (9th Cir. 1995).

Accordingly, the Applicant has not shown that a different approach to cross-examination on either of these witnesses would have been beneficial to the defense. The Applicant did not present any testimony showing the witnesses' answers at trial would have been different. Moreover, this Court finds that the information presented by the Applicant was not sufficient to have altered the outcome of Applicant's trial had it been presented. Therefore, this claim is denied and dismissed.

Failure to Properly Advise Applicant Regarding Testifying at Trial

Counsel testified that he did discuss with Applicant his right to testify, but the Applicant

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indicated to Counsel that he did not want to testify. (PCR p. 13-4). Counsel testified that he talked with the Applicant about the fact that his testimony could be valuable, but also that his testimony did not reconcile with the evidence and could present a problem. Counsel testified that the story the Applicant told him regarding the Brent Gentry wearing Applicant's clothes and shooting the victim, but then Applicant going on his own to dispose the body and then, being afraid of, but later spending all day with Gentry, did not appear to make sense. (PCR p. 14). Additionally, Counsel testified that there were some issues regarding whether or not the victim may have shot a gun based upon a shell that was found on the driveway, but then the victim had no gunshot residue on his hands. (PCR p. 15).

Counsel also testified that at the time of the decision regarding the Applicant testifying, he talked with him some about being able to have the last argument, if no evidence was put up by the defense. (PCR p. 18). Counsel testified that it was never the strategy to not present evidence in order to have last argument, but the witnesses they had available to testify were not and Counsel did not believe they would have been beneficial to the case. Applicant introduced his criminal record, which indicated a simple possession of marijuana charge only, as Applicant's Exhibit #1. (PCR p. 18).

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The Applicant testified that he never discussed with Counsel the fact of whether or not they could still put up evidence or witnesses for the defense even if the Applicant did not testify. (PCR p. 105). However, Applicant acknowledged that at the time of trial, when he informed the court that he agreed that he did not want to testify, he was just putting his trust in Counsel and "rolled with it, with the flow." (PCR p. 110).

This Court finds Counsel's testimony on this issue to be more credible than Applicant's testimony. This Court is not convinced that the Applicant wanted to testify on his behalf at trial

or that Counsel never discussed with him the options of calling other witnesses, when that information is directly refuted by the record. It is clear that the Applicant was aware of his right to testify and this Court finds that he chose to not testify on his own accord, after discussing the options with Counsel. Additionally, this Court, after reviewing the testimony provided by the Applicant at the hearing, finds his explanation of the events of that day to lack credibility and to be rather unbelievable. In particular, the Applicant's claims that Mr. Gentry was wearing Applicant's clothes, but picked up the Applicant at the pond and then later returned to the pond where the car was to try and disposed of the clothes, Applicant's failure to explain the lack of blood in the Cadillac, and his description of how he disposed of his own clothes. (PCR p. 95-96; 112-3). This Court finds no deficiency and can find no prejudice as a result of any actions of Counsel. This Court does not believe that Counsel offered any incorrect advice to the Applicant regarding his right to testify or whether or not he should testify based upon the testimony presented at the hearing. Therefore, this claim is denied and dismissed.

Failure to Convey and Discuss Plea Offers with Applicant

Applicant alleged that Counsel was ineffective for failing to convey and discuss plea offers with him prior to and during the trial. Counsel testified that prior to trial, the State had offered to reduce the charge to voluntary manslaughter and then sometime subsequent to that offer, the State made an offer of nineteen years. However, Counsel testified that he could only find a letter in his file regarding the offer reducing the charge to voluntary. (PCR p. 7). Counsel testified that prior to trial he did convey the offers to his client. Counsel also testified that he specifically recalled reviewing with Applicant the fact that voluntary manslaughter would be an 85% sentence rather than day for day. (PCR p. 53). However, Counsel testified that the Applicant rejected both offers. (PCR p. 7-8). Counsel also testified that following the

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presentation of the State's case, upon Counsel's request, the State indicated that they would be willing to talk with the victim's family and consider sixteen years if the Applicant would commit to that at the time. Counsel testified that he shared that information with the Applicant and the Applicant did not want to commit to accepting a sixteen year offer. (PCR p. 8; 10-11). Counsel testified that the reasons the Applicant gave for not accepting any of the offers was that he did not shoot the victim and was not guilty of anything, but that Brent Gentry was the one who shot the victim. (PCR p. 12-3). However, Counsel did testify that the Applicant admitted to disposing of the body. (PCR p. 13).

The Applicant testified that Counsel only relayed an offer of thirty years to him prior to trial and at first testified that he supposed it was for murder, but then stated that it was for manslaughter. (PCR p. 102). The Applicant testified that was the only offer he ever heard of from Counsel and that Counsel never came to him before trial with a nineteen year offer or during trial with a consideration for sixteen years. (PCR p. 102-3). Applicant testified that he would have taken the sixteen year consideration had he known about it during trial. (PCR p. 103). Applicant also testified that Counsel never reviewed with him the different between manslaughter being an 85% sentence versus murder being a day for day sentence. (PCR p. 109).

The Applicant's mother, Elizabeth Walker, also testified that she was told of a plea offer for thirty years to the charge of murder by Counsel, but was never informed of any other plea offers. (PCR p. 116). She also testified that after hearing the evidence presented at trial, if she had known there was a possibility for sixteen year sentence for voluntary manslaughter, she would have encouraged her son to take that sentence. (PCR p. 117).

The South Carolina Supreme Court has held that a case-by-case approach is appropriate for assessing "whether but for counsel's deficient performance a defendant would have accepted

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the State's proposed plea bargain and that he would have benefited from the offer.” Davie v. State, 381 S.C. 601, 613, 675 S.E.2d 416, 422 (2009). However, presumed prejudice is not appropriate and an Applicant must demonstrate actual prejudice. Id. (citing Nance v. Ozmint, 367 S.C. 547, 552, 626 S.E.2d 878, 880 (2006)).

This Court finds Counsel’s testimony as to the plea offers and the Applicant’s subsequent rejection of the offers to be credible. This Court does not find Applicant’s testimony credible that he would have accepted a lesser-offer had he known about it based upon his continued insistence as to his innocence of shooting the victim and only being involved in disposing of the body. This Court does not make any credibility findings as to the testimony of the Applicant’s mother because it is possible that she was unaware of the plea offers closer to and during trial. This Court finds that the Applicant failed to offer credible testimony that Counsel failed to convey these plea offers to him. Furthermore, the Applicant specifically testified that between the option of finishing the trial or accepting a sixteen year offer, he “probably,” would have taken the sixteen years instead of receive a life sentence. This Court finds that it is possible the Applicant failed to offer sufficient evidence that even if there was a plea offer that Counsel had failed to convey, that he would have accepted the offer. Therefore, this claim is denied and dismissed.

Failure to Properly Communicate with Applicant Regarding State’s Evidence

Counsel testified that he spoke with Applicant prior to trial about the nature of the State’s forensic evidence, including the palm print. (PCR p. 30). Counsel testified that his main concern was that if they had an independent test done on the palm print and it indicated that it was the Applicant, which was Counsel’s understanding from their conversations, then the State would have the right to have that information. (PCR p. 31). Counsel testified that he did not want to make the State’s evidence any stronger. (PCR p. 31). Counsel also testified that he did

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nothing to determine if it was possible that it was a palm print with blood on top of it, other than a palm print made with blood. (PCR p. 32). Counsel testified that he never told the Applicant that the print could be discounted because Counsel knew all along that it was the Applicant's print based upon what the Applicant told him. (PCR p. 33). Counsel testified that he did not ever tell the Applicant, prior to trial, that he thought he could raise the question in the jury's mind as to whether or not the palm print was on top of rather than made in the blood. (PCR p. 33-4).

Counsel also testified that he reviewed with the Applicant the results of the DNA testing prior to trial. (PCR p. 34). Counsel testified that he did send some of the clothes off in an attempt to see if Gentry's DNA would be found, but that test was inconclusive. Counsel testified that he made it clear that the inconclusive result was only as to the clothing and not the other blood evidence in the case. (PCR p. 35).

The Applicant testified that Counsel reviewed discovery materials with him prior to trial. Applicant also testified that he was aware that Brent Gentry was pointing to the Applicant as the shooter and he was aware that the police had seized a Timberland shoe box from his home and that the size and style matched the boots found at the scene. The Applicant also testified that Counsel had shared with him the fact that there was a bloody palm print inside the car, which the State was claiming was the Applicant's, along with the fact that the forensic reports indicated that there was a match between the blood on the shoes and the victim. (PCR p. 99).

This Court finds that Counsel met with Applicant and thoroughly reviewed the discovery materials and potential trial strategy. There was no testimony or evidence presented that Counsel ever mischaracterized evidence or failed to review with the Applicant the discovery materials in preparation for trial. Additionally, the Applicant has failed to show that any conversation with

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Counsel regarding the State's evidence prejudiced him in anyway. Therefore, this claim is denied and dismissed.

Ineffective Assistance of Appellate Counsel

The Applicant has claimed that trial counsel, who also represented Applicant on direct appeal, was ineffective for failing to file a merits brief and instead filing an Anders brief. However, the Applicant presented no testimony or evidence to support his claims in this regard. Therefore, this claim is denied and dismissed.

Summary

This Court finds that Counsel is an experienced attorney who was prepared for and effectively represented Applicant at his trial. This Court finds counsel adequately conferred with the Applicant, was thoroughly competent in his representation, and that Counsel's conduct does not fall below the objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence Counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland that he was prejudiced by Counsel's performance. There is no evidence that the outcome of the trial would have changed based upon any of the allegations of deficiency. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, this allegation is denied.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not



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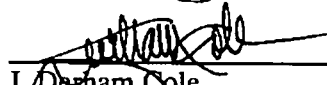
established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court cautions 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), SCRCR, 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. Your 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.

AND IT IS SO ORDERED this 10 day of July, 2013.



J. Derham Cole
Presiding Judge
Seventh Judicial Circuit

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August 19, 2013

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S.C. Supreme Court

The Honorable Daniel E. Shearouse
South Carolina Supreme Court Clerk
Post Office Box 11330
Columbia, South Carolina 29211-1330

Re: Isaiah Walker, 322149 v. State of South Carolina; 2010-CP-42-5368.

Dear Mr. Shearouse:

Enclosed please find for filing a Notice of Appeal on behalf of the above-captioned Post-Conviction Relief client. I would appreciate your returning two (2) clocked copies to me in the stamped self-addressed envelope provided. I have been *retained* by the family to handle this appeal. I have already received the transcript of the PCR hearing held in this matter and request that the time limits be set from the date this Notice of Appeal is filed. I have courtesy copied the Appellate Division of the South Carolina Commission on Indigent Defense on this correspondence so they will make note that I am retained in this case, and won't need to send me an inquiry concerning this appeal. With my thanks for your assistance in this matter, as always, I remain,

Sincerely yours,

A handwritten signature in cursive script that reads "Tara Dawn Shurling".

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg

Enclosures

cc: Suzanne H. White, Assistant Attorney General (w/enclosure)
Sharon Graham, South Carolina Office of Appellate Defense

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August 19, 2013

Suzanne H. White, Assistant Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-

Re: Isaiah Walker, 322149 v. State of South Carolina; 2010-CP-42-5368.

Dear Ms. White:

A handwritten signature in cursive script, appearing to read "Suzanne".

Enclosed please find for your records a copy of the Notice of Appeal that was filed in the above-captioned matter. I was retained in this Post-Conviction Relief case and have also been retained for the PCR appeal. If you have any questions please do not hesitate to call. Since I already have the PCR hearing transcript, I have asked that my filing deadline for the Petition for Writ of Certiorari be set from the date of this Notice of Appeal. I remain,

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Tara".

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg

Enclosure

cc: The Honorable Daniel E. Shearouse, Clerk, Supreme Court of South Carolina