

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT  
APPEAL FROM HAMPTON COUNTY  
Court of Common Pleas  
The Honorable J. Derham Cole, PCR Action Judge  
2020-CP-25-00257

**RECEIVED**  
**Aug 26 2024**  
S.C. SUPREME COURT

MALCOLM ORR, #329462,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**NOTICE OF APPEAL**

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Malcolm Orr appeals the denial of his post-conviction relief application. The post-conviction relief action was heard and denied by the Honorable J. Derham Cole, circuit court judge, on May 7, 2024, and was denied by written order issued filed on August 13, 2024.

Applicant received notice of the judgement on August 15, 2024.

/s Chelsey F. Marto  
Chelsey F. Marto, Esquire  
Attorney for the Applicant  
The Law Office of Chelsey F. Marto, LLC  
P.O. Box 8795  
Columbia, SC, 29201  
(864)-404-5583

Other Counsel of Record:  
Danielle Dixon, Esquire  
Office of the Attorney General, State of SC  
P.O. Box 11549  
Columbia, SC, 29211-1549

STATE OF SOUTH CAROLINA  
COUNTY OF HAMPTON

**FILED**  
IN THE COURT OF COMMON PLEAS  
AUG 13 2024  
NINETEENTH JUDICIAL CIRCUIT

Malcolm Antwon Orr, #329462,

MYLINDA D NETTLES  
CLERK OF COURT  
HAMPTON COUNTY, SC

Applicant

**FILED**  
AM/PM

**ORDER OF DISMISSAL**

v.

The State of South Carolina,

**AUG 13 2024**

Case No.: 2020-CP-25-00257

Respondent

MYLINDA D NETTLES  
CLERK OF COURT  
HAMPTON COUNTY, SC

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by Malcolm Antwon Orr. (Applicant) on June 4, 2020. On May 7, 2024, an evidentiary hearing convened before Circuit Judge J. Derham Cole. Applicant was present and represented by Chelsey Marto, Esquire. Assistant Attorney General Danielle Dixon represented the State. At the hearing, Applicant testified on his behalf and called as a witness trial counsel Robert M. Hughes, Esquire. The State entered as evidence a video of the shooting that was introduced at trial. Following a thorough review of the records before this Court and the testimony and evidence presented at the hearing, this Court finds Applicant did not meet his burden of proof. The Court denies Applicant relief and dismisses his application with prejudice.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections serving an aggregate thirty-five-year sentence. In February 2016, the Hampton County Grand Jury indicted Applicant for attempted murder and possession of a weapon during the commission of a violent crime (2016-GS-25-12, -13). These charges arose from the shooting of Officer Quincy Smith on January 1, 2016, which was captured on an eyeglasses-camera worn by Officer Smith.

On August 7, 2017, Applicant proceeded to a jury trial before the Honorable Roger M.

Young, Sr. Robert Hughes, Esq., represented Applicant. Circuit Solicitor Isaac McDuffie Stone and Assistant Circuit Solicitor Brian Hollen prosecuted the case. Applicant was convicted as indicted and sentenced to consecutive terms of thirty years for attempted murder and five years for possession of a firearm during the commission or attempted commission of a violent crime.

Applicant filed a notice of appeal, which was perfected by Appellate Defender Susan B. Hackett through the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The Court of Appeals dismissed pursuant to Anders. State v. Orr, 2019-UP-204 (filed June 5, 2019). The remittitur was sent June 21, 2019.

#### CURRENT PCR APPLICATION

On June 4, 2020, Applicant timely filed this PCR application alleging the following:

- a. Ineffective assistance of counsel: counsel was not properly prepared for trial and failed to properly object to the admission of highly prejudicial evidence; and
- b. Trial court error: the trial court erred in allowing the admission of the complete video of the event captured by Officer Smith's eyeglass camera.

Applicant requested for a reversal of his convictions and granting of a new trial.

Prior to the hearing, Applicant filed an amended application alleging counsel was ineffective for:

1. Failing to object to the Court charging the jury that specific intent is not an element of attempted murder (Tr. 284-85);
2. Failing to contemporaneously object to the video entered at trial (Tr. 130);
3. Failing to contemporaneously object to the chain of custody (Tr. 262);
4. Failing to object to the State burden-shifting during closing argument (Tr. 272); and

5. Failing to properly prepare for trial, including preparing a proper defense for trial.

At the hearing, Applicant proceeded on the five allegations of his amended application. Applicant also argued counsel was ineffective for not challenging the search warrant of a cell phone. Applicant did not present any testimony, evidence, or argument on any other claim, and this Court finds any additional claims were waived.

#### **FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

This Court has had the opportunity to review the records before it, including the Beaufort County Clerk of Court records of the underlying convictions; Applicant's records from the South Carolina Department of Corrections; Applicant's appellate records; and the records of Applicant's PCR application. This Court has further had the opportunity to observe the witnesses presented at the evidentiary hearing, closely pass upon their credibility, and weigh their testimony accordingly. 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 fact and conclusions of law as required by section 17-27-80 of the South Carolina Code of Laws Annotated.

#### **Ineffective Assistance of Counsel**

In a PCR action, an applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When the application alleges ineffective assistance of counsel, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. at 687-88. First, an applicant must prove counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625

(1989). Under this prong, courts measure an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, the applicant must prove that counsel’s deficient performance prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

*Failure to object to specific intent jury charge*

Applicant first contends counsel was ineffective for not objecting when the trial court charged the jury that attempted murder is not a specific intent crime. This Court finds Applicant did not prove prejudice from counsel’s failure to object to this charge.

At trial, the Court charged, “A specific intent to kill is not an element of attempted murder, but there must be a general intent to commit serious bodily injury.” Counsel did not object.

Although this charge was incorrect under State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017),<sup>1</sup> there is no reasonable probability this charge affected the outcome due to the overwhelming evidence of guilt. Cf. State v. Campbell, No. 2022-000349, 2024 WL 3435066, at \*4 (S.C. July 17, 2024) (“Erroneous jury instructions are subject to a harmless error analysis). In addition to Officer Smith’s testimony about the shooting, the State entered into evidence the video from Officer Smith’s eyeglasses-camera. The quality of the video is clear, and Applicant is depicted

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<sup>1</sup> Although this opinion was decided after Applicants trial, the Court of Appeals had previously determined that attempted murder is a specific intent crime. State v. King, 412 S.C. 403, 772 S.E.2d 189 (2015), overruled on other grounds by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019).

clearly and plainly in the video before the shooting. In the video, Officer Smith—who is attempting to detain Applicant based on reports that Applicant had just attempted to rob a man at a convenience store—repeatedly asks Applicant to stop and take his hands out his pocket. Officer Smith approaches Applicant; when he is in very close range, Applicant looks directly at him, pulls out a gun, and fires multiple times.<sup>2</sup> Based on this overwhelming evidence, this Court finds beyond a reasonable doubt the charge did not contribute to the verdict. Likewise, there is no reasonable probability the outcome would have been different had counsel objected. Thus, this claim is denied.

*Failure to contemporaneously object to video*

Applicant next contends counsel was ineffective for not contemporaneously objecting to the video entered at trial. At trial, Applicant generally averred counsel did not timely object to the video, and the outcome would have been different if he had. This Court finds Applicant did not prove counsel was ineffective in this regard.

At trial, counsel objected to the beginning of the video on the basis it contained evidence of a prior bad act by Applicant (i.e. an eyewitness statement that Applicant had attempted to rob another man). Counsel objected to the end of the video on the basis the probative value was outweighed by the danger of under prejudice. After hearing argument from the State, the Court determined the initial portion of the video was part of the res gestae of the incident itself and necessary for explaining why Officer Smith was approaching Applicant in the first place. The Court further determined the probative value of both the beginning and the end of the video outweighed any prejudicial effect.

Initially, although counsel did not object to the portion of the video depicting this shooting itself, Applicant did not set forth a valid objection to that portion of the video, and this Court is not

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<sup>2</sup> Eight shots can be heard in the video. Law enforcement recovered eight cartridge casings from the scene, all of which were fired by the same firearm. (Tr. 239).

aware of one. Thus, counsel's performance in that regard was not deficient. Regarding the remaining portions of the video, this Court finds it is not reasonably likely a contemporaneous objection at the time the evidence was entered would have changed the outcome. (Tr. 130). At the PCR hearing, counsel credibly testified this was also an issue he raised in chambers with the Court. This issue was clearly before the trial court, who ruled on the record, and this Court finds it is not reasonably likely a renewed objection when the evidence was entered would have caused the judge to exclude the beginning or end of the video. Applicant likewise did not set forth what further argument counsel should have made that would have successfully excluded any portion of the video and thus did not meet his burden in this regard. Finally, even if the beginning and end of the video had been excluded, it is not reasonably likely the outcome would have been different. Critically, the shooting itself was clearly depicted in the video and constituted overwhelming evidence that Applicant in fact attempted to murder Officer Smith. As stated, Applicant has not set forth a viable objection to this portion of the video, and this Court is not aware of any. Thus, even if counsel had successfully excluded the beginning and end of the video, this Court finds it is not reasonably likely the outcome would have been different, and this claim is denied.

*Failure to contemporaneously object to chain of custody (Tr. 262)*

Applicant next argues counsel was ineffective for failing to contemporaneously object to the chain of custody for a bullet recovered from Officer Smith's body. At the PCR hearing, Applicant merely averred counsel did not timely object, and it would have made a difference if counsel had objected. This Court finds Applicant did not prove this claim.

Initially, counsel *did* contemporaneously object to the admissibility of the bullet, which was entered as State's Exhibit 12. (Tr. 236). Thus, counsel was not deficient in this regard. Applicant likewise cannot show prejudice due to the very low probative value of the bullet.

Although the firearms expert opined it “was most consistent with a nine-millimeter Luger caliber bullet,” she acknowledged there were several possible manufacturers for the bullet.<sup>3</sup> Critically, based on other evidence presented by the State—specifically the video of the shooting itself—it is not reasonably likely the outcome would have been different had this bullet been excluded. Thus, this claim is denied.

*Failure to object to the State’s burden-shifting (Tr. 272)*

Applicant next argues counsel was ineffective for not objecting to the State’s burden shifting argument during closing argument.<sup>4</sup> This Court finds Applicant did not prove this ground.

Initially, although the appellate courts have admonished trial courts from using truth-seeking language, this Court is not aware of any cases applying that same admonishment to solicitors during closing argument, and Applicant has not set forth any such case. See, e.g., State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018) (finding trial court’s truth-seeking language during preliminary remarks were improper but did not warrant reversal); State v. Daniels, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012) (“[W]e instruct the trial judge to remove any suggestion from his general sessions charges that a criminal jury’s duty is to return a verdict that is “just” or “fair” to all parties.”). Thus, Applicant did not prove deficiency.

Further, it is not reasonably likely the outcome would have been different had counsel objected to this language. Critically, the trial court’s jury charge was proper and did not include truth-seeking language, and the trial court charged the jury that it must accept the law as charged by the Court. (Tr. 276-77). Further, even if this statement by the solicitor was improper, it did not

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<sup>3</sup> Police recovered eight fired nine-millimeter Luger caliber cartridge casings from the scene, and the expert opined they were fired by the same gun. Law enforcement, however, never recovered a weapon and thus could not link the bullet or fired cartridges to a weapon owned or used by Applicant.

<sup>4</sup> During closing argument, the State concluded, “When you come back with a verdict, speak the truth.” (Tr. 272).

amount to burden-shifting. See State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000) (finding truth-seeking language in jury charge did not shift the burden of proof because it was not charged in conjunction with the reasonable doubt charge or the circumstantial evidence charge). Thus, Applicant did not prove deficiency or prejudice, and this claim is denied.

Failure to prepare

Applicant asserts counsel was ineffective for failing to properly prepare for trial, including preparing a proper defense. However, at the PCR hearing, Applicant did not set forth or introduce any evidence counsel should have introduced; any issue counsel should have further investigated that would have reasonably changed the outcome; or any defense counsel should have pursued. Applicant thus did not meet his burden of proving this ground. Further, this Court finds credible trial counsel's testimony that he discussed this case extensively with Applicant. Ultimately Applicant failed to meet his burden of showing any viable defense counsel should have pursued or any specific thing counsel did not prepare that would have reasonably changed the outcome. Thus, Applicant did not prove deficiency or prejudice, and this claim is denied.

Search warrant of cell phone

Finally, at the PCR hearing, Applicant stated he wanted counsel to challenge the search warrant of a cell phone that was used for identification purposes. This Court finds Applicant did not prove this ground.

At trial, the State entered without objection a cellphone recovered from the crime scene (State's Ex. 4). (Tr. 204, 208, 218-19). Lieutenant Britt Dove, an expert in forensic computers, testified he performed an extraction on the phone and recovered two outgoing texts:

- Dis Mack-Mack. Goals over Dreams.
- Wassup, Bruh. Dis Malcolm. Happy New Years's Bruh, and dis my new number. Goals over dreams.

Initially, Applicant did not set forth what challenge counsel should have made to the admissibility of the cell phone other than to generally aver counsel should have challenged the search warrant. To the extent Applicant is referring to the search warrant for the contents of the phone, Applicant did not produce any search warrant or set forth what was allegedly wrong with the warrant that counsel should have challenged and thus did not prove deficiency.

Likewise, even if there was a valid challenge to the search warrant for the cell phone extraction,<sup>5</sup> this Court finds it is not reasonably likely the outcome would have been different without the text messages. The probative value of the messages themselves was very low in light of the properly-admitted video that clearly depicted Applicant's face right before the shooting. Thus, Applicant did not prove prejudice, and this claim is denied.

### CONCLUSION

Based on the foregoing, this Court concludes Applicant has not established any constitutional violations that would require this Court to grant relief. The application for relief should be and therefore is denied and dismissed with prejudice.

Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty 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 Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on applicant's behalf. Rule 71.1(g), SCRPC. Attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.


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<sup>5</sup> The phone itself was recovered from the crime scene, and Applicant has not set forth any valid objection (nor is this Court aware of any) to the admissibility of the phone itself.

**IT IS THEREFORE ORDERED:**

1. This application for PCR is denied and dismissed with prejudice; and
2. Applicant shall be remanded to and remain in the custody of the State for completion of the sentence imposed.

**AND IT IS SO ORDERED!**

  
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J. Derham Cole  
Presiding Judge  
Fourteenth Judicial Circuit

August 7, 2024  
Spartanburg, South Carolina



**STATE OF SOUTH CAROLINA**  
**THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT**

J. DERHAM COLE  
JUDGE

180 MAGNOLIA STREET, 2ND FLOOR  
POST OFFICE BOX 1744  
SPARTANBURG, SOUTH CAROLINA 29304-  
1744  
TELEPHONE: (864) 596-2685  
FAX: (864) 596-3592  
E-MAIL: jcolej@sccourts.org

August 7, 2024

The Honorable Mylinda D. Nettles  
PO Box 7  
Hampton, SC 29924-0007

Re: 2020-CP-25-00257  
Malcolm Antwon Orr, SCDC #329462 v. The State of South Carolina

Dear Clerk;

Enclosed please find for filing an order(s) with reference to the above-captioned case(s). Upon entry of the order(s), please serve notice upon the affected parties in accordance with *Rule 77(d) of the South Carolina Rules of Civil Procedure*. Thank you in advance for your usual and capable assistance in this matter.

With kindest personal regards, I remain,

Sincerely yours,

**J. Derham Cole**  
Resident Judge  
The Seventh Judicial Circuit

843-929 -  
6898  
Frank  
Blake