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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-18-00756

Terek Goodwin, ...Petitioner,

v.

State of South Carolina, ...Respondent.

NOTICE OF APPEAL

Petitioner, Terek Goodwin, appeals the order of the Honorable Paul M. Burch, dated September 26, 2024, and filed October 15, 2024. Petitioner received written notice of entry of this order on October 15, 2024.

10/16, 2024

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STATE OF SOUTH CAROLINA COUNTY OF DORCHESTER	)	IN THE COURT OF COMMON PLEAS FOR THE FIRST JUDICIAL CIRCUIT
Terek Goodwin, SCDC #295362, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2022-CP-18-00756 **ORDER OF DISMISSAL**

This matter is before the Court pursuant to an application for post-conviction relief ("PCR") filed by Terek Goodwin ("Applicant") on May 9, 2022. On February 6, 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 and called as a witness Ashley D. Chisholm, Esquire ("Chisholm"). Respondent called as a witness John T. Kornegay, Esquire ("Kornegay"). 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.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections ("SCDC") serving a thirty (30)-year sentence. On June 10-12, 2019, Applicant proceeded to a jury trial before the Honorable Perry M. Buckner, III. Assistant Solicitors Michael Spears and George Smythe prosecuted the case. Applicant was represented by Ashley Chisolm, Esq., and John Kornegay, Esq. (referenced collectively as "trial counsel"). The jury convicted Applicant of

burglary – first degree and kidnapping as indicted and strong-arm robbery. Judge Buckner sentenced Applicant to thirty (30) years for burglary – first degree, thirty (30) years for kidnapping, and fifteen (15) years for strong arm robbery. Judge Buckner ordered the sentences to be served concurrently.

On June 20, 2019, a notice of appeal was filed on Applicant's behalf by John Kornegay, Esquire. On March 26, 2021, the appeal was perfected by Tommy A. Thomas, Esquire, who filed a final brief on Applicant's behalf. Applicant's appeal raised the following issue(s):

> [Whether] the circuit court erred as a matter of law when it overruled Appellant's objection to the fact that jury qualifications occurred outside of the presence of both defendant and defense counsel, as such absence violates Appellant's right to due process and a fair trial pursuant to the United States and South Carolina Constitutions, as well as laws and rules propounding this right.

Following briefing and without oral argument, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences, finding the issue unpreserved. *State v. Goodwin*, Op. No. 2022-UP-159 (S.C. Ct. App. filed April 6, 2022). The Remittitur was sent on April 29, 2022.

II. CURRENT APPLICATION

Applicant timely commenced this PCR action on May 9, 2022, alleging he is being held in custody unlawfully for the following reasons:

> Ineffective Assistance of Counsel
> a. Failing to preserve for appeal the issue of the manner in which the trial court conducted jury qualifications.

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

Ineffective Assistance of Counsel

b. Failing to meet with Applicant a sufficient number of times to be adequately prepared to try the case.
c. Failing to advise Applicant that jury qualifications was being held outside of his presence.
d. Failing to object to jury qualifications being held outside of Applicant's presence, thereby not preserving the error for appellate review.
e. Failing to object to the trial judge's charge on circumstances evidence not being 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.

III. TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant averred he only met with trial counsel once. On cross-examination, Applicant testified his meeting with trial counsel lasted one (1) to two (2) hours. Applicant testified discussed the case with trial counsel including pleas, testifying, and whether Applicant's co-defendants would testify. Applicant averred he did not discuss trial strategy with trial counsel and did not believe there was enough time to meet. Regarding jury qualification, Applicant testified he learned about prior jury qualification when trial counsel objected. Applicant testified that he did not know he had a right to be present at jury qualification but wanted to be there. Applicant testified trial counsel did not contemporaneously object so the issue was not preserved. Applicant averred his accuser (co-defendant) did not show up to trial, and trial counsel did not discuss the benefit or disadvantage of the co-defendant being there or the elements of the offenses.

John Kornegay testified he was appointed to represent Applicant after Applicant's private counsel was relieved, and Kornegay met with Applicant six (6) times during the representation.

Kornegay testified that Applicant was out on bond prior to trial and could have called or scheduled an appointment to meet with trial counsel. Kornegay testified that, in chambers, Judge Buchner told the attorneys that he would hear pre-trial motions while jury qualifications were going on in a separate courtroom. Kornegay testified trial counsel and the solicitors did not understand the judge meant jury qualification and did not understand what was happening. Kornegay testified that he has been present at jury qualifications before, at which, the judge asks statutory questions to the jury panel. Kornegay testified he is unaware of a basis to object to the trial judge's questions at jury qualification because the questions are based on statute. Kornegay testified that criminal defendants are often present at jury qualification in Dorchester County. Kornegay testified that he does not know whether it was necessary for counsel to be present at jury qualification but it would have been helpful to hear information on the potential jurors and their spouses' occupations. Kornegay testified that although they had notes from qualifications, trial counsel would have taken more. On cross-examination, Kornegay testified the notes provided by someone in the public defender's officer were not as thorough as the notes trial counsel would have taken. Kornegay testified he was unsure whether trial counsel's and Applicant's absences at jury qualifications affected the outcome of trial.

Ashley Chisholm testified he served as second-chair on Applicant's trial and met with Applicant three (3) times. Chisholm testified that typically attorneys are not present when the jury panel comes in. Chisholm testified that, while doing pre-trial motions, another public defender told him that the jury was being qualified. Chisholm testified he believed the jury was just "checking-in" for roll-call, and not being questioned about their jobs. Chisholm testified that in Dorchester County, the attorneys are usually present for jury qualification. Chisholm testified

that when he realized the jury was being qualified in trial counsel's absence, trial counsel objected. Chisholm testified he believes there is value in attending jury qualification because *voire dire* is limited and jury qualification allows potential jurors' demeanor. Chisholm testified he has never been to jury qualification where criminal defendants were transported.

Chisholm testified that someone from the public defender's office took notes of jury qualification when they realized trial counsel was not present. Chisholm testified he does not recall if the person that took notes was able to take note of the entire qualification process or everyone's occupation. Chisholm testified he saw notes that were specific to exemptions but does not recall seeing occupations. Chisholm testified that he would have been present and would have had Applicant present.

On cross-examination, Chisholm testified the solicitors were also absent from jury qualification. Chisholm testified that in jury qualification, he cannot recall counsel having input in but counsel sometimes will approach the jury to ask questions. Chisholm testified he agrees the questions the trial judge asks the jury panel are statutory questions. Chisholm testified he also agrees that jury qualification is a different from *voire dire*. Chisholm testified trial counsel and Applicant were present for *voire dire*. Chisholm testified the judge gave trial counsel a clean copy of the criminal records of potential jurors from the solicitor's office. Regarding the *Logan* charge, Chisholm testified that trial counsel requested the *Logan* charge and agrees the trial judge charged the jury in conformity with *Logan.*

IV. 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 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.

A. Failure to Meet Sufficiently, Spend Adequate Time, and Adequately Prepare

This Court finds Applicant failed to prove trial counsel was ineffective for failing to meet with him sufficiently and spend adequate time on the case to be adequately prepared. "[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) (application 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 trial counsel met with Applicant sufficiently, spent adequate time, and adequately prepared in accordance with prevailing professional norms. This Court finds **credible** trial counsel's testimonies that they met with Applicant several times. This Court also finds **credible** Kornegay's testimony that Applicant was out on bond and could have met with or called trial counsel if additional time was needed. Further, this Court finds Applicant failed to prove he was prejudiced by failing to show evidence of what information or defenses trial counsel could have discovered if they had prepared more fully. Thus, Applicant did not meet his burden.

B. Failure to Object to Applicant's Absence at Jury Qualification

This Court finds Applicant failed to prove he was prejudiced by Counsel's failure to object to his absence at jury qualification because Applicant does not have a Sixth Amendment right to be present at jury qualification. 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).

The Sixth Amendment guarantees a criminal defendant the right to a public trial with a jury. U.S. Const. amend. VI. Under the Sixth Amendment, a defendant has the right to be present at any stage of the criminal proceeding that is *critical* to its outcome *if his presence would contribute to the fairness of the procedure*. *State v. Shuler*, 344 S.C. 604, 624, 545 S.E.2d 805, 815 (2001) (emphasis added). A defendant's right to be present is limited to critical stages "whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge[s]." *Kentucky v. Stincer*, 482 U.S. 730 (1987). The defendant's right to be present is not guaranteed "when [his] presence would be useless, or the benefit but a shadow[.]" *Id.*

The procedure for jury qualification is codified in the South Carolina Code as follows:

> The presiding judge shall at each term of court ascertain the qualifications of the jurors.
>
> The presiding judge shall determine whether any juror is disqualified or exempted by law and only he shall disqualify or excuse any juror as may be provided by law. The clerk of court shall maintain a list of all jurors excused or disqualified and the reasons provided thereof by the presiding judge [...]

S.C. Code Ann. § 14-7-1010 (Supp. 2020). South Carolina has several statutory automatic disqualifiers for jury service. *Id.* §§ 14-7-810 to -830. Statutory disqualifiers include reasons such as criminal convictions;[1] illiteracy; mental or physical infirmities that would render jury

[1] Limited to convictions punishable by imprisonment for more than one (1) year.

service inefficient; less than a sixth (6th) grade education; or any reason a person has good reason to suspect that he is disqualified. *Id.* § 14-7-810. A statutory exemption exists for persons who are sixty (65) years of age or older. *Id.* § 14-7-840. Further, the statute provides postponement of jury service for students and school employees. *Id.* § 14-7-845. A trial judge may, within its discretion, excuse a potential juror upon a finding of good and sufficient cause. *Id.* § 14-7-860; *State v. Rogers*, 263 S.C. 373, 210 S.E.2d 604 (1974).

In Applicant's trial, the trial judge heard pre-trial motions with the solicitors, Applicant, and trial counsels present. (R. 105-09). Simultaneously, the Honorable Maite Murphy conducted jury qualifications in a separate courtroom with a court reporter present. (R. 108). The trial judge stated counsels for both the State and Applicant were informed in chambers that the trial judge would hear pre-trial motions while Judge Murphy qualified the jury; neither Applicant nor the State objected at that time. (R. 107-08). After the jury was selected, Applicant's trial counsels objected to not being present at jury qualifications. (R. 105-06). The trial judge found the objection untimely. (R. 108).

1. **Jury qualification is an administrative function and not a critical stage for Sixth Amendment purposes because Applicant's presence neither contributes to the fairness of the proceeding nor is substantially related to the fulness of his opportunity to defend against the charges.**

Jury qualification is an administrative function of the trial court and not a critical stage for Sixth Amendment purposes. In South Carolina, jury qualification is a statutorily required administrative function that is to be completed by the trial judge. The determinations a trial judge must consider in determining whether a person is qualified to serve as a juror are codified in statute. The trial judge's discretion is limited to what the General Assembly has decided disqualifies, exempts, or excuses a person from jury service. Although the trial judge may excuse

a juror upon a finding of good cause, the determination rests solely in the trial judge's discretion absent a clear showing of abuse of discretion. *Id.* at 381, 210 S.E.2d at 608 ("excusing jurors is addressed to the sound discretion of the trial judge, the exercise of which will not be interfered with unless it is clearly shown to have been abused to the actual prejudice of the complaining party").

A criminal defendant's presence does not have a reasonably substantial relation to jury qualifications as neither the defendant nor his (or her) counsel plays an active role in the determination of whether a potential juror is qualified to serve. Ordinarily, neither the State nor the criminal defendant are involved in the jury qualification process as statute has deemed the trial judge the sole examiner of whether a person is statutorily qualified to serve as a juror. Because of this, a criminal defendant's presence at jury qualification does not contribute to the fairness of the procedure, would be useless, and the benefit of his presence would be "but a shadow." Thus, jury qualification is not a critical stage of trial for Sixth Amendment purposes.

The administrative function of jury qualification is distinguished from the jury assessment process of *voire dire*. The *voire dire* process occurs after the trial judge has determined which persons are statutorily qualified to serve as a juror. In *voire dire*, counsel from both the State and the criminal defendant may request the trial judge to ask certain questions to the jury panel. In the *voire dire* process, counsel is actively involved in the questioning of the jury panel to ascertain the potential jurors for biases, unlike jury qualification in which the trial judge is the sole examiner of qualifications. Unlike jury qualification, *voire dire* is a critical stage under the Sixth Amendment because the criminal defendant's presence has a reasonably

substantial relation to the defendant's opportunity to defend against the charges by ascertaining potential jurors for bias.

The administrative function of jury qualification is also distinguished from the process of jury selection. During jury selection, which occurs after *voire dire*, counsel from both the State and the criminal defendant may strike a potential juror to exclude them from being seated on the jury. Jury selection is undisputedly a critical stage under the Sixth Amendment because the criminal defendant's presence has a reasonably substantial relation to the defendant's opportunity to defend against the charges by giving the defendant a role in the composition of the jury. Unlike jury qualification, a criminal defendant's presence at *voire dire* and jury selection are directly related to his Sixth Amendment right to an impartial and competent jury. Thus, this Court finds Applicant failed to prove he was prejudiced because he does not have a Sixth Amendment right to be present at jury qualification.

2. **This Court finds Applicant failed to prove he was prejudiced by his absence at jury qualifications because the record reflects Applicant and trial counsel received all necessary information related to jury qualifications.**

This Court finds Applicant failed to prove he was prejudiced by his absence because the record reflects Applicant and trial counsel received all necessary information related to jury qualifications. Although trial counsels testified they would have liked to be present at jury qualification, this Court does not find that their absences infringed upon Applicant's right to a competent and impartial jury. *Rogers*, 263 S.C. at 382, 210 S.E.2d at 609 (A criminal defendant has no right to a trial by any particular jury or jurors and has a right only to a trial by a competent and impartial jury). At trial, the judge stated on the record that the information trial counsel requested had been provided, including the criminal history of every juror from the solicitor's

records. (R. 106:10-12; 107:24-109:1). The trial judge further stated that he did not believe Applicant was prejudiced by being absent because trial counsel received the relevant information. (R. 108:18-109:1). This Court also finds **credible** Kornegay's testimony that the trial judge gave trial counsel a clean copy of the criminal records of potential jurors from the solicitor's office.

The record reflects a member from trial counsel's office, the Public Defender's Office, was present at jury qualification and took notes, which were provided to trial counsel. (R. 108:18-21). This Court finds **credible** trial counsels' testimonies that a representative from their office was present and took notes during jury qualification. Counsel for the State represents that he exercised due diligence in attempting to obtain a transcript from the jury qualification in Applicant's trial, and to his knowledge, a transcript is unavailable. Counsel for Applicant does not dispute this and agrees that it appears a transcript is unavailable. Notwithstanding, this Court has had the opportunity to review the notes taken by trial counsels' colleague and finds the notes reflect the jurors were questioned by the trial judge regarding information consistent with the statutorily set criteria of S.C. Code §§ 14-7-810 to -840, such as criminal history, health, age, etc. (*See* PCR St.'s Ex. 1).

Additionally, this Court finds **credible** trial counsels' testimonies that the solicitors were also absent from jury qualifications, and this fact is also reflected in the trial record. (R. 105-06). As a result, the State did not receive any additional information that was not also afforded to Applicant and trial counsel. Thus, this Court finds Applicant failed to prove prejudice by showing a reasonable probability the result of trial would have been different if he was present at jury qualifications.

pmb

3. **This Court finds Applicant failed to prove he was prejudiced because the manner in which the trial judge conducted jury qualifications was not uncommon.**

This Court finds Applicant has failed to prove he was prejudiced by the trial judge holding pre-trial motions while the jury was qualified by another trial judge in a separate courtroom. This Court finds persuasive a ruling from the Florida Supreme Court, stating the following:

> It is important to understand the distinction between the general qualification of the jury by the court and the qualification of the jury to try a specific case.... The general qualification process is often conducted by one judge, who will qualify a panel for use by... [other judges] in multiple trials. Counsel or a defendant does not ordinarily participate in this type of qualification process.

Remeta v. State, 522 So.2d 825, 828 (1988) (holding the trial court was not required to obtain an express waiver from the defendant for his absence during jury qualification). As demonstrated by the Court in our sister state, not only is jury qualification by the court a separate and distinct process, it is common for jury qualification process to be conducted by a judge who qualifies the panel for use by other judges in multiple trials. This Court finds Applicant has failed to prove prejudice by showing a reasonable probability the result of trial would have been different but for trial counsel's failure to contemporaneously object to the manner in which jury qualifications was conducted. Thus, Applicant failed to meet his burden.

C. **Failure to Request a Circumstantial Evidence Jury Charge in Conformity with *State v. Logan***

This Court finds Applicant failed to prove trial counsel was ineffective for failing to request a circumstantial evidence jury charge that conforms 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.

In Applicant's trial, the trial judge charged the jury that "to the extent the state relies on circumstantial evidence in the trial of the case, all of the circumstances must be consistent with each other, and when taken together point conclusively to the guilt of the accused beyond a reasonable doubt." (R. 331-332). This Court finds the trial judge's jury charge on circumstantial evidence conformed with *Logan* and finds **credible** trial counsels' testimonies that the charge conformed with *Logan*. Thus, Applicant failed to meet his burden.

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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 26th **day of** September**, 2024.**

PAUL M. BURCH
Presiding Judge
First Judicial Circuit

Chesterfield, South Carolina