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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

R. Knox McMahon, Circuit Court Judge

KEITH SIMS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-213330

SUPPLEMENTAL APPENDIX

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Keith Sims, #314569, Applicant, v. State of South Carolina, Respondent.	)	**2011-CP-40-01881** **ORDER OF DISMISSAL**

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed March 21, 2011. An evidentiary hearing into the matter was convened on Tuesday, August 14, 2012, at the Richland County Courthouse. The Applicant was present at the hearing and was represented by Tynika Claxton, Esquire, and Charlie J. Johnson, Jr., Esquire. The Respondent was represented by Robert D. Corney of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Also testifying was Applicant's trial counsel, LaNelle DuRant, Esquire ("counsel"). This Court also had before it a copy of the transcript of the proceedings against Applicant, the records of the Richland County Clerk of Court, Applicant's direct appeal documents, and Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was true bill indicted at the February 2004 term of the Richland County Grand Jury for Murder (2004-GS-40-01037). LaNelle Durant, Esquire, and Stacy Rowell (nee Owings), Esquire, represented Applicant on the charges. On March 20, 2006, Applicant

proceeded to jury trial before The Honorable James Johnson. After a five (5) day trial, Applicant was found guilty of the charge as indicted, and was sentenced to forty (40) years imprisonment.

A Notice of Appeal was filed and an appeal perfected. After briefing, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence by order filed April 17, 2008. State v. Sims, 377 S.C. 598, 661 S.E.2d 122 (Ct. App. 2008). The subsequent Petition for Rehearing was denied by order dated May 22, 2008. Applicant thereafter filed a Petition for Writ of Certiorari with the South Carolina Supreme Court. The petition was granted and, after briefing and oral argument, the Court affirmed the Court of Appeals ruling in result on May 17, 2010. State v. Sims, 387 S.C. 557, 694 S.E.2d 9 (2010). Applicant's Petition for Rehearing was denied and the Remittitur was issued on June 24, 2010.

In his current Application, the Applicant alleges he is being held in custody unlawfully for the following reasons:[1]

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
   (a) Ineffective Assistance of Trial Counsel
   (b) Ineffective assistance of Appellate Counsel
   (c) Ineffective Assistance of Trial Counsel / Prosecutorial Misconduct
10. State concisely and in the same order the facts which support each of the grounds set out in (9):
   (a) See Attached Memorandum
   (b) "
   (c) "

At the PCR hearing, Applicant submitted a brief setting forth his allegations:[2]

Here, Applicant argues that trial counsel provided ineffective assistance by allowing the State, without objection, to charge, convict and sentence him under an indictment obtained through willful acts of perjury and prosecutorial misconduct.

[1] The original application stated "See Attached Memorandum", but no such memorandum was filed with the clerk as part of the application.

[2] The brief introduced appears to be partially prepared by PCR counsel, with the second half being handwritten by Applicant, *pro se*. This Court notes such a pleading would violate the rule against hybrid representation (Rule 11, SCRCP); however, this Court will make a determination of the case on the merits of the allegations set forth during the PCR hearing in the interest of fairness as this is Applicant's "one bite at the apple" that is PCR.

9(a)-10(a) The Applicant was denied the right to effective assistance of trial counsel by counsel's failure to object to solicitor's vouching for credibility of his witness.

My Due Process rights were violated when I was constitutionally deprived the ability to put forth a complete defense and the right to a Fair trial. >>

The flaw of trial court's evaluation and determination of denying my motion to admit the police report and testimony of police officer Scott McDonald culminates to Due Process violation because it deprived me of the ability to establish and present a complete demonstration of evidence to the jury in order for the jury to constitutionally evaluate the "reasonableness" of my action of Killing Brian Anderson.

Issue > Judge Violated my Due Process right when he Unconstitutionally shifted burden of proof

The error is that the Judge had no right to instruct the Jury that they might infer malice from the mere fact of killing with a weapon calculated to do serious bodily harm or to take life, for the reason that this is a charge on the facts contrary to the Constitution, in that it undertakes to intimate and instruct the jury what facts in the case are evidence of Malice". It was error in that after all evidence is out, the Infer of Malice from the use of a deadly weapon fades the case, and the jury must find malice, if at all, from the evidence without any aid from the court as to what weight should be attached to killing with a deadly weapon, or what inferences they may draw from such.

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 at the post-conviction relief 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 accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient

performance must have 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. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

Inability to Put Forth a Complete Defense

Applicant's first allegation raised at the PCR hearing was that he was unable to present the entirety of his defense at trial because the trial judge did not allow in certain pieces of evidence that would have gone to his "state of mind" at the time of the shooting. Specifically, the trial judge ruled the testimony of Officer Scott McDonald inadmissible as it pertained to a previous shootout involving Victim. Counsel told the trial court McDonald's testimony would indicate Victim had given a statement to police after a June 2001 incident admitting his possession and use of a firearm. The purported testimony was objected to by the State in chambers prior to McDonald being called as a defense witness; the trial judge ruled the alleged testimony was too remote and, therefore, inadmissible. The motion and judge's rulings were reiterated on the record directly after being addressed in chambers. (Trial Tr. pp. 652, l. 16 – p. 656, l. 4).

Applicant did not allege ineffective assistance of appellate counsel for failing to raise the issue on appeal.[3] Rather, Applicant only contended the trial court, through its ruling, prohibited his ability to present his "complete defense", i.e. Applicant's shooting in self-defense was reasonably justified because he knew Victim to carry and use firearms. This Court finds such an allegation to be improperly raised through this action. Applicant's contention raises a direct

[3] Nor did Applicant allege trial counsel failed to properly preserve this issue for direct appeal.

appeal issue (i.e. trial court error) procedurally barred from consideration in post-conviction relief under S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for direct appeal, and cannot raise any issues that could have been raised at trial or on direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974); Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The admission of this testimony could have been properly raised at trial or on direct appeal, and Applicant's failure to do so has waived this allegation as a ground for relief. Accordingly, this allegation is denied and dismissed.

Defective Indictment (Prosecutorial Misconduct)

Applicant next alleged his conviction was improper as it resulted from an indictment obtained through improper conduct of the prosecution. Specifically, Applicant's indictment cited the "February Term 2004" meeting of the Grand Jury and reflects the indictment was returned "True Billed" on February 12, 2004; however, Applicant argued no Grand Jury term was held in the Fifth Circuit during the month of February, 2004. Therefore, he said, the prosecutor lied or otherwise misled the Court in presenting such an indictment at trial.

Upon review of the record and exhibits introduced by Applicant in this regard, this Court finds the allegation to be wholly without merit. Applicant's indictment plainly states the Grand Jurors met, "[a]t a Court of General Sessions" on "February 11, 2004." The calendar before this Court reflects three (3) different terms of General Sessions Court held the week of February 9 through 13, 2004, in the Fifth Judicial Circuit. Therefore, I find this allegation to be without merit.

Further, this Court finds no resulting prejudice from any alleged ineffectiveness from counsel's failure to quash the indictment. As testified to by counsel, quashing the indictment would have made no difference on the outcome of the charges as the motion would not have

stopped the state from pursuing the charges at a later date. Even if the trial court granted counsel's motion to quash the indictments, Applicant still could have been charged through re-indictment or direct indictment, then prosecuted and sentenced for the crimes at a later date. Under S.C. Code Ann. § 17-19-90 (2003), "every objection to any indictment for any defect apparent on the fact thereof shall be taken...on motion to quash such indictment before the jury shall be sworn and not afterwards." Since the Double Jeopardy Clause of the Fifth Amendment attaches in a jury trial only once the jury is sworn, a successful motion to quash, by its very definition, will not work to bar subsequent prosecution on the same allegation on that grounds. See State v. Prince, 279 S.C. 30, 301 S.E.2d 471 (1983). Accordingly, this Court finds Applicant has failed to prove resulting prejudice from counsel's failure to move to quash the indictments.

Failure to Object to Testimony on Applicant's Invocation of Constitutional Rights

Applicant set forth an allegation that counsel was ineffective for failing to object to Investigator Eldon McCraw's ("McCraw") testimony about Applicant's invocation of his constitutional rights to silence and counsel during a police interrogation. Specifically, McCraw testified that on January 2, 2004, he interviewed Applicant about Victim's shooting, during which Applicant described his evening with Victim, but denied having any knowledge of the shooting. At the end of Applicant's statement, McCraw asked Applicant, "[w]hy did you kill [Victim]", at which time Applicant "became agitated, very nervous, wouldn't look at [McCraw], kept swallowing, crossing his arms and legs...[and] then stated that he might need an attorney." (Trial Tr. pp. 421, l. 24 – p. 422, l. 14). McCraw noted the interview was terminated thereafter.

Applicant gave limited testimony at the hearing, but stated the only real issue to be determined at trial was whether Applicant "felt threatened" by the victim, Brian Anderson, sufficiently to justify the shooting as self-defense.

Counsel testified she took over representation of Applicant in February of 2005 in her capacity as an Assistant Public Defender for Richland County from another attorney. Stacy Rowell (nee Owings) served as second chair in the matter, as the office policy was to assign two attorneys to murder cases.[4] Counsel testified she met with Applicant numerous times while he was incarcerated pre-trial, during which she was able to review the indictments/charges, Applicant's constitutional rights, potential sentences Applicant was facing, discovery materials and Applicant's version of the facts with Applicant. Counsel noted Applicant detailed the same set of facts to her during their meetings that he testified to at trial. She stated counsel was well aware of the potential life without parole sentence he was facing at trial, but he decided to turn down a plea offer extended by the State to Voluntary Manslaughter for a fifteen (15) to twenty (20) year sentencing range after discussing the matter with his family.

Counsel briefly reviewed the facts of the case, including the fact that Applicant had elicited the help of three friends to dispose of Victim's body after Applicant shot and killed him. Counsel stated that based on Applicant's steadfast version of the facts and the evidence involved, she developed a self-defense theory to present on his behalf at trial. She went on to say in order to bolster the self-defense theory, she planned on presenting evidence at trial to show Applicant had prior knowledge that Victim carried a gun, and to show Applicant was devastated/traumatized by the entire incident.

At trial, counsel said, a lot of the testimony and evidence presented by the State went uncontested as it was simply proving Applicant had in fact shot and killed Victim, a fact which counsel said was not contested. Counsel acknowledged there was substantial, irrefutable evidence to link Applicant to the killing and subsequent disposal of Victim's body. The evidence

[4] Ms. Rowell did not appear at the PCR hearing as she has since moved to Tallahassee, Florida where she currently practices law. As Ms. DuRant was lead counsel in the matter and privy to all conversations with Applicant, this Court finds Rowell's testimony in the matter to be unnecessary.

against Applicant included the three (3) co-defendants' statements/testimony, the gun used by Applicant in the shooting, ballistics positively identifying the gun as the one used in the shooting, items used to weigh down Victim's body in the pond (cement blocks, metal pipe, chains), blood spatter evidence from Victim's car, Victim's personal items recovered (necklace, wallet, cell phone), and Applicant's own confession to law enforcement.

Counsel testified Applicant had in fact given four (4) different statements to law enforcement during the course of their investigation. This first three given (January 1, January 2, and January 7, 2004) were all oral statements to law enforcement in which Applicant denied having any knowledge of Victim's shooting. On January 22, 2004, Applicant gave a written statement to police in which he confessed to shooting, killing and attempting to dispose of Victim's body, alleging he only shot because he saw Victim pulling a gun out from under his seat after making several threatening statements. At trial, counsel specifically noted she was *not* challenging the introduction of any of Applicant's statements to police as they went "straight to the defense" theory. (Trial Tr. p. 351, ll. 8 – 14). Regarding McCraw's specific testimony referenced above, counsel stated she did not object to the testimony as she did not believe "it was prejudicial" to Applicant's case, and agreed that the testimony simply bolstered the defense's theory that Applicant was traumatized by a shooting that he was forced, out of self-preservation, to commit.

This Court finds counsel was not ineffective in this regard. First, this Court finds counsel's decision not to object to McCraw's testimony to be objectively reasonable based on the trial strategy under which she and Applicant were operating. As a preliminary note, this Court would note that Applicant's statement that he "might need to talk to an attorney" is not an invocation of the right to counsel. See Davis v. U.S., 512 U.S. 452, 114 S.Ct. 2350 (1994) (If

suspect makes ambiguous or equivocal reference to attorney, cessation of questioning is not required, but, rather, suspect must unambiguously request counsel). Therefore, McCraw's testimony on the statement was not improper, nor was it objectionable, as it was not a comment on Applicant's invocation of rights. Therefore, counsel was not unreasonable in not posing an objection to the testimony, nor was Applicant prejudiced by that failure.

Further, this Court finds counsel's decision not to object was objectively reasonable and an exercise of valid trial strategy. The record reflects that, when confronted with the direct question of why he killed Victim, Applicant was paralyzed with panic and fear. This testimony bolstered the very heart of Applicant's defense theory as set forth in opening arguments: "[t]he night of December 30, 2003, was the most traumatic night of [Applicant's] young life." (Trial Tr. p. 103, ll. 21 – 23). Counsel set out to convince the jury Applicant reacted in the moment out of fear for his life, and never otherwise would have harmed Victim. McCraw's testimony as to the extreme distress Applicant labored under as a result of the incident was one of the crucial pieces of evidence counsel wanted the jury to hear in order to convince them Applicant had simply reacted, without malicious intent or ill-will, out of self-defense.

Counsel's subsequent cross-examination of McCraw only further convinces this Court of the strategy, as counsel made sure to highlight Applicant's extreme reaction to McCraw's question. (Trial Tr. p. 427, l. 3 – p. 428, l. 5). Specifically, counsel was able to elicit from McCraw that Applicant's "whole demeanor completely changed" when asked why he had killed Victim, furthering the theory that Applicant was extremely distraught over the incident and never intended to kill Victim. (Trial Tr. p. 427, l. 19). Therefore, this Court finds counsel's inaction in this regard to be objectively reasonable under professional norms as she made a deliberate, well-reasoned decision to allow in testimony that would bolster Applicant's defense theory. See

Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992) (Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance). Accordingly, this Court finds Applicant has failed to prove deficiency in this regard.

Further, this Court finds no resulting prejudice from counsel's alleged deficiency. Applicant was not challenging whether or not he had shot and killed Victim in the case; he plainly admitted to doing so in his testimony at trial. (Trial Tr. pp. 547, l. 17 – p. 548, l. 7). McCraw's testimony only went to show Applicant was nervous that he had killed a person, a reaction the jury could reasonably believe to be expected after such an incident regardless of the basis for the killing. The testimony about his uneasiness and insinuated unwillingness to talk about it did nothing to damage Applicant's case. In fact, as stated above, this Court finds it more likely the testimony *bolstered* Applicant's defense than impeded it, as McCraw's testimony showed Applicant was not a calculated, unemotional killer, but rather a scared individual who reacted out of fear for his life. Therefore, this Court finds no reasonable probability that the outcome of the trial would have been different had this testimony been objected to and suppressed.

"It is improper for the State to refer to or comment upon a defendant's exercise of a constitutional right." Edmond v. State, 341 S.C. 340, 534 S.E.2d 682 (2000). "Such comments may not be made either directly or indirectly." State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31 (1980), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). "The Sixth Amendment right to counsel attaches only at the initiation of adversary criminal proceedings, and before proceedings are initiated a suspect in a criminal investigation has no constitutional right to the assistance of counsel." Davis v. U.S., 512 U.S. at 456 – 457, 114 S.Ct.

at 2354. In Miranda v. Arizona[5], the Court determined that the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination required that custodial interrogation be preceded by advice to the putative defendant that he has the right to remain silent and also has the right to the presence of an attorney. Edwards v. Arizona, 451 U.S. 477, 481, 101 S.Ct. 1880, 1884 (1981). Therefore, while the right to counsel during an interrogation is *not* explicitly a 'constitutional right', the Miranda Court declared that defendants have an right to counsel during interrogation as a procedural safeguard to help protect the Fifth Amendment right against compulsory self-incrimination.

The State's commentary on a defendant's invocation of a constitutional right "will not be deemed prejudicial when the record shows the reference to the defendant's right...to silence/counsel was a single reference, which was not repeated or alluded to; the prosecutor did not tie the defendant's exercise of his right directly to his exculpatory story; the exculpatory story was totally implausible; and the evidence of guilt was overwhelming." Edmond at 348, 534 S.E.2d at 687. McCraw's testimony as complained of was the one and only time the Applicant's invocation of his rights to silence/counsel were mentioned during the course of the trial, and the solicitor never again mentioned the comment[6]; the solicitor at no point tied Applicant's invocation of rights to an insinuation of guilt; Applicant's statement was entirely implausible based on the testimony and evidence introduced at trial, which included Applicant's own acknowledgment that his first three statements were lies; and the evidence that Applicant had shot and killed Victim was overwhelming. In fact, it appears the testimony regarding Applicant's alleged invocation of his rights to silence/counsel was more pointed towards bolstering the

[5] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966).
[6] Counsel did impeach Applicant's version of the facts throughout trial by pointing to his failure to initially tell law enforcement in his first three statements that he had acted in self-defense; however, only Applicant's prior account of the night was used from his January 2, 2004, statement for this purpose and his invocation of the right was never mentioned to call the credibility of Applicant's January 2, 2004, statement into question.

credibility of Applicant's subsequent confession, as his invocation of constitutional rights at the January 2, 2004, interview only proved his knowledge of the ability to invoke such rights during his January 22, 2004, confession. Additionally, McCraw's testimony served to challenge testimony previously elicited by counsel attempting to show Applicant cooperated by voluntarily speaking to law enforcement. (Trial Tr. p. 281, ll. 2 – 11). For all of the reasons set forth above, this Court finds counsel was not ineffective in this regard.

Failure to Timely Object to Introduction of Ammunition Later Removed from Evidence

Applicant also contends counsel was ineffective for failing to object to the introduction of ammunition introduced by the State, and for failing to object when the ammunition was later removed from evidence by the trial judge.

During the testimony of the former Lieutenant James Berlin, the State moved to introduce evidence obtained from Applicant's house during the execution of a search warrant. Among those was Exhibit 79, which contained eleven (11) rounds of Wolfe ammunition, a Winchester twelve gauge shotgun shell, and another round of ammunition with an unknown caliber. (Trial Tr. pp. 366, l. 24 – p. 367, l. 10). Counsel timely posed an objection to their introduction, arguing they were not relevant as the firearm used in the incident was a nine millimeter handgun which none of the ammunition in Exhibit 79 matched. The trial judge overruled the objection and allowed the items into evidence. After the subsequent testimony of the State's firearms expert, Judge Johnson revisited the introduction of State's 79. (Trial Tr. p. 389, l. 8). The judge briefly questioned the State on their ability to "link up" the miscellaneous ammunition for relevance, after which he withdrew the items from evidence to allow both sides the opportunity to revisit its introduction if they wished. (Trial Tr. pp. 389, l. 8 – p. 392, l. 20). During a later break in trial,

the Court reiterated that State's Exhibit 79 had been withdrawn by the Court and was not in evidence. (Trial Tr. pp. 490, l. 6 – p. 491, l. 25).

Counsel testified she did make a timely objection to the introduction of the ammunition based on relevancy, but the trial judge overruled her objection. Counsel said when the judge revisited and ultimately decided to withdraw the ammunition from evidence, she did not move for a mistrial because she did not believe the evidence amounted to sufficient prejudice to warrant such a request. She noted that a motion for mistrial is a powerful tool used only in extraordinary situations and was not warranted here. Counsel conceded that no curative instruction was given by the trial judge, but based on the totality of the case, she did not "have a problem" with it. Counsel noted the ammunition was not given to the jury to consider in its deliberations, and it never entered the jury room.

This Court finds no deficiency, nor resulting prejudice, in this regard. Counsel was fully aware of the situation and made the decision not to bring the ammunition back to the jury's attention by requesting the court give a curative instruction. She timely objected to its initial introduction, which was the basis for the court's eventual suppression of the evidence. Further, the granting of motion for mistrial is an extreme measure that should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way. State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999). Mistrial should not be granted unless absolutely necessary; to receive mistrial, defendant must show error and resulting prejudice. State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). Counsel specifically noted she did not see proper prejudice to request a mistrial. Counsel's strategic choice in this regard was not objectively unreasonable. See Whitehead, *supra*.

Further, this Court finds no resulting prejudice as Applicant has failed to prove any reasonable likelihood that either the trial court would have granted a mistrial motion if requested, or that, but for the introduction of the evidence, the outcome at trial likely would have been different. The decision to grant or deny a motion for a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). Although the decision is vested in the sound discretion of the trial court, a mistrial is proper only where it is dictated by "manifest necessity" or "the ends of public justice." This Court finds no such "necessity" from the introduction of the ammunition and, therefore, no reasonable likelihood the trial court would have granted such a motion had it been made. Further, there is no reasonable likelihood the outcome at trial would have been different had the ammunition been suppressed from the outset of trial.

Failure to Object to Improper Vouching and Pitting of Witnesses in Closing

Applicant alleges counsel was ineffective for failing to object to the solicitor's "improper vouching" for witnesses, as well as his "improper pitting of witnesses", in closing argument. Specifically, Applicant pointed to the solicitor's argument that Nikki Davis' testimony about Natalie English telling her Applicant had "murdered somebody" was "the truth", and his statements about the credibility of Nikki Davis as compared to Applicant.

Counsel testified she did not object to the statement because she did not believe the comments were objectionable. Specifically, counsel noted she believed the solicitor was making permissible comments on the credibility of Davis based on the evidence introduced and reasonable inferences that could be drawn from that evidence. She also noted that objecting to a

statement made in closing argument can be risky as it may focus the jury's attention back on a damaging argument otherwise easily overlooked and/or forgotten.

This Court finds counsel not ineffective in either regard. As set forth by counsel, a solicitor may argue in closing anything within the record and reasonable inferences that may be drawn there-from. State v. New, 338 S.C. 313, 526 S.E.2d 237 (1999), State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). Further, a solicitor may argue the State's version of the testimony presented and may comment on the weight to be accorded to such testimony. State v. Raffaldt, 318 S.C. 110, 456 S.E.2d 390 (1995). "Therefore, although the State cannot 'pit' witnesses during questioning, it may comment on the credibility of the witnesses in argument." Id. at 115, 456 S.E.2d 393. Based upon a review of the record, this Court finds counsel was objectively reasonable for not objecting to the statements as they were not objectionable and counsel did not want to risk bringing that portion of the argument back to the jury's attention.

Further, Applicant has failed to prove resulting prejudice from the alleged improper closing arguments as this Court finds no reasonable probability that the outcome of the trial would have been different had the argument been objected to and sustained.[7] To be entitled to a new trial for improper closing arguments, the test is whether "the Solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. Hamilton, 344 S.C. 344, 362, 543 S.E.2d 586, 596 (2001). This Court finds the comments did not have such an effect on Applicant's trial.

Failure to Object to Improper Jury Charge on Inference of Malice

Finally, Applicant contends counsel was ineffective for failing to object to the trial judge's erroneous instruction on the inference of malice from the use of a deadly weapon as it

[7] Further, the trial court specifically instructed the jury that counsels' opening/closing statements were not evidence in the case for their consideration, thereby potentially curing any impropriety. (Trial Tr. p. 93, ll. 3 – 15.)

relates to Murder. In support of the allegation, Applicant set forth Sandstrom v. Montana, 442 U.S. 510, 99. S.Ct. 2450 (1979).

The Sandstrom Court found "burden-shifting presumptions" or "conclusive presumptions" unconstitutional as they deprived defendants of the due process of law in requiring the State to prove less than every element of a crime beyond a reasonable doubt. The South Carolina Supreme Court thereafter issued State v. Mattison, 276 S.C. 235, 277 S.E.2d 598 (1981), in accordance with Sandstrom, finding "an appropriate instruction on implied malice would not deal with the evidentiary nature of the presumption and that the implication does not *require* the jury to infer malice but only *permits* it." Id. at 238, 277 S.E.2d at 600 (emphasis added). Two years later, the Court set forth a jury charge on the inference of malice from the use of a deadly weapon in State v. Elmore, which the Court felt complied with the Due Process requirements that Sandstrom was concerned with. State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983). The Elmore Court noted that "only slight deviations from [the] charge [set forth] will be tolerated." Id. at 421, 308 S.E.2d at 784. Such was the legal standard for the permissible inference of malice from the use of a deadly weapon in South Carolina until the October 12, 2009, decision of State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

In Belcher, the Court held, "where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon." Id. at 612, 685 S.E.2d at 810. The Court held that Belcher, which was decided roughly three (3) years and seven (7) months after Applicant's conviction, would not apply retroactively, nor would it "apply to convictions challenged on post-conviction relief." Id.

The charge given at the time of Applicant's trial was the sanctioned charge on the law as it stood in South Carolina under State v. Elmore. Therefore, it was not objectionable and counsel was not ineffective for failing to object. Further, attorneys are not required "to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial." Thornes v. State, 310 S.C. 306, 310, 426 S.E.2d 764, 765 (1993); see also Robinson v. State, 308 S.C. 74, 78, 417 S.E.2d 88, 91 (1992) (finding counsel not ineffective for failing to assert defense not yet recognized by the Court). For those reasons, this Court finds the allegation to be without merit.

CONCLUSION

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

Except as discussed above, this Court finds that the Applicant failed to raise all additional allegations raised in his application at the hearing and has, thereby, waived them. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

This Court notes Applicant 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), SCRCP, 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 18 day of Oct, 2012.

R. Knox McMahon
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina.