STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS FOR THE SEVENTTH JUDICIAL CIRCUIT
Antwon M. Baker, Jr., #355673 Applicant,	)	2015-CP-42-5198
v.	)	
State of South Carolina,	)	**ORDER OF DISMISSAL**
Respondent.	)	

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2018 JUL 16 AM 10:58
M. HOPE BLACKLEY

This matter comes before the Court by way of an application for post-conviction relief filed on December 21, 2015, by Antwon M. Baker, Jr. (Applicant). Respondent made its Return on July 12, 2016, moving for a more definite statement by Applicant and requesting an evidentiary hearing. On December 30, 2016, Applicant submitted an Application Addendum to add additional allegations. An evidentiary hearing was convened on March 21, 2017, at the Spartanburg County Courthouse in Spartanburg, South Carolina.

Applicant was present and represented by Susannah C. Ross, Esquire. Respondent was represented by Alicia A. Olive, Esquire, of the South Carolina Attorney General's Office. At the evidentiary hearing, Applicant testified on his own behalf. Respondent called Robert Ianuario, Esquire, and Derrick Bulsa, Esquire, as witnesses. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies the application for post-conviction relief.

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of confinement of the Spartanburg County Clerk of Court. In July 2012, the Spartanburg County Grand Jury indicted Applicant for

murder (2012-GS-42-3668). In July 2013, Applicant was indicted for unlawful carrying of a pistol (2013-GS-42-2013) based on the same incident. Robert E. Ianuario, Esquire, and Matt Canady, Esquire, represented Applicant at trial. Assistant Solicitors Derrick B. Bulsa and Lindsey Overby prosecuted the case on behalf of the Seventh Circuit Solicitor's Office. On June 3-6, 2013, Applicant proceeded to trial before the Honorable J. Derham Cole. A jury found Applicant guilty of the lesser included offense of voluntary manslaughter and as indicted for the unlawful carrying of a pistol. Judge Cole sentenced Applicant to eighteen years for voluntary manslaughter and one year for unlawful carrying of a pistol. The terms were ordered to run concurrently.

Applicant filed a timely notice of appeal. Wanda H. Carter, Appellate Defendant of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, represented Applicant on appeal. The South Carolina Court of Appeals affirmed Applicant's conviction. State v. Baker, Op. No. 2015-UP-178 (S.C. Ct. App. filed April 8, 2015). Applicant filed a Petition for Rehearing, which was denied by the South Carolina Court of Appeals on May 21, 2015. On June 22, 2015, Applicant filed a Petition for Writ of Certiorari to review the Court of Appeals' opinion. The South Carolina Supreme Court denied the petition in an order dated October 8, 2015. The Remittitur was returned on November 20, 2015.

FACTUAL HISTORY

Applicant was convicted of murder and unlawful carrying of a pistol, arising out of the shooting death of Anthony Young (Victim) in Spartanburg County, June 3, 2012. The Victim and Applicant were both present at a Waffle House, located on Highway 29 in Spartanburg, SC. (Tr. p. 93). There was a history of prior physical altercations between the Applicant and Victim. (Tr. p. 98). On the night of the shooting, Applicant drove into the parking lot of Waffle House at

the same as Victim was standing outside the restaurant. (Tr. p. 98). Applicant witnessed Victim and a group of friends standing, and before exiting his vehicle, Applicant placed a loaded pistol in his waistband. (Tr. p. 98). After exiting the restaurant, Applicant encountered Victim and a group of friends and an argument began. (Tr. p. 98). Applicant turned to walk back inside the Waffle House and is struck in the back of his head. (App. p. 99). Evidence presented at trial indicated it was not the Victim who struck the Applicant in the head. Applicant removed the loaded pistol from his waistband and began firing into the group of people outside of Waffle House. (Tr. p. 99). As Victim was running away, Applicant shot Victim in the back. (Tr. p. 94). Applicant fled the scene, changed clothes, and placed the pistol in the trunk of Applicant's girlfriend's vehicle. (Tr. p. 229-246). Law enforcement officers located Applicant and his vehicle at an apartment complex and Applicant was then placed under arrest. (Tr. p. 229-242).

ALLEGATIONS

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

Ineffective assistance of counsel:

a. "Failing to object to the voluntary manslaughter charge
b. "Due Process violations"
c. "lack of subject matter jurisdiction because the murder indictment was true-billed July 19, 2012, when the Grand Jury was not convened until July 23, 2012."
d. "failing to investigate"
e. "failing to make proper objections to State's attacks on opposing counsel"
f. "failing to request charges on appearances and State's burden to disprove self-defense"

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

Applicant Testimony

At the evidentiary hearing, Applicant testified on his own behalf. Applicant testified that he had discussed testifying during a "stand your ground" hearing, but his attorney advised

against it. Applicant. Had he testified at a hearing, Applicant stated he would have explained how he feared for his life. Applicant admitted to arming himself before leaving his car, but that he always carries a weapon for protection. Applicant testified that he attempted to walk away, but was struck in the head and "rushed" by many people. Applicant testified he witnessed around thirty people in the parking lot that night, but his attorney did not investigate any of them for potential witness statements. Applicant alleged that had his attorney investigated these witnesses, they would have been able to provide potentially exculpatory evidence. Applicant testified that his attorney did not discuss and review the discovery file with him until the day before trial.

Trial Counsel Testimony

At the evidentiary hearing, Applicant's trial attorney, Robert Ianuario, testified on behalf of the State. Mr. Ianuario testified that he was retained by Applicant within two months of Applicant being charged with murder. According to Mr. Ianuario, he met with Applicant on several occasions and reviewed Applicant's discovery file multiple times. Mr. Ianuario testified that he conducted an extensive investigation of Applicant's case, including contacting witnesses, ballistic experts, gunshot residue experts, and medical examiners.

Mr. Ianuario testified that no experts were available to testify at trial, because Applicant's resources were limited. Mr. Ianuario testified that during the stand your ground hearing, he did not call Applicant to testify in order to avoid having Applicant subjected to cross-examination. Mr. Ianuario testified that while in chambers, the charge of voluntary manslaughter was discussed with Judge Cole. Mr. Ianuario testified that he took issue with the lesser included offense, but that Judge Cole included it during his charge to the jury.

Mr. Ianuario testified that he did not object to the self-defense charge as it was read to the jury. Mr. Ianuario also testified that he did not object to Judge Cole's jury charge of a

"defendant's right to act upon appearances." During his testimony, Mr. Ianuario stated "I freely admit I should have put Antwon on the stand." Mr. Ianuario testified that he did not object to the Solicitor's comments during closing arguments[1], because he thought it made him more credible on his knowledge of firearms than the State. Finally, Mr. Ianuario testified that a plea offer was made and discussed with Applicant, but Applicant wished to proceed to trial.

Assistant Solicitor Bulsa's Testimony

At the evidentiary hearing, Assistant Solicitor Derrick Bulsa testified on behalf of the State. During the hearing, Mr. Bulsa testified that he was prepared to cross-examine Applicant had he been called as a witness. Mr. Bulsa testified that the State was prepared to offer evidence that Applicant chased down the victim and shot him in the back. Mr. Bulsa testified that he was able to read multiple statements by the Applicant into evidence during the trial.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard testimony at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and can weigh their testimony and credibility accordingly. These credibility findings have been applied to the Court's findings and conclusions set forth below. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (2017).

Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the

[1] During closing argument, the State commented that Mr. Ianuario "apparently he has some fascination with firearms." Tr. p. 486-487.

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 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland v. Washington, 466 at 688). 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.

After careful review of the entire record, including the testimony presented at the evidentiary hearing, based on the standard discussed above, this Court finds Applicant has failed to carry her burden of proof and has not established any ineffectiveness of counsel. Below are the findings in regards to each specific allegation of ineffective assistance of counsel raised by Applicant:

Failure to Object: Improper Jury Instruction

Applicant has alleged that based upon the jury instructions charged by Judge Cole, his trial counsel rendered ineffective assistance. Specifically, Applicant alleges that his trial counsel should have objected to the inclusion of "voluntary manslaughter" and trial counsel should have requested a charge on the self-defense burden of proof.

To warrant the court eliminating the charge of manslaughter, there must be *no evidence whatsoever tending to reduce the crime from murder to manslaughter.* State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010)(citing State v. Wharton, 381 S.C. 209, 672 S.E.2d 786 (2009)). If there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed, the defendant is entitled to such charge. Dempsey v. State, 363 S.C. 365, 610 S.E.2d 8112 (2005). Whether a voluntary manslaughter charge is warranted turns on the facts and if the facts disclose any basis for the charge, the charge **must be given**. (emphasis added) Starnes, 388 S.C. at 597. Trial counsel testified that while in chambers, he indicated to Judge Cole he disagreed with the inclusion of the manslaughter charge. Judge Cole disagreed and informed the jury of the lesser-included offense of voluntary manslaughter.

As for the self-defense burden, the record indicates that Judge Cole did charge the jury on self-defense. Judge Cole explained the burden of proof for self-defense as:

> "Now, although the [Applicant] has raised the defense of self-defense, the burden of proof is **not** on the [Applicant] to prove the existence of self-defense. As I have previously instructed you, the burden is always upon the state to prove the [Applicant]'s commission of the crime alleged against the [Applicant] beyond a reasonable doubt, and this would therefore necessarily require that the state prove beyond a reasonable doubt the absence of self-defense."

Judge Cole gave a clear and proper charge as to the required burden of proof for self-defense, thus an objection by trial counsel was not warranted. Even if trial counsel's failure to object could be found as deficient representation, there is no evidence that Applicant was prejudiced by

the inclusion of the jury charges as they were presented. Based upon a review of the record and the testimony presented at the evidentiary hearing, this Court finds the Applicant has failed to meet his burden of proof. This allegation is denied and dismissed with prejudice.

Lack of Subject Matter Jurisdiction

Applicant alleges that the trial court lacked subject matter jurisdiction, because the grand jury met on a date different than indicated on the face of the indictment. A grand jury may meet at any time ordered by a circuit judge. See S.C. Code Ann. §§ 14-5-910 to -940 (allowing for terms of court not provided for by law). Accordingly, a grand jury is not unlawfully impaneled simply because it does not meet during a term of court as provided for in sections 14-5-620 to -820. See State v. Jeffcoat, 26 S.C. 114, 1 S.E. 440, 441 (1887) ("[M]erely changing the time for holding the court did not make the grand jury illegal."). Furthermore, a presumption of regularity attaches to proceedings in the Court of General Sessions. Pringle v. State, 287 S.C. 409, 411, 339 S.E.2d 127, 128 (1986). Absent evidence to the contrary, the court must presume that a properly returned indictment is valid. State v. James, 321 S.C. 75, 472 S.E.2d 38, 40 (Ct. App. 1996) (citing Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995)); State v. Thompson, 305 S.C. 496, 409 S.E.2d 420 (Ct. App. 1991). Applicant's indictments are valid on their face, because they state all the necessary elements of the crime, the date of the offense, and the name of the accused. Id. at 75, 472 S.E.2d at 40.

Additionally, Applicant's allegation regarding subject matter jurisdiction is without merit. Subject matter jurisdiction is the power of a court to hear a particular class of cases. State v. Gentry, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005). An applicant may challenge the subject matter jurisdiction of the trial court at any time. Id. However, "[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters." Id. at 101, 610 S.E.2d at 499. Thus, an

applicant challenging subject matter jurisdiction must present evidence that his case is of some class over which the circuit court does not have the authority to preside. Applicant's trial involved criminal matters, which are well within the jurisdiction of the South Carolina Circuit Court. Applicant has failed to meet his burden of proof. This allegation is denied and dismissed with prejudice.

Failure to Investigate

Applicant alleges his trial counsel was ineffective for failing to investigate. To show ineffective assistance in this regard, Applicant must present evidence to show what counsel could have discovered had he more fully investigated. Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 772 (1998) ("Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial."). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)).

During the evidentiary hearing, Applicant's trial counsel testified credibly and in detail as to his investigation of Applicant's case. Trial counsel testified that he met with multiple expert witnesses and interviewed possible fact witnesses that were willing to speak with him. Trial counsel testified in detail to his trial strategy and attempts to enter evidence for Applicant's defense. This Court finds trial counsel reasonably investigated Applicant's case, and to the extent that trial counsel's investigation was deficient, Applicant has failed to establish that his trial counsel's deficiency prejudiced Applicant in any way. Applicant has failed to meet his burden of proof. This allegation is denied and dismissed with prejudice.

Failing to Object to State's Attacks on Opposing Counsel

Applicant alleges that his trial counsel was ineffective for failing to object to Assistant Solicitor Bulsa's comments during closing argument. "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'" Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008).

Applicant's trial counsel testified that he was not concerned with the Solicitor's comments about trial counsel's "fascination with firearms." Applicant's trial counsel testified that he believed it may have been beneficial to the defense, since the jury may have been more sympathetic to Applicant's case based on the comments. Trial counsel's failure to object was a trial strategy and reasonable under the circumstances.

Additionally, Applicant has failed to present evidence that he was prejudiced by the failure to object. Therefore, Applicant has failed to meet his burden of proof. The allegation is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, the allegations are denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record 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 post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 3 day of July, 2018.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2018 JUL 16 AM 10:58
M. HOPE BLACKLEY

Robin B. Stilwell
Presiding Judge
Seventh Judicial Circuit

Greenville, South Carolina

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O Box 3483
Spartanburg, SC 29304-3483

Phone (864) 596-2591
Fax (864) 596-2239

M. Hope Blackley
Clerk of Court

July 16, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

Anderson M. Parker Jr.
#355603
Applicant

7TH JUDICIAL CIRCUIT

CASE# 2015CP42-5198

VS

State
Respondent

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the Order of Dismissal
In this action dated 7-8 2018 on 7-16-18

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Megan Jamison
Susannah Ross

FILED
2018 JUL 16 AM 11:57
M. HOPE BLACKLEY
CLERK OF COURT
SPARTANBURG COUNTY

7-16-18
(Date)

(Signature)