

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

**RECEIVED**

DEC - 5 2013

APPEAL FROM FLORENCE COUNTY  
Court of Common Pleas

**S.C. Supreme Court**

Benjamin H. Culbertson, Circuit Court Judge

Case No. 06-CP-21-1560

Tracy Willard Daniels, SCDC No. 274866.....Appellant,

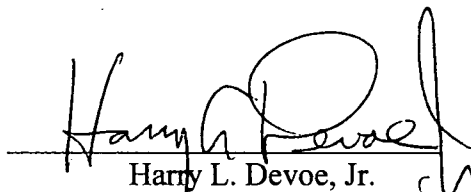
v.

State of South Carolina,.....Respondent.

NOTICE OF APPEAL

Tracy Willard Daniels appeals the Amended Order of Dismissal Following Remand of the Honorable Benjamin H. Culbertson dated November 1, 2013 and filed on November 11, 2013. Appellant received written notice of entry of this order on November 18, 2013.

December 4, 2013



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Attorney for Appellant

Other Counsel of Record:

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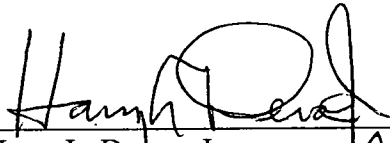
v.

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PROOF OF SERVICE

I certify that I have served the Notice of Appeal by depositing same in the United States mail, postage prepaid, on December 4, 2013 addressed to the State's attorney of record, David Spencer, Assistant Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549.

December 4, 2013

  
\_\_\_\_\_  
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Attorney for Appellant

STATE OF SOUTH CAROLINA )  
 COUNTY OF FLORENCE )  
 Tracy Willard Daniels, SCDC No. 274866, )  
 Applicant, )  
 v. )  
 State of South Carolina, )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 TWELFTH JUDICIAL CIRCUIT  
 2006-CP-21-1566

**AMENDED ORDER  
 OF DISMISSAL  
 FOLLOWING REMAND**

2013 NOV 11 AM 10:42  
 CONNIE REEL-SHEARER  
 CLERK OF COURT  
 FLORENCE COUNTY, S.C.  
**FILED**

This matter is before this Court by way of an application for post-conviction relief (PCR) filed on September 19, 2006. The Respondent made its Return on May 15, 2007. The Applicant alleges he is being held in custody unlawfully due to ineffective assistance of trial and appellate counsel. An evidentiary hearing was convened at the Florence County Courthouse on December 18, 2008. The Applicant was present at the hearing and represented by Harry L. Devoe, Jr., Esquire. The State was represented by Julie M. Thames of the Office of the Attorney General.

At the hearing, one of the issues Applicant raised was an allegation that trial counsel was ineffective for failing to cross-examine witness Mary McDougal with her taped statement to law enforcement. At the conclusion of the hearing, this Court indicated it was denying relief. At that point, Applicant requested a ruling on the allegation regarding cross-examination of McDougal. This Court noted it was not provided with the cassette tape and denied the allegation. At that point, counsel for Applicant sought to admit the tape, claiming it was in his car. This Court denied Applicant the opportunity to admit the tape after Applicant had already sought a ruling.

*1/mtc*

**CERTIFIED: A TRUE COPY**  
*Claudia Y. Spain*  
**CLERK OF COURT C.P. & O.C.**  
**FLORENCE COUNTY, S.C.**

On February 6, 2009, this Court issued an order denying the PCR application. Applicant appealed the Order. By order dated February 7, 2011, the Supreme Court vacated the order and remanded this matter for additional proceedings so that Applicant would be able to admit the tape into evidence. The State petitioned for rehearing, which was denied. Remittitur was issued on March 2, 2011.

A hearing was then held before this Court at the Georgetown County Courthouse on March 2, 2012. Applicant was present and once again represented by Mr. Devoe. The State was represented by David Spencer of the Office of the South Carolina Attorney General. A transcript of the tape was provided to this Court, along with the transcript of the prior PCR hearing.

This Court has considered these materials in conjunction with the materials originally provided in the first hearing and has determined that it must still deny relief.

### **I. PROCEDURAL BACKGROUND**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. The Applicant was indicted at the August 2000 term of the Florence County Grand Jury for murder (2000-GS-21-977). He was represented by John S. DeBerry, Esquire. On May 4, 2001, the Applicant underwent a jury trial pursuant to which he was found guilty of voluntary manslaughter. He was sentenced by the Honorable Paul M. Burch to confinement for twenty-six years.

A timely Notice of Appeal was filed and an appeal was perfected on Applicant's behalf. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Daniels, Op. No. 2004-UP-394 (S.C. Ct. App. filed June 22, 2004).

The South Carolina Supreme Court denied the Applicant's Petition for Writ of Certiorari and the Remittitur was sent down on December 16, 2005.

## I. APPLICABLE LAW

### 1. Ineffective Assistance of Counsel

In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRPC). Where the application alleges ineffective assistance of counsel 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, 686 (1984); see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 690. The 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 counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. 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.” Id. at 117-18, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 689). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

## **2. Ineffective Assistance of Appellate Counsel**

A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830 (1985). An Applicant asserting a claim of ineffective assistance of appellate counsel must prove both that counsel’s performance was deficient and that the deficient performance prejudiced him. Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). “To prove prejudice, the applicant must show that, but for counsel’s errors, there is a reasonable probability he would have prevailed on appeal.” Id. at 434, 581 S.E.2d at 835. Although a defendant is entitled to effective assistance of appellate counsel, counsel is not required to raise every non-frivolous issue presented by the record. Tisdale v. State, 357 S.C. 474, 594 S.E.2d 166 (2004). Indeed, an indigent defendant has no right to compel appointed counsel to press non-frivolous points requested by the client if counsel, as a matter of professional judgment, decides not to pursue those points. Jones v. Barnes, 463 U.S. 745 (1983). Appellate counsel has a professional duty to choose among potential issues according to their merit. Id. Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

### **III. SUMMARY OF TESTIMONY AND EVIDENCE PRESENTED AT THE PCR EVIDENTIARY HEARING**

Trial counsel testified that he was appointed to represent the Applicant on December 13, 1999. He testified that he appeared at a bond hearing in front of Judge Harwell but that he had known the Applicant prior to the incident and did not remember if he was at the bond hearing as a friend of the Applicant's or if he was already representing him at that point. Trial counsel testified that he did not remember whether Judge Harwell suggested that the Applicant should be evaluated. He testified that he had known the Applicant for a long time and that he did not have any difficulty communicating with the Applicant. He testified that he had several discussions with the Applicant and that the Applicant was very emotional about what had happened but that he participated in the discussions and assisted with his defense.

Trial counsel testified that he received discovery from the State. He testified that the State did not send the gun to SLED to be tested until the Friday before the trial began. Trial counsel testified he believed it was likely that the State sent the gun to be tested when they did because trial counsel had gotten funds to hire an expert to test the gun on behalf of the Applicant. Trial counsel hired Donald Grindt to examine the gun. While Grindt was qualified as an expert in several areas including crime scene analysis,

fingerprint identification, footwear identification, and bloodstain pattern interpretation, he was not qualified as a firearms expert. Trial counsel testified that in spite of Grindt not being qualified as a firearms expert, trial counsel elicited the testimony from Grindt that he wanted -- the hammer of the gun could go off if the gun was handled in the manner described by the witnesses. Trial counsel believed Grindt served the purpose he was hired for.

Upon being questioned about why trial counsel did not emphasize Grindt's testimony more in closing argument, trial counsel responded that perhaps he should have emphasized that testimony more but that hindsight is twenty/twenty. He testified that he felt that the jury was not likely to return a verdict of not guilty and completely exonerate his client, so he tried to weave in the possibility of an accident but focused on involuntary manslaughter because he thought that would be the most likely scenario the jury would believe.

Trial counsel testified that he thought he heard the tape of Mary McDougal, the next-door neighbor who witnessed the shooting, but he was not completely sure. He did not recall whether or not McDougal said on the tape that Applicant had taken a step back before the shot was fired. He testified that if she did not say that on the tape but did testify to that at trial, he wished he would have known of that discrepancy.

Trial counsel testified that no one testified that they saw the Applicant put the shell in the gun. He testified that one shot hit the carport and that the Applicant came down the steps of his home and gave the gun to the victim. He relayed that the testimony at trial was that the Applicant appeared to be experiencing difficulty ejecting the shell but that the victim was able to eject it. The victim then gave the gun back to the Applicant

and the Applicant shot the victim, but nobody saw a new shell being put into the gun after the first one was ejected.

Trial counsel testified that he brought to the jury's attention that the gun was not sent to SLED be tested until the Friday before the trial began. He testified that he attempted to show through Grindt's testimony that the gun could have fired accidentally while being passed back to the Applicant. He also brought to the jury's attention that the pattern of the gun residue could indicate that the victim was actually holding on to the barrel of the gun when it was fired.

Trial counsel testified that part of his strategy was to show the jury that the Applicant and the victim were close friends, that they were cooking out together, and that there was more congenial interaction than fussing or fighting going on that evening. He testified that the testimony showed the two men were cooking on the grill, that the victim had actually cleaned the grill prior to cooking, and that they generally were getting along.

~~Trial counsel testified that he tried to demonstrate to the jury through cross-examination~~ that the investigation by law enforcement was not thorough. He attempted to establish reasonable doubt by showing what law enforcement did not do.

Trial counsel testified that he checked what the lighting conditions were that night and that he examined witnesses as to how much light was available at the time of the incident. He did not remember whether or not he filed a motion for reconsideration, but he did file the notice of intent to appeal.

Trial counsel testified that he requested a charge on involuntary manslaughter and that he had to argue vehemently but that he did finally convince the judge to give the charge, unfortunately, the jury did not agree. He testified that the testimony at trial

showed that when the Applicant was not drinking, he was a very pleasant and mild mannered person but that when he was drinking he had a quick temper.

Applicant's daughter, Sherry Coker, testified on the Applicant's behalf. She testified that she lives in Turbeville, works in Olanta at a bank, and that she was present at the trial. She testified that she visits her father frequently and that the Department of Corrections honored a hardship request and transferred her father to a closer location so that it would be easier to visit him. She testified that on the last day of the trial, trial counsel advised her to be ready to speak. She testified she wished she had more time to prepare her remarks to the Court. She testified that her father was sober the night before the shooting but that when he drank he was not a pleasant person and that his drinking led to his separation from her mother.

#### **IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records of the Florence County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, the Applicant's PCR application, the Respondent's Return to the application, the briefs from the direct appeal, the opinion of the South Carolina Court of Appeals, and legal arguments of counsel. Pursuant to S.C. Code Ann. § 17-27-80 (1985), this Court makes the following findings of fact based upon all of the probative evidence presented.

This Court finds the allegations that trial counsel's and appellate counsel's representation fell below reasonable professional norms are without merit. With regard

to trial counsel, this Court finds no ineffective assistance of counsel. This Court finds trial counsel's testimony to be highly credible. He was very prepared for trial and did an excellent job in bringing inconsistencies to the jury's attention. His examination of Grindt brought to the jury's attention information that the gun could possibly have been fired just by handing it back and forth. Trial counsel also brought to the jury's attention the possibility that the victim may have been grabbing or pulling the gun when it went off. This Court finds trial counsel vigorously cross-examined law enforcement with the goal of demonstrating to the jury that the investigation was lacking.

This Court finds that trial counsel was not ineffective in failing to stress accident more in his closing argument. He believed that involuntary manslaughter was the most he could hope for and stressed that in closing. The fact that the jury came back with a verdict on voluntary manslaughter does not render trial counsel ineffective for failing to stress accident. He employed sound trial strategy. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995) (Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance). The fact that the jury did not return a verdict of guilty on involuntary manslaughter indicates that they did not buy the accident scenario.

This Court finds trial counsel was not ineffective regarding McDougal's taped statement. Trial counsel testified he was not sure if he listened to the tape but if there was a discrepancy, he wished he had known about it. This Court has reviewed the transcript of the taped recording and determined it is nearly identical to her trial testimony. The purported discrepancy, that McDougal stated at trial she saw Applicant take a step back and raise the gun, is merely more detail than the written statement, and is

not a true discrepancy. Further, this Court believes that cross-examination on this point would not have altered the result of trial. Accordingly, this Court finds that Applicant did not meet his burden of proving counsel was ineffective in this regard.

This Court finds trial counsel was not ineffective in failing to seek an evaluation for Applicant. The Applicant has not demonstrated that he was unable to assist trial counsel or that he was not competent at the time of the offense or at the time of trial. The Applicant himself testified that he met with trial counsel several times; he did not say that he had any difficulty understanding their conversations. Trial counsel testified that they had many conversations and that the Applicant was involved in the discussions and appeared to understand the context of those discussions. This Court notes that the Applicant has not alleged that he was incompetent at any stage of the proceedings; he merely alleged that trial counsel was ineffective in failing to have him evaluated. He has not made any showing of prejudice.

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This Court finds trial counsel requested a charge on involuntary manslaughter, fought hard to get the charge and eventually succeeded. The fact that the jury came back with a guilty verdict on voluntary does not render trial counsel's performance in this regard deficient.

While the Applicant did not testify and no testimony with regard to ineffective assistance of appellate counsel was offered, the Applicant alleged in his application that appellate counsel chose which arguments to raise on appeal without input from the Applicant. This Court finds the Applicant has not demonstrated that he would have prevailed on appeal if not for appellate counsel's errors. Anderson v. State, supra. Nor

has he shown that any alleged ignored issues are clearly stronger than those actually raised on appeal. Gray v. Greer, supra.

## V. CONCLUSION

This Court concludes that the Applicant failed to carry his burden of proof to show that trial counsel's or appellate counsel's representation fell below reasonable professional norms or that he was prejudiced by the alleged deficient representation. The Applicant's former trial counsel and appellate counsel rendered reasonably effective assistance under prevailing professional norms and demonstrated a normal degree of skill, knowledge, and professional judgment that is expected of an attorney in a criminal case. Strickland v. Washington, supra; Cherry v. State, supra. Additionally, the Applicant did not carry his burden to show a reasonable probability that the result at trial would have been different had trial counsel or appellate counsel done what the Applicant alleges should or should not have done. Cherry v. State, supra. ~~This Court finds trial counsel's testimony to be more credible than that of the Applicant.~~ BHC

As to any and all allegations, which were or could have been raised in the application or at the hearing in this matter, but were not specifically addressed in this Order, this Court finds that the Applicant failed to present any probative evidence regarding such allegations. These allegations are not supported by any law and were not addressed at the hearing. Accordingly, this Court finds that the Applicant waived the allegations and failed to meet his burden of proof regarding them. Accordingly, they are denied and dismissed with prejudice.

### IT IS THEREFORE ORDERED THAT:

1. The post-conviction relief application is **DENIED AND DISMISSED WITH PREJUDICE;**

2. The Court advises the Applicant and his attorney of record that any Notice of Appeal must be filed within thirty (30) days of service of the signed copy. Your attention is directed to South Carolina Appellate Court Rule 227 for appropriate procedures on appeal.
3. The Applicant is remanded to the custody of the Respondent for the completion of his sentence.

**AND IT IS SO ORDERED.**

*Benjamin H. Culbertson*

Benjamin H. Culbertson  
Presiding Judge  
Twelfth Judicial Circuit

Georgetown, South Carolina

NOV. 1, 2013.

**FILED**  
2013 NOV 11 AM 10:42  
CONNIE REEL-SHEARIN  
CCJP & GS  
FLORENCE COUNTY, SC

**CERTIFIED: A TRUE COPY**  
*Craig Spivey*  
**CLERK OF COURT C.P. & G.S.**  
**FLORENCE COUNTY, S.C.**