THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas
Honorable R. Knox McMahon Circuit Court Judge

Case No: 2012-CP-45-0172

Javon Rivers..... Appellant
S.C.D.C. No.: 332402

v.

The State.....Respondent

NOTICE OF APPEAL

Javon Rivers appeals his Denial for Post Conviction Relief in this case. The Order of Dismissal was imposed and signed by the Honorable R. Knox McMahon on November 26, 2013, which I, Charles T. Brooks, III, received on December 12, 2013

December 12, 2013

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF WILLIAMSBURG	)	
		2012-CP-45-0172
Javon Rivers, #332402,	)	
	)	
Applicant,	)	
	)	
v.	)	**ORDER OF DISMISSAL**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

This matter comes before the Court by way of an Application for Post-Conviction Relief filed March 27, 2012. An evidentiary hearing into the matter was convened on October 3, 2013, at the Sumter County Courthouse. The Applicant was present at the hearing and was represented by Charles T. Brooks, III, Esquire. The Respondent was represented by Mary S. Williams of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Also testifying was Legrand Carraway, Esquire ("Counsel"). This Court had before it the records of the Williamsburg County Clerk of Court, the trial transcript, the appellate records, and the Applicant's records from the South Carolina Department of Corrections.

PROCEDURAL HISTORY

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Williamsburg County Clerk of Court. The Applicant was indicted during the December 2008 term of the Williamsburg County Grand Jury for Murder and Possession of a Weapon during the Commission of a Violent

Crime (2008-GS-45-0275). LeGrand Carraway, Esquire, represented him. The Applicant proceeded to a jury trial before the Honorable George C. James, Jr., where he was convicted as indicted. On March 12, 2009, Judge James sentenced Applicant to thirty years imprisonment for Murder and a consecutive term of five years imprisonment for the Possession of a Weapon during the Commission of a Violent Crime.

Applicant appealed his convictions, and following the submission of an Anders brief, the South Carolina Court of Appeals dismissed the appeal. State v. Rivers, 2012-UP-199 (Ct. App. filed March 21, 2012). The Remittitur was sent on April 6, 2012.

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

1. "Ineffective Assistance of Counsel."
   a. "Trial lawyer was ineffective in failing to adequately prepare for trial and consequently in conducting trial."

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.

Ineffective Assistance of Counsel

The Applicant alleges he received 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), SCRCP). 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 v. State, 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, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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, supra). 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

Summary of Facts Adduced at Trial

In the early hours of May 17, 2008, Derial McCrea ("Victim") was a patron of Sadie's Place in Williamsburg County. Victim's girlfriend (and granddaughter of club owner Sadie McBride),

Dyshea McBride ("Dyshea"), arrived to pick him up. While Dyshea was outside the club, Dyshea's mother (and Sadie's daughter), Erica McBride ("Erica"), told Dyshea that Victim was inside dancing with another woman. Erica had often argued with Victim during the course of his relationship with Dyshea, and Victim and Erica argued outside the club following confrontation about Victim's dancing with another woman.[1] During the verbal altercation between Victim and Erica, Applicant stepped in. Erica conceded that there were some "very ugly" words exchanged between them but denied being in fear for her safety. Witnesses stated that Applicant intervened and an argument between Victim and Applicant ensued. Applicant was alleged to have said something along the lines of "you can argue with a woman but you can't argue with me" and "this is my family," when Victim told Applicant that Applicant had nothing to do with the argument.[2] (Tr. p. 54, lines 3-4; p. 204, lines 14-21; p. 212, lines 14-15.) The argument between Applicant and Victim apparently became physical. As the crowd gathered, Erica attempted to pull Dyshea away, but Dyshea protested saying that she could not "let them jump [Victim]." (Tr. p. 148, lines 7-15.) Applicant then ran quickly from the area. According to witness Ernie Wilson ("Wilson"), Applicant went to a vehicle and retrieved a gun from the passenger side. (Tr. p. 42, line 25 – p. 44, line 7.) After the initial altercation, Erica remained outside but distanced herself from the spot, removing herself away and near the stop sign. Dyshea pulled Victim from the scene toward their car. (Tr. p. 96, lines 22-23; p. 107, lines 1-2; p. 212, lines 23-24; p. 114, lines 14-20; p. 149, lines 21-23; p. 150, line 5.)

Applicant returned momentarily, however, now walking toward Victim, and spectators,

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[1] Erica remarked that she often disagreed with Victim, but Dyshea and Victim had been living together and shared an infant child. Since Dyshea would not leave Victim, she had to try to cope with him. Victim also shared a child with his estranged wife, Marcella. It was stated at trial that Applicant had been living with Marcella.

[2] Erica testified that her husband is related to Applicant though she seemed unsure of the exact kinship, stating "[Applicant's] mother is my husband's grandmother's mother. I don't know." (Tr. p. 157, lines 1-11.) Erica stated that Applicant may speak to her in passing but she "didn't see him all the time. He wasn't here all the time." (Tr. p. 157, line

including Dyshea, immediately shouted, "he got a gun." (Tr. p. 56, lines 16-20; p. 57, lines 8-9; p. 77, lines 13-17; p. 106, lines 20-25; p. 197, lines 22-23; p. 212, line 23; p. 232, lines 6-7.) Victim then turned back to Applicant and approached him, reportedly shouting "I ain't scare of no gun," "you gonna shoot me," "shoot me, MF," and "I ain't scared to die." (Tr. p. 45, lines 6-11; p. 78, lines 11-14; p. 107, lines 3-15; p. 197, line 23.) Victim swung at Applicant, though witnesses vary over whether it appeared he had a knife, and Applicant shot him in the face. (Tr. p. 108, lines 4-20; p. 197, line 24 – p. 198, line 7.)

Wilson, some distance away from the fight, testified that he never saw Victim with a knife, though Wilson told police it looked like Victim may have had a knife from the way he was swinging. (Tr. p. 47, lines 2-9; p. 48, line 7 – p. 49, line 13.) Leslie Morant, a friend who testified that she had held Dyshea back from the fight, stated that she never saw a knife. (Tr. p. 59, line 12 – p. 60, line 1.) Dyshea, who was close to the fight, did not see a knife during the first confrontation. (Tr. p. 96, lines 7-21.) Dyshea testified that she did not know whether Victim had a knife or not when Applicant returned for the second part of the conflict though she also testified she never saw him with one. (Tr. p. 105, line 24 – p. 106, line 7; p. 115, lines 6-8.)

The defense also presented witnesses. Christian Brand ("Brand"), a friend of Applicant's family and only fifteen years old at the time, was outside Sadie's that evening. According to Brand, Victim had reached into his pocket, retrieved a knife with a black handle, and approached Applicant. Brand agreed that Applicant had run away but came back seconds later. At that point, Victim swung at Applicant, and Applicant fired. Brand testified that Erica was behind Applicant when he fired, only a few feet away. Applicant's sister, Tatiana Rivers, also testified that Victim had swung at

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15 – p. 158, line 3.)

Applicant with a knife prior to the shooting.

In response, the State called Raheem McCrea ("Raheem"), a friend Brand claimed to have been at Sadie's with. Raheem initially denied being with Brand at Sadie's when he met with the solicitor outside of court. However, once on the stand, Raheem stated that he was at Sadie's with Brand. Raheem stated that he believed Victim had a knife and Applicant went and got a gun to defend himself.

After the incident, law enforcement attempted to locate Applicant. Applicant left for Miami, Florida, and was apprehended following a traffic stop nearly two months after the shooting. Victim was treated but never regained consciousness. As the prognosis worsened, the decision was ultimately made to remove life support on June 3, 2008, just over two weeks after the shooting. Victim's wife and brother were given items from Victim's pockets while he was in the hospital. Among the items was a small pocket knife with the blade closed when retrieved by hospital staff. No knife was recovered at the scene.

Failure to Request Pre-Trial Hearing Pursuant to Protection of Persons and Property Act

Applicant asserts that Counsel was ineffective in failing to request a pre-trial hearing pursuant to the Protection of Persons and Property Act, S.C. Code §16-11-410 *et. seq.* (2006) ("Act"). However, at the time of Applicant's trial, such a procedure was not clearly established. In State v. Duncan, 392 S.C. 404, 409, 709 S.E.2d 662, 664 (2011), decided more than two years after Applicant was sentenced, the South Carolina Supreme Court found that:

> Whether immunity under the Act should be determined *prior to trial* is an issue of first impression in this state. Further, the Act does not explicitly provide a procedure for determining immunity.

[Emphasis supplied.] In the decision, for the first time, the Court found that the legislature intended

through the Act to shield a defendant from trial and not simply to create an affirmative defense. Therefore, at the time of Applicant's trial, a demand for a pre-trial hearing was not within the common standard of practice. I therefore find that Counsel was not deficient in this regard. Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994) (attorney is not required to be clairvoyant or anticipate changes in the law which were not in existence at time of trial) (overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999)).

Moreover, even if Counsel had requested a pre-trial hearing, Applicant has failed to show the motion would have been successful. State v. Duncan also announced the proper standard of proof at a pre-trial hearing: "when a party raises the question of statutory immunity prior to trial, the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence." 392 S.C. at 411, 709 S.E.2d 665. The only potentially applicable portion of the Act in Applicant's case would be S.C. Code §16-11-440(C). The primary difference between §16-11-440(C) and self-defense is that §16-11-440(C) does away with the duty to retreat, allowing a person attacked in a place where he has a right to be (other than his dwelling, residence, occupied vehicle, or place of business) to "meet force with force." In Applicant's case, the undisputed evidence is that Applicant did retreat from his encounter with Victim. When Applicant retreated, testimony at trial was that Victim was also pulled away from the scene toward his car, no longer a threat. However, Applicant returned, this time armed with a pistol. The intent of §16-11-440(C) is clearly not to allow an individual in a place other than his dwelling, residence, occupied vehicle, or place of business to leave the area of danger, retreat to safety, then return in order to draw his retreating opponent into a second confrontation where danger to himself and the person he claimed to defend, Erica, had passed upon his retreat. If Applicant had already been armed at the time of the initial confrontation and it

was believed that Victim was armed and attacking Applicant or Erica with a knife, the protection could have foreseeably applied. However, where Applicant retreated and then returned with a pistol visibly in hand, an act which could have ostensibly caused his retreating opponent fear of attack, the Act's protection does not apply.

Even under Applicant's version of events, recounted for the first time at his PCR hearing, Applicant retreated then heard more arguing and returned. In Applicant's version, on his way back toward Victim, his "homeboy" handed him a gun. Applicant's claim that Victim had reignited the argument with Erica following Applicant's retreat is contrary to all testimony at trial. Not even defense witnesses mention that any conflict between Victim and Erica resumingwhen Applicant left. Most agreed that Applicant was gone for a very short time and that he had walked to a vehicle to retrieve the gun. Erica testified that she had removed herself to an area near a stop sign following the initial confrontation. She had not felt any danger even in the first confrontation. No witness, not even Applicant, testified that Victim threatened Erica with a knife or anything other than words in the first confrontation. In that Applicant's own self-serving statement that he returned only because he heard arguing between Erica and Victim is the only evidence that he had any basis for believing Erica may be the victim of violence without his intervention and contradicts other evidence that Victim was leaving the area, I find that Applicant has not established that he should be entitled to the protections of the Act by a preponderance of the evidence.

Moreover, the jury, charged with the law of self-defense and defense of others, found Applicant guilty beyond a reasonable doubt. For all these reasons, even if Counsel had moved for dismissal of charges pre-trial based on the Act, Applicant would not have been successful in showing he was entitled to its protection by a preponderance of the evidence. Therefore, Applicant has failed

to demonstrate prejudice even if Counsel's failure to request a pre-trial hearing could be considered deficient.

Proximate Cause of Death

Applicant also argued that he believed, in his lay opinion, Victim died due to errors by hospital staff in Victim's care, and therefore he was not the proximate cause of Victim's death. I find no error in Counsel's failure to present such an argument. State v. Doe, 218 S.C. 520, 63 S.E.2d 303 (1951) (defendant guilty of manslaughter where victim died when doctor manipulated gunshot wound several months after gunshot in course of necessary treatment, releasing a blood clot which was immediate cause of death); 40 C.J.S. Homicide §11 (2013); Lorenzen v. State, 376 S.C. 521 S.E.2d 771 (2008) (no prejudice from failure to call expert witness where expert does not testify); See also Graham v. Whitaker, 282 S.C. 393, 399, 321 S.E.2d 40, 44 (1984) ("The intervening negligence of a third person will not excuse the original wrongdoer if such intervention ought to have been foreseen in the exercise of due care.")

Advice not to Testify

Applicant stated that Counsel advised him not to testify at trial. Applicant believes this advice was in error. Applicant stated that Counsel advised him that testifying would not be beneficial due to introduction of his criminal record. Counsel further reflected that he felt that witnesses at trial testified to the facts as Applicant told him. Given that Applicant's record would be introduced and other witnesses would testify to Victim's possession of a knife, Counsel did not believe it was advisable for Applicant to testify. Counsel also stated that Applicant did not want to testify. Applicant's right to testify was also discussed by the trial court. (Tr. p. 136, line 6 – p. 139, line 9; p. 171, line 8 – p. 178, line 1; p. 179, line 21 – p. 181, line 5; p. 184, line 14 – p. 186, line 21; p. 260,

lines 17 – 23.) During colloquy with the trial court, Applicant was informed of his right to testify. Applicant informed the court that he had spoken with his attorney, his mother, and anyone else he wished. Applicant informed the court that his decision was not forced by anyone else.

Based on the foregoing, I find that Counsel's advice in this matter was not unreasonable. Counsel's concern with introducing his client's prior record was reasonable, especially when others would testify as to Victim's possession of a weapon. Further, based on the colloquy with the Court, it does not appear that Applicant's will was in any way overborne; his decision appears to have been made with full consideration of his rights and advice of his attorney and others. For these reasons, I find no error in this regard.

Preparation

Applicant further alleged that his attorney was inadequately prepared for trial. Counsel believed that he was adequately prepared. Counsel had access to all pertinent evidence and even visited the crime scene with Erica McBride. Applicant complains that one taped interview with a witness was not provided to Counsel until trial. Applicant has failed to show that Counsel's preparation was deficient. I further find that Applicant has failed to demonstrate any prejudice in this regard. Applicant has failed to produce any evidence that additional investigation into the facts of the case or would have yielded, and Applicant has failed to show what benefit earlier access to the taped interview would have provided. See Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) (no prejudice where claim of failure to investigate is supported only by mere speculation as to the result).

Jury Instruction

Applicant also stated that the supplemental jury instruction given by the trial court was in error. The trial court gave the following charge:

> Even when a defendant's passion was sufficiently inflamed by a legally adequate provocation if at the time of the killing his passions had cooled or sufficient time had elapsed that the passions of the ordinary reasonable person would have cooled then the killing would not be voluntary manslaughter.

(Tr. p. 334, lines 19-22.) Over defense counsel objection, the trial court charged additionally:

> If there was enough time between the provocation, if any, and the killing for the passion for a reasonable person to cool, the killing would not be voluntary manslaughter but instead it would be murder.

(Tr. p. 343, lines 3-19.) I find that this is not a burden-shifting charge. Therefore, Counsel was not ineffective in failing to object on this basis.

Other Allegations

No other allegations were raised at the PCR hearing. Therefore, any additional allegations are deemed waived because no evidence was presented.

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.

This Court advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order to secure the appropriate appellate review. His attention is also directed to Rule 243, SCACR, for appropriate procedures after notice has been timely filed.

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 26 day of Nov, 20__.

R. KNOX MCMAHON
Presiding Judge
Third Judicial Circuit

Lexington, South Carolina.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas
Honorable R. Knox McMahon, Circuit Court Judge

Case No: 2012-CP-45-0172

Javon Rivers.....Appellant
S.C.D.C. No.: 332402

v.

The State.....Respondent

PROOF OF SERVICE

I, the undersigned, do hereby certify that on this 12th day of December, 2013, I served the foregoing **Notice of Appeal, Order of Dismissal,** as well as **Proof of Service** in this matter by depositing a true copy of it in the United States Mail, postage prepaid, on December 12, 2013 addressed to the following as indicated below:

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Dated: December 12, 2013

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December 12, 2013

South Carolina Supreme Court
PO Box 11330
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RE: Javon Rivers v State of South Carolina
Case No. 2012-CP-45-0172

Dear Sir or Madam:

Enclosed herewith you will find the **Notice of Appeal, Order of Dismissal**, along with a **Proof of Service** in reference to the above named Applicant.

If you have any questions or concerns, please contact my office at the number stated above.

With kind regards, I am

Sincerely,

Charles T. Brooks, III
CTB/jlb

Enclosed as stated

Cc: Daniel Gourley, Office of Attorney's General
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