

Kcvd 12/13/2013

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE
IN THE COURT OF COMMON PLEAS

FILED

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP2103062

Kevin Walton

2013 DEC 12 AM 11:35

State Of South Carolina

CONNIE REEL SHEARIN
CCCP & GS
FLORENCE COUNTY, SC

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge

Judge Code

For Clerk of Court Office Use Only

12/12/2013

Date

CERTIFIED: A TRUE COPY
Connie Reel Shearin
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

This judgment was entered on **December 11, 2013**, and a copy mailed first class or placed in the appropriate attorney's box on **December 12, 2013**, to attorneys of record or to parties (when appearing pro se) as follows:

Jon Rene Josey PO Box 5478 Florence, SC 29502-5478

Joshua Lee Thomas PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Connie Reel-Shearin

Court Reporter

Connie Reel-Shearin - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE)

IN THE COURT OF COMMON PLEAS
FOR THE TWELFTH JUDICIAL CIRCUIT

Kevin Walton, #321491,)

Case No. 2011-CP-21-3062

Applicant,)

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

FILED
2013 DEC 11 PM 4:38
COMBIE RELEASER/AMM
COP & G.S.
FLORENCE COUNTY, S.C.

This matter comes before the Court by way of an Application for Post-Conviction Relief ("PCR") filed November 14, 2011. Respondent made its Return on or about September 27, 2012. The Court convened an evidentiary hearing into the matter on October 10, 2013, in Marion County. Applicant was present at the hearing and represented by J. Rene Josey, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the PCR hearing. Applicant's trial counsel, Patrick J. McLaughlin, Esquire, also testified. The Court had before it a copy of the record on appeal (which included transcripts from Applicant's trial and hearings), the records of the Florence County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the application, the return, and the exhibits introduced by Applicant. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Florence County Clerk of Court. In September 2004, the

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Comie R. Spain
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

Florence County Grand Jury indicted Applicant for murder and grand larceny (2004-GS-21-1168). He was originally represented by Karen E. Parrott, Esquire. On February 14, 2005, the State served Applicant and Ms. Parrott with its notice of intent to seek a sentence of life without parole ("LWOP") pursuant to S.C. Code Ann. § 17-25-45 ("the recidivist statute"). The State relied on Applicant's 1985 assault with intent to rob while armed conviction from the state of Michigan as the predicate offense to enhance Applicant's sentence. Applicant had Ms. Parrott relieved in February 2007 and was represented thereafter by Patrick J. McLaughlin, Esquire ("trial counsel"). The State again served its notice of intent to seek LWOP on trial counsel.

On April 23, 2007, Applicant proceeded to trial before the Honorable Thomas A. Russo and a jury. The jury found Applicant guilty as indicted on April 26, 2007. Judge Russo found Applicant's prior conviction was equivalent to an armed robbery conviction in South Carolina, and sentenced Applicant under the recidivist statute to life imprisonment for the murder conviction. Judge Russo sentenced Applicant to five (5) years for the grand larceny conviction.

Trial counsel filed a motion for a new trial, which Judge Russo denied by written order on December 27, 2007. Trial counsel filed a timely notice of appeal, and Robert Dudek, Esquire, of the South Carolina Office of Appellate Defense, was appointed to represent Applicant on appeal. Applicant subsequently filed grievances against Mr. Dudek and members of his staff, and the South Carolina Court of Appeals appointed trial counsel to represent Applicant on appeal. Trial counsel perfected the appeal with the filing of an Anders¹ brief. After a reviewing the record, the Court of Appeals dismissed Applicant's appeal on June 1, 2011. State v. Walton, Op. No. 2011-UP-255 (S.C. Ct. App. filed June 1, 2011). On August 26, 2011, the Court of

¹ Anders v. California, 386 U.S. 738 (1967).

Appeals denied Applicant's petition for rehearing. The South Carolina Supreme Court denied Applicant's petition for writ of certiorari on September 13, 2011, and the remittitur was returned to the circuit court on October 13, 2011.

II. ALLEGATIONS

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

1. "Attorneys were ineffective"
2. "Attorney should not have filed an Anders Brief"

Applicant included with his application an attachment listing thirty-six (36) paragraphs of allegations against his various attorneys. The allegations in this attachment are summarized as follows:

1. Ms. Parrott did not file a speedy trial motion.
2. Trial counsel entered evidence and waived the right to final closing.
3. Trial counsel should not have filed an Anders brief.
4. Trial counsel failed to retain expert witnesses.
5. Trial counsel failed to investigate the case.
6. Trial counsel was inexperienced.
7. Trial counsel did not cross-examine witnesses.
8. Judge Russo should have recused himself.

At the PCR hearing, Applicant proceeded on the above allegations relating to ineffective assistance of counsel. He did not raise any allegations of trial court error. Applicant also alleged trial counsel should have moved for a curative instruction when one witness referenced his "record of violence against women."

III. SUMMARY OF TESTIMONY

Applicant testified Ms. Parrott was relieved only sixty (60) days before the case went to trial. He testified he requested she file a motion for speedy trial, but she refused. However, on

cross-examination, Applicant admitted his case was delayed partially because he filed two federal *habeas corpus* actions while detained on these charges. He also admitted trial counsel filed a motion to quash the indictments for lack of a speedy trial.

Applicant testified he wanted a fingerprint expert to review the State's evidence linking him to a Lexus stolen from the area where police recovered the victim's car. He also testified he wanted trial counsel to retain an expert to review an alleged blonde hair recovered from the crime scene to show another person may have committed the murder. Applicant also alleged he requested trial counsel have a computer expert review the victims computer to recover the victim's diary, which Applicant claims would have shown he had no motive to murder the victim. Applicant further claims he asked trial counsel to have a footprint expert review the State's evidence linking him to the stolen Lexus.

Applicant also testified he had concerns with trial counsel's experience as an attorney. He believed trial counsel was not forthright with Judge Russo about his experience, but Applicant chose to stay with trial counsel instead of represent himself. Applicant also testified he had discussions with trial counsel about not entering evidence in an effort to present the last closing argument. He alleged he chose not to testify because he believed it was important to have the last argument. He also testified trial counsel should have sought a curative instruction when a witness made reference to Applicant's "record of violence against women." Applicant further testified he believed trial counsel did not adequately cross-examine the State's witnesses.

Applicant testified he met with trial counsel five (5) times before trial. During these meetings, they discussed the State's evidence and theory of the case. Applicant also recalled

telling trial counsel his defense to the charges was he was not in the house at the time of the murder. He also recalled rejecting the State's offer to plea to a thirty (30) year sentence.

Applicant alleged he provided trial counsel with the names of several witnesses who could testify on Applicant's behalf. He testified he also asked trial counsel to administer a polygraph to prove he was telling the truth about his involvement in the murder. Applicant also testified trial counsel should have briefed Applicant's directed verdict motion and motion for a new trial on appeal. However, on cross-examination, Applicant admitted he filed a *pro se* response to the Anders brief.

Trial counsel testified he filed a motion to quash Applicant's indictments for violation of his right to a speedy trial. He recalled Judge Russo denying the motion, and he recalled raising this issue in his Anders brief. He also recalled discussing the appeal with Applicant, who wanted to raise several issues in the brief. However, trial counsel testified he filed an Anders brief addressing two issues because he could not find any specific prejudice from the trial court's rulings.

Trial counsel recalled meeting with Applicant four (4) or five (5) times before trial and discussing the State's evidence. He recalled the State's evidence was entirely circumstantial, but was a very strong case nonetheless. Trial counsel testified Applicant always maintained he was innocent and his defense was he was not in the house when the victim was murdered. He testified he did not remember Applicant asking for a polygraph examination, but his advice would have been that a polygraph is inadmissible in court and would not have helped the case. Trial counsel recalled feeling it would be difficult to convince a jury Applicant was not in the home based on the evidence against him, particularly the statements from the victim's daughter.

Trial counsel testified he discussed other possible causes of the victim's death with Applicant, but Applicant maintained he was not in the house at that time. He also recalled Applicant provided a list of witnesses Applicant "hoped he could find." However, they decided not to pursue these leads because the trial strategy would be in part to attempt to convince the jury the police should have investigated other possible suspects.

Trial counsel recalled discussing the possibility of retaining experts with Applicant. Specifically, he recalled there was a question of whether Applicant's fingerprints were inside the Lexus stolen from the area where the police recovered the victim's car. However, trial counsel testified he did not believe an expert would have helped prove Applicant did not steal the Lexus. Rather, trial counsel relied on a memo from the Florida prosecutor stating Florida did not possess enough evidence to prosecute Applicant for the stolen Lexus. Trial counsel also did not hire a DNA expert to review the forensic evidence at the crime scene because Applicant lived in the house, and there was no question Applicant's DNA was found there. Trial counsel further testified he would not have retained these experts because it was helpful to his trial strategy to leave these questions unanswered. He also recalled discussing with Applicant the possibility of raising reasonable doubt by attacking the police for not pursuing other possible theories of the case.

Trial counsel did not hire a computer expert because he discussed the problems with the computer with his office's information technology staff. He recalled the disks were physically damaged and there was no way to recover the information in them. He also testified a boot print expert was unnecessary because there was no question the boots Applicant was wearing at the time of arrest did not match the boot print recovered near where the police found the victim's

car. Trial counsel testified Applicant agreed to not pursue these experts, but trial counsel would have attempted to get funding for them if Applicant had asked.

Trial counsel candidly testified he is more experienced now than he was at the time of Applicant's trial. However, he testified he had a good working relationship with Applicant and Applicant was very involved in his defense. Trial counsel conceded he discussed with Applicant the importance of having last argument, and admitted he inadvertently lost the right to last argument when he entered evidence. However, he testified he had a specific purpose for each item of evidence he entered. He entered a photograph to show the victim lived in a dangerous neighborhood. He entered some forensic reports to show the police did a sloppy investigation. He entered a memo from the Florida prosecutor to show the state of Florida had insufficient evidence to link Applicant to the stolen Lexus. Trial counsel testified he would have advised Applicant to not testify even if they had realized they waived last argument and could present a defense case. Trial counsel recalled discussing Applicant's prior record, and the two agreed the record would be harmful if brought out at trial.

Trial counsel recalled objecting to the witness statement about Applicant's "record of violence against women." He also recalled discussing with Applicant the possibility of requesting a curative instruction. Trial counsel testified he advised Applicant a curative instruction may focus the jury's attention on the statement, and Applicant agreed it was best left unaddressed. He further testified he made a point of cross-examining each expert witness to attempt to discredit their testimony. Trial counsel stated the only witness he did not cross-examine, the victims' daughter, was at the request of Applicant.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. The Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

A. Ineffective Assistance of Trial 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) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing 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).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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.

1. Motion for a Speedy Trial

The Court finds Applicant's allegation Ms. Parrott was ineffective for failing to secure a speedy trial is without merit. Ms. Parrott did not file a motion for a speedy trial because she felt the case was complicated and it would not be advantageous for Applicant to have a speedy trial. (Feb. 9, 2007 Hearing Tr. 5:8-13, R. on Appeal at 5). The Court finds she articulated a valid strategic reason for not filing a motion for a speedy trial. Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992))). Furthermore, any failure to secure a speedy trial was cured when trial counsel filed a motion to quash the indictment based on a denial of a speedy trial, which was thoroughly briefed and argued before trial. Judge Russo found trial was not unnecessarily delayed because the case was complicated in part by the actions of Applicant. (Trial Tr. 41:18-42:6, R. on App. at 71-72). Thus, Applicant may not have been entitled to a speedy trial even if a motion had been filed. Therefore, Applicant has failed to meet his burden of proving counsel was ineffective for failing to secure a speedy trial.

2. Waiver of Right to Final Closing Argument

The Court finds Applicant has failed to demonstrate trial counsel was ineffective by inadvertently waiving the right to give the final closing argument. Regarding this issue, the Court finds trial counsel's testimony to be credible, and Applicant's to be not credible. Trial counsel introduced four (4) pieces of evidence during the State's case: a photograph of the victim's neighborhood, two (2) forensic reports, and a memo from the Florida prosecutor. Trial counsel used each of these items to bolster his arguments that Applicant may not be the murderer or that the police did not do a sufficient investigation. Because trial counsel articulated a valid strategic reason for introducing these items, he was not deficient in introducing them in spite of his prior arrangement with Applicant to preserve closing argument. Stokes, 308 S.C. at 548, 419 S.E.2d at 779. Likewise, Applicant's allegation he relied on retaining last argument in making his decision to not testify is not borne out by the record. Judge Russo gave Applicant the opportunity to take the stand in his own defense, which Applicant declined. (Trial Tr. 523:24-524:17, R. on App. at 553-554). Applicant also made the decision not to testify to avoid having his prior record presented to the jury.

Furthermore, Applicant was not prejudiced by the introduction of these items. See Franklin v. Catoe, 346 S.C. 563, 570, 552 S.E.2d 718, 722 (2001) (Applicant must show prejudice from counsel's failure to secure last argument in death penalty trial); see also State v. Mouzon, 326 S.C. 199, 204, 485 S.E.2d 918, 921 (1997) ("[D]enial to the defendant of the right to argue last [] falls in the trial error, rather than the structural defect, category."). Applicant's defense theory was that he was factually innocent and that the police failed to investigate the case thoroughly. Trial counsel's closing argument thoroughly addresses these issues by

attacking the forensic evidence presented and attempting to create reasonable doubt. (Trial Tr. 536:18-549:10, R. on App. at 566-579). The State's closing argument is largely a summary of the evidence in the case and not devoted in any significant way to attempting to counter any points raised by trial counsel. (Trial Tr. 550:5-558:5, R. on App. at 580-588). The Court finds trial counsel could not have more adequately addressed the issues in this case had he been allowed to argue last. Mouzon, 326 S.C. at 205, 485 S.E.2d at 921. At the PCR hearing, Applicant "voice[d] no complaint whatsoever about the argument [trial counsel] made for him and even now offers no suggestion of things that [trial counsel] should have argued to the jury on his behalf." State v. Charing, 313 S.C. 147, 157, 437 S.E.2d 88, 94 (1993) (Goolsby, AAJ, dissenting), overruled by Franklin, 346 S.C. 563, 552 S.E.2d 718. Therefore, the Court finds, beyond a reasonable doubt, Applicant was not prejudiced by the order of closing arguments.

3. Trial Counsel's Anders Brief

The Court finds trial counsel was not ineffective for filing an Anders brief on appeal. The Court finds credible trial counsel's testimony he did not believe any non-frivolous issues existed on appeal. The Court finds not credible, or legally accurate, Applicant's assertion trial counsel should have briefed the issue of the denial of his directed verdict and new trial motions. Based upon this Court's review of the record, trial counsel was not deficient because he did not "unreasonably fail[] to discover nonfrivolous issues." Smith v. Robbins, 528 U.S. 259, 285 (2000).

Regardless, Applicant has not shown he would have prevailed on appeal had these issues been raised. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003) (prejudice prong of Strickland analysis requires showing the applicant would have been successful on appeal).

The Court of Appeal conducted a thorough review of the record before dismissing the appeal, and would have ordered full briefing if trial counsel failed to brief a meritorious issue. State v. McKennedy, 348 S.C. 270, 279, 559 S.E.2d 850, 855 (2002). Trial counsel's Anders brief addressed the issues he believed were strongest, and this Court agrees Applicant would likely have been unsuccessful in arguing the Judge Russo erred in denying the directed verdict and new trial motions. See State v. Frazier, 386 S.C. 526, 531, 689 S.E.2d 610, 613 (2010) ("If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury." (citing State v. Weston, 367 S.C. 279, 292-93, 625 S.E.2d 641, 648 (2006))). Therefore, the Court finds trial counsel's Anders brief afforded Applicant his full constitutional and statutory rights. Poston v. State, 303 S.C. 167, 168, 399 S.E.2d 592 (1989).

4. Failure to Retain Expert Witnesses

The Court finds Applicant has failed to meet his burden of proving trial counsel was ineffective for not retaining independent expert witnesses. Regarding this allegation, the Court finds trial counsel's testimony to be very credible, and Applicant's to be not credible or believable. Trial counsel discussed with Applicant the benefit of not retaining experts was to bolster the argument the police failed to perform a thorough investigation. The Court agrees trial counsel's articulated strategy of leaving unanswered questions is legitimate. Stokes, 308 S.C. at 548, 419 S.E.2d at 779. Furthermore, trial counsel planned to thoroughly cross-examine the State's experts to attempt to discredit their testimony. The Court also finds this is a legitimate trial strategy. Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) ("[D]ecision not

to call an expert witness to rebut the state's expert witness was a legitimate trial strategy.” (citing McLaughlin v. State, 352 S.C. 476, 483-484, 575 S.E.2d 841, 844-845 (2003))).

Furthermore, Applicant has not shown he was prejudiced by the decision not to retain independent experts. The testimony presented at the PCR hearing was merely speculative as to what Applicant's desired experts would have found. Id. Furthermore, the record reflects trial counsel thoroughly cross-examined the State's experts to attempt to discredit their testimony. See Lorenzen v. State, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008) (“[C]ounsel's failure to procure expert witnesses did not render her representation deficient given she vigorously cross-examined the State's witnesses and attacked the accuracy of the evidence.” (citing Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991))). In sum, Applicant had not proven any testimony by independent experts would have bolstered his defense at trial. Therefore, trial counsel was not ineffective in this regard.

5. Failure to Investigate

Applicant has failed to meet his burden of proving trial counsel was ineffective for failing to further investigate. Failure to conduct an independent investigation is not *per se* ineffective assistance of counsel when the allegation is supported only by mere speculation. Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (citing Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976)). Here, Applicant presented no testimony regarding what further evidence trial counsel could have uncovered that would have bolstered his defense. On this point, the Court finds very credible trial counsel's testimony Applicant merely provided him speculative leads which they decided did not need to be investigated. The Court finds not credible Applicant's unsubstantiated and vague testimony that other leads could be investigated.

Furthermore, the Court notes Applicant's prior counsel, Ms. Parrott, did investigate Applicant's leads, to no avail. (R. on App. at 631). Because Applicant has not shown what information remained to be uncovered, the Court finds trial counsel was not ineffective in his pre-trial investigation.

6. Trial Counsel's Experience

The Court finds the allegation trial counsel was ineffective because he was inexperienced to be wholly without merit. Although trial counsel admitted he is a better lawyer now than at the time of trial, lack of experience is not *per se* ineffective assistance of counsel. United States v. Cronin, 466 U.S. 648, 665 (1984) ("Every experienced criminal defense attorney once tried his first criminal case."). The record indicates trial counsel made timely and articulate objections, competently introduced evidence, and thoroughly performed cross-examination and argument. The Court finds no deficiency on trial counsel's part that is attributable to his relative inexperience in the courtroom.

7. Failure to Cross-examine Witnesses

The Court likewise finds the allegation trial counsel did not cross examine the State's witnesses to be unsubstantiated by the record. The record reflects and this Court finds trial counsel subjected the State's case to a thorough and "meaningful adversarial testing." Nance v. Ozmint, 367 S.C. 547, 553, 626 S.E.2d 878, 881 (2006). Trial counsel made timely and articulate objections, thoroughly cross-examined the State's witnesses, and made well-reasoned arguments to the jury. At the PCR hearing, Applicant did not articulate how he believed trial counsel was deficient in this regard. Furthermore, the Court finds credible trial counsel's

testimony he did not cross-examine the victim's daughter at the request of Applicant. In sum, trial counsel was not ineffective in his cross-examining of any of the State's witnesses.

8. Failure to Request Curative Instruction

The Court finds this allegation to be without merit as well. Trial counsel objected to the victim's daughter's reference to Applicant's "record of violence against women." (Trial Tr. 483:13-16, R. on App. at 513). Trial counsel also requested a curative instruction on the statement. (Trial Tr. 486:13-15, R. on App. at 516). The record also reflects trial counsel withdrew this request after Judge Russo warned it may "shine a light on it[.]" (Trial Tr. 483:16-19, R. on App. at 516). The Court finds credible trial counsel's testimony at the PCR hearing that he and Applicant made a tactical decision not to request the curative instruction. The Court also finds this is a valid trial strategy. Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000) (valid trial strategy to "not request curative instructions because they tend to bring into focus precisely the item the objector has kept out"). Therefore, trial counsel was not ineffective for not requesting the curative instruction.

9. Overwhelming Evidence of Guilt

The Court further finds Applicant cannot satisfy the prejudice prong of the Strickland analysis as to any of his allegations because the record contains overwhelming evidence of his guilt. Hutto v. State, 387 S.C. 244, 249, 692 S.E.2d 196, 198 (2010) ("No prejudice occurs, despite deficient performance, when there is overwhelming evidence of guilt." (citing Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009))). Although built on circumstantial evidence, the State's case against Applicant was overwhelming. The victim's daughter and a neighbor testified they saw the victim and Applicant together at the victim's house after 1:00 AM. A

forensic investigator determined the victim's time of death to be around 4:30 AM. A forensic pathologist opined the victim died from strangulation by another person. The daughter testified her mother was deceased at 6:00 AM. There was no evidence the house was broken into or that any person besides the victim, the daughter, and Applicant were in the house between 1:00 AM and 6:00 AM.

A local police officer spotted the victim's car leaving the area around 5:30 AM. The car was later recovered in Florida, where Applicant has family. The car was abandoned, but police found cigarette butts in the car containing Applicant's DNA. They also found boots in the trunk of the car that were the same brand as the boots Applicant was wearing when arrested. Near where the car was abandoned, police responded to a theft of a Lexus. At that scene of the theft, they found a boot print matching the boots in the victim's abandoned car. They also found the keys to the victim's car at the scene. The stolen Lexus was later found in a parking lot in Virginia with Applicant's fingerprints on it. Applicant was arrested near the location where the Lexus was located.

The natural conclusion to be drawn from this evidence is that Applicant was the only person present at the scene of the murder, from which he then fled. The Court can discern nothing trial counsel could have done differently to counter this evidence. In sum, trial counsel cannot be found ineffective because the evidence overwhelmingly points to Applicant's guilt in this murder.

B. All Other Allegations

As to any and all allegations raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present sufficient

evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

V. CONCLUSION


Based on the foregoing, the Court finds and concludes 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.

The Court notes that 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, 409 S.E.2d 395 (1991), an applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that 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 THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.


AND IT IS SO ORDERED this 25 day of Nov., 2013.


THE HONORABLE WILLIAM H. SEALS, JR.
Presiding Judge

Mani, South Carolina

2013 DEC 11 PM 4:38
CONNIE REEL-SHEPHERD
CCLCP & GS
FLORENCE COUNTY, SC

FILED

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CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.