

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY

Honorable Stephanie P. McDonald, Circuit Court Judge

CASE NO.: 2011-CP-10-7028

Shawn D. Phillips ,Appellant

v.

State of South Carolina, Respondent.

NOTICE OF INTENT TO APPEAL

Shawn D. Phillips appeals the Order of the Honorable Stephanie P. McDonald dated January 13 12, 2014 and received by the plaintiff on February 3, 2014 denying his petition for Post Conviction Relief.

RECEIVED

FEB 18 2014

S.C. SUPREME COURT



MARK L. ARCHER, ESQUIRE
ATTORNEY FOR PLAINTIFF/APPELLANT
PO Box 971
Mount Pleasant, SC 29465
(843) 566-0118/Fax (843) 566-0336

Charleston, SC

February 10, 2014

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Honorable Stephanie P. McDonald, Circuit Court Judge

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CERTIFICATE OF DELIVERY BY MAIL

I hereby certify that I have deposited a true and correct copy of the Notice of Intent to Appeal and Motion to Proceed Without Payment of Costs in the United States Mail with sufficient postage affixed thereto this 10th day of February, 2014 , addressed to

Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211



MARK L. ARCHER, ESQUIRE
ATTORNEY FOR PLAINTIFF/APPELLANT
PO Box 971
Mount Pleasant, SC 29465
(843) 566-0118/Fax (843) 566-0336
Archerlaw@netscape.net

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AG
AT
SDC
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STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
Shawn D. Phillips, #264250,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
2011-CP-10-7028

ORDER OF DISMISSAL

FILED
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JULIE J. HENNING
CLERK OF COURT
BY _____

THIS MATTER CAME BEFORE THE COURT by way of an application for post-conviction relief (PCR) filed September 28, 2011. The State filed its return on December 19, 2011. A hearing into the matter was convened at the Charleston County Courthouse on July 26, 2012. Applicant was present and represented by Leigh Hunter, Esquire.¹ The State was represented by David Spencer of the South Carolina Office of the Attorney General.

This Court has had the opportunity to hear and observe the testimony presented. This Court has also reviewed the trial transcript, the Clerk of Court records regarding the subject convictions, and the pleadings for both parties.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Charleston County. Applicant was indicted at the April 2007 and April 2008 terms of the Charleston County Grand Jury for murder (2007-GS-10-5565), armed robbery (2007-GS-10-5567), and criminal conspiracy (2008-GS-10-3459). Mark Peper, Esquire, represented Applicant. Applicant proceeded to trial on August 5 – 7, 2008,

¹ Ms. Hunter is now deceased. Mark Archer, Esquire, has now been appointed to represent Applicant.

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after which a jury found him guilty as indicted. The Honorable James C. Williams, Jr., sentenced Applicant to concurrent sentences of forty years' imprisonment for murder, thirty years' imprisonment for armed robbery, and five years' imprisonment for criminal conspiracy.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. Joseph L. Savitz, III, Esquire, of the South Carolina Commission on Defense, represented Applicant on appeal. Following an Anders brief, the South Carolina Court of Appeals dismissed the appeal. State v. Phillips, Op. No. 2011-UP-271 (S.C. Ct. App. filed June 8, 2011). The Remittitur was issued on June 24, 2011.

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 presented 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 (2003).

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant makes various allegations of ineffective assistance of counsel. The burden of proof is on the applicant in a PCR proceeding to prove the allegations in his application. Bell v. State, 321 S.C. 238, 467 S.E.2d 926 (1996); Rule 71.1(e), SCRCP.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996). In order to prove prejudice, an applicant

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must show that but for counsel's errors, there is a reasonable probability the result at trial would have been different. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id. Where trial counsel articulates a valid reason for employing a certain trial strategy, such conduct should not be deemed ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

ALLEGATIONS

The Applicant alleged the following claims: (1) that the prosecution knowingly used perjured testimony; (2) trial counsel was ineffective for not subpoenaing Dora Perkins; (3) trial counsel was ineffective in allowing evidence of a prior bad act; (4) trial counsel was ineffective for failing to object to in-court identification of Applicant; (5) appellate counsel was ineffective for failing to raise the issue of whether the trial court erred in admitting photographs of the victim; (6) trial counsel was ineffective for failing to object to the charge on duress; (7) the trial court's malice instruction was unconstitutional; (8) ineffective assistance of counsel regarding voluntariness of the Applicant's statement on the part of both trial counsel and appellate counsel; and (9) a portion of the prosecution's argument constitutes bolstering.

(1) Knowing Use of Perjured Testimony

Applicant alleges that the prosecution knowingly used perjured testimony from Angela Agagas, Applicant's girlfriend at the time of the robbery, who testified against Applicant. Agagas testified that she was with Applicant and co-defendant Lennie Mickey when they robbed Alec Browne at Towne Suites Hotel. Agagas testified that they took a gun from Browne and later the same gun was used when the victim in his case was robbed. Browne also testified at

trial and confirmed a gun was stolen. Testimony about the Towne Suites Hotel robbery was admitted over counsel's objection at trial.

The order of trials is relevant to this issue. Mickey was tried first, and the trial court ordered a mistrial after the jury could not reach a verdict. Applicant was tried afterwards and was convicted. Subsequently, Mickey was tried again. At Mickey's second trial, the trial court did not allow evidence of the Townes Suites Hotel robbery to be admitted which the prosecution argued went to the issue of identity. At this trial, Browne testified that the stolen gun was steel blue while Agagas testified that the stolen weapon was silver. This discrepancy became part of the basis for excluding the testimony. The trial court found that Agagas's testimony was not clear and convincing and therefore, insufficient to be admitted under Rule 404(b), SCRE.

Assistant Solicitor Bruce Durant testified at the PCR hearing and explained the chain of events. Durant explained the discrepancy in the description of the gun only came to light during Mickey's second trial. Durant noted that he could not locate Browne for Mickey's first trial. Durant testified that he did not find out about this discrepancy himself until Agagas's testimony at Mickey's second trial. Durant testified that the prosecution complied with Rule 5, SCRCrimP and that he did not know of the discrepancy until Mickey's second trial, which was last.

This Court finds Durant's testimony credible and therefore finds that the prosecution did not knowingly use perjured testimony. Further, this Court notes that while there may have been discrepancies between Browne and Agagas's description of the gun, that does not necessarily mean that Agagas, or Browne, were committing perjury. Discrepancies, such as the color of objects like guns or automobiles, are common in trial settings and may be an issue of the quality of a witness' recollection rather than their veracity. Therefore, this Court denies Applicant's claim for post-conviction relief as to this allegation.

(2) Statement of Dora Perkins

Applicant alleges trial counsel was ineffective for not subpoenaing Dora Perkins who gave an exculpatory statement to the police. Counsel testified that while Perkins's statement would have been exculpatory, counsel did not think it would likely be given much weight at trial. Counsel confirmed he received Perkins's statement in discovery. Durant testified that he did not think Perkins was a credible witness. Perkins did not testify at the PCR hearing.

This Court finds trial counsel's testimony credible and finds that his assessment is reasonable trial strategy. Further, Applicant did not provide testimony from Perkins, so it is speculative at best that Perkins' testimony would have been beneficial. Accordingly, this Court finds Applicant has not met his burden of proving either prong of Strickland.

(3) Prior Bad Act

Applicant alleges trial counsel was ineffective in allowing evidence of the Towne Suites robbery. As mentioned before, the prosecution sought to admit this testimony to prove the identity of Mickey and Applicant as robbers in the instant case. An in camera hearing was held to determine the admissibility of evidence of this prior robbery. Tr. pp. 208-256. Counsel argued against inclusion of the evidence. However the trial court found the evidence admissible to establish identity. Tr. pp. 243-249. Counsel requested a limiting instruction on the evidence. Tr. p. 252. The trial court gave the jury the limiting instruction. Tr. p. 256.

Applicant argues trial counsel was ineffective because he failed to renew the objection before the jury. However, Agagas testified immediately following the trial court's ruling, so no further objection was necessary. When a court admits evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the

objection as the issue has been preserved. State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001).

This Court finds trial counsel's performance was not deficient as he adequately objected to preserve the issue for an appeal. Further, this Court finds that Applicant was not prejudiced by the alleged deficiency. Even assuming that the issue was not preserved for appeal, this Court does not believe that the trial court abused its discretion in admitting the evidence and therefore, appeal of this issue would not have been successful. Therefore, this Court denies Applicant's claim for post-conviction relief as to this allegation.

(4) Failure to Object to In-Court Identification

Applicant alleges trial counsel was ineffective for failing to object to Sandra Barnes' in-court identification of Applicant. Counsel testified that his trial strategy was to pursue the defenses of duress and mere presence rather than challenge identity. Counsel noted that Applicant gave a statement admitting his presence at the murder scene, but Applicant claimed in his statement that he stayed in the car while Mickey and "D" went into the hotel room. Applicant contended he was under duress from Mickey to go with him in the car.

Barnes testified at trial that she first met Applicant two weeks before the murder and then met him again the evening of the murder. In Applicant's presence, Mickey questioned a prostitute named Alana Niesen ("China") about whether she had any clients that Mickey and Applicant could rob. Niesen provided Victim's name and they made plans to rob him. Niessen called Victim to arrange for Barnes to go over to Victim's hotel room. The plan was for Barnes to knock on Victim's door and then Mickey and Applicant would follow behind and rob Victim. When Barnes went to Victim's door, it was partially opened. Mickey and Applicant rushed into the room, while Barnes went back to the hotel room where the robbery was planned. Mickey

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and Applicant returned to the hotel room. Mickey was upset, but Applicant seemed cool. Mickey claimed they only tied up Victim and put him in the bathtub. Tr. pp. 411-24.

Barnes, who was later arrested, admitted on cross-examination to picking someone else out of a lineup, but she later identified Applicant as Mickey's accomplice when she saw him in a police interview room. Tr. pp. 425-30. In trial counsel's view, Barnes's admission to the prior identification killed her credibility.

This Court does not find trial counsel's failure to object to the in-court identification as deficient performance. The record reflects that Barnes had ample time to observe Applicant. Further, Detective Jourdan testified that shortly after she had picked up another individual out of the lineup, Jourdan was brought into an observation room with a two-way mirror at Detective Spears's request. Applicant was present on the other side of the mirror. Jourdan testified that she was not asked to identify Applicant as "D," the nickname she knew Applicant by, but only asked if she could identify the person on the other side of the mirror. She identified him as "D," the participant in the robbery. Tr. pp. 452-455.

This Court finds that had trial counsel objected to the identification, it likely would have been overruled. Further, Applicant was not prejudiced as Barnes was forced to admit to the prior identification. Finally, Applicant was not prejudiced as her identification was merely cumulative to the Niessen and Agagas' testimony establishing Applicant's involvement in the robbery, in addition to the statement that Applicant gave law enforcement. This Court finds that Applicant did not meet either prong of Strickland and denies relief as to this claim.

(5) Photographs Of Murder Victim

Applicant alleges appellate counsel should have raised the issue on appeal of whether the trial court erred in admitting photographs of the victim. The prosecution contended at trial that

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the photographs were probative to show malice and corroborate the pathologist's testimony that the gunshot wound was a contact injury. The prosecution indicated that they had withheld the more gruesome pictures and were using the black and white photographs instead of the color photographs. The prosecution argued: "That was an execution, it was a malicious killing, and these photographs are probative on the issue of malice." Tr. p. 562, lines 15-19. A color photograph that the trial court did not consider gory was admitted because it showed scratches on Victim's nose. The prosecution was alleging the scratches were caused by a pillow being put over Victim's face when he was shot in bed. Tr. pp. 563-564. The trial court found that the three black and white photographs showed the entry and exit wounds and found they were probative and admissible. The trial court excluded two other photographs. Tr. p. 564, lines 5-25.

This Court finds that the issue, if raised on appeal, would likely not have been successful as nothing in the record indicates the trial court abused its discretion when it admitted the photographs. Accordingly, Applicant was not prejudiced because the issue would not have been successful on appeal. Therefore, this Court finds Applicant has not met his burden of proving appellate counsel's performance was ineffective and denies post-conviction relief as to this allegation.

(6) Duress Charge

Applicant alleges trial counsel was ineffective for failing to object to the charge on duress because it was burden-shifting. The trial court gave the following charge:

Ladies and gentlemen, the Defendant has raised the defense of duress. Duress is an affirmative defense which means it must be proven by the defendant by the preponderance of the evidence. The State must prove the guilt of the defendant by beyond a reasonable doubt. To make out the defense of duress which would relieve the Defendant of responsibility, the Defendant must prove the defense of duress by the preponderance of the evidence, which as I told you, is more probable than not. To establish duress which

will excuse criminal act the degree of coercion must be present, imminent, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done. Coercion is no defense if there is any reasonable way, other than committing the crime, to escape the threat of harm. The fear of injury must be reasonable. Further, ladies and gentlemen, I charge you that duress is not a defense to the charge or the crime of murder.

Tr. p. 809, line 8 – p. 810, line 1.

The South Carolina Supreme Court found it was not error to charge the jury that the defendant had the burden of proving his defense of duress by a preponderance of the evidence in State v. New, 371 S.C. 523, 640 S.E.2d 871 (2007). In reaching that conclusion, the Supreme Court noted that unlike self-defense, the defense of duress does not negate any element of the crime because although duress may allow a defendant to avoid criminal liability, the crime is still knowingly committed. Id., 371 S.C. at 526, 640 S.E.2d at 873.

The jury instruction was a correct statement of law; thus, trial counsel's performance was not deficient, nor was Applicant prejudiced by the alleged deficiency.

(7) Malice Charge

Applicant complains that the trial court's malice instruction was unconstitutional in reliance on State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). The Belcher opinion was issued after the trial. The South Carolina Supreme Court expressly stated that Belcher is not to be applied retroactively. Further, counsel is not required to be clairvoyant and anticipate changes in the law. Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994). Accordingly, Applicant has failed to prove ineffective assistance of counsel.

(8) Involuntary Statement

Applicant contends that trial counsel should have challenged the voluntariness of Applicant's statement. Counsel testified that his strategy was to not argue that the statement was

involuntary, but instead use the statement to support Applicant's defense of duress. Counsel noted the statement put Applicant in the car at the hotel, but not in the hotel room that was robbed. This Court finds counsel's strategy was reasonable given the evidence in this case. Further, this Court finds Applicant was not prejudiced as this Court does not believe there is a reasonable likelihood that the jury would be convinced that the statement was involuntary. Furthermore, ample evidence in the record supports the jury's verdict even without the statement.

Applicant also contends appellate counsel was ineffective for not raising the issue of voluntariness of the statement on appeal. However, the standard of review on appeal of the judge's admission of a statement is under the abuse of standard discretion. The trial court's ruling will be upheld if supported by any evidence. State v. Breeze, 379 S.C. 538, 543, 665 S.E.2d 247, 250 (Ct. App. 2008). The trial court, although concerned about consistencies on the timing of the statement, ultimately concluded there was no evidence of any pressure or coercion placed on Applicant, or that Applicant had any difficulty in understanding what was happening or with what he was doing. Tr. p. 146. The findings are supported by the record, and the trial court's ruling would most likely be upheld if an issue of voluntariness had been raised on appeal.

Further, although not dispositive, this Court notes that the appeal was submitted for an Anders review. Had the Court of Appeals considered the issue to be meritorious after it reviewed the entire record, the Court of Appeals would have required the issue to be briefed.

This Court finds that Applicant has failed to prove either prong of Strickland.

(9) Closing Argument – Bolstering

Applicant complains that the following portion of the prosecution's argument constitutes bolstering:

And Angela Agagas, well, let's talk about her. We know that her relationship with Shawn is that she's the mother of his child. She had a close relationship with him. She loved him, may still love him, I don't know. She's got a baby with him. And she's been in jail because of Shawn Phillips. He got her into this whole mess. And did she want to say anything in the very beginning about Shawn? Heck, no. She wanted to protect him in every way possible, and she never said anything. And that's because she loved him, that's because he was the, her baby's daddy. But when it comes down to it, she's been in jail two years now. She has pending charges, and she's telling you what happened, because Sandra and Alan had already said that Angela's boyfriend was in the room at the travel lodge, and he was the one who went over there with Lennie Mickey to go commit this crime. **Well, Angela, was he or not? Yeah, he was, of course, he was. She tells the truth. And that is the truth.**

Tr. p. 382, line 16 – pl. 383, line 9 (emphasis added).

Applicant complains that the bolded portion of the above passage was impermissible bolstering. This Court finds that it was not. “A solicitor’s argument concerning the credibility of the State’s witness based on the record and its reasonable inferences is not error.” State v. Caldwell, 300 S.C. 494, 505, 388 S.E.2d 816, 823 (1990). However, “[a] solicitor may not vouch for the credibility of a State’s witness based on personal knowledge or other information outside the record.” Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002).

In the instant case, the prosecution’s comments do not indicate personal information or information outside the record. Instead, although in isolation the statement may be conclusory, when put in context, it is merely the prosecution’s view of the evidence presented and not impermissible bolstering. Counsel’s performance was not deficient for failing to object. In any event, Applicant was not prejudiced by the failure to object as this was an oblique comment and not violative of the Matthews rule.

CONCLUSION

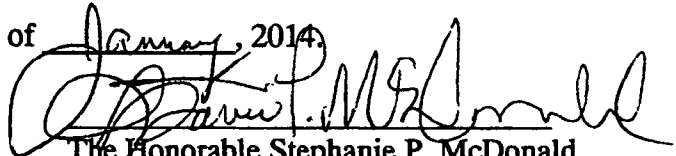
Based on the foregoing, this Court finds and hereby concludes that the Applicant has not established any constitutional violation or deprivation that would require this Court to grant his application. Therefore, this Application for Post-Conviction Relief must be denied and dismissed with prejudice.

This Court advises the parties that in order to secure the appropriate appellate review, notice of appeal must be served and filed within thirty (30) days after receipt by counsel of notice of entry of this order. See Rules 203 and 243 of the South Carolina Appellate Court Rules. This Court notes that post-conviction relief counsel must advise an applicant of the right to seek appellate review of a post-conviction relief order. State v. Bray, 366 S.C. 137, 620 S.E.2d 743 (2005). Also, pursuant to Austin v. State, 305 S.C. 453, 409 S.E. 2d 395 (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 that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on an applicant's behalf.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 13th day of January, 2014.



The Honorable Stephanie P. McDonald
Presiding Judge
9th Judicial Circuit

Charleston, South Carolina

ARCHER LAW OFFICE, PA

736 LAVALIER SQUARE
POST OFFICE BOX 971
MOUNT PLEASANT, SOUTH CAROLINA 29465-0971
(843) 566-0118/FAX 566-0336

February 10, 2014

Hon. Daniel E. Shearous, Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Shawn D. Phillips v. State of South Carolina
CASE NO.: 2011-CP-10-7028

Dear Sir/Madam:

Enclosed for filing please find the following original document or documents related to the above subject case:

- A. Notice of Intent to Appeal
- B. Certificate of Delivery by Mail
- C. Motion to Proceed Without Payment of Costs
- D. Order Appealed From

Upon filing the originals, I would ask that you clock the enclosed copy of this letter and return them to me in the self-addressed envelope which I have provided. as proof of filing for my records. I thank you for your assistance in this matter.

Sincerely,



Mark L. Archer

MLA

Enclosures

cc: Attorney General

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FEB 18 2014

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
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MOTION TO PROCEED WITHOUT PAYMENT OF COSTS

The undersigned attorney hereby moves to proceed with appeal of this car without the payment of cost The within Motion is made on the grounds that the Grounds that:

- A. The undersigned attorney is court appointed to represent the Appellant due to his indigence;
- B. The Appellant is without funds to pay the costs of Appeal;
- C. The undersigned attorney is without funds to donate towards the cost of the appeal.



MARK L. ARCHER, ESQUIRE
ATTORNEY FOR DEFENDANT/APPELLANT
PO Box 971
Mount Pleasant, SC 29465
(843) 566-0118/Fax (843) 566-0336

Charleston, SC

February 10, 2014

ARCHER LAW OFFICE PA
POST OFFICE BOX 971
MOUNT PLEASANT, SOUTH CAROLINA 29465



Hon. Daniel E. Shearous, Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

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