

(92-GS-32-3398), in February of 1993 for possession of a firearm during the commission of a violent crime (93-GS-32-586), and in May of 1993 for pointing a firearm (93-GS-32-1514). He was represented by Mr. Gregory and underwent a jury trial on May 26-29, 2003. Applicant was convicted as indicted and sentenced by the Honorable Frank Eppes to life imprisonment for murder, 10 years for pointing a firearm, and 5 years for possession of a firearm during the commission of a violent crime. In a motion dated June 6, 1993, Applicant requested a new trial based on several allegations of trial court error. After that motion was denied, Applicant submitted a Motion for a New Trial on After-Discovered Evidence and to Stay the Time for Perfecting an Appeal. This motion was dated June 15, 1993 and filed on June 21, 1993. Judge Eppes denied the motion on June 23, 1995. Both of these post-trial motions were filed by Gregory on Applicant's behalf.

Applicant filed a Notice of Appeal on June 23, 1993. The South Carolina Supreme Court affirmed Applicant's convictions and sentences. State v. Rutland, Op. No. 95-MO-263 (S.C. Sup. Ct. filed August 25, 1995). Applicant's petition for rehearing was denied on October 9, 1995 and the case was also remitted on October 9, 1995.

In a pro se motion dated April 17, 1996, Applicant again moved for a new trial based on newly or after-discovered evidence. Because of allegations of impropriety by the prosecution, the State was represented on the motion by the South Carolina Attorney General's Office. The State made its return to the motion on July 27, 2001. On May 28, 2003, Applicant voluntarily withdrew his pending new trial motion with the intention of filing the current action and apparently with the understanding that the State would not seek to have this action dismissed on the ground it was barred by the applicable statute of limitations.

FACTUAL BACKGROUND

The case against Applicant arose from the shooting death of Jimmy Peele at the Bow Wow Boutique, a pet grooming salon. Peele's estranged wife, Sally Peele, was involved with Applicant, a married man with whom she had worked. (Trial tr. pp. 209-11.) Sally was a commercial carpenter and although she and Applicant contend she was abused by Peele, a detective testified his investigation revealed Sally actually abused Peele throughout their marriage. (Trial tr. pp. 311-13; pp. 240-43.) Earlier on the day of the shooting, Applicant and Sally went to a pawn shop where Sally purchased a shotgun, a pistol, and ammunition for both weapons. (Trial tr. p. 286-94.) Later, they went to the Peele residence. Sally went inside and upon encountering Peele, pointed the pistol at him. Sally backed out of the door after Peele verbally challenged her, and he followed her outside. (Trial tr. pp. 268-72.) Applicant then came out of a van, pointing a shotgun at Peele. (Trial tr. pp. 272-73.) Applicant fired a shot in the air and then pointed the gun again at Peele. (Trial tr. pp. 273-74.) Bruce Sharpe, a friend of Peele's, was present during the altercation and stated Peele was unarmed and not looking for trouble when Applicant and Sally arrived. (Trial tr. pp. 275-76.) Applicant, by contrast, made a comment about crippling Peele, which was overheard by Robin Hunt, a passenger who was with Applicant and Sally. (Trial tr. p. 497.) Peele then called 911 to report the incident. (Trial tr. pp. 244-45, 557.)

Applicant, Sally, and Hunt went to Hunt's home, where Hunt overheard Sally's end of a telephone call. Sally was talking to someone named "Jimmy" and arranged to meet him at the boutique. (Trial tr. pp. 498-502.)

Thereafter, Applicant and Sally arrived at the Bow Wow Boutique, purportedly to ask Kim and Daniel Kestner to sell them a car. After the Kestners agreed to sell the car, Mr. Kestner went

outside to look for the car title. (Trial tr. pp.107-12, 117.) Peele arrived, went inside, and was shot four times while Mr. Kestner was outside. At trial, Kim Kestner testified the only thing she saw in Peele's hands was a pack of cigarettes, but he did put the pack in his mouth and reach behind his back before Applicant shot him. (Trial tr. pp.137-42) After the shooting, Kestner saw Applicant with one gun and another gun on the floor. (Trial tr. pp.143-44.) She testified she never saw Peele with a gun. (Trial tr. p.145.) Applicant, however, testified Peele was armed when he entered the boutique, although they both stated Applicant drew his weapon first. (Trial tr. pp.417-23.)

The State presented evidence that Applicant admitted to a police detective that about a month before the shooting, he had talked with Sally about doing away with, or having something done to take care of, Peele. (Tr.60-61, Trial tr. pp.241-242.) David Jones, Applicant's cellmate in jail, testified Applicant said he was in jail for killing a man, that the man deserved it, and that he offered to do it a month earlier. (Trial tr. p.506) Jones further testified Applicant was cocky, arrogant and without remorse, almost boasting about killing Peele. Applicant also told Jones about buying the guns earlier in the day and about going to the boutique with the knowledge that Peele would also be there. (Trial tr. pp.506-08.)

The State's theory essentially was that Applicant and Sally lured Peele to the boutique with the intention of killing him and that they might have planted the gun after the shooting in an effort to establish self-defense. (Trial tr. p.558-61, 565-66.)

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 fact and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (2003).

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), SCRCPP). 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 proceedings. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). As discussed below, Applicant has failed to carry his burden in this action. Therefore, this Court finds that the application must be denied and dismissed.

General Lack of Trial Preparation

Applicant contends Gregory was ineffective in that he failed to adequately prepare for trial. This Court does not agree.

David Farrell testified he was appointed to represent Applicant on his pro se motion for a new trial based on after-discovered evidence.¹ Farrell testified he recalled an accusation that Peele's father paid off a witness, but determined that was simply a rumor. After investigating further, Farrell reached the conclusion that although there was not much to support an after-discovered evidence motion, Applicant had some legitimate PCR issues. (PCR tr. pp.5-6.) Farrell spoke with James Irvin, who worked for Mr. Gregory and assisted him in preparing Applicant's defense. Irvin, who was deceased by the time of the PCR hearing, told Farrell that Gregory contacted him approximately ten days before trial and said: (1) he had never been paid all the money he was promised, (2) he had not expected the case to go to trial, and (3) he was under-prepared. (PCR tr. pp.6-9.)

Gregory testified he practiced criminal law for 30 years. (PCR tr. p.11, 48.) His former legal secretary, Robin Hunt, introduced him to Applicant. (PCR tr. p.11.) Gregory recalled that while in jail, Applicant gave Gregory one dollar to retain him and later signed a retainer agreement. (PCR tr. p.11.) Gregory anticipated Applicant would provide additional money pursuant to their fee agreement to fund the investigation and preparation of the defense. However, when the Applicant

¹ Gregory was disbarred in 2000. In re Gregory, 340 S.C. 413, 532 S.E.2d 605 (2000).

failed to fulfill his financial obligation under the retainer agreement, the only resource Gregory had to complete an investigation was the limited cash flow from his office. (PCR tr. pp.11-13.) Additionally, after Applicant bonded out of jail, he left the jurisdiction with Sally Peele in violation of his bond. (PCR tr. pp.13-14, 50.) Authorities brought Applicant back to the jurisdiction shortly before trial. Thus during the months before trial, Applicant was almost completely unavailable to assist Gregory in preparing his defense. (PCR tr. pp.14, 50.)

According to Gregory, the defense received no more than two weeks notice of trial. Once they received notice of trial, Gregory and Irvin, his paralegal, tried to find witnesses when they were not otherwise engaged in running the firm. Irvin was the only person helping him get ready for trial. Their efforts to find witnesses for trial, including Hunt, were unsuccessful. (PCR tr. pp.14-17.) Despite these difficulties, Gregory testified he was not concerned about going to trial when he did. He thought the police statements were pretty much in the defense's favor and that they supported both self-defense and defense of others. Additionally, he was confident in his trial skills and encouraged by the identity of the trial judge. With these things in mind, Gregory believed it was better to proceed to trial rather than to seek a postponement. Thus he did not seek a continuance or mention his difficulty in finding witnesses to the trial court, but rather simply kept trying to locate them. (PCR tr. pp.29-31.) After trial, several witnesses who were not available for trial came forward and gave statements. Gregory submitted their affidavits to support the defense's motion for a new trial based on after-discovered evidence. (PCR tr. p.31.)

Applicant testified at the PCR hearing that he bonded out of jail four or five days after the shooting. He met with Gregory at Hunt's home for a couple of hours. That was the only time they discussed the substance of the case before Applicant went to Florida. (PCR tr. pp.86-87.) When he

saw Gregory after that, Gregory would ask him about getting money for the defense. Applicant testified he probably left for Florida in late January 1993. Law enforcement brought him back in early May and his case was called to trial on May 23. (PCR tr. p.87.) Applicant did not feel prepared for trial when it began. (PCR tr. p.89.)

Although Gregory's trial preparation has been harshly criticized, his performance must be considered in light of the circumstances of his representation. Counsel believed the case would not go to trial and that much of the State's own evidence would support a claim of self-defense. Additionally, the case came to trial quickly, with no more than two weeks notice to the defense. Moreover, Applicant only paid him \$1 toward their retainer agreement and, rather than assist in the preparation of his defense, Applicant left the jurisdiction with the victim's wife while on bond.² Applicant has failed to establish that in the particular situation in which Gregory found himself, his performance during trial preparation fell below the standard of reasonableness under prevailing professional norms. Applicant has also failed to establish prejudice from Gregory's trial preparation in general. However, several specific allegations regarding trial counsel's performance are discussed below.

Additionally, this Court does not find trial counsel's decision to proceed to trial rather than requesting a continuance rises to the level of ineffective assistance of counsel. Based on Gregory's explanations, the presumption that his decision was professionally reasonable has not been overcome.

Cross-Examination of Kimberly Kestner

Applicant asserts Gregory was ineffective for failing to impeach State witness Kimberly

² This latter fact was even introduced at Applicant's trial. (Trial tr. pp.443-45.)

Kestner. Kestner testified at trial that she did not see a weapon in Jimmy Peele's hands at the boutique, but that she did see him reach behind his back before he was shot. (Trial tr. pp.139-42.) Kestner testified that after the shooting she saw two guns on the floor. She reiterated that she had not seen Peele with a gun. (Trial tr. pp.144-45.) Applicant complains Gregory should have impeached Kestner with her police statement in which she stated she saw Peele pull a gun just before the shooting and a newspaper article in which she was quoted as saying Peele pulled a gun and prepared to shoot without any explanation. As to his failure to impeach Kestner with the newspaper article, Gregory testified that the article was several months old and he was unable to locate it. He further explained he did not expect Kestner to testify at trial that she had not seen Peele with a gun. Gregory described his failure to impeach Kestner with her police statement as an oversight. (Tr. pp. 51-52.) He further testified he does not know what Kestner would have said had she been cross-examined on her statements to police or the media. (Tr. pp.62-63.)

This Court agrees with Applicant that Gregory's failure to impeach Kestner with her prior statements that she saw Peele draw a weapon constituted deficient performance. However, Applicant has not carried his burden of establishing prejudice in that he failed to present Kestner's testimony at the PCR hearing. Had he done so, Kestner might have denied the statements attributed to her, requiring they be proved through extrinsic evidence which Applicant also did not provide at his PCR hearing, or she might have provided some satisfactory explanation for the difference between her pretrial statements and her trial testimony. Without presenting Kestner's testimony, Applicant leaves this Court to speculate as to the impact the proposed impeachment of Kestner would have had at Applicant's trial. Applicant's request for relief on this issue is therefore denied.

Cross-Examination of Robin Hunt

Applicant contends Gregory was ineffective for failing to establish Peele was dangerous and that he threatened Sally in the days before the shooting. He maintains Gregory could have done this through examination of Robin Hunt. The State called Hunt as a reply witness at Applicant's trial, and she testified she was with Applicant and Sally when they went to the Peele residence on the day of the shooting. As they were leaving the home, Applicant said he would cripple Peele. (Trial tr. p.497.) Hunt testified the group went to her home, where she overheard Sally on the phone with someone named Jimmy, whom she asked to meet her at the Bow-Wow Boutique. (Trial tr. pp.498-501.)

Unlike Kestner, Applicant presented testimony of Hunt, now Robbie Lankford, at his PCR hearing. At the PCR hearing, she testified she also accompanied Applicant and Sally to the pawn shop to reclaim a shotgun and purchase a pistol. Sally wanted the gun for protection because Peele had been threatening and chasing her. She testified Peele had threatened to kill her and Sally, had attacked Sally's car with a 2 X 4, and had attempted to run them off the road when they were walking to call for a ride home. (PCR tr. pp.72-74.) Applicant and Sally went to the boutique to try to buy a car so they could leave the area together. (PCR tr. pp.74-75.) Her understanding was that Sally and Applicant were not planning to go after Peele, but rather were trying to get away from him. (PCR tr. p.76.) Gregory testified he was planning to call Hunt to testify to these matters, but was unable to locate her for trial. Nevertheless, when she testified as a State witness, he did not question her about these matters. He did, however, cross examine her on her inability to know who Sally Peele was talking to on the phone at her home or if there was another person on the phone with her. (Tr. pp. 52-54.)

Although her testimony at the PCR hearing portrayed Peele as an aggressor, this Court finds Hunt (Lankford) was not a credible witness. Although she claims to have been friends with both Peele and his wife Sally, she spent the last few days before the shooting with Sally and Applicant and helped Applicant after his arrest. Furthermore, Hunt was not present during the shooting and thus has no personal knowledge of how it took place. For these reasons, Gregory's failure to elicit testimony that Peele was threatening and aggressive in the days before the shooting and Sally and Applicant were simply trying to get away from him, though arguably deficient, was not ineffective. Applicant has failed to show his defense suffered because of the lack of this non-credible and biased testimony. This allegation is therefore denied and dismissed.

Failure to Locate Other Witnesses

Applicant next challenges Gregory's failure to secure the favorable trial testimony of several witnesses, including Cindy Lou Wise, Belinda Smith, and Charles Howard. However, Applicant did not present these witnesses at his PCR hearing and thus has failed to meet his burden of establishing counsel's ineffectiveness. As such, the allegations regarding these witnesses are denied and dismissed.

Gun Attributed to Peele

Although not raised as an issue by Applicant, Gregory testified he believed his biggest mistake was not objecting to the prosecutor's statement during closing argument that after shooting Peele, Applicant threw down the 9 mm pistol to make it appear that Peele was armed. (PCR tr. p.36.) Gregory notes there was no fingerprint evidence taken from the gun, but he did not question the investigating officer about that issue. Gregory stated there was a lack of time and money to hire an expert to independently test the gun for fingerprint evidence.

Although the prosecutor clearly suggested the gun might have been "planted" near Peele's body after the shooting, he did not assert as fact that Applicant threw down the 9mm gun attributed to Peele after shooting him with the other pistol. (Trial tr.pp.558-61, 565-66.) Thus Gregory's confession of deficient performance on this issue is not supported by the record. Further, the prosecutor's inference that the gun might have been planted was supported by evidence introduced at trial. For these reasons, this issue is denied and dismissed as without merit.

To the extent Gregory's testimony that the lack of fingerprint analysis can be construed as a claim that he was ineffective for not pursuing forensic evidence on that issue, Applicant has failed to establish Gregory's inaction prejudiced him and the issue must, therefore, be denied.

Jury Charges

Applicant alleges Gregory was ineffective for not objecting to the trial court's failure to issue a defense of others charge to the jury. He also asserts Gregory was ineffective for failing to object to the trial court's issuance of a mutual combat instruction.

Although the State did not object to it at trial, his Court concludes, based on the testimony offered at trial (as well as the PCR hearing), that a defense of others charge was not appropriate. (Trial tr. p.309.) According to Applicant's own testimony at trial and at the PCR hearing, Sally Peele was not in imminent danger at the time he fired the gun at her husband, Jimmy Peele. See Douglas v. State, 332 S.C. 67, 504 S.E.2d 307 (1998) (holding that a defendant is entitled to a defense of others charge only where there is evidence he was lawfully defending another person, i.e., the other person would have had the right to take the decedent's life in self-defense). Instead, Applicant explained that Peele was pointing his weapon at Applicant when Applicant began to fire at him. (PCR tr. p.91, trial tr. pp.419-24.) Additionally, Sally was not without fault in bringing on the difficulty as she had

pointed a pistol at Peele earlier in the day.

Regarding the mutual combat jury instruction, Gregory explained he believed the charge was proper considering voluntary manslaughter was charged and thought it was helpful. Based on the evidence of the altercation between Applicant and Peele earlier in the day and the evidence Sally asked Peele to meet her at the boutique, this Court finds no fault in Gregory's decision not to object to the charge, particularly considering the verdict option of voluntary manslaughter given to the jury. On this issue, Applicant has failed to overcome the presumption that Gregory's exercised reasonable professional judgment. Additionally, although the jury convicted Applicant of murder rather than manslaughter, viewing counsel's decision through the hindsight of the jury's verdict is not appropriate. See Butler v. State, 286 S.C. 441, 444-45, 334 S.E.2d 813, 815-16 (1985) (quoting Strickland v. Washington). Based on the information available to him at that time, Gregory's decision was an exercise of reasonable professional judgment and Applicant has failed to overcome the presumption of effectiveness to which counsel was entitled. (PCR tr. pp.44-47.)

Any Other Allegations

As to any and all allegations that 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 Applicant failed to present any probative evidence regarding such allegations. Accordingly, this Court finds that Applicant waived such allegations and failed to meet his burden of proof regarding them. Accordingly, they are dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings.

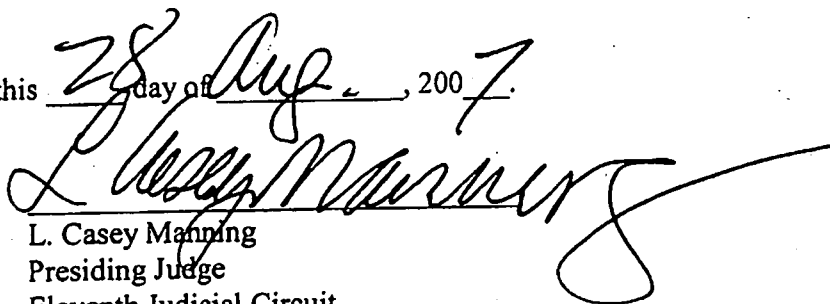
Applicant has failed to establish counsel was ineffective on any of the challenged issues. Therefore, this application for PCR must be denied and dismissed with prejudice.

This Court advises that if Applicant wants to secure appellate review of this Order, a notice of appeal must be filed and served within thirty (30) days from the receipt of this Order. Pursuant to Rule 71.1(g), SCRPC, PCR counsel must file a notice of appeal on Applicant's behalf if he wishes to pursue appellate review. Applicant and counsel are directed to Rules 203, 206, and 227 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 28 Aug. day of Aug., 2007.


L. Casey Manning
Presiding Judge
Eleventh Judicial Circuit

Columbia, South Carolina.

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

2003-CP-32-1983

Fred R. Rutland, #197903,)

Applicant.)

**ORDER DENYING MOTION TO
ALTER OR AMEND**

v.)

State of South Carolina,)

Respondent.)

This matter comes before the Court by way of Applicant's Motion to Alter or Amend. The Respondent made its Return to this motion on October 4, 2007. The Order of Dismissal in this matter was signed by me on August 28, 2007.

Based upon careful reconsideration of all of the evidence in this case and upon full consideration of Applicant's motion, this Court is not persuaded to alter or amend the judgment. This Court further finds that oral argument would not aid in the reconsideration of the original judgment.

AND IT IS SO ORDERED this 6 day of Aug, 2011. *(Signature)*

(Signature)
L. Casey Manning
Presiding Judge
Eleventh Judicial Circuit

(Signature), South Carolina.

STATE OF SOUTH CAROLINA)
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COUNTY OF LEXINGTON)
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FRED R. RUTLAND, #197903)
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Applicant,)
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vs)
)
STATE OF SOUTH CAROLINA,)
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)
Respondent.)
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IN THE COURT OF COMMON PLEAS

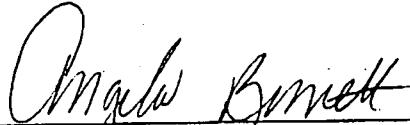
2003-CP-32-1983

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Order Denying Motion to Alter or Amend** in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Jennifer Williams, Esquire
1807 Hampton Street
Columbia, South Carolina 29201

DATED this 12th day of August, 2013



Angela Bennett, Legal Assistant
For Respondent