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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas
The Honorable Clifton Newman, Circuit Court Judge

Case No. 2010-CP-24-0259

Charles N. Vandross, #316095,.....Appellant,

v.

State of South Carolina.....Respondent.

NOTICE OF APPEAL

Charles N. Vandross, #316095, appeals from the *Order of Dismissal* of the Honorable Clifton Newman, Circuit Court Judge, in this case, dated March 11, 2014, and filed March 17, 2014, dismissing Appellant's *Application for Post-Conviction Relief.* Appellant's counsel received notice of entry of this *Order* on March 21, 2014.

BY: David E Belding

David E. Belding (S.C. Bar #00623)
Post Office Box 11964
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(803) 665-3161
ATTORNEY FOR APPELLANT

Columbia, South Carolina
March 24, 2014

Other Counsel of Record:
J. Rutledge Johnson, Esquire
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-1867
Attorney for Respondent

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v.

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PROOF OF SERVICE

I certify that I have served the *Notice of Appeal* on J. Rutledge Johnson, Esquire, counsel for Respondent, by depositing a copy of same in the United States Mail, postage prepaid, on March 24, 2014, addressed to him as counsel of record at Post Office Box 11549, Columbia, South Carolina, 29211-1549.

March 24, 2014

David E. Belding
Post Office Box 11964
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ATTORNEY FOR APPELLANT.

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2010CP2400259

Charles Nemon Vandross	State of South Carolina
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), SCRCP; ☐ Rule 41(a), SCRCP; ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ ACTION STRICKEN (*CHECK REASON*): ☐ Rule 40(j) SCRCP; ☐ 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 — 3/17/2014 Date

For Clerk of Court Office Use Only

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

Charles Nemon Vandross Mccormick Correctional Institution 386 Redemption Way McCormick, SC 29899
David Edward Belding Law Office Of David E. Belding PO Box 11964 Columbia, SC 29211-1964

ATTORNEY(S) FOR THE PLAINTIFF(S)

James Rutledge Johnson PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

Angela Woodhurst

Court Reporter

Angela Woodhurst - 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 GREENWOOD	)	IN THE COURT OF COMMON PLEAS EIGHTH JUDICIAL CIRCUIT
Charles N. Vandross, #316095, Applicant, v. State of South Carolina, Respondent.	)	2010-CP-24-0259 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed February 26, 2010. Respondent made its Return on July 29, 2010. An evidentiary hearing into the matter was convened on March 13, 2013, at the Greenwood County Courthouse. David Belding, Esquire represented Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. Lance Sheek, Esquire also testified. This Court had before it a copy of the records of the Greenwood County Clerk of Court, records from the South Carolina Department of Corrections, the trial transcript and the appellate records.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenwood County Clerk of Court. Applicant was indicted at the December 2004 term of the Greenwood County Grand Jury for Burglary, 1st Degree; Murder; Kidnapping; and Possession of a Firearm or Knife during the Commission of a Violent Crime (2004-GS-24-1187). Lance Sheek, Esquire, represented Applicant on these charges. Applicant proceeded

to trial and was convicted by a jury of all charges on June 21, 2006. The Honorable Wyatt T. Saunders sentenced Applicant to confinement for the balance of his natural life for both Murder and Burglary 1st Degree, thirty (30) years for Kidnapping, and five (5) years for Possession of a Firearm or Knife during Commission of a Violent Crime.

A Timely Notice of Appeal was filed and an appeal was perfected on Applicant's behalf by Joseph L. Savitz, III, Esquire. The South Carolina Court of Appeals affirmed Applicant's convictions. State v. Vandross, Op. No. 2009-UP-192 (S.C. Ct. App. filed May 5, 2009) The Remittitur was issued on May 22, 2009.

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

1. Ineffective Assistance of Trial Counsel;
2. Ineffective Assistance of Appellate Counsel;
3. "Prosecutorial Misconduct (Trial)"; and
4. "Judge's Abuse of Discretion (Trial)."

At the PCR hearing, Applicant proceeded on the claim of ineffective assistance of counsel.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety, including the Applicant's submissions, 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 (2003).

This Court finds Counsel's testimony credible based upon his demeanor, his extensive experience in criminal law, and his knowledge of this case. The Court also finds Applicant's testimony concerning Counsel's ineffectiveness not credible.

Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on 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, 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. Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, 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. Second, counsel's deficient performance must have prejudiced 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.

Failure to retain and call expert witnesses

Applicant alleges Counsel was ineffective for failing to retain and call an expert witness on Applicant's behalf to examine the handprint found on JoAnn Suber Wilson's (Wilson) shirt. Applicant also alleged Counsel was ineffective for not retaining an expert witness on the subject of ballistics. Applicant further claims Counsel was ineffective for failing to retain a gunshot residue expert in this case.

At the PCR hearing, Applicant testified he had conversations with Counsel about the handprint found on Wilson's shirt and how none of the blood on the shirt matched his DNA profile. Applicant also claims the State argued at trial that the handprint was Applicant's, and Counsel failed to contest this through the use of expert testimony.

Applicant testified Counsel failed to question the State's evidence of the shell casing found in the bedroom where the shooting occurred. Applicant alleged Counsel did not impeach Wilson's testimony that she was asleep when the shooting occurred with the trajectory of the shell casing which, Applicant claims, would have travelled over Ms. Wilson while she was sleeping. Applicant further testified Counsel failed to fully contest Dr. Sexton's testimony concerning the distance which the gun was fired at the decedent.

Additionally, Applicant testified Counsel failed to retain a gunshot residue expert in this case to challenge the State's evidence that lead particles, which are consistent with gunshot residue, were found on Applicant's sleeve.

On cross-examination, Applicant admitted that none of these "experts" were present to testify on his behalf at the PCR hearing.

Counsel testified he wanted to retain experts in this case, but Applicant had no funds with which to hire these experts. Counsel also testified he used the prior trial transcripts to fully cross-

examine the witnesses, especially Wilson.

Prejudice from trial counsel's failure to call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Applicant produced no such testimony of any expert witnesses at the PCR hearing, and therefore cannot show any resulting prejudice.

This Court finds counsel was effective in his representation of Applicant and no prejudice resulted in this case. Applicant has failed to meet his burden of proof and thus, this allegation is denied.

Failure to call lay witnesses

Applicant alleges Counsel was ineffective for failing to call lay witnesses on his behalf at trial. Applicant testified he consulted with Counsel and provided a list of witnesses Applicant wanted Counsel to interview and call at trial.

Applicant testified he wanted Counsel to call Wilson's preacher and his employer on his behalf at the trial. Applicant alleges these witnesses would have attacked Wilson's character and credibility and would have shown that he was not a jealous man, as the State argued. He also wanted character witnesses to bolster his credibility.

Counsel testified he interviewed all of the fact witnesses in the case and found no reason to call them at trial because they were also the State's witnesses. Further, the only eye-witnesses to this

crime were Applicant and Wilson. Additionally, Counsel testified he would not have called Applicant's employer as a witness at trial because Counsel was of the opinion, based on his investigation and case preparation, that Applicant admitted his guilt to his employer.

This Court finds Counsel's testimony credible concerning the decision not to call witnesses on Applicant's behalf at trial.

Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead, *supra*. Counsel testified he did not call any witnesses on Applicant's behalf because the fact witnesses had already testified for the State in this case. Counsel also stated that he did not call Applicant's employer at trial because of Counsel's view that Applicant admitted his guilt to his employer. Further, Counsel was able to secure the last argument to the jury by not presenting witnesses on Applicant's behalf. This Court finds Counsel articulated valid reasons for not calling witnesses on Applicant's behalf based on his reasonable trial strategy.

Second, prejudice from trial counsel's failure to call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood, *supra*. An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister, *supra*. Applicant produced no such testimony at the PCR hearing, and therefore cannot show any resulting prejudice.

This Court finds counsel was effective in his representation of Applicant and no prejudice resulted in this case. Applicant has failed to meet his burden of proof and thus, this allegation is denied.

Applicant's testimony at trial

Applicant alleges he wanted to testify at trial to tell "his side of the story" to the jury. Counsel testified he implored Applicant to testify at trial and that there was a good possibility for a hung jury in this case if he had. Counsel also testified it was Applicant's decision not to testify.

This Court has reviewed the entire record and finds evidence in the trial transcript which directly refutes Applicant's claim. Applicant was thoroughly advised by the trial court of his constitutional rights to remain silent or to testify on his own behalf. (Tr. p. 525 ln. 4-19) When questioned by the trial court about his decision not to testify, Applicant stated he did not want to testify in this case (Tr. p. 525 ll. 21-22 "Sir, I have decided not to testify."). Because there is evidence which directly refutes Applicant's claim, this allegation is denied.

Change of Venue Motion

Applicant alleges Counsel was ineffective for not filing a Motion for a Change of Venue due to the media coverage of this case. S.C. Code Ann. §17-27-90 states "All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application." This issue was not raised in the original application, and no amended application was filed. Thus, it is not properly before this Court.

Nevertheless, Applicant failed to produce evidence sufficient to meet his burden of proof as to this allegation. Applicant failed to produce evidence that the jury was influenced by the media coverage and that the trial would have had a different outcome had Counsel filed a motion for a change of venue. Accordingly, this allegation is denied.

Jury selection

Applicant alleged Counsel was ineffective for not properly raising a challenge pursuant to

Batson v. Kentucky, 476 U.S. 79 (1986).

Applicant testified Counsel was ineffective for not challenging two jurors; one was a student and the other was an unemployed housewife.

Counsel testified he filed a Batson motion, but the trial judge overruled it. Counsel stated he utilized the juror questionnaire, the nature of the charges and the defendant's interest when deciding to make a Batson challenge. Counsel also stated he used all of his strikes on this particular jury.

This Court finds Counsel was effective in his representation of Applicant by filing a Batson motion. Applicant alleges Counsel was ineffective for not challenging two jurors because one was a student and the other an unemployed housewife. Applicant's understanding of a Batson challenge is misguided. A Batson challenge is an objection to a preemptory challenge based solely on a juror's race. In this case, Applicant is not claiming race as a factor for the State's strikes but lack of employment. Employment status is not a ground for a Batson challenge. Because Applicant has failed to meet his burden of proof under 71.1(e) SCRCP, this allegation is denied.

Failure to request a Jackson v. Denno hearing

Applicant alleged Counsel was ineffective for not properly raising a challenge to his statement pursuant to Jackson v. Denno, 378 U.S. 368 (1964).

Applicant testified Counsel was ineffective for not challenging whether the statement Applicant made to law enforcement was considered voluntary.

Applicant testified Counsel should have requested a hearing pursuant to Denno in an attempt to suppress his statement as involuntarily given.

On cross-examination, Applicant admitted he was not in custody when he gave the statement to law enforcement that, "[t]he gun is in [Applicant's] pocket. It's unloaded." (Tr. p. 278 ln. 12).

Counsel testified he did not ask for a Denno hearing because when Applicant made the statement that the gun was in his pocket, Applicant was neither in custody nor was there any interrogation. Applicant made this statement on his own accord without responding to any law enforcement question.

This Court finds this allegation without merit. For Counsel to have a legitimate reason to request a Denno hearing, Counsel must be challenging a statement made during the course of custodial interrogation. In this case, Applicant was neither in custody nor was subject to interrogation when he made the voluntary statement. Therefore, Denno does not apply to this case.

Failure to object to the trial court's reasonable doubt jury charge

Applicant alleges Counsel was ineffective for failing to object to the trial court's jury instruction concerning reasonable doubt.

During the jury instructions, the trial court charged the jury:

> This presumption of innocence remains with a defendant at all times throughout the trial and is only removed when and if the State has proved the guilt of the defendant beyond a reasonable doubt. It is your solemn duty, ladies and gentlemen of the jury, if not clearly convinced of the defendant's guilt beyond a reasonable doubt to the contrary to find him not guilty....So, the burden of proof is upon the State to establish by evidence to your satisfaction, Mr. Foreman and ladies and gentlemen, the guilt of the defendant here on trial beyond a reasonable doubt. The Court will not attempt to define for you what is meant by the term beyond a reasonable doubt. This is up to you. A reasonable doubt is simply a doubt that you, under all of the circumstances and facts that have been presented to you, find to be reasonable. A reasonable doubt can arise from the evidence presented or it can arise from the evidence not presented. If the State has presented evidence that has removed all reasonable doubt from your mind as to the defendant's guilt it's your duty to find the defendant to be guilty. However, if you are left with a reasonable doubt in your mind it's your duty to find the defendant to be not guilty.

(Tr. p. 594 ln. 1- p 595 ln. 13).

"In determining whether a defendant was prejudiced by improper jury instructions, the court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the improper instruction in way that violates the Constitution." Battle v. State, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009).

In this case, the trial court clearly emphasized the State's burden of proving Applicant guilty beyond a reasonable doubt. At no time during this charge, was this burden shifted to Applicant. As jurors are presumed to follow the instructions of the trial court (see State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975)), Applicant presented no evidence to show how Counsel's failure to object to this instruction violated his Constitutional Due Process rights. Further, Applicant can show no prejudice because, as indicted below, there is overwhelming evidence of Applicant's guilt in this case. Therefore, this allegation is without merit.

Failure to object to Solicitor's closing argument

Applicant alleges Counsel failed to object to the Solicitor's closing argument concerning Dr. Sexton testimony as the evidence and testimony did not support the inference made by the Solicitor.

During the State's case, Dr. Joel Sexton was qualified as an expert in forensic pathology. Dr. Sexton was also allowed to testify about gunshots in relation to the volume of sound based on his personal experience. His testimony, in part, is as follows:

> I personally put things like a quart size or more, commonly a half gallon size coke bottle or any type of bottle of that sort and you put it over the muzzle of the gun and fire it as opposed to firing it without anything on the muzzle, you see a great difference in the sound. So, it tends to deafen that or silence that because of the characteristic of that particular structure. Here we've got a skull that's solid and inside of which we've got brain [t]issue that is the consistency of cold toothpaste. It's very soft, it tends to absorb that sound so that the sounds comes back out of the same hole with time but the majority of it is captured inside the head and that's why we often hear people say they didn't hear the gunshot and people nearby who have had the gun against their head at the time the shot was fired.

Q: Dr. Sexton, is it your opinion, based on this particular wound, it would be usual, or unusual for a person not to hear the shot?

A: It would not be unusual.

(Tr. p. 427 ln. 11- p. 528 ln 8).

During closing arguments, the Solicitor stated:

> Now, you know, [Ms. Wilson] doesn't know what's happened. She doesn't know [Victim] is dead because she hasn't heard the gunshot. Now, doesn't that sound stupid? Doesn't that sound stupid? [Ms. Wilson's] in the bed with [Victim] and she didn't hear the gunshot? But what did we learn later? Dr. Sexton, Dr. Sexton, who has been handling guns since 1954, he's been a forensic pathologist for over thirty years, "That doesn't surprise me at all." Why? Why? Because it's a contact or close contact wound, and you will have all the photographs back there with you and you can see, just as he testified, the imprint, you can see the imprint of this barrel on the head of [Victim].

(Tr. p. 541 line 21- p. 542 line 9).

"A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury. The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Brown v. State, 383 S.C. 506, 515, 680 S.E.2d 909, 914 (2009). Even if there are impermissible arguments made by the State, courts must consider whether there is overwhelming evidence of guilt in a prejudice analysis. Id.

This Court finds the Solicitor was properly inferred from Dr. Sexton's testimony that it was not unusual for someone close to the gunshot to not hear it as there was ample testimony during the State's case-in-chief to support his argument. This Court also finds the Solicitor did not arouse the jurors' passions or prejudices in his closing argument and that the content of his argument stayed within the record and reasonable inferences therefrom. As such, Counsel was not required to object

to the Solicitor's argument. Therefore, this Court finds Applicant has failed to meet his burden of proof as to this allegation. Thus, it is dismissed.

Failure to properly cross-examine the State's witnesses

Applicant alleges Counsel failed to properly cross-examine the State's witnesses during this trial.

Applicant specifically testified that Counsel was ineffective for not challenging, objecting to or arguing the following issues: failure to impeach Ms. Wilson with her prior inconsistent statements from Applicant's previous trials; failure to attack Ms. Wilson's testimony about her being duct taped during the incident; failure to impeach Ms. Wilson concerning her being asleep when the gun was fired and not having heard the gunshot; failure to argue the defense that Applicant was "set-up" by Ms. Wilson; failure to object to the autopsy photographs of Victim; and failure to argue that Applicant fired the gun hours later.

Counsel testified he prepared this case by reviewing the facts, reading the prior trial transcripts, interviewing witnesses, meeting with law enforcement, and discussing the case with Applicant. Counsel also stated, in his professional opinion, that he thoroughly cross-examined each of the State's witnesses which he felt needed to be discredited. Specifically, Counsel cross examined Ms. Wilson for roughly sixty pages in the transcript. (See Tr. pp. 202-262). Counsel testified he based his cross-examinations of these witnesses on the facts of the case and his preparation of the case. Counsel also stated, while Applicant passed him notes during the trial, he was not going to allow Applicant to control the cross-examinations.

Where trial counsel articulates a valid reason for employing certain trial strategy, such conduct should not be deemed ineffective assistance of counsel. Caprood v. State, 338 S.C. 103, 525

S.E.2d 514 (2000). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d, 529 (1992).

The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation, and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995). Applicant did not proffer specific questions Counsel allegedly failed to ask, and did not present any testimony showing the Victim's answers at trial would have been different had Counsel asked certain questions. This Court finds Counsel adequately cross-examined the State's witnesses and challenged the State's evidence in this case. Accordingly, Applicant has not shown that a different approach to cross-examination would have been beneficial to the defense. Applicant has failed to meet his burden of proof and thus, this allegation is denied.

Overwhelming Evidence

This Court further finds overwhelming evidence of the Applicant's guilt in this case. No prejudice can be shown, even when trial counsel's performance is deficient, where there is overwhelming evidence of the Applicant's guilt. Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010) (citing Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2008)).

In this case, Wilson testified she and Applicant dated in the past and Applicant became jealous when she began dating Victim. On the night of the incident, Wilson testified she woke up with Applicant's hand over her mouth and a gun to her head. (Tr. p. 127). Applicant then threw

Wilson onto the floor, and she did not resist because she believed Applicant would involve Wilson's children who were inside of the home. Wilson also testified Applicant forced her to put duct tape over her own mouth. (Tr. p. 133). This duct tape was found in the bathroom trashcan as well as the car in which they both rode to the church. Wilson testified that when they arrived at the church, Applicant ripped off the duct tape and stated, "My life is ruined; I've killed a man." (Tr. p. 155). Wilson also stated that on the way back to her house, Applicant made her promise that she would do a few things for Applicant and then, when Wilson asked Applicant to stop the car and call police because Victim might not be dead, Applicant responded, "Trust me, [Victim's] dead." (Tr. p. 161). Applicant presented no testimony to prove Wilson lied under oath, and as such this Court takes her testimony under oath as the truth.

Additionally, when police arrived on the scene to arrest Applicant and found Applicant behind the house, Applicant exclaimed, "The gun is in my pocket. It's unloaded." (Tr. p. 278). The bullets for this gun matched exactly the shell casing found in the bedroom where Victim was shot and killed. Moreover, the shell casing found in the bedroom was determined to have been fired from Applicant's gun. (Tr. p. 486). Police also found a loaded magazine and loose bullets on Applicant's person. (Tr. p. 279). Further, an expert from South Carolina Law Enforcement Division testified that lead particles, which are commonly found after one had fired a gun, were found on Applicant's sleeve and were consistent with gunshot residue. (Tr. p. 505-506; p. 519).

This Court finds that all of the testimony and evidence presented at trial culminates in overwhelming evidence of Applicant's guilt in this case.

Because there is overwhelming evidence of Applicant's guilt in this case, no prejudice can be shown by Applicant's alleged errors.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that 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 is also in receipt of Applicant's Motion under SCRCP 15 (b) and (c) to Amend the Pleadings to Conform to the Evidence. This Court finds all issues raised at the PCR hearing were raised in the pleadings. This Court finds no reasons for further hearings in this case.

This Court notifies Applicant that he 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 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant is remanded to the custody of Respondent.

AND IT IS SO ORDERED!

Clifton Newman
Presiding Judge

March 11, 2014

Conway, South Carolina

DAVID E. BELDING
Attorney at Law
South Carolina Bar #00623
Federal ID # 57-1101784
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March 24, 2014

HAND DELIVERED

The Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

Re: Charles N. Vandross, #316095, vs. State of South Carolina
Civil Action No.: 2010-CP-24-0259

Dear Mr. Shearouse:

Enclosed for filing is a *Notice of Appeal* in the above-referenced case. Also enclosed are the following:

1. Proof of Service of the *Notice of Appeal* on the Respondent.
2. A copy of the *Order* which is challenged on appeal.

Since the Appellant is indigent, and the undersigned appeared as Court-appointed counsel in this matter, I respectfully request that the filing fee be waived pursuant to Rule 203(d), *South Carolina Appellate Court Rules*.

Thank you very much for your assistance.

Sincerely,

David E. Belding
Attorney for Appellant

DEB/ym
cc: J. Rutledge Johnson, Esquire
Appellant