STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Michael Adam Bailey, #323554, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2011-CP-26-4890 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed June 10, 2011. Respondent made its Return on or about July 21, 2011. The Court convened an evidentiary hearing into the matter on August 26, 2013, at the Horry County Courthouse. Applicant was present at the hearing and represented by J. Marshall Biddle, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the PCR hearing. Also testifying were Applicant's trial counsel, William I. Diggs, Esquire, and Applicant's mother. The Court had before it a copy of the trial transcript, the records of the Horry County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the return, and the appellate records. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to a conviction from Horry County. In July 2005, the Horry County Grand Jury indicted Applicant for murder (2005-GS-26-2560). William I. Diggs, Esquire ("trial counsel"),

represented Applicant. On July 23-26, 2007, Applicant proceeded to trial before the Honorable James E. Lockemy and a jury.[1] The jury found Applicant guilty as indicted. On August 16, 2007, Judge Lockemy sentenced Applicant to thirty (30) years incarceration.

A notice of appeal was timely filed, and Joseph L. Savitz, III, ("appellate counsel") perfected Applicant's appeal. The South Carolina Court of Appeals affirmed the conviction on June 10, 2010. State v. Bailey, Op. No. 2010-UP-306 (S.C. Ct App. filed June 10, 2010). The case was remitted to the circuit court on June 28, 2010.

II. ALLEGATIONS

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

(1) Prosecutor misconduct: presented faulty indictment;
(2) Ineffective assistance of counsel: failure to investigate; and
(3) Ineffective assistance by appellate defense attorney: raised only one issue that had no merit.

At the PCR hearing, Applicant proceeded on all the grounds included in his application.

III. 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).

[1] The Applicant was tried with a co-defendant, Mike Carr, who was also convicted of murder and sentenced to 30 years.

A. Summary of Testimony

Applicant testified he met with trial counsel numerous times over three (3) years but was not informed he was charged with felony murder. Applicant testified he was under the impression he could not be convicted of murder unless he was the actual shooter. Applicant recalled receiving a twenty (20) year plea offer, but Applicant rejected the plea upon advice of trial counsel because the State could not prove Applicant was the shooter. He further testified he probably would have accepted the offer if he understood he could be convicted under a felony murder theory.

Applicant recalled two indictments being presented to the trial judge. He testified he never actually saw the indictments. However, he recalled the bodies of the indictments were different. He also remembered trial counsel asking for a continuance to clarify the indictments. Applicant also testified appellate counsel did not raise an indictment issue on direct appeal.

On cross-examination, Applicant testified his defense was that he thought he was merely going to buy marijuana from the victim, not rob him. He testified he never discussed the "hand of one" theory with trial counsel. He also claimed he never heard of accomplice liability until the day of trial. He did recall trial counsel making a motion to quash the indictments. Applicant maintained he was always under the impression he must be the shooter to be convicted.

Trial counsel testified he has been a practicing attorney since 1980 and has extensive criminal law experience. He believed he spent a sufficient amount of time on Applicant's case considering the serious nature of the charges. Trial counsel testified Applicant always understood the State's theory was that Applicant and the co-defendants were participating in a crime by intending to rob the victim. However, trial counsel believed Applicant's claims he did

not know the co-defendant intended to rob the victim. He also recalled there was no doubt the State knew the co-defendant actually shot the victim. Trial counsel testified several co-defendants gave conflicting stories that changed over time. He also testified he moved for a severance because he feared the codefendant would take the stand and implicate Applicant. Trial counsel testified Applicant needed to testify to explain why he was at the victim's home that night.

Trial counsel admitted he was under the impression there was no felony murder rule in South Carolina, so Applicant may not have understood there were circumstances where he could be convicted of murder despite not having pulled the trigger. However, on cross-examination, trial counsel admitted he discussed the "hand of one" and accomplice liability theory with Applicant and he thinks Applicant understood those concepts. He further testified he explained to Applicant the State would have to prove he went to the victim's home with the intent to rob the victim.

Trial counsel testified he was surprised when two (2) indictments appeared at trial. He believed the copy of the indictment he received in discovery was not the same as the copy currently in the clerk's file. He testified moved to dismiss the indictment because there were more than one. However, Judge Lockemy required the State to elect which indictment they would proceed under. Trial counsel recalled the State apologizing for any confusion in the indictments. Trial counsel also testified the second indictment was tailored to fit the evidence the State would present at trial. However, he admitted the State would have been required to prove the same elements no matter what indictment they proceeded under. He also admitted he is not sure his advice to Applicant would have changed if he had the other indictment.

Trial counsel also testified he discussed Applicant's appeal with appellate counsel. He testified he mailed an affidavit to appellate counsel regarding the indictment issue. Trial counsel stated he would have raised the indictment issue along with a challenge to Judge Lockemy's ruling on a motion to sever.

Applicant's mother testified she was in the courtroom when Judge Lockemy read the two indictments. She testified she saw Judge Lockemy give one indictment back to the solicitor, who put the indictment in his file. However, she has not seen the indictment since that time.

B. Ineffective Assistance of 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. (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. With respect to appellate counsel, the applicant must prove prejudice by showing "there is a reasonable probability he would have prevailed on appeal." Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003) (citations omitted).

1. Trial Counsel

The Court finds Applicant failed to meet his burden of proving trial counsel was ineffective for failing to investigate. Regarding this allegation, the Court finds Applicant's testimony to be not credible, and trial counsel's to be credible. Failure to conduct an independent investigation is not *per se* ineffective assistance of counsel, especially where an investigation would not have uncovered any helpful information. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998). Here, Applicant presented no testimony of how trial counsel's investigation was deficient. In contrast, trial counsel demonstrated a thorough knowledge of Applicant's case. The record reflects trial counsel competently and thoroughly cross-examined the State's witnesses and presented Applicant's defense. The Court finds trial counsel adequately conferred with Applicant, conducted a proper investigation, and was thoroughly competent in his representation. Thus, Applicant has not shown any deficiency in

trial counsel's performance. Furthermore, the Court finds Applicant cannot show prejudice because there is overwhelming evidence of his guilt in the form of witness testimony about the plan to rob the victim. Harris v. State, 377 S.C. 66, 79, 659 S.E.2d 140, 147 (2008) (citations omitted) (overwhelming evidence of guilt negates any claim of deficient performance).

2. Appellate Counsel

The Court also finds Applicant failed to meet his burden with respect to appellate counsel. Though Applicant argued appellate counsel should have briefed additional issues, he failed to present any testimony from appellate counsel on that issue. As such, the Court cannot speculate as to why certain issues were not briefed. Cf. Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, without a witness's testimony, "any finding of prejudice is merely speculative"). Furthermore, appellate counsel was clearly aware of these other potential issues from trial counsel's affidavit. Therefore, the Court must presume appellate counsel made a reasonable professional judgment to not brief them. Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 690).

Regardless, the Court finds Applicant failed to demonstrate appellate counsel did not exercise sound judgment in choosing which issues to present on appeal. See Jones v. Barnes, 463 U.S. 745, 103 S. Ct. 3308 (1983) (holding appellate counsel must be allowed to exercise reasonable professional judgment in determining which non-frivolous issues to raise on appeal). He also failed to demonstrate he would have been successful on appeal had his preferred issues been raised. Anderson, 354 S.C. at 434, 581 S.E.2d at 835. The indictment is a notice document. State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005). As will be discussed below, the allegations in the either indictment were sufficient to put Applicant on notice of the

charges he was required to defend at trial. Id. Furthermore, Judge Lockemy did not abuse his discretion in ruling on the severance motion. See State v. Dennis, 337 S.C. 275, 281, 523 S.E.2d 173, 176 (1999) ("The general rule allowing joint trials applies with equal force when a defendant's severance motion is based upon the likelihood he and a codefendant will present mutually antagonistic defenses, i.e., accuse one another of committing the crime." (citing State v. Leonard, 287 S.C. 462, 339 S.E.2d 159 (Ct. App. 1986))). Because none of Applicant's suggested appellate issues are viable, he was not prejudiced by appellate counsel's decision to not brief them. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (no ineffective assistance of appellate counsel where applicant's alleged issues are not meritorious).

C. Prosecutorial Misconduct

The Court further finds Applicant failed to prove prosecutorial misconduct. Generally, an allegation of prosecutorial misconduct involves a solicitor's "improper efforts to collect evidence or unfair trial tactics." State v. Needs, 333 S.C. 134, 145, 508 S.E.2d 857, 862 (1998). Neither form of misconduct is implicated here. Rather, Applicant's allegation is essentially one of a fraudulent indictment. At trial, the State initially presented Judge Lockemy an indictment alleging Applicant

> "did in Horry County on or about September 28th, 2004 willfully, feloniously intentionally kill the victim, Joseph Patterson, junior, with malice aforethought either express or implied by means of shooting him"

(Trial Tr. 59:18-22). However, trial counsel and the clerk of court provided Judge Lockemy with an indictment (the "indictment of record") which alleges Applicant did

> "combine with two or more people to commit an unlawful act, i.e. robbery and/or burglary and, in the execution of the criminal act and as a natural and probable consequence of the criminal act the victim, JOSEPH PATTERSON, JR, was

> willfully, feloniously and intentionally killed with malice aforethought either express or implied, by means of shooting the victim, and the victim did die as a proximate result thereof on or about SEPTEMBER 28, 2004."

(Trial Tr. 64:23-65:8). The State elected to proceed under the indictment of record. Applicant does not argue the indictment of record is insufficient on its face, but rather that the State procured two different indictments relating to the same crime. He alleges the indictment of record was fraudulently created because it more closely recites the facts presented at trial.

The Court finds there is no evidence in the record or before this Court indicating the indictment of record was obtained by fraud. A presumption of regularity attaches to proceedings in the Court of General Sessions. Pringle v. State, 287 S.C. 409, 411, 339 S.E.2d 127, 128 (1986) (citing State v. Britt, 235 S.C. 395, 111 S.E.2d 669 (1959); State v. Jones, 211 S.C. 319, 45 S.E.2d 29 (1947); State v. Waring, 109 S.C. 52, 95 S.E. 143 (1918)). Absent evidence to the contrary, the Court must presume that a properly returned indictment is valid. State v. James, 321 S.C. 75, 472 S.E.2d 38, 40 (Ct. App. 1996) (citing Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995); State v. Thompson, 305 S.C. 496, 409 S.E.2d 420 (Ct. App. 1991). Here, there is no evidence the indictment of record is irregular in any manner whatsoever. Likewise, there is no evidence it was fraudulently created and presented to the grand jury. The indictment of record is valid on its face because it states all the necessary elements murder, the date of the offense, and the name of the accused. Id. at 75, 472 S.E.2d at 40. Likewise, the indictment of record is stamped "True Billed" and signed by the foreman. Pringle, 287 S.C. at 410, 339 S.E.2d at 128. There is no evidence, aside from Applicant and his mother's self-serving testimony, to indicate the indictment was procured by fraud or deceit. Thus, Applicant has not proven any prosecutorial misconduct in the procurement of the indictment of record.

Regardless, Applicant has not shown how he was prejudiced by the being tried under the indictment of record. See State v. Robinson, 305 S.C. 469, 476, 409 S.E.2d 404, 409 (1991) (finding no prejudice from alleged prosecutorial misconduct). Initially, the Court notes trial counsel conceded during arguments on the motion to quash that he was provided with the indictment of record prior to trial. (Trial Tr. 60:9-12). Furthermore, trial counsel testified he discussed theories of accomplice liability with Applicant. Thus, Applicant cannot now argue the indictment did not give him notice of the charges against him or what the State would attempt to prove. Gentry, 363 S.C. at 102, 610 S.E.2d at 500 (2005) ("The indictment is a notice document.").

Even if trial counsel had been provided a copy of the other alleged indictment, it would have likewise been sufficient to put him on notice of the charges against him.[2] The language of the other indictment was sufficient to charge Applicant with murder as an accomplice regardless of whether he was the shooter. See State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000) ("It is well-settled that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense." (citing State v. Leonard, 292 S.C. 133, 355 S.E.2d 270 (1987); State v. Cox, 258 S.C. 114, 187 S.E.2d 525 (1972); State v. Hicks, 257 S.C. 279, 185 S.E.2d 746 (1971); State v. Hunter, 79 S.C. 73, 60 S.E. 240 (1908))). Applicant contended at trial the two indictments alleged different crimes. However, South Carolina "makes no distinction between murder and felony murder." State v. Yates, 280 S.C. 29, 34, 310 S.E.2d 805, 808 (1982) overruled on other grounds by State v.

[2] Trial counsel conceded his advice regarding the charges would likely not have been affected by the language of the indictment.

Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). The record indicates the State proceeded under the theory the co-defendant was the shooter, and Applicant was merely an accomplice. (Trial Tr. 67:25-68:4; 691:6-15). Therefore, the State had to prove Applicant and co-defendant went to the victim's home with the intent of committing a robbery. This theory is consistent with South Carolina jurisprudence on accomplice liability to murder. See State v. Crowe, 258 S.C. 258, 265, 188 S.E.2d 379, 382 (1972) ("It is further well settled that, if two or more combine together to commit an unlawful act, such as robbery, and, in the execution of that criminal act, a homicide is committed by one of the actors, as a probable or natural consequence of the acts done in pursuance of the common design, all present participating in the unlawful undertaking are as guilty as the one who committed the fatal act."). Furthermore, Judge Lockemy's charge instructed the jury they must find Applicant committed a burglary or robbery (Trial Tr. 717:5-10). This charge effectively increased the State's burden because they had to prove each element of a second crime to support the murder conviction. Ultimately, Applicant is not prejudiced because either indictment, and certainly the indictment of record, supported the State's theory and the jury's verdict.

C. All Other Allegations

As to any and all allegations that were 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.

IV. 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 Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt 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), 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 Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on 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 30 day of January, 2014.

THE HONORABLE J. CORDELL MADDOX, JR.
Presiding Judge

Anderson, South Carolina