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April 11, 2014

South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

RE: Darrell Burgess, 265544 vs. State of South Carolina
2012-CP-32-2813

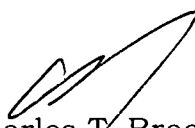
Dear Sir or Madam:

Enclosed herewith you will find the **Notice of Appeal, Order of Dismissal**, along with a **Proof of Service** in reference to the above named Applicant.

If you have any questions or concerns, please contact my office at the number stated above.

With kind regards, I am

Sincerely,



Charles T. Brooks, III
CTB/srw

RECEIVED

APR 14 2014

S.C. SUPREME COURT

Enclosed as stated

cc: Walt Whitmire, Office of Attorney's General
South Carolina Office of Appellate Defense
Darrell Burgess, 265544

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY

Court of Common Pleas
Honorable R. Lawton McIntosh Circuit Court Judge

Case No: 2012-CP-32-2813

Darrell Burgess.....Appellant

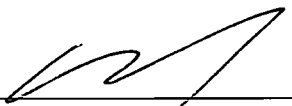
S.C.D.C. 265544

v.

The State Respondent

NOTICE OF APPEAL

Darrell Burgess, appeals his Denial for Post Conviction Relief in this case. The order of Dismissal was imposed and signed by the Honorable R. Lawton McIntosh, March 27, 2014, which I, Charles T. Brooks, III, received on April 10, 2014.



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Attorney for Appellant

Other Counsel on Record:
Walt Whitmire, Esquire
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Post Office Box 11549
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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY

Court of Common Pleas
Honorable R. Lawton McIntosh Circuit Court Judge

Case No: 2012-CP-32-2813

Darrell Burgess.....Appellant

S.C.D.C. 265544

v.

The State Respondent

PROOF OF SERVICE

I, the undersigned, do hereby certify that on this 11th day of April, 2014, I served the foregoing **Notice of Appeal, Order of Dismissal** , as well as **Proof of Service** in this matter by depositing a true copy of it in the United States Mail, postage prepaid, on April 11, 2014, addressed to the following as indicated below:

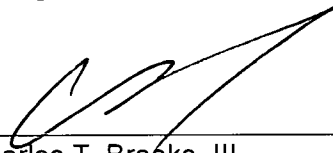
South Carolina Supreme Court
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Office of Attorney's General
Attn: Walt Whitmire, Esquire
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Darrell Burgess, 265544
Lee Correctional Institution
990 Wisacky Highway
Bishopville, SC 29010

Dated: April 11, 2014



Charles T. Brooks, III
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A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Robert M. Dudek, Esq. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence in a published opinion filed on December 15, 2010 (State v. Burgess, 391 S.C. 15, 703 S.E.2d. 512). A Petition for Writ of Certiorari to the South Carolina Supreme Court was filed on Applicant's behalf. The Petitioner was denied on May 25, 2012. The Remittitur soon followed. At the PCR hearing, Applicant alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:
 - a. failure to make a Batson motion;
 - b. failure to make a motion for a change of venue;
 - c. failure to adequately present a suppression defense;
 - d. failure to object to State's presentation of prejudicial photographs from the investigation;
 - e. failure to make a timely motion for continuance based upon a discovery violation;
 - f. failure to properly preserve the objection regarding the Trial Judge's ruling to not disqualify juror Emanuel.

SUMMARY OF TRIAL TESTIMONY

Johnson testified at trial to he was at the scene when Applicant executed the victims. (Trial Tr. p.333). Applicant told Johnson that the Victim David could not be trusted. (Trial Tr. p.347). Wise testified he drove Applicant to the victim's residence but remained in his vehicle and listened to music when Applicant committed the murders. (Trial Tr. p.624). Wise phoned Applicant several times after he spent an unusual amount of time at the victims' residence. (Trial p.406). Telecommunications records corroborated Wise's testimony here along with the timeline on the night of the murder. (Trial Tr. p.624). Wise gave a statement to police that Applicant disposed of a gun while in route on Interstate 77 near the Bluff Road exit. (Trial Tr. p.407). A gun was recovered at the location. (Trial Tr. p.488). Ballistics testing revealed the gun was the

murder weapon. (Trial Tr. p.491). Wise testified that he accompanied Applicant into a filling station on Elmwood Street where Applicant purchased a gallon of diesel gasoline. (Trial Tr. p.409). The attendant on the night of the murders put two black males at the station buying a gallon or so of diesel. (Trial Tr. p.433). She also corroborated Wise's account of the approximate time. (Trial Tr. p.433). Wise testified Applicant utilized the gasoline to burn evidence. (Trial Tr. p.409). Police discovered remnants of clothing at a discarded burn pile at a nearby location. (Trial Tr. p.444). In denying counsel's motion for directed verdicts, the Trial Judge stated that "there was clearly enough direct and circumstantial evidence to convict Applicant." (Trial Tr. p.795).

APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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, 104 S.Ct. 2052, 2064, (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668, 104 S.Ct. at 2064. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective

assistance of plea 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 professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, *supra*.

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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court's records regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Application for Post-Conviction Relief, the transcripts and exhibits from the prior proceedings, Applicant's appellate records, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Applicant received the benefit of counsel's exceptional performance and finds counsel's testimony at the PCR hearing to be compelling. Counsel testified he spent hundreds of hours on this case and employed an investigator to aid his efforts. Counsel met with Applicant numerous times where he discussed the State's evidence and relevant developments in the case with Applicant. Counsel explained the prospect of success at trial would be a difficult proposition because the State's two critical witnesses, Johnson and Wise, Applicant's close childhood friends, were credible witnesses. Counsel noted that Applicant had unrealistic expectations regarding the gravity of Johnson and

Wise's testifying against him. Furthermore, Applicant never explained his version of the facts in manner that could reasonably refute Johnson and Wise's statements. Applicant never provided an alibi. Counsel prepared for trial and investigated witnesses and defenses at Applicant's will. He further attended the guilty plea of a co-defendant and investigated various avenues to attack the credibility of the two main witnesses. As a result, counsel mounted a suppression defense based upon Applicant's version of the facts surrounding the original arrest warrant. He also proffered testimony in an attempt to establish a third-party guilt claim. Counsel made over ten pre-trial motions that included: motion to quash defective indictments; motion to suppress photographs from the crime scene; motion to suppress letters from defendant to a State witness grounded in an authenticity argument. (Trial Tr. p.50; p.55; p.118). The Trial Judge told Applicant that counsel filed credible motions and was a seasoned attorney in response to Applicant's belaboring over losing several of the pre-trial motions. (Trial Tr. p.109). This Court agrees with that assessment. Counsel's diligence yielded beneficial results. The trial judge limited the admissibility of Applicant's statement and ordered the police to locate an evasive defense witness. (Trial Tr. p.69; p.132). This Court finds the majority of Applicant's allegations are facially without merit.

A.

This Court grants Respondent's motion for summary judgment on Applicant's allegation that counsel was ineffective for failing to make a Batson¹ motion. A trial court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter

¹ Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

of law.” Young v. S. Carolina Dep't of Disabilities & Special Needs, 374 S.C. 360, 365, 649 S.E.2d 488, 490 (2007) (citing Rule 56(c), SCRCPP). This Court finds that there was a lack of evidence in the record to support a merited review on jury selection here. See State v. Haigler, 334 S.C. 623, 628, 515 S.E.2d 88, 90 (1999) (“The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venire person on the basis of race.”). At the outset of the PCR hearing, Applicant completely provide additional evidence or argument from the pleadings that raised a dispute of a material fact at issue here. See State v. Shuler, 344 S.C. 604, 615-16, 545 S.E.2d 805, 810-11 (2001) (“Often the demeanor of the challenged attorney will be the best and only evidence of discrimination, and ‘evaluation of the prosecutor's mind lies peculiarly within a trial judge's province.’”). Therefore, this allegation is summarily dismissed.

For similar reasons to those announced above, this Court finds Applicant’s allegation that counsel was ineffective for failing to make a motion for a change of venue to also be without merit. “The moving party bears the burden of proving actual juror prejudice, and the trial court's ruling on the venue motion will not be reversed on appeal absent an abuse of discretion.” State v. Gardner, 332 S.C. 389, 392, 505 S.E.2d 338, 339 (1998). Applicant failed to provide any credible justification to show counsel was deficient for failing to make the motion. Therefore, this allegation is summarily denied and dismissed.

B.

This Court finds Applicant’s allegation that counsel was ineffective for failing to adequately present a suppression defense is without merit. “A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence

introduced by the State.” Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). Applicant testified at the PCR hearing that he was not served a search warrant on an unrelated narcotics charge until several days after he was booked at the Lexington County Detention Center. Applicant testified that the execution of the search warrant served as a pretext to search for evidence related to the murders. As a result, Applicant stated that the police unlawfully obtained phones and other personal effects that were used against him at his murder trial. He claimed that he was specifically prejudiced because the police use information from the cellular phone to bolster Wise’s trial testimony. Applicant testified that he was untimely served the arrest warrant. This Court finds Applicant’s testimony that the police engaged in misconduct not credible. Regardless, this Court finds counsel’s performance in presenting Applicant’s theory and Nezzie Burgess’ testimony at the pre-trial suppression hearing to be reasonable based upon Applicant’s version of facts conveyed to counsel during their consultations. See Strickland, 466 U.S. at 690, 104 S.Ct. 2052 (“The court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.”); see also Strickland, 466 U.S. 691, 104 S. Ct. 2052 (“The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.”). This Court finds the Trial Judge soundly denied the motion and finds Applicant’s PCR testimony was cumulative.

Applicant also alleged that counsel was ineffective for failing to make a motion to suppress the fruits of the search based upon a defective search warrant. This Court finds this allegation lacks merit. Applicant claimed the affidavit that accompanied the warrant was

insufficient. Applicant cited Code Section 17-13-140 in support.² This Court finds Applicant failed to meet his burden to prove counsel's investigation and trial performance here to be deficient. Furthermore, this allegation rested upon mere speculation where Applicant failed to present the arrest warrant or credible testimony in support of the allegation. See Porter v. State, 368 S.C. 378, 385, 629 S.E.2d 353, 357 (2006) ("Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result."). Therefore this allegation is denied and dismissed.

C.

Applicant alleged counsel failed to object to inadmissible photographs of the victims found at the crime and pictures of the victims from the autopsy. This Court summarily dismisses both allegations where the objections were raised and ruled upon by the Trial Judge. First, Counsel made a timely objection that resulted in an in-camera hearing on the matter where the Trial Judge sustained the objection. (Trial Tr. p.275). Second, counsel objected to other photographs of the victims at the crime scene. See Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) ("PCR is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal."). Therefore, these allegations are denied and dismissed.

D.

² "A warrant issued hereunder shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant. If the magistrate, municipal judge, or other judicial officer abovementioned is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. In the case of a warrant issued by a magistrate or a judge of a court of record, it shall be directed to any peace officer having jurisdiction in the county where issued, including members of the South Carolina Law Enforcement Division." S.C. Code Ann. § 17-13-140

This Court finds Applicant failed to meet his burden to prove counsel was ineffective for failing to make a more timely motion for continuance based upon State's failure to properly disclose discovery related to the telecommunications custodians. "The court first noted the general rule that the denial of a motion for a continuance rests within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion resulting in prejudice to the appellant." Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 131 (1997). "This was no "reversible error in denial of motion for continuance, where appellant could not point to any specific testimony or other evidence he could have produced had his motion been granted." State v. Motley, 251 S.C. 568, 164 S.E.2d 569 (1968). "Compliance with Rule 5, SCRCrP is a fact-based inquiry." Hyman v. State, 397 S.C. 35, 47, 723 S.E.2d 375, 381 (2012). Counsel made a timely motion for continuance and preserved the issue for appeal. See Drayton, 312 S.C. at 4, 430 S.E.2d at 517. This Court find Applicant failed to produce any credible testimony or evidence of what possible defense counsel could have pursued had the case been continued and counsel had time in the interim to further investigate. Furthermore, this Court notes counsel's stellar performance here at trial. Counsel exhibited great skill and dexterity in the manner in which he handled the relevant evidentiary issues. (Trial Tr. p.526; p.533; p.564; p.584; p.588). In addition, This Court finds counsel exhibited a keen understanding of underlying methodology and science employed to triangulate the location of a phone call in his performance on cross-examination. Therefore, this allegation is denied and dismissed.

E.

This Court finds Applicant failed to meet his burden to prove counsel was ineffective for failing to tailor his motion to disqualify juror Emanuel in a manner to preserve advanced by appellate counsel on appeal. In viewing the entire the bench colloquy with juror Emanuel, this

Court notes that the Trial Judge rendered his judgment pursuant to the correct legal framework. “The ultimate goal behind preservation of error rules is to insure that an issue raised on appeal has first been addressed to and ruled on by the trial court.” State v. Nelson, 331 S.C. 1, 6 n. 6, 501 S.E.2d 716, 718 n. 6 (1998). In order to preserve an error for appellate review, a defendant must make a contemporaneous objection on a specific ground. State v. Holliday, 333 S.C. 332, 338, 509 S.E.2d 280, 283 (Ct. App. 1998). Rule 103(a)(1), SCRE states “**Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context.” Counsel made the objection and properly preserved the issue of whether the trial judge’s ruling constituted an abuse of discretion. The creative logic employed by Appellate counsel to further extend Applicant’s argument on appeal does not reflect poorly on counsel’s effective performance here when the Court of Appeals found the argument to be unpreserved. Neither does this Court find appellate counsel’s performance deficient. On the contrary, this Court finds appellate counsel’s performance in pushing the envelope constituted vigorous adversarial representation warrant the underlying issue lacked sufficient merit to warrant a reversal of Applicant’s conviction. See State v. Bailey, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (a party cannot argue one theory at trial and a different theory on appeal). Counsel testified that once a judge makes an adverse ruling and his objection has been properly preserved, it is his general practice to refrain from belaboring over the ruling at the risk of antagonizing the judge. This Court agrees. See Drayton, 312 S.C. at 12, 430 S.E.2d at 522 (“[counsel] was ineffective in the sense that all criminal defense lawyers whose clients are found guilty are ineffective. That any more argument or different contentions might possibly have altered this result would be sheer

speculation.”). Last, this Court notes that our judicial system would collapse if trial judges were required to recite treatises before announcing every single discretionary ruling.

Regardless, this Court finds Applicant failed to meet his burden to prove Strickland's prejudice prong. “[A] criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury.” Palacio v. State, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999). “To protect both parties’ right to an impartial jury, the trial judge must ask potential jurors whether they are aware of any bias or prejudice against a party.” State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001). The trial judge is charged with the duty to determine if a juror’s concealment of delayed disclosure of a *voir dire* matter was intentional along the surrounding circumstances of a case by case manner. State v. Guillebeaux, 362 S.C. 270, 274, 607 S.E.2d 99, 101 02 (Ct.App.2004). “Concealment is considered unintentional where the *voir dire* question posed is ambiguous or incomprehensible to the average juror or where the subject of the inquiry is insignificant or so far removed in time that the juror’s failure to respond is reasonable under the circumstances.” Id. (internal quotations omitted). “[T]he qualification of a prospective juror is addressed to the sound discretion of the trial judge, whose decision will not be disturbed unless wholly unsupported by the evidence.” State v. Elmore, 279 S.C. 417, 420, 308 S.E.2d 781, 784 (1983). This Court finds juror Emanuel did not incorrectly answer the trial judge’s preliminary question to the *venire panel*. While the trial judge did ask whether any venireman or a member of the venireman’s “immediate family were ... close personal friends of the victims,” neither this question nor the trial judge’s other inquiries asked whether any venireman had a business or working relationship with either victim’s family members. This Court finds that there is nothing in the record to refute juror Emanuel’s representations that he did not know anything about the case and that he did not even know that the murders had

occurred. There is no indication that the victim possessed a name known in Lexington County. Subsequent to a thorough colloquy, the Trial Judge ruled within the ambit of his discretion. Therefore, this allegation is denied and dismissed.

E.

Except as discussed above, this Court finds that the Applicant affirmatively abandons the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

CONCLUSION

Based on all the forgoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

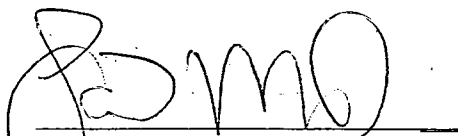
This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice

has been timely filed.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 27 day of March, 2014.


R. LAWTON MCINTOSH
Presiding Judge
Eleventh Judicial Circuit

Anderson, South Carolina

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

2014 MAR 31 A 11:49

FILED

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