SUPREME COURT OF SOUTH CAROLINA

APPEAL FROM HORRY COUNTY
In The Court of Common Pleas

Honorable J. Cordell Maddox, Jr.,
Common Pleas Judge of the Fifteenth Judicial Circuit

Case No.: 2012-CP-26-2015

Luther Garner, Petitioner,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Petitioner appeals the Order of Dismissal, dated February 3, 2014 and the Order Denying Motion for Reconsideration of the Honorable J. Cordell Maddox, Jr. dated May 2, 2014, filed May 14, 2014 and received by Petitioner on May 15, 2014.

June 16, 2014

Tristan M. Shaffer, Esq.
AXELROD & ASSOCIATES P.A.
604 16th Avenue North
Myrtle Beach, SC 29577
(843) 848-6708 Phone
(843) 848-6709 Fax
Attorney for Appellant

Respondent's Attorney:
Joshua L. Thomas, Esquire
S.C. Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

SUPREME COURT OF SOUTH CAROLINA

APPEAL FROM HORRY COUNTY
In The Court of Common Pleas

Honorable J. Cordell Maddox, Jr.,
Common Pleas Judge of the Fifteenth Judicial Circuit

Case No.: 2012-CP-26-2015

Luther Garner, Petitioner,

v.

State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I, Deborah Evans, do hereby certify that I am an employee of Axelrod & Associates, P.A., in Myrtle Beach, South Carolina, and that I have this date served the Petitioner's Notice of Appeal upon the Respondent, by depositing a copy of same in the United States Mail, postage prepaid, addressed as follows:

Joshua L. Thomas, Esquire
S.C. Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

Luther Garner
Lee Correctional Institute
990 Wisacky Highway
Bishopville, SC 29010

Horry County Clerk of Court
1300 Second Avenue
Conway, SC 29526

Deborah Evans
Paralegal to Tristan M. Shaffer

June 16, 2014
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Luther Garner, #322156, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2012-CP-26-2015 **ORDER DENYING APPLICANT'S RULE 59(E) MOTION**

This matter comes before the Court on Applicant's "Motion to Reconsider" filed March 4, 2014. Applicant's motion appears to ask the Court to reconsider, pursuant to Rule 59(e), its order of dismissal filed February 3, 2014, on three grounds. First, Applicant alleges trial counsel was ineffective for failing to object to the Allen[1] charge. Second, he alleges the charge violated his right to due process and a fair trial. Finally, Applicant alleges the Court incorrectly ruled on all other issues.

The Court finds its order of dismissal adequately addresses whether trial counsel was ineffective in failing to object to the trial judge's Allen charge. The Court declines to rule on whether trial counsel was deficient in the manner of his objection to the charge because it is not dispositive to Applicant's claims. See Strickland v. Washington, 466 U.S. 668, 697, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674 (1984) ("[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies ... [i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice[.]").

[1] Allen v. United States, 164 U.S. 492 (1896).

Regarding prejudice, the Court has reviewed each of the allegedly coercive statements in the trial judge's charge. The Court does not find any of the statements, standing alone, to be coercive. Likewise, the Court does not find the charge as a whole to be overly coercive. State v. Jones, 320 S.C. 555, 559, 466 S.E.2d 733, 735 (Ct. App. 1996) (citing State v. Dawson, 203 S.C. 167, 26 S.E.2d 506 (1943)). Specifically, the Court finds the charge did not mandate the jury reach a decision; did not reduce the burden of proof the jury must hold the State to; did not directly address the minority voting jurors; and did not set an inappropriate time limit on jury deliberations. Therefore, the Court finds all of Applicant's exceptions to the charge to be without merit when read in light of the entire charge.

Accordingly, trial counsel was not ineffective in failing to object to the charge. Furthermore, in light of the Court's finding the charge was not coercive, the Court also finds Applicant's rights to due process and a fair trial were not offended by the trial judge's decision to issue the charge. Regarding Applicant's third and final ground for reconsideration, the Court finds its prior order properly addressed each of Applicant's remaining allegations.

Based on the foregoing, the Court finds and concludes Applicant has not established any errors or deficiencies in the prior Order of Dismissal . Therefore, Applicant's motion for reconsideration is hereby denied and his application for post-conviction relief is dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from 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. Applicant's "Motion for Reconsideration" is denied;
2. The Application for Post-Conviction Relief is dismissed with prejudice; and
3. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

IT IS SO ORDERED this 2nd **day of** May **, 2014.**

THE HONORABLE J. CORDELL MADDOX, JR.
Presiding Judge

Anderson, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Luther Garner, #322156, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2012-CP-26-2015 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed March 13, 2012. Respondent made its Return on or about April 18, 2012. The Court convened an evidentiary hearing into the matter on August 28, 2013, at the Horry County Courthouse. Applicant was present at the hearing and represented by Tristan M. Shaffer, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office represented Respondent.

Applicant's plea counsel, Stuart M. Axelrod, Esquire, ("plea counsel") testified at the hearing. Applicant also called his wife, Ms. Hopkins, to the stand. Finally, Applicant testified on his own behalf. 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 and amendment, and the return.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Horry County Clerk of Court. In March 2007, the Horry County Grand Jury indicted Applicant for murder (2007-GS-26-928), attempted armed robbery

(07-GS-26-1536), and first degree burglary (07-GS-26-927). Trial counsel was appointed to represent Applicant on these charges.

From May 29 to June 1, 2013, Applicant proceeded to trial before the Honorable Edward B. Cottingham and a jury. The jury found Applicant guilty as indicted on all three charges. Judge Cottingham sentenced Applicant to thirty (30) years for murder, thirty (30) years for first degree burglary, and ten (10) years for attempted armed robbery. All sentences were to run concurrently.

Applicant filed a timely notice of appeal and M. Celia Robinson, Esquire, of the South Carolina Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed the convictions on April 28, 2010. State v. Garner, 389 S.C. 61, 697 S.E.2d 615 (Ct. App. 2010). The Court of Appeals denied Applicant's petition for rehearing on August 17, 2010, and the South Carolina Supreme Court denied a petition for writ of certiorari on February 8, 2012. The remitter was returned to the circuit court on February 10, 2012.

II. ALLEGATIONS

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

1. "Constitutional violations by Solicitors & Judge
    a. Solicitors Improper comments
2. Improper & prejudicial comments
    a. Improper & prejudicial comments/coercive statement by trial judge
3. ineffective assistance of counsel
    a. Issues that was abandond, and non objections"

On August 27, 2013, Applicant's counsel filed an amendment to the application titled "Supplemental Grounds for Post-Conviction Relief." In this amendment, Applicant asserts:

1. "Ineffective assistance of counsel for not moving to admit the Turllijos'

statement under Chambers v. Mississippi, 410 U.S. 284 (1973).

2. Ineffective assistance of appellate counsel for failure to support the 911 argument.
3. Ineffective assistance of counsel for allowing Sowden to comment on Applicant's right to remain silent.
4. Ineffective assistance of counsel for failure to request a mere presence charge.
5. Ineffective assistance of counsel for not objecting to burden shifting argument.
6. Ineffective assistance of counsel for failure to object to the Allen charge.
7. Ineffective assistance of counsel for failing to object to Judge Cottingham's second reasonable doubt instruction and second circumstantial evidence charge.
8. Brady violation for failure to disclose Sowden's status as a confidential informant.
9. Ineffective assistance of counsel for failure to present evidence that Applicant was not physically able to drag the decedent.

At the PCR hearing, the Applicant proceeded on the allegations included in the original application and the amendment.

III. SUMMARY OF TESTIMONY

Trial counsel testified he was appointed some time before the case was called to trial. He recalled the State's theory of the case was the Applicant entered a residence to rob the victim of drugs and that, in the process, Applicant bludgeoned the victim to death with a handgun. However, trial counsel testified the State produced no physical evidence linking Applicant to the crime. The State's key piece of evidence was the testimony of Lonya Sowden ("Sowden"). Sowden was allegedly a participant in the attempted robbery of the victim. Trial counsel testified that Sowden contacted police two days after the murder and implicated Applicant. On cross examination, trial counsel testified he never received any information regarding Sowden's status as a confidential informant because this was not a typical confidential informant case.

Trial counsel testified he though Sowden was an unreliable witness and he felt she "was lying about everything." He further testified Sowden gave multiple stories at different stages of

the investigation. In an effort to discredit Sowden, trial counsel cross examined her on these inconsistent statements. He also called as a witness the individual she claimed to be her employer, Mr. Linsky. Linsky testified Sowden never worked for him. Trial counsel also called the manager of the hotel where Sowden claimed to reside on the fifth floor to testify that the hotel only had four floors.

Counsel also had Linsky testify that he owned the car allegedly used by Applicant and Sowden to travel to and from the crime scene. Trial counsel testified he asked the trial judge to allow the jury to view the car in person, but that the judge limited him to admitting photographs of the car. Trial counsel also testified he did not remember Applicant having any knee problems at the time of trial.

Trial counsel testified he also attempted to enter into evidence the statement of the victim's roommates, the Trujillos. According to trial counsel, this statement would have shown the victim was alive at a point after the State asserted he was murdered. However, the judge excluded the statement as testimonial hearsay. Trial counsel testified this statement would have bolstered the defense theory that the State's key witness was unreliable.

Trial counsel also testified he recalled discussing the Allen charge with opposing counsel and the trial judge in chambers. He did not recall whether he objected to the specific language of the charge in chambers, but he did object to its issuance at that time. On cross examination, trial counsel testified the basis of his objection was that it was too early in the deliberations to issue the charge. He further testified he would have discussed the charge with Applicant. However, on re-direct, counsel testified he does not recall if there was ever any indication of the numerical division in the jury or that he told Applicant how the jury was split.

Applicant's wife testified Applicant was in a car accident on Father's Day in 2002. As a result of that accident, Applicant has pins in both legs and cannot do strenuous work.

Applicant testified the State made him three plea offers. The first offer was for life; the second was for twenty-five (25) years; and the third was for thirteen (13) years. He further testified that his co-defendant was charged for the crime, but that Sowden was not charged with any crime. He testified the statements from Sowden and the other alleged witness were consistent with each other because they were both lying. He attributes this consistency to the State coaching the witness on what to say. He believes trial counsel did not do a good job bringing out the inconsistencies in their stories. However, on cross examination he admitted trial counsel brought out the fact Sowden used crack cocaine and the fact that other witnesses had prior criminal records.

Applicant further testified trial counsel did not call as a witness a Charles Odom ("Odom"). Odom was Applicant's cellmate in county detention. Applicant testified Odom gave the State a statement indicating Applicant admitted to the murder. Applicant contends Odom's statement was a complete fabrication. Applicant admitted Odom did not testify at trial on behalf of the State, but he believes trial counsel should have called him to show the extent to which the State was willing to go to secure a conviction.

Applicant also contends he told trial counsel about his prior accident and disability. He believes trial counsel should have brought up the disability to the jury. However, on cross examination Applicant admitted he did not want to testify at trial. He also testified his appellate counsel should not have abandoned the issue of a 911 tape in his appeal.

Applicant recalled meeting with trial counsel prior to the issuance of the Allen charge. He contends trial counsel at that time told him the jury was deadlocked eleven to one. However, on cross-examination, he admitted he could not remember whether the eleven were voting to convict or acquit.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This 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):

A. 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 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." Id. at 442, 334 S.E.2d at 814 (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 that 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.

Regarding appellate counsel, the "applicant must prove ineffective assistance by showing counsel's performance deficient, and the deficient performance prejudiced the applicant." Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003) (citing Strickland, 466 U.S. at 668; Cherry, 300 S.C. at 115, 386 S.E.2d at 624; Butler, 286 S.C. at 441, 334 S.E.2d at 813). When counsel abandons an issue on appeal, the applicant must show he would have prevailed on appeal had the issue not been abandoned. Id. (citations omitted). Below are the Court's findings in regards to each of Applicant's allegations of ineffective assistance of trial and appellate counsel.

1. Ineffective assistance of counsel for not moving to admit the Turllijos' statement under Chambers v. Mississippi, 410 U.S. 284 (1973).

The Court finds trial counsel was not ineffective for being unsuccessful in admitting the roommate's statement. At the outset, the Court notes that Chambers v. Mississippi is inapposite to this case for two important reasons. First, the statements allowed in Chambers involved a

declaration against penal interest. Chambers, 410 U.S. 284, 299 (1973). There, the declarant told three individuals he was guilty of a crime. Id. at 300. Here, the statement sought to be introduced merely involved the declarant's recollection of the whereabouts of the victim in this case. (Trial Tr. vol. 2, 113:7-13).

Second, and more importantly, the declarant in Chambers was present in the courtroom. Chambers, 410 U.S. at 301. At Applicant's trial, the roommates were not available to testify because they could not be found. (Trial Tr. vol. 2, 114:4-6). Therefore, trial counsel would have had no reason to cite Chambers v. Mississippi as precedent for admission of the statement.

Furthermore, the Court finds trial counsel properly argued for the admission of the statements. Trial counsel made the argument that the statements were non-testimonial based on the ongoing nature of the investigation. (Trial Tr. vol. 2, 115:16-21). However, the trial judge disagreed and ruled the statements were clearly testimonial. (Trial Tr. vol. 2, 115:22-25). Therefore, the statements were inadmissible regardless of any exception to the hearsay rule. See Garner, 389 S.C. at 67, 697 S.E.2d at 618 ("If a statement is admissible hearsay, the Confrontation Clause may operate to render this otherwise admissible hearsay inadmissible if testimonial in nature." (citing Crawford v. Washington, 541 U.S. 36, 68 (2004))).

2. Ineffective assistance of appellate counsel for failure to support the 911 argument.

The Court finds Applicant's allegation that appellate counsel was ineffective to be without merit. The Court of Appeals ruled appellate counsel abandoned the argument the 911 tape was not properly authenticated. See Garner, 389 S.C. at 67, 697 S.E.2d at 618 ("To this issue, Appellant's argument states in total: 'Counsel for [A]ppellant argued that it was improper to allow the 911 tape to be admitted through Lonya as opposed to an appropriate 911

representative.' Accordingly, this issue is abandoned on appeal."). In her brief, appellate counsel appears to only argue that the tape was inadmissible hearsay. (Appellant's Br. 26). She does not argue the tape was not properly authenticated by the custodian of the tape, which was the trial objection. (Trial Tr. vol. 1, 84:11-12). Thus, although appellate counsel raised a valid argument regarding the admissibility of the tape on hearsay grounds, this Court is constrained by the Court of Appeal's ruling that she abandoned the argument regarding the admissibility of the tape on authenticity grounds.

However, the Court finds no prejudice from appellate counsel's abandonment of this issue. Rule 903, SCRCP, provides that a tape of a voice is properly authenticated "under circumstances connecting it with the alleged speaker." In State v. Aragon the Court of Appeals held the trial court properly admitted a tape of a phone call made by the victim to the defendant at the behest of police. State v. Aragon, 354 S.C. 334, 336, 579 S.E.2d 626 (Ct. App. 2003). The defendant argued the State failed to properly authenticate the tape because the State did not establish a chain of custody. Id. However, the victim testified she recognized the voice on the tape and the tape fairly and accurately represented the phone conversation. Id., 579 S.E.2d at 627. Therefore, the court ruled the tape was properly authenticated. Furthermore, the court ruled that the chain of custody of the actual tape need not be proven where its contents are otherwise properly authenticated. Id. at 337, 579 S.E.2d at 627.

Aragon is directly on point here. Sowden testified she previously listened to the tape and recognized the voice as her own. (Trial Tr. vol. 1, 80:20-81:2). Thus, the tape was properly authenticated. Therefore, Applicant has not shown the Court of Appeals would have overturned his conviction if the issue was properly presented.

3. Ineffective assistance of counsel for allowing Sowden to comment on Applicant's right to remain silent.

The Court finds this ground is likewise without merit. Applicant presented no testimony at the hearing regarding Sowden's comments on Applicant's right to remain silent. From a review of the transcript, the Court discerns Applicant is referring to Sowden's responses during cross-examination to the effect of "you should ask your client that question." (Trial Tr. vol. 1, 168:9-10; 174:8-9). The Court finds this non-responsive answer to does not rise to the level of a comment on the right to remain silent. Rather, Sowden was implying that she could not speculate about Applicant's behavior after the crime. Furthermore, even if it was a comment on his right to remain silent, it was not prejudicial to Applicant. State v. Hill, 382 S.C. 360, 369, 675 S.E.2d 764, 769 (Ct. App. 2009) (citing Gill v. State, 346 S.C. 209, 552 S.E.2d 26 (2001)). Sowden's cross-examination was heated, and her response can best be characterized as frustration with trial counsel's questions rather than a statement regarding Applicant's silence. Finally, the trial judge thoroughly charged the jury on Applicant's right to remain silent. Id. ("[A] curative instruction emphasizing the jury cannot consider the defendant's failure to testify will cure any potential error." (citing Gill, 346 S.C. at 221, 552 S.E.2d at 33)). Therefore, trial counsel was not ineffective for eliciting Sowden's non-responsive statement.

4. Ineffective assistance of counsel for failure to request a mere presence charge.

The Court finds Applicant's allegation regarding the mere presence charge to be without merit. Again, no testimony was presented regarding this issue at the hearing. However, a mere presence charge would only be available if there was some doubt over whether Applicant was guilty of a crime by virtue of accomplice liability. State v. Dennis, 321 S.C. 413, 420, 468 S.E.2d 674, 678 (Ct. App. 1996) (citations omitted). The State never presented any evidence

Applicant was guilty under a theory of accomplice liability; rather, all of the evidence implicated Applicant as the murderer. See State v. James, 386 S.C. 650, 654, 689 S.E.2d 643, 645 (Ct. App. 2010) ("Therefore, because there was no evidence of accomplice liability, a charge of mere presence on that basis was not necessary." (citing State v. Stokes, 339 S.C. 154, 528 S.E.2d 430 (Ct.App.2000))). Because Applicant was not entitled to a mere presence charge, trial counsel was not ineffective for not requesting one.

5. Ineffective assistance of counsel for not objecting to burden shifting argument.

The Court finds this allegation to likewise be without merit. Specifically, counsel points to the State's comments in closing arguments that the jury's job was to "find the truth." Generally, jury instructions that charge the jury to "seek the truth" are disfavored because they may shift the burden of proof to a defendant. State v. Aleksey, 343 S.C. 20, 26-27, 538 S.E.2d 248, 251 (2000) (citing State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998)). However, such language is permissible if it only appears in the instructions on witness credibility. Id. at 27, 538 S.E.2d at 251-52. Here, the trial judge only used the "seek the truth" language in his instructions on witness credibility. (Trans, Vol 2, P. 152:18-24). Thus, the State's use of similar language referred to a proper jury charge.

The State references the judge's admonition to find the truth in its closing after discussing Sowden's testimony. (Trial Tr. vol. 2, 209:14-17). The record is clear that trial counsel's strategy was to discredit Sowden as a witness; the majority of his closing argument is dedicated to highlighting the inconsistencies in her story. In light of defense strategy, the State's argument to the jury to seek the truth in her testimony did not impermissibly shift the burden of proof to Applicant. Rather, it is a fair response to trail counsel's argument regarding Sowden's

believability. See Ellenburg v. State, 367 S.C. 66, 69, 625 S.E.2d 224, 226 (2006). Therefore, trial counsel was not ineffective for not objecting.

6. Ineffective assistance of counsel for failure to object to the Allen charge.

The Court finds Applicant's allegation regarding the Allen charge to be without merit. Trial counsel testified he objected to the issuance of the Allen charge off the record in chambers. The Court finds trial counsel's testimony on this issue to be credible. However, because there is no record of an objection to the charge on the record, the Court cannot determine whether trial counsel's objection constituted adequate performance.

Nevertheless, the Court finds Applicant cannot show any prejudice from the lack of an objection to the issuance of the charge or to its specific language. The decision to issue an Allen charge is within the sound discretion of the trial judge. State v. Kelly, 372 S.C. 167, 171, 641 S.E.2d 468, 470 (Ct. App. 2007). The record clearly indicates the jury informed the court it could not reach a unanimous verdict at the time the charge was issued. Therefore, the trial judge did not abuse his discretion in issuing the charge.

Likewise, the charge contained no objectionable language. Applicant contends the language in the charge is identical to the language found coercive by the South Carolina Supreme Court in Dawson v. State, 352 S.C. 15, 572 S.E.2d 445 (2002). There, the trial judge charged the jury:

> I have sometimes thought that the juror who could render less service to the Court and to the country than any other juror is the juror who says, I know what I want to do in this case and when and if everybody agrees with me, then we'll write a verdict, and we'll not write a verdict until that time.

Dawson, 352 S.C. at 18, 572 S.E.2d at 446. In Applicant's case, the trial judge recited that exact language to the jurors, and then followed it by saying "I would never say that to you." (Trial Tr.

vol. 2, 222:15). Therefore, Applicant's trial judge essentially told the jury the exact opposite of what the trial judge told the jury in Dawson.

Furthermore, the Dawson jury was deadlocked at eleven to one. Dawson, 352 S.C. at 17, 572 S.E.2d at 446. The Supreme Court indicated the issuance of the Allen charge in that circumstance was clearly coercive to the minority juror. Id. at 21, 572 S.E.2d 448. Applicant testified his jury was similarly deadlocked; however, trial counsel testified he did not recall ever knowing the exact numerical division. On this point, the Court finds trial counsel's testimony credible and Applicant's not credible. Therefore, the trial judge's charge would not be coercive because the judge was not aware of the division of the jury. Because the charge was not objectionable, trial counsel was not ineffective for failing to object to it.

7. Ineffective assistance of counsel for failing to object to Judge Cottingham's second reasonable doubt instruction and second circumstantial evidence charge.

The Court finds this allegation to be wholly without merit. The jury requested a re-charge on reasonable doubt and the types of evidence they could consider. The trial judge's re-charge was nearly identical to his initial charges on reasonable doubt and circumstantial evidence, which were not objectionable. Therefore, trial counsel was not ineffective for failing to object to the re-charge.

8. Brady violation for failure to disclose Sowden's status as a confidential informant.

The Court finds Applicant's allegation of a Brady violation to be without merit. Trial counsel testified he did not believe Sowden was acting as a confidential informant when she contacted the police regarding the murder. However, she did testify at trial she did informant work for the police in the past. The State questioned Sowden on re-direct regarding any offers made by any police officers in exchange for her testimony and she stated there were none. The

record does not support any nexus between Sowden's alleged prior informant work and her participation in Applicant's case. Therefore, the Court finds any information the State may have had regarding her prior informant work would have been neither favorable to Applicant nor material to his guilt or innocence. See Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 268 (1993) ("Brady requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment." (citing Pennsylvania v. Ritchie, 480 U.S. 39 (1987))). Furthermore, the Court can discern no "reasonable probability the result [of Applicant's trial] would have been different" if the alleged information had been disclosed because trial counsel fully cross examined Sowden on her motivations to give false testimony. Id. at 389, 434 S.E.2d at 268. Likewise, Applicant presented no information at the PCR hearing regarding Sowden's alleged informant work. Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999). Therefore, no Brady violation occurred.

9. Ineffective assistance of counsel for failure to present evidence that Applicant was not physically able to drag the decedent.

The Court finds this allegation to likewise be without merit. Applicant alleges trial counsel should have presented evidence of his prior injury and disability to prove he was not capable of moving the victim's body. However, trial counsel testified Applicant never mentioned any injury or disability and Applicant did not appear to be disabled. On this issue, the Court finds trial counsel's testimony to be credible and Applicant's to be not credible. Because trial counsel had no reason to believe Applicant had any type of physical disability, he was not obligated to present any witnesses to that effect. Cf. Jeter v. State, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992) (finding counsel not deficient for failing to present evidence of mental incompetence where counsel reasonably relied on his own perceptions that defendant was not

incompetent and neither the defendant nor his family ever indicated defendant may have a mental defect). Therefore, counsel was not ineffective for not presenting evidence of Applicant's alleged disability.

10. Allegations in Applicant's original application.

The Court finds Applicant's allegations regarding prejudicial comments by the solicitor and trial judge to be without merit. The Court reviewed each of the statements challenged by Applicant in his testimony and finds them to be neither improper vouching nor burden shifting.

Furthermore, the Court finds trial counsel provided competent representation in light of the overwhelming evidence against Applicant. Rosemond v. Catoe, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009). Sowden testified to being a witness to the murder. Her testimony was corroborated by other witnesses who saw Applicant with Sowden and the co-defendant prior to and after the murder. Both of these witnesses testified to seeing Applicant with blood on his clothes after the murder. The record reflects some inconsistencies in Sowden's various stories. However, trial counsel vigorously cross-examined Sowden in an effort to highlight these inconsistencies. Thus, the key issue in this case was her credibility, and the jury clearly believed her to the extent it found Applicant guilty. Therefore, trial counsel was not ineffective.

B. <u>All Other Allegations</u>

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.

V. CONCLUSION

Based on the foregoing, the 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.

The Court notes that Applicant 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 post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on the 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

ALAN WILSON
ATTORNEY GENERAL

January 21, 2014

The Honorable J. Cordell Maddox, Jr.
Presiding Judge, Fifteenth Judicial Circuit
P.O. Box 8002
Anderson, SC 29622

Re: **Luther Garner, #322156 v. State of South Carolina**
2012-CP-26-2015

Dear Judge Maddox:

Enclosed please find the proposed original **Order of Dismissal** in regards to the above-referenced case. If this Order meets with your approval, please sign and return to me in the enclosed self-addressed, stamped envelope, so that I may serve and file it.

Thank you for your time and consideration in this matter. By copy of this letter, we are serving Tristan M. Shaffer, Esquire with these orders.

Sincerely,

Joshua L. Thomas
Assistant Attorney General

JLT/nb
Enclosure(s)

cc: Tristan M. Shaffer, Esquire

AXELROD & ASSOCIATES, P.A.

Attorneys and Counselors at Law

Stuart Mark Axelrod
W. Chris Castro*
Carlton E. Elliott
Grant Smaldone
Tristan M. Shaffer

* Currently on Active Military Duty

604 Sixteenth Avenue North
Myrtle Beach, SC 29577
Phone: (843) 916-9300
Fax: (843) 916-9311

635 East Bay Street
Charleston, SC 29403
Phone: (843) 805-7200
Fax: (843) 577-3911

June 16, 2014

Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: Luther Garner v. State of South Carolina
Case No.: 2012-CP-26-2015

Dear Clerk of Court:

Enclosed please find an original and one copy of a Notice of Appeal in the above referenced matter. If you would, please file the Notice of Appeal and return a clocked copy to me in the envelope provided.

Thank you for your assistance in this matter. If you have any questions or concerns, please feel free to contact my office.

With kind regards,

Tristan M. Shaffer

TMS/dke
cc: Joshua L. Thomas, Esquire
Horry County Clerk of Court
Luther Garner

AXELROD
& ASSOCIATES
ATTORNEYS AT LAW
604 Sixteenth Ave. North ♦ Myrtle Beach, SC 29577

COLUMBIA
SC 290
16 JUN '14
PM 3 L

UNITED STATES POSTAGE
PITNEY BOWES
02 1P $ 000.69⁰
0004434807 JUN 16 2014
MAILED FROM ZIP CODE 29577

Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

29211133030