STATE OF SOUTH CAROLINA COUNTY OF MARLBORO	)	IN THE COURT OF COMMON PLEAS FOR THE FOURTH JUDICIAL CIRCUIT
Kenwood Bright, #273013, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2012-CP-34-178 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed August 28, 2012. Respondent made a timely return on or about January 17, 2013. The Court convened an evidentiary hearing into the matter on January 14, 2014, at the Darlington County Courthouse. Applicant was present at the hearing and represented by James Marshall Biddle, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Myesha L. Brown, Esquire, also testified. 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 the return. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Marlboro County Clerk of Court. In September 2008, the Marlboro County Grand Jury indicted Applicant for murder (2008-GS-34-820). Myesha

Brown, Esquire, ("trial counsel") represented Applicant. On March 8-11, 2010, Applicant proceeded to trial before the Honorable William H. Seals, Jr., and a jury. The jury found Applicant guilty as indicted. Judge Seals sentenced Applicant to life without the possibility of parole.

Applicant filed a timely notice of appeal and Wanda H. Carter, Esquire ("appellate counsel"), of the Office of Appellate Defense perfected the appeal with the filing of an Anders[1] brief. The South Carolina Court of Appeals dismissed Applicant's appeal on May 9, 2012. State v. Bright, 2012-UP-288 (S.C. Ct. App. filed May 9, 2012). The Court of Appeals returned the remittitur to the circuit court on May 25, 2012.

II. ALLEGATIONS

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

1. "Ineffective Assistance of Trial Counsel"
    a. "Trial counsel was ineffective in representing me by failing to have a expert witness testify that the hand gun the state had wasn't the gun that kill the victim. Frazier v. State 306 S.C. 158"
    b. "Trial Counsel was ineffective in representing me by failing to request a charge of voluntary manslaughter when Victoria Knight testified that there was an argument (heart of passion) before the shot. Which would require a charge of voluntary manslaughter. Tr. pg. 250 line 3-5 Locklair v. State 341 S.C. 352"
    c. "Trial counsel was ineffective in representing me by failing to move to exclude Ira B. Parnell testimony."
    d. "Trial counsel was ineffective in representing me by failing to object to the jury charge that malice may be inferred with the use of a deadly weapon was involved when there was evidence of an argument (heat of the passion) according to Victoria Knight testimony. Tr. pg 504 line 14-16 Drayton v. Evatt 312

[1] Anders v. California, 386 U.S. 738 (1967)

S.C. 4"

2. "Prosecutor Misconduct"
    a. "Prosecutor statement to the jury during closing argument that witnesses was telling the truth was improper vouching. Tr. pg. 478 line 16-17 Marshall v. Hendricks 307 F3d 36"
    b. "Prosecutor withheld a witness and a statement until the day of trial was a Brady violation"
3. "Judicial Error"
    a. "Trial judge denied the motion to exclude the hand gun that wasn't connected to the crime was abuse of discretion. Tr pg 38 line 20-pg 43 line 11 State v. Jarrell 564 S.E.2d 362"
    b. "Trial judge overruled trial counsel objection to admitting the hand gun into evidence was abuse of discretion. Tr. pg. 412 line 3-9 State v. Jarrell 564 S.E.2d 362"
    c. "Trial judge denied the motion to exclude the witness and a statement we didn't find out about until the fay of trial was abuse of discretion. Tr. pg 44 line 14-pg 48 line 6 State v. Jarrell 564 S.E.2d 362"

On April 22, 2013, Applicant filed an amendment to his application adding the following allegations of ineffective assistance of counsel:

1. Ineffective assistance of trial counsel for failing to object to the solicitors closing argument containing inappropriate vouching.
2. Ineffective assistance of trial counsel for failing to investigate.
3. Ineffective assistance of appellate counsel for failing to argue the trial judge erred in ruling on Applicant's motion to exclude the handgun.

At the PCR hearing, Applicant proceeded on only the allegations of ineffective assistance of trial and appellate counsel with the exception of the allegation counsel was ineffective by failing to move to exclude the testimony of Ira B. Parnell.

III. 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 evidentiary 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. Summary of Testimony

Applicant testified he believed appellate counsel should have argued Judge Seals erred in admitting the handgun. He also testified he never met with appellate counsel. Applicant testified trial counsel never had an expert examine the handgun to show it was not the murder weapon. He claimed he asked trial counsel about experts, and trial counsel said she would get one. Applicant further testified counsel failed to object to the solicitor's closing argument, which he claims included the solicitor's personal bias. Applicant also testified trial counsel failed to request a charge on the lesser included offense of voluntary manslaughter. However, he admitted his defense was that the State could not prove he shot the victim. He also admitted he previously rejected a plea to voluntary manslaughter. Applicant testified he felt counsel should have objected to the judge's charge regarding malice. He stated the charge about inferred malice from a deadly weapon was inappropriate because the weapon could not be proven to be the murder weapon. Applicant finally testified that he only met with trial counsel three (3) times. In the first meeting they only discussed the State's plea offer. In the second and third they merely discussed the State's evidence. He admitted trial counsel interviewed the State's witnesses, but believed she should have done a further investigation. He stated he gave her a list of fifteen (15) witnesses to interview, but she only interviewed two (2). Applicant further stated he believed a further investigation would have led to a not guilty verdict.

Trial counsel testified she was an assistant public defender at the time she was appointed to Applicant's case, but did not recall who Applicant's prior attorney was. She further testified

she was assisted at trial by Chief Deputy Public Defender Rick Jones and Assistant Public Defender Emily Crayton. She recalled meeting many times with Applicant. She further recalled reviewing the State's evidence and discussing possible defenses and strategies. Trial counsel testified Applicant was very involved in his defense. She further testified Applicant claimed he was not the person who shot the victim. Trial counsel testified her trial strategy, based on discussions with Applicant, was to try and show that the State's evidence did not link Applicant to the crime and that the State's key witness was lying.

Trial counsel testified Applicant did not give her any witnesses to investigate. However, her investigation included visiting the crime scene, meeting with the State's witnesses, and examining the State's evidence. Trial counsel specifically recalled meeting with the State's key witness, Victoria Knight. He also recalled meeting with the pathologist. She also recalled reviewing the report from the firearms expert. Trial counsel testified she believed the expert's report helped her case because it could not positively conclude Applicant's gun was the murder weapon. She testified she did not retain her own expert to examine the gun in light of the helpfulness of the State's expert's report. She also testified she did not want to risk the possibility a second expert may opine the gun could have been the murder weapon. Trial counsel testified she discussed all of this with Applicant. She also recalled trying to exclude the gun at trial on the grounds it could not be positively identified. Trial counsel testified she made several other pre-trial motions, including: a motion to determine the voluntariness of Applicant's statement; a motion to exclude photos of the victim's injuries; a motion to reveal Victoria Knight's plea deal; a motion to exclude evidence of prior bad acts; and a motion to change venue.

Trial counsel reviewed the transcript of the closing argument and testified she did not object to anything because she did not think the solicitor improperly bolstered the witness' credibility. She recalled part of her strategy was to attack Victoria Knight's credibility. She also recalled Judge Seals charging the jury that arguments are not evidence. Trial counsel recalled discussing a voluntary manslaughter charge with Applicant. She recalled Applicant telling her not to request a lesser included because he did not shoot anyone. She testified she could not credibly argue for a lesser included offense to the jury where she had attempted to convince them Applicant was not at the scene and did not shoot the victim. She also recalled discussing the malice charge with Applicant, and allowing the more senior attorney, Mr. Jones, to argue that issue to Judge Seals.

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. 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 544 (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).

The Court finds Applicant failed to carry his burden of proving ineffective assistance of trial counsel. Specifically, the Court finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in her representation. The Court also finds trial counsel's testimony very credible, and Applicant's not credible.

The Court finds Applicant's allegation trial counsel failed to retain an expert to be without merit. The State's expert testified hundreds of weapons could have fired the fatal bullet and he could not positively identify Applicant's gun as the murder weapon. (Trial Tr. 371:19-372:9). Trial counsel testified she did not call a second expert because the State's expert's testimony helped her case. The Court finds this to be a valid trial strategy. Dempsey v. State,

363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) ("[C]ounsel's decision not to call an expert witness to rebut the state's expert witness was a legitimate trial strategy." (citing McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003))). Applicant also has not shown any prejudice from trial counsel's decision. Trial counsel thoroughly cross-examined the State's expert to drive home the point the gun could not be identified as the murder weapon. Lorenzen v. State, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008) (citing Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991)). Furthermore, Applicant presented no expert testimony at the evidentiary hearing. Id. at 530, 657 S.E.2d at 776-77 (2008) (citing Dempsey, 363 S.C. at 369, 610 S.E.2d at 814).

The Court also finds without merit Applicant's allegation trial counsel should have requested a charge on voluntary manslaughter. Trial counsel testified her trial strategy was to show Applicant did not shoot the victim. In light of this trial strategy, trial counsel articulated a valid trial strategy for not seeking a voluntary manslaughter charge. Abney v. State, 408 S.C. 41, 46-47, 757 S.E.2d 544, 547 (Ct. App. 2014), reh'g denied (Apr. 24, 2014) (refusing to ask for a lesser included offense may be reasonable trial strategy). Furthermore, trial counsel was under no duty seek the lesser included offense where Applicant maintained he was not present at the crime scene and did not shoot the victim. McCray v. State, 317 S.C. 557, 560, 455 S.E.2d 686, 688 (1995). The Court also finds Applicant cannot show prejudice from the failure to request a voluntary manslaughter charge. Judge Seals indicated he would not have given the charge even if requested. (Trial Tr. 460:19-23). The Court agrees such a lesser included offense was not applicable under the facts presented at trial.

Furthermore, because the evidence did not support a charge on a lesser included offense, it also did not support the elimination of the implied malice instruction in Judge Seal's charge.

See State v. Belcher, 385 S.C. 597, 610, 685 S.E.2d 802, 809 (2009) ("[T]he 'use of a deadly weapon' implied malice instruction has no place in a murder prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing."). The Court notes trial counsel, through Mr. Jones, argued the malice charge was inappropriate in light of the evidence the victim's dog may have been vicious. (Trial Tr. 458:13-459:1). However, Judge Seals overruled the objection and charged the jury on implied malice. Thus, trial counsel could not have been deficient in this regard because she did attempt to exclude the implied malice charge. Furthermore, the mere fact the murder weapon was not positively identified is not sufficient grounds to exclude a charge on implied malice by the use of a deadly weapon. An eyewitness testified Applicant used a gun to shoot the victim. Accordingly, trial counsel was not ineffective where no grounds existed to object to Judge Seals' proper charge on implied malice.

The Court also finds Applicant failed to demonstrate error by trial counsel in failing to object to the solicitor's closing argument. The Court has reviewed the portions of the argument Applicant alleges were inappropriate, and finds no inappropriate vouching. The solicitor neither "places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity" nor "indicat[es] information not presented to the jury supports the testimony." State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001) (citing State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001); 75A Am.Jur. Trial § 700 (1991)). Rather, he indicated the manner in which the witnesses testified lent credibility to their testimony. This argument is not improper because "[a] solicitor has the right to state his version of the testimony and to comment on the weight to be given such testimony." State v. Caldwell, 300 S.C. 494, 505, 388 S.E.2d 816, 823 (1990) (citing State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976)), overruled on other grounds

by State v. Evans, 371 S.C. 27, 637 S.E.2d 313 (2006). The Court agrees with trial counsel that these statements are not objectionable and finds her reasoning was sound. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992))). Furthermore, Judge Seals consistently reminded the jury that an attorney's arguments are not evidence. See State v. Dawkins, 297 S.C. 386, 393, 377 S.E.2d 298, 302 (1989) (judge's instruction sufficient to cure error from improper arguments). Therefore, trial counsel was not ineffective because the solicitor's statement was not objectionable.

The Court also finds Applicant failed to demonstrate trial counsel should have conducted a further investigation. 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). Applicant has failed to demonstrate what counsel would have uncovered with a further investigation. He presented no testimony for other witnesses about what could have been uncovered. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (to show prejudice from failure to investigate witnesses, applicant must produce the witnesses at the evidentiary hearing or otherwise introduce testimony pursuant to the rules of evidence). Accordingly, the Court finds Applicant has not shown counsel was ineffective in this regard.

Finally, The Court finds Applicant failed to meet his burden to show appellate counsel ineffective. 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, 363 S.C. at 370, 610 S.E.2d at 815 (without a witness's testimony, "any finding of prejudice is merely speculative").

Regardless, the Court finds Applicant has not demonstrated he was prejudiced by appellate counsel's failure to brief the issue of Judge Seals' ruling on the suppression motion because appellate counsel filed an Anders brief. In State v. McKennedy, 348 S.C. 270, 559 S.E.2d 850 (2002), the South Carolina Supreme Court outlined the Anders procedure as follows:

> "[A]ccording to Anders, the reviewing court is obligated to make a full examination of the proceedings on its own. After such an examination, if the reviewing court agrees with the attorney, it may dismiss the appeal or proceed to a decision on the merits. On the other hand, if the court disagrees with the attorney's analysis of the appeal, it must afford the defendant 'the assistance of counsel to argue the appeal.' The purpose of filing a brief under Anders is to ensure the merits of the appeal are not overlooked. The court has to conclude independently, regardless of counsel's conclusion, whether or not the appeal has merit before it can dismiss the appeal."

McKennedy, 348 S.C. at 279, 559 S.E.2d at 855. A presumption of regularity attaches to judicial proceedings, and this presumption should extend to the Court of Appeal's review under the Anders procedure. See Pringle v. State, 287 S.C. 409, 410-11, 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)). Accordingly, this Court must presume the Court of Appeals reviewed this preserved[2] issue before dismissing Applicant's direct appeal. See McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 46 (2013) ("Under the Anders procedure, an appellate court is required to review the entire record, including the complete trial transcript, for any preserved issues with potential merit." (citing State v.

[2] Trial counsel raised an objection in a pretrial motion (Trial Tr. 38:20) and renewed her objection when the gun was introduced (Trial Tr. 415:11).

Williams, 305 S.C. 116, 406 S.E.2d 357 (1991))). Furthermore, Applicant has not demonstrated Judge Seals erred in admitting the gun. See State v. Spears, 393 S.C. 466, 479, 713 S.E.2d 324, 331 (Ct. App. 2011) (admission of gun proper where State laid a proper foundation and witnesses testified the gun found near defendant was similar to the gun they witnessed him use in crime). Accordingly, Applicant has failed to demonstrate ineffectiveness of appellate counsel in this regard.

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 any 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. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 12 day of Aug, 2014.

A CERTIFIED TRUE COPY

William B. Funderburk

CLERK OF COURT
MARLBORO COUNTY

R. Ferrell Cothran

THE HONORABLE R. FERRELL COTHRAN, JR.
Presiding Judge

Manning, South Carolina

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WILLIAM B. FUNDERBURK
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