

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas  
Honorable Maite Murphy, Circuit Court Judge

Case No: 2011-CP-18-02453

Dervick L. Parker.....Appellant  
S.C.D.C. 334246

v.

The State.....Respondent

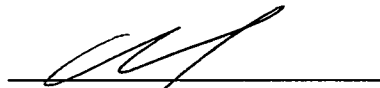
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SEP 25 2014

**S.C. SUPREME COURT**

NOTICE OF APPEAL

Dervick L. Parker, appeals his Denial for Post Conviction Relief in this case. The order of Dismissal was imposed and signed by the Honorable Maite Murphy, September 8, 2014, which I, Charles T. Brooks, III, received on September 19, 2014.



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September 23, 2014

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APPEAL FROM DORCHESTER COUNTY  
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Dervick L. Parker.....Appellant  
S.C.D.C. 334246  
v.  
The State.....Respondent

PROOF OF SERVICE

I, the undersigned, do hereby certify that on this 23rd day of September, 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 September 23rd, 2014, addressed to the following as indicated below:

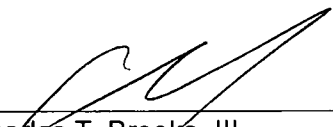
South Carolina Supreme Court  
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Mr. Dervick Parker, 334246  
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Dated: September 23rd, 2014

  
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STATE OF SOUTH CAROLINA )  
COUNTY OF DORCHESTER )  
Dervick L. Parker, #334246, )  
Applicant, )  
v. )  
State of South Carolina, )  
Respondent. )

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IN THE COURT OF COMMON PLEAS  
FOR THE FIRST JUDICIAL CIRCUIT

Case No. 2011-CP-18-0243

**ORDER OF DISMISSAL**

2014 SEP 16 PM 2:28  
CLERK OF COURT  
DORCHESTER COUNTY

This matter comes before the Court by way of an application for post-conviction relief filed December 7, 2011, alleging ineffective assistance of counsel and various other due process claims. The State made its Return and Partial Motion to Dismiss on April 12, 2012, requesting an evidentiary hearing be held on Applicant's ineffective assistance of counsel claims and requesting summary dismissal of the remaining claims. Thereafter, Applicant amended his Application on April 10, 2014 and again on April 28, 2014. An evidentiary hearing into the matter was convened on May 28, 2014, at the Dorchester County Courthouse. Applicant was present at the hearing and was represented by counsel, Charles T. Brooks, III, Esquire. Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office. After reviewing all testimony and other evidence presented at the hearing, along with a review of all records provided to the Court, this Court finds that there are no constitutional deprivations or other grounds on which to grant relief and is denying and dismissing this application with prejudice.

## PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Dorchester County Clerk of Court. Applicant was indicted during the April 2008 term of the Dorchester County Grand Jury for Assault and Battery with Intent to Kill (2008-GS-18-0481). Mark L. Archer, Esquire, represented him. On April 13-16, 2009, Applicant proceeded to a jury trial before the Honorable Diane S. Goodstein, where he was convicted as indicted. Judge Goodstein sentenced Applicant to twenty years imprisonment.

A notice of appeal was filed and an appeal perfected on Applicant's behalf by Deputy Chief Appellate Defender Wanda H. Carter. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence by unpublished opinion. State v. Parker, Op. No. 2011-UP-060 (S.C. Ct. App. filed February 16, 2011). The Remittitur was sent March 24, 2011.

At the evidentiary hearing, Applicant proceeded forward on the following allegations as set forth in his most recent amended application, filed on April 28, 2014:

1. Ineffective assistance of counsel for opening the door to Applicant's prior statement to law enforcement and for failure to move to suppress this statement;
2. Ineffective assistance of counsel for failure to object to the trial court's failure to charge the jury on the mandatory jury instruction on the voluntariness of his statement; and
3. Ineffective assistance of counsel for failing to object to the chain of custody of the firearm introduced at trial.

Applicant failed to present any testimony or other evidence regarding his original allegations of due process violations, trial court errors, and other claims, such as ineffective assistance of appellate counsel. Respondent has moved to dismiss these for failure to state a claim on which

relief can be granted pursuant to S.C. Code Ann. § 17-27-10 through -160. This Court grants Respondent's motion to dismiss all claims beyond the three specific claims listed above.

#### **SUMMARY OF TESTIMONY PRESENTED AT EVIDENTIARY HEARING**

At the evidentiary hearing, Applicant testified on his own behalf and presented testimony from trial counsel Mark Archer, Esquire (hereafter "Counsel"). This Court also had before it Applicant's trial transcript, the records from the Dorchester County Clerk of Court regarding the subject convictions, Applicant's appellate records, and Applicant's records from the South Carolina Department of Corrections.

Applicant testified first on his own behalf. He testified that the incident involved the shooting of an undercover police officer when he was eighteen years old. He testified that he was at his girlfriend's home when he was advised by a female friend that a suspicious male was wondering around the apartment complex. He testified that he did not know at the time that this person was an undercover police officer and perceived him as a threat. He acknowledged that he and a friend approached the officer, which resulted in an exchange of gun fire. He testified that he learned after the shooting that an undercover officer had been shot. He testified that he was arrested thereafter and charged with Assault and Battery with Intent to Kill. He testified that he attempted to plead guilty in January 2009 before Judge Williams, but Judge Williams refused to accept the State's recommendation after hearing a victim impact statement from the officer. He testified that Judge Williams allowed him to stand down.

He testified that Counsel was retained to represent him by family members in August 2008. He testified that he met with Counsel three or four times for approximately fifteen

minutes before his trial. He testified that he did “not really” review discovery with Counsel, but conceded that he did review numerous statements with Counsel, including a statement he gave to law enforcement following his arrest. He testified that Counsel should have moved to suppress his statement in a pre-trial Jackson v. Denno hearing. He acknowledged that the State agreed that his statement would not be admitted as substantive evidence and would only be introduced for impeachment purposes if he testified inconsistently. He testified that Counsel explained this to him and he decided to testify knowing the statement would likely come in because he wanted to show the jury he was acting in self-defense and that his previous statement was a lie given to law enforcement immediately after the shooting while he was scared. He testified that during his trial testimony, his testimony was inconsistent with his statement to law enforcement and he was impeached with his prior statement. He acknowledged that Counsel objected at this time and an *in camera* hearing was held to determine if the statement was admissible, after which the court concluded the statement was admissible for impeachment purposes. He testified that Counsel also should have requested a jury instruction requiring the jury to determine the voluntariness of his statement and objected to the charge as given.

Applicant testified that Counsel also should have objected to the admission of the firearm on chain of custody issues. He elaborated that Counsel never checked the chain of custody receipts to see if the weapon had been handled properly or to insure that all necessary witnesses were present to testify at trial.

Following Applicant’s testimony, Counsel was called to testify by Applicant. Counsel testified that he was retained to represent Applicant by Applicant’s family and that he met with

Applicant numerous times. He testified that the charges arose out of the shooting of an undercover police officer in a very dangerous apartment complex notorious for violence and drug activity. He testified that Applicant and his co-defendant approached the undercover officer and acknowledged that Applicant and his co-defendant repeatedly followed the officer while he was trying to flee the complex. He testified that the State's case centered on the officer's testimony, but there was also a recording from the officer's radio that encompassed the encounter and shooting. He testified that he attempted to broker a plea offer on Applicant's behalf, but that Judge Williams refused to accept the State's offer for ten to twelve years imprisonment after hearing the victim impact statement from the officer. He testified that after this failed plea attempt, he was fully prepared for trial, with a defense of self-defense.

He testified that Applicant had given a statement to law enforcement before he was retained. He testified that this statement was exculpatory and therefore would not be used in the State's case in chief. He testified that he wanted to insure that the record was protected, so he addressed the issue pre-trial and had prepared a written motion to suppress in case the State attempted to introduce the statement. However, he testified that the State did plan to use the statement for impeachment purposes if Applicant took the stand and testified inconsistently, which was likely because the statement falsely indicated that different individuals were with Applicant during the shooting. He testified that he advised Applicant of this and the danger of having the statement used for impeachment purposes. However, he testified that both he and Applicant were in agreement that Applicant would have to testify to explain to the jury that he was acting in self-defense. He testified that based on this, he made a strategic decision to bring

this inconsistency out during Applicant's direct testimony to reduce its impact on the jury. He testified that he thought it was in error for the statement to be introduced as a whole as Applicant's testimony already admitted to giving a prior inconsistent statement and that he objected to the statement's introduction resulting in an *in camera* hearing. He testified that despite the risk of any possible, albeit minimal, negative effect from Applicant's prior statement, he made the strategic decision to call Applicant because it was absolutely essential for the jury to hear his story for his self-defense claim.

Counsel testified that three total guns were involved in the incident, including the officer's weapon. He testified that the officer testified that both suspects (Applicant and his co-defendant) had weapons and shot during the encounter. He testified that he recalled there being a possible issue regarding different DNA on the two other weapons, but that this was not exculpatory because the weapons were not found on Applicant. He testified that there was no reason to challenge the chain of custody for the firearms and conceded that because firearms are non-fungible items, the entire chain of custody does not need to be accounted for before introduction into evidence. He testified that there is "no way" the firearms would have been suppressed if he had made such a motion.

Counsel testified that he requested several specific jury instructions, including one of the voluntariness of Applicant's statement. He testified that he recalled the charging conference taking place off the record. However, he testified that since the statement was not admitted as probative evidence, but rather, admitted for impeachment purposes, such a jury charge was not required. Additionally, he testified that he believed the jury charge as a whole conveyed this to

the jury without any need for a specific instruction. He testified that he thought this was an excellent case for self-defense and that he likely would have won if it had not been a law enforcement officer as the victim. He elaborated that once the jury heard that an officer was shot during the line of duty, it would be an uphill battle to secure an acquittal, but that he was fully prepared for trial.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. This Court finds that Counsel's testimony is credible and should be afforded great weight; conversely, this Court finds that Applicant's testimony lacks credibility. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

#### ***Ineffective Assistance of Counsel***

In a post-conviction relief action, the applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged 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 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced 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.

After careful review based on the standard discussed above, including a review of the testimony of the witnesses presented at the evidentiary hearing, this Court denies this application on the basis that Counsel's performance did not fall below the standard required and there was no resulting prejudice to Applicant from these alleged deficiencies. Below are the specific findings as to Applicant's allegations of ineffective assistance of counsel:

*Allegation that counsel was ineffective for opening the door to Applicant's prior statement to law enforcement and for failure to move to suppress this statement*

Applicant alleges that Counsel was ineffective for opening the door to the admission of his prior inconsistent statement and for bringing the inconsistencies out during his direct examination. See Tr. p. 524-25. The uncontroverted testimony and the record reveal that

following this testimony regarding Applicant's inconsistencies, Counsel moved to suppress the introduction of Applicant's statement for impeachment purposes. See Tr. p. 526-532. This was after a pre-trial hearing took place, where the State conceded the statement would not be used in its case in chief and would only possibly be used for impeachment purposes if Applicant testified differently than his statement. See Tr. p. 52-53. Counsel testified that he made a strategic decision to bring out the inconsistency in Applicant's statement to lessen the impact on the jury and reduce any possible tarnishing to Applicant's credibility. Additionally, Counsel testified that Applicant's statement to law enforcement was no exculpatory, but rather innocuous and the inconsistency dealt with who was present alongside Applicant. Additionally, he testified it was absolutely essential to call Applicant as a witness to present his theory of self-defense.

"There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (citing Strickland, 466 U.S. at 689). "[W]hen counsel articulates a *valid* reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'" Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011) (citing Strickland, 466 U.S. at 689). Therefore, courts must be wary of second-guessing trial counsel's tactics. Edwards, supra (citing Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992)).

Accordingly, this Court finds that Counsel's performance was reasonable based on professional standards. See Cherry, supra. This Court finds that Counsel's strategic decision to address the inconsistencies in Applicant's statement during his direct examination to lessen the potential effects was reasonable based on the circumstances of this case. As this Court finds no deficiency exists, this allegation must be denied and dismissed with prejudice.

*Allegation that counsel was ineffective for failing to object to the trial court's failure to charge the jury on the mandatory jury instruction on the voluntariness of his statement*

Applicant alleges that Counsel was ineffective for failing to request a specific jury instruction on the voluntariness of Applicant's statement. Counsel testified that he believes he requested such a charge, but that such a charge was not required because the statement was admitted for impeachment purposes only. Furthermore, he testified that the jury instructions, taken as a whole, conveyed this to the jury without the need for a particular instruction. This Court agrees and finds that Counsel's performance was not deficient. South Carolina law dictates that jury instructions, when analyzed, must be considered in their entirety. See Todd v. State, 355 S.C. 396, 585 S.E.2d 305 (2003). This Court finds that not specific instruction on the voluntariness of Applicant's statement was necessary, as the statement was offered for the limited purpose of impeachment. Furthermore, the trial court's instruction, when viewed as a whole, convey this to the jury. Therefore, this Court finds Counsel's performance to be reasonable and in accordance with professional norms. As this Court finds no deficiency exists, this allegation must be denied and dismissed with prejudice.

*Allegation that counsel was ineffective for failing to object to the chain of custody of the firearm introduced at trial*

Applicant alleges that counsel was ineffective for failing to object to the chain of custody for the firearms introduced at trial. In support of this allegation, Applicant cites to Counsel's statement during pre-trial hearings that he was not objecting to the introduction based on chain of custody. See Amended Application; Tr. p. 57 lines 19-25. However, Applicant failed to establish what the particular defect in custody was or how it would have made the evidence in question inadmissible. Counsel testified that he did not object to the admission of the firearm based on chain of custody because there was no defect in the chain. Furthermore, Counsel noted that because the evidence in question – a firearm – is non-fungible evidence, testimony from every piece of the chain is not required for introduction.

A party offering into evidence of fungible items, such as drugs or blood, must establish a complete chain of custody as far as practicable. State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 752 (2011). "Testimony from each custodian of fungible evidence, however, is not a prerequisite to establishing a chain of custody sufficient for admissibility." State v. Sweet, 374 S.C. 1, 7, 647 S.E.2d 202, 206 (2007) (internal citations omitted). "Where other evidence establishes the identity of those who have handled the evidence and reasonably demonstrates the manner of handling of the evidence, our courts have been willing to fill gaps in the chain of custody due to an absent witness." Id.

In contrast, "[w]hile the chain of custody requirement is strict where fungible evidence is involved, where the issue is the admissibility of non-fungible evidence—that is, evidence that is unique and identifiable—the establishment of a strict chain of custody is not required: if the

offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition.” State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741-42 (2005) (citing State v. Glenn, 328 S.C. 300, 305–306, 492 S.E.2d 393, 395 (Ct.App.1997)).

In the present case, the evidence in question, a firearm, is non-fungible, as it is “fairly unique and readily identifiable.” Freiburger, *supra*. As a non-fungible item, admission of the firearm into evidence did not require a strict chain of custody, but rather, only testimony that the weapon is the firearm in question and in a substantially unchanged condition. Here, these requirements were satisfied As the State fulfilled its chain of custody requirements in regards to this non-fungible evidence, this Court finds that trial counsel was not deficient for not objecting to its admission based on purported chain of custody defects. As this Court finds no deficiency exists, this allegation must be denied and dismissed with prejudice.

### CONCLUSION

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


This Court notes that Applicant must file and serve a Notice of Appeal within thirty 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 an applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. That the Application for Post-Conviction Relief shall be denied and dismissed with prejudice; and
2. The Applicant shall remain remanded to the custody of the State.

AND IT IS SO ORDERED this 8 day of Sept., 2014.

  
\_\_\_\_\_  
MAITÉ MURPHY  
Presiding Judge  
First Judicial Circuit

  
\_\_\_\_\_, South Carolina.

# The Brooks Law Office, LLC

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SEP 25 2014

September 23, 2014

**S.C. SUPREME COURT**

South Carolina Supreme Court  
PO Box 11330  
Columbia, SC 29211

**RE: Dervick Parker vs. State of South Carolina  
2011-CP-18-02453**

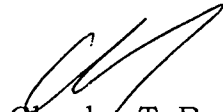
Dear Sir or Madam:

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

Enclosed as stated

cc: Meagan E. Harrigan, Office of Attorney's General  
South Carolina Office of Appellate Defense  
Dervick Parker, 334246

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