AXELROD & ASSOCIATES, P.A.

Attorneys and Counselors at Law

"Success is all that matters"

Stuart Mark Axelrod
Carlton E. Elliott
W. Christopher Castro*
Tristan M. Shaffer

*Currently on Active Military Leave

4701 Oleander Drive
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

November 6, 2014

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

341480

RE: Craig Geathers ~~#260814~~ v. State of South Carolina
Case No.: 2013-CP-22-572

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/cdc
cc: Joshua L. Thomas, Esquire
Georgetown County Clerk of Court
Loreen French
Craig Geathers

SUPREME COURT OF SOUTH CAROLINA

APPEAL FROM GEORGETOWN COUNTY
In The Court of Common Pleas

Honorable Kristi Lea Harrington
Common Pleas Judge of the Fifteenth Judicial Circuit

Case No.: 2013-CP-22-475

Craig Geathers, #341480, Petitioner,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Petitioner appeals the Order of Dismissal, dated October 7, 2014 of the Honorable Kristi Lea Harrington, filed October 20, 2014 and received by Petitioner on October 27, 2014.

November 6, 2014

Tristan M. Shaffer, Esq.
AXELROD & ASSOCIATES P.A.
4701 Oleander Drive
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 GEORGETOWN COUNTY
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Honorable Kristi Lea Harrington
Common Pleas Judge of the Fifteenth Judicial Circuit

Case No.: 2013-CP-22-475

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v.

State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

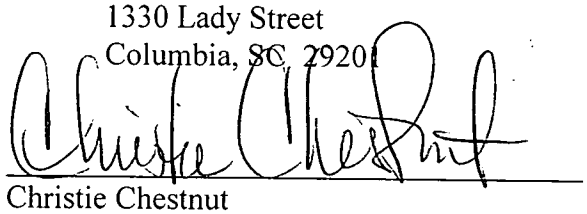
I, Christie Chestnut, do hereby certify that I am an employee of Axelrod & Associates, P.A., in Myrtle Beach, South Carolina, and that I have this date served the Petitioner's Notice of Appeal upon the Respondent, by depositing a copy of same in the United States Mail, postage prepaid, addressed as follows:

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

Georgetown County Clerk of Court
P.O. Box 479
Georgetown, SC 29442-0479

Craig Geathers
Lieber Correctional Institution
136 Wilborn Avenue
Ridgeville, SC 29472

Loreen French
Appellate Defense
1330 Lady Street
Columbia, SC 29201



Christie Chestnut
Paralegal to Tristan M. Shaffer

November 6, 2014
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Craig Gathers, #341480, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2013-CP-22-475 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed May 2, 2013. Respondent made a timely Return on or about September 18, 2013. The Court convened an evidentiary hearing into the matter on August 28 and 29, 2014, at the Georgetown County Courthouse. Applicant was present at the hearing and represented by Tristan M. Shaffer, 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, Jonathan Eric Fox, Esquire, also testified. The Court had before it a copy of the trial transcript, the records of the Georgetown County Clerk of Court regarding the subject convictions, 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 Georgetown County Clerk of Court. In January 2010, the Georgetown County Grand Jury indicted Applicant for kidnapping (2010-GS-22-172) and armed robbery (2010-GS-22-173). Jonathan Eric Fox, Esquire ("trial counsel"), represented Applicant. On June 21, 2010,

Applicant proceeded to trial before the Honorable Benjamin H. Culbertson and a jury. On June 23, 2010, the jury found Applicant guilty as indicted. On each charge, Judge Culbertson sentenced Applicant to concurrent terms of twenty-five (25) years in the State Department of Corrections with credit for time served.

Applicant filed a timely notice of appeal, and Elizabeth A. Franklin-Best, Esquire perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on May 2, 2012. *State v. Geathers*, Op. No. 2012-UP-259 (S.C. Ct. App. filed May 2, 2012). The remittitur was returned to the circuit court on May 18, 2012.

II. ALLEGATIONS

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

1. "Ineffective Assistance of Counsel"
2. "5th Amendment violations: Due Process Clause & Pre-indictment delay."
3. "6th Amendment violations: Right to Counsel & Compulsory Process."

At the evidentiary hearing, Applicant orally amended his application and proceeded only on allegations of ineffective assistance of trail counsel in the following regards:

1. Failure to object to a violation of the Confrontation Clause.
2. Failure to investigate.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. 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

Trial counsel testified he was appointed to Applicant's case in 2009. He testified the State's

evidence was largely based on the testimony of the victim. Trial counsel recalled reviewing the evidence with Applicant, and believed they had enough meetings to be prepared for trial. He testified Applicant never denied being in the cab, but said he did not have a gun and did not rob the victim. Trial counsel recalled Applicant giving him names of three witnesses to investigate: Irma Scarborough, Bryant Vereen, and Ruby Allman. Trial counsel testified his investigation largely consisted of locating and interviewing these witnesses. Scarborough was the aunt Applicant lived with while in South Carolina. Trial counsel recalled speaking to her, but she could not remember any details of the night of the crime. Vereen was Applicant's cousin, and trial counsel recalled Vereen stated he was living in North Carolina at the time of the crime and would not have seen Applicant. Trial counsel recalled neither his investigator nor the Berkeley County Sheriff's Department were able to locate Allman to subpoena her. He testified he likely would not have called Allman as a witness because she was hostile to Applicant after he ended his relationship with her daughter.

Trial counsel recalled his trial strategy was not to establish an alibi because Applicant admitted to being in the cab that night. Instead, he attempted to discredit the victim as lying to hide the fact he was working "off the books" the night of the crime. Regardless, he researched issues relating to the photo array and challenged the victim's identification. Trial counsel testified he did not object to the police officer relaying Allman's statements because they were statements demonstrating the officer's investigation.

Applicant testified he lived in New York City, but was visiting family in South Carolina at the time of the crime. He testified he broke up with his girlfriend shortly before the crime, and was traveling to her house that night to take her a gift. He recalled meeting with trial counsel two (2) to three (3) times and reviewing the victim's statements. Applicant testified he told trial counsel to call Allman

as a witness to prove he came to her house the night of the crime. Applicant also testified he did not know the witnesses he requested would not be called until the day of trial. He further testified trial counsel never explained to him why the witnesses were not called.

B. Ineffective Assistance of Trial 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 540 (4th Cir. 1977)). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* (citing *Strickland*, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. *Id.* at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. *Id.* Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." *Id.* (citing *Strickland*, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." *Id.* at 117-18, 386 S.E.2d at 625.

1. Failure to Object to a Violation of the Confrontation Clause.

The Court finds Applicant failed to meet his burden to show trial counsel ineffective for failing to object to the introduction of Allman's statements through the police officer as a violation of the Confrontation Clause. The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. This procedural safeguard is also applicable to state prosecutions. *Crawford v. Washington*, 541 U.S. 36, 42 (2004). The Confrontation Clause prohibits the admission of testimonial statements of a witness who does not appear at trial unless the defendant had a prior opportunity for cross-examination. *Id.* at 53-54. The Confrontation Clause does not prohibit the use of testimonial statements for non-hearsay purposes. *Id.* at 60 n.9 ("The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (citing *Tennessee v. Street*, 471 U.S. 409 (1985))).

No Confrontation Clause violation occurred here because Allman's statements were not offered for the truth of the matter asserted. In *State v. Thompson*, 352 S.C. 552, 558, 575 S.E.2d 77, 81 (Ct. App. 2003), the Court of Appeals held that statements are not hearsay when "offered for the purpose of explaining why a government investigation was undertaken." There, the trial court admitted a statement from a bystander that a suspect driving in a stolen car could be found in a certain home. *Thompson*, 352 S.C. at 556, 575 S.E.2d at 79. The defendant objected to the statements as hearsay because the bystander directly implicated the defendant as the driver of the victim's car. *Id.* at 557, 575 S.E.2d at 80. The Court of Appeals held the statements "were not entered for their truth but rather to explain and

outline the officers' investigation and their reasons for going to the [defendant's] home." *Id.* at 559, 575 S.E.2d at 81.

Allman's statements here were not offered to prove Applicant was the individual who committed the crime. Allman's statements identify the owner of the house Applicant visited and his relationship with the owner. These statements are intended to demonstrate why the officer began to investigate Applicant as a suspect. Because the statements simply explain and outline the officer's investigation, they are not hearsay. *Id.* Accordingly, the Court finds trial counsel articulated a valid reason for not objecting to the officer's testimony. *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, because the testimony was not hearsay, it was not objectionable as a violation of the Confrontation Clause. *Crawford*, 541 U.S. at 60 n. 9; *see also State v. Cyrus*, 2011-1175, p. 23 (La. App. 4 Cir. 7/5/12); 97 So. 3d 554, 567 (finding that a detective's testimony "that an unnamed witness identified defendant as the individual seen exiting [the victim's car] was not offered for the truth of the matter asserted, but to explain the course of [the detective's] investigation[,]" and was thus not hearsay and not prohibited by the Confrontation Clause). Trial counsel was not deficient in failing to object to the testimony on that ground.

Applicant has not shown the admission of the testimony was prejudicial. *State v. Davis*, 371 S.C. 170, 181, 638 S.E.2d 57, 63 (2006) (Confrontation Clause violations subject to harmless error analysis (citing *State v. Graham*, 314 S.C. 383, 444 S.E.2d 525 (1994); *State v. Mitchell*, 286 S.C. 572, 336 S.E.2d 150 (1985))). Allman's statement was simply that her daughter lived in her house and was in a previous relationship with Applicant. Applicant did not deny he was in a previous relationship with

Allman's daughter. Nor did he deny he was in the victim's cab and traveled to Allman's house the night of the crime. He also testified to the fact his ex-girlfriend lived in Allman's house. None of the information in Allman's statement contradicts Applicant's defense theory. It also has no bearing on the truth of the victim's accusations. In light of the whole record, Allman's statement could not have affected the outcome of Applicant's trial.

2. Failure to Investigate.

The Court finds Applicant failed to carry his burden to prove trial counsel ineffective for failing to investigate his case. 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). Trial counsel reviewed the State's evidence and shared it with Applicant. Trial counsel interviewed two (2) of the witnesses Applicant requested he interview. Trial counsel employed the services of an investigator and the Berkeley County Sheriff's Office to locate the third witness, Allman, but was unsuccessful. The Court also notes trial counsel had reservation about calling Allman as a witness based on her daughter's relationship with Applicant. *Stokes*, 308 S.C. at 548, 419 S.E.2d at 779. The Court finds trial counsel's actions reasonable under the circumstances. The Court finds trial counsel conducted a proper investigation, adequately conferred with Applicant, and was thoroughly competent in his representation.

Applicant has presented no evidence of what information would have been uncovered had trial counsel conducted a further investigation. At the evidentiary hearing, Applicant also did not present any of the witnesses he alleged trial counsel should have called at trial. *Dempsey v. State*, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing

or otherwise offer testimony within the rules of evidence." (citing *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995))). The Court finds Applicant has not shown how he was prejudiced by the extent of trial counsel's investigation.

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. This application for post-conviction relief is denied and dismissed with prejudice.

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 4th day of December, 2014.

THE HONORABLE KRISTI LEA HARRINGTON
Presiding Judge

Charleston, South Carolina

AXELROD
& ASSOCIATES
ATTORNEYS AT LAW

4701 Oleander Drive ◆ Myrtle Beach, SC 29577

cdc

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