STATE OF SOUTH CAROLINA)
COUNTY OF MARLBORO)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTH JUDICIAL CIRCUIT

Allen J. Gathings, #279208,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

Case No. 2012-CP-34-217

A CERTIFIED TRUE COPY
William B. Sundurburk
CLERK OF COURT
MARLBORO COUNTY

ORDER OF DISMISSAL

RECEIVED
FEB 17 2015
SC Court of Appeals

This matter comes before the Court by way of an Application for Post-Conviction Relief filed October 16, 2012. Respondent made a timely Return on or about February 22, 2013. The Court convened an evidentiary hearing into the matter on July 24, 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 counsels, Emily M. Crayton, Esquire, and J. Richard Jones, Esquire, also testified. The Court had before it a copy of the trial transcript, the records of the Marlboro 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:

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WILLIAM B. FUNDERBURK
CLERK OF COURT
MARLBORO COUNTY, SC

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 2007, the Marlboro County Grand Jury indicted Applicant for two counts of murder (2007-GS-34-887,

888) and one count of grand larceny (2007-GS-34-909). Emily M. Crayton, Esquire, and J. Richard Jones, Esquire, represented Applicant. On October 18-21, 2010, Applicant proceeded to trial before the Honorable Howard P. King and a jury. The jury found Applicant guilty as indicted. Judge King sentenced Applicant to consecutive terms of life imprisonment without the possibility of parole for the murder convictions, and a concurrent term of five (5) years imprisonment for the grand larceny conviction.

Applicant filed a timely notice of appeal, and Elizabeth Franklin-Best, Esquire ("appellate counsel"), perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on August 22, 2012. State v. Gathings, Op. No. 2012-UP-494 (S.C. Ct. App. filed August 22, 2012). The remittitur was returned to the circuit court on September 7, 2012.

II. ALLEGATIONS

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

1. "Ineffective Assistant of Appellate Councel"
    a. "Fell to appeal all grounds apon which a decision is based conviction was affirmed apon two issue rule"
2. "Prosecutor Misconduct"
    a. "Character evidence prior to defense opening door."
3. "Ineffective Assistant of Trial Councel"
    a. "Fell to object to character witness to preserve for Appelatte review"
    b. "Fell to object to prior record – "Bad Acts" introduced to jury for Appelatte review"

At the evidentiary hearing, Applicant proceeded on the following allegations:

1. Ineffective assistance of trial counsel for failing to object to the State eliciting improper character evidence.

2. Ineffective assistance of trial counsel for failing to quash the indictments.

3. Ineffective assistance of trial counsel for failing to retain an expert witness.

4. Ineffective assistance of appellate counsel for failing to challenge on appeal the trial judge's admission of evidence of Applicant's prior bad acts.

5. Ineffective assistance of appellate counsel for failing to challenge on appeal the trial judge's refusal to declare a mistrial after the jury may have seen Applicant in leg restraints.

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 the State improperly elicited character evidence from its first witness, and his attorneys did not object. He further testified appellate counsel did not raise an appeal to all of Judge King's grounds for allowing the testimony. Applicant also testified appellate counsel did not appeal Judge King's denial of a mistrial when trial counsel objected to the jury seeing Applicant in leg restraints. Applicant testified trial counsel should have moved to quash the indictments because the body indicates the grand jury met on September 10, 2007, but the face of the indictment was signed on September 6, 2007.

Applicant also testified Mr. Jones was supposed to be lead counsel on the case, but allowed Ms. Crayton to ask most questions. Applicant alleged Ms. Crayton told him she did not have enough experience to try a murder case. Applicant testified he only met with Mr. Jones

once before trial, but admitted he had several meetings with Ms. Crayton. He testified he discussed his potential defense with Ms. Crayton, and told her who to subpoena as alibi witnesses. Applicant further alleged he told Ms. Crayton to hire a DNA expert to review his case.

Ms. Crayton testified she met with Applicant seventeen (17) times after being appointed. She denied ever telling Applicant she did not have enough experience to handle his case. Ms. Crayton testified this may have been her second murder case, and that a senior attorney always sits on murder cases. She testified she felt sufficiently prepared to go forward with trial. She recalled discussing the State's evidence with Applicant and with Mr. Jones. She also recalled discussing Applicant's alibi defense.

Ms. Crayton testified Applicant never asked her about hiring an expert for this case. She also testified she did not discuss an expert with Mr. Jones because an expert would not have been helpful. Mr. Crayton testified Applicant's DNA was on the murder weapon, and that part of the trial strategy was to argue his DNA would have been there because he lived in the house and regularly handled the weapon. She also recalled cross examining the State's DNA expert on the fact the DNA could have been on the weapon before the murder. Ms. Crayton testified she did discuss the indictment dates with Applicant, but advised him it was not a significant issue.

Mr. Jones testified he met with Applicant once or twice, but that Ms. Crayton discussed the case with him regularly. He recalled traveling to Horry County to meet with the alibi witness. He recalled not looking into an expert because one would not have been able to add any useful information the case in light of the fact the State's expert could not say Applicant's DNA was transferred to the weapon at the time of the murder. Mr. Jones testified they moved for a

mistrial even though Applicant's leg restraint was not obviously a restraint device and he could not be sure the jury even saw the device.

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. Character Evidence

The Court finds Applicant filed to meet his burden of showing trial counsel ineffective for failing to object to improper character evidence. Mr. Jones argued against admission of applicant's prior convictions for crimes against the victims. (Trial Tr. 54:20). Trial counsel was under no duty to renew the objection when the first two witnesses testified as to the nature of those crimes. See State v. Mueller, 319 S.C. 266, 268, 460 S.E.2d 409, 410 (Ct. App. 1995) (motion in limine need not be renewed when first witness at trial testifies to matters sought to be excluded by the motion). Furthermore, Ms. Crayton renewed the motion when the State introduced certified copies of Applicant's convictions. (Trial Tr. 195:10-11). Accordingly, Applicant has not shown trial counsel was ineffective in failing to object to the introduction evidence of his prior convictions.

2. Indictments

The Court finds Applicant has failed meet his burden to prove trial counsel ineffective for failing to quash the indictments. Ms. Crayton moved prior to trial to quash the indictment based on the inconsistent dates. (Trial Tr. 56:16). Accordingly, there can be no deficiency in failing to make such a motion. Furthermore, the motion was properly denied. A presumption of regularity attaches to proceedings in the Court of General Sessions. Pringle v. State, 287 S.C. 409, 411, 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)). Absent evidence to the contrary, the Court must presume that a properly returned indictment is

valid. State v. James, 321 S.C. 75, 472 S.E.2d 38, 40 (Ct. App. 1996) (citing Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995); State v. Thompson, 305 S.C. 496, 409 S.E.2d 420 (Ct. App. 1991). Here, there is no evidence the indictments were irregular in any manner whatsoever. The indictments are valid on their face because they state all the necessary elements of the charges, the dates of the offenses, and the name of the accused. Id. at 75, 472 S.E.2d at 40. Likewise, the indictments are stamped "True Billed" and signed by the foreman. Pringle, 287 S.C. at 410, 339 S.E.2d at 128. Therefore, the Court finds Applicant has not shown a further objection to the indictments would have yielded a different result.

3. Expert Witness

The Court finds Applicant failed to meet his burden of showing trial counsel was ineffective in failing to procure an independent DNA expert. Regarding this allegation, the Court finds the testimony of Ms. Crayton and Mr. Jones to be very credible, and the testimony of Applicant to be not credible. Both trial counsels articulated a valid strategy in not retaining an independent expert in that such an expert would not have been able to add any information to the case. 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, Ms. Crayton thoroughly cross-examine the State's expert on the lack of testing of certain samples. Likewise, the State's expert testified she could not date Applicant's DNA found on the murder weapon. (Trial Tr. 531:13-20). In light of the evidence presented at trial, the Court finds trial counsel was not deficient in failing to call an independent DNA expert. Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) ("[D]ecision 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, 483-484, 575 S.E.2d 841, 844-845 (2003))).

Regardless, Applicant has not shown he was prejudiced by the decision not to retain independent experts. Applicant presented no expert testimony at the evidentiary hearing, and the Court will not speculate as to what Applicant's desired experts would have found. Id. Furthermore, the record reflects trial counsel thoroughly cross-examined the State's experts to attempt to discredit their testimony. See Lorenzen v. State, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008) ("[C]ounsel's failure to procure expert witnesses did not render her representation deficient given she vigorously cross-examined the State's witnesses and attacked the accuracy of the evidence." (citing Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991))). In sum, Applicant had not proven any testimony by independent experts would have bolstered his defense at trial. Therefore, trial counsel was not ineffective in this regard.

C. Ineffective Assistance of Appellate Counsel

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 396 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones, 463 U.S. at 753. Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226, 1235 (4th Cir. 1985).

The applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, 302 S.C. at 537, 397 S.E.2d at 526; Strickland, 466 U.S. at 687. When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id. Furthermore, 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).

1. Prior Bad Acts

The Court finds Applicant failed to meet his burden of showing ineffective assistance of appellate counsel for failing to fully challenge Judge King's ruling regarding evidence of his prior convictions. Initially, the Court notes Applicant failed to present any testimony from appellate counsel on that issue. As such, the Court cannot speculate as to why Judge King's second ground for admitting the evidence was not briefed. Cf. Dempsey, 363 S.C. at 370, 610 S.E.2d at 815 (finding that, without a witness's testimony, "any finding of prejudice is merely speculative").

Regardless, the Court finds Applicant failed to demonstrate he would have been successful on appeal had this issue been raised. The evidence was clearly admissible under State v. Williams, 321 S.C. 327, 468 S.E.2d 626 (1996). There, the South Carolina Supreme Court reiterated the rule that "evidence of previous quarrels and ill feelings or hostile acts between

parties is admissible to show that animus probably existed between the parties at the time of the homicide[.]" Williams, 321 S.C. at 336, 468 S.E.2d at 631. See also State v. Braxton, 343 S.C. 629, 636, 541 S.E.2d 833, 836-37 (2001) ("In homicide cases, evidence of previous quarrels and ill feelings or hostile acts between parties is admissible to show that animus probably existed between the parties at the time of the homicide."); State v. Clinkscales, 231 S.C. 650, 654, 99 S.E.2d 663, 665 (1957) ("[I]n assault and battery and homicide cases, evidence that the accused and prosecuting witness or the deceased had a previous difficulty is admissible[.]").

Here, Applicant's prior convictions for similar crimes constitutes hostile acts from which the jury could determine prior animosity between Applicant and the victims. Furthermore, the convictions were probative of the relationship between Applicant and the victims. In light of the similarity of prior incidents and the clear precedent regarding prior hostile acts in a homicide case, the Court finds Applicant has failed to demonstrate the outcome of his appeal would have been different had appellate counsel raised this issue. Anderson, 354 S.C. at 434, 581 S.E.2d at 835.

2. Leg Restraints

The Court finds Applicant failed to meet his burden of showing ineffective assistance of appellate counsel for failing to fully challenge Judge King's denial of a mistrial when Applicant appeared in court in a leg restraint. Again, the Court notes Applicant failed to present any testimony from appellate counsel on that issue. Cf. Dempsey, 363 S.C. at 370, 610 S.E.2d at 495 Regardless, the Court finds the Applicant failed to demonstrate appellate counsel failed to exercise sound judgment in choosing which issues to present on appeal. This is not a case where Applicant appeared dressed in prison clothing. See, e.g., Humbert v. State, 345 S.C. 332, 337,

548 S.E.2d 862, 865 (2001). Instead, Applicant was wearing a device that immobilized his legs. From the trial transcript and the testimony at the evidentiary hearing, the device likely resembled a knee brace worn by athletes when recovering from a knee injury. Thus, the Court finds Judge King properly denied the motion for a mistrial and Applicant would not have been successful on appeal had appellate counsel raised the issue. Anderson, 354 S.C. at 434, 581 S.E.2d at 835. Furthermore, the Court finds credible the testimony of Mr. Jones that he was not sure the jury even saw Applicant wearing the device. Therefore, the Court cannot speculate about whether the presence of the device on Applicant deprived him of a fair trial.

C. Overwhelming Evidence of Guilt

Independent of the above analysis, the Court finds Applicant has not demonstrated he was prejudiced by the performance of counsel because there was overwhelming evidence of his guilt. Applicant had prior difficulties with the victims. Applicant was the last person seen with the victims while they were alive, and was located days later with the car of one of the victims. When apprehended, Applicant had blood from the victims on his shoes. Applicant's alibi witness failed to corroborate Applicant's whereabouts for the entire time during which the crime could have occurred. In light of this overwhelming evidence, the Court finds Applicant has not demonstrated the outcome of his trial would have been different in any way. See Harris v. State, 377 S.C. 66, 79, 659 S.E.2d 140, 147 (2008) (no prejudice where there is overwhelming evidence of guilt). The Court further finds Ms. Crayton and Mr. Jones adequately conferred with Applicant, conducted a proper investigation, and were thoroughly competent in their representation.

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

FILED
2014 SEP 30 PM 3 32
WILLIAM B. FUNDERBURK
CLERK OF COURT
MARLBORO COUNTY, SC

A CERTIFIED
TRUE COPY

William B. Funderburk
CLERK OF COURT
MARLBORO COUNTY

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

THE HONORABLE THOMAS A. RUSSO
Presiding Judge

Darlington, South Carolina

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CLERK OF COURT
MARLBORO COUNTY, SC

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MARLBORO COUNTY

STATE OF SOUTH CAROLINA)
COUNTY OF MARLBORO)

IN THE COURT OF COMMON PLEAS

Allen J. Gathings, 279208
☐ Plaintiff

CERTIFIED TRUE COPY
William B. Sunderburk
CLERK OF COURT
MARLBORO COUNTY

CASE NO.
2012-CP-34-0217

v.

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

State Of South Carolina
☒ Defendant.

Plaintiff's Attorney:	Defendant's Attorney:
J. Marshall Biddle, Bar No. 69471	Joshua L. Thomas, Bar No. 100777
Address:	Address:
Post Office Box 50460 Myrtle Beach SC 29579	Post Office Box 11549 Columbia SC 29211-1549
phone: (843) 903-1600 fax: (843) 903-6209	phone: (803) 734-3737 fax: (803) 734-4113
e-mail: marshall@biddlelawfirm.net other:	e-mail: JThomas@scag.gov other:

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☒ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion:
Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached
☒ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant — September 2, 2014 Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT:
☒ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

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2014 SEP 30 PM 3 33
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CLERK OF COURT
MARLBORO COUNTY, SC

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Collected by: Williams
Date Filed: 9-30-14

☑ MOTION FEE COLLECTED $0.00
☐ CONTESTED – AMOUNT DUE:

SCCA/233 (11-03)