

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF SPARTANBURG )  
 )  
 )  
**Supreme Raheem Ackbar, #275886,** )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
 )

IN THE COURT OF COMMON PLEAS  
 SEVENTH JUDICIAL CIRCUIT

2012-CP-42-4987

**ORDER OF DISMISSAL**

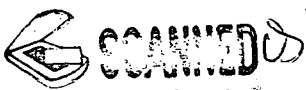
This matter comes before the Court by way of an Application for Post-Conviction Relief filed December 4, 2012, and amendment on January 25, 2013. The Respondent made its Return on or about March 19, 2014. An evidentiary hearing into the matter was convened on September 15, 2014, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by J. Brandt Rucker, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

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At the hearing, the Applicant testified on his own behalf. J. Roger Poole, Esquire, also testified. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, the Appellate Court records, and the trial transcript.

**PROCEDURAL HISTORY**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the June 2009 term of the Spartanburg County Grand Jury for murder (2009-GS-42-5943). The Applicant was represented by J. Roger Poole, Esquire. On February 9, 2011, the Applicant



*[Handwritten signature]*

proceeded to trial, where he was convicted by a jury. The Honorable J. Derham Cole sentenced Applicant to life.

A timely notice of appeal and Anders brief were filed on Applicant's behalf. Applicant also filed a *pro se* brief in support of his appeal. The South Carolina Court of Appeals dismissed the appeal. State v. Ackbar, Op. No. 2012-UP-521 (filed September 12, 2012). After reviewing a letter from the Applicant and his *pro se* petition for rehearing, the Court of Appeals denied the petition on October 17, 2012. The Remittitur was returned on November 29, 2012.

### ALLEGATIONS

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

1. Ineffective assistance of counsel, in that;
  - i. Counsel deprived Applicant of his Sixth Amendment right to effective counsel by engaging in intrinsic fraud with the State,
  - ii. Counsel failed to fully disclose Brady material,
  - iii. Counsel failed to object to the State's failure to properly serve Applicant for the charge of murder,
  - iv. Counsel failed to object and make a motion to quash the indictment,
  - v. Counsel failed to object to perjury,
  - vi. Counsel failed to object to the trial judge not making impartial findings of fact and conclusions of law,
  - vii. Counsel failed to object to the jury charge,
  - viii. Counsel failed to make a motion for directed verdict,
  - ix. Counsel failed to move to suppress evidence based upon an illegal search and seizure,
  - x. Counsel failed to raise a meritorious argument that Applicant was illegally seized and that the evidence was

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obtained because of unlawful  
detainment.

### 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 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).

#### Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. This Court found the testimony of Counsel to be more credible than the testimony of Applicant as to all allegations raised in the application and at the hearing.

In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 177, 179 (2000) (citing Rule 71.1(e), SCRCP). 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the 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, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

Counsel testified that at the time of trial, he had practiced law for over 31 years, with a substantial amount of his practice spent practicing criminal law. Counsel testified that he began representing the Applicant in mid-2010. Counsel testified that he started going to see the Applicant monthly in 2010 and went several times in December 2010. Counsel testified that he and the Applicant had some communication problems, which led to the Applicant filing a motion to relieve Counsel in January 2011.

During their meetings, Counsel testified that he and the Applicant discussed Applicant's wife's motives for testifying against Applicant, content of witness statements, and relationship of Applicant and various witnesses. Counsel testified that he sent a letter to Applicant about the roles of both Counsel and Applicant in preparing a defense, as well as discussing trial strategy and the ultimate objective. Counsel testified that the Applicant never discussed a defense of self-defense or alibi with Counsel. Counsel testified that the first time he heard that the Applicant was not even present at the location of the stabbing was at the PCR hearing.

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*Counsel engaged in intrinsic fraud with the State and*

*Counsel failed to fully disclose Brady material*

The Applicant testified that Counsel failed to turn over discovery materials. A hearing was held approximately a week prior to trial, at which point Applicant moved to relieve Counsel based upon the fact that he believed Counsel was withholding evidence. Applicant alleged that he had requested copies of phone recordings, but had never received them. Applicant further testified that Counsel tried to mislead Applicant about the evidence and phone records. During the hearing on Applicant's motion to relieve and at the PCR hearing, it was clear that Counsel had the information requested by Applicant, but was unable to review the information with the Applicant because of Applicant's desire to relieve Counsel at a prior appointment. Counsel testified that the discovery materials included documents showing phone calls, but the information was solely the phone numbers and times, not the actual messages.

In evaluating post-trial Brady claims, the Applicant must show that (1) the prosecution suppressed evidence, (2) the evidence would have been favorable to the accused, and (3) the suppressed evidence is material. United States v. Wolf, 839 F.2d 1387 (10th Cir. 1988). Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., 434 S.E.2d at 268.

This Court finds that there is no merit to the assertion that Counsel was involved in fraud with the State or withheld discovery materials from the Applicant. This Court finds Counsel's testimony to be most credible as to the lack of existence of any documents regarding phone calls and their contents. Furthermore, this Court finds no evidence of a Brady violation.



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*Counsel failed to object to the State's failure to properly serve Applicant for charge of murder,  
failed to object to and make motion to quash indictment*

Applicant testified that he was never served with a warrant on the charge of murder; therefore, Counsel should have objected to and moved to quash the indictment. Further, the Applicant testified that Counsel should have moved to quash the indictment because the language of the indictment indicated that the victim was killed by "stabbing and/or cutting . . . with a large fixed blade hunting knife," but a knife was never introduced as evidence. Applicant testified that this entitled him to an acquittal.

This Court finds that these allegations lack merit. Counsel would have had no legal basis on which to object to the failure of the arresting officer to properly serve the Applicant with the arrest warrant. Applicant had been properly arrested on a prior armed robbery. The South Carolina Supreme Court has held that an officer is authorized to make a warrantless arrest based upon his knowledge that a valid arrest warrant has been issued against a defendant. State v. Grate, 310 S.C. 240, 242, 423 S.E.2d 119, 120 (1992). Furthermore, there is no legal basis for Counsel to object to the indictment. An indictment for murder is sufficient "if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and if an acquittal or conviction thereon may be pleaded as a bar to any subsequent prosecution." Winns v. State, 363 S.C. 414, 418, 611 S.E.2d 901, 903 (2005) (citing Joseph v. State, 351 S.C. 551, 561, 571 S.E.2d 280, 285 (2002)).

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*Counsel failed to object to perjury*

Applicant testified that Counsel failed to properly impeach witnesses when they testified and committed perjury. Applicant testified that Counsel failed to impeach Octavia Burnside, Marcus Wright, Shaquille Kelly, and Investigator Loren Williams. Applicant also testified that Counsel failed to cross-examine witnesses as to possible biases against Applicant. Applicant testified that Marcus Wright testified against Applicant because he wanted a deal for lesser-time, while Octavia Burnside wanted custody of her children with Applicant. Applicant surmised that Shaquille Kelly could have been involved in the stabbing, which is why he testified and blamed Applicant.

Applicant testified that there was no evidence to support the testimony that Applicant was in the car with Marcus Wright. Further, Applicant testified that there was exculpatory evidence of blood on the passenger side door of the car with Wright's fingerprint in the blood. Applicant testified that Counsel should have objected when Octavia Burnside, Applicant's ex-wife, testified because of hearsay. Applicant acknowledged that Counsel objected to some testimony by Ms. Burnside, but was overruled by the trial court. Applicant also testified that Counsel should have objected to Shaquille Kelly's testimony that he saw Applicant stab the victim because the testimony was contradictory.

In regards to the Applicant's allegation that Counsel was deficient in his cross-examination of the State's witnesses, this Court finds that the Applicant has failed to meet the burden of proof. The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2<sup>nd</sup> Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation and of showing 'whether such information . . .



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would have produced a different result." United States v. Rodriguez, 53 F.3d 1439, 1449 (7<sup>th</sup> Cir. 1995). The Applicant did not proffer any questions counsel allegedly failed to ask, and did not present any testimony showing the witnesses' answers at trial would have been different. Accordingly, the Applicant has not shown that a different approach to cross-examination would have been beneficial to the defense.

*Counsel failed to object to the trial judge not making impartial findings of fact and conclusions of law*

This Court finds that the Applicant has voluntarily abandoned this claim. Although raised in his application, the Applicant offered no testimony or evidence in support of this allegation at his hearing. Therefore, this claim is denied and dismissed.

*Counsel failed to object to the jury charge*

The Applicant alleged that Counsel was ineffective for failing to object to the court's charge regarding the murder. Applicant testified that the charge focused on reasonable doubt, but Counsel should have objected to the murder charge; however, Applicant failed to specify which portions of the charge he believed were improper. This Court finds no legal basis for objecting to the jury charge regarding murder and cannot find Counsel deficient in failing to object. Therefore, this Court finds that the Applicant has failed to meet his burden of proof as to this claim and it is denied and dismissed.

*Counsel failed to move for directed verdict*

This Court finds that there was no evidence that Counsel was deficient in any way relating to a failure to make a motion for directed verdict. The Applicant did not demonstrate that a motion would have made an outcome in his trial, so this claim is denied and dismissed.



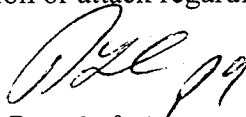
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*Counsel failed to move to suppress evidence based upon illegal search and seizure and argue that Applicant himself was illegally seized during an unlawful detainment*

Applicant testified that he was illegally detained as a result of an armed robbery warrant and was never served with a warrant for murder. Applicant also testified that the police took evidence from Octavia Burnside's truck and their home, but Applicant believes the evidence was seized illegally because the police did not have probable cause to take the truck or search their home. The record reflects that the State introduced photos of a blue latex glove, backpack with Kel-Tec 9mm handgun, and M-tech knife sheath, all items found in the truck. The State also later introduced, over Counsel's objection, the actual items. The State also presented a package of open blue latex gloves found behind the home.

Counsel testified that he was aware of the search of the truck and home, but saw no legal basis to object because Applicant had no proprietary interest in either. The truck was owned by Octavia Burnside and there appeared to be a valid search warrant to search the truck and the home, which was in Ms. Burnside's name. Counsel did object to the introduction of the actual items from the truck because the photographs had already been introduced, but the objection was overruled.

Regarding Applicant's allegation that Counsel failed to object to the probable cause for Applicant's arrest, this Court finds that this allegation lacks merit and this Court finds that Applicant has failed to meet his burden of proof as to this claim. This Court finds that the Applicant failed to offer any evidence to show that the arrest warrant relating to a prior armed robbery was invalid. Accordingly, this Court finds that the Applicant has failed to meet his burden of proof as to this claim and failed to establish that the outcome of his trial would have been different had Counsel made any motion or attack regarding the arrest warrant.

  
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In making a fair assessment of attorney performance, a court must make every effort to “eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984). There is a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance and the “defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” Id. The Applicant has failed to meet his burden of proof as to all claims.

*Summary*

This Court finds in regards to the allegations of ineffective assistance of counsel, Applicant’s testimony as a whole was not credible. This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in his representation, and that Counsel’s conduct does not fall below the objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel’s performance. This Court concludes the Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, this allegation is denied.

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**IT IS THEREFORE ORDERED:**

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

AND IT IS SO ORDERED this 13 day of August, 2010.



R. Lawton McIntosh  
Presiding Judge  
Tenth Judicial Circuit

Anderson, South Carolina.

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