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September 5, 2015

Via Regular Mail
Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: *BRANDON HEATH CLARK v. State*

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondents. The Notice has been filed with the Greenville County Clerk of Court.

These matters are being referred to the Office of Appellate Defense in that we were participating as Court appointed counsel at trial.

Thank you for your attention to this matter.

Yours very truly,

Caroline Horlbeck

Caroline M. Horlbeck, Esq.

Enclosure

cc: Office of the Attorney General
Office of Appellate Defense

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
THE HONORABLE Perry H. Gravely

CA No. 2013-CP-23-1325

BRANDON HEATH CLARK,

APPELLANT,

vs.

STATE OF SOUTH CAROLINA

RESPONDENT.

NOTICE OF APPEAL

Appellant BRANDON HEATH CLARK, appeals from the Order of the Honorable Perry H. Gravely, Circuit Court Judge clocked August 6, 2015.

Respectfully submitted,

Caroline M. Horlbeck

Caroline M. Horlbeck, Esq.
101 Whitsett St
Greenville, SC 29601

Date: September 1, 2015

Other Counsel of Record: Karen Ratigan, Esq.
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211

STATE OF SOUTH CAROLINA	)	**IN THE SUPREME COURT**
	)	
COUNTY OF GREENVILLE	)	
	)	**C.A. No. 2013-CP-23-1325**
Brandon Heath Clark,	)	
	)	
Appellant,	)	
	)	
-vs-	)	**CERTIFICATE OF SERVICE**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

This is to certify that I am an employee in the law office of Caroline M. Horlbec,, attorneys for Appellant, and that I have this day caused to be served upon the person(s) named below Appellant's Notice of Appeal by placing copies of same in the United States mail, with adequate postage thereon, addressed as follows:

Ms. Loriene French
S.C. Office of Appellate Defense
P.O. Box 11433
Columbia, SC 29211

Karen Ratigan, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Caroline M. Horlbeck

Greenville, South Carolina

September 5, 2015

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	C.A. No. 2013-CP-23-1325
COUNTY OF GREENVILLE)	
)	
Brandon Heath Clark,)	
S.C.D.C. No. 336351,)	
)	
Applicant,)	
)	**ORDER OF DISMISSAL**
v.)	
)	
State of South Carolina,)	
)	
Respondent.)	
)	

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed March 7, 2013. The Respondent made its return on October 23, 2013. An evidentiary hearing was held on June 18, 2015 at the Greenville County Courthouse. The Applicant was present and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying were Howard Stewart, Katye Allison, Dustin Allison, Christy Clark, and the Applicant's trial counsel, Scott D. Robinson, Esquire. The Court had before it the trial transcript, the Greenville County Clerk of Court records, the South Carolina Department of Corrections records, the PCR application, the return, the appellate records, and Applicant's Exhibit 1.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the March 2007 term of the Greenville County Grand Jury for two counts each of murder (2007-GS-23-2442, count 1 and -2443, count 1) and possession of a weapon during the

commission of a violent crime (2007-GS-23-2442, count 2 and -2443, count 2. He was represented by Scott D. Robinson, Esquire.

After the State took the case to trial, the Applicant was found guilty. On November 4, 2009, the Honorable Edward W. Miller sentenced the Applicant to concurrent terms of 40 years for each count of murder and 5 years on each count of possession of a weapon during the commission of a violent crime.

A notice of appeal was filed at the South Carolina Court of Appeals. Dayne C. Phillips, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. Clark, Op. No. 2012-UP-549 (S.C. Ct. App. filed Oct. 10, 2012). The remittitur was sent on October 26, 2012.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:[1]

1. Ineffective assistance of counsel.
   a. "Trial [counsel] should have objected to Indictment of Possession of a weapon during commission of a violent crime."
   b. "Trial [counsel] should have objected to State Attorney vouching for the truthfulness and validity of a states witness."
   c. "Trial [counsel] should have objected to the charge of inferred malice because deed was done with a deadly weapon."

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

[1] In an "Amended Petition for Post Conviction Relief" filed December 16, 2014, the Applicant added the following allegation: "That evidence of material facts exist which have not been previously presented and heard by the Court. This material evidence requires vacation of the conviction and sentence."

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 Trial Counsel

The Applicant alleges he received ineffective assistance of trial counsel. 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 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "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 v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

The Applicant stated trial counsel was retained on these charges, as well as an unrelated charge of assault and battery of a high and aggravated nature (ABHAN).[2] The Applicant stated he and trial counsel discussed the case and reviewed the discovery materials. The Applicant stated they discussed possible defenses and his version of events. The Applicant stated he gave several witness names to trial counsel, who interviewed them and subpoenaed them for trial.

[2] The Applicant stated he pled guilty to this charge in August 2009.

The Applicant stated trial counsel did not want to call these witnesses at trial. The Applicant stated the outcome of his trial would have been different if these witnesses had testified. The Applicant stated trial counsel should have objected when – during closing argument – the State said Wood was being honest. The Applicant stated trial counsel should have objected when the trial judge charged the jury about the inference of malice.

Katye Allison, the Applicant's cousin, stated she had known the Applicant, Wood, and Murray for years. Allison stated she was not at the party on the night in question. Allison stated Wood told them about the party and that the Applicant and Chris Allison (her brother-in-law) went. Allison stated Wood and Murray came by her house 45 minutes after the Applicant and Chris Allison returned from the party. Allison stated Murray stayed in the vehicle but Wood got out and had blood on his leg. Allison also stated Chris Allison would have been able to see Wood's leg. Allison stated she told trial counsel about Wood's appearance.

Dustin Allison, Katye Allison's husband, stated he had known the Applicant, Wood, and Murray for years. Allison stated he was not at the party on the night in question. Allison stated the Applicant and Chris Allison (his brother) came by after the party. Allison stated Wood and Murray both exited the vehicle. Allison stated Wood had blood on his leg. Allison stated Chris Allison would have been able to see Wood's leg. Allison stated Wood said he did not see the Applicant when Wood kicked in the victims' windshield. Allison stated Chris Allison would have been able to see Wood's leg. Allison stated he spoke to trial counsel.

Trial counsel confirmed he was retained in this case and also represented the Applicant on an unrelated ABHAN charge. Trial counsel testified he filed discovery motions, received those materials, and reviewed them with the Applicant. Trial counsel testified he had 6-10 meetings with the Applicant, discussed his version of events, and developed a defense strategy.

Trial counsel testified he also visited the crime scene. Trial counsel testified the strategy was to argue the Applicant was innocent and that David Murray and Josh Wood were guilty (third party guilt). Trial counsel testified he spoke to all witnesses the Applicant requested he interview and had subpoenaed several of them for trial. Trial counsel testified Murray and Wood gave conflicting testimony. Trial counsel testified they did not call subpoenaed witnesses or put up a defense case because he did not believe the State had made its case. Trial counsel confirmed he did not object to the "inference of malice" jury charge.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have called witnesses to testify at trial. This Court finds the testimony of Katye and Dustin Allison would not have changed the outcome of the Applicant's trial.[3] While these witnesses testified the Applicant did not have a gun when he arrived at their house after the party, this is irrelevant because the Applicant stipulated at trial that he had a gun at the party and fired nine times into the air. (Trial transcript, p.11). While the Allisons could have testified about seeing Wood's bloody leg after the party, Wood and Chris Allison testified at trial about Wood's bloody leg. (Trial transcript, p.99; p.151). Further, Katye Allison testified only Wood exited the vehicle when it came to her house after the party, while Dustin Allison testified both Wood and Murray got out. This Court finds there is no reasonable probability that Katye and Dustin Allison's testimony would have changed the outcome of the trial. See Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625.

[3] While the Applicant named several other potential witnesses during his testimony, as these individuals did not testify at the PCR hearing, this Court cannot speculate as to what impact their testimony would have had upon the trial. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme Court "has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial.") (emphasis in original).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the State's closing argument. The Applicant argued trial counsel should have objected to the State vouching for Wood during closing argument. This Court notes the State made the following comments:

> And you heard from Josh Wood and you heard that he's charged with lynching. That the State has not made any deals with him. That he was here to testify freely and voluntarily and tell you about his part in it. And I submit to you that he was candid with you. But you be the judge of that. Because it is your -- it is your judgment, it is your common sense that you have to apply to what you heard from the witness stand. But he accepted his responsibility in this. He told you how foolishly he was acting. That he was drinking, that he was pumped up, that he was running around without a shirt on, that he was pumped up and ready to fight. That he threaten to whip Cameron's rear-end. He didn't deny that. He accepted that and he told you about it. (Trial transcript, p.114).
>
> So I ask you to consider his credibility in coming here testifying the way he did. When you think about what all he had to say and his motivation for saying it. I submit to you that he was truthful. (Trial transcript, p.115).

This Court, however, finds the State was not vouching for Wood or commenting on his credibility. See Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) ("A prosecutor improperly vouches for a witness' credibility and places the government's prestige behind a witness by making explicit personal assurances, or indicating that information not presented to the jury supports the testimony."). This Court finds the solicitor was merely arguing that, based on the facts before them, the witness's testimony was true. This Court finds this does not rise to the level of vouching and, therefore, there was no valid reason for trial counsel to have objected.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the jury charge regarding an inference of malice. The Applicant argued trial counsel should have objected – under State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) – to the following portion of the jury charge: "Inferred malice may also arise when the deed is done

with a deadly weapon." (Trial transcript, p.138). In Belcher, the South Carolina Supreme Court held "the 'use of a deadly weapon' implied malice instruction had no place in a murder . . . prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing." Id. at 610, 685 S.E.2d at 809. The Supreme Court held further "the permissive inference charge concerning the use of a deadly weapon remains a correct statement under the law where the only issue presented to the jury is whether the defendant has committed murder." Id. at 612, 685 S.E.2d at 810. This Court finds Belcher is inapplicable in this case as there was no evidence presented at trial that would mitigate, reduce, excuse, or justify the murder for which a jury found the Applicant guilty. As such, trial counsel was not deficient in failing to object to this portion of the jury charge.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial 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 trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

Facebook Conversation

Howard Stewart stated his girlfriend is Murray's sister but that he and Murray are not close. Stewart stated he was not at the party on the night in question. Stewart stated Austin Shaw made a comment on Facebook that Murray was the shooter in this case. Stewart stated he was drunk and posted a status update on Facebook (sometime after the trial in this case) in order

to make Murray angry. Stewart stated this turned into a Facebook conversation with Katye Allison and Christy Clark.[4] Stewart stated he based all of his comments in that Facebook conversation upon what Shaw said. Stewart admitted he never contacted law enforcement to relay this information.

Katye Allison stated she is "Facebook friends" with Stewart but has never talked to him. Allison stated Stewart sent her a Facebook message "about a year ago."

Christy Clark, the Applicant's mother, stated she was involved in the Facebook conversation with Stewart and that he never said he wanted to make Murray mad. Clark admitted Stewart told her that he never heard this information from Murray. Clark admitted Wood never said he shot the victims. Clark admitted she never contacted law enforcement to relay this information.

This Court finds the Applicant has failed to raise a cognizable post-conviction relief issue related to the Facebook conversation. See S.C. Code Ann. §§ 17-27-10 et seq. (Supp. 2003). This Court finds this issue does not involve a failure to investigate. This Court finds this issue does not involve after-discovered evidence. As such, this issue must be dismissed. See Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence.").

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, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

[4] Applicant's Exhibit 1.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and

2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 30th day of July, 2015.

Perry H. Gravely
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina.

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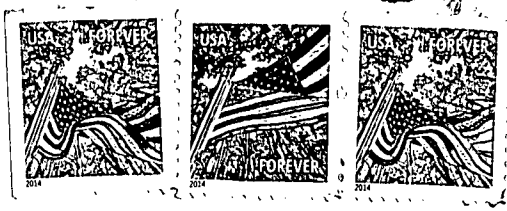

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