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RECEIVED

JAN 11 2016

S.C. SUPREME COURT

January 7, 2016

Via Regular Mail

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

Re: RICHEY LAMONT BOYD v. State

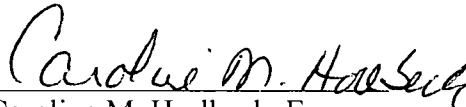
Dear Mr. Shearouse:

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 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. 2014-CP-23-4669

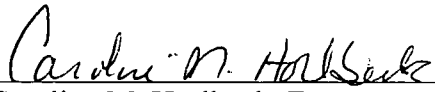
RICHEY LAMONT BOYD,
APPELLANT,
vs.
STATE OF SOUTH CAROLINA
RESPONDENT.

RECEIVED
JAN 11 2016
S.C. SUPREME COURT
2016 JAN 6 PM 12 10
FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER

NOTICE OF APPEAL

Appellant RICHEY LAMONT BOYD, appeals from the Order of the Honorable Perry H. Gravely, Circuit Court Judge clocked December 9, 2014.

Respectfully submitted,


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

Date: January 6, 2016

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

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE SUPREME COURT

Richey Lamont Boyd,)
)
)
Appellant,)

C.A. No. 2014-CP-23-4669

-vs-)

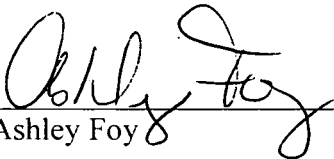
CERTIFICATE OF SERVICE

State of South Carolina,)
)
)
Respondent.)

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

Ms. Lorie French
S.C. Office of Appellate Defense
PO Box 11433
Columbia, SC 29211

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


Ashley Foy

Greenville, South Carolina

1-8-16, 2016

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
Richey Lamont Boyd,)
S.C.D.C. No. 344612,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
C.A. No. 2014-CP-23-4669

ORDER OF DISMISSAL

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER
2015 DEC 9 AM 11 30

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed August 22, 2014. The Respondent made its return on January 8, 2015. An evidentiary hearing was held on October 20, 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.¹ 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, and the appellate records.

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 January 2012 term of the Greenville County Grand Jury for murder (2011-GS-23-6381, count 1), possession of a weapon during commission of a violent crime (2011-GS-23-6381,

¹ This Court took judicial notice of the fact that trial counsel's health had deteriorated to the point that he could neither attend the PCR hearing nor provide telephone testimony. This Court ruled the case should go forward, as nothing would really change this circumstance if the case were continued.

count 2), kidnapping (2011-GS-23-6382), first-degree burglary (2011-GS-23-6383), attempted armed robbery (2011-GS-23-6384), and conspiracy (2011-GS-23-6385). E.P. "Bill" Godfrey, Esquire represented the Applicant.

After the State called the case to trial,² the Applicant was found guilty. On February 16, 2012, the Honorable Carmen T. Mullen sentenced the Applicant to concurrent terms of 30 years for murder, 5 years for possession of a weapon during commission of a violent crime, 30 years for kidnapping, 30 years for first-degree burglary, 20 years for attempted armed robbery, and 5 years for conspiracy.

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Dudek, 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. Boyd, Op. No. 2014-UP-263 (S.C. Ct. App. filed June 30, 2014). The remittitur was sent on July 16, 2014.

ALLEGATIONS

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

1. Ineffective assistance of trial counsel:
 - a. Failed to object to hearsay testimony.
 - b. Failed to object to the court allowing the three co-defendants' guilty pleas into evidence.
 - c. Failed to object to the prosecutor's closing argument.
 - d. Failed to object to the curative instruction during the charge for intimidation of a state witness.
 - e. Failed to object to the jury charge for intent.
 - f. Failed to request a motion for speedy trial or a motion to dismiss based on the lack of speedy trial.
 - g. Failed to request a limiting instruction due to hearsay evidence.
 - h. Failed to challenge "the reasonable standard on the material

² The Applicant had a joint trial with one of his co-defendants, Lamar Williams.

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- elements of the theory of the hands of one hands of all theory.”
 - i. Failed to re-raise the motion for severance at the end of the State’s case.
 - j. Failed to request a preliminary hearing.
 - k. Failed to attack credibility of co-defendants Willie Taylor, Scottie Butler, and Jeffrey Dornberg.
 - 2. “Violation of Confrontation Clause, and violation of Bruton.”
 - a. Court erred in allowing co-defendants Butler and Dornberg to testify to statements made to them by co-defendant Williams implicating the Applicant. Also failed to give a limiting instruction as to this testimony.
 - 3. “Violation of Due Process and Unfair Prejudice.”
 - a. Court erred in admission of the co-defendants’ guilty pleas into evidence.
 - b. Court erred in not giving limiting instructions as to hearsay testimony.
 - c. Court erred in charging the intent instruction.
 - d. Court erred in not granting a mistrial after the clerk of court stated to the jury that there was a charge of intimidation of a state’s witness.
 - e. Court erred in admission of three co-defendants’ statements that co-defendant Williams stated to them that the Applicant shot and killed the victim. Also should have given a limiting instruction.
 - f. Court erred in not quashing the indictment as the Applicant was not tried pursuant to the 180 day order.
 - 4. “Prosecutorial misconduct – Prosecutor Bias.”
 - a. Court erred in allowing prosecutor to commit misconduct during closing argument.
 - 5. “Failure to grant a directed verdict.”
 - 6. “Violation of Separation of Powers, and Due Process.”

In a document filed on October 28, 2014, the Applicant raised the following allegations:

- 1. Ineffective assistance of trial counsel:
 - a. Failed to “re-rai[s]e” the motion for severance at the end of trial, nor for raising the motion for severance under the proper grounds at the beginning of trial.”
- 2. Ineffective assistance of appellate counsel:
 - a. Failed to raise the motion for severance as an issue on appeal.

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

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opportunity to observe the witness who testified at the hearing, and to closely pass upon his 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. 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).

Initially, this Court notes the Applicant stated he was incarcerated in the Department of Corrections (on a narcotics charge from Greenwood County) before he went to trial in this case. The Applicant stated he reviewed evidence (including witness statements), defenses, co-defendants, and witnesses with trial counsel prior to trial. The Applicant stated he told trial counsel he never wanted to plead guilty.

A.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to alleged hearsay testimony. The Applicant stated Scottie Butler and Jeff Dornberg mentioned a comment from his co-defendant (Lamar Williams) that a projectile was found inside the Applicant's boot. The Applicant stated trial counsel should have objected and requested a limiting instruction because this was a Bruton violation. This Court notes Butler and Dornberg did testify at trial that Williams said the bullet ended up in the Applicant's boot. (Trial transcript, pp.383-84; p.421). This Court finds, however, that these statements are not hearsay because they were not offered for the truth of the matter asserted. Rule 801, SCRE. This Court also finds these statements did not constitute Bruton violations. See Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620 (1968). This Court notes these comments made by Butler and Dornberg were not made solely to put the Applicant at the scene of the shooting. Butler and Dornberg (as well as Willie Taylor) all testified the Applicant was present and involved with the planning and execution of these crimes (while Williams actually shot the victim).

B.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have re-raised the motion to sever. The Applicant acknowledged trial counsel moved for severance at the start of trial but argued the motion should have been made again because he was prejudiced by having a joint trial with Williams. This Court finds trial counsel made a thorough motion for severance, which was denied by the trial judge. (Trial transcript, pp.15-17; p.19). Motions for severance and separate trials, are addressed to the discretion of the trial court. See State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997). "Generally, when offenses charged in separate indictments are of the same general nature involving connected transactions closely

related in kind, place, and character, the trial judge has the discretion to order the indictments tried together, but only so long as the defendant's substantive rights are not prejudiced." State v. Cutro, 365 S.C. 366, 374, 618 S.E.2d 890, 894 (2005). "Offenses are considered to be of the same general nature where they are interconnected." State v. Jones, 325 S.C. 310, 315, 479 S.E.2d 517, 519 (Ct. App. 1996). This Court notes the trial judge ruled upon counsel's motion and finds it was not incumbent upon him to make this motion again. See State v. McDaniel, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App. 1995) ("So long as the judge had an opportunity to rule on an issue, and did so, it was not incumbent upon defense counsel to harass the judge by parading the issue before him again.").

C.

This Court finds the Applicant failed to meet his burden of proving trial counsel improperly handled the speedy trial issue. The Applicant argued he made a pro se motion for a speedy trial but that, if trial counsel had filed such after he was appointed, the outcome of his case would have been different because only one of his co-defendants had given a statement at that point. Prior to the commencement of trial, trial counsel noted both that the Applicant filed a motion for speedy trial and that he had not filed a similar motion after he was appointed. (Trial transcript, p.8; pp.11-12). This Court, however, finds the Applicant failed to meet his burden of proving he is entitled to relief on this allegation because he has failed to present credible evidence or testimony that he suffered any prejudice. See generally State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012) (containing a discussion of the right to speedy trial and noting a violation of such cannot be proven without a demonstration that the defendant suffered prejudice from the delay).

D.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the examination of the co-defendants about their guilty pleas. The Applicant argued trial counsel should have objected because this was prosecutorial misconduct and a violation of due process since it indicated to the jury that if one person pled guilty, all of them were guilty. The Applicant admitted trial counsel explained the concept of accomplice liability. First, this Court notes trial counsel was not deficient for failing to object to the testimony from the witnesses/co-defendants about their guilty pleas because there was no valid basis for trial counsel to have made such an objection. Second, the Applicant has failed to demonstrate the existence of prosecutorial misconduct because the State's questioning of the witnesses/co-defendants about their guilty pleas was not improper. The Applicant cannot demonstrate the State's questioning on this matter resulted in a denial of due process. See Darden v. Wainwright, 477 U.S. 168, 180-81, 106 S. Ct. 2464, 2471 (1986) (in order to establish prejudicial misconduct on the part of the prosecutor the alleged misconduct must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process.").

E.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the jury charge that contained language about an inference of malice. The trial judge – as part of the jury charge – instructed the jury that "[m]alice may be inferred from conduct showing a total disregard for human life." (Trial transcript, p.604). This Court finds this is a proper jury instruction and trial counsel was not deficient in failing to object to it.

F.

This Court finds the Applicant failed to meet his burden of proving trial counsel should

have argued there was a Brady³ violation. The Applicant stated trial counsel did not receive a copy of Jeffrey Dornberg's second statement until the middle of trial. Trial counsel argued he did not believe he was given a copy of Dornberg's most recent statement. (Trial transcript, pp.422-23; pp.424-25). After reviewing the second statement, trial counsel said there was "nothing unusual" in the statement that would cause a problem and that it was "basically[] what we expected." (Trial transcript, pp.427-28). This Court finds the Applicant has failed to demonstrate a Brady violation. "A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment." Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999) (emphasis added). The Applicant cannot prevail upon his Brady claim because the statement was not suppressed by the State – it was made available for trial counsel to pick up and through inadvertence was not (Trial transcript, pp.425-28) – and it was neither favorable to the Applicant nor material to guilt or punishment.

G.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have attacked the theory of accomplice liability because it is a theory or presumption, not a fact. The doctrine of accomplice liability – or "the hand of one is the hand of all" – was charged to the jury. (Trial transcript, pp.599-600). In State v. Kelsey, 331 S.C. 50, 76-77, 502 S.E.2d 63, 76 (1998), the supreme court approved a broad accomplice liability charge that stated, "... if a crime is committed by two or more persons who are acting together in the commission of a crime, then the act of one is the act of both." The trial judge, therefore, properly issued this jury charge. See

³ Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963).



State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996) (a trial court has a duty to give a requested instruction that correctly states the law applicable to the issues and is supported by the evidence). This Court finds there was no basis for trial counsel to have objected to the jury charge for accomplice liability.

H.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have attacked the witnesses' credibility on issues such as character and reputation. The Applicant argued trial counsel should have raised an identification defense because Scottie Butler did not identify him. First, this Court notes the Applicant failed to present any evidence or testimony about the witnesses' character or reputation that trial counsel should have used in cross-examining them at trial. See Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial); see also Jackson v. State, 329 S.C. 345, 349-50, 495 S.E.2d 768, 770 (1998) (finding applicant failed to prove prejudice from counsel's failure to investigate criminal backgrounds of victims and witnesses when he failed to substantiate at the PCR hearing that the victims and witnesses had criminal records). Second, this Court notes one of the State's witnesses (and one of the Applicant's co-defendants), Scottie Butler, could not identify the Applicant in a photo lineup. (Trial transcript, pp.385-86). Trial counsel had Butler confirm this on cross-examination (and also that he did not really know the Applicant) and trial counsel reiterated these points in closing argument. (Trial transcript, p.393; pp.542-43). Further, the jury was later given a charge related to identification testimony. (Trial transcript, p.599). This Court finds the Applicant has failed to demonstrate prejudice because he did not articulate what more trial counsel should have done in order to

argue identification.

I.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the curative instruction given by the trial judge after the clerk of court announced one of Williams' charges was the intimidation of a witness. When the clerk of court announced the charges against both co-defendants at the start of trial, the charge of "intimidation or attempted intimidation of a witness or potential witness" was listed as one of Williams' charges. (Trial transcript, p.63). The trial judge immediately advised the jury that "[t]here was one charge that was read in there that is not a proper charge, and was not a charge. It was the intimidation of a witness. So you are to strike that and disregard it, ladies and gentlemen. That is not a charge." (Trial transcript, p.64). After opening statements, trial counsel moved for a mistrial. (Trial transcript, pp.86-87).⁴ The trial judge denied the motion, noting she had immediately issued a curative instruction after the comment. (Trial transcript, pp.89-90). This Court finds the Applicant failed to demonstrate trial counsel should have objected to the trial judge's curative instruction. Regardless, this Court also finds the Applicant failed to demonstrate he was prejudiced by trial counsel not objecting to the curative instruction because there was no reasonable probability that such an objection would have changed the outcome of the trial. See Johnson v. State, 325 S.C. at 186, 480 S.E.2d at 735.⁵

J.

This Court finds the Applicant failed to meet his burden of proving trial counsel should

⁴ This matter was originally raised in a bench conference prior to opening arguments. (Trial transcript, p.72; p.86).

⁵ This Court further notes the denial of the motion for mistrial was the subject of the Applicant's appeal and the court of appeals, in affirming the conviction, found the trial judge did not abuse her discretion in denying this motion.

have requested a preliminary hearing. This Court notes a defendant does not have a constitutional right to a preliminary hearing. State v. Keenan, 278 S.C. 361, 365, 296 S.E.2d 676, 678 (1982). This Court further finds the Applicant failed to present any evidence to demonstrate he was prejudiced by the lack of a preliminary hearing. See Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (in a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application).

K.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have made a separation of powers argument. The Applicant argued the judges were switched before trial and that he was suspicious the assistant solicitor had something to do with this. This Court finds, by the Applicant's own admission, this argument is based solely upon his speculation. As such, the Applicant has failed to present any evidence to support his argument. See Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814.

L.

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.

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.

CONCLUSION

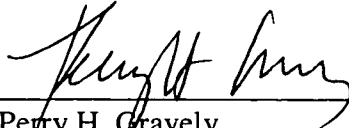
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this 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 20th day of December, 2015.



Perry H. Gravely
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina.

CAROLINE M. HORLBECK

Attorney At Law

101 WHITSETT ST.
GREENVILLE, SOUTH CAROLINA 29601



Via Regular Mail

Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
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