

LAW OFFICE OF



TARA DAWN SHURLING, PA

Attorney and Counselor at Law

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Columbia, South Carolina 29204

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February 11, 2016

RECEIVED

FEB 18 2016

The Honorable Daniel E. Shearouse
South Carolina Supreme Court Clerk
Post Office Box 11330
Columbia, South Carolina 29211-1330

S.C. SUPREME COURT

RE: David Dwight Smith v. State of South Carolina; 2011-CP-42-1283

Dear Mr. Shearouse:

Enclosed please find for filing a Notice of Appeal in the above captioned Post-Conviction Relief matter along with proof of service on opposing counsel. This Notice addresses the client's intent to appeal the Order of Dismissal issued by Judge R. Scott Sprouse in this matter as well as the Order denying the Rule 59(e) Motion that was subsequently filed on his behalf. I was retained to represent this client in the circuit court only. The family has not yet advised me whether they intend to hire me to handle this appeal. I am asking that they make this decision immediately. I am hopeful that I will be retained for this appeal.

I am providing the client a copy of this Notice of Appeal, and a Form Affidavit of Indigency. I am instructing him to fill out the affidavit, and return it to me immediately for submission to Appellate Division of the South Carolina Commission on Indigent Defense, if he wishes to seek representation by them. By copy of this letter, I am making certain he is aware that time is of the essence, and that he must return his affidavit to me *immediately*. For now, I would appreciate having the two additional copies of this Notice of Appeal enclosed with this correspondence clocked and returned to me in the self-addressed, stamped envelope provided. With my thanks for your kind assistance as always, I remain,

Sincerely yours,

A handwritten signature in black ink that reads "Tara Dawn Shurling". The signature is fluid and cursive, with the first letter of each name being significantly larger and more decorative.

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg
Enclosure

cc: Alicia Olive, Assistant Attorney General (w/enclosure)
Paula Murdock, Legal Service Coordinate, Appellate Defense (w/enclosure)
David Dwight Smith, #245760 (w/enclosure)
Edna Dowson (w/enclosure)

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
R. Scott Sprouse, Presiding Judge

RECEIVED

FEB 16 2016

2011-CP-42-01283

S.C. SUPREME COURT

DAVID DWIGHT SMITH, 245760,

Petitioner,

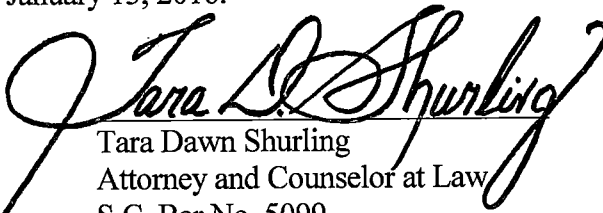
v.

THE STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

NOW COMES the Petitioner in the above-captioned Post-Conviction Relief matter, acting by and through his undersigned counsel, giving notice of his appeal from the Order of Dismissal filed December 14, 2015 denying his Post-Conviction Relief Application, and the Order Denying the Petitioner's Motion to Alter or Amend pursuant to Rule 59(e) SCRCP, which was filed with the Spartanburg County Clerk of Court on January 13, 2016.


Tara Dawn Shurling
Attorney and Counselor at Law
S.C. Bar No. 5099

3614 Landmark Drive, Suite A
Columbia, South Carolina 29204
(803)738-8622
(803)738-1600 FAX

ATTORNEY FOR PETITIONER

This 11th day of February, 2016.

Other Counsel of Record:
Alicia Olive, Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211
Attorney for Respondent
(803) 734-3737

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
R. Scott Sprouse, Presiding Judge

RECEIVED

FEB 16 2016

2011-CP-42-01283

S.C. SUPREME COURT

DAVID DWIGHT SMITH, 245760,

Petitioner,

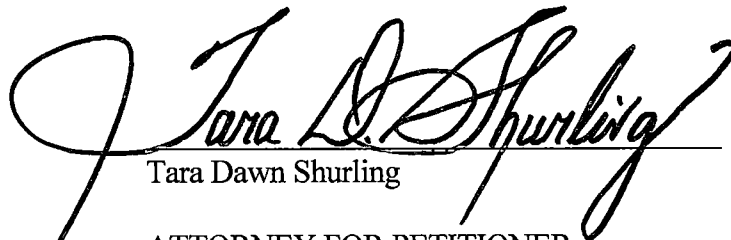
v.

THE STATE OF SOUTH CAROLINA,

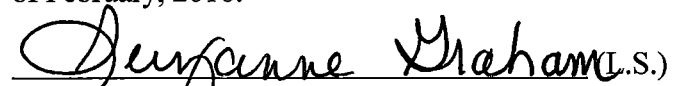
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Petitioner's Notice of Appeal in the above-entitled cause has been served upon opposing counsel, Alicia Olive, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 11th day of February, 2016.


Tara Dawn Shurling
ATTORNEY FOR PETITIONER

SWORN TO BEFORE me this 11th day
of February, 2016.


Notary Public for South Carolina
My Commission Expires: 2/28/24

LAW OFFICE OF



TARA DAWN SHURLING, PA

Attorney and Counselor at Law

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February 11, 2016

RECEIVED

FEB 16 2016

S.C. SUPREME COURT

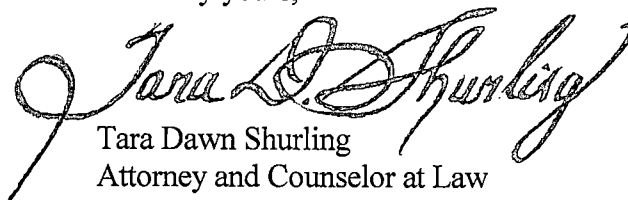
Alicia Olive, Assistant Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-

RE: David Dwight Smith v. State of South Carolina; 2011-CP-42-1283

Dear Ms. Olive:

Enclosed please find for your records a copy of the Notice of Appeal that was filed in the above-captioned matter. The family has not yet decided if they will be hiring me to handle this appeal. I certainly hope they do. I have requested that they make a decision as soon as possible. I will let you know if they decide to hire someone else or if they decide to ask the Appellate Division of the South Carolina Commission on Indigent Defense to handle this appeal. I remain,

Sincerely yours,


Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg

Enclosure

cc: The Honorable Daniel E. Shearouse, Clerk, Supreme Court of South Carolina ✓
David Dwight Smith, #245760
Edna Dowson

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 David Dwight Smith, #245760,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2011-CP-42-1283

ORDER OF DISMISSAL

This matter comes before the court pursuant to an application for Post-Conviction Relief (PCR) filed March 17, 2011, and superseding amended application filed June 11, 2015.

A PCR hearing into the matter was convened on June 11, 2015, at the Spartanburg County Courthouse before the undersigned. Applicant was present and represented by Tara D. Shurling, Esquire. Assistant Attorney General Suzanne H. White Represented the State. Trial counsel, E. P. "Bill" Godfrey, Esquire ("Counsel"), testified on Applicant's behalf. Applicant also testified.

I. PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. Applicant was indicted at the April 1997 term of the Spartanburg County Grand Jury for murder and possession of a weapon during the commission of a violent crime (97-GS-42-1639, counts 1 and 2). The Applicant was first tried on these charges in 1997 before the Honorable J. Derham Cole and a jury. T. Louis Cox, Esquire, represented him at that trial. On December 4, 1997, the jury found Applicant guilty of both charges. Judge Cole sentenced Applicant to life for murder and five years for possession of weapon during the commission of a violent crime.



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CLERK OF COURT
 SPARTANBURG COUNTY
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Applicant appealed his conviction or sentence to the South Carolina Supreme Court. The court dismissed the appeal in an Order dated December 2, 1999 and denied the Applicant's Petition for Rehearing in an Order dated April 6, 2000. Applicant subsequently filed an application for PCR on June 7, 2000. An evidentiary hearing was held at which the Applicant was present and represented by E. P. "Bill" Godfrey, Esquire. The Honorable Donald W. Beatty granted relief by written Order dated May 23, 2003. Respondents filed a Petition for Writ of Certiorari to the South Carolina Supreme Court, which was denied on December 1, 2004. The Remittitur was returned on December 17, 2004.

Applicant then proceeded to trial a second time on these charges. E. P. "Bill" Godfrey, Esquire, represented the Applicant at his second trial. On November 1, 2005, the Applicant was convicted of these charges by a jury. The Honorable Doyet A. Early III sentenced the Applicant to concurrent terms of thirty-five years for murder and five years for possession of a weapon during the commission of a violent crime.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals reversed Applicant's conviction and sentence and remanded the case for a new trial. State v. Smith, Op. No. 2008-UP-194 (filed March 20, 2008). The Respondent filed a Petition for Rehearing and a Petition for Rehearing En Banc, both of which were subsequently denied on May 27, 2008. Respondent then filed a Petition for Writ of Certiorari, which was granted by the South Carolina Supreme Court on April 10, 2009. The South Carolina Supreme Court reversed the decision of the Court of Appeals and reinstated the Applicant's convictions and sentence. State v. Smith, Op. No. 26926 (filed February 7, 2011). The Remittitur was returned on February 24, 2011.

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CLERK OF COURT
CHARLESTON COUNTY

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II. ALLEGATIONS

In this action, Applicant alleges that he is being held in custody unlawfully for the following reasons:

Ineffective Assistance of Counsel, in that;

- a. Counsel failed to effectively cross examine, specifically:
 - i. Counsel failed to cross examine State's witnesses concerning any deals they may have been given or favorable consideration they received for testimony at Applicant's first trial in 1997 (App. Para. 1) or at his second trial in 2005 (App. Para. 2);
 - ii. Counsel failed to cross examine Dr. Wren regarding whether abrasions and lacerations reported in the autopsy report may be from the surface of the gun grips and consistent with being struck with the gun (App. Paras. 4 and 28);
 - iii. Counsel failed to cross examine Angie Smith regarding:
 1. Whether she had been charged with or threatened with drug charges in connection with this case (App. Paras. 17 & 18); or
 2. Whether she set Applicant up to be robbed on the night of the shooting (App. para. 19);
 - iv. Counsel failed to cross examine Cynthia Roseburgh to ascertain what she meant when she said "well, both of them got it wrong." (App. para. 21);
 - v. With respect to Detective Denton's testimony:
 1. Counsel failed to impeach Detective Denton with crime scene photographs regarding his assertion there had been no struggle. (App. paras. 22 & 13);
 2. Counsel failed to cross examine Denton about his assertion that there had been testimony that the gun was discharged towards the trailer. (App. para. 23);
 3. Counsel failed to cross examine Denton about his use of the term "murder" when recalling his initial discussions with Applicant. (App. par. 26);

STATE OF IOWA
SARASOTA COUNTY
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M. H. BLACKLEY

4. Counsel failed to cross examine Denton about his investigation of Julian Terry Bradley (Bradley) and his role in this case. (App. para. 27);
- b. Counsel failed to object, specifically:
- i. Counsel failed to consistently object to the prosecution asking leading questions and misstating previous witness testimony (App. paras. 3 & 20);
 - ii. Counsel failed to object to the introduction of Otis Hyder's trial testimony on the grounds that:
 1. he was not cross-examined at the first trial about when the damage to the door frame occurred (App. para. 14); and
 2. he was virtually blind. (App. para. 30).
 - iii. Counsel failed to object to the self-defense charge on the grounds that:
 1. it was confusing and addressed facts not present in his case (App. para. 15); and
 2. it was unconstitutionally burden shifting. (App. para. 35).
 - iv. Counsel failed to object to Angie Smith's testimony that it was "her understanding" that Applicant had crack and a gun. (App. para. 16);
 - v. Counsel failed to object to Denton's ballistics testimony on the grounds that he was not an expert. (App. para. 24);
 - vi. Counsel failed to object to Denton's testimony that Applicant "wanted to know if it was about 'a murder case' in Spartanburg." (App. para. 25);
 - vii. Counsel failed to object to Dr. Wren's testimony that law enforcement probably moved the deceased's body. (App. para. 29);
 - viii. Counsel failed to object to Applicant's retrial on grounds that double jeopardy prevented a retrial because certain exculpatory evidence had not been handed over at the first trial. (App. para. 31).
- c. Counsel failed to investigate, specifically:
- i. Counsel failed to interview and investigate Julian Terry Bradley as a potential witness in this case where Bradley was present at the scene at the time of this shooting (App. para. 5);
 - ii. Counsel failed to request criminal records on all the State's witnesses who were neither law enforcement or experts (App. para. 6);
 - iii. Counsel failed to request criminal records for the victim, Robert Onley (App. para. 7);
 - iv. Counsel failed to call Morgan Simmons Ortez to testify at trial; (App. para. 12);

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 H. HOPE LACKLEY
 CLERK OF COURT
 SPARTANBURG COUNTY

- d. Counsel failed to argue that:
- i. Terry Bradley could have removed the five rocks of crack cocaine from the scene (App. para. 8);
 - ii. Hyder's prior testimony should not be introduced because:
 - 1. he was not impeached at the trial with the notes from an investigator from the Solicitor's Office (App. para. 9); and
 - 2. it was inadmissible under Rule 804(a)(4), SCRE, where the State failed to present competent evidence that Hyder was unavailable (App. para. 10).
 - iii. Applicant may have intentionally put pressure on the trigger as a reflex reaction to losing his balance during his struggle with the victim (App. para. 32);
 - iv. Applicant would not have let someone as large as the victim get so close to him had he intended to kill the victim over the \$40 debt (App. para. 33);
 - e. Counsel failed to present a closing argument to the jury in which he reviewed the standard for self-defense and illustrated for the jury how the evidence fit the standard (App. para. 34);
 - f. Counsel failed to counsel Applicant against withdrawing his objection to Hyder's testimony at the first trial (App. para. 11).

III. APPLICABLE LAW

In a PCR action, the applicant has the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must show 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 Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). The applicant must prove both that counsel's performance was deficient and that such deficient performance prejudiced him. Strickland, 466 U.S. at 688.

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The Court measures counsel's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117-18, 326 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). In other words, the question is whether counsel "provided representation within the range of competence required" in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 687). The Court strongly presumes counsel rendered adequate assistance, Green v. State, 351 S.C. 184, 192, 569 S.E.2d 318, 322 (2002) (citing Strickland v. Washington, 466 U.S. 668, (1984); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989), and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. at 442, 334 S.E.2d at 814. An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and the "[Applicant] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Strickland, 466 U.S. at 689. 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." Id.

To show prejudice, the applicant must affirmatively prove 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 (quoting Strickland, 466 U.S. at 690). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Patrick v. State, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). "It is not enough for the

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M. JOPELACKLEY
CLERK OF COURT
SOUTH CAROLINA COUNTY

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[applicant] to show that the errors had some conceivable effect on the outcome of the proceeding." Strickland, 466 U.S. at 693.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the 2005 trial transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the appellate records, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. These credibility findings have been applied to the Court's findings and conclusions set forth below.

Failure to Cross-Examine

The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2d Cir. 1987). Counsel must be given leeway to make reasonable strategic decisions at trial. Strickland, 466 U.S. at 681-82. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996).

Applicant alleges that Counsel was ineffective for failing to cross-examine State's witnesses regarding favorable treatment they may have had in exchange for their testimony at both the 1997 and 2005 trials. (App. Paras. 1 and 2). Applicant produced no evidence at the PCR hearing that there were any charges that were either dismissed or not pursued. Additionally,

CLERK OF COURT
SOUTH CAROLINA COUNTY
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Applicant testified at the PCR hearing that to his knowledge, there were never any potential charges against anyone related to the incident that were either dropped or not pursued. (Tr. p. 105). This Court finds Applicant has failed to satisfy his burden of proving error or prejudice as to these allegations.

Applicant alleges Counsel failed to cross examine Dr. Wren, the pathologist, about whether abrasions and lacerations reported in the autopsy may have been caused by the surface of the gun grips and consistent with being struck with the gun (App. Paras. 4 and 28). Counsel testified at the PCR hearing that his decision not to cross-examine Dr. Wren on these matters was intentional. Counsel testified in essence he did not know whether Dr. Wren's testimony would be favorable on that issue. Counsel further testified he thought anyone who looked at the photographs of the injuries "would realize it was a gun that hit the face." Accordingly, the Court finds Applicant has failed to satisfy his burden of proving error or prejudice as to these allegations.

Applicant alleges Counsel failed to impeach Denton with crime scene photographs to refute his testimony at trial that he found no signs of struggle inside the trailer. (App. paras. 13 & 22). The photographs at issue were introduced as exhibits at Applicant's second trial, and though Counsel did not specifically impeach Denton with the photographs, he cross-examined him about the crime scene and his statement that he had seen no evidence of struggle in the trailer. Therefore, this Court finds Applicant has failed to satisfy his burden of showing error or resulting prejudice as to this allegation.

Applicant also alleges Counsel failed to cross-examine Denton regarding "their investigation of Julian Terry Bradley." (App. para. 27). Applicant failed to present Bradley at the hearing, though PCR counsel established for the record that she could not locate him. The only

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JULIAN TERRY BRADLEY
SPRINGFIELD COUNTY

testimony presented was that Bradley was asleep on the couch. Applicant has failed to show his testimony would have been different or more favorable than that of Hyder's testimony. This Court finds applicant has failed to establish his burden of proving error or prejudice as to this allegation.

Applicant also alleges Counsel failed to cross-examine Denton regarding his use of the term "murder" when recalling Applicant's statements to him (App. para. 26). Counsel did object to the use of the term murder at the trial. Applicant did not question Counsel about cross-examining Denton on this point. Applicant has failed to demonstrate that any cross-examination in that respect would have assisted in his defense. Therefore, this Court finds Applicant has failed to satisfy his burden of proving error or prejudice as to this allegation.

Applicant alleges Counsel failed to cross-examine Angie Smith regarding whether she had been charged with or threatened with any potential charges in connection with drugs involved in the incident. (App. paras. 17 & 18). Counsel testified he did not cross examine her on that basis because she was not charged. At the PCR hearing, Applicant testified that to his knowledge there were never any charges against anyone related to the incident that were either dropped or not pursued. Applicant also failed to produce any evidence that Angie Smith faced any potential charges, other than Counsel's speculative testimony that the state could have brought charges against her. Therefore, this Court finds Applicant has failed to satisfy his burden of proving error or prejudice.

Applicant also alleges Counsel was ineffective for failing to cross-examine Angie Smith about whether she had set Applicant up to be robbed on the night of the shooting. (App. para. 19). Counsel testified he did not recall questioning her on this point. The record reflects that he extensively cross-examined Angie Smith at trial and was even able to elicit favorable

STATE OF OHIO
SPRINGFIELD COUNTY
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testimony from her on several points. Counsel testified that on cross-examination he highlighted inconsistencies in her testimony. This Court finds Applicant has failed to satisfy his burden of showing error or prejudice as to this allegation.

Failure to Argue

Counsel must be given leeway to make reasonable strategic decisions at trial. Strickland, 446 U.S. at 681-82. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996). 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, 446 U.S. at 689.

Applicant alleges that Counsel was ineffective for failing to argue that Hyder's testimony could not be introduced because Hyder was not impeached at the original trial with certain notes taken by an investigator. (App. para. 9). Applicant has failed to satisfy his burden of proving this allegation. Counsel raised this issue at the trial and couched it as a Crawford issue. Judge Early reviewed Cox's cross-examination of Hyder, Hyder's statement, and Exhibit 1 and considered the arguments of Counsel and the State. Judge Early stated that Hyder's statement "pretty much does mirror Court's Exhibit 1." Judge Early further stated he would give counsel the evening to further research the issue but that "unless [they] [came] up with something different, it appears . . . that it falls within all four corners" of Rule 804(b)(1). (Trial Tr. pp. 146-60) The following morning after the solicitor's office confirmed Hyder was in fact alive but homebound, Counsel withdrew his motion. This Court finds Applicant has failed to satisfy his burden of showing error or prejudice in this regard.

CLERK OF COURT
SPACIA JAY GORG COUNTY
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M. HOPBLACKLEY

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Applicant alleges Counsel was ineffective for failing to argue Terry Bradley could have removed the five crack rocks at the scene. (App. para. 8). Counsel agreed with PCR counsel that in retrospect, it was probably something he should have done. At the PCR hearing, Applicant testified he did not "have any direct evidence" that Bradley was involved, took drugs, or had anything to do with the incident. This Court finds applicant has failed to satisfy his burden of establishing counsel was ineffective for failing to argue Bradley could have removed the five crack rocks at the scene, or that there was a reasonable probability that had he done so the outcome would have been different.

Applicant alleges Counsel failed to make certain arguments at trial. (App. paras. 32-33). The record reflects that counsel made both arguments, either indirectly through testimony he elicited at trial, or directly in his closing argument. Counsel testified to that effect at the PCR hearing as well. Applicant also alleges that in his closing argument, Counsel failed to specifically enumerate the elements of self-defense and illustrate how the evidence fit that standard. (App. para. 34). Counsel testified that as a practice he does not go through each element of the charge when he closes and that he has a lot of success that way. Therefore, this Court finds Applicant has failed to satisfy his burden of proving error or prejudice as to this allegation.

Failure to Advise

Applicant alleges Counsel was ineffective for failing to advise Applicant against withdrawing his objection to the previous testimony of Hyder. (App. para. 11). At trial, Counsel told Judge Early that he discussed it with Applicant that morning and had spoken to his family about it the night before. Applicant did not question Counsel about this specifically at the PCR hearing. At the trial, the Court asked Applicant if he had any questions about it and he said no. Applicant testified at the PCR hearing that Counsel did not discuss with him what the State

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STATE OF TEXAS
COUNTY OF TARRANT
HOE BLAKEY

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would have to establish to introduce Hyder's testimony. This Court finds Applicant has failed to satisfy his burden of proving either error or prejudice as to this allegation.

Failure to Investigate

Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported by mere speculation as to the result. Rollinson v. State, 346 S.C. 506, 552 S.E.2d 290 (2001). An Applicant's mere speculation as to what an alleged beneficial witness' testimony would have been does not satisfy the prejudice prong. Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). 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, 446 U.S. at 689.

Applicant alleges Counsel was ineffective for failing to interview and investigate Terry Bradley as a potential witness. (App. para. 5). Though Counsel could not recall a specific reason why he did not call Bradley to testify, he testified that he employed a private investigator and had him look into Bradley, but that he "learned nothing" and was "left with the discovery." When questioned again later in the hearing, Counsel testified he did not recall whether they tried to locate Bradley or whether there was any mention in the discovery of any investigation into Bradley and what role he might have had. PCR Counsel noted at the hearing that she attempted to find Morgan Simmons and Terry Bradley to testify at the hearing but had been unable to locate either. This Court finds Counsel made a reasonable investigation into Terry Bradley. Further, Bradley was apparently asleep on the couch in the trailer. Applicant has failed to show there is a reasonable probability that had Bradley been called the outcome of the trial would have

APPROVED BY
SANTANDER COUNTY
2015 DEC 14 AM 11:20
M. H. PECKLEY

been different. Applicant has failed to satisfy his burden of proving either error or resulting prejudice as to this allegation.

Applicant alleges Counsel was ineffective for failing to present Morgan Simmons as a witness at trial because she gave a written statement that the victim had said "he had tried to rob a drug dealer." (App. para. 12). Counsel testified he did not know why he did not present Simmons as a witness. Counsel also testified he employed an investigator who was responsible for interviewing any potential witnesses, including those who had given statements. This Court finds Applicant has failed to satisfy his burden of proving error or prejudice as to this allegation.

Applicant alleges Counsel was ineffective for failing to request criminal records of State's witnesses or the victim. (App. paras 6 & 7). Applicant failed to elicit any testimony or otherwise produce any competent evidence pertaining to this allegation. Therefore, this Court finds Applicant has failed to satisfy his burden of proving either error or prejudice in this regard.

Failure to Object

Applicant argues Counsel was ineffective for failing to consistently object to the State asking leading questions. (App. paras. 3 & 20). Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. SCRE 611(C). Applicant highlights certain excerpts of Angie Smith's testimony but has failed to present any evidence that Counsel failed to object to improper leading questions. Moreover, this Court finds Counsel extensively cross-examined Angie Smith at trial and was even able to elicit favorable testimony that was inconsistent with her statements on direct examination. Therefore, this Court finds Applicant has failed to satisfy his burden of proving error or prejudice with respect to this allegation.

CLERK OF COURT
SPARTANBURG COUNTY
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HOPE BLACKLEY

Applicant alleges Counsel was ineffective for failing to object to the admission of Hyder's testimony under 804(a)(4) because: (1) the State failed to present competent evidence Hyder was unavailable (App. para. 10); (2) Hyder had not been cross-examined about his admission in his prior testimony that he was legally blind (App. para. 30); and (3) Hyder had not been cross-examined about when the damage to the doorjamb occurred (App. para. 14). However, Counsel used favorable points from Hyder's prior testimony in his closing argument. Additionally, both Angie Smith and Applicant testified at trial that there had been a scuffle or fight between Applicant and the victim and that the two of them fell out of the door of the trailer. Photographs of the scene were also introduced as exhibits at trial. Regarding Hyder's unavailability at the second trial, the record shows Counsel and the solicitor made an effort to get Hyder to court. Hyder's son came to court and told the judge and counsel Hyder was alive but ill. This Court finds Applicant has failed to satisfy his burden of showing error or prejudice as to this allegation.

Applicant alleges Counsel was ineffective for failing to object to Angie Smith's testimony that it was "to her understanding" the Applicant had crack and a gun. (App. para. 16). Counsel testified he did not recall her making such statement at trial, and agreed with PCR counsel that if he had "caught" it at trial he would have objected. However, the record reflects Counsel cross examined her on this point at trial and was able to elicit favorable testimony. Therefore, this Court finds Applicant has failed to satisfy his burden of proving error or prejudice as to this allegation.

Applicant alleges Counsel was ineffective for failing to object to Denton's testimony that Applicant had asked about a "murder" investigation. (App. para. 25). The record reflects Counsel

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did object to this testimony, though the Court did not make a specific ruling. This Court finds Applicant has failed to establish either error or prejudice as to this allegation.

Applicant alleges Counsel should have objected to Dr. Wren's testimony that law enforcement probably moved the deceased's body. Several witnesses testified the body had not been moved prior to the time the photographs were taken. Applicant has failed to establish error or prejudice with respect to this claim.

Applicant alleges Counsel should have objected to or cross-examined Denton regarding his ballistics testimony when he had not been qualified in that field. (App. paras. 23 & 24). Objectionable testimony may not be prejudicial where it is merely cumulative to other evidence presented at trial. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294 at 1321. Applicant failed to establish that Denton's testimony that the gun was fired in the direction of the door to the trailer undermined Applicant's defense or was anything but cumulative to other evidence presented at trial. Accordingly, this Court finds Applicant has failed to satisfy his burden of showing error or prejudice as to these allegations.

Applicant alleges Counsel should have objected to Applicant's retrial on grounds of double-jeopardy because certain exculpatory evidence had not been turned over by the state. Counsel testified he considered it but that he did not "ever think [he] could have proven that it was an intentional withholding of evidence. Counsel testified that even though there was "no downside" to making the argument, he did not do so because he did not "think it had any chance of winning because it was not an intentional act on the part of [the solicitor]." The Court finds Applicant has failed to establish error or prejudice as to this allegation.

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SOUTH CAROLINA
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Finally, Applicant alleges Counsel should have objected to the self-defense charge as given at Applicant's trial because it was confusing and unconstitutionally burden shifting. Counsel testified he did not feel there was any problem with the instruction as given at trial. The Court notes that the instruction was a standard jury charge on self-defense at the time. As PCR Counsel pointed out, the South Carolina Supreme Court even noted that based on its review of the record, a self-defense instructive was not merited at all. The case Applicant relies on, Belcher,¹ was not decided until 2009—roughly four years after Applicant's second trial. The Courts "have never required an attorney to be clairvoyant or anticipate changes in the law [that] were not in existence at the time of trial." State v. Gilmore, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994). This Court finds Applicant has failed to show counsel's performance fell below an objective standard of reasonableness.

To show prejudice as to this allegation, Applicant must also establish he was entitled to a self-defense charge based on the evidence presented at trial. The elements of self-defense are as follows:

- (1) The defendant was without fault in bringing on the difficulty;
- (2) The defendant ... actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger;
- (3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief ...; and
- (4) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011) (citing State v. Wiggins, 328 S.C. 538, 543, 500 S.E.2d 489, 492 (1998)).

¹ State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

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SPARTANBURG COUNTY
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Here, no evidence or testimony was presented either at trial or at the PCR hearing that anyone in the trailer was armed with a deadly weapon except Applicant. The only evidence that Applicant believed he was in imminent danger is that Applicant weight 165 pounds and was 5'8 and the victim weighed about 220 and was 6'2. This Court finds Applicant has failed to establish that there is a reasonable probability that but for Counsel's failure to object to the self-defense instruction, the outcome of the proceeding would have been different.

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.

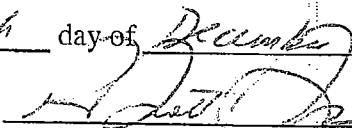
V. CONCLUSION

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.

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 10th day of December


THE HONORABLE R. SCOTT SPROUSE
Presiding Judge

Wadwell, South Carolina

CLERK OF COURT
SPARTANBURG COUNTY
2015 DEC 14 AM 11:20
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

David Dwight Smith, 245760)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2011-CP-42-01283

ORDER DENYING APPLICANT'S MOTION
FOR RECONSIDERATION

After careful consideration of the able argument and filings of Counsel and review of the record, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered. Accordingly, the Plaintiff's Motion, pursuant to Rule 59, SCRPC,¹ is DENIED.

AND, IT IS SO ORDERED.



R. SCOTT SPROUSE
Judge, Tenth Judicial Circuit

Walhalla, South Carolina
1-11, 2016

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¹ The Court, in its discretion, has determined this Motion on the filings, without oral argument, pursuant to Rule 59(f), SCRPC.



State of South Carolina
The Circuit Court of the Tenth Judicial Circuit

R. Scott Sprouse
Judge

Oconee County Courthouse
Post Office Box 1277
Walhalla, SC 29691
Phone: (864) 638-4266
Fax: (864) 638-4267
rssprousej@sccourts.org

January 11, 2016

The Honorable M. Hope Blackley
Spartanburg County Clerk of Court
PO Box 3483
Spartanburg, SC 29304-3483

RE: David Dwight Smith, #245760 vs. State of South Carolina
2011-CP-42-1283

Dear Ms. Blackley:

Enclosed for filing please find an executed Order Denying Applicant's Motion for Reconsideration in the above-referenced action.

I trust that you will find everything in order. However, if you have any questions, or if I may be of any further assistance in this matter, please do not hesitate to contact me.

With kindest regards I remain,

Very truly yours,

A handwritten signature in cursive script that reads "Renee".

Renee Hattenstein
Administrative Assistant to Judge Sprouse

Enclosures: Signed Order

2016 JAN 13 AM 9:06
CLERK OF COURT
M. HOPE BLACKLEY

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O. Box 3483
Spartanburg, SC 29304-3483

Phone (864) 596-2591
Fax (864) 596-2239



M. Hope Blackley
Clerk of Court

January 13, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

David Dwight Smith
Applicant # *245760*

7TH JUDICIAL CIRCUIT

CASE # *2011CP42-1283*

VS

State
Respondent

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the *Order Denying Applicant's Motion for*
In this action dated *1-11 2014* on *1-13-14* *Reconsideration*

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Robley Hancock
Tara Spurlock
David Smith

1-13-14
(Date)

Carrie Seal
(Signature)