

STATE OF SOUTH CAROLINA )  
COUNTY OF HORRY )  
  
Roshod Baker, #318851, )  
) )  
Applicant, )  
) )  
v. )  
) )  
State of South Carolina, )  
) )  
Respondent. )

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IN THE COURT OF COMMON PLEAS  
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No. 2010-CP-26-7814

**ORDER OF DISMISSAL**

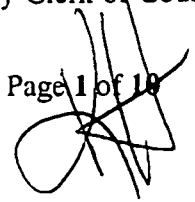
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HORRY COUNTY  
14 JULY 19 AM 9:43  
KELAN E. HUGHES-WARD  
CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief filed August 24, 2010. Respondent made a timely Return on or about October 25, 2010. The Court convened an evidentiary hearing into the matter on August 28, 2014, at the Georgetown County Courthouse. Applicant was present at the hearing and represented by Tristan M. Shaffer, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Johnny Gardner, Esquire, also testified. The Court had before it a copy of the trial transcript, the records of the Horry County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief and amendments, and the return.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In May 2002, the Horry County

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Grand Jury indicted Applicant for Murder (2002-GS-26-2040). Johnny Gardner, Esquire (“trial counsel”), represented Applicant. On November 13, 2006, Applicant, along with co-defendant Telly Manning, proceeded to trial before the Honorable Steven H. John and a jury. On November 15, 2006, the jury found Applicant guilty as indicted. Judge John sentenced Applicant to thirty (30) years imprisonment.

Applicant filed a timely notice of appeal. Kathrine H. Hudgins, Esquire, of the Office of Appellate Defense perfected the appeal with the filing of an *Anders*<sup>1</sup> brief. The South Carolina Court of Appeals dismissed Applicant’s appeal on September 8, 2009. *State v. Baker*, Op. No. 2009-UP-426 (S.C. Ct. App. filed September 8, 2009). The remittitur was returned to the circuit court on September 24, 2009.

### ALLEGATIONS

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

1. “Ineffective Assistance of Counsel”
  - a. “Violation of 6 US Constitutional Amendment”
2. “Due Process of Law”
  - a. “Violation of 14<sup>th</sup> US Constitutional Amendment”

On January 4, 2014, Applicant filed an amendment to his application raising the following grounds for relief:

1. “Trial Counsel prejudiced applicant when he failed to move for a ‘separate trial’, from Applicant’s co-defendant, Telly Manning.”
2. And, further prejudiced Applicant when he did not object to Applicant’s co-defendant’s counsel, Mr. Mullins who kept pointing out in joint trial that Applicant was the master-mind and the guilty party, murdering Troy Riggins. See Mullins cross of Bowens and Smith. Counsel Mullins should not have been able to point his finger

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<sup>1</sup> *Anders v. California*, 386 U.S. 738 (1967).

at Applicant without Applicant's own counsel objecting to this line of cross by Mullins, which prevented the jury from making a reliable judgment about who was really in fact, guilty or not guilty.

3. And, since Applicant's co-defendant was not testifying, making these statements, Applicant could not confront him, his counsel should not have been able to, which violated Applicant's constitutional right per the Sixth and Fourteenth Amendment to the United States and South Carolina Constitution.

At the evidentiary hearing, Applicant proceeded on the following allegations of ineffective assistance of trial counsel:

1. Failure to investigate.
2. Failure to cross-examine a testifying co-defendant on pending charges.
3. Failure to move for a severance.
4. Failure to move for a mistrial.
5. Failure to impeach a co-defendant with an inconsistent statement.

The Court denied Applicant's Motion to Amend the Pleadings to include an allegation of prosecutorial misconduct or failing disclose a witness's pending charges because Applicant failed to present evidence to support the allegation.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Applicant testified he only had a few meetings with trial counsel while he was out on bond. Applicant alleged trial counsel did not hire an investigator and asked for a continuance because he was not prepared for trial. He testified trial counsel did not have a copy of co-defendant Derrick Bowens' statement. Applicant testified Bowens' statement was presented at trial by Manning's attorney. Applicant also testified Manning's attorney accused Applicant of

“robbing drug dealers,” and trial counsel did not move for a mistrial based on this statement. Applicant testified trial counsel did not cross examine co-defendant Ernest Smith on a pending burglary charge. Applicant averred his trial was delayed because Smith was in jail on the burglary charge. On cross-examination, Applicant admitted he never gave trial counsel any leads to investigate. Applicant also admitted he was in the company of Smith weekend before his trial.

Trial counsel testified he was appointed to Applicant’s case because the public defender’s office could not represent all of the co-defendants. Trial counsel testified Applicant was initially uncooperative with him, but they did have several meetings as the case progressed. Counsel recalled three (3) of the five (5) co-defendants entered pleas before trial and testified against Applicant and Manning. Trial counsel testified he did not move to sever the trials because he did not believe there were grounds for a severance based on the facts of the case. Counsel further testified a severance would not have been helpful because the testimony and ballistics indicated both co-defendants shot the victim and both injuries contributed to the victim’s death. Counsel testified that he did not recall ever moving for a continuance because he was unprepared. Instead, trial counsel testified he felt he had sufficient time to prepare for trial. Trial counsel testified he reviewed the discovery with Applicant. He recalled this discovery consisted of ballistics, witness statements, photos, and the criminal records of the lay witnesses.

Trial counsel recalled Smith was also indicted for the murder. However, he was unaware of any pending burglary charges. Trial counsel testified that both he and Manning’s attorney vigorously cross-examined Smith on his involvement in the murder and the rewards he hoped to gain from testifying against Applicant. Trial counsel testified the trial was delayed, but not

because Smith was incarcerated. The delay was due to co-defendant Manning's incarceration in another state and Manning had to be returned to Horry County. Trial counsel testified any further pending charges against Smith would not have bolstered his cross-examination because the murder charge was so important. Trial counsel also recalled asking for and receiving a curative instruction when Manning's attorney characterized Applicant as "robbing drug dealers."

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing *Griffin v. Martin*, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Id.* at 442, 334 S.E.2d at 814 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Id.* (citing *Strickland*, 466 U.S. at 687; *Turner v. Bass*, 753 F.2d 342 (4th Cir. 1985); *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir. 1977)). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* (citing *Strickland*, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. *Id.* at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. *Id.* Under this prong, courts measure an attorney's performance by its

"reasonableness under prevailing professional norms." *Id.* (citing *Strickland*, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 117-18, 386 S.E.2d at 625.

The Court finds Applicant failed to meet his burden of proving trial counsel ineffective for failing to investigate his case. Failure to conduct an independent investigation is not *per se* ineffective assistance of counsel, especially where an investigation would not have uncovered any helpful information. See *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998). Applicant has not shown what information a further investigation into the facts of his case would have revealed. Trial counsel testified he reviewed discovery and was prepared for trial. Applicant also admitted he did not provide trial counsel with any leads to investigate. Accordingly, the Court finds trial counsel conducted a proper investigation, adequately conferred with Applicant, and was thoroughly competent in his representation.

The Court finds Applicant failed to meet his burden of proof to demonstrate trial counsel ineffective for failing to cross-examine Smith on any pending charges. Applicant asserted that the trial was delayed because Smith was incarcerated. However, testimony showed that the delay was actually due to Manning's incarceration. Trial counsel testified he was not aware of any burglary charges against Smith at the time of trial. Furthermore, Applicant admitted to being in Smith's presence the weekend before trial began. Applicant had ample opportunity to provide trial counsel information about Smith's alleged pending charges before trial.

The Court finds Applicant failed to show he was prejudiced by trial counsel not further cross-examining Smith. Applicant presented no probative evidence, other than his own

testimony, to prove Smith had a pending burglary charge at the time of trial. *Jackson v. State*, 329 S.C. 345, 349, 495 S.E.2d 768, 770 (1998). The record indicates trial counsel and Manning's attorney thoroughly impeached Smith regarding his involvement in the murder as well as his plea bargain with the State. In light of this thorough cross-examination, further questioning about a burglary charge would have been merely cumulative to trial counsel's impeachment during cross-examination. *Id.* at 351, 495 S.E.2d at 771 (no prejudice where testimony could not have provided additional information to jury).

The Court further finds Applicant did not meet his burden to demonstrate trial counsel ineffective for failing to move for a severance. The Court finds there were no grounds to move for severance and further finds trial counsel's reasoning valid. *See Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." (citing *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992))). "Criminal defendants who are jointly tried [...] are not entitled to separate trials as a matter of right." *State v. Dennis* 337 S.C. 275, 281, 523 SE2d 173, 176 (1999) (citing *State v. Kelsey*, 331 S.C. 50, 502 S.E.2d 63 (1998); *State v. Holland*, 261 S.C. 488, 201 S.E.2d 118 (1973); *State v. Crowe*, 258 S.C. 258, 188 S.E.2d 379 (1972)). Instead, a court should only grant a severance "when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent a jury from making a reliable judgment about a co-defendant's guilt." *Id.* at 282, 523 S.E.2d at 176. The testimonial and ballistic evidence in this case indicate Applicant and Manning were in the car with the victim, and that two guns were used in the shooting. There is no evidence indicating a severance would have been warranted in this case. Therefore, the Court finds that trial counsel

was not deficient in not requesting a severance.

In any event, Applicant was not prejudiced by the joint trial with Manning. A cautionary instruction as to multiple defendants is sufficient to protect each co-defendant from prejudice that might result from a joint trial. *See State v. Holland*, 261 S.C. 488, 494, 201 S.E.2d 118, 121 (1973). Here, Judge John gave a thorough jury instruction on the duties of the jury regarding multiple defendants on three (3) separate occasions. (Trial Tr. p. 8, lines 8-5; p. 45, line 18-p. 46, line 4; p. 370, lines 5-12). The instructions negated any prejudice that may have resulted from the joint trial. Applicant has failed to prove prejudice from trial counsel's decision.

The Court finds Applicant failed to meet his burden of proof regarding his allegation trial counsel was ineffective in failing to move for a mistrial when Manning's attorney referred to Applicant as someone who "robbed drug dealers." Trial counsel objected to Manning's counsel's question about whether Applicant "had a tendency to rob drug dealers." (Trial Tr. p. 138, line 25-p. 139, line 8). Judge John sustained the objection and trial counsel asked for a curative instruction. (Trial Tr. p. 142, line 24-p. 143, line 2). Trial counsel's performance was reasonable under the circumstances.

Applicant also failed to demonstrate how he was prejudice by trial counsel's performance in this regard. The witness, Smith, initially responded to the question in the negative. (Trial Tr. p. 138, line 25-p. 139, line 2). The jury was instructed to disregard Manning's attorney's question. "Generally, a curative instruction is deemed to have cured any alleged error." *State v. Patterson*, 337 S.C. 215, 226, 522 S.E.2d 845, 850 (Ct.App. 1999) (citing *State v. George*, 323 S.C. 496, 476 S.E.2d 903 (1996); *State v. Kelsey*, 331 S.C. 50, 502 S.E.2d 63 (1998); State v.

Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996)). Judge John's instruction sufficiently cured any prejudice Applicant may have suffered as a result of Manning's attorney's question.

The Court finds Applicant failed to prove trial counsel was ineffective in failing to impeach Bowens with a prior statement. Manning's attorney thoroughly cross-examined Bowens regarding his prior statement. (Trial Tr. p. 95-98). Trial counsel also referred to the statement in his cross-examination. (Trial Tr. p. 110). Manning's attorney and trial counsel thoroughly impeached Bowens regarding his expected reward for testifying. The Court finds Applicant has not shown how any further impeachment would have affected the outcome of his trial. *Jackson*, 329 S.C. at 351, 495 S.E.2d at 771.

The Court finds Applicant has not demonstrated he was prejudiced by the actions of trial counsel because overwhelming evidence of his guilt exists. Three witnesses testified Applicant and Manning were in a car with the victim when he was shot and that Applicant sat in the passenger seat with Manning seated in the rear. One witness saw both men with guns prior to entering the car. The witnesses also testified that they observed Applicant and Manning run back to the car after hearing the shots. The forensic evidence indicates the victim was shot with two different guns. The forensic evidence further indicates the victim was shot from the back and from the side. The Court finds Applicant has not demonstrated trial counsel was ineffective nor has Applicant demonstrated any prejudice resulted from trial counsel's performance. *See Harris v. State*, 377 S.C. 66, 79, 659 S.E.2d 140, 147 (2008) (applicant cannot prove prejudice where there is overwhelming evidence of guilt).

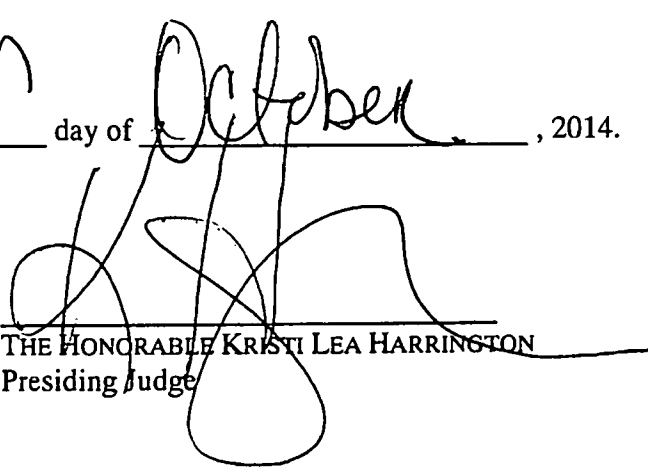
**CONCLUSION**

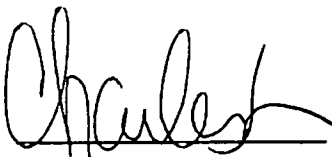
Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, Applicant's petition for post-conviction relief is **denied** and **dismissed** with prejudice.

**IT IS THEREFORE ORDERED THAT** the Application for Post-Conviction Relief is denied and dismissed with prejudice; and

**IT IS FURTHER ORDERED THAT** Applicant be remanded to the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 8<sup>th</sup> day of October, 2014.

  
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THE HONORABLE KRISTI LEA HARRINGTON  
Presiding Judge

  
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South Carolina

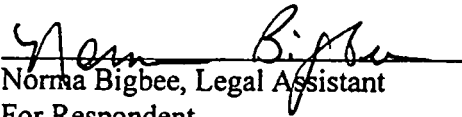
STATE OF SOUTH CAROLINA )  
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COUNTY OF HORRY )  
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ROSHOD BAKER, #318851 )  
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vs )  
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STATE OF SOUTH CAROLINA, )  
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Respondent. )  
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IN THE COURT OF COMMON PLEAS  
2010-CP-26-7814  
AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a filed copy of the Order of Dismissal the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**Tristan Michael Shaffer, Esquire**  
4701 Oleander Drive  
Myrtle Beach, SC 29577

DATED this 8<sup>TH</sup> day of December, 2014.

  
Norma Bigbee, Legal Assistant  
For Respondent