

The Law Office of Tristan M. Shaffer

April 29, 2015

The Supreme Court of South Carolina
Daniel E. Shearhouse, Clerk of Court
P.O. Box 11330
Columbia, SC 29211

Re: Jeffrey Herrmann v. State
2013-CP-10-4994

Dear Clerk of Court,

Please file the attached Notice of Appeal, Proof of Service and Order in the above referenced case.

Thank you for your assistance in this matter.

Sincerely,



Tristan M. Shaffer

CC: Charleston County Clerk of Court
Rutledge Johnson

RECEIVED

MAY 02 2016

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Perry Gravely, Circuit Court Judge

Case No. 2013-CP-10-4994

Jeffrey Herrman #338692,

Petitioner,

v.

The State of South Carolina,

Respondent.

RECEIVED


MAY 02 2016

S.C. SUPREME COURT

NOTICE OF APPEAL

Petitioner appeals the order dismissing his post-conviction relief action filed on March 30, 2016. This order was received by Petitioner on April 6, 2016.

April 29, 2016


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Attorney for Respondent

THE STATE OF SOUTH CAROLINA
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APPEAL FROM CHARLESTON COUNTY
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Case No. 2013-CP-10-4994

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v.


The State of South Carolina,

Respondent. **S.C. SUPREME COURT**

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on The State of South Carolina by mailing a copy to the Attorney General's Office at P.O. Box 11549, SC 29211 on the date listed below.

April 29, 2016



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Attorney for Respondent

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AG
AT
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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS)
NINTH JUDICIAL CIRCUIT)

Jeffrey Herrman, #338692,)

2013-CP-10-4994)

Applicant,)

ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

FILED
2016 MAR 30 PM 4:02
JULIE J. AMSTUTZ
CLERK OF COURT
BY _____

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed August 26, 2013. The Respondent made its Return on February 6, 2014. An evidentiary hearing into the matter was convened on January 19, 2016, at the Charleston County Courthouse. Tristan Shaffer, Esquire, represented Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his behalf. Rodney Davis, Esquire, Applicant's trial counsel, also testified. This Court had before it a copy of the records of the Charleston County Clerk of Court, records from the South Carolina Department of Corrections, the trial transcript, and the appellate records.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the November 2009 term of the Charleston County Grand Jury for murder (2009-GS-10-9048). The Applicant was represented by Rodney Davis, Esquire.

On January 4, 2010, the Applicant proceeded to trial and was convicted as indicted. The Applicant was sentenced by the Honorable Kristi L. Harrington to confinement for a period of forty-five (45) years.

The Applicant filed a timely Notice of Appeal at the South Carolina Court of Appeals. His appeal was perfected by Katherine Hudgins, Esquire, of the South Carolina Office of Appellate Defense. The Applicant's convictions and sentences were affirmed by the Court of Appeals. State v. Herrman, No. 2013-UP-159 (S.C. Ct. App. filed April 17, 2013). The remittitur was sent thereafter.

ALLEGATIONS

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

1. Ineffective assistance of counsel.
2. Held unlawfully in violation of 4th, 5th, 6th, 8th, and 14th amendments of the United States and South Carolina Constitutions.

At the hearing, Applicant proceeded on his claims of ineffective assistance of counsel for failure to object to alleged vouching by the solicitor and failure to object to an alleged improper closing argument by the solicitor. The Court also granted Applicant's Motion to Amend the Application at the time of the hearing to include a passion and prejudice argument under the improper closing argument. Also raised at the hearing was the issue of Applicant's competency during the trial.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This



Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. 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 that he is currently serving forty-five years for murder. Applicant stated that his trial counsel was a public defender and that he had requested his file for the past six years and had received only 120 pages of the file. Applicant stated that he quit taking Thorzine after the second day of trial. Applicant stated no one told him to stop taking the medication, but that it was his own decision. Applicant stated that while on the medication he understood everything and knew what was going on, but was groggy and tired. Applicant stated that he is not currently on mental



health and that once he arrived at the South Carolina Department of Corrections, he was taken off of the Thorzine. Applicant stated that he and his attorney talked about strategy and that their strategy revolved around trial counsel's opinion that the State would not be able to prove its case and that the co-defendant had lied.

Trial counsel testified that he was with the Public Defender's Office at the time and was appointed on this case in August of 2008. Trial counsel testified that he and the Applicant met to discuss the case in excess of half a dozen times, and the Applicant was very involved with the preparation of the case. Trial counsel noted in his file that, "Defendant heavily medicated, not good for him." Trial counsel testified that, under his supervision, second chair on this case, Cody Groeber, wrote a brief on the jurisdictional issues. Trial counsel testified that during the trial, there was a motion to suppress all evidence stemming from the recovery of the vehicle in which the victim's body was found due to the fact the Charleston County Sheriff's Office and Charleston County employees were involved in the recovery of the vehicle which was found in a stream or small river and extracted from the stream or river using a boat ramp on the Berkeley County side of said stream or river. Trial counsel testified that there was no physical evidence linking the Applicant to the murder. Trial counsel testified that at least three witnesses testified that Applicant admitted to killing the victim, one of which was Applicant's codefendant, Jason Cumbee. Trial counsel testified it was their trial strategy to attack the credibility of these witnesses and argue that the co-defendant could have been the person who committed the crime. Trial counsel stated that he was able to obtain a self-defense jury charge without putting on a defense based on evidence that had already been presented, and while it was never their position that Applicant acted in self-defense, he was going to take advantage of every defense available to Applicant. Trial counsel testified that he and Applicant have



discussed Applicant testifying and that Applicant had not wanted to testify and that he concurred with this decision. Trial counsel testified that he made an objection to burden shifting during the State's closing argument. Trial counsel testified that he did not make any objections to alleged vouching of witnesses or a passion and prejudice objection during the State's closing argument because he did not believe that there were comments that rose to the level of objectionable, or they were not worth the objection.

A.

Applicant alleges that he was not competent to stand trial. A criminal defendant is competent to stand trial if "the accused [has] sufficient capability to consult with his lawyer with a reasonable degree of rational understanding and [has] a rational as well as a factual understanding of the proceeding against him." Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 596 (1992). An Applicant challenging his competency must prove this allegation by a preponderance of the evidence. Id. In order to do this, 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. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).

This Court finds Applicant provided no evidence to support a finding that he was not competent to stand trial. Applicant provided no expert testimony or other documentation showing he did not understand the criminal proceedings brought against him. The Court finds that Applicant admitted that during the trial he was able to understand everything and knew what was going on at the time. Trial counsel testified that Applicant was very involved in preparation of the case and during trial. It was noted when the trial court questioned Applicant about testifying, trial counsel stated that he had no concerns about Applicant's competency, but wanted

to bring the medication issue to the trial court's attention so that it would not be a problem later. (Trial Tr. pp.1091-1094). After reviewing the trial transcript and listening to witness testimony, the Court finds that there is no evidence before it to support an allegation that Applicant was not competent to stand trial.

B.

Under South Carolina law, "[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." Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004).

Additionally, the State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. State v. Copeland, 321 S.C. 318, 324 468 S.E.2d 620, 624 (1996). Furthermore, the solicitor's closing argument must not appeal to the personal biases of the jurors. Id. Three things that a court must consider when considering alleged impropriety in the solicitor's closing argument are the argument in the context of the record as a whole, if the judge's instructions cured any inappropriate argument, and if there is overwhelming evidence of guilty. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). It is the applicant's burden to prove that he did not receive a fair trial because the solicitor's comments rose to such a level that the whole trial was infected and the applicant's due process rights were denied. Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002).

Further:

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after



it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made 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, 466 U.S. at 689 (internal citations omitted).

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

Jason Cumbee did not come out with the whole truth until December 4th, 2009, just a little over a month ago. But what did Jason say when he finally admitted the truth? When he had hired an attorney and when he'd talked to that attorney? (Trial Tr. p.1152).

But on 12/4/2009—and I want you to remember that date because we are going to come back to it, he came out with the whole truth and what happened? (Trial Tr. p.1155).

Jerry Castleman was another witness you heard from. Jerry Castleman also was very honest with you. (Trial Tr. p. 1160).

It's not an inconsistency for Melissa Hollander, who is telling you the truth. (Trial Tr. p. 1167).

Jason Cumbee finally decided to tell the truth on December 4th, 2009... (Trial Tr. p. 1172).

This Court, however, finds the State was not improperly vouching for Cumbee, Castleman, or Hollander, nor commenting on their credibility. 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

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objected.

This Court also finds that the State did not improperly appeal to the jury's passion and prejudice. To the contrary, the State's closing argument was confined to the evidence in the record and the reasonable inferences drawn therefrom. Comments by the solicitor asking the jury to live up to the promise of justice for all did not rise to the level to overstep the boundaries and incite any improper passion or prejudice on the part of the jury. (Trial Tr. pp. 1192-94). Applicant presented no credible evidence that the Solicitor's comments infected the trial and fairness as to make the resulting conviction a denial of due process.

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. Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of Applicant. This Court also finds 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 Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds Applicant has abandoned any such allegations.



CONCLUSION

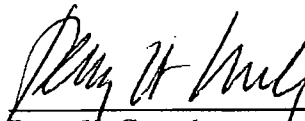
Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Trial counsel was not deficient and Applicant was not prejudiced by counsel's representation. Therefore, this PCR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

This Court advises 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 14th day of March, 2016.



Perry H. Gravely
Presiding Judge
Ninth Judicial Circuit

Charleston, South Carolina.



ALAN WILSON
ATTORNEY GENERAL

March 28, 2016

The Honorable Julie J. Armstrong
Clerk of Court, Charleston County
100 Broad St. Ste 106
Charleston, SC 29401-2210

Re: Jeffrey Herrman, #338692 v. State of South Carolina
2013-CP-10-4994

Dear Ms. Armstrong:

Enclosed please find the signed original **Order of Dismissal** in the above captioned case for filing in your office. If you have any questions or concerns, please contact me at (803) 734-3737.

Sincerely,

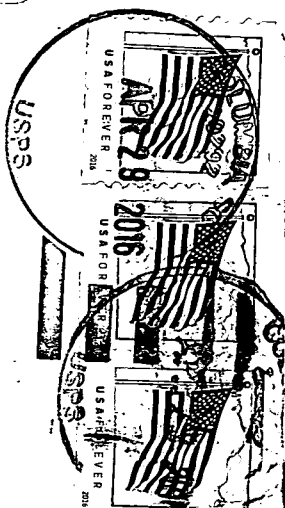
J. Rutledge Johnson
Assistant Deputy Attorney General

JRJ/jyb

cc: Tristan M. Shaffer, Esquire

Tristan M. Shaffer
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The Supreme Court of South Carolina
Daniel E. Shearhouse, Clerk of Court
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Columbia, SC 29211



The image displays a highly detailed, repeating geometric pattern. The pattern consists of a grid of squares. Each square contains a smaller square in the center, which is further divided into four quadrants by an 'X' shape. The lines forming these shapes are composed of fine, parallel lines, creating a textured, woven appearance. The overall effect is a complex, high-frequency geometric tessellation.

Patent Number
US 6,732,494 R1