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May 13, 2016

The Honorable Daniel E. Shearouse
Clerk of South Carolina Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, South Carolina 29201

Re: *Tramaine D. Nelson, #316883 v. State of South Carolina*
Case No.: 2012-CP-10-7003

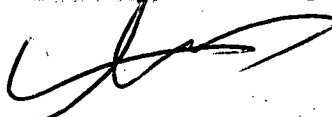
Dear Mr. Shearouse:

Enclosed for filing, please find an original and two copies of Appellant's Notice of Appeal of the denial of his application for Post-Conviction Relief. If you find everything in order, please file the original and return the clocked in copies in the enclosed self-addressed envelope.

Please note I was appointed and copy the Office of Appellate Defense who will handle the appeal. Please call if you have any questions.

With kindest regards, I am

Sincerely,



Christopher L. Murphy

CLM;jh
Enclosures

cc (e/ encls.): Mr. Tramaine Nelson
Robert M. Dudek, Esq., Office of Appellate Defense
The Honorable Larry B. Hyman, Jr.
The Honorable Julie J. Armstrong
Rutledge Johnson, Asst. AG

RECEIVED

MAY 18 2016

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge


Case Nos.: 2012-CP-10-7003

Tramaine D. Nelson, #316883 Appellant
v,
State of South Carolina Respondent

NOTICE OF APPEAL

Appellant appeals the Court's denial of his application for Post-Conviction Relief. Attached is the order from the Court dated May 2, 2016 received May 4, 2016.

May 13, 2016


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MAY 1 8 2016

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

TRAMAINE D. NELSON, #316883,

Applicant,

v.

STATE OF SOUTH CAROLINA,

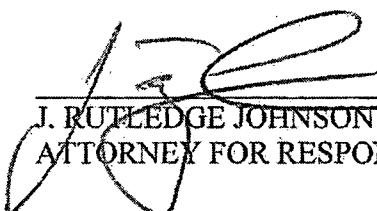
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

**Christopher L. Murphy, Esquire
Murphy Law Offices, LLC
PO Box 2008
Mount Pleasant, SC 29465-2008**

This 2nd day of May, 2016.



J. RUTLEDGE JOHNSON
ATTORNEY FOR RESPONDENT

SWORN to before me this 2nd day of May, 2016.



Notary Public for South Carolina.

My Commission Expires: 12/16/2024

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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Tramaine D. Nelson, #316883,)

2012-CP-10-7003

Applicant,)

ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

FILED
2016 MAY -2 AM 11:04
JULIE J. ARYSTROMBERG
CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief filed October 26, 2012. The Respondent made its Return on July 8, 2013. An evidentiary hearing into the matter was convened on September 10, 2015, at the Charleston County Courthouse. Christopher L. Murphy, Esquire represented Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. Bill Runyon, Esquire and Bob Dudek, Esquire 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 Record on Appeal 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 October 2007 term of the Charleston County Grand Jury for murder (2007-GS-10-

11054) and at the October 2008 term for assault and battery with intent to kill (2008-GS-10-7463). The Applicant was represented by William L. Runyon, Esquire.

On November 10, 2009, the Applicant proceeded to trial and was convicted of both charges. On April 23, 2010, the Applicant was sentenced by the Honorable Kristi Lea Harrington to confinement for a period of forty-five (45) years for murder and twenty (20) years for assault and battery with intent to kill. The sentences are to be served concurrently. The Applicant filed a timely Notice of Appeal at the South Carolina Court of Appeals. Robert Dudek, Esquire, of the South Carolina Office of Appellate Defense represented the Applicant on appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. *State v. Nelson*, 2012-UP-518 (S.C. Ct. App. September 12, 2012). The Remittitur was issued on September 28, 2012.

SUMMARY OF TESTIMONY

At the evidentiary hearing, Applicant testified his mother hired Bill Runyon to represent him. Applicant stated he met with counsel twice, both times in the jail and no more than five minutes per visit. Applicant stated there was a 20 year offer, which he rejected. Applicant stated counsel never discussed a self-defense claim with him. Applicant also stated he did not take the stand in his own defense in either the first or second trials; he claimed he never discussed testifying with his attorney. Applicant then testified he never discussed lesser included offenses with counsel. Applicant lastly stated that while an appeal was filed on his behalf, he did not discuss his issues with his appellate attorney.

On cross-examination, Applicant testified that his statement was introduced at trial, in which he admitted that some third party had robbed him of drugs, went back to a friend's house, had another friend call a codefendant, got into a different vehicle, and drove to the apartments where he

was robbed. Codefendant got out of the car and started shooting; whereupon, defendant admitted to exiting the vehicle with a black Glock .45, ran around the car, and shooting one time. This shot killed victim, an innocent bystander at the apartments. Applicant also admitted that his codefendant gave a statement, implicating defendant in this crime. Furthermore, Applicant's girlfriend gave a statement to law enforcement, in which she stated Applicant called her asking for marijuana and then stated, "I have got to go because I think I shot your baby's daddy." Additionally, Applicant admitted other witnesses saw him shoot the victim in this case.

Appellate counsel testified as to how he reviews cases based on the record before him. In this case, is strongest argument was a statement given to law enforcement by Applicant. Applicant's appeal was dismissed pursuant to Anders v. California, 386 U.S. 738 (1967).

Trial counsel testified he represented Applicant at both his trials. He stated the first trial was a hung jury; with a successful suppression motion concerning Applicant's statement to law enforcement. He also stated at the second trial, the trial court allowed Applicant's statement into evidence. Counsel testified there was no change in circumstances between the first and second trials. Counsel stated he filed the appeal, but did not recall speaking to appellate counsel.

On cross-examination, Counsel testified he met with Applicant around 12 times. He also testified he fully discussed self-defense claim with Applicant, as well as Applicant's potential testimony had he chosen to testify at his trial. Counsel then stated Applicant was legally sane but still had some ill health issues. As far as the Jackson v. Denno hearing was concerned, Counsel testified he renewed his objections and preserve it for appeal. As to the lesser included offenses, he would have asked for them by the trial judge if there was an offer from the solicitor lesser included

offenses; but there was no offer. Lastly, Counsel stated as to the theory of "hand of one hand of all," he thought this was proper because there were multiple actors involved in this incident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. The Court also has read the trial transcript and the appellate records, all of which assists the Court in judging their credibility.

Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

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) (citing Rule 71.1(e), SCRPC). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "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." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel's performance was deficient. Under this prong,

attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing* Strickland. Second, counsel's 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The Court finds Applicant failed to meet his burden to proving that counsel was ineffective in his representation of Applicant.

Lesser included offenses

Applicant claims Counsel was ineffective for not discussing lesser included offenses with him or requesting jury charges of voluntary manslaughter or involuntary manslaughter. This Court finds this allegation to be without merit.

For a defendant to be entitled to a jury instruction on a lesser-included offense, there must be some evidence in the record that would tend to show that the defendant is guilty of the lesser rather than the greater offense. State v. Fields, 356 S.C. 517, 589 S.E.2d 792 (Ct. App. 2003); State v. Funchess, 267 S.C. 427, 229 S.E.2d 331 (1976). The possibility that the jury might believe some of the State's case and not the rest is an insufficient argument for a lesser-included offense instruction. Funchess, 267 S.C. at 430, 229 S.E.2d at 332. Additionally, voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. State v. Wharton, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009). "To warrant the court eliminating the charge of manslaughter, there must be no evidence whatsoever tending to reduce the crime from murder to manslaughter." State v. Starnes, 388 S.C. 590, 596-97, 698 S.E.2d 604, 608 (2010). "A

defendant is not entitled to a voluntary manslaughter charge merely because he was in a heat of passion." Id. "Conversely, a defendant is not entitled to voluntary manslaughter merely because he was legally provoked." Id. "Moreover, there must be evidence that the heat of passion was caused by sufficient legal provocation." Id.

In this case, no evidence exists to warrant a lesser included offense charge of voluntary manslaughter. Applicant's own statement, introduced into evidence on page 215-216 of the appellate record, implicates Applicant in a murder, not a voluntary manslaughter. According to the statement, Applicant, with individuals Tooka and Wanda, drove to some apartments and was robbed of some drugs. Applicant then went back to Wanda's house, where Tooka called his cousin Timothy, one of Applicant's co-defendants. Timothy then came over to Wanda's house. Around 20 minutes later a gentleman, who went by the name A.T.L., pulled up in a small SUV-type vehicle. (ROA p. 173 lines -10). Apparently, the person who robbed Applicant called Applicant and stated for Applicant to come get his money. As a result, Applicant, Timothy and A.T.L. drove over to the apartments, where Timothy got out of the vehicle and started shooting. Applicant then decided to exit the vehicle and fire one shot. Victim was killed by Applicant's bullet. (ROA p 133 lines 24). But more importantly, witnesses testified that Victim was an innocent bystander and was not the person who robbed Applicant earlier that day, nor did he have a gun. (ROA p. 164 lines 18-23; p. 283 lines 16).

In Cottrell¹, the South Carolina Supreme Court held that the trial court erred in not instructing the jury on voluntary manslaughter as a lesser included offense. In that case, a law enforcement officer, after an initial consensual encounter with the defendant, observed the defendant raise his hands at which time the officer pulled out his gun. After holstering his gun, the officer and the defendant got into a struggle with each other. At this time, the defendant shot the officer in the face. After an exchange of gunfire with a second officer, the defendant fled the scene. The Supreme Court held “an alternative and reasonable inference was that the victim reacted in an impermissibly aggressive manner, physically assaulting and then shooting [defendant] when he exercised his constitutional right to walk away.” Cottrell at 265, 657 at 454. Unlike Cottrell, Applicant was not involved in a struggle whatsoever with Victim in this case. Victim was an innocent bystander who had no involvement with the earlier robbery that Applicant claims to be the “sufficient legal provocation” for his actions. Therefore, there is no other reasonable inference other than Applicant acted with malice in this case.

Additionally, Starnes, supra, held “[w]hether a voluntary manslaughter charge is warranted turns on the facts.” Id. at 597, 698 at 608. Starnes focused on the “heat of passion” prong of voluntary manslaughter in that “there must be evidence that the heat of passion was caused by sufficient legal provocation.” Id. at 597, 698 at 608. However, this Court finds this case distinguishable from Starnes. Starnes satisfied the “sufficient legal provocation” prong because there was an incident between the victims and the defendant prior to the defendant shooting and killing the

¹ State v. Cottrell, 376 S.C 260, 657 S.E.2d 451 (2008).

victims. Here, as stated prior, there was no interaction between Victim and Applicant as to satisfy the “sufficient legal provocation prong.” As such, Starnes is inapplicable as this Court need not address the “heat of passion” prong if sufficient legal provocation does not exist.

Even assuming *arguendo*, there existed sufficient legal provocation, Starnes states, “in order to constitute “sudden heat of passion upon sufficient legal provocation,” the fear must be the result of sufficient legal provocation and cause the defendant to lose control and create an uncontrollable impulse to do violence.” Id. at 598, 698 at 609. Nowhere in the trial testimony or the testimony presented at the PCR hearing did Applicant or any of the witnesses state Applicant was in fear for his life and/or lose control as to create an uncontrollable impulse to do violence. As such, this Court need not analyze these facts as in depth as Starnes because there was no prior altercation between Victim and Applicant which would mitigate the homicide as to justify a voluntary manslaughter charge.

Likewise, Cook v. State, Op. No. 27596 (S. Ct. filed December 9, 2015) is inapplicable to this case because in that case there was sufficient legal provocation.² However, the Supreme Court found there was no heat of passion and further found that “Cook either shot victim with malice or in self-defense.” In this case, there was no self-defense claim presented, nor was there any sufficient legal provocation that even necessitates a “heat of passion” analysis.

Consequently, this Court finds that a charge of voluntary manslaughter was not warranted in this case as no sufficient legal provocation existed. While Applicant claims that he was legally

² “At trial, Cook conceded that there was a sufficient legal provocation.”

entitled to forcibly recover one's own property, in this case, Victim was an innocent bystander who had absolutely no involvement with the earlier robbery for drugs. Thus, Applicant simply cannot claim that he had legal provocation to shoot and kill Victim. Even if Applicant had sufficient legal provocation, this Court finds there was a sufficient "cooling off period" such that Applicant was not acting in the heat of passion. According to Applicant's own statement, after Applicant was robbed of the drugs by a third party, he, Tooka and Wanda went back to a house, where they called other people to explain the events of what a just occurred. There was a period of around 20 minutes or so to "cool off." It was not until the third party who robbed Applicant called him that Applicant, et al. got into a car and proceeded to the apartments where the third party and Victim were located. At this point it was decided to exit the vehicle and fired the guns. For these reasons, this Court finds that Applicant was not entitled to a charge of voluntary manslaughter. As such, Counsel was not ineffective in not discussing voluntary and involuntary manslaughter with Applicant or requesting a charge of voluntary manslaughter at trial. Therefore, this allegation is denied.

"Hand of one, Hand of all"

Applicant also claimed counsel was ineffective for failing to object to the "hand of one hand of all" jury charge. This Court finds this allegation is without merit.

Evidence in the record supports that there was an implicit agreement between codefendants to pursue their stolen property and money, none of which Victim had any involvement. According to Applicant's own statement, after Applicant was robbed of drugs and money when he was with Wanda and Tooka and they drove back to Wanda's house, Tooka's cousin, Timothy, was called over to Wanda's house, presumably to aid Applicant in getting his drugs and money back. Another

codefendant, A.T.L. then drove up in a small SUV-type vehicle; both Timothy and Applicant proceeded to get into the car and drive to the apartments where Applicant was robbed earlier that day. Both Timothy and Applicant possessed guns. Timothy was the first to get out and began shooting, followed by Applicant shooting one shot that ultimately killed Victim. Implicit in this action is an agreement between Timothy and Applicant which displays a common plan to retrieve Applicant's drugs and money. Therefore, the "hand of one hand of all" jury instruction was proper.

Even assuming, *arguendo*, that the "hand of one hand of all" jury instruction was improper and Counsel was ineffective for failing to object to this jury instruction, Applicant can prove no resulting prejudice as there is overwhelming evidence of his guilt in this case. Where there is overwhelming evidence of guilt, trial counsel's deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); See also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001); Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (1991). In Ford, trial counsel failed to request an alibi instruction and his representation was found deficient as a result. However, the evidence of the Applicant's guilt in Ford was overwhelming and this Court held that the Applicant failed to prove the second prong of Strickland, which requires that an Applicant show prejudice by the deficient representation. Likewise, the Applicant here has shown no prejudice resulting from any alleged deficient representation.

In this case, Applicant admitted to law enforcement that he was fully involved in the shooting death of Victim. Codefendant, Jovan Bryant, also testified that defendant stated to him, "[I] think [I] hit one." (ROA p. 238 lines 2-5). Later, there was a phone conversation between all three defendants in which Applicant stated he tag one, meaning he shot victim. (ROA p. 238 line 15- p. 239 line 4).

Additionally, Applicant's girlfriend stated Applicant called her and stated, "I think I shot your baby's daddy." (ROA p. 175 lines 9-12). Moreover, other witnesses saw Applicant at the scene with a gun in his hand. (ROA p. 255 lines 9- p. 255 line 3; p. 259 lines 10-18). Based on these statements, especially Applicant's own statements to law enforcement and to others, there is overwhelming evidence of Applicant's guilt in this case. As such, Applicant can prove no resulting prejudice from any alleged deficiency of counsel's performance. Therefore, this allegation is denied.

All other allegations

This Court notes that Applicant alleged other allegations such ineffective assistance concerning Applicant statement being admitted at the second trial, when is excluded the first trial and counsel's alleged ineffectiveness concerning Applicant's decision to testify at his trials. However, this Court finds Applicant either failed to meet his burden of proving Counsel was ineffective or failed to show how Counsel's actions prejudiced Applicant's case. Specifically, this Court finds that properly objected and argued for the suppression of Applicant statement at the second trial, preserving this issue for appeal. Additionally, this Court finds the trial court properly advised Applicant of the advantages and disadvantages of testifying or exercising his right to remain silent. Accordingly, these allegations are denied.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the 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.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED!



Larry B. Hyman
Presiding Circuit Court Judge
Ninth Judicial Circuit

4-20-2018
Cowley, South Carolina

2012-CP-10-7003

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case Nos.: 2012-CP-10-7003

Tramaine D. Nelson, #316883 Appellant
v.
State of South Carolina Respondent

PROOF OF SERVICE

I CERTIFY that I have served APPELLANT'S NOTICE OF APPEAL by delivering a copy via U.S. Mail First-Class postage prepaid on the 13rd day of May, 2016, on the following:

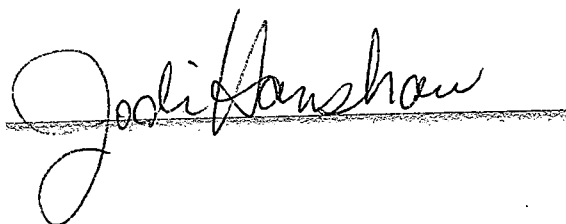
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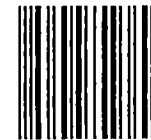
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