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May 27, 2016

Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Fredrick flowers, 2014-CP-10-05219

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above CharlestonCounty PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,

James K Falk

Thank you for your assistance.

Cc: Rutledge Johnson, Esq.; Fredrick Flowers 352185.

Mailing Address: PO Box 1058, Charleston, S.C. 29402
Location: 38 Broad Street, Suite 350, Charleston, S.C. 29401

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Honorable Deadra L. Jefferson, Circuit Judge

RECEIVED

JUN 02 2016

S.C. SUPREME COURT

Case No.: 2014-CP-10-5219

Frederick ~~Fredrick~~ Flowers 352185.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Frederick Flowers ~~Bernardo Evans~~ appeals the Honorable Deadra L. Jefferson's May 12, 2016, Order of Dismissal. Undersigned counsel received notice of entry of the order on May 26, 2016. A copy of the order on appeal is attached hereto.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

May 27, 2016

Rutledge Johnson, Esq
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

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PROOF OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Rutledge Johnson, Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this May 27, 2016.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT
Frederick Flowers, #352185, Applicant, v. State of South Carolina, Respondent.	)	2014-CP-10-5219 **ORDER OF DISMISSAL**

Presiding Judge:	Hon. Deadra L. Jefferson
Applicant's Attorney:	James K. Falk, Esquire
Respondent's Attorney:	J. Rutledge Johnson, Esquire
Trial Counsel:	Beattie I. Butler, Esquire Mary A. Ford, Esquire
Date of Hearing:	December 17, 2015
Court Reporter:	Karen Anderson

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed August 26, 2014. The Respondent made its Return on April 14, 2015 and filed on April 15, 2015. An evidentiary hearing into the matter was convened on December 17, 2015, at the Charleston County Courthouse. James K. Falk, Esquire, represented the Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, Applicant testified on his behalf. Tanya Flowers, Yvette Flowers, Davetta Davenport and Mary Ford, 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 Applicant's PCR application, the State's Return, the trial transcript and the appellate records.

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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 July 2011 term of the Charleston County Grand Jury for Murder[1] (2011-GS-10-4314) and Possession of a Weapon During the Commission of a Violent Crime[2] (2011-GS-10-4317). The Applicant was represented by Mary Ford, Esquire, sitting as primary counsel and Beattie Butler, Esquire assisting.

On August 31, 2014, the Applicant proceeded to trial and was found guilty. The Applicant was sentenced by the Honorable J.C. Nicholson to confinement for a period of forty (40) years for Murder and five (5) years for Possession of a Weapon. The Applicant's convictions are to be served concurrently.

The Applicant filed a timely Notice of Appeal. His appeal was perfected by Benjamin Tripp, Esquire, of the South Carolina Office of Appellate Defense. The Court of Appeals dismissed Applicant's appeal pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Flowers, No. 2014-UP-185 (S.C. Ct. App. May 5, 2014). The Remittitur was issued on June 20, 2014.

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[1] Murder is a violent, most serious felony punishable by death, imprisonment for life, or by a mandatory minimum term of imprisonment for thirty (30) years. See S.C. CODE ANN. §§ 16–3–10, –20 (2003), 16–1–60 (2003), 17–25–45 (2003). Life imprisonment means until death of the offender without the possibility of parole. See S.C. CODE ANN. § 16–3–20 (2003).

[2] "If a person is in possession of a firearm or visibly displays what appears to be a firearm or visibly displays a knife during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60, he must be imprisoned five [(5)] years, in addition to the punishment provided for the principal crime. This five-year [(5)] sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime." Further, "[s]ervice of the five-year [(5)] sentence is mandatory unless a longer mandatory minimum term of imprisonment is provided by law for the violent crime. The court may impose this mandatory five-year [(5)] sentence to run consecutively or concurrently." S.C. CODE ANN. § 16–23–490 (2010).

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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. Constitutional violations.

SUMMARY OF TESTIMONY

At the evidentiary hearing, Counsel testified she sat first chair and was responsible for decisions, strategy and examination of witnesses. Counsel stated the witnesses were not cooperative and that Victim's father had identified Applicant in a photo lineup. Counsel also stated the other witnesses that had identified Applicant had credibility issues changing their stories "constantly" and her strategy was to attack their credibility. She further stated that she did not call anyone to testify on Applicant's behalf. Counsel testified she spoke with Tanya Flowers multiple times, but Ms. Flowers did not provide any information useful to the Applicant's defense. Counsel further testified that Applicant left his cellphone in the Victim's car where it was ultimately found by law enforcement. As a result law enforcement discovered the Applicant's name and he was developed as a suspect. Subsequently, there were phone records which showed Applicant and Victim calling each other on the day of the incident. Counsel argued against the fact that the phone tied Applicant to the shooting, and did not recall Ms. Flowers saying anything concerning the cell phone. She further testified Applicant never told her he was on the phone with his mother at the time of the shooting.

Counsel testified she did not call any witnesses provided by the applicant because they did not have any helpful information. Counsel also testified she attacked the credibility of each witness

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and stated that any family members would have presented as biased in favor of the Applicant. She further testified none of the witnesses provided by the Applicant were "solid" enough to clear him. By not calling any witnesses, it was Counsel's strategy to preserve final argument. Specifically, Counsel spoke with Applicant's aunt, Yvette Flowers, but his aunt did not have anything to offer in Applicant's defense because she was not present at the time of the incident. Counsel then testified Davetta Davenport, the Applicant's cousin spoke with her investigator, who explained that she picked up Applicant and took him to North Charleston around 4:30 PM on the afternoon of the shooting. She further testified that Ms. Davenport was uncertain and vague regarding the time frame estimating it to be around 4:30 PM or sometime afterwards. Counsel stated Applicant claimed he was at his uncle's house down the street when he heard the shooting. Counsel stated she did not put the State on notice of alibi witnesses because Ms. Davenport did not inform Counsel that she picked Applicant up at 4:30 PM on the day of the incident until over one (1) year after Applicant's trial.

Counsel stated she reviewed the jury charges with Mr. Butler, because Mr. Butler handled most of the legal issues. Counsel stated she did not object to the malice jury charge. She further testified that it was the defense's trial theory that it "wasn't the Defendant at all" so such a request would have been contrary to this strategy. She further testified in any event there was no factual basis for the request to instruct lesser included offenses or a redaction of the malice instruction.

On cross-examination, Counsel testified there was no basis for a self-defense claim in this case, nor was there a case for voluntary manslaughter. Counsel also admitted that there were five (5) witnesses who testified against Applicant, including Carlos Jones, who identified Applicant and testified that he saw Applicant with a gun, firing into the Victim's car. Counsel also admitted that

the Victim's father testified at trial that the shooting happened around 4:00 PM, essentially destroying Applicant's potential for any alibi defense.

Lastly, counsel testified the facts in this case were particularly damaging and hard to overcome as the testimony at trial reflected that the Victim's father took him to a residence in West Ashley where the Applicant walked up to the Victim's car and shot the victim point blank without provocation. She further stated that the testimony reflected that the Victim's father then fled to a nearby fire station for assistance but the Victim died before he could get assistance.

Tanya Flowers testified she was Applicant's mother and did not speak to the assistant solicitor in the case, but had spoken to Counsel. She testified that she told Counsel about the phone her sister had given Applicant and had spoken to Applicant on the phone found in the Victim's car. She claimed that she called a different phone because the first phone given to the Applicant was no longer in his possession. Ms. Flowers stated she had a conversation about a gunshot with Applicant and that Applicant's mood was one of shock. She testified that Applicant was not talking faster than normal in his conversation, but acted surprised. Ms. Flowers then testified Applicant wanted to get out of the area all of that day.

On cross-examination, Ms. Flowers testified that she was not at the scene when the gun was fired, nor was she present with her son when the gun was fired. She stated she remembered that Applicant sounded surprised in her phone conversation with him which occurred on March 2, 2011, but could not remember what she had for lunch on November 2, 2015.[3]

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[3] This Court recognizes that Ms. Tanya Flowers may recall events differently with the benefit of hindsight which would have the effect of favoring her son.

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On redirect examination, Ms. Flowers testified she remembered her son's arrest, remembers most special days in her life, and remembers she was at work when she heard about the Charleston 9 shooting.

Yvette Flowers testified that she spoke with Counsel and Counsel's investigator, and she gave Applicant a cell phone because he lost his other phone. Ms. Flowers stated she pays the bills on Applicant's cell phone and received a receipt which shows received and transmitted calls; she claims she provided this information to Counsel.

Davetta Davenport testified she spoke with Counsel and informed Counsel that she picked Applicant up from his uncle's house on Wimbee Drive in West Ashley. Ms. Davenport did not know where the shooting occurred and stated she picked Applicant up before 5:30 PM. She states she waited until between 5-5:30 PM because she was not feeling well and had to drive from North Charleston to West Ashley. She testified that when she got back to North Charleston off Ashley Phosphate from picking up the Applicant, she saw the "breaking news" of the shooting on the television.

On cross-examination, Ms. Davenport admitted that the news she was watching came on at 6:00 PM.

Applicant testified he was represented by Mary Ford and instructed Counsel to speak with his mother, his aunt, and his cousin because he claims he was at his uncle's house on the phone with his mother during the shooting. He stated he asked Counsel to speak with Ms. Davenport because as he claims, Ms. Davenport could prove that Applicant was not at the incident location during the shooting. Applicant stated he was two (2) streets away from the incident location. Applicant also testified he was not sure why Counsel did not call him to testify in his trial because he only had a

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juvenile record which could not be used for impeachment. Applicant denies any knowledge of the events of the crime. Applicant then stated he should have testified, and that both the trial judge and Counsel advised him not to testify.

On cross-examination, Applicant admitted it was his decision not to testify and that the trial court advised him concerning his right to remain silent or to testify on his own behalf. While Applicant claimed he was not at the scene during the incident, he admitted that five (5) witnesses testified against him, all of which identified him at the scene. Applicant also admitted the Victim's father identified him. He admitted that there were witnesses who put him at the scene with a gun murdering the victim. He lastly admitted the trial testimony of Myesha Wine, an eye witness, who testified that he lured the victim to the location to rob him; however, he denies any knowledge of this fact.

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 has also 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), SCRCP). 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 (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.

This Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. This Court also has read the trial transcript and appellate records, all of which assists the Court in judging the witnesses' credibility. This Court finds the Applicant's, Yvette Flowers', Tanya Flowers' and Davetta Davenport's testimony regarding Counsel's ineffectiveness is not credible while also finding Counsel's testimony is persuasive and very credible.

This Court finds Counsel's representation of Applicant in this case well above the professional norms. Counsel fully investigated this case and thoroughly assisted Applicant in his defense. Counsel fully advised Applicant concerning his right to testify or remain silent. This Court

also finds the trial court fully explained Applicant's rights, including his right to testify (Tr. 623-628; 638: 23-25; 639 1-9). Counsel did not threaten or coerce Applicant into not testifying (Tr. 2-10). It was Applicant's decision and his alone, not to testify in this case (Tr. 627: 11-25; 628: 1-2).

Additionally, neither Applicant nor Davetta Davenport informed Counsel that Ms. Davenport picked up Applicant from his uncle's house on the day of the shooting at 4:30 PM as to establish a viable alibi defense. See Strickland v. Washington, 466 U.S. 668, 691, 104 S. Ct. 2052, 2066 (1984) ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant."). "To establish an alibi defense and thus be entitled to an instruction of alibi, a defendant must present some evidence that he was at another place at the time of the crime and could not therefore have committed the crime." State v. Diamond, 280 S.C. 296, 297, 312 S.E.2d 550 (1984), quoting State v. Robbins, 275 S.C. 273, 271 S.E.2d 319 (1980). "A simple denial of one's presence at the scene does not constitute an alibi." Id.

At the PCR hearing, Ms. Davenport testified that she picked Applicant up between 5-5:30 PM. and was in North Charleston in time to see the 6 o'clock news. However, at the trial, Victim's father testified the shooting happened between 4-4:30 PM (Tr. 76: 19-20). While Applicant claims he was not present during the incident, five (5) independent witnesses testified otherwise. This Court finds the five (5) witnesses and the Victim's father's testimony more credible than Ms. Davenport's or Applicant's testimony, especially considering Ms. Davenport did not come forward with this information until over a year after Applicant's trial. As such, Applicant has failed to sufficiently

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establish a viable alibi defense which Counsel could have argued at the trial. "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 at 689-90, 104 S. Ct. at 2065-66. Counsel cannot be held to be clairvoyant of information not presented to her by Applicant. Moreover, it is more likely that Ms. Davenport would have established Applicant's flight from the crime scene as evidence of Applicant's guilt. It would have been a strategic choice by Counsel not to call Ms. Davenport even if she had this information, as not to establish flight by the Applicant. Also, by not calling any witnesses, Counsel was able to preserve final argument which she articulated was a part of the trial strategy. See Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006) ("[W]here counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.")

Further, Applicant was not entitled to an exclusion of a malice charge pursuant to State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) (Jury instruction concerning inferred malice from the use of a deadly weapon not proper where there is evidence of self-defense or evidence mitigating, reducing, excusing or justifying a homicide). Applicant failed to present any evidence of self-defense or of voluntary manslaughter. Applicant's shooting of Victim was unprovoked and not supported by any sufficient legal provocation. As such, Counsel cannot be held ineffective for not requesting a charge under Belcher. Thus, the prejudice prong under Strickland need not be discussed.

This Court finds Counsel's actions reasonable under the circumstances and based on the information provided by Applicant. Accordingly, this allegation is denied.

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Moreover, this Court finds there is overwhelming evidence of Applicant's guilt in this case. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. See 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 (S.C. 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 the Court held that the Applicant failed to prove the second prong of Strickland, which requires that an Applicant show prejudice by the deficient representation.

In this case, five (5) witnesses testified that Applicant was the instigator of the shooting as Victim never exited his vehicle, that Applicant approached Victim with a gun behind his back, that Applicant pointed the gun at Victim and shot Victim multiple times, killing the Victim. There existed no fight between the Victim and the Applicant, nor did there exist any credible alibi testimony. Therefore, this Court finds overwhelming evidence of Applicant's guilt in this case.

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, 409 S.E.2d 395

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(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. Applicant's 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!

Deadra L. Jefferson
Presiding Circuit Court Judge
Ninth Judicial Circuit

May 12, 2016
Charleston, South Carolina

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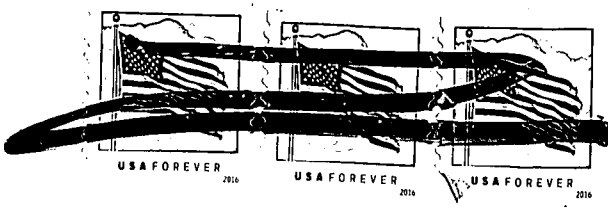

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