

VOLUME III of III

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Williamsburg County

Steven H. John, Circuit Court Judge

RECEIVED

JUN 23 2016

SC SUPREME COURT

KELVIN BOWEN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002248

APPENDIX

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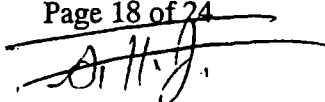
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allowing the State to play Co-Defendant Mack's statement through Lt. Collins. Clearly, the State laid the proper foundation for the admission of the extrinsic evidence of the written statement. See Rule 613(b), SCRE. The State advised Co-Defendant Mack of the substance of the statement by showing him the transcript of the state while on the stand; Co-Defendant Mack was also advised of the time and place the statement was allegedly made, and the person to whom it was made. (Tr. p. 191 line 21—p. 193 line 25). Co-Defendant Mack was given the opportunity to explain or deny the statement and he chose to deny making the statement. (Tr. p. 191 line 21—p. 193 line 25). Thus, the statement was admissible under Rule 613(b), SCRE, and no Confrontation Clause violation resulted from this admission. See Stokes, 381 S.C at 401, 673 S.E.2d at 439.

Based off of the foregoing, this Court finds that Applicant has failed to establish the requisite deficiency of appellate counsel or prejudice entitling him to relief. First, this Court finds that Applicant has failed to show that appellate counsel's performance was deficient in any regard, where there is no standard requiring appellate counsel to brief every possible meritorious issue and counsel appropriately raised a stronger, meritorious issue on Applicant's behalf. Second, this Court finds that Applicant has failed to establish prejudice, as there is no reasonable likelihood that he would have prevailed on appeal had the issue address above been raised.

2. Ineffective assistance of Appellate Counsel for failing to brief the issue of whether the Trial Court erred in allowing the jury to hearing Co-Defendant's statement after the jury was excused for deliberation.


Applicant alleges appellate counsel was ineffective for failing to brief the issue of whether the Trial Court abused its discretion when it allowed Co-Defendant's Mack statement to



be played to the jury after it had begun deliberations. This Court finds this allegation without merit. This issue is not clearly stronger than the single photograph array issue raised by appellate counsel.

“The trial judge, in his discretion, may permit the jury at their request to review, in the defendant's presence, testimony after beginning their deliberations.” State v. Plyler, 275 S.C. 291, 298, 270 S.E.2d 126, 129 (1980). “The extent of such review is within the discretion of the trial judge to be exercised in the light of the jury's request.” Id. The court is not required to submit evidence to the jury for review beyond that specifically requested but in its discretion may have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested. Id. In Plyler, the trial court allowed the jury to hear a tape of the testimony of the defendant's ex-wife in response to the jury's request to have her testimony read back to them. Id. In that case, the court found there was no abuse of discretion where only the direct examination was played and the trial judge denied the defendant's motion that the jury be required to also hear the cross-examination to prevent overemphasis of the portion reheard. Id.

In this case, during jury deliberations, the jury sent the judge a question asking if they could hear a portion of exhibit # 65, Co-Defendant Mack's statement. (Tr. p. 711 line 25—p. 712 line 2). Specifically, the jury requested to hear the portion of the taped statement where Co-Defendant Mack identified Applicant as “Callie.” (Tr. p. 711 line 25—p. 712 line 2). Trial Counsel argued that the statement was only played for impeachment purposes and was not to be considered in the guilt or innocence of Applicant. (Tr. p. 712 lines 3-20). The Trial Court replayed Co-Defendant Mack's statement where he identified Applicant as “Callie” for the jury

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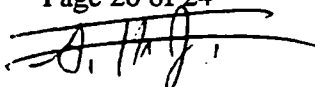
in the courtroom. (Tr. p. 714 lines 12-20). This was done in the Applicant's presence at the request of the jury. Thus, the trial judge properly exercised proper discretion and committed no error in allowing the jury to listen to the portion of Co-Defendant Mack's statement where he identified Applicant as "Callie."

Based off of the foregoing, this Court finds that Applicant has failed to establish the requisite deficiency of appellate counsel or prejudice entitling him to relief. First, this Court finds that Applicant has failed to show that appellate counsel's performance was deficient in any regard, where there is no standard requiring appellate counsel to brief every possible meritorious issue and counsel appropriately raised a stronger, meritorious issue on Applicant's behalf. Second, this Court finds that Applicant has failed to establish prejudice, as there is no reasonable likelihood that he would have prevailed on appeal had the issue address above been raised.

3. Ineffective assistance of Appellate Counsel for failing to brief the issue of whether the State committed a Brady violation regarding the missing Samsung Cell phone.

Applicant alleges appellate counsel was ineffective for failing to brief the issue of whether Assistant Solicitor Barr violated Brady by failing to turn over the Samsung Cell phone. This Court finds this allegation is without merit. This issue is not clearly stronger than the single photograph array issue raised by appellate counsel.

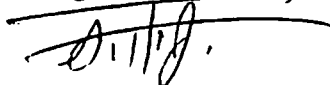
Initially, this Court finds Applicant's allegation that the Solicitor failed to turn over any required evidence is without merit. An individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). A Brady

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violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., 434 S.E.2d at 268.

This Court finds credible Assistant Solicitor Barr's testimony that the Samsung Cell phone was never in the possession of Williamsburg County Sheriff's office. Furthermore, this Court notes Applicant failed to present any evidence that the State possessed the Samsung Cell phone at any point in time. See Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (holding that, since the contents of challenged documents were not presented at the PCR hearing, the Applicant could not demonstrate how the failure of counsel to obtain these documents prejudiced the defense).

Based off of the foregoing, this Court finds that Applicant has failed to establish the requisite deficiency of appellate counsel or prejudice entitling him to relief. First, this Court finds that Applicant has failed to show that appellate counsel's performance was deficient in any regard, where there is no standard requiring appellate counsel to brief every possible meritorious issue and counsel appropriately raised a stronger, meritorious issue on Applicant's behalf. Second, this Court finds that Applicant has failed to establish prejudice, as there is no reasonable likelihood that he would have prevailed on appeal had the issue address above been raised.

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4. Ineffective assistance of Appellate Counsel for failing to brief the issue of whether the Trial Court erred in allowing the State to introduce exhibit #82 – Co-Defendant Mack’s composition notebook.

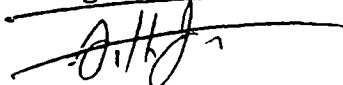
Applicant alleges appellate counsel was ineffective for failing to brief the issue of whether the court abused its discretion in allowing exhibit #82 – Co-Defendant Mack’s composition notebook into evidence. This Court finds this allegation without merit. This issue is not clearly stronger than the single photograph array issue raised by appellate counsel.

This Court notes Applicant failed to provide State’s Trial Exhibit 82 for this Court’s review. This Court will not speculate as to the contents contained in this exhibit. See Bannister v. State, 333 S.C. at 303, 509 S.E.2d at 809. This allegation is readily denied and dismissed with prejudice.

Based off of the foregoing, this Court finds that Applicant has failed to establish the requisite deficiency of appellate counsel or prejudice entitling him to relief. First, this Court finds that Applicant has failed to show that appellate counsel’s performance was deficient in any regard, where there is no standard requiring appellate counsel to brief every possible meritorious issue and counsel appropriately raised a stronger, meritorious issue on Applicant’s behalf. Second, this Court finds that Applicant has failed to establish prejudice, as there is no reasonable likelihood that he would have prevailed on appeal had the issue address above been raised.

ALL OTHER ALLEGATIONS

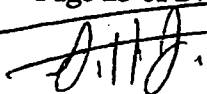
As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to

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present any testimony, argument, or evidence at the hearing regarding such allegations.

Accordingly, this Court finds the Applicant has abandoned any such allegations.

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CONCLUSION

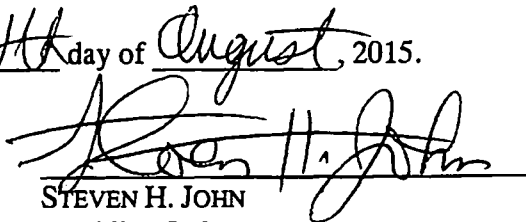
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.


This Court notes that Applicant must file and serve a notice of appeal within thirty 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 post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

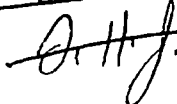
IT IS THEREFORE ORDERED:

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 this 4th day of August, 2015.


 STEVEN H. JOHN
 Presiding Judge
 Third Judicial Circuit

 South Carolina



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

KELVIN MICHAEL BOWEN, JR., #344725 Applicant,

v.

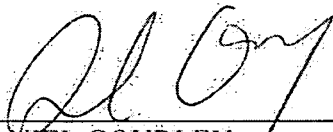
STATE OF SOUTH CAROLINA, Respondent.

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:

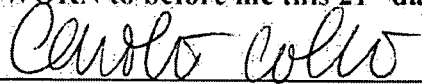
**Charles Thomas Brooks, III, Esquire
Law Office of Charles T. Brooks, III
309 Broad St.
Sumter, SC 29150**

This 21st day of October, 2015.



DANIEL GOURLEY
Attorney for Respondent

SWORN to before me this 21st day of October, 2015.



Notary Public for South Carolina.
My Commission Expires: 5/20/2025