



LAW OFFICE OF TRICIA A. BLANCHETTE

January 9, 2017
VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RECEIVED

JAN -9 2017

S.C. SUPREME COURT

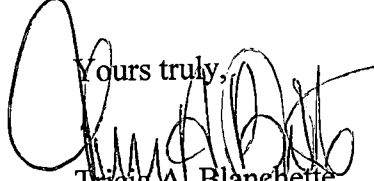
RE: George Smith v. State; Docket No.: 2012-CP-14-0392

Dear Sir:

For filing, attached please find an original Notice of Appeal, copies of the Order issued by the Honorable Clifton Newman, and Certificate of Service. I am copying this letter and attached documents on the Office of Appellate Defense with a completed Affidavit of Indigency since Mr. Smith is in need of the services of the Office of Appellate Defense for his appeal.

Thank you for your assistance with this matter. Please contact my office with any questions.

Yours truly,



Tricia A. Blanchette
Attorney at Law

cc: Julie Coleman, Office of the Attorney General
Office of Appellate Defense
Clarendon County Clerk of Court (Notice)
George Smith

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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JAN -9 2017

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas
Post Conviction Relief

S.C. SUPREME COURT

Honorable Clifton Newman, Circuit Court Judge

Case No.: 2012-CP-14-0392

George Smith, 329531,

Petitioner,

vs.

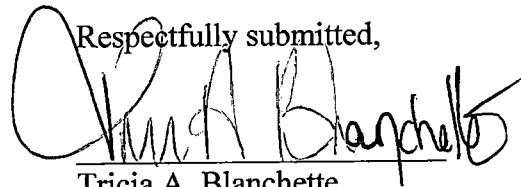
State of South Carolina

Respondent.

NOTICE OF APPEAL

George Smith, Petitioner, appeals the Order of Dismissal issued by the Honorable Clifton Newman on September 21, 2016, which was filed on November 15, 2016 . Petitioner, through counsel, received notice of the entry of the Order of Dismissal on December 20, 2016.

Respectfully submitted,



Tricia A. Blanchette
S.C. Bar No. 74904
PO Box 2147
Leesville, SC 29070
(803) 908-3266

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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JAN -9 2017

S.C. SUPREME COURT

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas
Post Conviction Relief

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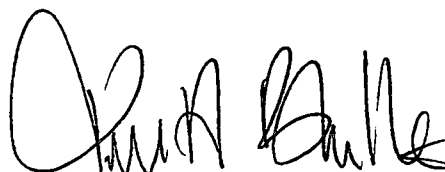
State of South Carolina

Respondent.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney at Law, hereby certify that a copy of a Notice of Appeal, with attachments was placed in the United States mail this 9th day of January 2017 to Julie Coleman of the Attorney General's Office, at:

Office of the Attorney General
Att: Julie Coleman, Ast. AG
PO Box 11549
Columbia, SC 29211



Tricia A. Blanchette
Bar #74904
PO Box 2147
Leesville, SC 29070
(803) 908-3266

January __, 2017

STATE OF SOUTH CAROLINA)
COUNTY OF CLARENDON)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

George Smith, #329531,)

Case No. 2012-CP-14-0392

2016 NOV 15 PM 12:5

BEULAH B. ROBERTS
CLERK OF COURT
CLARENDON COUNTY, SC

Applicant

v.

CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE
DATE 12/12/16

ORDER OF DISMISSAL

State of South Carolina,

Beulah B. Roberts

CLERK OF COURT
CLARENDON COUNTY, SC

Respondent.

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on August 22, 2012. Respondent made its return on February 12, 2013. An evidentiary hearing into the matter was convened on September 10, 2014, at the Sumter County Courthouse. Applicant was present at the hearing and was represented by Tricia Blanchette, Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

The records before this Court indicate the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clarendon County Clerk of Court. The Applicant was true bill indicted at the August 2008 term of the Clarendon County Grand Jury for assault and battery with intent to kill, armed robbery, and possession of a weapon during a violent crime (2008-GS-14-0352). Harry Devoe, Esquire represented him. Applicant proceeded to a jury trial before the Honorable R. Ferrell Cothran, Jr. On December 8, 2009, Applicant was found guilty of assault and battery with intent to kill, armed robbery, and possession of a weapon during a violent crime. Judge Cothran sentenced Applicant to twenty years imprisonment for assault and battery with intent to kill, twenty five years for armed

robbery, and five years for possession of a weapon during a violent crime with all sentences running concurrently.

A timely notice of appeal was filed. The South Carolina Court of Appeals affirmed the lower court's conviction. State v. George Smith, Op. No 2012-UP-350 (S.C. Ct. App. filed June 6, 2012). The remittitur was sent on June 25, 2012.

ALLEGATIONS

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

1. Ineffective assistance of counsel.
 - a. Failure to prepare and investigate.
 - b. Failure to utilize witnesses.
2. Ineffective assistance of appellate counsel
 - a. Failure to raise all meritorious issues on appeal.

Applicant filed an amendment to his post-conviction relief application on September 4, 2014. Applicant alleged he was being held unlawfully for the following reasons:

1. Ineffective assistance of trial counsel for failure to make a pretrial motion and/or trial objection to the identification of Applicant.
2. Ineffective assistance of trial counsel for failure to advise Applicant of conflict of interest due to representation of Kelvin and Broaddus Black.
3. Ineffective assistance of trial counsel for failure to raise the victim's motive in bringing the instant charges due to a prior-break in allegation against applicant.
4. Ineffective assistance of trial counsel for introducing evidence of Applicant's flight through cross-examination of Investigator Burgess.
5. Ineffective assistance of trial counsel for his comments in mitigation prior to sentencing.
6. Ineffective assistance of trial counsel for failure to object to Applicant's illegal sentence.
7. Ineffective assistance of appellate counsel for failure to obtain transcript and raise Applicant's pro-se motion to relieve counsel on appeal.

SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf and presented testimony from Pete Skidmore (hereinafter "Investigator Skidmore"). The State presented testimony from Harry Devoe, Esquire. (hereinafter "Trial Counsel"). This Court also had before it a copy of the trial transcript, the Clarendon County Clerk of Court records, Applicant's South Carolina Department of Correction records, the PCR application, appellate records and return. During the evidentiary hearing, various exhibits were introduced including a statement from Tasha Cannon, a case history report for case J124620, and a motion for discovery for case J124620 filed by Trial Counsel. Additionally, both parties stipulated to the introduction of a sworn affidavit by Elizabeth Franklin-Best (hereinafter "Appellate Counsel").

At the Hearing, counsel for the Defendant requested additional time to locate and present testimony of the alleged witness, Uncle Levi. After being given several months the applicant has failed to present any additional witnesses or testimony and the record is now closed.

During the evidentiary hearing Applicant testified on his own behalf. Applicant stated he is currently housed at Lee Correctional Institution. Applicant stated the incident took place on April 6, 2008 and he proceeded to trial in December 8, 2009. Applicant stated Kelvin Black (hereinafter "Victim") was shot. Applicant stated he was indicted for assault and battery with intent to kill, armed robbery and possession of a weapon during the commission of a violent crime. Applicant stated he received twenty six years for assault and battery with intent to kill, twenty five years for armed robbery, and five years for possession of a weapon during a violent crime. However, Applicant stated he is now serving a twenty year sentence for assault and battery with intent to kill.

Applicant stated Trial Counsel was appointed to represent him. Applicant stated he met with Trial Counsel twice prior to trial. Applicant stated Trial Counsel tried to convince Applicant to plead guilty. Applicant stated he did not review any discovery material with Trial Counsel. Applicant stated he did not discuss any possible defenses with Trial Counsel. Applicant stated that there was a twenty year plea offer, but Applicant rejected the offer. Applicant stated that he told Trial Counsel about various witnesses including, Uncle Levi. Applicant explained that he was staying at Uncle Levi's house at the time of the incident. Applicant further stated that he requested Trial Counsel to investigate into the residents of the apartment complex where the shooting took place, however Applicant did not know any of their names. Applicant stated he requested Trial Counsel to retrieve the video feed from the cameras located at the apartment complex.

Applicant stated he requested Trial Counsel so speak to his Uncle Levi, who could provide an alibi. Applicant stated he told Trial Counsel about Uncle Levi seven days before trial. Specifically, Applicant stated he was staying with Uncle Levi during the time the crime occurred. Applicant stated he does not know if Trial Counsel ever spoke to Uncle Levi. Applicant stated Uncle Levi is paraplegic.

Applicant stated there were three eye witnesses who positively identified him as the shooter. However, Applicant stated there was no DNA evidence, no trace evidence, and no weapon. Applicant stated that it was important to attack the credibility of the witnesses. Applicant stated Trial Counsel failed to file a pretrial motion to suppress the photo lineup identification of Applicant. Applicant stated Trial Counsel failed to object to the Investigator Burgess stating he showed the photo line up to both Victim and Cannon. Applicant further

stated Trial Counsel should have objected to Investigator Burgess summarizing Victim pointing Applicant out in the photo lineup with a "bloody finger."

Applicant stated Trial Counsel elicited testimony regarding his flight for two months. Specifically, Applicant referred to Trial Counsel cross examination of Investigator Burgess. Investigator Burgess responded to Trial Counsel's question by stating "I said we did not take him in to custody for two months. We were looking for him. And I had to actually have the assistance of marshal services to take him into custody." (Tr. t. p. 99 lines 4-11):

Applicant stated that Trial Counsel had represented Victim and Broddus Black (Victim's brother). Applicant stated he was in county lock up with Victim and saw Trial Counsel meeting with Victim. Applicant stated he was unaware that he could raise a conflict of interest claim in an attempt to relieve Trial Counsel.

Applicant stated that he wanted to testify during trial, however he would have been impeached with pending burglary—first degree charges. Applicant stated Tasha Cannon (hereinafter "Cannon") had alleged that he broke into her home. Applicant stated this was the motive for naming him in the shooting. Applicant stated he had a "beef" with Victim.

Applicant stated that he filed a motion to relieve counsel and that motion was heard before Judge Cothran. Applicant stated Judge Cothran refused to relieve Trial Counsel. Applicant stated Appellate Counsel should have retrieved the motion hearing transcript and briefed the issue on appeal.

Applicant testified Trial Counsel stated during mitigation that the jury was out for hour and a half and that they deliberate for a short period of time. Applicant felt Trial Counsel should not have brought to the trial judge's attention that the jury deliberate for such a short period of time. Applicant stated he received an illegal sentence of twenty six years for assault and battery

with intent to kill. However, Applicant stated he is now serving a twenty year sentence and the court corrected its mistake.

Following Applicant's testimony, Investigator Skidmore testified. Investigator Skidmore stated that Applicant's family retained his services. Investigator Skidmore stated that if he had been retained for the trial, he would have canvassed the area and attempted to recover the videos from the apartment complex. Investigator Skidmore stated he went to the apartment complex and attempted to retrieve any video footage, however none existed. Investigator Skidmore stated he attempted to locate Cannon, however she has moved to Connecticut. Investigator Skidmore stated that he attempted to talk with Uncle Levi on multiple occasions, however Uncle Levi refused to talk to him. Investigator Skidmore stated he first met with him outside and around multiple people. Investigator Skidmore stated Uncle Levi seemed uneasy and scared. Investigator Levi stated he met with Uncle Levi the following day at his house while he was receiving medical treatment. Investigator Skidmore stated Uncle Levi wanted to verify who he was with Applicant, however Applicant's jail pin number has been out the last few weeks and Applicant has been unable to receive calls. Investigator Skidmore stated PCR Counsel, Tricia Blanchette's phones have been out as well.

Following Investigator Skidmore's testimony, Trial Counsel was called to testify by the State. Trial Counsel stated he has been practicing law for fifty years. Trial Counsel stated he is a public defender in Clarendon County. Trial Counsel stated he was appointed to represent Applicant. Trial Counsel stated the Clarendon County public defender's office consisted of the attorney's only. Trial Counsel explained that they did not have any secretaries, investigator's, or assistants. Trial Counsel stated if he wanted to hire an investigator he would need to request funding from the court. Trial Counsel stated it was not his typical practice to hire an

investigator. Trial Counsel stated he typically talked to family members and conducted his own investigation. Trial Counsel stated he filed for all Rule 5 and Brady material. Trial Counsel stated he reviewed this material with Applicant. Trial Counsel stated he discussed the various elements of the charges and the State's burden of proof with Applicant prior to trial.

Trial Counsel stated he received notice that the trial was set on December 7, 2009. Trial Counsel stated Judge Cothran was well aware that he received only one day notice prior to trial. Trial Counsel stated that he could not recall if Applicant ever attempted to have him relieved as counsel. Trial Counsel stated Applicant did not give him any leads or witnesses to investigate. Trial Counsel stated he had never heard of Uncle Levi or any potential alibi witness. Trial Counsel stated had Applicant told him about Uncle Levi he would have investigated him and filed an alibi notice. Trial Counsel stated that he did talk to Applicant's parents. Trial Counsel stated he went out to the apartment complex and reviewed the scene, the lighting, and learned about the video cameras. Trial Counsel stated he attempted to review the film, but they had already been recorded over. Trial Counsel stated the film was available for only a seven day period. Trial Counsel stated he attempted to argue that the police investigation was bad because they failed to obtain the video tapes.

Trial Counsel stated he was prepared for trial, despite the fact that he received very short notice. Trial Counsel stated if he did not feel prepared for trial he would have made a motion for a continuance. Trial Counsel stated his trial strategy was to impeach the witnesses. Specifically, Trial Counsel referenced the fact that the incident took place in the early morning hours. Trial Counsel stated he argued that the lighting surrounding the apartment complex was very poor, which hindered the witnesses' identification of Applicant. Trial Counsel stated he saw no basis

to object to the photo lineup and had he felt there was an arguable objection to be made he would have made it.

Trial Counsel stated that he did not recall representing Victim or his brother Broddus Black. Trial Counsel stated Applicant never brought to his attention that he allegedly represented Victim or Broddus Black on previous cases. Trial Counsel stated he filed a Rule 5/Brady motion for Applicant on his 2008 burglary—first degree charges. Trial Counsel stated those charges were dismissed on July 8, 2008 and he could not recall who the victim was in that case.

Trial Counsel stated Applicant told him that he did not rob Victim only beat him up because there was “bad blood” between them. Trial Counsel characterized the evidence against the Applicant as “overwhelming.” Specifically, Trial Counsel stated both Applicant and Cannon knew Applicant prior to the crime and were able to positively identify Applicant as the shooter. Trial Counsel stated Cannon’s sister was able to positively identify Applicant as the shooter.

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 at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. Specifically, this Court finds Trial Counsel’s testimony credible and Applicant’s testimony not credible. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

INEFFECTIVE ASSISTANCE OF COUNSEL

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

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, (1984); Butler, 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, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. 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.

Ineffective assistance of trial counsel for failure to make a pretrial motion and/or trial objection to the identification of Applicant.

This Court finds Applicant's allegation that trial counsel was ineffective for failing to make a pretrial motion or trial objection to the identification of the Applicant is meritless. Trial Counsel stated Applicant was positively identified by three separate witnesses. The trial transcript reveals both Victim and Cannon made in court identification of Victim. (Tr. t. p. 28 lines 11-25; Tr. t. p. 69 lines 2-8). Additionally, Investigator Burgess discussed the process of

compiling the lineup, how he presented the lineup to both Victim and Cannon, and described who they identified out of the lineup. (Tr. t. p. 83 line 19—p. 89 line 20). During the evidentiary hearing, Trial Counsel stated that he did not see any basis to challenge or object to the lineup. This Court finds counsels representation of Applicant well within the bounds of “professional norms.” Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland).

Additionally, this Court notes Applicant failed to present any evidence thin support of his claim that Trial Counsel should have objected to the photo lineup. Specifically, Applicant failed to present for this Court’s inspection a copy of the photo lineup, any expert testimony regarding the reliability of the lineup itself, or any witness testimony from either Victim or Cannon regarding their identification of Applicant. 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); See Dempsev v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, as the applicant failed to have an expert testify at the evidentiary hearing, “any finding of prejudice is merely speculative”).

Furthermore, Applicant can show no resulting prejudice due to Trial Counsel’s alleged deficiencies as there is clear evidence of overwhelming guilt. Where there is overwhelming evidence of guilt, a trial counsel’s deficient representation will not be prejudicial. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel’s deficient performance could have reasonably affected the result of defendant’s trial). This Court agrees with Trial Counsel’s characterization of the State’s evidence against Applicant as “overwhelming.” A review of the trial transcript reveals that Applicant was positively identified by three separate witnesses. Two of those three

witnesses made in court identification of Applicant. Even more significant is Trial Counsel's testimony that Applicant admitted his guilt during the course of his representation. Based on the foregoing, this Court finds Applicant has failed to meet his burden of proof. Therefore, this Court finds this allegation should be denied and dismissed with prejudice.

Ineffective assistance of trial counsel for failure to advise Applicant of conflict of interest due to representation of Kelvin and Broddus Black.

This Court finds Applicant's allegation that he received ineffective assistance of counsel due to Trial Counsel's failure to advise him of an alleged conflict of interest to be without merit. "An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007). This Court has further stated that a conflict of interest occurs when "a defense attorney places himself in a situation inherently conducive to divided loyalties." Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008).

Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for a claim of ineffective assistance of counsel arising from multiple representation. Langford v. State, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993) (citing Cuyler v. Sullivan, 446 U.S. 335, 350 (1980); see also Burger v. Kemp, 483 U.S. 776, 783 (1987)). "The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." State v. Gregory, 364 S.C. 150, 152-53, 612 S.E.2d 449, 450 (2005). A defendant need not demonstrate prejudice if there is an actual conflict of interest." Id., 364 S.C. at 153, 612 S.E.2d at 450.

In the instant case, Applicant asserts Trial Counsel represented Victim and his brother, Broddus Black. However, Applicant has failed to present any evidence in support of his

allegation. See Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). Additionally, Trial Counsel stated that he did not recall representing Victim or his brother Broddus Black. Based off of the foregoing, this Court finds Applicant has failed to meet his burden of proof and denies the allegation with prejudice.

Ineffective assistance of trial counsel for failure to raise the victim's motive in bringing the instant charges due to a prior-break in allegation against applicant.

This Court finds Applicant's allegation that he received ineffective assistance of counsel for failing to raise the victim's motive in bringing the instant charges due to a prior-break in allegation against applicant is without merit. Trial Counsel stated he filed a Rule 5/Brady motion for Applicant on his 2008 burglary—first degree charges. Trial Counsel stated those charges were dismissed on July 8, 2008 and he could not recall who the victim was in that case. Trial Counsel further stated that Applicant gave him no leads or witnesses to investigate. Based on the foregoing, this Court finds Trial Counsel's actions were reasonable in the circumstances, and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland).

This Court further finds Applicant can show no resulting prejudice due to Trial Counsel's alleged deficiencies as there is clear evidence of overwhelming guilt. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial). This Court agrees with Trial Counsel's

characterization of the State's evidence against Applicant as "overwhelming." A review of the trial transcript reveals that Applicant was positively identified by three separate witnesses. Two of those three witnesses made in court identification of Applicant. Even more significant is Trial Counsel's testimony that Applicant admitted his guilt during the course of his representation. Based on the foregoing, this Court finds Applicant has failed to meet his burden of proof. Therefore, this Court finds this allegation should be denied and dismissed with prejudice.

Ineffective assistance of trial counsel for introducing evidence of Applicant's flight through cross-examination of Investigator Burgess.

This Court finds Applicant's allegation that he received ineffective assistance of counsel for introducing evidence of Applicant's flight through cross-examination of Investigator Burgess to be without merit. Applicant specifically cites to the following in support of his argument:

Q: You also mention at the very end, you say there were no suspects for two months?

A: No, I do not say no suspects.

Q: I thought you said that.

A: I said we did not take him into to custody for 2 months. We were looking for him. And I had to actually have the assistance of marshal services to take him in to custody.

(p. 99 lines 4-9). This Court finds the testimony elicited on cross-examination of Investigator Burgess was cumulative in nature. Investigator Burgess had previously testified on direct that they "did not apprehend the suspect for 2 months." (p. 93 lines 1-2). This Court notes that it is clear from the record that Trial Counsel was merely attempting to clarify Investigator Burgess comments on direct. Based on the foregoing, this Court finds Trial Counsel's actions were reasonable in the circumstances, and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland).

This Court further finds Applicant can show no resulting prejudice due to Trial Counsel's alleged deficiencies as there is clear evidence of overwhelming guilt. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial). This Court agrees with Trial Counsel's characterization of the State's evidence against Applicant as "overwhelming." A review of the trial transcript reveals that Applicant was positively identified by three separate witnesses. Two of those three witnesses made in court identification of Applicant. Even more significant is Trial Counsel's testimony that Applicant admitted his guilt during the course of his representation. Based on the foregoing, this Court finds Applicant has failed to meet his burden of proof. Therefore, this Court finds this allegation should be denied and dismissed with prejudice.

Ineffective assistance of trial counsel for his comments in mitigation prior to sentencing.

This Court finds Applicant's allegation that he received ineffective assistance of counsel for his comments in mitigation prior to sentencing is meritless. A trial court has broad discretion in imposing criminal sentences within the limits prescribed by law. State v. Franklin, 267 S.C. 240, 226 S.E.2d 896 (1976); Clark v. State, 259 S.C. 378, 192 S.E.2d 209 (1972). The courts normally have no jurisdiction to correct a sentence given within statutory limits. To be entitled to relief, the Applicant must prove that the alleged excessive sentence was the result of partiality, prejudice, oppression or corrupt motive, or that the sentence constitutes cruel and unusual punishment per se. Clark, Id.; State v. Cogdell, 273 S.C. 563, 257 S.E.2d 748 (1979).

Applicant argues that Trial Counsel should not have stated that the jury was out for hour and a half and that they deliberate for a short period of time to the trial court. This Court finds

nothing improper about Trial Counsel's remarks. Based on the foregoing, this Court finds Trial Counsel's actions were reasonable in the circumstances, and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland).

This Court further finds Applicant can show no resulting prejudice due to Trial Counsel's alleged deficiencies as there is clear evidence of overwhelming guilt. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial). This Court agrees with Trial Counsel's characterization of the State's evidence against Applicant as "overwhelming." A review of the trial transcript reveals that Applicant was positively identified by three separate witnesses. Two of those three witnesses made in court identification of Applicant. Even more significant is Trial Counsel's testimony that Applicant admitted his guilt during the course of his representation. Based on the foregoing, this Court finds Applicant has failed to meet his burden of proof. Therefore, this Court finds this allegation should be denied and dismissed with prejudice.

Ineffective assistance of trial counsel for failure to object to Applicant's illegal sentence.

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to object to his illegal sentence is without merit. This Court notes Applicant was sentenced to twenty six year for assault and battery with intent to kill. That sentence exceeded the statutory maximum. The illegal sentence was brought to the court's attention and Applicant was resentenced to twenty years for assault and battery with intent to kill. Therefore, this Court finds Applicant can show no prejudice as he is currently serving a legal sentence.

Ineffective assistance of appellate counsel for failure to obtain transcript and raise Applicant's pro-se motion to relieve counsel on appeal.

This Court finds Applicant's allegation that appellate counsel was ineffective for failing to obtain transcript and raise Applicant's pro-se motion to relieve counsel on appeal is without merit. This Court notes Applicant failed to produce the transcript for this Court's review. 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 PGR hearing, the Applicant could not demonstrate how the failure of counsel to obtain these documents prejudiced the defense).

This Court notes in order to prove prejudice, Applicant must show that had Appellate Counsel raised this issue on appeal she would have been meritorious. See generally Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) ("When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, [the] defendant must show that such claim is *meritorious* and that the verdict would have been different absent the evidence that should have been excluded." (emphasis added)). This Court finds Applicant has failed to show that had Appellate Counsel raised the issue of whether the trial court erred in denying his pro-se motion to relieve counsel it would have been meritorious. Based on the foregoing, this Court finds this allegation should be denied and dismissed.

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 present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

CONCLUSION

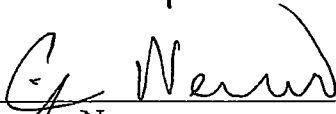
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that 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 21st day of September 2016.


CLIFTON NEWMAN
Presiding Judge

Columbia, South Carolina.