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February 9, 2017

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

RECEIVED

FEB 13 2017

S.C. SUPREME COURT

Re: Brett Howard, 2014-CP-27-00323

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Jasper County 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: Ruston Neely, Esq.; Brett Howard 350845

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM JASPER COUNTY

Court of Common Pleas

Honorable Michael G. Nettles, Circuit Judge

RECEIVED

FEB 13 2017

S.C. SUPREME COURT

Case No.: 2014-CP-27-0323

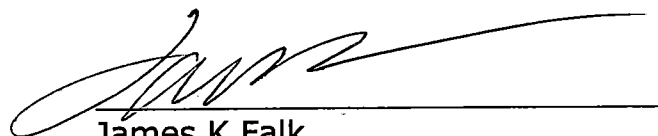
Brett Howard 350845.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner George Brown appeals the Honorable Michael G. Nettles December 20, 2016, Order of Dismissal. Undersigned counsel received notice of entry of the order on February 9, 2017. A copy of the order on appeal is attached hereto.



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

February 9, 2017

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM JASPER COUNTY
Court of Common Pleas
Honorable Michael G Nettles, Circuit Judge

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S.C. SUPREME COURT

Case No.: 2014-CP-27-00323


Bret Howard 350845.....PETITIONER

V.

State of South Carolina.....RESPONDENT

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, Ruston Neely, 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 February, 9, 2017.


James K Falk
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STATE OF SOUTH CAROLINA)
COUNTY OF JASPER)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL CIRCUIT

Brett Howard, #350845,)

Case No. 2014-CP-27-0323

Applicant,)

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

JASPER COUNTY
SOUTH CAROLINA

2017 NOV 31 AM 9:35

FILED

This Court convened an evidentiary hearing into the matter on October 19, 2016, at the Beaufort County Courthouse. Applicant was present at the hearing and represented by James Falk, Esquire. Ruston W. Neely, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant's trial counsel Robert Hughes, Esquire (hereinafter "trial counsel") was present and testified. Testimony was elicited from Applicant. The Court had before it a copy of the trial transcript, the records of the Jasper County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the direct appeal records and the pleadings in this matter. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Jasper County Clerk of Court's orders of commitment. Applicant was indicted by the January 2010 term of the Jasper County Grand Jury for Murder (2010-GS-27-0014) and Possession of a Weapon During the Commission of a Violent Crime (2010-CP-27-0015). Robert Hughes, Esquire and Stephen Plexico, Esquire, represented him. On May 14-16, 2012, the Applicant proceeded to a jury trial pursuant to which he was found guilty as indicted. The Honorable Perry

M. Buckner sentenced the Applicant to confinement for forty (40) years for Murder and five (5) years, concurrent, for the possession charge.

A notice of appeal was filed and an appeal perfected pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967). The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Howard, Op. No. 2014-UP-216 (filed June 11, 2014). The Remittitur was issued on June 27, 2014.

II. ALLEGATIONS

In his application for post-conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
2. Counsel failed to object to a Belcher¹ violation
3. Counsel failed to ask for a lesser included offense

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court reviewed the record in its entirety, listened to the testimony given, and heard the arguments presented at the evidentiary 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. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

In this post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of plea counsel as a ground for relief, Applicant must prove plea counsel's "conduct so undermined the proper functioning of the adversarial process" that the plea proceedings

¹ State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009)

“cannot be relied upon as having produced a just result.” Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel’s performance was deficient. Id. Under this first prong, the proper measure of performance is whether trial counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). Second, any deficient performance must have prejudiced Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 117-18, 386 S.E.2d at 625. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 688.

Applicant has not shown how trial counsel’s representation fell below professional norms. Applicant has not met his burden. For the reasons listed below, this post-conviction application is denied.

A. Ineffective Assistance of Counsel

This general allegation is unfounded. This Court finds trial counsel’s testimony credible. Trial counsel testified he was admitted to practice law in 2004 and has almost exclusively limited his practice to criminal law. The Court finds trial counsel adequately investigated this case. Trial counsel informed Applicant of his constitutional rights and specifically his right to a jury trial.

Trial counsel met with Applicant on numerous occasions and reviewed discovery. Trial counsel engaged in plea negotiations and was able to obtain an offer of voluntary manslaughter. Applicant testified he did not accept the offer because he was not guaranteed a specific amount of time and more importantly that he was not guilty. He testified at the PCR hearing that he did not fire a gun nor did he kill the victim. This Court finds there is no merit to this claim. Therefore, this allegation is dismissed.

B. Belcher Violation

Given the facts of this case, the trial judge's charge allowing the jury to infer malice was appropriate. The facts of this case did not give rise to the lesser included charges of voluntary manslaughter, involuntary manslaughter, or the defense of accident. As part of the defense strategy, there was no mitigation evidence presented at trial. Additionally, there was evidence of express malice presented at trial and Applicant claimed complete innocence. Therefore, there was no evidence "presented that would reduce, mitigate, excuse or justify the killing." State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). Because there was no evidence to reduce, mitigate, excuse, or justify the killing, Belcher does not apply to the facts of this case. The testimony of both trial counsel and Applicant was a verdict of not guilty was the only verdict sought. This Court finds there is no merit to this claim. Therefore, this allegation is dismissed.

C. Lesser-included Offense

For the same reasons given in the Belcher allegation, this Court finds the jury charge was appropriate and a lesser-included offense would have been inappropriate given the facts and circumstances of the case. Therefore, this allegation is dismissed.

IV. CONCLUSION

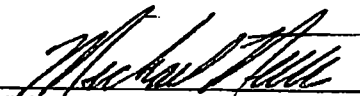
Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from receipt 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 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRPC, provides that if Applicant wishes to seek appellate review, his post-conviction relief attorney must serve and file a notice of appeal on Applicant's behalf. Applicant and his attorney are directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 20 day of December, 2016.


MICHAEL G. NETTLES
Presiding Judge
Fourteenth Judicial Circuit

Florence, South Carolina

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Clerk of Court
Supreme Court of South Carolina
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