

VOL. II of II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Roger L. Couch, Circuit Court Judge

RECEIVED

SEP 30 2015

S.C. Supreme Court

KENNETH D. SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000696

APPENDIX

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

ALICIA OLIVE
Assistant Attorney General

P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

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Applicant called Adam Solesbee, currently incarcerated with the South Carolina Department of Corrections, as a witness. This Court advised Solesbee of his right to remain silent, right to an attorney and right to refuse to answer any questions or terminate answering questions at any time. Solesbee stated that he wanted to invoke his 5th amendment right and remain silent. Applicant and the Respondent stipulated that the statement introduced as Applicant's Exhibit #1, was the statement given by Adam Solesbee previously provided in discovery materials.

Counsel testified that the Applicant provided an inconsistent defense, in that he claimed he never had a gun, but yet wanted to claim self-defense. Counsel testified that he reviewed all discovery materials with the Applicant prior to trial, including witness statements. Counsel testified that he was aware that Solesbee did not identify the Applicant in his statement, but Counsel testified that he felt Solesbee would be a risky witness for the defense. Counsel testified that Solesbee had been friends with the victim and in the victim's car when he was shot and very well could have identified the Applicant in the court room even though he had not done so prior to trial. However, Counsel acknowledged that the statement by Solesbee was more consistent with the Applicant's version of events than the other witness statements.

Counsel testified that he saw no arguable basis to object to the trial court's jury instructions on inference of malice or breach of peace. However, Counsel testified that had he felt there was a basis, he would have made an objection.

In making a fair assessment of attorney performance, a court must make every effort 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 v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984).

Del
P 5

2015 MAR 27 AM 8:46
 M. HOPE BLAKEY
 CLERK OF COURT
 SPARTANBURG COUNTY

There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and the "defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* This Court finds that the Applicant has failed to meet his burden of proof as to this claim. This Court can find no deficiency on Counsel's behalf as it relates to his representation of Applicant at trial. Counsel fully cross-examined the State's witnesses as to their inconsistencies or potential holes in their testimony.

Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Bassette v. Thompson*, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993); *Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998). This Court cannot speculate as to what, if anything, Solesbee might have said at trial. In light of his relationship with the victim and actions on the night of the shooting, this Court would be forced to speculate that his testimony would have been more harmful than helpful and cannot find the required prejudice.

The Applicant alleged that Counsel was ineffective for failing to object to the court's charge regarding the inference of malice and as to the charge of breach of peace. This Court finds no legal basis for objecting to the jury charge as to either charge and cannot find Counsel

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CLERK OF COURT
PART AND BOND COUNTY
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M. HEPE BLACKEY

deficient in failing to object. Specifically, as to the Applicant's claims that the charge violated State v. Belcher, the "permissive inference charge concerning the use of a deadly weapon remains a correct statement of the law where the only issue presented to the jury is whether the defendant has committed murder (or assault and battery with intent to kill)." State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009). Seeing as the Applicant raised the self-defense defense solely at the post-conviction relief hearing and not at trial, this Court finds that the jury charge was not improper.

Therefore, this Court finds that the Applicant has failed to meet his burden of proof as to this claim and it is denied and dismissed.

Summary

This Court finds in regards to the allegations of ineffective assistance of counsel, Applicant's testimony as a whole was not credible. This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in his representation, and that Counsel's conduct does not fall below the objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under professional norms. The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes the Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, this allegation is denied.

CLERK OF COURT
SPARTANBURG COUNTY
2015 MAR 27 AM 8:26
M. HOPE BLAKLEY

Handwritten signature/initials

CONCLUSION

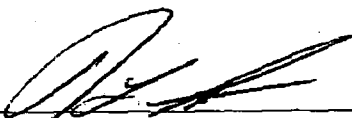
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court cautions 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 this 26th day of March, 2014.



 ROGER L. COUCH
 Presiding Judge

CLERK OF COURT
 SPARTANBURG COUNTY
 2015 MAR 27 AM 8:46
 M. HOPE BLACKLEY

WITNESSES

[Signature]

Spartanburg County Sheriff's Office

- 1. SENTENCE MADE
- 2. REPORT ENDED **Computer**
- 3. CARD FILLED
- 4. INDEXED
- 5. CHECKED WARRANTS
- 6. CHECKED WARRANT NUMBER **Computer**
- 7. ASSESSMENT AND M-1 CARD MADE
- 8. TRAFFIC VIOLATIONS COPY

ACTION OF GRAND JURY

[Signature]

Foreperson of Grand Jury
Date: 10-24-08

VERDICT

QUILTY

[Signature]

Foreperson of Petit Jury
Date: 9-10-09

DOCKET NO. **08-GS-42-6013**

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

OCT 27 2008

TERM

THE STATE

vs.

KENNETH DANFELIX SMITH

Indictment for

MURDER

SC Code 16-03-0010, 0020

CDR Code 116

Class FEL-EXM

FILED
CLERK OF COURT
SPARTANBURG COUNTY

2008 NOV -3 AM 10:40

MARC KITCHENS

M-021236

STATE OF SOUTH CAROLINA

County/

Municipality of

Spartanburg

THE STATE
against

Kenneth Smith

Address:

Phone: _____ SSN: _____

Sex: _____ Race: _____ Height: _____ Weight: _____

DL State: _____ DL #: _____

DOB: _____ Agency ORI #: SC0420100

Prosecuting Agency: Spartanburg Public Safety Department

Prosecuting Officer: Adrian T Patton - 1080

Offense: Murder / Murder

Offense Code: 0116

Code/Ordinance Sec: 16-03-0010, 0020

This warrant is CERTIFIED FOR SERVICE in the

County/ Municipality of

The accused

is to be arrested and brought before me to be
dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to

defendant

Kenneth Smith

on

03/29/08

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

General Sessions
180 Magnolia Street
P O Box 3483
Spartanburg, SC 29304

ORIGINAL

RECEIVED

APR 01 2008

BY:

ORIGINAL

ORIGINAL

ORIGINAL

County/ Municipality of

Spartanburg

HDC

AFFIDAVIT

April 21, 2003
SCCA 518

Personally appeared before me the affiant Adrian T Patton who

being duly sworn deposes and says that defendant Kenneth Smith

did within this county and state on or about 03/28/2008

violate the criminal laws of the

State of South Carolina (or ordinance of County/ Municipality of

Spartanburg)

in the following particulars:

DESCRIPTION OF OFFENSE Murder / Murder

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:

That on March 28, 2008 in the city of Spartanburg, one Kenneth Smith did, with malice and aforethought, cause the death of
JERRY DE ROSA BY SHOOTING THE VICTIM.

Attest:

W. D. Little
CLERK OF COURT
SPARTANBURG COUNTY

BY: _____ D.C.
DATED 4/1/08 Signature of Affiant

STATE OF SOUTH CAROLINA

County/ Municipality of

Spartanburg

Affiant's Address 145 West Broad Street
Spartanburg, SC 29306

Affiant's Telephone _____

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 3/28/2008 defendant Kenneth Smith

did violate the criminal laws of the State of South Carolina (or ordinance of

County/ Municipality of Spartanburg) as set forth below:

DESCRIPTION OF OFFENSE: Murder / Murder

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or
her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as
soon thereafter as is practicable
Sworn to and subscribed before me

on 03/29/2008

Judge's Address Spartanburg County Judicial Center
Spartanburg, SC 29306-2335

Judge's Telephone (864)596-3424

Signature of Issuing Judge
Frederick "Fred" Douglas Caton

Judge Code: 5013

Issuing Court: Magistrate Municipal Circuit

ORIGINAL

ORIGINAL

ORIGINAL

507

508

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

STATE VS.

Kenneth Smith

AKA:

Race: Sex: Age:

DOB: SS#:

Address:

DL#: SID#:

In disposition of the said indictment comes now the Defendant who was TO: Murder

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2008GS4206013

A/W#: M021236

Date of Offense: 3/28/2008

S.C. Code § 16-03-0010

CDR Code #: 0116

SENTENCE SHEET

CONVICTED OF or PLEADS

in violation of § 16-3-10 of the S.C. Code of Laws, bearing CDR Code # 0116

NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC w/minor 1st or Lewd Act) §17-25-45

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury. The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST: D. B. Balsa 15264 SC Bar# Defendant; [Signature] 6057 SC Bar# Attorney for Defendant

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center, for a determinate term of life days/months/years or under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on: The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered Total: \$ plus 20% fee: \$ Payment Terms: set by SCDPPPS

PTUP days/hours Public Service Employment Obtain GED Attend Voc. Rehab. or Job Corp. May serve W/E beginning Substance Abuse Counseling Random Drug/Alcohol testing Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ beginning \$ paid to Public Defender Fund Other:

Table with columns for Recipient, *Fine, and amounts. Includes items like § 14-1-206 (Assessments 107.5%), § 14-1-211(A)(1) (Conv. Surcharge) \$100, § 14-1-211(A)(2) (DUI Surcharge) \$100, § 56-5-2995 (DUI Assessment) \$12, § 56-1-286 (DUI Breath Test) \$25, § 47.12 (Public Def/Prob) \$500, § 14-1-212 (Law Enforce. Funding) \$25, § 14-1-213 (Drug Court Surcharge) \$100, § 50-21-114 (BUI Breath Test Fee) \$50, § 56-5-2942(J) (Vehicle Assessment) \$40/ea, § 90.7 (SCCJA Surcharge) \$5, 3% to County (if paid in installments) \$3.90, TOTAL \$133.90

Appointed PD or appointed other counsel, §47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk: J. Camp; Court Reporter: Linda Moffitt; SCCA/217 (06/2009)

PRESIDING JUDGE: [Signature]; Judge Code: 2; Sentence Date: September 10, 2009

WITNESSES

Spartanburg Public Safety

1. SENTENCE MADE

2. REPORT ENDED

Computer

3. CARD FILLED

4. INDEXED

5. CHECKED WARRANTS

6. CHECKED SIGNATURE

7. ASSESSMENT AND FINES WARRANT NUMBER

Computer

8. DIRECT PRINT FROM COPY

DOCKET NO.

09-GS-42-3470

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

JUL 20 2009

TERM

CLERK OF COURT
SPARTANBURG COUNTY
2009 JUL 27 AM 10:23
MARC KITCHENS

THE STATE
vs.

Kenneth Smith

ACTION OF GRAND JURY

True Bill

[Signature]

Foreperson of Grand Jury

Date:

17 Jul 09

VERDICT

Guilty

[Signature]

Foreperson of Petit Jury

Date:

9-20-09

Indictment for

BREACH OF PEACE OF A HIGH AND
AGGRAVATED NATURE

SC Code: 17-25-30, 22-5-150

CDR Code: 0955

Class MISUN

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions, convened on JUL 17 2009 the

Grand Jurors of Spartanburg County present upon their oath:

BREACH OF PEACE OF A HIGH AND AGGRAVATED NATURE

That the defendant did in Spartanburg County on or about March 28, 2008 disturb and break the peace of the general public on Hayne Street in Spartanburg, SC, between 5:00 p.m. and 6:00 p.m., in a high and aggravated nature in that he went armed offensively, and fired a pistol or firearm while at the location at a time while vehicle(s) were traveling on Hayne Street, placing persons in the vehicle(s) in grave and serious danger of violent injury or death, in violation of the laws of the State of South Carolina, and Section 22-5-150 of the Code of Laws of South Carolina, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

D. B. Baha
DEPUTY SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF SPARTANBURG
STATE VS.

INDICTMENT/CASE#: 2009GS4203470

Kenneth Smith

A/W#: 2009GS4203470

AKA:

Date of Offense: 3/28/2008

Race: Sex: Age:

S.C. Code §: C/L 17-25-0, 22-5-150

DOB: SS#:

CDR Code #: 0955

Address:

DL#: SID#:

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was TO: Breach / Breach of peace, aggravated in nature

CONVICTED OF or PLEADS

in violation of § C/L 17-25-0, 22-5-150 of the S.C. Code of Laws, bearing CDR Code # 0955
 NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC §17-25-45 w/minor 1st or Lewd Act)

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury. (defendant's initials)

The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST: B. B. Bulsa 15264 x Kenneth Smith T. P. W. W. W. 6057
BULSA, DERRICK SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center, for a determinate term of 10 days/months/years or under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

- CONCURRENT or CONSECUTIVE to sentence on:
- The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
- The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP days/hours Public Service Employment
Total: \$ plus 20% fee: \$
Obtain GED
Payment Terms:
Attend Voc. Rehab. or Job Corp.
 set by SCDPPPS
May serve W/E beginning
Substance Abuse Counseling
Random Drug/Alcohol testing
Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ beginning
\$ paid to Public Defender Fund
Other:

Recipient:

*Fine:	\$
§ 14-1-206 (Assessments 107.5 %)	\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100 \$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100 \$
§ 56-5-2995 (DUI Assessment)	\$12 \$
§ 56-1-286 (DUI Breath Test)	\$25 \$
§ 47.12 (Public Def/Prob)	\$500 \$
§ 14-1-212 (Law Enforce. Funding)	\$25 \$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$100 \$
§ 50-21-114(BUI Breath Test Fee)	\$50 \$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea \$
§ 907 (SCCJA Surcharge)	\$5 \$ 5.00
3% to County (if paid in installments)	\$ 3.90
TOTAL	\$ 133.90

Appointed PD or appointed other counsel, §47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk J. Camp
Court Reporter: Linda Moffitt
SCCA/217 (06/2009)

PRESIDING JUDGE [Signature]
Judge Code: 2 1 0 1 5 1 3
Sentence Date: September 10, 2009