THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Circuit Court

The Honorable Frank R. Addy, Jr., Circuit Court Judge

Case No. 2015-CP-42-0150

State of South Carolina,

Respondent,

v.

Charles L. Anderson, # 00338944,

Appellant.

Notice of Appeal

Charles L. Anderson appeals the order of the Honorable Frank R. Addy, Jr., dated April 8, 2017. Appellant received written notice of entry of this order on April 17, 2017.

April 21, 2017

Sincerely,

Brandt Rucker
128 Millport Circle, Suite 200
Greenville, South Carolina 29607
(864) 271-9925
Attorney for Appellant

cc:
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Case No. 2015-CP-42-0150

State of South Carolina

Respondent,

v.

Charles L. Anderson
#00338944,

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina, assistant Attorney General by depositing a copy of it in the United States Mail, postage prepaid, on April 21, 2017, addressed to its attorney of record, Alicia Olive, PO Box 11549, Columbia, S.C. 29211

May 1, 2017

s/ 

Brandt Rucker
128 Millport Circle, STE 200
Greenville, S.C. 29607
Attorney for Appellant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
Charles L. Anderson, #338944,	)	C/A No.: 2015-CP-42-0150
Applicant,	)	
v.	)	**ORDER OF DISMISSAL**
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of an Application for Post-Conviction Relief filed January 12, 2015. Respondent made its Return on September 8, 2015, and amended Return and Motion for More Definite Statement on July 21, 2016. Applicant amended his Application on October 24, 2016.

The Court convened an evidentiary hearing into the matter on November 7, 2016, at the Spartanburg County Courthouse. Applicant was present at the hearing and represented by J. Brandt Rucker, Esquire. Alicia A. Olive, Esquire of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Christopher P. Thompson, Esquire also testified. The Court had before it a copy of the trial transcript, the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, Applicant's records from the South Carolina Department of Corrections, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Charles L. Anderson ("Applicant") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk

of Court. Applicant was indicted at the August 2011 term of the Spartanburg County Grand Jury for murder (2011-GS-42-5098) and armed robbery (2011-GS-42-5097). Christopher P. Thompson, Esquire represented Applicant. Abel Gray, Esquire and Daniel Cude, Esquire prosecuted the case. On October 1–4, 2012, Applicant was tried before the Honorable Roger L. Couch and a jury. The jury found Applicant guilty as indicted. Judge Couch sentenced Applicant to concurrent terms of life for murder and 30 years for armed robbery.

A timely Notice of Appeal was filed on Applicant's behalf pursuant to Anders v. California.[1] The South Carolina Court of Appeals dismissed Applicant's appeal in an unpublished opinion. State v. Charles Anderson, 2014-UP-108 (Filed March 12, 2014). The Remittitur was returned on March 28, 2014.

II. ALLEGATIONS

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

1. Ineffective assistance of counsel, in that:
    a. Counsel failed to request or object to a jury instruction on lesser included offense;
    b. Counsel failed to object to the trial judge's mandatory presumption language and burden-shifting language in the jury instruction on malice;
    c. Counsel failed to object to an unconstitutional constructive amendment of the indictment through misleading the jury instructions;
    d. Counsel failed to object to the joinder of trial due to the unfair prejudice and failure of the State to indict Applicant for conspiracy or criminal conspiracy, and counsel failed to object to the joinder without a consolidation hearing being held; and
    e. Counsel failed to object to the lack of specificity in the indictment for armed robbery.
2. "Violation of 6th Amendment Bruton's Sixth," in that:
    a. "Powerfully incriminating extrajudicial statement";
3. "Violation of SCrimP Rule 5 Brady Violation," in that:

[1] 386 U.S. 738 (1967).

a. "Failure to support [the Applicant's] Brady motion of discovery."

At the evidentiary hearing, Applicant proceeded only on the following allegations:

1. Counsel was not prepared
2. Counsel failed to object to a burden-shifting charge
3. Applicant was never indicted on some charges
4. Counsel was deficient in failing to ask to sever Applicant' trial from his co-defendants
5. Failing to object to lack of specificity in the armed robbery indictment

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility. The Court has weighed the 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.

A. Summary of Evidence Adduced at Trial

Applicant was tried with his co-defendant, Lauri Danielle Hollis, for the murder and armed robbery of Stephen Means. Molly Bogan testified she was present at the apartment complex when the shooting occurred. (Tr. at 179-82). She testified she saw Hollis and heard her talking about someone being a snitch and there was a group gathered around her. (Tr. at 183-86). She heard a gunshot, saw the victim fall, saw Hollis near the victim with about four other people, and saw them scatter after the gunshot. (Tr. at 184-86). Bogan testified she saw a gun in someone's hand, that she did not know him then and still did not know him, but she identified him in court as Applicant. (Tr. at 186). She denied seeing Hollis or anyone else with a gun. (Tr. at 187). Counsel cross-examined Bogan about her identification of Applicant. (Tr. at 190-92). She admitted could not identify Applicant in a photo line-up, but testified "I see him face-to-face

right now." (Tr. at 193).

The victim's sister testified she saw him just before he was shot and that he was wearing a necklace with a Stewie (from the cartoon Family Guy) charm. (Tr. at 163). The victim's cousin, Anthony Kelly, testified the victim wore this necklace every day. (Tr. at 226). Kelly saw Hollis at ~~had~~ a party after the victim's death, and she was wearing the victim's necklace. (Tr. at 231). Jennifer Watson testified she recovered the victim's belongings from the hospital and that she did not recover a necklace from those items. (Tr. at 240).

Lead investigator Brian Stokes testified he identified Charles Jackson and Quartez Lyles as other potential suspects. (Tr. at 253). He testified he collected a buccal swab from Jackson. (Id.). Buccal swabs were also collected from Applicant, Hollis, Feishunti Clark, (Tr. at 342), and Quartez Lyles. (Tr. at 371-72).

Applicant signed an authorization form giving officers consent to search his room. (Tr. at 256-57). Officer Christopher Layton testified that pursuant to the search warrant, they obtained a set of black overalls and a silver 9mm pistol, which was found under Applicant's mattress and contained two 9mm rounds inside. (Tr. at 322). Officer Ed Guthro testified he collected a shell casing, Styrofoam cups, a juice bottle, and photographs from the scene. (Tr. at 336-37). Ira Parnell, qualified as an expert in firearms and tool mark identification, testified the fired bullet and fired cartridge case were both fired from the 9mm pistol. (Tr. at 429-30). Dr. David Wren testified he removed a medium-caliber, copper-jacketed lead bullet from the victim. (Tr. at 289-91). Stephanie Stanley, qualified as an expert in forensic DNA analysis, testified the DNA from the grip of the pistol contained a mixture of at least three individuals. (Tr. at 452). She testified Applicant could not be excluded, but that Hollis, Clark, Lyles, and Jackson could all be excluded. (App. p. 453). Gunshot residue was found on Hollis's clothing. (Tr. at 414-16).

In his closing argument, Counsel pointed out that two witnesses identified the shooter as having dreadlocks and that Applicant did not have dreadlocks. (Tr. at 560-61). He also pointed out that the victim's sister told officers she saw "guys in white T-shirts" chasing the victim right before the shots were fired, but that Applicant was wearing black overalls. (Tr. at 561). He also pointed out that Molly Bogan failed to identify Applicant in two photo lineups. (Tr. at 561). Counsel also pointed out that the State did not present as witnesses Charles Jackson or Quartez Lyles though they had also been charged in connection with the murder and armed robbery. (Tr. at 563). Counsel argued "the only thing tying [Applicant] to the scene is Molly Bogan, whose credibility is minimal at best." (Tr. at 565).

B. Summary of Testimony Presented at Evidentiary Hearing

Applicant testified he met with counsel four or five times prior to trial for about twenty minutes each time. Applicant testified he did not feel Counsel was prepared to go to trial. He stated Counsel reviewed discovery with him but that the solicitor only gave him "certain things on [his] Rule 5." Applicant testified Counsel should have objected to the malice charge or asked for a curative instruction. Applicant testified the State had offered a plea deal for thirty years and he rejected the offer because thirty years seemed like a life sentence.

Counsel testified he has been practicing criminal law since 2004. He was appointed eighteen months prior to Applicant's trial. Counsel testified he filed the appropriate discovery motions. He testified he met with Applicant nine times for a total of eleven hours, and that during these meetings, he reviewed discovery with Applicant, including all paper discovery and the recorded statements of Applicant's co-defendant, Hollis. He testified he and Applicant also discussed everything Applicant knew about the facts of the case. Counsel testified Applicant did not deny being present at the scene, but told him that Lyles was the shooter and that he brought

the gun to Applicant's home. Counsel testified he pursued everything Applicant told him about the facts of the case. Counsel testified that as part of his investigation, he pursued Lyles as the shooter. He also stated that the police reports contained information about additional witnesses, and he went to the apartments to try to speak to some of those witnesses but was unable to find any witnesses who would have been helpful to Applicant. Counsel testified he felt he had enough time to meet with Applicant, had sufficient time to prepare his case for trial, and felt prepared for trial.

Counsel testified Applicant was identified at the scene and his home was searched pursuant to a search warrant and the murder weapon was found in his house under his mattress and that the weapon had Applicant's DNA on the trigger. His overall theory of the case was that Hollis was the shooter, and he pursued this theory in preparing for trial. Counsel testified he was also trying to suggest Lyles was the shooter. Counsel stated he knew witnesses would identify Applicant as the shooter, but Hollis had gunshot residue on her clothes. Counsel testified he reviewed applicable defenses and his overall strategy and theory with Applicant. Counsel testified he did not move to sever because he felt it helped Applicant's case to have Hollis tried at the same time because her appearance matched witnesses' description of the shooter. He testified that Hollis did not testify and nothing came into trial other than what she said to Bogan. Counsel testified Bogan would have been called to testify even if the trials had been separated.

Counsel testified that Bogan's testimony and the connection of the murder weapon to Applicant were very damaging. He testified Bogan failed to identify Applicant in a lineup and that he had no reason to request a Neil v. Biggers hearing. Counsel testified Bogan identified Applicant in Court as the person she saw holding the gun and that he cross-examined her on her inability to identify him in a lineup. Counsel testified he had no basis to object to the jury charge.

He felt the charge was accurate and balanced. Counsel testified that he likewise had no reason to challenge the indictment. He testified he was expecting the charge of hand-of-one, hand-of-all.

C. Ineffective Assistance of Trial Counsel

In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. 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.

Failure to prepare for trial

Counsel testified he met with Applicant nine times for a cumulative total of about eleven hours and that in these meetings he reviewed the State's evidence with Applicant and discussed Applicant's knowledge of the facts, any available defenses, and trial strategy. This Court finds that based upon the testimony of Counsel at the hearing, trial counsel was extensively prepared for trial and articulated a wise trial strategy. Applicant made no showing that Counsel's trial preparation fell below an objective standard of reasonableness and has therefore failed to overcome the presumption that Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. See Strickland v. Washington, 466 U.S. 668, 690 (1984).

Additionally, Applicant presented no evidence that he was prejudiced by the alleged failure to Counsel to prepare for trial. See Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (holding PCR applicant was not entitled to relief where he failed to show how counsel's lack of preparation prejudiced him); See also Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (holding, where applicant alleged counsel was ineffective for failing to call certain witnesses, applicant's "mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice."). Applicant has presented absolutely no evidence of what information Counsel failed to uncover. Therefore, Applicant has failed to prove prejudice with respect to this allegation. Because Applicant has failed to demonstrate either deficiency or prejudice, this allegation is denied and dismissed.

Failure to move to sever

Applicant alleges counsel was deficient for failing to move to sever his and Hollis' trial. Applicant has failed to show that Counsel's conduct in not moving to sever the trials fell below

an objective standard of reasonableness. First, Counsel testified he had no reason to ask for severance and that regardless, he felt it was actually helpful for Applicant to be tried with Hollis. He testified and the record reflects that Hollis had gunshot residue on her clothing and that her appearance matched the witnesses' descriptions of the shooter. This Court finds Counsel articulated a credible reason for not moving to sever the trials, namely, that co-defendant Hollis most closely resembled the description of the shooter. Where Counsel articulates a valid reason for employing a certain strategy, his conduct will not be deemed ineffective assistance. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992))). Accordingly, it helped Applicant that Hollis was tried with him.

Second, Applicant has made no showing that he would have been entitled to severance in this case had Counsel made such a request. Applicant was not entitled to a separate trial from his co-defendant as a matter of right. State v. Dennis, 337 S.C. 275, 281, 523 S.E.2d 173, 176 (1999) ("Criminal defendants who are jointly tried for murder are not entitled to separate trials as a matter of right.") (citations omitted). Where such a motion is made, the decision to sever is addressed to the sound discussion of the trial court and "should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a co-defendant's guilt." Id. (citing Zafiro v. United States, 506 U.S. 534 (1993)). A defendant appealing a judge's refusal to sever must also show he was prejudiced as a result of being jointly tried. Id. In this case, Counsel testified Molly Bogan's testimony and the murder weapon were both very damaging to Applicant's case. However, Counsel testified that Bogan's testimony would have come in regardless of whether Hollis was tried with Applicant. In addition, severance of the trials would not have prevented the

introduction of the weapon because it was found pursuant to a search that was conducted of Applicant's room with Applicant's consent. Accordingly, Applicant has failed to show that, had the motion been made, he would have been entitled to severance.

In light of these circumstances and in light of counsel's reasoned decision that he need not ask to sever Applicant and Hollis' trials, this Court finds Counsel was not deficient. In addition, this Court finds there is no reasonable probability the outcome of trial would have been different but for the alleged error of counsel in declining to move to sever the trials because Applicant made no showing that he would have been entitled to a severance of the trials and this Court finds it *did* help Applicant's case that he was tried with Hollis. Accordingly, this allegation ~~and it~~ is denied and dismissed.

Failure to object to lack of specificity in indictments

Similarly, this Court finds Counsel was not ineffective for failing to request greater specificity in the indictment. An indictment is a "notice document." State v. Tumbleston, 376 S.C. 90, 95, 654 S.E.2d 849, 852 (Ct. App. 2007) (citing S.C. Const. art. I, § 11; S.C. Code Ann. § 17-19-10 (2003)). That an "indictment could be more definite or certain is irrelevant." State v. Tumbleston, 376 S.C. 90, 97, 654 S.E.2d 849, 853 (Ct. App. 2007) (citing State v. Gentry, 363 S.C. 93,102-03, 610 S.E.2d 494, 500 (2005)). An indictment is sufficient if "it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet." State v. Ham, 259 S.C. 118, 129, 191 S.E.2d 13, 17 (1972) (citing State v. McIntire, 221 S.C. 504, 509, 71 S.E.2d 410, 412 (1952) ("The general rule on this question is that the offense must be so described that the accused may know how to answer the charge, the court what judgment to pronounce, and conviction or acquittal thereon may be pleaded in bar to any subsequent prosecution.").

The indictment charging Applicant with murder stated that Applicant "did in Spartanburg County on or about April 7, 2011, feloniously, willfully, and with malice aforethought, cause the death of Stephen Means by shooting the victim with a handgun, and that the victim died as a proximate result, all in violation of" §§ 16-3-10, -20 [of the] South Carolina Code of Laws." Counsel testified he had no reason to object to challenge the indictments. This Court finds that as a notice instrument, the indictment was sufficient to place Applicant on notice of the charge for which he would have to answer. Therefore, Counsel was not deficient for not challenging the murder indictment. In addition, given the discovery provided to Applicant, any lack of specificity in the indictment did not prejudice Applicant because he was on notice concerning the allegations. Accordingly, Applicant has failed to prove either deficiency or prejudice, and this allegation is denied and dismissed.

Failure to object to burden-shifting charge on Malice

Applicant has failed to demonstrate deficiency or prejudice with respect to this allegation. At trial, the court gave the following instructions regarding malice:

> Malice is hatred or ill will or hostility toward another person. [It is] the intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury, or under circumstances where the law might infer an evil intent.
>
> . . .
>
> Malice aforethought can either be expressed or inferred; in other words, proved by circumstantial evidence. These terms "expressed" and "inferred" malice do not mean different kinds of malic. It however, refers to the manner in which malice might be shown to have existed. That is either by direct evidence or by inference from the facts and circumstances which have been proven. Express malice is shown when a person speaks words which express hatred or ill will for another person, when the person prepares beforehand to do the act which was later accomplished. . . .
>
> Malice can be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when a deed was done with a deadly weapon.

(Tr. at 612-13).

This Court has reviewed the trial judge's instructions on malice and finds the instruction comports with the law. See, e.g., State v. Price, 400 S.C. 732 S.E.2d 652 (Ct. App. 2012) (finding no error where trial judge instructed on inferred malice where there was no evidence in the record that could reduce, mitigate, excuse, or justify the crime). Likewise, the Court does not find that the instruction was unduly confusing to the jury. Applicant has failed to prove that Counsel had any basis to object to the instruction or that any prejudice resulted from the lack of objection. See id. Accordingly, Applicant has failed to show either deficiency or prejudice with respect to this allegation.

Applicant was never indicted on some charges

This Court finds the record and charging documents do not support this allegation. In addition, Applicant has failed to present any evidence in support of this allegation. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985) ("In a PCR action, Applicant bears the burden of proving the allegations in his application."). Accordingly, this allegation is dismissed.

C. 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, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

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 PCR counsel's 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), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is 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 8th day of April, 2017.

FRANK R. ADDY, JR.
Presiding Judge
Seventh Judicial Circuit

Greenwood, South Carolina

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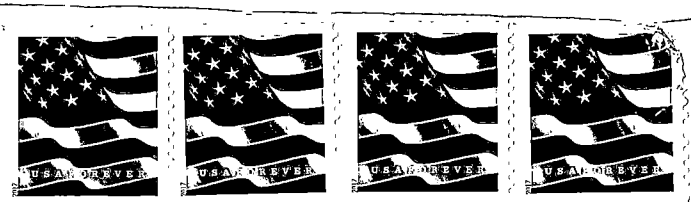

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