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*Working on your behalf*

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May 27, 2017

Daniel E. Shearouse, Clerk
The Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re.: Anthony Carter v. State
2015-CP-29-00075

Dear Clerk Shearouse:

Please find enclosed the following documents in reference to the above listed case:

1- Notice of Appeal
2- Proof of service
3- Order Denying PCR Relief

Thank you and please feel free to contact me with any additional questions or concerns. Please note that I have also sent all of this information to the South Carolina Commission on Indigent Defense and have asked them to handle this appeal from here forward.

Sincerely Yours,

Nathan Sheldon
The Law Office of Nathan J. Sheldon

RECEIVED
JUN 05 2017
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

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Case No. 2015-CP-29-00075

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State of South Carolina, Respondent,

v.

Anthony Carter, Applicant.

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NOTICE OF APPEAL

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Anthony Carter appeals the order of the Honorable W. Jeffrey Young dated May 10, 2017 denying his request for post-conviction relief. Applicant received written notice of entry of this order on May 18, 2017.

May 30, 2017

Nathan J. Sheldon
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Attorney for Applicant

Other Counsel of Record:
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM LANCASTER COUNTY
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PROOF OF SERVICE

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I certify that I have served the Notice of Appeal on DeShawn Mitchell with the Attorney General's Office by depositing a copy of it in the United States Mail, postage prepaid, on May 30, 2017 mailed to Post Office Box 11549, Columbia, South Carolina 29211-1549.

May 30, 2017

Nathan Sheldon
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803-909-9343
Attorney for Appellant

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF LANCASTER | ) | SIXTH JUDICIAL CIRCUIT |
| | ) | |
| Anthony Carter,<br>S.C.D.C. No. 292039 | ) | **C.A. No. 2015-CP-29-0075** |
| | ) | |
| Applicant, | ) | |
| | ) | |
| v. | ) | **ORDER OF DISMISSAL**<br>**(with prejudice)** |
| | ) | |
| State of South Carolina, | ) | |
| | ) | |
| Respondent. | ) | |



This matter comes before the Court by way of a post-conviction relief (PCR) application filed on January 13, 2015. Respondent subsequently filed its responsive pleadings. An evidentiary hearing into the matter was convened on January 10, 2017, at the Lancaster County Courthouse. The Applicant was present and testified in his defense. The Applicant's trial counsel, Michael H. Lifsey, Esquire, also testified. The Applicant was represented by Nathan J. Sheldon, Esquire. Respondent was represented by Patrick Schmeckpeper, Esquire, of the South Carolina Attorney General's Office.

## PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Lancaster County Clerk of Court's orders of commitment. The Applicant was indicted at the August 2010 term of the Lancaster County Grand Jury for murder (2010-GS-29-1000). Michael Lifsey, Esquire, represented him. Applicant proceeded to a jury trial pursuant to which he was found guilty as indicted. On November 14, 2011, the Honorable J. Ernest Kinard, Jr., sentenced the Applicant to thirty-two years imprisonment.

A notice of appeal was filed on Applicant's behalf and an appeal was perfected by

Kathrine H. Hudgins, Esquire. The South Carolina Court of Appeals affirmed the Applicant's conviction. State v. Carter, 2014-UP-178 (filed April 30, 2014). The Remittitur was issued on December 12, 2014.

**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
    a. Failure to investigate.
    b. Failure to properly object.

At the evidentiary hearing, the Applicant proceeded on allegation that counsel was ineffective in failing to object to statements by the judge; failing to call witnesses; and failing to properly preserve his directed verdict motion for appellate review.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and the legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2015), this Court has made the following findings of fact and conclusions of law based upon all of the probative evidence presented.

**Ineffective Assistance of Counsel**

A two-pronged test is used 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 v. State, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland v. Washington). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In other words, where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner 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, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

**Failure to Object to Judge's Remarks to the Jury**

*Informing the Jury of Guilty plea*

The Applicant alleged counsel was ineffective for allowing the jury to hear that he had pled guilty to possession of a weapon. After the case was called – and after the judge informed the jury that the Applicant was indicted for "possession of a pistol"[1] – the Applicant chose to plead guilty to that offense. The trial judge subsequently informed the jury that the Applicant

[1] Tr. p. 6.

pled guilty to possession of a pistol, and that they were not to consider that charge in their deliberations. Tr. p. 607. The judge further emphasized that the fact that the Applicant pled guilty to that charge created no inference of guilt on the other charges he was facing. Tr. p. 607, l. 8-17; l. 663, l. 20 - p. 664, l. 5. A jury is presumed to follow instructions. Foye v. State, 335 S.C. 586, 590 n.1, 518 S.E.2d 265, 267 n.1 (1999). Having failed to present any evidence to refute this presumption, the Applicant has not met his burden to prove prejudice.

Given counsel's credible testimony at the evidentiary hearing, the Applicant has also failed to show deficiency. Counsel testified that he did not think the judge's instruction mattered, and believed it gave the Applicant better credibility in saying that he already pled to what he was guilty of, and was not contesting that charge at all. Having failed to meet his burden with respect to either prong of the Strickland test, this allegation is denied and dismissed.

*Telling the Jury the Applicant testified*

The Applicant further alleged counsel was ineffective in failing to object where the trial judge told the jury that the Applicant testified. After reviewing the record, this Court finds the allegation to be without merit. In addressing the fact that the Applicant previously pled guilty to possession of a pistol, the trial judge told the jury that the Applicant "testified that he had [a weapon] at some point so he just removed that from your consideration and pled guilty to that charge. The fact that he pled guilty to that charge creates no inference of guilt toward him on these other two charges as you just forget that charge was ever there." Tr. p. 607, l. 10-17.

Clearly the trial judge misspoke, as evidenced by the fact that the Applicant did not testify at the trial. In any event, the judge clearly cured any misstatement by correctly informing the jury they were not to consider the fact that the Applicant did not testify during their deliberations. Immediately after the defense rested, it told the jury that "the fact that the

defendant did not testify from the stand can't even be considered by you on the issue of whether he committed a crime or not." Tr. p. 606, l. 22 - p. 607, l. 1. During its jury charge, the trial judge further emphasized that the Applicant had "absolutely no obligation on his part to testify," and that "the fact that he actually did not take the stand creates no inference of guilt against him at all." Tr. p. 663, l. 3-8. Having failed to meet his burden to show deficient performance or prejudice, this allegation is denied and dismissed.

**Failure to call witness**

The Applicant also alleged counsel was ineffective in failing to locate and call JD Hemphill as a witness. Counsel testified that he did not make an effort to track Mr. Hemphill down because he did not think his statement would have helped him at trial. Counsel testified that his thought process was that it would have been better to argue Mr. Hemphill's absence than to have him testify consistent with his statement. Clarifying, counsel said he thought it was strategically better for Mr. Hemphill to be absent. Given that counsel has articulate a reasonable strategic basis for his actions, the Applicant has failed to show he was deficient in failing to call Mr. Hemphill. This Court would also note that Mr. Hemphill was not present to testify during the evidentiary hearing, nor was his testimony offered in accordance with the rules of evidence.[2] See Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Having failed to show deficiency or prejudice, this allegation is denied and dismissed.

**Failure to Preserve Argument for Appellate Review**

[2] Mr. Hemphill's handwritten statement was admitted for the limited purpose of showing that counsel was, in fact, aware of what he would have testified to at trial. The statement itself, however, would have been inadmissible at trial and does not assist the Applicant in satisfying the prejudice prong in the present proceedings. This Court will not speculate what Mr. Hemphill would have actually said at trial or at the evidentiary hearing.

Finally, the Applicant has alleged counsel was ineffective in failing to adequately preserve for appellate review whether he was entitled to directed verdict. This Court would first note that counsel did, in fact, move for directed verdict. Tr. p. 605. However, the Court of Appeals found that the motion did not adequately preserve the issue of whether there was sufficient evidence to submit the charge of murder to the jury. Regardless, this Court finds the Applicant has failed to show actual deficiency. The fact that counsel did not make an argument he did not believe was meritorious does not constitute ineffective assistance of counsel. This Court also finds that the Applicant has failed to meet his burden to show prejudice, or a reasonable likelihood that had counsel preserved the issue to the Court of Appeals' satisfaction, the outcome of the proceeding would have been different. For the following reasons, the Applicant would not have been entitled to directed verdict on the issues raised.

*Principal Liability*

A reasonable jury could have clearly found that the Applicant shot and killed the minor child while meaning to kill the intended victims with malice. The evidence established that there was some prior dispute between the Applicant and intended victims, in which he had stolen 450 dollars. Tr. p. 277; 304. There was also testimony that the group had recently "chased [the Applicant] out" of a trailer park. Tr. p. 221. In discussing the altercations to others, the Applicant had merely stated he would "handle it." Tr. p. 341-42.

In this context, the Applicant and his co-defendant gave a friend – [Coats] – a ride home to the same trailer park. Tr. p. 218. On the way there, the Applicant told his co-defendant about

the prior altercations, who then handed him a gun.[3] The Applicant laid the gun in his lap. Tr. p. 222.

Testimony was presented at trial that upon arriving, the Applicant got out of the car and approached the intended victims with his gun pointed at one of them.[4] Tr. p. 314-16. After saying he "ought to shoot you but I ain't want to do the time," and asking "[w]hat you gone do now," the Applicant turned around and started walking back. Tr. p. 316-17.

While at this point the testimony diverged to some extent as to where the first shot came from, the expert testimony clearly established that the bullet that ultimately killed the minor child came from the side of the street the Applicant and his co-defendant were on.[5] Clearly it was reasonably inferable that the Applicant walked into an already heated situation armed, was pointing a gun at people – thereby bringing on the difficulty – and ultimately fired the shot that killed the victim.

*Accomplice Liability*

Alternatively, even if the Applicant's co-defendant fired the fatal shot, a reasonable jury could still have found him guilty. It was clearly inferable from the testimony and evidence presented at trial that if the co-defendant shot the victim, then the Applicant was guilty under a "hand of one, hand of all" theory of liability.

"Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." State v. Langly, 334 S.C. 643,

[3] According to a witness to the exchange, the gun looked like the one admitted into evidence as State's Exhibit 2. Tr. p. 221-22.
[4] Another witness, Ms. Coats, testified that the gun was either in his pocket or tucked under his shirt as he approached them. Tr. p. 230.
[5] The Applicant's trial counsel agreed, noting that this was not an issue at trial.

515 S.E.2d 98 (1999). Under an accomplice liability theory, "a person must personally commit the crime or be present at the scene of the crime and intentionally, or though a common design, aid, abet, or assist in the commission of that crime through some overt act." Id. at 648-49, 515 S.E.2d at 101. A formally expressed agreement is not necessary to establish the conspiracy. State v. Oliver, 275 S.C. 79, 267 S.E.2d 529 (1980).

The evidence presented at trial was that the Applicant and his co-defendant went to the location of the intended victims. They talked about the dispute prior to arriving. Under these circumstances, the jury could have clearly interpreted that the gun changing hands signified a common design, from which the victim's death resulted.[6] In any event, whether the Applicant or the co-defendant fired the shot that ultimately killed the victim, a motion for directed verdict would have been appropriately denied. As a result, the Applicant has failed to meet his burden to prove prejudice. This allegation is therefore 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, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

[6] In fact, it appears that counsel conceded, during trial, that the trial judge's decision to charge "hand of one, hand of all" was appropriate. Tr. p. 596-97. Counsel testified at the evidentiary hearing that he did not believe there was any issue as to whether the "hand of one, hand of all" charge was appropriate, noting that the Applicant and his co-defendant went to the scene together, and were both holding the gun at different points. Given the evidence in the record, this Court finds such a concession was inherently reasonable.

## CONCLUSION

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

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

**IT IS THEREFORE ORDERED**

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of the South Carolina Department of Corrections.

**AND IT IS SO ORDERED** this 10 day of May, 2017.

W. JEFFREY YOUNG
Presiding Judge
Sixth Judicial Circuit

Sumter, South Carolina