



crime (2009-GS-43-0059). Shaun Kent, Esquire, and Ray Chandler, Esquire, represented Applicant. On November 18, 2011, Applicant was convicted as indicted. The Honorable Howard P. King sentenced Applicant to forty two year term of imprisonment for murder and five year term of imprisonment for possession of a weapon during commission of a violent crime with all sentences running concurrently.

A timely Notice of Appeal was filed on Applicant's behalf. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Antrell Felder, Op. No. 2013-UP-437 (Ct. App. filed November 27, 2013). The Remittitur was issued on December 13, 2013.

## II. ALLEGATIONS

In his current application, Applicant alleges that he is being held in custody unlawfully based on the following allegations:

1. Ineffective Assistance of Counsel
  - a. "failing to articulate and argue dismissal of the criminal case at the pretrial hearing on the grounds of speedy trial rights violation."
  - b. "failing to articulate and argue dismissal of the criminal case on the grounds of prosecutorial misconduct and the resulting prejudice as the result of solicitor Catherine Fant controlling and manipulating the trial docket of this case to gain an unconstitutional advantage."
  - c. "failing to compel the attendance of solicitor Catherine Fant at the pretrial evidentiary motions hearing where solicitor's Fant actions and inactions were the core of the prosecutorial misconduct allegations and where solicitor Fant is the only individual privy to the information that will answer her actions and inactions and which will justify the trial court granting dismissal of the case based on prosecutorial misconduct."
  - d. "failing to move for disqualification of recusal of the Third Circuit Solicitor's office for repeated actions of prosecutorial misconduct committed by Solicitor Catherine Fant which has prejudice the trial preparation and discovery defense development strategies of the Applicant."
  - e. "failing to conduct a reasonable investigation and interview Tavares Felder, while Tavares Felder's pretrial hearing testimony and trial testimony would have established grounds

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for suppression for the motion in limine and would have established a viable defense and rebuttal evidence against the law enforcement officers at trial who made an in-court identification of the defendant faked his identity to elude law enforcement which in turn alluded to defendant's guilty of this crime and the correctness of the law enforcement officers' identification of defendant."

- f. "Trial Counsel Ineffective for stipulating to unredacted introduction of defendant's oral statement into trial evidence via detective Potteiger's report and trial testimony which emphasizes that the defendant was currently out on bond for a lynching charge," resulting in the unobjectionable introduction of inadmissible 'prior bad acts' and 'other crimes' to demonstrate defendant's propensity to violent and to chill defendant's willingness to exercise his right to testify in his defense."
  - g. "failing to conduct a reasonable investigation and interview of Stacey Caughman and Ida Mae Felder, where their pretrial hearing testimony and trial testimony will have established grounds for suppression for the pretrial motions and will have established a viable defense and rebuttal evidence against the law enforcement officers at trial who made in-court identification of Mrs. Ida Mae Felder's white automobile as being with tinted windows on the night of the crime, and who additionally testified that the tint on the windows were subsequently removed to obstruct and conceal from law enforcement that Mrs. Felder's white car is the 'tinted window' white car the eyewitness saw at the crime scene which in turn alluded to the defendant's guilt of this crime and to the integrity of law enforcement investigation of this case."
2. Due process violation
- a. "for the repeated actions of prosecutorial misconduct committed by solicitor Catherine Fant which was prejudiced the trial preparation and discovery and defense development strategies of the Applicant."
  - b. "for prosecutorial misconduct and the resulting prejudice as the result of solicitor Catherine Fant controlling and manipulating the trial docket of this case to gain an unconstitutional advantage."
3. Ineffective Assistance of Appellate Counsel
- a. "failing to evaluate and brief suppression of the phone records, the victim's pending burglaries, 'third party guilt' principles to impeach the investigation, and the trial judge's denial to dismiss the case on prosecutorial misconduct."

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### III. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their 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, 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, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

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, 466 U.S. 668. Applicant must overcome this presumption in order 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. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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. at 117-18, 386 S.E.2d at 625. With respect to guilty pleas, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

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## V. SUMMARY OF RELEVANT TESTIMONY

At the evidentiary hearing, Applicant testified that Solicitor Catherine Fant told lies about his case so that he would not get bond. He testified that his trial attorneys were incompetent for failing to argue and have his case dismissed based on prosecutorial misconduct, and for failing to have Solicitor Catherine Fant present at the pretrial motion hearing to testify about her misconduct. He stated that his attorneys were ineffective for failing to present testimony from witnesses including Tavares Felder, Ida Mae Felder, and Stacey Caughman. Applicant presented affidavits with testimony from these witnesses.

Trial Counsel Shaun Kent testified that he met with Applicant more than ten times prior to trial to review discovery and discuss trial strategy. He stated that this was a murder case, but Applicant always maintained his innocence. He stated that there were no eye-witnesses; the worst evidence against Applicant was his hat which was found at the scene of the crime with his DNA on it. Mr. Kent testified that their trial strategy was to discredit the State's case and question the hat with Applicant's DNA. He stated that they made a motion for prosecutorial misconduct before the trial and argued it to the trial court because Solicitor Catherine Fant had withheld discovery and information about the case from the defense and had mentioned on the eve of trial that the State had an eye-witness, when there was actually no eye-witness to the crime. Mr. Kent testified that he did not believe that Applicant's trial was prejudiced by Ms. Fant's failure to turn over discovery because by the time they tried the case they had all the discovery material and were fully prepared for trial.

Mr. Kent testified that Applicant gave him lots of witnesses to track down and he investigated all of them, but he did not find them useful or credible. He stated that they had a lengthy investigation and they spent a lot of time chasing down "rabbit holes" to investigate

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issues that were not helpful in the end. Mr. Kent testified that he discussed stipulating to Applicant's oral statement with him before the trial, and Applicant agreed with their decision to do so and had no problem with it. He testified that he believed he investigated Tavares Felder, Ida Mae Felder, and Stacey Caughman and chose not to use them at trial because they were not good witnesses; they were in Applicant's family, and they were not very credible. He stated that he does not believe that their testimony would have changed the outcome of the trial. He stated that they made a decision not to have Applicant testify at trial because they wanted the last word in closing argument and because he did not believe that Applicant was a credible witness. He stated that there was no new evidence presented in the affidavits Applicant presented to this Court at the evidentiary hearing.

Trial Counsel Ray Chandler testified that he met with Applicant more than ten times, and he met several times with Applicant's family, his investigator, and other witnesses. He stated that Applicant looked very much like his brother, Tavares, who law enforcement testified about at trial; this was an issue in the case, but it was not the "lynchpin issue" that led to his conviction. He stated that it was their trial strategy not to present any witnesses so that they could have the last closing argument before the jury, and they believed this strategy was better for them than trying to present alibi witnesses. He testified that if their decision not to call these witnesses was wrong, then it is a retrospective error; this was their strategy at the time, and they stuck to it.

Mr. Chandler testified that, in his opinion, if Catherine Fant were present at the pre-trial motions hearing over prosecutorial misconduct, she would have gotten "a slap on the wrist" but it would not have changed the trial or helped his case to have her there. He stated that their prosecutorial misconduct motions would not have been successful even if Solicitor Fant had been in attendance.

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## VI. 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. 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).

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds Counsel's testimony to be credible and persuasive. These credibility findings have been applied to the Court's findings and conclusions set forth below.

### INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant has asserted several allegations of ineffective assistance of counsel. This Court finds these claims to be meritless and they should be denied and dismissed with prejudice. Each allegation presented at the evidentiary hearing is addressed below.

#### *Failure to argue dismissal of charges for violation of speedy trial rights*

Applicant alleges that Trial Counsel was ineffective for failing to argue for the dismissal of his charges based on the violation of his right to a speedy trial. This allegation is meritless. Applicant's attorneys testified that they moved for a speedy trial in this case, but their motion was denied. While Mr. Kent did testify that the case possibly could have turned out differently if it were tried faster because it would have been tried with different solicitors, this Court finds that Applicant has failed to meet this burden of proving prejudice. The trial transcript shows that by the time this case was called for trial, Applicant's attorneys had enough time to get the complete

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discovery material and all potential prosecutorial misconduct issues had been cured by the new solicitor who tried the case.

Trial Counsel was not deficient for failing to argue for a speedy trial because they did, in fact, argue on this basis. Finally, Applicant has not proven that he was prejudiced. Therefore, this allegation is denied and dismissed with prejudice.

*Failure to argue dismissal of charge for prosecutorial misconduct*

Applicant alleges that Trial Counsel was ineffective for failing to argue and have his case dismissed based on allegations of prosecutorial misconduct. This allegation is meritless. The trial transcript clearly illustrates that Applicant's attorneys did move to have the case dismissed for prosecutorial misconduct before the trial was held. Mr. Kent argued the motion and requested that the case be dropped, that the case be continued to allow more time to prepare, or that the State be prohibited from using an expert witness that they were not aware of until the eve of trial. The trial court heard Trial Counsel's entire argument on the issue, considered the issue fully including prejudice to Applicant, and denied his motion to dismiss the charges. However, the trial court did grant relief by excluding testimony from the State's expert witness based on prejudice to Applicant.

It is clear from the record before the Court and from the testimony presented at the evidentiary hearing that the prosecutorial misconduct issues were argued and ruled upon by the trial court. Therefore, Trial Counsel cannot be deficient for failing to argue this issue. Furthermore, as the trial court held before the trial, Applicant was not prejudiced by the denial of this motion because he was fully prepared for trial, had all discovery materials, and the State's witness was not allowed to testify against him. Therefore, because there was neither deficiency nor prejudice, this allegation is denied and dismissed with prejudice.

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*Failure to compel attendance of Solicitor Catherine Fant at pre-trial hearing*

Applicant alleges that Trial Counsel was ineffective for failing to compel the attendance of Solicitor Catherine Fant at the pre-trial hearing on his motion for prosecutorial misconduct, resulting in the denial of his motion. This allegation is meritless. Trial Counsel was not deficient for choosing not to involve Solicitor Fant in the hearing. Furthermore, Applicant can show no prejudice from the fact that she was not at the hearing. Both Mr. Kent and Mr. Chandler credibly testified at the evidentiary hearing that if Solicitor Fant had been present, it would not have changed the outcome of the hearing or of the case. This Court agrees. Applicant has failed to prove either prong of the Strickland test, and this allegation is denied and dismissed with prejudice.

*Failure to move to recuse Third Circuit Solicitor's Office*

Applicant alleges that Trial Counsel was ineffective for failing to move to recuse the entire Third Circuit Solicitor's Office from his case based on his allegations of prosecutorial misconduct. This allegation is meritless.

Applicant has failed to meet his burden of proving that any motion to recuse the entire solicitor's office would be successful, especially in light of the fact that the trial court denied his motion for prosecutorial misconduct. It is unlikely that this motion would have been granted. Furthermore, even if this motion were granted, the trial would still have been held, and although the prosecutors would have differed, the evidence and the jury pool would have been the same. Applicant cannot prove that the result of the trial would have been different under these circumstances. Applicant has not proven that the Third Circuit Solicitor's Office prosecuted the case in an inappropriate manner by the time the case went to trial, and the trial likely would have been the same regardless of who was prosecuting. Therefore, this Court finds that Trial Counsel

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was not deficient and Applicant has shown no prejudice but the mere speculation that the result of the trial would have been different. Accordingly, this allegation is denied and dismissed with prejudice.

*Failure to investigate*

Applicant alleges that Trial Counsel is ineffective for failing to investigate his case and interview potential witnesses that would have changed the outcome of his case. This allegation is meritless.

“[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case.” Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.” Wiggins v. Smith, 539 U.S. 510, 521-22 (2003).

Mr. Kent and Mr. Chandler credibly testified that they investigated and interviewed every potential witness that Applicant presented them. They stated that they met with Stacey Caughman several times. Their trial strategy was not to present any witnesses for the defense in order to have the last closing argument, and they testified that they knew about the information these witnesses planned to testify about. Mr. Kent and Mr. Chandler credibly testified that these witnesses would not have been credible for multiple reasons, and it was their strategic decision

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not to use them at trial. This Court will not question that strategy in retrospect, and finds that Trial Counsel was not deficient in choosing not to use these witnesses at trial.

Furthermore, Applicant can prove no prejudice because he did not present the testimony of these witnesses that he alleges would have changed the outcome of the case. "In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence." *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." *Id.* This Court notes that, while the witness's affidavits were part of the record before the Court as part of Applicant's application for post-conviction relief, these affidavits cannot be used to satisfy Applicant's burden of proof because the witnesses were not available for cross-examination by the opposing party.

Because Applicant has failed to prove deficiency and prejudice, this allegation is denied and dismissed with prejudice.

*Stipulating to unredacted oral statement*

Applicant alleges that Trial Counsel was ineffective for stipulating to the admission of an oral statement Applicant gave law enforcement without redacting information within about how Applicant was out on bond for another crime. Trial Counsel credibly testified that he discussed this stipulation before the trial and Applicant did not raise this issue; Applicant understood and agreed with the decision to stipulate. The statement was a voluntary statement given by Applicant to law enforcement, and it is unlikely that Applicant could have kept it out of evidence. Furthermore, this Court finds there was no prejudice from the introduction of this

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evidence, and that the Applicant's comment that he was out on bond for another crime did not change the jury's verdict. Therefore, this allegation is denied and dismissed with prejudice.

#### INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Applicant alleges ineffective assistance of appellate counsel. A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy..." Jones, 463 U.S. at 754, 103 S.Ct. 3308.

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Applicant was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). Applicant cannot satisfy either requirement of the Strickland test.

This Court finds that Applicant has failed to meet his burden of proving that Appellate Counsel was deficient in choosing not to brief any of the issues he alleged should have been

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briefed, and that there was prejudice to Applicant by the failure to brief these issues. Because Applicant failed to prove either prong of the Strickland test, this allegation is denied and dismissed with prejudice.

#### PROSECUTORIAL MISCONDUCT

Applicant alleges prosecutorial misconduct. Prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). Applicant has not carried his burden of proving actual prosecutorial misconduct; therefore, this allegation must be dismissed.

While both trial attorneys testified that they experienced difficulty getting discovery material from the former Solicitor who prosecuted the case and that there was a confrontation between the parties about potential witnesses of the case, this Court finds that there was no prejudice to Applicant. Applicant's attorneys made a motion to dismiss the case based on prosecutorial misconduct to the trial court before the trial began. The trial transcript shows that Trial Counsel fully argued this motion and requested relief from the trial court before the case was heard. The trial court heard the full argument, considered the effect of these actions on Applicant, and denied the motion. As the trial court pointed out in the transcript, by the time the case was called for trial, the State had addressed all issues with discovery and turned over every

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piece of Rule 5 material to which Applicant was entitled. Furthermore, the trial court ruled that it would not allow the testimony of one of the State's witnesses because it would result in prejudice to Applicant in the face of the complications with the Solicitor's Office.

This Court finds that all issues of prosecutorial misconduct were fully heard and ruled upon by the trial court in this case, and Applicant has failed to prove that he was prejudiced by any of the Solicitor's actions that should result in a new trial. Therefore, this allegation is denied and dismissed with prejudice.

#### 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.

#### **VII. 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 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), SCRPC, 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


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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 is denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 2 day of May, 2017.

  
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D. CRAIG BROWN  
Presiding Judge  
Third Judicial Circuit

Flourence, South Carolina

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