

THE BOOZER LAW FIRM, LLC

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September 25, 2017

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

The Honorable Scott B. Suggs
Clerk of Court
1 Public Square
Darlington, SC 29532

RECEIVED
SEP 27 2017
S.C. SUPREME COURT

**RE: Bobby Gilbert, #219284, v. State of South Carolina
2015-CP-16-694**

Dear Mr. Shearouse and Mr. Suggs:

Enclosed for filing is a Notice of Appeal in the above-referenced case. Also enclosed are the following:

- (1) Proof of Service of the Notice of Appeal;
- (2) A copy of the Order which is to be challenged on appeal; and
- (3) Prior Order of Appointment of Counsel.

As I was appointed to represent Mr. Gilbert in his PCR proceeding, I anticipate that the Office of Appellate Defense will represent Mr. Gilbert in this appeal.

Yours very truly,



Lance S. Boozer

Enclosures

cc: Johnny E. James, Jr., AAG
Loriene French, OAD
Bobby A. Gilbert, #219284

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

SEP 27 2017

S.C. SUPREME COURT

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

The Honorable Roger E. Henderson, Circuit Court Judge

Case No. 2015-CP-16-694

Bobby A. Gilbert, #219284,Petitioner,

v.

State of South Carolina,.....Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable Roger E. Henderson's Order dated September 8, 2017, denying post-conviction relief to the Petitioner. The Order was received by undersigned counsel on September 25, 2017. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,



Lance S. Boozer
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September 25, 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

The Honorable Roger E. Henderson, Circuit Court Judge

Case No. 2015-CP-16-694

RECEIVED

SEP 27 2017

S.C. SUPREME COURT

Bobby A. Gilbert, #219284,Petitioner,

v.

State of South Carolina,.....Respondent.

PROOF OF SERVICE

I, Lance S. Boozer, appointed attorney for Petitioner, certify that I have today served within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to Assistant Attorney General Johnny E. James, Jr., P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 25th day of September, 2017.



Lance S. Boozer
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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
) FOR THE FOURTH JUDICIAL CIRCUIT
COUNTY OF DARLINGTON)

Bobby A. Gilbert,)
S.C.D.C. No. 219284,)
) Case No.: 2015-CP-16-00694

Applicant,)

ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

2017 SEP 18 PM 12:44
SCOTT B. SUGGS
CLERK OF COURT/R.M.C.
DARLINGTON COUNTY, S.C.

FILED

This matter comes before the Court by way of an application for post-conviction relief filed by Bobby A. Gilbert ("Applicant") on September 3, 2015. Respondent made its return on or about December 5, 2016, and amended on June 16, 2017. The Court convened an evidentiary hearing into the matter on Tuesday, July 18 2017, at the Dillon County Judicial Center in Dillon, South Carolina. Applicant was present at the hearing and represented by Lance S. Boozer, Esquire. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, W.S. "Trey" Watts, III, Esquire ("Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Darlington County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Darlington County Clerk of Court. Applicant was indicted at the July

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SEP 20 2017

Referred to

James | PB

Answered

Page 1 of 12

[Signature]

TRUE CERTIFIED COPY,

Scott B. Suggs

CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

2008 term of the Darlington County Grand Jury for murder (2008-GS-16-01031), larceny in excess of \$5,000 (2008-GS-16-01032), and armed robbery (2008-GS-16-01039). W.S. "Trey" Watts, III, Esq. represented Applicant. Kernard E. Redmond, Esq., and Patti McKenzie, Esq., of the Fourth Circuit Solicitor's Office, prosecuted the case. Applicant proceeded to trial before the Honorable Howard P. King and a jury. The jury found Applicant guilty as indicted on April 29, 2009. Judge King sentenced Applicant to imprisonment for consecutive terms of life without parole for murder, and 30 years for armed robbery. Judge King additionally sentenced Applicant to a concurrent term of 10 years for the larceny.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Joseph L. Savitz, Esq. By unpublished opinion decided June 26, 2013, the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Gilbert, Op. No. 2013-UP-283 (S.C. Ct. App. 2013). Applicant's petition for rehearing was denied on August 22, 2013. Applicant petitioned the Supreme Court of South Carolina for a writ of certiorari, which was denied by order dated July 23, 2015. The Remittitur was issued on August 31, 2015.

Present Application

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

1. Ineffective Assistance of Counsel
 - a. "Failure to investigate"
 - b. "Failure to request certain jury instructions"
 - c. "Failure to object to the trial judge's error of law/abuse of discretion"
2. Trial Court Error
 - a. Error in granting the State's Batson motion
 - b. Failing to instruct the jury

Applicant, by amendment dated June 7, 2017, also alleges the following additional grounds:

3. Ineffective Assistance of Counsel, in that:



- a. "Counsel was ineffective for introducing Jamie Gilbert's video statement. See trial transcript pg. 309."
- b. "Counsel was ineffective for failing to object to implied malice jury instruction."
- c. "Counsel failed to explain the legal concept of 'hand of one, hand of all' to Applicant prior to trial."

By filing dated June 16, 2017, Respondent amended its return to address the additional allegations and include a partial motion to dismiss the allegations of trial court error and that Counsel was ineffective for failing to object to the implied malice jury instruction.

II. 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 records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "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." Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler at 442, 334



S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). “Judicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). “[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Courts use a two-pronged test 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 at 117, 386 S.E.2d at 625 (citing Strickland at 688). 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 at 117-18, 386 S.E.2d at 625 (citing Strickland at 694). The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 696-97.



IAC Allegation #1 – Failure to Investigate

Applicant alleges that Counsel was ineffective by failing to investigate his case. The scope of a reasonable investigation depends upon a number of issues, but “at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.” Ard v. Catoe, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007) (quotation omitted). “Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the 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)).

At the evidentiary hearing, Applicant testified he did not believe Counsel investigated the case at all. Applicant testified he believed Counsel should have interviewed his co-defendants, investigated their video statements, and talked to Applicant’s mother in order to prepare an alibi defense. Applicant asserted that he specifically instructed Counsel to interview Applicant’s mother. Applicant testified Counsel met with him on only three occasions prior to trial, despite the severity of the crimes alleged.

Counsel testified that he investigated the statements provided by Applicant’s co-defendants, drove to the crime scene alongside an attorney for a co-defendant, and reviewed cell phone records. Counsel spoke with Applicant’s mother on multiple occasions, but could not recall any discussion of her value as a potential alibi witness. Counsel attempted to speak with any witnesses he believed were potentially viable, but could not recall getting much useful material from the effort. Counsel testified he met with Applicant on more than three occasions, but lacked documentation to corroborate his assertion. Counsel asserted that he both met with Applicant in person and communicated by mail, and that he reviewed all evidence and strategy



with his client. Counsel explained his strategy of discrediting the State's key witness, co-defendant Jamie Gilbert, through his four conflicting statements. Counsel did not hire a private investigator because he was able to personally conduct the investigation, including contacting the witnesses or their attorneys and reviewing the crime scene. Counsel generally demonstrated a strong command of the facts of Applicant's case throughout his testimony.

The Court finds that Applicant has failed to demonstrate any deficiency in Counsel's investigation of his case. Applicant's complaint that Counsel did not speak with Applicant's mother is rebutted by Counsel's testimony that he did so speak with the mother on multiple occasions, and that no alibi defense was discovered or developed as a result of those meetings. As to Applicant's general allegation that Counsel failed to adequately investigate his case, he offers nothing specific as to the nature of what should have been investigated and what the result of it might be. Applicant's testimony that Counsel did nothing is not credible, given Counsel's credible testimony regarding the facts and investigation of the case. Accordingly, Applicant has failed to meet his burden by proving either deficiency on the part of Counsel or prejudice therefrom, and his claim for relief based upon this ground is **DENIED**.

IAC Allegation #2 – Failure to Request Certain Jury Instructions, Lesser-Included Offenses

Applicant alleges that Counsel was ineffective by failing to request jury instructions. Applicant did not identify with any specificity the jury instructions he desired, but testified as to his desire expressed to the trial court that lesser-included offenses not be made questions for the jury to consider. See Tr. 529-30. Applicant testified that Counsel did not explain the concept of a lesser-included offense to him and that he was not actually aware of what it meant at the time of trial. Counsel testified that he did explain lesser-included offenses to Applicant, counseled



Applicant to have them presented to the jury, and that Applicant refused. Counsel testified to the risk that a lesser-included offense offers the jury the opportunity to convict by compromise.

The Court finds that Applicant has failed to demonstrate any deficiency on the part of Counsel in determining whether to seek particular jury instructions. In light of Applicant's previously discussed, baseless allegations that Counsel failed to investigate or explain anything, when it is apparent from the trial transcript and testimony that Counsel substantially investigated the matter, the Court finds Counsel's testimony credible and Applicant's testimony not credible. The Court gives no weight to Applicant's claim that he did not understand lesser-included offenses at the time of trial, but accepts Counsel's testimony that he explained and advocated for inclusion of lesser-included offenses. Applicant clearly and unequivocally informed the trial court that he freely and voluntarily made the decision to not seek instruction on lesser-included offenses. Aside from lesser-included offenses, Applicant offers no specific jury instructions that Counsel should have sought. For all of these reasons, Applicant has failed to meet his burden of demonstrating deficiency on the part of counsel or prejudice therefrom, and his claim for relief based upon this ground is **DENIED**.

IAC Allegation #3 – Failure to Object to Trial Court Error, Implied Malice Jury Instruction

Applicant alleges that Counsel failed to object to error by the trial court. By amendment, Applicant specifies that Counsel should have objected to the trial court's instruction on implied malice from the use of a deadly weapon. "[W]here evidence is presented that would reduce, mitigate, excuse or justify a homicide [or attempted homicide] caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon." State v. Belcher, 385 S.C. 597, 613, 685 S.E.2d 802, 810 (2009). However, "[t]he 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 attempted murder].” Id. Furthermore, because the Court’s October 12, 2009, decision in Belcher represented a clear break from precedent, its limited prohibition against the implied malice instruction does not apply to then-existing convictions challenged on post-conviction relief. Id.

The trial court instructed the jury on express and implied malice as follows:

Expressed malice is when there is a deliberate intention to unlawfully take the life of another such as lying in wait. Implied malice is when circumstances demonstrate a wanton or reckless disregard for human life or a reasonably prudent man would have known that according to common experiences there was a plain and strong likelihood that death would follow the contemplated act. *The law says if one intentionally kills another with a deadly weapon the implication of malice may arise.* If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in this case and you may give it such weight as you determine it should receive.

Tr. 513-14 (emphasis added).

Respondent, in its amended return, moved to dismiss this allegation on the grounds that Belcher was inapplicable to Applicant’s April 29, 2009, conviction and sentence because it occurred before Belcher was decided. Counsel argued that though the trial and conviction occurred before Belcher was decided, that Counsel should have known to make the same argument since Belcher was pending on appeal. This Court expressed its inclination that the language of Belcher explicitly foreclosed its applicability to the present matter, but nonetheless permitted Applicant leeway to proceed upon the allegation.

Counsel testified that, at the time of trial, the Court’s implied malice instruction was good law, that no appeals offered him a basis to claim it was not good law, and that he therefore had no basis for an objection.

The Court finds that Applicant has failed to show any deficiency on the part of counsel by his failure to object to the implied malice jury instruction. The Court agrees with Counsel and Respondent that Belcher is inapplicable to the present matter—the Court very clearly and explicitly established its ruling would not be applicable in a post-conviction relief action against a then-existing conviction. But even if Belcher did apply, it would be of no consequence to Applicant's case because there was no evidence to reduce, mitigate, excuse, or justify the homicide. The victim was directed to a remote location, beaten, shot, forced into the trunk of a vehicle, pulled out, brutalized with a cinder block, run over twice, and had his head wrapped in a grocery bag. There is no justification for the barbarism the victim suffered; the only question before the jury was whether Applicant committed the murder. Accordingly, Applicant has failed to meet his burden of demonstrating deficiency on the part of counsel or prejudice therefrom, and his claim for relief based upon this ground is **DENIED**.

IAC Allegation #4 – Introduction of Co-Defendant's Video Statement

Applicant alleges that Counsel was ineffective by introducing the video statement of co-defendant and key witness for the State, Jamie Gilbert. Specifically, during cross-examination, Counsel pressed Jamie on whether his testimony on direct examination was consistent with numerous prior statements given to law enforcement. After Jamie stated that his testimony at trial was "exactly the same as what [he] said in July," Counsel introduced the video recording of Applicant's July statement to law enforcement as Defendant's Number 5. Tr. 310.

Counsel offered a defense theory that Applicant was used by his co-defendants to get in contact with the victim, and that Applicant did not do anything to set up any part of the brutal murder. As previously noted, Counsel testified that his trial strategy was to destroy Jamie's credibility. Counsel testified that the purpose of introducing the video statement, along with the

written statements, was part of his impeachment strategy and calculated to show that Jamie was dishonest and that all of his statements and testimony were self-serving.

The Court finds that Counsel articulated a valid impeachment strategy for introducing Jamie's statements and, as such, this Court cannot deem his conduct ineffective assistance of counsel. See Smith, 386 S.C. at 567, 689 S.E.2d at 632. Accordingly, Applicant's claim for relief based upon this ground is **DENIED**.

IAC Allegation #5 – Failure to Explain “Hand of One, Hand of All”

Applicant alleges that Counsel was ineffective by failing to adequately explain the concept of “hand of one, hand of all.” Applicant testified that Counsel failed to explain or review the evidence against him, defense available, the planned trial strategy, or the concept of “hand of one, hand of all.” Applicant conceded that Counsel mentioned or discussed “hand of one, hand of all” on one occasion, but did not explain it in full detail. Applicant claimed that if Counsel had properly explained to him the concept in full detail, Applicant would have accepted the plea offer of 30 years for voluntary manslaughter.

Counsel testified that he reviewed all of the evidence with Applicant, explained the strategy, and specifically discussed the subject of “hand of one, hand of all.” Counsel recalled that he discussed the subject with Applicant after receiving the statements of the co-defendants, which prompted him to do so. Counsel testified that he additionally discussed “mere presence” and its relation to “hand of one, hand of all.”

For reasons previously set forth, the Court finds Counsel's testimony credible and Applicant's testimony for the most part not credible. The Court notes that Applicant conceded that Counsel discussed “hand of one, hand of all” on at least one occasion. The Court finds that Counsel adequately discussed the concept and its relationship to the defenses available to

Applicant. Applicant has failed to meet his burden of demonstrating deficiency on the part of counsel or prejudice therefrom, and his claim for relief based upon this ground is **DENIED**.

B. Trial Court Error

In his original application, Applicant alleged two instances of error on the part of the trial court. Respondent, in its amended return, argued that the allegations of trial court error were not cognizable under the Uniform Post-Conviction Procedure Act and should be dismissed. At the hearing, Applicant's PCR counsel conceded that PCR is not a venue to review trial court error. Accordingly, the Court finds that Applicant's allegations of trial court error were appropriately abandoned, and any claims for relief based upon those grounds are **DENIED**.

III. CONCLUSION


Based on all the foregoing, this Court finds and concludes that 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 notifies the 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 South Carolina Department of Corrections.

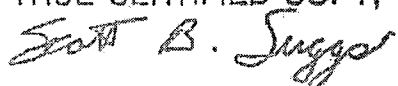
AND IT IS SO ORDERED this 8th day of September, 2017.



ROGER E. HENDERSON
Presiding Judge
Fourth Judicial Circuit

Chesterfield, South Carolina

FILED
2017 SEP 18 PM 12:45
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

TRUE CERTIFIED COPY,

CLERK OF COURT/RMC
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