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September 27, 2017

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

RECEIVED

SEP 29 2017

The Honorable Beulah G. Roberts
Clerk of Court
P.O. Box 136
Manning, SC 29102

S.C. SUPREME COURT

**RE: Victor Weldon, #350911, v. State of South Carolina
2016-CP-14-00002**

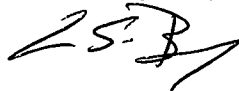
Dear Mr. Shearouse and Ms. Roberts:

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. Weldon in his PCR proceeding, I anticipate that the Office of Appellate Defense will represent Mr. Weldon in this appeal.

Yours very truly,



Lance S. Boozer

Enclosures

cc: Julie A. Coleman, AAG
Loriene French, OAD
Victor Weldon, #350911

RECEIVED

SEP 29 2017

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

The Honorable Jocelyn Newman, Circuit Court Judge

Case No. 2016-CP-14-00002

Victor Weldon, #350911,Petitioner,

v.

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

NOTICE OF APPEAL

The Petitioner appeals the Honorable Jocelyn Newman's Order dated July 28, 2017, denying post-conviction relief to the Petitioner and received by undersigned counsel on September 27, 2017. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,



Lance S. Boozer
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September 27, 2017

RECEIVED

SEP 29 2017

S.C. SUPREME COUR

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

The Honorable Jocelyn Newman, Circuit Court Judge

Case No. 2016-CP-14-00002

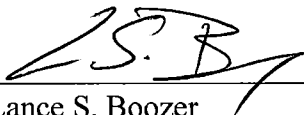
Victor Weldon, #350911,Petitioner,

v.

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

PROOF OF SERVICE

I, Lance S. Boozer, 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 Julie A. Coleman, P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 27th day of September, 2017.



Lance S. Boozer
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STATE OF SOUTH CAROLINA)
COUNTY OF CLARENDON)

Victor McCoy Weldon, #350911,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

2016-CP-14-00002

ORDER OF DISMISSAL

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CLARENDON COUNTY, SC
SIS

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on January 5, 2016. Respondent submitted its return on April 11, 2016. An evidentiary hearing was convened on July 27, 2016, at the Sumter County Courthouse. Applicant was present at the hearing and was represented by Lance Boozcr, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.¹

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clarendon County Clerk of Court. Applicant was true bill indicted at the January 2011 term of the Clarendon County Grand Jury for burglary – first degree, attempted murder, armed robbery, grand larceny (\$2000-\$10000), kidnapping, and possession of a weapon during a violent crime (2011-GS-14-0068). John Knobloch, Esquire, represented Applicant.

¹ At the PCR hearing, this Court held the record open for the parties to attempt to obtain a copy of a hearing transcript regarding trial counsel's motion to change venue. During that time, this Court inadvertently caused an Order of Dismissal to be signed on November 6, 2016, and later filed November 17, 2016. The parties have represented to this Court that they were not served with notice of the entry of the Order and have requested that the Court vacate the Order and substitute this Order as the Final Order. This Court agrees and vacates its prior Order dated November 6, 2016. This Court further instructs the Clerk of Court to strike the prior Order of Dismissal filed November 17, 2016, and clock and file this Order instead. Any post-trial motions and/or appeals will be based on the date of filing of this Order.

Applicant proceeded to a jury trial before the Honorable R. Ferrell Cothran, Jr. Judge Cothran sentenced Applicant to thirty years imprisonment for armed robbery running consecutively to a sentence of thirty years imprisonment for burglary – first degree. Judge Cothran further sentenced Applicant to five years imprisonment for grand larceny, twenty years for kidnapping, and five years for possession of a weapon during a violent crime, all 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. Weldon, 2014-UP-463 (Ct. App. filed December 17, 2014). Applicant filed a Petition for Writ of Certiorari to the South Carolina Supreme Court. The Petition was denied via order filed January 23, 2015. The Remittitur was issued on May 8, 2015.

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. "Attorney file a motion to be relieved of case."
 - b. "None of my alibi's were called to testify on my behalf."
 - c. "I was never called to the stand to testify."
 - d. "Lack of communication."
 - e. "Force me into a joint trial."
 - f. "offer a joint plea instead of independent plea."
2. Due process violation
 - a. "denied my motion for a change of venue."
 - b. "gave me a joint trial."
3. Prosecutorial misconduct
 - a. "offer me a joint plea instead of independent plea."
4. Judicial Bias
 - a. "Judge and victim were acquaintance."
5. Jury violation
 - a. "charge the jury when proven clearly of a lesser included offense."
 - b. "the charge of the jury made me look guilty."

At the PCR hearing, Applicant orally amended his application to add an additional allegation of ineffective assistance of counsel for failing to object to the State's question on direct examination about destroying evidence. This was located on Volume 4, page 76 of the trial transcript, lines 15 through 21.

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.

IV. 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).

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant raises several allegations arguing that Counsel was ineffective in his representation surrounding his trial. In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. See Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (1999) (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)). This Court finds that the testimony presented at the PCR hearing satisfies neither prong of the Strickland test; Applicant can show neither ineffectiveness nor prejudice, thus these allegations should be denied and dismissed with prejudice.

Motion to be Relieved

Applicant argues that counsel was ineffective for moving to be relieved as counsel. This argument is meritless, especially because Trial Counsel chose not to make his motion to be relieved as counsel and instead proceeded forward with the trial for which he had prepared. Trial Counsel testified that Applicant had expressed some concern and no longer wanted his representation. However, before the trial, he and Applicant resolved their issues and Applicant decided that he wanted Trial Counsel to stay on the case. Trial Counsel then, on the record, chose not to move to be relieved before the judge and decided to continue forward with trial. Even if Trial Counsel had moved to be relieved, Applicant cannot prove that anything about that motion constituted

ineffective assistance of counsel or was prejudicial to his case, and thus neither prong of the Strickland test is satisfied. Therefore, this allegation is denied and dismissed.

Alibi Witnesses

Trial Counsel's decision not to use the alibi witnesses presented at the PCR hearing was part of a valid trial strategy and was neither ineffective nor prejudicial.

Trial Counsel testified that he spoke to each alibi witness prior to the trial and had filed notice of an alibi defense. He had prepared to use their testimony at trial, but did not. Trial Counsel stated that he could not recall why he did not use their testimony.

At the PCR hearing, Applicant testified about his alibi and presented two witnesses which corroborated his alibi testimony. However, the testimony presented did not exactly match up. All three recollections of the morning in question differed slightly in time and detail. For example, Applicant testified that his mother was at work the morning of the crime and he woke up between 6:00 and 6:45 A.M. to wait for her when she came home at 7:15 A.M. However, Applicant's mother, Debra Weldon, testified that she did not work that day because it was Saturday morning and she did not work on weekends at the time; she stated she was home and did not wake up until 8:00 A.M. Jessica Weldon, Applicant's sister, testified that Applicant was in his room with his girlfriend that morning and did not wake up until around 9:00 A.M., which contradicts Applicant's testimony that he woke up around 6:00 A.M.

When asked about the discrepancies in the alibi stories, Trial Counsel agreed that presenting all three of these different stories at trial would have hurt his case. He stated that using only one of these stories would have helped his case, but agreed that the State could have presented testimony from the other two alibi witnesses to contradict his witness had he only used one.

The South Carolina Supreme Court has held that an attorney cannot be ineffective if there is evidence to support his decision not to call witness with credibility issues. "A witness's credibility and demeanor is crucial to an attorney's trial strategy, and an attorney cannot be said to be deficient if there is evidence to support his decision to not call a witness with serious credibility questions, even if that witness is a co-defendant." Edwards v. State, 392 S.C. 449, 458, 710 S.E.2d 60, 65 (2011) (citing Jackson v. State, 329 S.C. 345, 351-52, 495 S.E.2d 768, 771 (1998) (holding counsel had a valid strategic reason for not calling a co-defendant as a witness where the co-defendant's credibility was a concern and the same evidence would be presented through another witness)). Trial Counsel testified that having conflicting alibi witnesses would have hurt his case rather than help, and it is reasonable to think that he considered this as part of his strategy in not calling these witnesses.

The decision not to use contradictory alibi witnesses at trial was very likely part of Trial Counsel's trial strategy. Trial counsel must be given leeway to make reasonable strategic decisions. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." Strickland at 688-89. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. at 689. In proving a claim of ineffectiveness, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id.

Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312

(1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546; 419 S.E.2d 778. "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003).

A strategic or tactical decision does not have to be articulated by counsel on the record; counsel doesn't have to personally identify his or her thinking. It is enough that the record show a basis for strategy, not that counsel announce that strategy on the record. See Wood v. Allen, 558 U.S. 290, ___, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010). Even though Trial Counsel did not recall his specific reasoning for choosing not to call alibi witnesses, his trial strategy can be inferred from the basis of his overall strategy, which he testified was to attack the State's DNA evidence against Applicant.

Furthermore, the testimony at the PCR hearing reflected Trial Counsel's intention to have the final closing argument at trial, which is accomplished by not presenting the alibi witnesses. Not only did Trial Counsel testify about his plan to have the final word during closing argument, but Applicant testified that Trial Counsel told him this plan at the time of the trial, thus indicating his trial strategy in not calling these witnesses.

Finally, at the PCR hearing, Trial Counsel testified that, had he thought the alibi witnesses were necessary at the time of trial, he would have called them. He stated that, in hindsight, he had no idea why he did not call them to testify, but at the time of the trial he would have weighed the pros and cons and, if he believed their testimony would have been helpful, he would have used them.

"[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough v. Gentry, 540 U.S. 1, 6, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003). Trial Counsel's decisions at the trial were clearly made with a tactical strategy in mind and his actions were carefully chosen, even if he disagreed with them looking back in hindsight. Trial Counsel was at least reasonably competent in his decisions at the time of trial, and thus his representation was not ineffective.

Because Trial Counsel articulated, both at the PCR hearing and at the time of trial, a strategic reason for choosing not to call alibi witnesses, his performance cannot be found ineffective, and this allegation is denied and dismissed with prejudice.

Applicant Not Called to Testify

Applicant alleges that Trial Counsel is ineffective for failing to call him to testify at his trial. This argument is meritless. Although Applicant testified at the PCR hearing that he indicated to his attorney that he wished to take the stand, no evidence presented proves that Trial Counsel would not allow him to testify. Trial Counsel could not recall why Applicant chose not to take the stand.

If Trial Counsel advised Applicant not to testify, it would fit into the trial strategy he articulated to have the final word in closing arguments by not putting up a defense. This is a reasonable strategy that should not be questioned in hindsight. Therefore, this argument is meritless and is denied and dismissed with prejudice.

Lack of Communication

Applicant's allegation that Trial Counsel was ineffective because of a lack of communication is meritless. At the PCR hearing, Applicant testified that he spoke with Trial

Counsel about four times before his trial. He stated that Trial Counsel was not communicating like he should, so he filed a motion to have Trial Counsel relieved. Applicant stated that Trial Counsel filed a motion to be relieved, as well. Before the trial, however, Applicant indicated to Trial Counsel that he did want Trial Counsel to represent him, so Trial Counsel did not present his motion to be relieved and proceeded with the trial.

Trial Counsel testified that he met with Applicant at least twice. He stated that they mostly communicated by telephone or through written letters. South Carolina case law has established that even if Trial Counsel only met with his client very briefly, that alone does not establish that he was unprepared or ineffective at trial. "First, there is no question that counsel met with [Applicant] on several occasions prior to the first trial. Even if the meetings were brief, this fact alone is not indicative of inadequate trial preparation." Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) (citing Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980) (recognizing that brevity of time spent in consultation with defendant, without more, did not establish that trial counsel was ineffective)).

Regardless of the gap in Trial Counsel's communication with Applicant, Applicant had the opportunity to discuss the details of his case with his attorney and provide him with defenses, witnesses, and an alibi as well as review his discovery in preparation for trial. Trial Counsel was clearly prepared for trial and vigorously cross-examined all the State's witnesses to present a defense on Applicant's behalf. Any breakdown in communication did not result in ineffective assistance of counsel. More importantly, even if this lack of communication was ineffective, it was not prejudicial to Applicant's case because there was no further information that could have been discussed before trial that could have changed the outcome of the case. Applicant has presented

no evidence that Trial Counsel was unprepared for trial or required any additional communication with Applicant prior to trial. Thus, this allegation is denied and dismissed.

Joint Trial

Applicant's allegation that counsel was ineffective for allowing him to have a joint trial with his co-defendant is meritless. Although this argument should have been made on direct appeal, Applicant is framing the issue as one of ineffective assistance of counsel for failing to move to sever the trials.

Joint trials with co-defendants are very common and happen often. It is in the solicitor's discretion to choose how to prosecute the action, and very often it is the best use of the State's resources to combine co-defendants with the same or similar charges under the same facts into one trial. This is a standard practice, and it is only inappropriate when the court determines that it would be prejudicial or unfair to one defendant to be tried along with his co-defendant.

"A severance 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 codefendant's guilt." State v. Spears, 393 S.C. 466, 475, 713 S.E.2d 324, 329 (Ct. App. 2011) (citing State v. Walker, 366 S.C. 643, 657, 623 S.E.2d 122, 129 (Ct.App.2005)). In Spears, the South Carolina Court of Appeals held that the defendant was not prejudiced by a joint trial with his co-defendant where the evidence against both defendants for armed robbery and kidnapping was interconnected and no specific trial right was prejudiced by the joinder of these trials. The same argument applies to this case because the facts of the cases were the same, the evidence presented was connected, and neither co-defendant's case prejudiced the other's in any way.



Applicant has not only failed to prove that he was prejudiced in any way by having a joint trial, but also that Trial Counsel is somehow ineffective for allowing this to happen. At the PCR hearing, Trial Counsel testified that, at the time of the trial, he saw no legal reason for moving to sever the trials. He stated that, if he had seen reason to move for separate trials, he would have made the proper motion. Although Applicant testified that he asked Trial Counsel to file a motion to sever the trial, Trial Counsel credibly testified that he did not recall Applicant making this request. He stated that he would have filed a motion to sever if Applicant had asked him. This evidence supports the argument that counsel was not ineffective and Applicant was not prejudiced by this action, and accordingly this allegation is denied and dismissed with prejudice.

Joint Plea

Applicant alleges that Trial Counsel was ineffective for obtaining a joint plea rather than an independent plea. This argument is meritless, primarily because Trial Counsel has no direct control over any plea offer, if any, which the State chooses to extend to Applicant. While trial counsel may negotiate with the State to obtain a favorable plea deal, they cannot have the final say in what the State chooses to offer. Furthermore, Applicant has no constitutional right to a plea offer, whether independent from his co-defendants or otherwise. Thus he has been deprived of no right or necessity in his case. The only way Trial Counsel could have been ineffective in regard to a plea offer is by failing to convey the offer to Applicant, and this was not the case in Applicant's situation.

Furthermore, Applicant can show no prejudice from the offer of a joint plea deal. Whether the State offered a satisfactory plea deal to Applicant that he may or may not have accepted has no bearing on the outcome of his trial. Applicant chose to go to trial rather than plead guilty, and the



existence of an independent plea offer would not have changed the jury's verdict. Thus, the second prong of the Strickland test is not met.

Applicant can show no ineffective assistance of counsel and no prejudice from the offer of a joint plea, and thus has failed to meet his burden of proof. This allegation is denied and dismissed with prejudice.

Failure to Object

Applicant alleges that Trial Counsel was ineffective for failing to object to the State implying that Applicant could have destroyed the evidence that was not found during the execution of the search warrant. This Court finds that failure to object was not ineffective.

At the PCR hearing, Trial Counsel testified that he did not object to the testimony in question and that he did not ask for a curative instruction from the court. He stated that, in hindsight, he did think that he should have objected to the testimony at trial. However, he testified that, at the time the statement was made, if he had thought it was objectionable, he probably would have objected. He also stated that, if he had found it objectionable, he might not have objected to the statement anyway because he did not want to stop the flow of questioning and draw unnecessary attention to the statement.

As explained above, our courts do not expect defense counsel to act based on the knowledge that comes with the benefit of hindsight. Yarborough v. Gentry, 540 U.S. 1, 6, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003). If Trial Counsel acted reasonably and strategically at the time the statement was made, then he cannot be found ineffective.

Furthermore, under the Strickland standard, because Trial Counsel articulated a strategic reasoning for choosing not to object to this statement, his inaction cannot be deemed ineffective. Therefore, this allegation is denied and dismissed with prejudice.



"Jury Violation": Lesser Included Offense

This Court interprets Applicant's allegation about a jury violation as one of ineffective assistance of counsel for failing to ask for the lesser included offense. Applicant has failed to present sufficient evidence to prove that counsel was ineffective on these grounds for any reason, and this allegation is denied and dismissed.

"Jury Violation": Jury Charge

This Court interprets Applicant's allegation regarding jury charges that made him look guilty as one of ineffective assistance of counsel for failing to object to the jury charges. Applicant has failed to present sufficient evidence to prove that counsel should have objected to any statements by the court during jury instructions that would have prejudiced him in any way, and this allegation is denied and dismissed.

In General

Trial Counsel's testimony at the PCR hearing combined with his actions at trial supported by the trial transcript evidence the fact that Trial Counsel performed above the standard level of competence required of defense counsel.

Trial Counsel testified that his trial strategy was to attack the State's DNA evidence against Applicant, which he did fully. Applicant's fingerprints were found on the piece of duct tape which was placed on the victim by his attackers during the armed robbery, and the fingerprints were matched to Applicant through a CODIS database hit which linked to him. Trial Counsel took several steps to investigate the evidence, he moved to suppress the evidence based on the fact that it matched through the CODIS database, and he questioned the integrity of the evidence in front of the jury. Trial Counsel vigorously cross-examined the State's witnesses about the reliability of




the fingerprints, about whether they were on the sticky side of the duct tape rather than the smooth side and how that affected them, and whether or not it was possible that his fingerprints could have been on the tape from before the robbery. He also moved for a directed verdict at the close of the State's case and provided the court with case law supporting his arguments.

Additionally, Trial Counsel moved for a change in venue based on what he believed was an unusual circumstance because the victim was well acquainted with every attorney in the county. Although his motion was not granted, Trial Counsel acted competently in moving for this relief on behalf of his client.

Even if Trial Counsel doubted his actions in hindsight based on the result of the trial or his fairly limited experience practicing criminal law, it is clear from the record and evidence presented that he was well prepared for trial, he vigorously argued for his client, questioned the evidence presented, and made the proper motions and arguments to support Applicant's case. Trial counsel acted well above the standard levels of competence required by Strickland. Thus, these allegations of ineffective assistance of counsel must be denied and dismissed.

OVERWHELMING EVIDENCE

Applicant cannot meet his burden to show that he was prejudiced by any alleged deficiencies because there is overwhelming evidence of his guilt. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), cert. denied, 535 U.S. 1114, 122 S.Ct. 2332, 153 L.Ed.2d 162 (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of the defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt); cf. Ford v. State, 314



S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (holding respondent failed to prove prejudice from trial counsel's failure to request an alibi charge where there was overwhelming evidence of guilt).

Applicant's fingerprints were found on the duct tape that was placed on the victim by his attackers during the robbery. Trial Counsel argued vigorously about the reliability of this evidence at trial, and while it was essentially the only direct evidence tying Applicant to the crime, it was an exact DNA match and cannot be rebutted easily. This evidence was overwhelming and it is unlikely that any other actions by Trial Counsel could have prevented a jury from convicting Applicant based on this DNA evidence.

Applicant did not dispute the evidence against him. This is clearly overwhelming evidence of Applicant's guilt. As a result, Applicant can show no prejudice from any of the allegations raised in his PCR application as no deficiency on behalf of Trial Counsel could have reasonably changed the outcome of trial, and this Court finds that this application should be denied.

DUE PROCESS VIOLATION

Change of Venue²

Applicant's allegation that he was denied due process because his motion to change venue was denied is meritless and should be denied.

The testimony presented at the PCR hearing established that the victim in this case was a well-known figure throughout the local community and was personally connected to nearly every attorney in the county, which is why Trial Counsel, who practiced in another county, was appointed

² This Court notes that the parties attempted to recover the transcript from the change of venue motion hearing to make a part of the record before the Court, but because it had been longer than five years since the hearing, the tapes had been destroyed and no longer exist.

to represent Applicant. Applicant alleges that, because the victim is so connected within the community, it was impossible for him to receive a fair trial in the venue in which he was tried. Trial Counsel filed a motion to change venue before his trial and it was denied.

First, the denial of Applicant's motion for change of venue is a direct appeal issue and should have been raised when he appealed his conviction. Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). This argument is inappropriate for post-conviction relief and should be denied on that ground.

Furthermore, even if it had been raised in the direct appeal, South Carolina case law supports the trial court's denial of the motion absent an abuse of discretion, which Applicant has not proven.

Empaneling a jury pursuant to § 17-21-85 is similar in effect to a change of venue and is subject to the same scope of review. State v. Longworth, 313 S.C. 360, 438 S.E.2d 219 (1993), cert. denied, 513 U.S. 831, 115 S.Ct. 105, 130 L.Ed.2d 53 (1994). A motion to change venue is addressed to the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion. State v. Patterson, 324 S.C. 5, 482 S.E.2d 760, cert. denied, 522 U.S. 853, 118 S.Ct. 146, 139 L.Ed.2d 92 (1997); State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990). An abuse of discretion occurs when the judge's ruling has no evidentiary support. Gooding v. St. Francis Xavier Hosp., 317 S.C. 320, 454 S.E.2d 328 (Ct.App.1995), affirmed in part, reversed in part, 326 S.C. 248, 487 S.E.2d 596 (1997).

State v. Manning, 329 S.C. 1, 7-8, 495 S.E.2d 191, 194 (1997).

Finally, even if the victim in this case was well-known throughout the local community, the *voir dire* process would have eliminated any potential jurors who were acquainted with him

and biased for that reason. Applicant has shown no evidence to support an argument that the jurors were tainted by alleged personal connections to any of the participants of this trial. Therefore, Applicant has failed to meet his burden of proof and cannot show a due process violation on these grounds. This allegation is denied and dismissed with prejudice.

Joint Trial

For the reasons argued above, Applicant's allegation that he was denied due process because he was given a joint trial with his co-defendant is meritless. See State v. Spears, 393 S.C. 466, 475, 713 S.E.2d 324, 329 (Ct. App. 2011) ("A severance 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 codefendant's guilt."). Applicant has proven no such prejudice based on his joint trial. Furthermore, this is a direct appeal issue that was not argued in Applicant's appeal, and thus this issue should be deemed abandoned and is denied and dismissed with prejudice.

PROSECUTORIAL MISCONDUCT

Joint Plea Offer

Applicant's allegation of prosecutorial misconduct based on the State's offer of a joint plea deal with his co-defendant rather than an individual plea offer is meritless. As discussed above, Applicant has no constitutional right to a plea offer from the State and was not entitled to relief by pleading guilty to this crime. It is in the State's discretion whether to offer any kind of benefit for choosing to plead, and they are simply not required to do so.

Applicant has not proven any misconduct or inappropriate behavior from the prosecutor and therefore this allegation is denied and dismissed with prejudice.

JUDICIAL BIAS

Judge's Relationship to Victim

Applicant's allegation that the trial judge was acquainted with the victim in his case which resulted in inappropriate judicial bias is meritless and must be dismissed.

No evidence presented at the PCR hearing indicated that the judge was acquainted with the victim. Both Applicant and Trial Counsel testified that they did not know for a fact that the Judge had a personal relationship with the victim. Applicant's allegation is not based on fact or evidence. Furthermore, he has shown no prejudice resulting from this alleged bias. Even if the judge was familiar with the victim, Applicant has not proven that the judge's failure to recuse himself from the case changed the jury's guilty verdict. The jury likely would have made the same decision with a different judge presiding. 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.

V. 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), SCRCP, 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 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 28th day of July 2017.


JOCELYN NEWMAN
Presiding Judge
Third Judicial Circuit

Columbia, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF CLARENDON)

IN THE COURT OF (Select one.)
 COMMON PLEAS FAMILY COURT
JUDICIAL CIRCUIT

VICTOR MCCOY WELDON,
Plaintiff(s),
-vs-

CASE NO.:
APPOINTMENT OF COUNSEL OR GAL
(Select one.)

STATE OF SOUTH CAROLINA,
Defendant(s).

ORDER
 AMENDED ORDER

TYPE OF CASE/PROCEEDING: (Check one.)

- | | | |
|--|--|--|
| <input checked="" type="checkbox"/> Post-Conviction Relief (PCR)/habeas case | <input type="checkbox"/> Adoption | <input type="checkbox"/> Juvenile |
| <input type="checkbox"/> SVP case | <input type="checkbox"/> Custody and/or Visitation | <input type="checkbox"/> Abuse and Neglect |
| <input type="checkbox"/> Minor Name Change | <input type="checkbox"/> Other: | |

It appears that VICTOR MCCOY WELDON, who is a litigant in this case, is entitled to court-appointed counsel or a guardian ad litem.

It further appears that: (Select only one.)

- counsel/guardian ad litem has not yet been appointed by the court; therefore, an appointment for counsel/guardian ad litem is necessary.
- counsel or a guardian ad litem was previously appointed by the court but has indicated either a possible conflict of interest, an entitlement to exemption, or other good cause warranting the appointment of new counsel or guardian ad litem based on: _____
- counsel was previously appointed by the court but has not indicated that the litigant has retained private counsel and is no longer entitled to appointed counsel.
- court appointed counsel has obtained _____, Esquire as substitute counsel pursuant to Rule 608(h)(2); provided, however, only the member who originally received the appointment and who sought substitute counsel shall receive credit.
- Other: _____

Therefore, it is ordered that LANCE BOOZER, hereby is appointed as (Select one.)

counsel lead counsel (if capital PCR case) guardian ad litem
for the above-named person. Any counsel or GAL previously appointed is/are hereby relieved.

(If Death Penalty PCR Case) It is further ordered that _____, Esquire, is hereby appointed as second counsel in this capital PCR case.

The clerk of court is directed to forward a copy of this order to all persons entitled to notice.

IT IS SO ORDERED THIS 28TH DAY OF JANUARY, 2016.

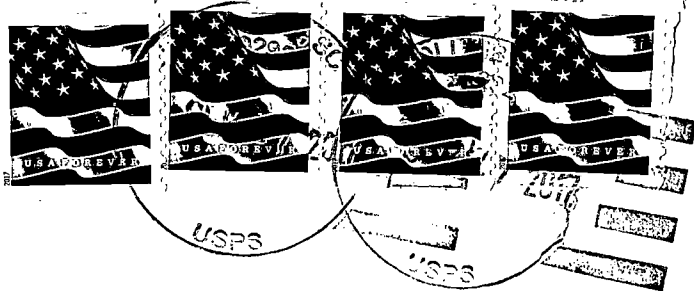
Brenda B. Roberts
 Circuit Judge Clerk of Court

CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THE OFFICE
DATE 1/28/2016
Brenda B. Roberts
CLERK OF COURT
CLARENDON COUNTY, SC

NOTICE: SC Supreme Court Order of September 29, 2006, requires appointed counsel entitled to payment from the Office of Indigent Defense (OID) to register the case online with OID within fifteen (15) days of this appointment at www.sccid.sc.gov, and further directs that reimbursement vouchers be submitted directly to SCCID and not to the trial judge or clerk of court. See SCCID website for further details.

THE BOOZER LAW FIRM, LLC

1400 Laurel Street, Suite 4A
Columbia, SC 29201



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