



WALLER LAW GROUP

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OCT 12 2017

S.C. SUPREME COURT

October 10, 2017

Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

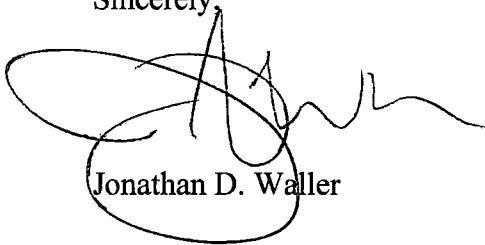
Re: Deshawn L. Powell vs. State of South Carolina
C/A No: 2015-CP-38-1052

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Powell in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-520-7278.

Sincerely,



Jonathan D. Waller

Cc: Ruston W. Neely, South Carolina Office of Attorney General

Enclosures

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OCT 12 2017

STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. SUPREME COURT

APPEAL FROM ORANGEBURG COUNTY
Diane S. Goodstein, Circuit Court Judge

2015-CP-38-1052

Deshawn L. Powell, #350880,

Appellant,

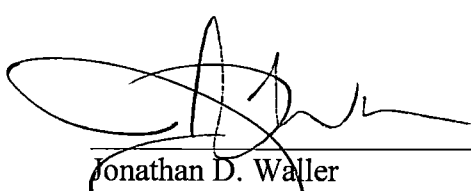
v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Deshawn L. Powell, #350880, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed September 8, 2017 and served on counsel by letter dated September 25, 2017, issued by the Honorable Diane S. Goodstein, Presiding Judge, First Judicial Circuit.



Jonathan D. Waller

Waller Law Group
SC Bar No.: 76290
1116 Blanding Street
Suite 2B
Columbia, SC 29201
803-520-7278 (phone)
jonathan@wallergroupsc.com
ATTORNEY FOR PETITIONER

This 10 day of October, 2017.

Other Counsel of Record:
Lindsey A. McCallister, Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3319

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Diane S. Goodstein, Circuit Court Judge

2015-CP-38-1052

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OCT 12 2017
S.C. SUPREME COURT

Deshawn L. Powell, #350880,

Appellant,

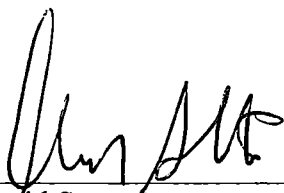
v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, Ruston W. Neely, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 10th day of October 2017, to his office located at P.O. Box 11549, Columbia, SC 29211.



M. David Scott

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

)
Deshawn L. Powell, #350880,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

2015-CP-38-1052

ORDER OF DISMISSAL

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WINNIEFA B. CLARK
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CLERK OF COURT
ORANGEBURG, SC

This Court convened an evidentiary hearing into the matter on October 27, 2016, at the Dorchester County Courthouse. Applicant was present at the hearing and represented by Jonathan D. Waller, Esquire. Ruston W. Neely, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant's trial counsel, Margaret Hinds, Esquire (hereinafter "trial counsel") was present and testified. This Court had the opportunity to listen to the testimony of Applicant and trial counsel. This Court had before it a copy of the trial transcript, the records of the Orangeburg County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the direct appeal records, and the pleadings in this matter. This Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Orangeburg County. Applicant was indicted at the February 2011 term of the Court of General Sessions for Orangeburg County for murder (2011-GS-38-0015). Applicant was represented by Margaret Hinds, Esquire and Douglass Mellard, Esquire, sat with trial counsel as second chair. Applicant proceeded to trial before the

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CLERK OF COURT
ORANGEBURG COUNTY, SC

Honorable Edgar W. Dickson. The jury found Applicant guilty of the lesser included offense of voluntary manslaughter. Judge Dickson sentenced Applicant to thirty years' imprisonment.

Applicant filed a timely notice of appeal. Kathrine H. Hudgins, Esquire, of the Office of Appellate Defense, perfected the appeal with the filing of an Anders¹ brief. Applicant also filed a *pro se* brief. The South Carolina Court of Appeals dismissed Applicant's appeal after review on July 01, 2015. State v. Powell, Op. No. 2015-UP-379 (S.C. Ct. App. filed July 01, 2015). Remittitur was issued to the lower court on August 18, 2015.

II. ALLEGATIONS

Applicant did not allege any grounds against Douglas Mellard. Against trial counsel, Applicant alleged the following grounds in his application:

1. Ineffective Assistance of Counsel
 - a. Counsel failed to properly cross-examine witnesses
 - b. Counsel failed to investigate circumstances surrounding death of victim
 - c. Counsel failed to develop a defense regarding weapon
 - d. Counsel failed to investigate or develop all mitigating evidence
 - e. Counsel failed to object to irrelevant evidence
2. Ineffective Assistance of Appellate Counsel
 - a. Appellate counsel failed to obtain a complete transcript to review

III. SUMMARY OF FACTS

Applicant was convicted of murder for stabbing a sixty-nine year old man, Arthur Riley, to death. A witness testified he saw the Applicant beating the victim 'to death' at the victim's home. App. p. 81-82. Witnesses testified they saw Applicant at a club before seeing Applicant again at the victim's residence later that evening. App. p. 67. Witnesses testified to leaving the scene of the murder when the fight started. App. p. 221. Law enforcement found a bloody knife, the DNA of which was a match for the victim, on Applicant's porch. App. p.196.

¹ Anders v. California, 386 U.S. 738 (1967).

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court reviewed the record in its entirety, listened to the testimony given, and heard the arguments presented at the evidentiary 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 fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

In this post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove counsel's "conduct so undermined the proper functioning of the adversarial process" that the proceedings "cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this first prong, the proper measure of performance is whether counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). Second, any deficient performance must have prejudiced 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 688.

This Court finds trial counsel properly prepared for Applicant's trial. She interviewed multiple witnesses. Trial counsel elucidated valid trial strategies and the reasoning behind her decisions. A strategic or tactical decision does not have to be articulated by counsel on the record; counsel doesn't to 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). Strickland itself recites that there are countless ways to provide effective assistance and even the best lawyers would not defend a particular client in the same way. 466 U.S. at 689. This Court finds trial counsel rendered adequate assistance and exercised professional judgment in all her decisions at trial. This Court dismisses Applicant's application for the reasons set out below:

A. Ineffective Assistance of Counsel

1. Counsel failed to properly cross-examine witnesses.

The trial transcript reflects the only witness trial counsel failed to cross-examine was Phillip Furtick. Furtick's testimony was duplicative to the testimony already taken from other officers and he was not a substantive witness for the State. The record reflects Counsel adequately cross-examined each witness in defense of Applicant.

Therefore, this Court finds Applicant failed to show how trial counsel's cross-examination was deficient or how he was prejudiced by a lack of further cross-examination. Accordingly, this Court denies and dismisses this allegation.

2. Counsel failed to investigate circumstances surrounding victim's death.

At the evidentiary hearing, Applicant claims he did not remember whether trial counsel discussed the State's evidence against him. Applicant testified he met with trial counsel's investigator and discussed potential witnesses and alibis. Trial counsel testified Applicant was only able to give her investigator witness names and an alibi from the party that occurred prior to the murder. It was uncontroverted that Applicant was at the party prior to the murder. Trial counsel testified she spoke to numerous witnesses in preparation for Applicant's trial.

Applicant also failed to show how he was prejudiced by trial counsel's alleged failure to further investigate. "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).

This Court finds trial counsel made reasonable efforts to investigate the circumstances of the murder with the assistance of Applicant. Therefore, this Court finds Applicant failed to show how trial counsel's investigation was deficient or how he was prejudiced by a lack of further investigation. Accordingly this Court denies and dismisses this allegation.

3. Counsel failed to develop a defense regarding the weapon.

Applicant's half-brother, Maurice Tucker, testified at the evidentiary that he did not see the murder weapon, which was found at Applicant's home on the porch, when he entered the home that morning. The substance of this testimony was already in evidence from law enforcement. Law enforcement entered the home and also did not see the knife until they were exiting the home. Tucker testifying he did not see the knife when he went into the home adds no new evidence for the jury to consider. Law enforcement found the knife later that day on Applicant's front porch. Trial counsel testified she chose not to introduce Tucker's testimony

because she did not believe the testimony was stronger than having the final closing argument. During closing argument, trial counsel's strategy was to argue law enforcement did not have enough evidence to convict Applicant beyond a reasonable doubt. "Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

This Court finds trial counsel made reasonable efforts to investigate the circumstances of the murder with the assistance of Applicant. Therefore, this Court finds Applicant failed to show how trial counsel's defense of the knife was deficient or how he was prejudiced by trial counsel's choice of argument. Accordingly, this Court denies and dismisses this allegation.

4. Counsel failed to investigate or develop mitigating evidence

As delineated above, trial counsel had her office's investigator investigate each of Applicant's potential alibis and witnesses. Further, trial counsel herself interviewed a number of witnesses in preparation for the trial. Trial counsel also presented mitigating evidence on Applicant's behalf after he was found guilty. Applicant failed to show how he was prejudiced by trial counsel's failure to further investigate mitigating evidence. "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, 368 S.C. at 385-86, 629 S.E.2d at 357.

This Court finds trial counsel made reasonable efforts to investigate the circumstances of the murder with the assistance of Applicant. Therefore, this Court finds Applicant failed to show how trial counsel's investigation was deficient or how he was prejudiced by a lack of further investigation into mitigation. Accordingly, this Court denies and dismisses this allegation.

5. Counsel failed to object to irrelevant evidence

Applicant failed to prove that trial counsel should have objected. Applicant further failed to prove that an objection to irrelevant evidence would have resulted in the result of the proceeding being different.

This Court finds trial counsel's objections were appropriate. Therefore, this Court finds Applicant failed to show how trial counsel's failure to object was deficient or how he was prejudiced by a lack of objection. Accordingly, this Court denies and dismisses this allegation.

After a thorough review of the record, this Court finds Applicant was adequately and professionally represented by trial counsel. This Court finds trial counsel appropriately based their investigation, questioning, and arguments around a valid trial strategy. This Court finds Applicant has failed to satisfy his burden of proving the alleged deficiency. This Court also finds that Applicant has failed to prove how he was prejudiced by any of trial counsel's actions. Accordingly, Applicant has failed to satisfy his burden of proving ineffective assistance of counsel with regard to this allegation and it is therefore denied and dismissed.

B. Ineffective Assistance of Appellate Counsel

This ground was not fully argued at the evidentiary hearing. There were a few pages missing from the transcript obtained by appellate counsel, Kathrine H. Hudgins, Esquire. Ms. Hudgins presented an Anders brief to the Court of Appeals. Applicant also filed a *pro se* brief. The Court must fully review the record, separate from appellate counsel and Applicant's briefs. The law is clear that even in Anders briefing situations, the normal Strickland analysis applies. "With a claim that counsel erroneously failed to file a merits brief, it will be easier for a defendant-appellant to satisfy the first part of the Strickland test, for it is only necessary for him to show that a reasonably competent attorney would have found one nonfrivolous issue

warranting a merits brief.” Smith v. Robbins, 528 U.S. 259, 288 (2000). Here, Applicant has failed to show that a reasonably competent attorney would have found one nonfrivolous issue. Therefore, this Court finds Applicant has failed to satisfy his burden of proving the alleged deficiency. This Court also finds that Applicant has failed to prove how he was prejudiced by any of the missing pages in the trial transcript.

Accordingly, Applicant has failed to satisfy his burden of proving ineffective assistance of counsel with regard to this allegation and it is therefore denied and dismissed.

IV. CONCLUSION

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

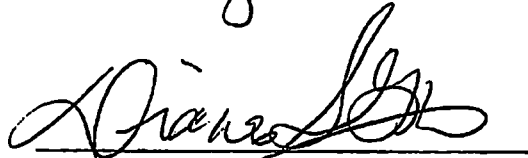
This Court notes Applicant must file and serve a notice of appeal within thirty (30) days from receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel’s assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if Applicant wishes to seek appellate review, his post-conviction relief attorney must serve and file a notice of appeal on Applicant’s behalf. Applicant and his attorney are directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 29 day of August, 2017.



DIANE GOODSTEIN
Presiding Judge
1st Judicial Circuit

Orangeburg, South Carolina



State of South Carolina
The Circuit Court of the First Judicial Circuit

DIANE SCHAFER GOODSTEIN
JUDGE

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WINNIE B. CLARK
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CLERK OF COURT
ORANGEBURG, SC

MEMORANDUM

To: Ruston W. Neely

From: Karen "Kaye" M. Parker, Administrative Assistant to Judge Diane S. Goodstein

Subject: Dehawn L. Powell # 350880 v. State of SC

Date: August 30, 2017

=====

In an effort to expedite the processing time of our large volume of orders, I am now submitting the above-referenced executed, original order(s) to you without a standard coversheet. Your office will be responsible for filing the original(s) with the appropriate Clerk of Court's office and mailing a copy to all opposing counsel.

Should you have any questions, please do not hesitate to call our office.

Sincerely,

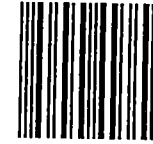
Kaye Parker

Karen "Kaye" M. Parker
Administrative Assistant to Judge Diane S. Goodstein

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Winnia B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC



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