

STATE OF SOUTH CAROLINA  
COUNTY OF CHESTERFIELD

IN THE COURT OF COMMON PLEAS  
FOR THE FOURTH JUDICIAL CIRCUIT

Dameion Jermiah Rivers, #342549,

Case No. 2011-CP-13-0210

Applicant, 2016 JUL 8 PM 12 28

v.

FAYE L. SELLERS  
CLERK OF COURT  
CHESTERFIELD COUNTY, S.C.

ORDER OF DISMISSAL

State of South Carolina,

Respondent.

This matter came before the Court by way of an Application for Post-Conviction Relief ("PCR") filed June 9, 2011. Respondent filed a return on or about August 19, 2011. The Court convened an evidentiary hearing into the matter on January 11, 2016 at the Darlington County Courthouse. Applicant was present and represented by Andrew McLeod, Esquire. Jessica E. Kinard, Esquire, of the South Carolina Attorney General's Office, represented respondent.

Applicant; his trial counsel, Paul V. Cannarella, Esquire; Kory Little; and Billy Lee Lisenby, Jr. testified at the hearing. The Court had before it a copy of the trial transcript, the records of the Chesterfield County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, and the pleadings.

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Chesterfield County Clerk of Court's orders of commitment. The Chesterfield County Grand Jury indicted the Applicant at the November 2007 term of General Sessions for murder (2007-GS-13-0814) and at the December 2007 term for possession of a weapon during commission of a violent crime (2007-GS- 13-0897). Paul V. Cannarella, Esquire represented the Applicant.

Upon information and belief, the State called the case to trial before the Honorable Paul M. Burch on August 30, 2010 and a jury was selected. Upon information and belief, a suppression hearing was held that day and the motion to suppress was denied. On August 31, 2010, the Applicant pled guilty to the lesser included charge of voluntary manslaughter and the weapons possession charge as indicted. Judge Burch sentenced the Applicant to concurrent terms of nineteen (19) years for voluntary manslaughter and five (5) years for possession of a weapon during commission of a violent crime, with credit for time served. The Applicant did not appeal.

## II.

In his Application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel
  - a. Failure to investigate.
  - b. Convinced the Applicant to plead guilty after a "new turn in the case."
2. Involuntary guilty plea.

On or about January 11, 2013, Amendment filed an amendment to his application, adding the following allegations:

1. Ineffective assistance of counsel.
  - a. Failure to quash the indictment for murder.
    1. "The indictment was invalid based on the fact that it states that the victim died in Chesterfield County when in fact the record clearly indicates that the victim was airlifted to Charlotte, north Carolina where surgery was performed and that ultimately the victim expired in Charlotte, North Carolina at the hospital and not in Chesterfield County. There are several cases that indicate that he place of death is absolutely necessary in an indictment for murder. These include:
      - State v. Platt, 154 S.C. 1
      - State v. Shoemaker, 276 S.C. 86
      - State v. Coleman, 17 S.C. 473
      - State v. Blakeney, 33 S.C. 111
  - b. Failing to advise the Applicant of the mandatory minimum penalty of the guilty plea involved.

A second amendment to the post-conviction relief application was filed by the Applicant on or about May 29, 2013. This added the following allegations:

1. Failure to discover exculpatory evidence;
2. Failure to advise the plea court to give applicant all of his time served;
3. Failure to clarify plea court's erroneous language pertaining to the murder indictment;
4. Failure to advise the applicant of the mandatory minimum penalty based on the plea;
5. Failure to quash indictment for murder.

Applicant filed a second amended PCR application on or about December 22, 2015, which added the following allegations:

1. Trial counsel was ineffective in not obtaining a continuance due to the fact that the State did not comply with the Brady request in it did not provide the recorded statement of Kenneth Louallen. Said statement was clearly referenced in the incident report and was not produced.
2. Trial counsel was ineffective in not advising the PCR applicant concerning the fact that he would have to serve 85% of any sentence and the trial counsel advised that PCR application would only have to serve 65% of any sentence. Had PCR Applicant known this then, he would not have pled guilty and would have gone to trial.
3. Trial counsel was ineffective in failing to raise all the issues possible concerning the validity of the indictment. The incident [sic] was not signed by the grand jury foreman, and it incorrectly stated the location where the victim died.
4. The police officer who was investigating this case for the Town of Pageland is currently on administrative leave and being investigated for improper conduct, and the PCR applicant believes that the police office intentionally withheld evidence and did not investigate this case.
5. There is a witness, Billy Lee Lisenby, Jr., who is prepared to testify that he informed Chief Brown, the investigating officer, after the shooting that her saw the victim with a gun prior to the shooting at the scene, but the investigating officer did not get a statement from Billy Lee Lisenby, Jr. or bring this information to light during the investigation.

Applicant filed a supplement to this amendment on or about January 4, 2016, which alleged that the testimony that Billy Lee Lisenby, Jr. was expected to present constituted newly-discovered evidence. It further provided that Kory Little was prepared to recant his statement and provide testimony that would be helpful to the Applicant.

### **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**



The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe the witnesses who testified at the hearing, and to closely pass upon their credibility. This Court finds Counsel's testimony credible, and that the testimony presented by Applicant and his witnesses was less than credible. The Court has weighed the 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). Furthermore, this Court finds that Applicant abandoned all allegations except for those specifically addressed below.

A. Summary of Testimony

Applicant – Dameion Rivers

Applicant testified first, and began by stating that trial counsel was retained, and they met approximately three times over the course of three years of representation. He believed that trial counsel failed to engage in an adequate pre-trial investigation because he failed to find exculpatory evidence. In particular, Applicant alleged that once he reached the state prison system and received his case file, he saw that the indictment for his murder charge listed the victim's place of death as being in North Carolina. He also alleged that the person signing as the Grand Jury foreman was not the current foreman. Applicant further testified that a statement seemed to be missing from the discovery. He testified that he believed if he pled to the lesser-included charge of voluntary manslaughter, he would serve sixty-five percent (65%) of that sentence as long as he was well-behaved. Because this was not the case, he believed that his guilty plea was not fully voluntary and intelligent.

Applicant further testified about the idea of a self-defense argument, and that he understood it would not work because he stepped out of the car with a gun and could be viewed as initiating the difficulty. He also testified that he was unaware at the time that Billy Lee

Lisenby, Jr. was at the scene and saw that the victim had a gun. Applicant brought up the idea of asking for a continuance because he and trial counsel had just received an incident report at the time of the call of the case, and said that he was not aware a continuance was a possibility. He further testified that he did not discuss with trial counsel that there was alcohol in his system at the time of the crime. Lastly, he stated that he was on house arrest with an ankle monitor for two and a half (2 ½) years, and wanted credit for time served.

On cross examination, Applicant admitted that he voluntarily testified to the questions regarding waiver of his constitutional rights and satisfaction with his attorney during the entry of his guilty plea. Additionally, he testified that he recalled that Judge Burch told him during the plea colloquy that he could potentially serve the entire sentence length.

Kory Little

Kory Little, who was being held in Darlington County on a Federal detainer for possession of a firearm by a felon, testified that he was at the scene of the incident. During the investigation of this crime, he wrote a statement for the police that he said he saw the Applicant get out of the car with a gun; however, he testified at this hearing that it was a coerced statement because the police would not let him go to the bathroom without issuing it. He further testified that what he actually saw was someone getting out of the car with a long gun and, when that person tried to back up and get back into the car, the gun went off. Mr. Little testified that he did not know who this person was, nor did he know if the victim had a gun. He admitted to lying in his previous statement when questioned on cross-examination.

Billy Lee Lisenby, Jr.

Billy Lee Lisenby, Jr., an inmate serving time in South Carolina Department of Corrections for assault with intent to kill, assaulting a corrections officer, and failure to stop for law enforcement, was called to testify based on a letter that he submitted to PCR counsel in



December of 2015. This stated that he witnessed the shooting of which Applicant is charged, as well as that the victim had a gun when he was shot. He testified that he saw the Applicant step out of the car, the victim came toward Applicant, Applicant seemed to ignore the victim, Lisenby heard a shot and assumed that Applicant was shot, but then saw the victim fall. Mr. Lisenby further testified that, between the time of the incident and his current incarceration, he informed the police chief that he saw the victim holding a gun, but does not believe that this information was ever utilized or provided to Applicant and trial counsel. Mr. Lisenby and the Applicant were eventually housed at Lieber Correctional Institute together, and Applicant asked for Lisenby's assistance. On cross-examination, Lisenby testified that he was not absolutely certain it was Applicant that stepped out of the car, but he was certain that the victim had a gun, as he watched him conceal it when the car arrived.

Trial Counsel – Paul V. Cannarella

Trial counsel was called by Applicant's PCR counsel, and confirmed that he was hired by Applicant's family to represent him. From the outset, he testified that he firmly believed Applicant was in possession of a long gun and exited the car with that gun. When questioned about presenting the affirmative defense of self-defense, trial counsel admitted that the statement of Kory Little may have influenced his decision, as it called into doubt exactly what the facts were and what would be credible. Trial counsel felt that it would be disingenuous and confusing to ask for jury charges on all three issues of voluntary manslaughter, involuntary manslaughter, and self-defense, and that he explained all of this to the Applicant. Further, trial counsel believed that it would be difficult for a jury to process information under a theory of self-defense knowing that he arrived at the scene with a gun. He testified that if he knew conclusively that the victim had a gun, he may have recommended "rolling the dice" at trial using a self-defense argument.



Similarly, he stated that, had they proceeded to trial, he would have put up a witness to testify regarding the victim's reputation for carrying a gun.

Regarding the allegation of failing to investigate, trial counsel testified that he realized a statement was probably missing from the discovery, but he did not believe that its purported contents would have been helpful at the time; therefore, he believed that all exculpatory evidence had been provided by the state. When it came to the inaccuracy in the indictment, he did not believe it was worth the time to mention it – everyone involved knew what the crime was and what they were there to defend. Further, he testified that he would never have told the Applicant that it was a 65% sentence, and was certain that, if he had mentioned a percentage of time that would need to be served, it would have been 85%. Trial counsel also recalled the trial judge stating that Applicant may have to serve the entirety of his sentence. When questioned about the motion to suppress that preceded the plea, trial counsel stated that he believed it would have been a good ground for appeal if Applicant had not pled. Lastly, he believed that he had plenty of time to meet with the Applicant and familiarize himself with the case before heading to Court.

#### B. Ineffective Assistance of Counsel

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 trial counsel as a ground for relief, Applicant must prove trial 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." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether trial 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 trial 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).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove trial counsel's performance was deficient. Id. Under this prong, the Court measures trial counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial counsel's 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.

This Court finds Applicant has failed to show Counsel's performance fell below an objective standard of reasonableness. Counsel's testimony indicated he was extremely familiar with the facts of Applicant's case. This Court finds Counsel met with Applicant an adequate number of times and was familiar with the discovery materials. Counsel indicated he explained Applicant's constitutional rights, and he explained the differences between going to trial and entering a guilty plea. Counsel indicated he never had trouble communicating with Applicant, and he never had any concern that Applicant did not fully understand their conversations.

Trial counsel refuted the allegations that Applicant made in his application including, but not limited to, issues regarding validity of the indictment, discovery of exculpatory evidence, discussions regarding percentage of the sentence that Applicant would have to serve, importance of a statement that may have been omitted from discovery, and whether the plea was knowingly entered. He described conversations that he had with Applicant in which all of these items were



discussed. Specifically regarding failure to investigation, “[a] criminal defense attorney has a duty to investigate, but this duty is limited to a reasonable investigation.” Ard v. Catoe, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007). Accordingly, the controlling standard for counsel’s duty to investigate is *reasonableness*. Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 64 (2011). So long as a defendant’s attorney conducts a reasonable investigation, including interviewing potential witnesses when it is reasonable to do so, his performance will not be deficient. Id. at 457, 710 S.E.2d at 65. Moreover, 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. Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998). This Court finds that, through the presentation of evidence at the post-conviction relief hearing, Applicant has failed to demonstrate both deficiency by trial counsel, as well as any prejudice caused by trial counsel’s actions. Therefore, this allegation is denied and dismissed with prejudice.

### C. Newly-discovered Evidence

This Court finds Applicant's allegation that the testimony of Kory Little and Billy Lee Lisenby, Jr. constitute newly-discovery evidence is without merit. An Applicant requesting a new trial based on after discovered evidence must show that the evidence:

- 1) Is such as would probably change the result if a new trial was had; 2) has been discovered since the trial; 3) could not by the exercise of due diligence have been discovered before the trial; 4) is material to the issue of guilt or innocence; and 5) is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983). The information presented by these witnesses does not rise to the level of probably changing the outcome of a new trial, as they spoke mostly to the availability of a self-defense claim. One witness (Little) said that he was not certain who got out of the car, but that man had a gun, and he was unsure whether the victim



did. The other witness (Lisenby) said that he was fairly sure that Applicant got out of the car with a gun, but he that he also saw the victim with a gun. Regardless, it is not a far reach to think that a jury would believe that the Applicant exited the car with a gun, yet doubt whether the victim had one.<sup>1</sup> Lastly, it is worth noting that Applicant pled guilty and, therefore, waived the right to subject any evidence to review by the Court or a jury. Though he may have made a different decision with this information at hand, this Court does not believe that this information is so material to the issue of guilt or innocence that it would have reasonably led to an acquittal by a jury.

#### D. All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

### IV. CONCLUSION

Based on the foregoing, the 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.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's 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

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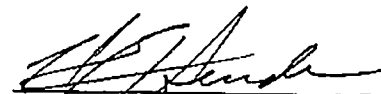
<sup>1</sup> The Court notes that, during his testimony at the PCR hearing, Applicant admitted to exiting the vehicle while holding a gun.

of post-conviction relief. Rule 71.1(g), SCRPC, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is 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. The Applicant shall be remanded to the custody of the South Carolina Department of Corrections for service of the remainder of his term of imprisonment.

AND IT IS SO ORDERED this 12<sup>th</sup> day of July, 2016.

  
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THE HONORABLE ROGER E. HENDERSON  
Presiding Judge  
Fourth Judicial Circuit

Chesterfield, South Carolina