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November 20, 2017

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

RECEIVED
NOV 22 2017
S.C. SUPREME COURT

The Honorable Sharon W. Staggers
Clerk of Court
125 W Main St.
Kingstree, SC 29556

RE: Marty Baggett, #216091, v. State of South Carolina
2016-CP-45-587

Dear Mr. Shearouse and Ms. Staggers:

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

Yours very truly,

Lance S. Boozer

Enclosures
cc: Julie Coleman, AAG
Loriene French, OAD
Marty Baggett, #216091

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
NOV 22 2017
S.C. SUPREME COURT

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

The Honorable D. Craig Brown, Circuit Court Judge

Case No. 2016-CP-45-587

Marty Baggett, #216091 ....Petitioner,

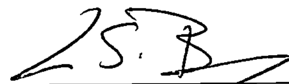
v.

State of South Carolina,...Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable D. Craig Brown's Order dated October 23, 2017, denying post-conviction relief to the Petitioner. Undersigned counsel received a copy of the filed Order on November 20, 2017. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
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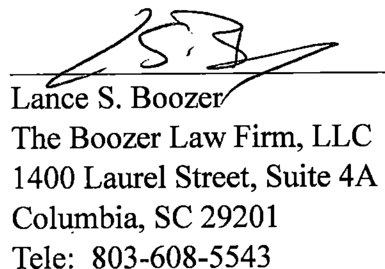
PROOF OF SERVICE

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 Coleman, P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 20th day of November, 2017.



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STATE OF SOUTH CAROLINA
COUNTY OF WILLIAMSBURG

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

2016-CP-45-00587

2017 NOV -6 AM 11:04
FILED

Marty Baggett, #216091,

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on December 5, 2016. Respondent submitted its Return on June 15, 2017. An evidentiary hearing was convened on July 25, 2017, at the Sumter County Courthouse. Applicant was present at the hearing and was represented by Lance S. Boozer, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

Applicant testified on his own behalf at the evidentiary hearing. William Legrand Carraway, Esquire, and Sam Floyd, Esquire ("Trial Counsel") also testified. The Court had before it a copy of the trial transcript, the records of the Williamsburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Williamsburg County Clerk of Court. In October 2010, the Williamsburg County Grand Jury indicted Applicant for reckless homicide (2010-GS-45-0269) and felony DUI (2010-GS-45-0270). Sam

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Floyd, Esquire represented Applicant. Assistant Attorney Generals Dale Scott, Esquire and David Stumbo, Esquire prosecuted the case. On July 18 through July 20, 2011, Applicant proceeded to trial before the Honorable George C. James, Jr. The jury found Applicant guilty as indicted on both charges. Judge James sentenced Applicant to imprisonment for concurrent terms of ten years for reckless homicide and twenty years for felony DUI.

Applicant filed a timely notice of appeal. Susan B. Hackett, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals initially reversed Applicant's conviction for felony DUI on June 24, 2015. State v. Baggett, Op. No. 2015-UP-311 (S.C. Ct. App. filed June 24, 2015). The State submitted a petition for rehearing on July 9, 2015 and it was granted by the South Carolina Court of Appeals on October 21, 2015. The Court dispensed with further briefing and argument and substituted an opinion for the previously submitted opinion. In the new opinion, the Court affirmed Appellant's conviction for felony DUI. State v. Baggett, Op. No. 2015-UP-311 (S.C. Ct. App. filed October 21, 2015). Appellant submitted a petition for rehearing on November 5, 2015. On December 17, 2015, after consideration, the Court denied the petition, as it was unable to discover any material fact or principle of law that would provide a basis for granting a rehearing.

Applicant subsequently filed a petition for writ of certiorari to the South Carolina Supreme Court on February 1, 2016. On November 9, 2016, the Supreme Court denied the petition. The remittitur was subsequently returned to the circuit court on November 14, 2016.

While his direct appeals were pending, Applicant filed an application for post-conviction relief on July 13, 2015. However, on August 9, 2016, the Court issued an order dismissing the action without prejudice until his appeals were finalized. This application follows.

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. Failed to have quashed indictments. The State had no evidence against Applicant for a Felony DUI or Reckless Homicide. Applicant never had a BA, urine, blood, or videotaping done by the arresting officer. This is violation of Applicant's due process.
   b. For allowing Jeffrey Scott's testimony to the jury to be heard without the judge qualifying him as an expert in his field of work. This is violation of Applicant's due process.
   c. For not objecting to the State's questioning of Officer Staggers about him identifying Applicant as the driver that night of the accident.
   d. For allowing the statements of Officer Staggers and Officer Boston given in front of the jury about Applicant's statements the night of the accident. Applicant was intoxicated and gave the statement involuntarily.
   e. For allowing the State to tell the jury a false version of Applicant's statement. Trial counsel did not object to the State's version. This in violation of Applicant's due process rights.
   f. For not objecting to the State's closing arguments on the second version that Officer Boston gave. The State version was false. This is in violation of Applicant's rights and due process.
   g. For not objecting to the State's testimony to the jury. Telling the jury how a passenger falls out of a car. The State is not a qualified expert in this field.
   h. For not objecting to the State testimony to the jury. Telling the jury "none of these stories are the at my given time." According to Officer Boston stories never changed.
   i. For not objecting to the State testimony to the jury. Telling the jury a version that Applicant ran Ms. Turner down while she was walking. The expert witness Dr. Prenell testified that the victim had no leg injuries from the truck bumpers.
   j. For not objecting to the second jury charge to the jury when they had two questions. The judge charged the jury with two elements of felony DUI and there's three elements total. The State must show a burden of proof of all three elements. The judge did not charge the jury with the first element of a felony DUI: 1) the actor drives a vehicle while under the influence of alcohol or drugs.
   k. For not getting Applicant his first plea offer to him in a timely manner.

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III. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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

V. SUMMARY OF RELEVANT TESTIMONY

Applicant's testimony

Applicant testified that he is currently serving time for felony DUI and reckless homicide. He stated that he was arrested on March 8, 2007, and he was originally charged with murder, voluntary manslaughter, and kidnapping. He stated he was evaluated for mental competency and was found competent to stand trial. Applicant stated he was offered a plea deal for involuntary manslaughter for a five year sentence with credit for time served. He stated that he had already served three and a half years when that offer was made, so he would not have to serve any more time. He stated they took that offer before the court and Judge Newman did not accept the plea.

Applicant testified that Ronnie Sabb originally prosecuted the case, then Assistant Solicitor Kimberly Barr took the case over. Applicant stated they went before Judge Newman to plead in March of 2010, and Solicitor Barr told the judge she had no evidence and she was not taking the case to trial. He stated Judge Newman denied his plea and locked him back up, and he stayed locked up until October 7, 2010, when he was indicted for felony DUI and reckless homicide. He stated that after the plea was not accepted by the court, the Solicitor's Office released the case and the Attorney General's Office prosecuted him. He testified that he had no conversations about this with his original attorney, Legrand Carraway.

Applicant testified Legrand Carraway was relieved as his attorney because he had a conflict of interest. Applicant stated Carraway represented his jail cell mate, William Foxworth, who was going to testify against Applicant at trial. He stated Foxworth's testimony was all lies. He testified that after Carraway was relieved, Trial Counsel was appointed to represent him. He stated they did not discuss anything about the case, even though Trial Counsel told him he worked on his case for countless hours. He stated Trial Counsel did not ask him about any prior

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plea offers from the State. He stated they did not discuss trial strategy or any defenses before the trial.

Applicant testified Trial Counsel did not object to the lack of evidence of blood alcohol content in his blood, breath, or urine and did not move to have the indictments quashed on those grounds. He stated Trial Counsel did not object to witness Jeffrey Scott testifying without being qualified by the judge as an expert. Applicant testified Trial Counsel should have objected to Officer Staggers' statements being used against him to say that he ran the victim over, because the victim actually fell out of the car, and her body and all the blood were on the driver's side of the car because she was driving. He stated the State should not have used his statements against him even though he was given his Miranda warnings because they were involuntary; he was intoxicated when he gave the statements.

Applicant testified Trial Counsel should have objected to the State's comments in closing argument about how he changed his story—he stated he has told the same story the whole time. He stated that Dr. Presnell testified at trial that there were no indications on the bumper of the car that the victim was run over and hit the bumper, and Trial Counsel argued this to the jury and cross-examined the witness on it.

W. Legrand Carraway's testimony

W. Legrand Carraway, Esquire, testified that he was originally appointed to represent Applicant through the Public Defender's Office. He stated when he represented Applicant, he was charged with DUI and reckless driving. He stated he entered into plea negotiations with the State on Applicant's behalf, and they agreed on a plea to DUI and involuntary manslaughter with a negotiated sentence. He stated that at the plea hearing, the victim's family objected to the plea and the sentence, so Judge Newman rejected the negotiated sentence and would not let the plea

go forward. Mr. Carraway testified he was relieved from his representation because of the situation with the Solicitor's Office. He stated he explained his reasons for thinking the plea offer was fair on the record at the plea hearing, and he told the plea court that Applicant did and did not do some things; this is why he was relieved. He stated there was no conflict of interest with William Foxworth, and he does not recall William Foxworth having any connection or involvement in this case. He stated William Foxworth didn't have anything to do with him being relieved on the case, and he did not discuss this case with William Foxworth. Mr. Carraway testified that he discussed the original plea offer with Trial Counsel when he took over the case, and Trial Counsel knew about it.

Trial Counsel's testimony

Trial Counsel testified he was appointed to this case in March 2010 by the Attorney General's Office. He stated he was in the courtroom the day of the original plea, when Applicant was represented by Mr. Carraway, so he was aware of the plea deal and of the situation surrounding this case. He stated the victim's family and the press were very involved in this case. He stated the Attorney General's Office offered a twenty year plea deal right before the trial, which Applicant rejected, so he had no choice but to go to trial and he did the best he could. He stated his theory of defense and trial strategy was to show that the victim was driving the vehicle and fell out, causing the vehicle to run her over, because she was extremely intoxicated and had a .387 blood alcohol content level.

Trial Counsel stated he hired an investigator, Woody Poplin, to help him investigate the case, but he did not have him write a report or testify at trial because his results did not help his case. He stated Mr. Poplin found that all the blood splatter that was analyzed was under the passenger side door of the vehicle, and none of it was under the driver's side door. He stated this

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finding supported the State's story that Applicant ran over the victim on the passenger's side, and negated Applicant's version of the story that the victim was driving the vehicle and fell out. He stated this was the reason he chose not to pursue or argue the theory that the victim was driving the vehicle. Trial Counsel testified that he and Applicant discussed their trial strategy on several occasions.

Trial Counsel testified that he was familiar with DUI cases and had handled them before he did this case. He stated that the statute requires a sample of blood, breath, or urine that shows the defendant's blood alcohol content was above the legal limit while driving, or some other evidence that he was intoxicated, and they did not have a sample here. He stated the DUI charge was dismissed in magistrate's court because of the lack of a sample, but Applicant was later charged by the Attorney General's Office with felony DUI. Trial Counsel testified that he raised the issue of lack of a sample to the trial court in his directed verdict motion in what he thought was an effective argument, but the trial court denied his motion. He stated that the Court of Appeals agreed with him on appeal, finding it was an error not to have strict compliance with the felony DUI statute.[1]

Trial Counsel testified Jeffrey Scott was qualified to provide expert testimony at trial, and he listed all his qualifications on the record, but the State must have forgotten to ask to have him qualified as an expert. He stated he did not believe this was objectionable, and there was no resulting prejudice that changed the outcome of the trial. He stated that all circumstantial evidence showed Applicant was driving the vehicle. He stated Applicant told his father that he

[1] The Court notes the Court of Appeals initially reversed the conviction on these grounds, but later substituted the opinion and affirmed the conviction after a petition for rehearing was held. In the new opinion, the court found that, in Applicant's case, the totality of the circumstances shows this was not a typical DUI traffic stop, so law enforcement did not need to follow typical DUI traffic stop procedures. Rather, law enforcement was responding to a call about a dead body found in the road, and appeared at the scene where at least fifteen other witnesses were already gathered. This totality of the circumstances analysis excused the lack of BAC sample or videotape. State v. Baggett, Op. No. 2015-UP-311 (S.C. Ct. App. filed October 21, 2015).

hit the victim, and he told the lady who found him at the scene of the crime that he "found a body." He stated he cross-examined Dr. Prenell on the issue of the victim's leg injuries and the lack of evidence of a hit on the bumper of the vehicle. He stated he argued that the victim had an extremely high blood alcohol content to the jury in his closing argument.

Trial Counsel testified the evidence against Applicant was not overwhelming, but it was enough to result in a conviction. He stated that Applicant told investigator Boston that the victim was driving the vehicle on three separate occasions—once at the crime scene, once at the Hemingway Police Department, and once the next day during his interview. However, he stated Applicant told Corporal Staggers that he was driving the vehicle himself, which was the basis for the State's argument that there were conflicting stories.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

As a matter of general impression, this Court finds Trial Counsel's testimony to be credible and persuasive. These credibility findings have been applied to the Court's findings and conclusions set forth below.

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant has asserted several allegations of ineffective assistance of counsel. This Court finds these claims to be meritless and they should be denied and dismissed with prejudice. This Court finds Trial Counsel's representation did not fall below the standards of professional norms

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in any manner. Based on the testimony presented and the record before the court, this Court finds Trial Counsel's representation was not ineffective in any regard.

Failure to move to quash indictments

Applicant alleges Trial Counsel was ineffective for failing to move to quash the indictments based on the lack of evidence of Applicant's blood alcohol content through a blood, breath, or urine sample. This allegation is meritless. Pursuant to section 56-5-2945 of the South Carolina Code (Supp. 2010):

> A person who, while under the influence of alcohol, drugs, or the combination of alcohol and drugs, drives a motor vehicle and when driving a motor vehicle does any act forbidden by law or neglects any duty imposed by law in the driving of the motor vehicle, which act or neglect proximately causes great bodily injury or death to another person, is guilty of the offense of felony driving under the influence.

S.C. Code Ann. § 56-5-2945 (Supp. 2010). South Carolina law provides that a person in violation of this statute must have his conduct at the incident site and the breath test site videotaped. S.C. Code Ann. § 56-5-2953 (Supp. 2010). Applicant argues that Trial Counsel should have moved to quash the indictments based on the lack of videotape evidence or evidence of Applicant's blood alcohol content through a blood, breath, or urine sample, which violates the felony DUI statute. However, the videotaping requirements of section 56-5-2953(A)(1)(b) were not applicable in Applicant's case because law enforcement officers were not making a traffic stop for a DUI, but rather were responding to the report of a dead body in the roadway.

The South Carolina Court of Appeals ruled on this specific issue in Applicant's direct appeal. The Court of Appeals found the trial court did not err in denying Applicant's directed verdict motion over the felony DUI charge because the State was not required in this circumstance to videotape the traffic stop:

In this case, videotaping never became practicable. The law enforcement officers

> were responding to the report of a dead body in the roadway. Therefore, the normal protocol for a traffic stop was not applicable. At least fifteen people, including Emergency Medical Service personnel, volunteer fire fighters, law enforcement officers, and members of Baggett's family, were present at the incident site. Although Corporal Staggers stated he identified Baggett as the driver of the truck, he testified Baggett told him the victim had been driving and had fallen out of the truck. Corporal Staggers turned the investigation of the case over to Investigator Boston, who arrived on the scene as Corporal Staggers questioned Baggett. Investigator Boston testified Baggett was already in Corporal Staggers's patrol car when he arrived. Thus, Baggett would not have been within camera range of a car-mounted camera. Baggett also told Investigator Boston the victim was driving. Corporal Staggers testified he did not have Baggett perform any field sobriety tests due to safety concerns because Baggett was so unsteady on his feet. Accordingly, the videotaping requirements of section 56-5-2953(A)(1)(b) were not applicable. We find dismissal of the felony DUI charge was not required under the totality of the circumstances.

State v. Baggett, Op. No. 2015-UP-311 (S.C. Ct. App. filed October 21, 2015). The Court of Appeals' opinion, and the South Carolina Supreme Court's denial of Applicant's Petition for Writ of Certiorari, confirms that this issue would not have succeeded if raised in a pre-trial motion to quash the indictments.

The record before the Court shows that although Trial Counsel did not raise this issue in a motion to quash, he did in fact raise and effectively argue the issue in his motion for a directed verdict, which later became the basis for the appeal and the opinion above. This Court finds Trial Counsel was not deficient in failing to move to quash the indictments based on the lack of a videotape or blood, breath, or urine sample because he *did* argue this issue to the trial court in his directed verdict motion. Regardless of the stage at which he raised the issue, it was presented to the trial court.

This Court further finds Applicant can show no prejudice from the lack of a motion to quash the indictments for multiple reasons. First, the motion would have been denied by the trial court, as clearly indicated by the trial court's denial of the directed verdict motion over the same issue. Second, the Court of Appeals' ruling shows the issue was not successful on appeal and

cannot be the basis for a successful motion to quash. Third, even without the trial court ruling or appellate opinion, it is clear that Applicant's motion on these grounds would not have been successful. In order to prove felony DUI, the statute requires that the State prove the defendant (1) was under the influence of alcohol or drugs; (2) was driving the vehicle; and (3) caused an act forbidden by law or neglected a duty that resulted in great bodily injury or death to another person. S.C. Code Ann. § 56-5-2945. Though the evidence was disputed, the State presented evidence that Applicant was driving the truck, that while driving he ran over the victim and killed her, and that he was intoxicated at the time. The statute does not require the State to prove Applicant's blood alcohol content exceeded the legal limit at the time of the offense. They must only provide some sort of evidence that he was intoxicated. The State's Final Brief of Respondent from the direct appeal best summarizes this evidence:

> Numerous witnesses testified [Applicant] was intoxicated both at the time of the discovery of the accident and at his arrest. Most significant is the testimony of Carolina Jones, the woman who first came across [Applicant] and the victim. She testified she came across the truck blocking the road and [Applicant] indicating he found a dead body. She asked him if he had called 911, and he said no. She testified he was "kind of drunk," "staggering around," and "repeating the same thing over again." She testified she believed he was under the influence of alcohol. (T. 129- 130). Officer Staggers was one of the initial officers to arrive on scene. He testified he spoke with [Applicant]. He indicated [Applicant] "had a[n] odor of alcoholic beverages on his person. He had been drinking." (T. 1 52-153). He also testified [Applicant] was "unsteady on his feet." (T.160).
>
> Investigator Boston arrived at the scene and also talked with [Applicant]. He indicated [Applicant] claimed to be too drunk to drive so the victim was driving. (T.177). Investigator Boston further testified he could smell alcohol on [Applicant], [Applicant's] "speech was slurred," and [Applicant] was "slouched down in the back of the patrol car." He then stated: "I was advising him of his Miranda Warnings and he blurted out I know my rights and to me he was very intoxicated." (T.178). Investigator Boston testified based on his experience, [Applicant] was intoxicated. (T.179). He indicated the basis for the original DUI charge against [Applicant] was [Applicant's] admission he was drinking. (T.182). Investigator Boston also took a statement from [Applicant's] father who described his son as "crazy and drunk." (T.189). Appellant's father then told Investigator Boston Appellant indicated "he had run over [the victim]." (T.189). Finally,

Investigator Boston testified Appellant did not appear in shock at the scene of the homicide, instead he appeared intoxicated. (T.214).

FBOR at 5-6. The State clearly had enough evidence to convict Applicant under the statute. Therefore, because Applicant failed to prove deficiency or prejudice, this allegation is denied and dismissed with prejudice.

Allowing Jeffrey Scott's testimony without the judge qualifying him as an expert

Applicant alleges Trial Counsel was ineffective for failing to object to the expert testimony of the State's witness Jeffrey Scott when he was not technically qualified by the trial judge as an expert. This allegation is meritless. Trial Counsel credibly testified he saw no reason to object at the time, and this failure to object did not affect the outcome of the trial. This Court agrees. Even if Trial Counsel had objected to Mr. Scott's expert testimony, the State would only have moved to have him qualified as an expert, and his testimony would have come in regardless of the technical mistake made. Therefore, Applicant has failed to prove prejudice that changed the result of his trial, and this allegation is denied and dismissed with prejudice.

Failing to object to the State's questioning of Officer Staggers about him identifying Applicant as the driver the night of the accident

Applicant alleges Trial Counsel was ineffective for failing to object to the State's questioning of Corporal Staggers, who responded to the scene of the accident, about Applicant being the driver of the vehicle. On direct examination, the State asked the witness "Where [sic] you able to identify [Applicant] as the driver of the white truck that was there on the scene that night?" Corporal Staggers responded, "Yes sir." The State then asked, "Did he indicate that was his truck?" Staggers responded "He did." Tr. 153 line 19-23. Applicant argues this questioning was objectionable because the factual finding of who was driving the truck was in dispute at trial; Applicant asserted at trial and at the evidentiary hearing that the victim was driving.

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This Court finds Trial Counsel was not deficient for not making an objection to this questioning. The question was simply if Applicant was the driver of the truck that was at the scene. The State did not ask the witness whether Applicant was driving the truck when the accident occurred. The question asked merely inquires into the ownership of the vehicle. This Court further finds that even if a jury did take this testimony to believe Applicant was driving the truck during the accident, this specific testimony alone would not have changed the outcome of the trial because there was other evidence presented that Applicant was driving the truck. Trial Counsel credibly testified he chose not to actively pursue and argue Applicant's theory that he was not driving the vehicle because all of the blood splatter analysis indicated the victim was run over on the passenger side, meaning she could not have been driving.

Therefore, because Applicant has failed to meet his burden of proving deficiency and prejudice, this allegation is denied and dismissed with prejudice.

Allowing testimony of Officer Staggers and Officer Boston about Applicant's statements the night of the accident

Applicant alleges Trial Counsel was ineffective for failing to move to suppress his statements given to Corporal Staggers and Officer Boston on the night of the crime. This allegation is meritless. Before Applicant gave his statements to the officers, he was read his Miranda rights, and he explained that he understood his rights. Tr. 153 line 24 - 155 line 8; Tr. 175 line 21 – 176 line 17. After indicating that he knew and understood his rights, Applicant proceeded to tell the law enforcement officers his version of the story. This Court finds Trial Counsel was not deficient by not challenging the admissibility of the statements, as it appears they were voluntarily given based on the totality of the circumstances. This Court further finds no prejudice resulting from the lack of challenge to the statements, as a motion to suppress likely would have been denied. Therefore, Applicant has failed to prove either prong of the Strickland

test, and this allegation is denied and dismissed with prejudice.

Allowing the State to tell the jury a false version of Applicant's statement

Applicant alleges Trial Counsel was ineffective for failing to object to the State's comments in closing argument about Corporal Staggers' testimony. On direct examination, Staggers recollected the statement Applicant gave him on the night of the accident and testified that Applicant told him the victim was driving the truck when she fell out and was run over. Tr. 155 line 1-19. However, in closing argument, the State mistakenly argued to the jury that Staggers had testified Applicant told him he was driving the truck when she was run over. Tr. 372 line 13 – 373 line 4.

"Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions." State v. Mouzon, 321 S.C. 27, 31-32, 467 S.E.2d 122, 124-25 (Ct. App. 1995), aff'd, 326 S.C. 199, 485 S.E.2d 918 (1997) (citing Herring v. New York, 422 U.S. 853 (1975)). "Improper comments [by the State] do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id.

This Court finds Trial Counsel was not ineffective for failing to object to this mistaken representation of the evidence by the State. The mistaken comment did not infect the trial with unfairness as to make the resulting conviction a denial of due process. It was not unreasonable

for Trial Counsel to choose not to object to the statement, and this Court finds Trial Counsel was not deficient in this regard. Furthermore, this Court finds no prejudice resulting from the comment because the trial court cured any potential error by instructing the jury to rely only on the evidence presented, not the arguments from the attorneys. Before the State's closing argument, the trial judge issued the following jury instruction:

> A couple points that I mentioned at the beginning of the trial, the lawyers are not witnesses. If a lawyer stands up and argues to you a piece of evidence or point of evidence does not correspond with your collective memory what the evidence actually was or is, you go with you memory, not what the lawyer tells you...You as jurors have sworn an oath to reach a verdict on the evidence as you see it and the law as I give it to you and not as anybody else gives it to you.

Tr. 363 line 3-18. This jury instruction cured the potential defects of any discrepancies in closing arguments. This Court finds Applicant has failed to prove deficiency or prejudice, and this allegation is denied and dismissed with prejudice.

Failure to object to the State's closing argument

Applicant alleges Trial Counsel was ineffective for failing to object to the State's closing argument summary of Officer Boston's testimony, which he alleges was false. This Court finds the State's comments were not incorrect or misleading, and they were a proper comment on the evidence presented, thus there was no reason to object. Applicant has failed to prove deficiency or prejudice, and this allegation is denied and dismissed with prejudice.

Failure to object to the State's testimony to the jury about how a passenger falls out of a car

Applicant alleges Trial Counsel was ineffective for failing to object to the State's "testimony" to the jury about how a passenger falls out of a car, because the State is not an expert in this field. The comments in question were part of the State's closing argument to the jury. Tr. 374. These statements were a proper and permissible comment on the evidence

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presented and Applicant's theory of defense, which the State was entitled to argue against in closing arguments. This Court finds Trial Counsel was not deficient for failing to object to these statements, and there was no prejudice resulting from his failure to object because the objection would not have been successful or changed the outcome of the trial. Therefore, this allegation is denied and dismissed with prejudice.

Failure to object to the State's argument to the jury that Applicant's story changed

Applicant alleges Trial Counsel was ineffective for failing to object to the State's closing argument comments about how Applicant's version of the facts changed over time. This allegation is meritless and must be denied. There was ample evidence presented at trial that Applicant was driving the vehicle during the accident, including the blood splatter analysis showing the victim was hit on the passenger side of the car and could not have been driving. There was also evidence presented that Applicant told his father immediately after the accident that he hit the victim. This evidence clearly contradicts Applicant's assertion that he was not driving the car and shows differences in Applicant's versions of the facts. Therefore, the Solicitor's closing argument about Applicant's changing stories was not objectionable, and there was no resulting prejudice from these comments because they were not improper. Applicant has failed to prove deficiency or prejudice, and this allegation is denied and dismissed with prejudice.

Failure to object to the State telling the jury that Applicant ran Ms. Turner down while she was walking

Applicant's allegation that Trial Counsel was ineffective for failing to object to the State's closing argument regarding their theory of the case in meritless. The State is entitled to present their theory to the jury as long as it is reasonably based on the evidence presented, and it

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becomes the jury's duty to determine whether the evidence supports the theory. The jury was able to weigh the evidence presented, including the testimony of expert witness Dr. Prenell, despite the State's closing argument. There was nothing objectionable about the State's closing argument. Accordingly, this Court finds Applicant has failed to prove either prong of the Strickland test, and this allegation is denied and dismissed with prejudice.

Failure to object to the second jury charge when the jury had two questions

Applicant alleges Trial Counsel should have objected when the trial court failed to charge the jury with the first element of felony DUI (that the actor drive a vehicle while under the influence of alcohol or drugs) when they were recharged after asking a question. This allegation is meritless because the trial court did, in fact, include the first element in his recharge. When the jury asked to be recharged after asking a question, the trial court explained again, for the second time, "The Defendant is charged with felony driving under the influence. In that regard, the State must first prove beyond a reasonable doubt that the Defendant drove a vehicle while under the influence of alcohol and or drugs." Tr. 421 line 10-14. Therefore, this allegation is denied and dismissed with prejudice.

Failure to get Applicant his first plea offer to him in a timely manner

Applicant alleges his original counsel W. Legrand Carraway was ineffective for failing to get his first plea offer to him in a timely manner. This allegation is meritless. Mr. Carraway credibly testified that he entered into plea negotiations with the State during his representation and was able to obtain a plea offer to involuntary manslaughter with a negotiated sentence for five years with credit for time served. He obviously communicated this offer with Applicant, who accepted the offer, and came before the court to plead guilty. Mr. Carraway explained that the plea judge, Judge Newman, would not accept the negotiated plea after the victim's family

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made an objection. The loss of this plea deal was clearly because the plea court would not accept it, not because of any fault of Mr. Carraway or Trial Counsel. Therefore, Applicant has failed to prove any ineffectiveness of either of his attorneys, and this allegation is denied and dismissed with prejudice.

VII. 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 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.

[signature page to follow]

IT IS THEREFORE ORDERED:

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. That Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 23 day of Oct, 2017.

D. CRAIG BROWN
Presiding Judge
Third Judicial Circuit

Florence, South Carolina

DCB 1-20-20

STATE OF SOUTH CAROLINA County of Williamsburg Marty Baggett Petitioner vs. STATE OF SOUTH CAROLINA Defendant	))))))))))))))))	IN THE COURT OF COMMON PLEAS Third Judicial Circuit NOTICE OF APPOINTMENT FOR LEGAL COUNSEL Case Number 2016-CP-45- 587

To: Boozer ,Attorney at Law

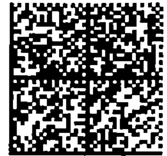
By order of the Chief Administrative Judge and pursuant to Rule 608, SCACR, you are hereby appointed to act as attorney for Marty Baggett, the Petitioner, in this action.

This 9th day of May, 2017.

Shawn W. Skinner [signature]

~~Judge~~/Clerk of Court

SCCA 265 (2/04)



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S.C. SUPREME COURT

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