

LAW OFFICE OF
C. RAUCH WISE
Attorney & Counselor at Law
305 Main Street
Greenwood, SC 29646
e-mail rauchwise@gmail.com

C. Rauch Wise

Telephone
(864) 229-5010
Facsimile
(864) 229-2665

November 20, 2017

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

RECEIVED

NOV 27 2017

S.C. SUPREME COURT

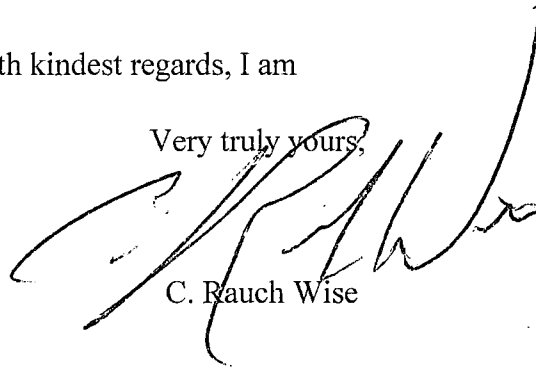
Re: State vs. Larry Brent Horton

Gentlemen:

I am enclosing herewith for filing the original Notice of Appeal regarding the above matter together with the original Affidavit of Service.

With kindest regards, I am

Very truly yours,



C. Rauch Wise

CRW/slt
Enclosure

cc Valerie Giovanoli

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

NOV 27 2017

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Roger L. Couch, Circuit Court Judge

Case No 2013-CP-42-0007

Larry Brent Horton, # 329065, Applicant,

vs.

State of South Carolina, Respondent.

NOTICE OF INTENT TO APPEAL

Larry Brent Horton appeals the Order of the Honorable Roger L. Couch dated October 25, 2017 and the Order dated February 22, 2016.

November 20, 2017

C. Rauch Wise

C. Rauch Wise
Attorney at Law
305 Main Street
Greenwood, SC 29646
(864) 229-5010

Attorney for Applicant

OTHER COUNSEL OF RECORD

Valeria Giovanoli
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

IN THE SUPREME COURT

RECEIVED

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

NOV 27 2017

S.C. SUPREME COURT

Roger L. Couch, Circuit Court Judge

Case № 2013-CP-42-0007

Larry Brent Horton, # 329065, Applicant,

vs.

State of South Carolina, Respondent.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Traynham who, after being duly sworn, deposes and says that she is the legal assistant for C. Rauch Wise, Attorney for the Applicant in the above entitled case. That on November 20, 2017, she did deposit in the United States Mail with proper postage affixed thereto a copy of the Notice of Appeal in the above case addressed to Valerie Giovanoli, Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina 29211, M. Hope Blackley, Spartanburg Clerk of Court, Post Office Box 3483 Spartanburg, SC 29304, and Hon. Roger L. Couch, Post Office Box 2614, Spartanburg, SC 29304-2614.

SWORN to and Subscribed
before me this 20th day

Sandy Traynham

of November, 2017.

[Signature] (L.S.)
Notary Public for South Carolina
My Commission expires: 12/7/2019

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Larry Brent Horton, #329065,

Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

2013-CP-42-0007

**ORDER DENYING MOTION TO ALTER
OR AMEND JUDGMENT**

2013 OCT 25 PM 4:55

This matter comes before the Court by way of Applicant's Motion to Alter or Amend the Order of Dismissal pursuant to Rule 59(e), SCRPC, filed February 22, 2016. In Applicant's Motion, he requested reconsideration on the following issues:

1. Erroneous factual framework.
2. The order did not contain a legal conclusion that trial counsel's failure to object to testimony of Anthony Sellers did not violate Applicant's rights under the Confrontation Clause of the United States and South Carolina Constitutions
3. The order did not include the Court's finding that Mr. Seller's testimony was damaging to the defense.
4. Counsel's Comments in Closing Argument Concerning Credibility of Witnesses.
5. Failure to Effectively Argue the Facts and Law in Support of His Request for A Jury Instruction on Voluntary Manslaughter.
6. Failure to Object to the Trial Judge's Instruction on Malice Aforethought.
7. Failure to Argue that Voluntary Manslaughter is the Absence of Premeditation and not the Absence of Malice.
8. Cumulative Error.
9. The order failed to address all claims of Ineffective Assistance of Appellate Counsel.
10. Cumulative error with regard to deficiencies of both trial and appellate counsel.

Based upon careful reconsideration of all of the evidence in this case and upon full consideration of Applicant's motion and supporting memorandum, this Court is not persuaded to alter or amend the judgment.

This Court finds there is no erroneous factual framework within its order of dismissal. The facts as stated in the order of dismissal are consistent with the testimony presented at Applicant's trial, Applicant's direct appeal records, and the testimony and evidence presented at the PCR hearing.

This Court also finds the order of dismissal does contain its rulings on the issue of whether trial counsel was ineffective for failing to object to testimony from Anthony Sellers, in counsel's comments in closing argument regarding witness credibility, for failing to effectively argue the facts and law in support of his request for a jury instruction on voluntary manslaughter, for failing to object to the trial judge's instruction on malice aforethought, and for failing to argue that voluntary manslaughter is the absence of premeditation and not the absence of malice. This Court has already considered the applicable law and facts pertaining to this issue and sees no reason to reconsider the issues.

With regard to Applicant's cumulative error argument, this Court declines to adopt such an analysis. South Carolina courts have consistently declined to apply a cumulative error analysis in PCR actions. See, e.g., Green v. State, 351 S.C. 184, 196-97, 569 S.E.2d 318, 324-25 (2002) (declining to address whether applicant was entitled to relief based on supposed cumulative effect of counsel's alleged errors); Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) (finding PCR court did not err in failing to conduct a cumulative error analysis where only one allegation had merit and the "record simply did not contain 'several errors' for the judge to cumulatively assess"). In addition, a number of other jurisdictions, including the Fourth Circuit Court of Appeals, have held a cumulative effect analysis is inappropriate and that the appropriate analysis focuses upon each individual allegation of ineffective assistance. See Fisher



2012 OCT 25 PM 4:35

v. Angelone, 163 F.3d 835, 852-53 (4th Cir. 1998); Wainwright v. Lockhart, 80 F.3d 1226 (8th Cir. 1996); Jones v. Sotts, 59 F.3d 143, 147 (10th Cir. 1995).

Additionally, because this Court found Applicant failed to satisfy his burden of proving ineffective assistance of counsel on any issue, the record contains no error for the Court to cumulatively assess. Before an alleged error may be considered as a factor contributing to cumulative prejudice, a court first must find that the alleged error is, in fact, error. See, e.g., Green v. State, 351 S.C. at 197, 569 S.E.2d at 325 ("While it is unsettled law whether individual errors, which may not be independently prejudicial, may be prejudicial when taken as a whole, we recognize the threshold to asking the cumulative prejudicial question is to first find multiple errors."). Only then can the cumulative prejudice arising from the alleged errors be considered. See id. To hold otherwise is to conclude that even non-deficient performance might result in reversal of a conviction. Such a conclusion is manifestly contrary to the analysis set forth in Strickland. See 466 U.S. at 687 ("Unless a defendant makes both showings [i.e., deficient performance and prejudice] it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable").

This Court did not overlook this issue. Rather, the Court adequately addressed all issues before it and found Applicant failed to satisfy his burden of proving ineffective assistance on any issue. Therefore, the order of dismissal need not address the issue of cumulative error.

The order of this Court also adequately addressed all issues regarding ineffective assistance of appellate counsel. Once again, this Court declines to adopt a cumulative error analysis by combining alleged deficiencies of both trial counsel and appellate counsel. Therefore, the order of dismissal need not be amended to address such a claim.

Handwritten signature and initials, possibly "J. L. P. 3", written in black ink.

A vertical stamp in the bottom right corner, oriented sideways, containing the text "3/17/08 25 PM 4:35".


IT IS THEREFORE ORDERED:

1. Applicant's motion is denied and dismissed.
2. Applicant shall remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this _____ day of _____, 2017.

October 25, 2017

[Signature] _____, South Carolina



HONORABLE ROGER L. COUCH
Presiding Judge
Seventh Judicial Circuit

2017 OCT 25 PM 4:35

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O. Box 3483
Spartanburg, SC 29304-3483

Phone (864) 596-2591
Fax (864) 596-2239



M. Hope Blackley
Clerk of Court

October 26, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

Harry Brent Horton
Applicant #389065

7TH JUDICIAL CIRCUIT

CASE # 2013CP42-17

VS
Jill
Respondent

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the Order Denying Motion to Arrest or
In this action dated 10-25 2017 on 10-26-17 Clarence Wise

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

- Valerie Costantini
- Hindsey McCoy
- Clarence Wise
- Harry Horton

10-26-17
(Date)

Carrie Selby
(Signature)

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
IN THE COURT OF COMMON PLEAS

LARRY BRENT HORTON, #329065

Applicant,

v.

STATE OF SOUTH CAROLINA,

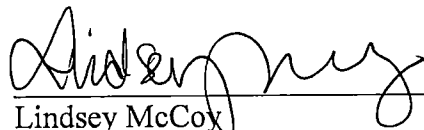
Respondent.

CERTIFICATE OF SERVICE


The undersigned hereby certifies that a true copy of the **Order Denying Motion to Alter or Amend Judgment** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

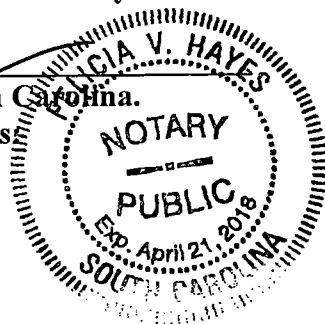
Clarence Rauch Wise, Esquire
305 Main Street
Greenwood, South Carolina 29646

This 1st day of November, 2017.


Lindsey McCoy
Legal Assistant for Respondent

SWORN to before me this 1st day of November, 2017.


Notary Public for South Carolina.
My Commission Expires



STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 Larry Brent Horton, #329065,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2013-CP-42-0007

ORDER OF DISMISSAL

2016 FEB 22 PM 12:38

This matter comes before the Court by way of an Application for Post-Conviction Relief ("PCR") filed January 2, 2013. Respondent filed its Return on March 18, 2014. An evidentiary hearing into the matter was held on March 25, 2015, at the Spartanburg County Courthouse. Applicant was present and represented by C. Rauch Wise, Esquire, and E. Charles Grose, Jr., Esquire. Respondent was represented by Suzanne H. White, Esquire. Applicant did not testify and presented no witnesses at the hearing. Respondent called Richard Vieth, Esquire, to testify.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the February 2008 term of the Spartanburg County Grand Jury for murder (2008-GS-42-0950). Applicant was represented by Richard W. Vieth, Esquire ("Counsel"). On June 16-18, 2008, Applicant was tried before the Honorable J. Derham Cole and a jury. The jury found him guilty as indicted, and Judge Cole sentenced him to life without parole.

A timely notice of appeal was filed on Applicant's behalf, and Joseph L. Savitz III, Esquire, ("Appellate Counsel") of the Office of Appellate Defense perfected the appeal. The

South Carolina Court of Appeals dismissed the appeal. State v. Horton, Op. No. 2010-UP-406 (filed September 16, 2010). The South Carolina Court of Appeals also denied the Applicant's Petition for Rehearing on October 29, 2010. Wanda Carter, Esquire, also of the Office of Appellate Defense, filed a Petition for Writ of Certiorari with the Supreme Court of South Carolina, which was denied on January 11, 2012. The Remittitur was returned on January 13, 2012.

At the PCR hearing, Applicant alleged that he is being held in custody unlawfully for the following reasons:

a. Ineffective assistance of counsel, in that;

1. Counsel failed to object to testimony of Anthony Sellers when this witness' entire testimony was inadmissible and prejudicial hearsay,
2. Counsel failed to cross-examine the State's witnesses to reveal evidence which would mitigate the offense from murder to voluntary manslaughter,
3. Counsel failed to present available evidence of the victim's conduct and state of mind that would mitigate the offense from murder to voluntary manslaughter,
4. Counsel failed to present available evidence of Applicant's conduct and state of mind that would mitigate the offense from murder to voluntary manslaughter,
5. Counsel undermined the credibility of the defense when he told jurors during his closing argument that they should question the credibility of the Applicant and his witnesses,
6. Counsel failed to effectively argue the facts and existing law so that the trial court would instruct the jurors about the law of voluntary manslaughter,
7. Counsel failed to object to the trial court's erroneous jury instruction on malice aforethought,

2016 FEB 22 PM 12:38
M. ...

PSL
12

2016 FEB 22 PM 12:38

8. Counsel failed to argue that voluntary manslaughter is the absence of premeditation and not the absence of malice,
9. Counsel failed to object to the trial court's refusal to consider any evidence or circumstances that would mitigate the punishment,

b. Ineffective assistance of appellate counsel, in that;

1. Appellate Counsel failed to argue that the trial court erred by not admitting evidence of the victim's state of mind that was relevant to mitigate the offense from murder to voluntary manslaughter,
2. Appellate Counsel failed to effectively argue the facts and existing law to show that the trial court erroneously failed to instruct the jurors about the law of voluntary manslaughter,
3. Appellate Counsel failed to argue that voluntary manslaughter is the absence of premeditation and not the absence of malice.

At the hearing, Applicant indicated that he would proceed on allegations (a)1, 5, 6, 7, 8, and abandon allegations (a) 2, 3, 4, and 9. Applicant orally amended allegation 1 to include the issue of confrontation clause. Applicant also abandoned allegation (b)1. Before this Court are the records from the Spartanburg County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, and the pleadings.

II. TRIAL TESTIMONY

On January 2, 2007, Applicant severely beat his wife Erika Bell Horton ("Erika") until she was unconscious or helpless. (Tr. p. 180, lines 18-22; p. 261, lines 16-19). The beating was so severe one of her eyeballs collapsed into her sinus. (Tr. p. 180, 261). Additionally, Erika's nose was broken, and she had bruises and contusions to her lips, her scalp, and about her eye and

forehead. (Tr. pp. 179-181, 261). Her frenulum, the piece of supporting tissue inside the upper lip, was also torn. (Tr. p. 180). She also had extreme congestion of the thinnest layer covering the brain, which can be caused by trauma. (Tr. p. 181). Prior to the attack on January 2, 2007, Erika had been diagnosed with multiple sclerosis. (Tr. pp. 240).

After beating his wife until she was unconscious or helpless, Applicant then walked the length of his home dripping her blood from the bedroom, where the beating took place, to the kitchen. (Tr. pp. 165-178, 260-61). Once there, Applicant opened a kitchen drawer, took out a kitchen knife, and returned to the other end of the home to the bedroom where Erika lay. (Tr. pp. 130, 165-78, 179-86). Applicant then stabbed her at least five times in the neck with the kitchen knife. Several of the stab wounds penetrated to the victim's spine. (Tr. pp. 179, 185). The victim's jugular veins, both common carotid arteries in the neck, as well as her esophagus, trachea, and all of the muscles of the front of her neck were severed. (Tr. pp. 184-85). There were also hesitation stab wounds to the victim's shoulders. (Tr. pp. 179, 181-82, 261). After the stab wounds to her neck were inflicted, the only thing holding Erika's head onto her body was the skin and musculature of the back of the neck and her vertebral column. (Tr. p. 185). There were *no defensive stab wounds* to Erika's hands or forearms indicating that when she was stabbed she was either unconscious or could not put her hands up to defend herself. (Tr. p. 182, 260). Erika died from blood loss as a result of the stab wounds. (Tr. pp. 184-85, 106-07, 179-82).¹

Afterwards, Applicant called 911 and told the operator that he thought he killed his wife. (Tr. p. 100; p. 131-32). When police arrived at the crime scene, Applicant was sitting in a chair

¹While the pathologist did not specify the cause of death, the fact the victim died from blood loss from the stab wounds is the only reasonable inference from the record, including the exhibits offered at trial, the testimony of the pathologist, the testimony of the officers who worked the crime scene, the testimony of the officer who attended the autopsy, and the cross-examination of Applicant and is readily apparent from the record. (Tr. pp. 178-186, 106-107, 107-111, 118, 120-121, 123-124, 136, 140, 157-160, 259-273).

under the carport of the home. (Tr. p. 63). In addition to finding the trail of blood from the bedroom to the kitchen drawer where the knife was taken, police found the murder weapon lying on the bedroom floor. There was blood everywhere in the bedroom where Erika's body was found, on Applicant's clothing, and on Applicant's hands and forearms. (Tr. pp. 165-177). The pathologist and an investigator testified that at the autopsy there was very little blood left in Erika's body. (Tr. pp. 184-185, 106-107).

Applicant told the investigator that he could not remember what happened regarding the killing of his wife. (Tr. p. 129). Applicant stated he and his wife had separated but had gotten back together several weeks before her death and that they were living together in the home where the victim's body was found. (Tr. p. 134). Applicant told the investigator that earlier in the evening there was an altercation between he and his wife and she left. (Tr. p. 128). Applicant stated his mother then came and picked up the couple's children. (Tr. p. 128). Applicant stated that later he was sitting on the couch in the dark when Erika returned to the home. (Tr. p. 127-28). Applicant stated Erika was getting some of her things together, and they were fussing. (Tr. p. 27-28). At that point in the interrogation, Applicant stated the next thing he remembered was being in the carport on the phone with 911. (Tr. p. 128). The investigator testified that when he played the 911 tape for Applicant, Applicant said over and over that "he wouldn't do that, he wouldn't do that." (Tr. p. 129). However, Applicant admitted that he and his wife were alone in the house at the time of her death. (Tr. p. 129).

Applicant continued to assert that he could not remember anything that happened between the fussing and being out in the carport talking to the 911 operator. (Tr. p. 129). Applicant was then asked if he saw the victim on the floor in the bedroom. (Tr. p. 129). Applicant admitted he saw the victim on the floor but said he didn't know how that happened to her. (Tr. p. 129). When

Page 5

the investigator told Applicant "the way it looked in the house, whether they got into a fight, he got a knife [sic], he hurt her." (Tr. p. 129). Applicant stated "they did get physical and they did hit each other." (Tr. p. 129). But Applicant never stated who initiated the physical altercation or who hit whom first, nor did he explain why the confrontation became physical. (Tr. pp. 129-30). The investigator testified there were no injuries to Applicant that he could see other than a bite mark to his hand, which Applicant admitted was from an altercation much earlier in the evening. (Tr. p. 136).

Applicant never told the investigator his wife hit him first. In fact, Applicant admitted he grabbed the victim by the hair. (Tr. p. 129-130). Applicant also admitted to the investigator four times in a row, "I kept hitting her." (Tr. p. 130). Applicant then stated he got the knife. (Tr. p. 130). Applicant initially denied knowing where the knife came from, but eventually admitted to the investigator the knife was a kitchen knife, and he had retrieved the knife and used it. (Tr. p. 130).

Applicant testified in his own defense at trial. He testified that he could not remember anything about beating his wife or walking the entire length of the home, obtaining a knife from the kitchen drawer, and then walking all the way back to the bedroom and stabbing his wife at least five times in the neck with the kitchen knife. (Tr. pp. 260-62). Applicant testified that "[he] and Erika had an argument, and she told [him] to leave. . . I told her I wasn't going anywhere, that she could go." (Tr. p. 253). Applicant claimed amnesia about the events of the murder itself and claimed amnesia about what he had told the police and the 911 operator. (Tr. p. 262). Applicant also called a psychiatric expert, Dr. Margaret Milikian, who testified that in her opinion Applicant suffered from amnesia. (Tr. pp. 311-19). However, in his trial testimony, Applicant testified he clearly remembered all the events that led up to his beating and eventual stabbing of his wife to

Pal
16

2016 FEB 22 PM 12:38

death. (Tr. pp. 262-69). Applicant testified the couple was having marital difficulties and his wife decided to leave. (Tr. p. 252-53). Applicant testified "the argument, the discussions of her leaving—wasn't something that hadn't happened a million times before." (Tr. p. 258). Applicant testified that earlier in the evening when his wife was leaving the home the first time, he took his wife's phone away from her and she bit his hand when she was trying to get the phone back. Applicant testified that after that she left in her car. (Tr. p. 265).

Applicant testified that after his mother came to pick up the children from the house, he was sitting on the couch in the dark when his wife came back to get more of her things from the home. (Tr. p. 268). Applicant testified he followed his wife to the bedroom and was asking her repeatedly "what was going on." (Tr. p. 257). But she would not answer him. (Tr. p. 257). Applicant testified: "[s]he was going through a drawer and turned around and like she threw something at me." (Tr. p. 257). Then he lunged for her, "everything went gray," and he heard her call out his name. (Tr. p. 257). Applicant testified he remembered everything up until the point that he lunged at his wife. (Tr. p. 257-58, 262, 267-268). On direct examination, Applicant was asked the following question and gave the following answer regarding what occurred before he lunged at his wife:

Q: Okay. Was there any arguing or fighting or anything of that nature?

A: I was just trying to find out what was going on. I mean, like I said, I remember she turned around and I remember lunging for her.

Everything went gray. She yelled my name, and that was it. I don't know what happened. It was like she just didn't want to talk to me when I got home. And we'd been talking the whole day.

(Tr. p. 257, line 23 - p. 258, line 6).

On cross-examination, Applicant testified as follows:

Asl
p 7

2018 FTB 22 P112:39

Q: You just don't remember - - you remember everything in vivid high-definition detail up until when?

A: She came back. She turned *like* she was going to throw something. I lunged at her. Things went gray. She yelled my name, and that was that.

(Tr. p. 267) (emphasis added). On cross-examination Applicant also testified as follows:

Q: You don't deny calling 911?

A: No, sir.

Q: You don't deny that that's your voice?

A: No, sir.

Q: You don't deny telling 9-1-1 that you beat her because you thought she was going to take the children?

A: Correct.

Q: You don't deny telling William Gary that you beat her, and repeated it four times for emphasise [sic]?

A: Correct.

Q: And you don't deny telling William Gary that you went to get a knife?

A: Correct.

(Tr. p. 272, lines 12-24). On cross-examination Applicant was asked several times if the victim fought back, and he stated he did not remember. (Tr. p. 260, lines 3-10). Upon further questioning, based on the physical evidence, Applicant agreed with the Solicitor the victim did not put up a fight. (Tr. p. 260, lines 11-19). However, Applicant continued to assert, he did not recall anything after he lunged into his wife. (Tr. pp. 261-72).

Page 18

2016 FEB 22 PM 12:39

Counsel requested a jury charge on voluntary manslaughter. In his argument to the trial court requesting the charge, Counsel conceded he had no pinpoint evidence of what occurred when the victim returned to the house, because the victim was deceased and he, Applicant, purportedly could not remember. (Tr. p. 341, lines 1-10). The trial judge considered the request and declined to charge voluntary manslaughter on the grounds there was no evidence that would support a charge that Ericka's murder was in the heat of passion upon adequate legal provocation. (Tr. pp. 340-41). Specifically, the trial court found that while there *might* be some evidence from which one could infer heat of passion, he saw no evidence of sufficient legal provocation for that heat of passion. (Tr. p. 340-41).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Ineffective Assistance of Trial Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in the 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, the 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 the attorney 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,

Page 9

2016 FEB 22 PM 12:08

466 U.S. at 690). The 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 reviewing 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, the applicant must prove trial counsel's performance was deficient. Id. Under this prong, the court measures an attorney'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 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 688). After careful review based on the standard discussed above, this Court finds Applicant has failed to carry his burden of proving ineffective assistance of counsel in this action.

Failure to Object to Testimony of Anthony Sellers

Applicant asserts Counsel was ineffective for failing to object to Anthony Sellers' testimony at trial. This Court finds Counsel's performance was not deficient because he articulated a valid strategic reason for not objecting to Sellers' testimony. "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir.1977)).

Sellers testified that on the night she was killed, he had a couple of missed calls from the victim. (Tr. p. 143). He testified she called for the first time probably sometime between 8:00 PM

Pal
p 10

2016 FEB 22 PM 1:39

and 8:30 PM and that he called her back around 9:00 PM. (Tr. p. 143-44). Sellers testified that the victim told him she wanted her job back so that she could "make some money so that [she] can get out and get . . . a place." (Tr. p. 145). Sellers testified she said "my husband just beat my ass and threw me out of the house." (Tr. p. 145). Sellers also testified the victim said she was going back to the house to get some things. (Tr. p. 146).

Counsel testified that he chose not to object to Sellers' hearsay testimony at trial because he reasoned that through effective cross-examination he could introduce evidence supporting a voluntary manslaughter charge. According to Counsel's testimony and the record, Counsel's trial strategy was to show that Applicant was entitled to a voluntary manslaughter charge. At trial, Counsel requested and argued for a jury charge on the lesser included offense of voluntary manslaughter. Additionally, according to Counsel's testimony and the record, he spent a great deal of time addressing Sellers' testimony during his closing arguments. Counsel noted and the trial transcript reflects that Applicant remembered nothing that happened between lunging at his wife and then calling 911.

This Court finds that because Counsel articulated valid strategic reasons for not objecting to Sellers' testimony, his decision not to object is entitled to deference and does not constitute ineffective assistance of counsel. Accordingly, this Court finds Applicant has failed to satisfy his burden of showing Counsel's performance was deficient.

This Court also finds Applicant has failed to satisfy his burden of proving that any alleged deficient performance prejudiced him. This Court finds that there is no reasonable probability that had the testimony been excluded the outcome of trial would have been different. There was no dispute at the trial that Applicant beat his wife until she was unconscious and then stabbed her so

pyl
11

2016 FEB 12 PM 12:39

severely that he almost decapitated her. Accordingly, this Court finds that Applicant has also failed to satisfy his burden of proving prejudice with respect to this allegation.

Counsel's Comments in Closing Argument Concerning Credibility of Witnesses

Applicant alleged Counsel was ineffective for arguing to the jury that it should question the credibility of Applicant and his witnesses because such argument undermined the credibility of the defense. "[C]ounsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage." Yarborough v. Gentry, 540 U.S. 1, 5-6, (2003). In light of this range, this Court's review of an attorney's closing arguments must be "highly deferential." Id. at 6.

In this case, Counsel addressed the jury in closing argument in a manner intended to be accessible. Counsel testified that he spoke in a manner to be down to earth and to be sarcastic about the State's questioning of the expert on amnesia. Applicant offered no evidence to support his contention that Counsel's manner and tone during closing arguments were damaging to his defense, nor did he offer any evidence to support his claim that Counsel's performance in giving his closing argument was deficient. Accordingly, this Court finds Applicant has failed to present any competent evidence to support a finding that Counsel's performance was deficient in this regard.

This Court also finds that Applicant has failed to present any competent evidence that any alleged deficiency in Counsel's performance during his closing argument prejudiced him. A court may find that ineffective assistance of counsel occurred when "there is a reasonable probability that, but for counsel's improper closing comments, the result of the trial would have been different." Lounds v. State, 380 S.C. 454, 465, 670 S.E.2d 646, 652 (2008). "An error by counsel,

ALC
1/12

FILED
FEB 21
11:23 AM
CLERK

even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” Smith v. State, 386 S.C. 562, 565, 689 S.E.2d 629, 631 (2010). “Moreover, no prejudice occurs, despite trial counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt.” Rosemond v. Catoe, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009).

Here, there was overwhelming evidence of Applicant's guilt. The record is undisputed that Applicant killed his wife. Applicant testified at trial and the investigator testified that Applicant did not remember anything that happened after lunging at his wife up until the time he called 911. Applicant did not testify at the PCR hearing. As Counsel testified, the predominant issue at trial was whether the elements of voluntary manslaughter were present. This Court finds Applicant has produced no evidence to show that there is a reasonable probability that the outcome of Applicant's trial would have been different but for Counsel's alleged errors. Therefore, this Court finds Applicant has also failed to satisfy his burden of proving prejudice with respect to this allegation.

Failure to Effectively Argue the Facts and Law in Support of His Request for a Jury Instruction on Voluntary Manslaughter

Applicant alleges Counsel failed to effectively argue the facts and existing law to convince the trial judge to instruct the jury on the law of voluntary manslaughter. Applicant argues that the facts Counsel should have highlighted as entitling him to an instruction on voluntary manslaughter were that: (1) Applicant made statements to Investigator Gary that he and the victim had been "fighting" and that "they did get physical and they did hit each other," and (2) that the victim had threatened that she was going to take the kids. At the appropriate time, Counsel requested a voluntary manslaughter charge. At the charge conference, the judge asked Counsel: "what evidence is there, do you believe, that would support a jury instruction on voluntary

manslaughter?" (Tr. p. 337). Counsel argued that there was evidence, based on Investigator Gary's testimony, that Applicant and the victim had been in a physical altercation that night, and that, therefore, there was evidence of sufficient legal provocation. (Tr. p. 338, lines 1-5). Counsel also cited to case law in support of his argument. (Tr. p. 338, lines 6-12). Counsel also argued that based on the timeline and Sellers' testimony, there was evidence of both heat of passion and sufficient legal provocation. (Tr. pp. 338-39). There was no other testimony at trial that Counsel could have argued in support of his request for a voluntary manslaughter charge.

At trial, Applicant testified in his own defense. Applicant testified that he could not remember anything about beating his wife or walking the entire length of the home, taking a knife from the kitchen drawer, and walking all the way back to the bedroom and stabbing his wife five times in the neck. Applicant claimed he had amnesia about the events of the murder itself and his statements to police and the 911 operator. Applicant also called a psychiatric expert at trial who testified that in her opinion Applicant suffered from amnesia. However, Applicant testified he clearly remembered all the events that led up to his beating and eventual stabbing of his wife to death. Applicant testified the couple was having marital difficulties and his wife was leaving him. Applicant testified that earlier in the evening when his wife was leaving their home the first time, he took her cell phone away from her and she bit his hand to get it back. Applicant testified that after taking her phone back, she left.

Applicant testified that later that night he was sitting on the couch in the dark when his wife returned home to retrieve some of her things. He testified that he followed her to the bedroom asking her repeatedly "what was going on" but that she would not answer. Applicant testified: "[s]he was going through a drawer and turned around and like she threw something at me." Applicant testified he lunged for her, "everything went gray," and he heard his wife call out

APL
2/14

2015 FEB 22 PM 12:59

his name. Applicant testified he remembered everything up until the point that he lunged into his wife. On direct examination, Counsel asked Applicant if there was “any arguing or fighting or anything of that nature” and Applicant stated: “I was just trying to find out what was going on. I mean, like I said, I remember she turned around and I remember lunging for her. Everything went gray. She yelled my name, and that was it. I don’t know what happened. It was like she just didn’t want to talk to me when I got home. And we’d been talking the whole day.” On cross-examination Applicant was asked several times if the victim fought back, but he said he did not remember. After further questioning, Applicant agreed with the Solicitor that, based on the physical evidence, the victim did not put up a fight. However, Applicant continued to assert he did not recall anything after he lunged into his wife.

To mitigate a charge of murder to the offense of voluntary manslaughter, a defendant must show that the killing occurred “in sudden heat of passion upon sufficient legal provocation,” 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000), which “must be such as would render the mind of an ordinary person incapable of cool reflection, and produce . . . ‘an uncontrollable impulse to do violence.’” State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993). “Heat of passion alone will not suffice to reduce murder to voluntary manslaughter.” State v. Walker, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996) (holding no error where evidence showed a witness heard a ‘scuffle’; victim and defendant had a bad relationship, and victim was angry at defendant and charged at defendant). Rather, both “must be present at the time of the killing.” Id. (citing State v. Tyson, 283 S.C. 375, 323 S.E.2d 770 (1984)). “‘The killing of a human being, even in the heat of passion[,] is murder if the slayer ha[s] no just cause for his anger.’” State v. Norris, 253 S.C. 31, 38, 168 S.E.2d 564, 567 (1969) (quoting Smith v. State, 49 Ga. 482 (1873)). Even if sufficient legal provocation has aroused a defendant’s passion, “if at the time of the killing those passions

RC
p 15

FILED
22 PM
39

had cooled or a sufficiently reasonable time had elapsed so that the passions of the ordinary reasonable person would have cooled, the killing would be murder and not manslaughter." State v. Knoten, 347 S.C. 296, 303, 555 S.E.2d 391, 395 (2001). Furthermore, "mere words, no matter how opprobrious, are insufficient to constitute adequate legal provocation when death is caused by the use of a deadly weapon." State v. Rogers, 320 S.C. 520, 525, 466 S.E.2d 360, 362 (1996). The court need not charge voluntary manslaughter if "there is no evidence whatsoever tending to reduce the crime . . . to manslaughter." State v. Pittman, 373 S.C. 527, 572, 647 S.E.2d 144, 168 (2007) (quoting State v. Burriss, 334 S.C. 256, 264, 513 S.E.2d 104, 109 (1999)).

Applicant alleges Counsel failed to point to Investigator Gary's testimony about the occurrence of a physical altercation in support of his request for the voluntary manslaughter instruction. However, Counsel did refer to Gary's testimony in recounting the evidence supporting legal provocation. Gary testified that Applicant told him that he and the victim had been "fussing" that day and "said they did get physical and they did hit each other." He also testified that Applicant "never . . . [told him] exactly how any of the injuries [to the victim] were caused, which ones were caused first, . . . he never would go into any details with that." Gary testified that Applicant "just kept saying 'we were just fussing, we were just fussing, I love her, I would never hurt her.'" But Gary testified "I asked him what happened once the fussing stopped. He told me he doesn't remember." Gary also testified that he "saw no injuries on [Applicant] other than the bite mark that [he] could see on [Applicant's] hand." Additionally, at trial, Applicant admitted on cross-examination that the victim did not defend herself.

Brenda Horton ("Brenda"), Applicant's mother, testified at trial that around 7:30 p.m., Applicant had called her to ask if he could bring the children to her house in the morning. (Tr. pp. 215-16). She testified she did not think anything of it because the children had been at her house

Bel
p/16

for the most part of the year before. (Tr. p. 216). She also testified that the victim had come by her house and asked her to take care of the children around 8:00 or 8:30 p.m. on the night in question. (Tr. p. 215). In addition, She also testified she did not see any evidence that Erika had been struck. (Tr. p. 217). Brenda testified that she then called Applicant and asked if she could come by and pick up the children that night rather than him having to bring them very early the next morning. (Tr. pp. 217-18). Applicant corroborated that testimony when he testified he called his parents and told them he would bring the children to them in the morning, and then they called back and said they would come get the girls that night. (Tr. p. 253, lines 20-24). Brenda testified that when she and her other son went to pick the children up from Applicant's house, Applicant seemed fine. (Tr. p. 228, lines 10-11). Finally, Applicant testified "I was not afraid of my wife taking the kids. She'd already told me she couldn't take care of them." (Tr. p. 269, lines 22-23).

This Court finds that Applicant has failed to show that Counsel's performance fell below an objective standard of reasonableness with respect to this allegation. "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough v. Gentry, 540 U.S. 1, 1 (2003). Counsel properly apprised the trial judge of the relevant facts and governing case law. The judge nevertheless refused to charge the jury on voluntary manslaughter, finding that, though there may have been evidence presented from which the factfinder might infer "anger or heat of passion[.]" there was no "evidence from which [the jury] could reasonably infer . . . sufficient legal provocation for heat of passion. The South Carolina Court of Appeals affirmed Applicant's conviction finding that the charge was properly denied because there was no evidence whatsoever of the lesser offense of voluntary manslaughter. State v. Horton, No. 2010-UP-406, 2010 WL 10080219, at *1 (S.C. Ct. App. Sept.

2016 FEB 22 PM 12:08

16, 2010). The Court had before it the trial transcript. In its opinion the court of appeals made no suggestion that the argument was not preserved because of a failure of Counsel to highlight specific testimony. Therefore, this Court finds Applicant has failed to establish that Counsel's performance fell below an objective standard of reasonableness with respect to this allegation.

Applicant has also failed to show prejudice with regard to this allegation. Counsel requested a jury instruction on voluntary manslaughter. The judge considered counsel's request and argument for a jury instruction on voluntary manslaughter but found that there was no evidence of legal provocation. Applicant offers nothing more than mere speculative statements to meet his required burden of proof and offered no testimony to support his claims. There is no dispute in this case as to whether Applicant killed his wife. No evidence was presented at trial that would reduce, mitigate, or excuse that killing. By Applicant's own admission at trial, he was not afraid that the victim was going to take his children. Additionally, Applicant could never identify who started the physical altercation between him and his wife or who threw the first blow. Applicant simply testified the victim "turned like she was going to throw something." (Tr. p. 267, lines 19-21). But he never gave any details about what it was she was going to throw or how or why this upset him. Applicant has failed to point to any additional competent evidence that Counsel could have presented to the court to convince it to give that charge. Additionally, this Court notes that the trial judge was present throughout the entire trial and heard all of the same testimony that Counsel heard. In arguing legal provocation to the judge, Counsel stated the evidence would have to come "from the officer talking to [Applicant] when he said [he and his wife] had been fighting." There is no dispute that the judge heard that testimony.

Therefore, based on the record and the testimony presented at the PCR hearing, this Court is not convinced that Counsel could have said anything further that would have persuaded the trial

RJC
1/18

judge to give the charge. The request to charge was made, a discussion of legal provocation and heat of passion ensued, and the Court denied the request. Therefore, this Court finds there is no reasonable probability that any alleged deficiencies of counsel affected the outcome of the trial, nor is there a reasonable probability, in light of the facts shown at trial, that the jury would not have convicted Applicant of murder even if a voluntary manslaughter charge had been given. Accordingly, this Court finds Applicant has failed to satisfy his burden of proving he was prejudiced by any alleged deficiency of counsel.

Failure to Object to the Trial Judge's Instruction on Malice Aforethought

Applicant contends that Counsel was ineffective for failing to object to the trial judge's "erroneous" instruction on malice aforethought. However, the Court finds Applicant has not only failed to demonstrate any deficiency in Counsel's performance, but has also failed to show that the trial court's instruction on malice aforethought was erroneous. In support of his assertion that the trial judge gave an erroneous instruction, Applicant points to the case of State v. Belcher, in which the court held that a jury instruction permitting the jury to infer malice from the use of a deadly weapon is no longer valid law in cases "where evidence is presented that would reduce, mitigate, excuse, or justify the homicide." 385 S.C. 597, 600, 685 S.E.2d 802, 804 (2009) (emphasis added). Belcher is inapplicable in this case for two reasons. First, it was decided after Applicant's trial, State v. Belcher, 385 S.C. 597, 613, 685 S.E.2d 802, 810 (2009) ("Our ruling, however, will not apply to convictions challenged on post-conviction relief.") (citations omitted). See also State v. Gilmore, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) ("[the courts] have never required an attorney to be clairvoyant or anticipate changes in the law [that] were not in existence at the time of trial."). Second, Applicant has failed to point to any evidence that was presented at trial that would reduce, mitigate, excuse, or justify the homicide.

Bel
8/19

Here, the trial judge charged the jury that it was "permitted to infer the existence of malice from proof of the intentional use of a deadly weapon." Applicant did not testify at the PCR hearing. The record clearly shows that Counsel requested a voluntary manslaughter charge. However, the court refused to charge voluntary manslaughter because it specifically found there was no evidence from which the jury could infer sufficient legal provocation. The Court of Appeals affirmed his conviction. Accordingly, this Court finds Applicant has failed to show Counsel was deficient in failing to object the trial court's instruction regarding malice because Applicant failed to point to any evidence produced at trial that would reduce, mitigate, excuse, or justify the killing.

Furthermore, this Court finds Applicant failed to establish his burden of proving he was prejudiced because the court had already found that a voluntary manslaughter charge was improper because there was no evidence presented from which the jury could infer sufficient legal provocation. The court of appeals had the full trial record before it and affirmed Applicant's conviction. Where there is no evidence presented to reduce, mitigate, excuse, or justify a killing, an instruction on the inference of malice through the use of a deadly weapon is not improper under Belcher. Accordingly, this Court finds Applicant has failed to show that there is a reasonable probability that the outcome of the proceedings would have been different had counsel objected to the malice instruction.

Failure to Argue That Voluntary Manslaughter Is the Absence of Premeditation and Not the Absence of Malice

Likewise, in light of this Court's findings above regarding Counsel's request to charge voluntary manslaughter, Applicant's assertion that Counsel was ineffective for failing to argue that "voluntary manslaughter is the absence of premeditation and not the absence of malice" is entirely without merit. Murder is defined as "the killing of any person with malice aforethought,

Del
020

2016 FEB 02 PM 12:39

either express or implied." S.C. Code Ann. § 16-3-10 (2003). Premeditation is not an element of murder in this state. Furthermore, voluntary "[m]anslaughter is defined as "the unlawful killing of another without malice." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001) (citing S.C. Code Ann. § 16-3-50 (2003)); Carter v. State, 301 S.C. 396, 398, 392 S.E.2d 184, 185 (1990)). Applicant has failed to set forth any evidence that Counsel's performance fell below an objective standard of reasonableness with respect to this allegation. Therefore, this Court finds Applicant has failed to satisfy his burden of proving that counsel's performance was deficient. This Court also finds that Applicant has failed to satisfy his burden of proving that any alleged deficiency in this regard affected the outcome at trial.

B. Ineffective Assistance of Appellate Counsel

Applicant alleged his appellate counsel, Joseph L. Savitz, III ("Appellate Counsel") was ineffective for (1) failing to argue that the trial court erred in refusing to admit evidence of the victim's state of mind where it would have been relevant to mitigate the offense from murder to manslaughter; (2) failing to effectively argue the facts and existing law to show the trial court erroneously failed to instruct the jurors about the law of voluntary manslaughter; and (3) failing to argue voluntary manslaughter is the absence of premeditation and not the absence of malice. This Court finds Applicant has failed to meet his burden of proving ineffective assistance of appellate counsel. Applicant failed to show that appellate counsel's performance was deficient or that any such deficiency prejudiced Applicant.

"A defendant is constitutionally entitled to effective assistance of appellate counsel." Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)).

ASL
P21

2016 FEB 22 PM 1:39

Appellate counsel has a "professional duty to choose among potential issues" according to their merit. Barnes, 463 U.S. 745. Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

This Court must analyze claims of ineffective assistance of appellate counsel according to the same standard set forth in Strickland v. Washington. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009) (citing Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999)). In other words, Applicant has the burden of proving appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537, 397 S.E.2d at 525; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005) (citing Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003)). Where an Applicant contends appellate counsel rendered ineffective assistance by failing to argue an issue, Applicant must show the failure to raise the issue was objectively unreasonable and that, but for this failure, his conviction or sentence would have been reversed. See Southerland v. State, 337 S.C. 610, 617, 524 S.E.2d 833, 836 (1999) (citing People v. Griffin, 687 N.E.2d 820 (Ill. 1997)). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Applicant argues Appellate Counsel's performance was deficient, in part, because of the length and content of his brief filed in the court of appeals. In support of that argument, Applicant refers to the South Carolina Supreme Court's ruling in Patrick v. State, 349 S.C. 203, 562 S.E.2d

Roll
p 22

609 (2002). In that case, however, counsel "devoted [only] three short paragraphs to [the] issue [on appeal], did not give any useful analysis, . . . only cited one case. . . ." in his brief and failed to "make any note of [the pertinent] issue in his petition for rehearing." Id. at 208, 562 S.E.2d at 611. Additionally, counsel raised the issue "in a conclusory fashion in [his] final brief" and failed to state it with particularity in [the] petition for rehearing." Id. at 208-09, 562 S.E.2d at 612. Based on the court of appeals statements and counsel's briefs, the supreme court found appellate counsel was ineffective for failing to adequately raise or address the merits of prosecutorial retaliation. Id. Here, Appellate Counsel not only presented an argument on the controlling legal issue of voluntary manslaughter in his brief to the South Carolina Court of Appeals, but also cited the relevant case law addressing the requirements of "heat of passion" and "sufficient legal provocation." Therefore, this Court finds Patrick is not applicable in this case.

Applicant also argues that State v. Belcher, 385 S.C. 597, 685 S.E.2d 802, was a seminal case on the issue of voluntary manslaughter. In Belcher the court held it was improper for the trial court to charge the jury that it could infer malice from the use of a deadly weapon where evidence is presented that would reduce, mitigate, or excuse the homicide. Here, the trial judge found that a jury instruction on voluntary manslaughter was inappropriate because there was no evidence from which the jury could infer that there was a sufficient legal provocation in Applicant's case. Because there was no evidence to support a voluntary manslaughter charge and the jury was not charged on voluntary manslaughter, the judge's charge to the jury that it could infer malice from the use of a deadly weapon was not an erroneous instruction under the rule established in Belcher. Therefore, this Court finds Belcher was inapplicable both at Applicant's trial and on appeal. Therefore, Applicant has failed to demonstrate that Appellate Counsel's performance in failing to raise Belcher was deficient. Furthermore, this Court finds Applicant has failed to demonstrate that

FILED
2016 FEB 22
P. 12: 38

the alleged deficiency in failing to raise Belcher prejudiced him because there is no reasonable probability that had Appellate Counsel raised Belcher as an issue the result of the appeal would have been different.

This Court finds that Appellate Counsel effectively argued the controlling legal issue of voluntary manslaughter and cited to relevant case law in support of his arguments. Following the denial of the appeal, Wanda Carter, also with the Office of Appellate Defense, filed a well-argued petition for rehearing in the court of appeals and an extensive Petition for Writ of Certiorari to the supreme court. Although the court ultimately denied certiorari, Appellate Counsel provided effective assistance in both selecting and raising the issues that he deemed meritorious on appeal. Applicant has failed to show that Appellate Counsel's "failure to raise the issue was objectively unreasonable and that, but for this failure, his conviction or sentence would have been reversed." See Southerland v. State, 337 S.C. at 617, 524 S.E.2d at 836. Applicant has therefore failed to produce evidence sufficient to overcome the presumption of effective assistance. Accordingly, this Court finds Applicant has failed to show that Appellate Counsel's performance was deficient.

This Court also finds Applicant has failed to demonstrate that he was prejudiced by any alleged deficiency of Appellate Counsel. As this Court found above, Belcher was inapplicable to Applicant's case because this Court agrees with the trial Court's finding that there was no evidence presented at the trial from which a juror could reasonably infer that there was sufficient legal provocation. Applicant could not even remember what occurred between 10:00 and 10:30 PM and could not testify whether he or the victim made the first blow. There was simply nothing in the testimony at trial that indicated Applicant acted under sufficient legal provocation. Therefore, there is no reasonable probability that the outcome of Applicant's appeal would have been different but for the alleged deficiency of Appellate Counsel. Applicant has failed to point to

Pal
p24

any other arguments he feels Appellate Counsel should have made. Accordingly, this Court finds Applicant has failed to demonstrate that he was prejudiced by any alleged deficient performance by Appellate Counsel.

C. 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 of post-conviction relief. Rule 71.1(g), SCRCR, 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

Handwritten signature
p. 25

016 FEB 22 PM 2:33

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 22nd day of February, 2016.



THE HONORABLE ROGER L. COUCH
Presiding Judge

 _____, South Carolina

2016 FEB 22 PM 12:39

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O. Box 3483
Spartanburg, SC 29304-3483

Phone (864) 596-2591
Fax (864) 596-2239



M. Hope Blackley
Clerk of Court

February 22, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

Larry Sweet Horton
Applicant # *325065*

7TH JUDICIAL CIRCUIT

CASE # *03-C-42-7*

VS
Shel
Respondent

CERTIFICATE OF SERVICE

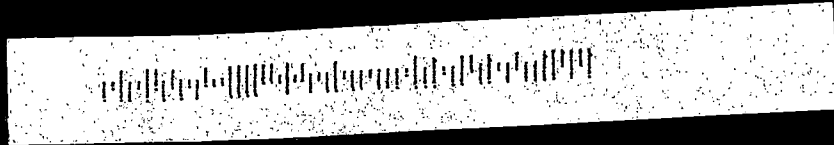
I certify that, on this date, I served a copy of the *Order of Dismissal*
In this action dated *2-22-2014* on *2-22-14*

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Anthony Hancock
Clarence Wise

2-22-14
(Date)

Corrie Gray
(Signature)



LAW OFFICE OF
C. RAUCH WISE
Attorney & Counselor at Law
305 Main Street
Greenwood, SC 29646

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