

THE STATE OF SOUTH CAROLINA

In the Supreme Court

RECEIVED

JUN 16 2015

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

SC Court of Appeals

Alexander S. Macaulay, Circuit Court Judge

RECEIVED

JUN 30 2015

Case No. 2009-CP-04-319

S.C. Supreme Court

Sammy Cowan, a/k/a Sammy Kay Cowan, Appellant,

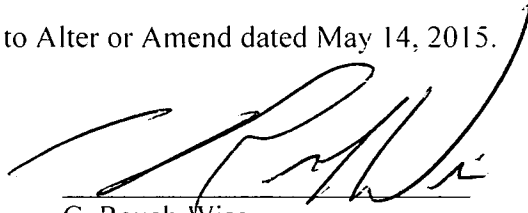
vs.

State of South Carolina Respondent.

NOTICE OF APPEAL

Sammy Kay Cowan appeals the order of the Honorable Alexander S. McCaulay, dated April 2, 2015, and the Order denying the Motion to Alter or Amend dated May 14, 2015.

June 12, 2015



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

Attorney for Appellant

Other Counsel of Record:
Walt Whitmire
SC Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

9

THE STATE OF SOUTH CAROLINA

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SC Court of Appeals

Sammy Cowan, a/k/a Sammy Kay Cowan, Appellant,

vs.

State of South Carolina Respondent.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Trayhnam who, after being duly sworn, deposes and says that she is the legal assistant for C. Rauch Wise, Attorney for the Appellant in the above entitled case. That on June 12, 2015, 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 J. Walt Whitmire, Office of the Attorney General, P.O. Box 11549, Columbia, SC, 29211.

SWORN to and Subscribed

Sandy Trayhnam

before me this 12 day

of June, 2015.

Mary Jane Harter (L.S.)
Notary Public for South Carolina
My Commission expires: 11/30/22

RECEIVED

JUN 16 2015

SC Court of Appeals

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

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

C. Rauch Wise

June 12, 2015

Jenny Abbott Kitchings, Clerk
SC Court of Appeals
P.O. Box 11629
Columbia, SC 29211

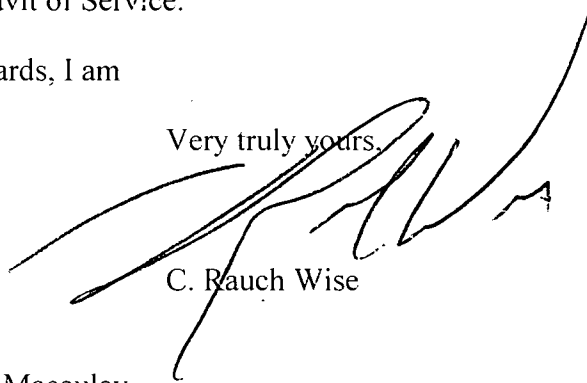
Re: Sammy Kay Cowan vs. The State of South Carolina

Dear Ms. Kitchings:

Enclosed herewith is the Notice of Intent to Appeal concerning the above referenced matter, together with the original Affidavit of Service.

With kindest regards, I am

Very truly yours,



C. Rauch Wise

CRW/mjh

cc: Walt Whitmire
Honorable Alexander S. Macaulay

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



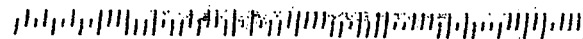
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SC Court of Appeals
P.O. Box 11629
Columbia, SC 29211

JUN 16 2015

SC Court of Appeals

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ANDERSON SC

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF ANDERSON)

TENTH JUDICIAL CIRCUIT

Sammy Cowan, a/k/a)
Sammy Kay Cowan,)
S.C.D.C. No. 214656)

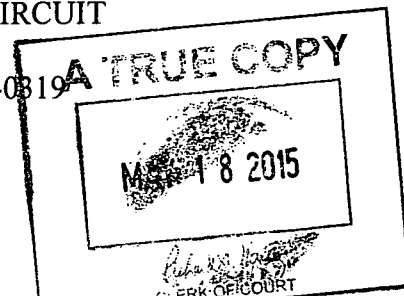
C.A. No. 2009-CP-04-0319

Applicant,)

v.)

**ORDER DENYING APPLICANT'S MOTION
TO ALTER OR AMEND THE JUDGMENT**

State of South Carolina,)
Respondent.)



This matter comes before this Court by way of Applicant's "Rule 59(e) Motion to Alter or Amend" asking this Court to alter or amend its Order of Dismissal denying Applicant post-conviction relief.

I.

An evidentiary hearing into the matter was convened on June 5, 2012. Applicant was present and was represented by C. Rauch Wise, Esq. Respondent was represented by Kaleon May, Esq., of the Office of the Attorney General. At the conclusion of the hearing, this Court took the case under advisement. Respondent subsequently obtained the transcript from the hearing and provided it to the necessary parties. Pursuant to this Court's review of the Record, testimony, and evidence presented at the PCR hearing, an order of dismissal with prejudice was entered and filed on April 7, 2015. Applicant filed its post-trial motion on April 15, 2015. Respondent's Return followed.

II.

5-2

This Court's Order of Dismissal contains the required findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (1976) and Rule 52(a) SCRPC. See also McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991). Having carefully reviewed the entire record in this matter, this Court finds that there is no basis for altering or amending its prior ruling. Therefore, this Court hereby denies the Applicant's Motion in its entirety, and affirms the previous Order of Dismissal.



This Court notes that if the Petitioner desires to secure appellate review of this Order and the Order of Dismissal, a notice of appeal must be filed and served within thirty days of the service of this Order. Petitioner is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed.

AND, IT IS SO ORDERED this 14th day of May, 2015

ALEXANDER S. MACAULAY
Presiding Judge
Tenth Judicial Circuit

W. D. Helle, South Carolina

FILED-CLERK'S OFFICE
ANDERSON SC
2015 MAY 18 AM 11:40
COMMON PLEAS AND
GENERAL SESSIONS

Sammy Cowan, a/k/a Sammy Kay Cowan,

State of South Carolina

SCDC No. 214, 656

CLERK'S OFFICE
ANDERSON SC

Applicant

Respondent

Submitted by:

2015 APR - 7 A 11: 08

Attorney for : Plaintiff Defendant
or
 Self-Represented Litigant

COMMON PLEAS AND
GENERAL SESSIONS
DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order Statement of Judgment by the Court; Post Conviction Relief Denied and Application Dismissed.

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk :

A TRUE COPY

APR - 7 2015

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Alexander S. Macaulay
Circuit Court Judge

2063
Judge Code

April 2, 2015
Date

For Clerk of Court Office Use Only

imprisonment for possession of a firearm by a convicted felon. The sentences were to be served concurrently.

A Notice of Appeal was filed on the Applicant's behalf, and his Appeal was perfected. Applicant was represented by Katherine Hudgins, Esquire, of the Office of Appellate Defense. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence in an unpublished opinion, Op. No. 08-UP-577 (filed on October 14, 2008). The Remittitur was issued October 30, 2008.

At the PCR hearing, Applicant moved forward on the following allegations:

1. Ineffective assistance of counsel:
 - a. failure to investigate the 911 tapes by having them enhanced.
 - b. failure to object to hearsay testimony from Detective Steven Reeves.
2. Prosecutorial Misconduct:
 - a. failure to object to prosecutorial misconduct where solicitor did not provide full details of State witness Kinshaba Simmons' rap sheet.
 - b. failure to investigate State witness Joctavious Williams' pending charges.

SUMMARY OF TESTIMONY

Applicant testified at the PCR hearing stating that he was originally from Detroit, Michigan. Applicant stated he was innocent and did not fatally shoot the victim, Fred Penn. Applicant further stated he had listened to the emergency dispatch recording that captured audio from the offense at trial and again at the hearing. Applicant also stated that trial counsel should have objected to Detective Reeves' hearsay statement at trial. Applicant believed an objection to the alleged hearsay statement would have been outcome determinative because the jury deliberated for over four hours.

Applicant stated the solicitor withheld State witness Kinsahaba Simmons' March 2005 prior convictions. Applicant stated that he additionally learned State witness Joctavious Williams had his pending charges dismissed after Applicant's trial. Applicant stated Detective Reeves took his statement. Applicant asserted it would have benefited his case to have Simmons' rap sheet at trial.

At the PCR hearing, Jimmy Powers testified on behalf of Applicant that he lived in Greenwood, South Carolina, and was employed as a private investigator. Powers further stated that he had obtained and analyzed the emergency dispatch recording presented at trial and that the audio on the original tape was distorted, which included scratchy sounds and background noise. Powers additionally obtained a transcript of the statements made on the tape and had the tape enhanced to filter out the background noise. Powers stated he interpreted the statement on the tape, "we run this," as coming from State witness Allen Johnson. Powers also stated that no one made the statement, "we do this Detroit style," on the tape. Powers stated he spoke to several witnesses who had testified at Applicant's trial, and that the witnesses did not identify Applicant's voice on the tape. The enhanced 911 tape was entered into evidence.

At the PCR hearing, the trial counsel, Ms. Thomason, testified. Trial counsel was appointed to represent Applicant because the Tenth Circuit Public Defender's Office was conflicted off of the case. Trial counsel utilized a private investigator provided by the Public Defender's Office in investigating Applicant's case and preparing for trial. Trial counsel discussed complications with Applicant regarding potential witnesses who would not cooperate with her investigation.

Trial counsel summarized the incident that led to Applicant's arrest and conviction. There had been a shooting outside a local night club, Club Envy, where an argument had occurred

between Simmons and the victim inside of the establishment. As a result of the altercation, the security guard, Allen Johnson, had removed them from the establishment. Johnson, along with other eyewitnesses, placed Applicant at the scene of the offense.

Trial counsel testified she reviewed the 911 tape prior to trial. Trial counsel did not have difficulty determining and identifying the voices on the tape. Trial counsel testified that she did not find that an additional investigation of the 911 tapes by having them enhanced was necessary or would be helpful. The jury only heard the recording, without the aid of the transcript. Trial counsel also was unable to locate any potential witnesses to identify Simmons' voice on the recording. Trial counsel testified she cross-examined Johnson on discrepancies between his trial testimony of comments Applicant made at the scene, and comments captured on the 911 recording.

Trial counsel testified she was not convinced she erred by failing to object to an alleged hearsay testimony from Detective Reeves. At trial, Detective Reeves testified that during his investigation of the victim's death, no witness identified a third party as the shooter. (Trial Tr. p. 242, lines 16-22). Trial counsel stated an objection could have been more harmful than beneficial to Applicant's case.

Trial counsel testified she received rap sheets of State witnesses prior to trial. Trial counsel testified Simmons' 2001 charges for burglary and kidnapping had been *nolle pros'd*. Trial counsel stated the dismissed charges did not constitute admissible impeachment material. Simmons' 2005 convictions for trespassing and simple assault and battery were disclosed to trial counsel, but she was unaware a *nolle pros'd* burglary charge accompanied those convictions. A copy of the rap sheet provided to trial counsel by the Solicitor's Office was submitted into evidence as Applicant's Exhibit 6. Applicant additionally submitted the disposition sheet for the

nolle pros'd burglary charge as Applicant's Exhibit 5. The disposition sheet indicated Applicant was arrested for burglary on March 12, 2005. The record of the arrest was processed on March 30, 2005. The charge was *nolle pros'd* on April 13, 2005. The record of the disposition was processed on April 18, 2005. Trial counsel testified the burglary charge constituted *Brady* material that would have been useful in her presentation of Applicant's case.

Subsequent to the PCR hearing, Respondent submitted Asst. Solicitor Rame Campbell's affidavit regarding his General Sessions involvement in Applicant's case. He provided trial counsel discovery on April 15, 2005 followed by four supplemental discovery disclosures prior to the State calling its case for trial. Asst. Solicitor Campbell called Simmons as a State's witness at trial. He recalled Simmons' disclosure of prior convictions to the jury. Asst. Solicitor Campbell had no knowledge of Simmons' 2005 charges while prosecuting Applicant's case. He stated that a different solicitor handled the disposition of Simmons' 2005 charges. Asst. Solicitor Campbell did not engage in plea negotiations with Simmons. He stated, "this was not a consideration of mine when I used him as a witness" at Applicant's trial. Furthermore, he stated Simmons' was an uncooperative witness. Simmons ignored a subpoena to testify at Applicant's trial on November 14, 2005. As a result, Simmons was picked up on a bench warrant issued by the trial judge and testified on November 15, 2005.

APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process

that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064, (1984); *Butler*, 286 S.C. at 441, 334 S.E.2d at 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. at 668, 104 S.Ct. at 2064. The Applicant must overcome this presumption in order to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625, *citing Strickland, supra*. Second, 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." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court's records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and exhibits from the prior proceedings, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

I.

A.

This Court finds Applicant failed to meet his burden to prove trial counsel was ineffective for not further investigating the emergency dispatch recording. This Court finds trial counsel's testimony on the matter more credible than Applicant's testimony. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (citing *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). Trial counsel reviewed the tape prior to trial and stipulated to its admission as evidence. (Trial Tr. p.49; p.56). At the PCR hearing, trial counsel testified the enhanced recording would not have benefited Applicant's defense. This Court agrees. At trial, Johnson testified to witnessing Applicant enter the immediate area where the victim was slain moments prior to hearing the fatal shots. (Trial Tr. p.87). Johnson testified Applicant exclaimed, "When he went past me he turned to, like, the left side. I saw the gun down in his left hand, down on his left side, screaming we run this "sh" Detroit style. This is south side. I done killed one of your boys and I don't' mind doing it again." (Trial Tr. p.87, lines 14-18). (Trial Tr. p.88). This Court finds trial counsel strategically utilized the emergency dispatch recording during her cross-examination of Johnson. (Trial Tr. pp.99-101). Trial counsel questioned Johnson on his delayed disclosure of Applicant's involvement in the offense. This Court finds trial counsels tactics here were a matter of sound trial strategy. See *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992) (where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel). See Also *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (recognizing that "[c]ourts

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.").

Furthermore, Applicant failed to prove how trial counsel's alleged deficiency on the matter resulted in prejudice. Trial counsel was not provided any potential witnesses that could have identified Simmons' voice on the recording. Applicant failed to produce testimony from any witness on the identification. Therefore, this Court finds the allegation rests on hearsay and speculation. *See Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995) (applicant's allegations, alone, will not support a finding of prejudice when applicant claims counsel was ineffective for failing to investigate witnesses; instead, applicant must show the results of an investigation would have resulted in a different outcome at trial. Mere speculation and conjecture on the part of respondent is insufficient.). This Court finds an enhancement of the emergency dispatch recording would have produced an ancillary benefit at best to Applicant's defense. The enhanced evidence would have not diminished the eyewitness identification testimony of Applicant's involvement in the victim's murder. Therefore, this allegation is denied and dismissed.

B.

This Court finds Applicant failed to meet his burden to prove trial counsel was ineffective for not objecting to Detective Reeves' alleged improper hearsay testimony. Applicant failed to prove the testimony was improper. *State v. Brown*, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994) (citing *United States v. Love*, 767 F.2d 1052 (1985) ("An out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken.")). (Trial Tr. p.242, lines 16-20). Additionally, trial counsel provided sound trial strategy on the matter. Trial counsel testified she did not want to risk focusing the jury's



attention to prior testimony that Applicant was the only person armed at the scene of the offense. *See Stokes*, 308 S.C. at 546, 419 S.E.2d at 778.

Furthermore, Applicant failed to prove how trial counsel's alleged deficiency on the matter resulted in prejudice. Detective Reeves' testimony was cumulative to other testimony presented at trial. *See State v. Haselden*, 353 S.C. 190, 577 S.E.2d 445 (2003) (when evidence is improperly admitted it is harmless error where it is merely cumulative). Therefore, this allegation is denied and dismissed.

C.

Last, Applicant failed to meet his burden to prove the solicitor's disclosure of State witness Simmons' prior criminal history constituted a *Brady* violation. "A *Brady* claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. *Gibson v. State*, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). This Court finds Applicant failed to prove the non-disclosure of Simmons' 2005 convictions for trespassing and simple assault and battery equated to a *Brady* violation. Rule 609(a)(2), SCRE, stipulates evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regarding the punishment. Applicant failed to prove the convictions would have been admissible for impeachment purposes. *See State v. LaBarge*, 275 S.C.168, 288 S.E.2d 278 (1980) (holding trial judge did not err finding a witnesses convictions for disorderly conduct and trespassing, among other related convictions, were not admissible for impeachment purposes.). Additionally, the allegedly withheld impeachment evidence was not material because it was cumulative. Simons' prior convictions for armed robbery and assault

with intent to kill were disclosed to the jury. (Trial Tr. p.182). Additionally, Simons testified to drug use. (Trial Tr. p.183). See *State v. Black*, 400 S.C. 10, 732 S.E.2d 880 (citing *Mason v. State*, 756 P.2d 612 (Okla. Crim. App. 1988) (“erroneous admission of a prior manslaughter conviction was harmless error where the witness was already impeached by other evidence of prior conviction.”)).

Second, this Court finds Applicant failed to prove the solicitor intentionally withheld any alleged clandestine plea agreements with State witnesses Simmons and Williams. “Under the Due Process Clause, prosecutors have a duty to provide an accused with favorable evidence, including any plea agreement involving testifying accomplices, which is material to either guilty or punishment.” *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375 (1985). “The trial court may determine, through testimony of [the witness], the solicitor, and other parties with knowledge of the facts, the circumstances of the alleged promise. A decision can then be made on the basis of the facts as they are determined to be, not on the basis of speculation.” *State v. Hinson*, 293 S.C. 406, 408, 361 S.E.2d 120, 121 (1987)

This Court finds the solicitor statement credible and convincing. This Court finds the solicitor is an experienced trial attorney with a thorough understanding of criminal procedure. The solicitor told the trial judge he complied with Rule 5 and *Brady*. (Trial Tr. p.58). Furthermore, the solicitor provided the NCIS reports of State witnesses to trial counsel. (Trial Tr. p.57). Trial counsel also requested NCIS reports for the State’s potential rebuttal witnesses. Trial counsel stated, “[The solicitor] will give [the rap sheets] to me. I’m not worried about that.” (Trial Tr. p.57, lines 9-10). Additionally, the trial record further corroborates the solicitor’s statement that Simmons was an uncooperative witness. He was present and testified at Applicant’s trial pursuant to a bench warrant issued by the trial judge. Upon review of the record,

this Court finds the incomplete NCIS report on Simmons provided to trial counsel was attributed to a clerical error. The Anderson County Clerk of Court's recorded disposition of the 2005 burglary charge, as evidenced in Applicant's Exhibit 5, lists the defendant as "Simmons, Kinshaba Malong." In contrast, the NCIS report of the witness listed his name as "Simmons, Kinshaba Malongo. The report also listed five other additional identifiers. None of the six names matched the name provided in the Clerk's recorded disposition of the 2005 burglary charge.

Applicant also failed to prove the solicitor withheld details of Williams' guilty plea negotiations from plea counsel. Under the crucible of cross-examination, Williams candidly testified he anticipated receiving consideration on his pending charges for aiding law enforcement in Applicant's case. (Trial Tr. p.197). Thus, Applicant failed to prove prosecutorial misconduct. Furthermore, Applicant failed to show how the alleged *Brady* violations constituted prejudice. Therefore, these allegations are denied and dismissed.

II.

This Court finds Applicant also failed the second prong of *Strickland* – that he was prejudiced by trial counsel's performance. Both employees of Club Envy testified to witnessing Applicant run with a gun to an area blocked from their view where the victim was just prior to hearing gun shots. (Trial Tr. p.87; p.116). This Court finds overwhelming evidence of guilt supports Applicant's conviction. *See Franklin v. Catoe*, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial.). Johnson testified he heard Applicant exclaim he did not mind killing someone else again prior to phoning the police. (Trial Tr. p.87). Craig Williford testified Applicant told him to distance himself from the victim while Applicant held two guns. (Trial Tr. p.142). Williams testified he witnessed

Applicant draw two guns when Applicant engaged Williford. (Trial Tr. p.193). Williams testified he witnessed Applicant shoot the victim. Simmons also testified he witnessed Applicant shoot the victim. (Trial Tr. p.172-3). Natasha Reed testified that an unknown man approach Simmons and the victim while armed. (Trial Tr. p.201).

Furthermore, Thomas McDonald testified Applicant confessed to the murder twice while in custody. (Trial Tr. p. 209; p. 210). McDonald testified Applicant told him he originally planned to flee Anderson and travel back to Detroit, Michigan after committing the murder. (Trial Tr. p.210). McDonald testified Applicant told him he changed plans and traveled to Athens, Georgia where Applicant knew a girl. (Trial Tr. p.210). Evidence of flight was presented that corroborated McDonald's testimony. Michael Murphy testified he was an employee with Greyhound Bus. (Trial Tr. p.156). Murphy testified a bus ticket departing from Atlanta, Georgia and arriving in Bowling Green, Kentucky was purchased by a "Sam Cowan" on February 7, 2005, one day after the murder. (Trial Tr. p.157-9). Murphy testified the ticket was not used. (Trial Tr. p.159). Murphy testified a second bus ticket departing from Atlanta, Georgia and arriving in Athens, Georgia was also purchased by a "Sam Cowan." (Trial Tr. 159). Applicant's girlfriend, Francis Fleming, testified Applicant phoned her from a bus station and asked for money. (Trial Tr. 227). Information obtained from Fleming was used to locate Applicant. (Trial Tr. 239-40). Thus, this Court finds any alleged error committed by trial counsel could not have affected the outcome of Applicant's trial.

III.

Except as discussed above, this Court finds that the Applicant affirmatively waived the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. *Janasik v. Fairway Oaks Villas*



Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." *Lyles v. BMI, Inc.*, 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

CONCLUSION

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

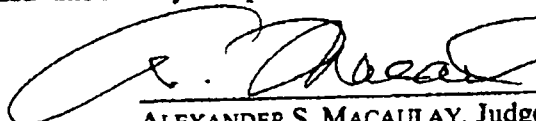
This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; *Bray v. State*, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS, THEREFORE, ORDERED:

1. That the Application for Post-Conviction Relief must be DENIED and DISMISSED with prejudice; and
2. Applicant must be remanded to the custody of Respondent

AND, IT IS SO ORDERED this 2nd day of April, 2015.

Walhalla, South Carolina


 ALEXANDER S. MACAULAY, Judge

CLERK'S OFFICE
 ANDERSON SC
 2015 APR - 7 A 11: 08
 COMMON PLEAS AND
 GENERAL SESSIONS