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March 27, 2018

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

Re: Brandon Greene v State, 2015-CP-25-0090

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Hampton County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,

James K Falk

Thank you for your assistance.

Cc: Christian Saville, Brandon Greene 289919.

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM HAMPTON COUNTY

Court of Common Pleas

Honorable Thomas A Russo. Circuit Judge

RECEIVED

MAR 30 2018

S.C. SUPREME COURT

Case No.: 2015-CP-25-0090

Brandon Greene 289919.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Brandon Greene appeals the Honorable Thomas A. Russo's November 7, 2017 Order of Dismissal. Undersigned counsel received notice of entry of the order on March 17, 2018. A copy of the order on appeal is attached hereto.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

March 27, 2018

Christian Saville, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA
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APPEAL FROM HAMPTON COUNTY
Court of Common Pleas
Honorable Thomas A. Russo, Circuit Judge

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PROOF OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Christian Saville, Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this March 27, 2018.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

STATE OF SOUTH CAROLINA COUNTY OF HAMPTON	)	IN THE COURT OF COMMON PLEAS THE FOURTEENTH JUDICIAL CIRCUIT
Brandon Greene, #289919	)	Case no. 2015-CP-25-0090
Applicant,	)	
v.	)	**ORDER OF DISMISSAL**
State of South Carolina,	)	
Respondent.	)	

The above-captioned matter comes before the court via an application for post-conviction relief (PCR) filed by Brandon Greene on March 4, 2015. This Court convened an evidentiary hearing into the matter on October 9, 2017, at the Beaufort County Courthouse. Applicant was present at the hearing and represented by James Falk, Esquire. Ruston W. Neely, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant's trial counsel, Byron E. Gipson (Counsel), Esquire, and Applicant were both present and testified. This Court had the opportunity to listen to their testimony and rule on their credibility. This Court also had before it a copy of the trial transcript, the records of the Hampton County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the direct appeal records, and the pleadings in this matter.

I. PROCEDURAL HISTORY

Applicant was indicted at the December 2009 term of the Hampton County Grand Jury for murder (2009-GS-25-0515) and at the July 2010[1] term for assault and battery with intent to kill (ABWIK) (2009-GS-25-0567.) On September 5, 2012, Applicant proceeded to trial before the Honorable R. Markley Dennis, Jr. Applicant was found guilty of murder and not guilty of

[1] The Applicant had previously been indicted for ABWIK at the December 2009 term; July 2010 reflects the term of re-indictment.

ABWIK by a jury of his peers. Judge Dennis sentenced Applicant to confinement for forty years for murder.

Applicant filed a timely notice of appeal and an appeal was perfected on his behalf. On Appeal, Kathrine Hudgins, Esquire, represented the Applicant. The South Carolina Court of Appeals dismissed the appeal. State v. Greene, Op. No. 2014-UP-140 (S.C. Ct. App. filed April 2, 2014). The Remittitur was issued on April 18, 2014.

II. ALLEGATIONS

Applicant alleged the following grounds in his application:

I. Ineffective Assistance of Counsel
   a. Failure to call witnesses to rebut the State's reply witness.
   b. Failure to request a *Batson* hearing.
   c. Failure to strike juror 55.
   d. Failure to move for a mistrial when juror 172 was removed from the jury panel.
   e. Failure to object to the Solicitor's remarks regarding Applicant's unlawful possession of a firearm, during the State's opening statement.
   f. Trial counsel failed to make a specific Brady request.
   g. Failure to object to the State pitting Applicant against other witnesses.
   h. Failure to request the lesser-included charge of voluntary manslaughter.
   i. Appellate counsel failed to raise the properly preserved and meritorious issue regarding the introduction of an inconsistent statement.
   j. Trial counsel failed to object to the sentence pronounced.

After the presentation of the defense's case, the State moved for summary judgment based on Applicant's failure to present any evidence supporting the following allegations:

f. Trial counsel failed to make a specific Brady request

i. Appellate counsel failed to raise the properly preserved and meritorious issue regarding the introduction of an inconsistent statement

This Court granted summary judgment and finds these allegations abandoned based on Applicant's failure to present any evidence supporting these allegations.

III. SUMMARY OF FACTS

At trial, Applicant testified he shot both Dominick Badger (Dominick) and his brother Anthony Badger ("Tony") in self-defense. (R. pp. 291-292). The jury found Greene not guilty of the AWBIK involving Tony. On October 2, 2009, Applicant left work at 5:00 PM, purchased two half-pints of brandy, and went to the home he shared with his grandparents. At the house, he retrieved a pistol, which he had taken from his girlfriend without her knowledge. (R. pp. 296-299). Applicant then stopped at Dominick's house. (R. pp. 299-300). Applicant had previously spoken with Dominick about borrowing a chain for Applicant's son's four-wheeler. (R. p. 297, ll. 2-22). Dominick told Applicant he did not have the chain for the four-wheeler. (R. p. 300, ll. 1-6). Applicant stayed in the yard at Dominick's house and began drinking. (R. pp. 300-301). Applicant testified as the evening went on Tony became more aggressive. (R. pp. 311-314). Dominick and Dexter Bozeman tried to separate Applicant and Tony by putting Tony in their car. (R. pp. 314-315). Tony got out of the car and moved toward Applicant. (R. pp. 315-316). Applicant testified he pulled the gun from his waistband and shot Tony. (R. pp. 316-317). After Applicant shot Tony, Dominick tried to stop him. Applicant shot and killed Dominick. (R. p. 318-319). Applicant got in his car, and fled the scene. (R. p. 320, ll. 1-5). Applicant testified he went home and changed his shirt and then drove to his cousin's house. (R. p. 320, ll. 11-25). Applicant received phone calls from his family telling him the police were looking for him so he

returned home. (R. p. 322, ll. 3-7). Applicant testified on the way home he threw the gun away. (R. p. 322, ll. 8-22).

IV. SUMMARY OF TESTIMONY

Former Solicitor Randolph Murdaugh, III, Esquire, (the Solicitor) testified he was responsible for jury selection and he was looking for fair and impartial jurors. He testified juror 44 was struck because the Solicitor knew the Dobson family and didn't think highly of anyone in that family. Juror 105 was struck because he prosecuted his brother for assault and battery. Juror 146 was struck because the Solicitor had knowledge 146 was involved in the drug business.

Counsel testified he and Applicant discussed the pros and cons of letting Juror Gill on the jury and decided to let him on as a matter of trial strategy. Counsel discussed the fishing tackle with Samuel Greene prior to trial. Counsel was worried Samuel Greene, if called as a witness, would be led into presenting positive character evidence for Applicant. Counsel was concerned this could allow the State to call witnesses in response and attack his prior bad acts and reputation. For this reason, Counsel testified he wasn't going to call Samuel Greene as a witness during the defense's case. However, Counsel testified, after the State called witnesses in reply, he believed Samuel Greene's testimony was worth the risk. Counsel requested a surrebuttal, which the trial court denied. Counsel did not believe the Solicitor's statement, regarding the gun, was damaging to his client's case. Counsel testified he and Applicant discussed the case multiple times before hand and Applicant was going to testify on his own behalf. Counsel did not believe the Solicitor's question asking Applicant if the other witnesses were lying was prejudicial. Counsel explained to Applicant the sentencing ranges of all the charges he was facing, as well as for voluntary manslaughter. Counsel testified he and Applicant discussed whether to request a voluntary manslaughter instruction and Applicant did not want an instruction on voluntary

manslaughter. Counsel testified he did not ask for a mistrial when the juror was caught speaking to a witness because it was before deliberations and the juror was replaced with an alternate. Further, Counsel testified he preferred the alternate and thought the substitution was favorable to Applicant's case.

Applicant testified he and Counsel spoke about Juror Gill and decided, after weighing the pros and cons, to seat him as a juror. Applicant testified Counsel never spoke to him concerning the lesser-included charge of voluntary manslaughter. During the trial, the State offered Applicant the ability to plea to voluntary manslaughter, but he refused the offer because he believed he would receive 30 years' incarceration.

Samuel Greene, Applicant's grandfather, testified he took the fishing tackle out of the vehicle before law enforcement impounded it. He also testified Applicant had been in trouble involving guns before, but Applicant was still a good hard-working person.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds Applicant has failed to satisfy his burden to prove Counsel's actions were deficient. Applicant also failed to prove he was prejudiced by Counsel's alleged deficiencies. This Court finds the Solicitor's testimony was credible. Likewise, this Court finds Counsel's testimony was credible. This Court finds Counsel properly prepared for Applicant's trial. This Court finds Counsel elucidated valid trial strategies in defending Applicant and preparing for trial. This Court finds Counsel rendered adequate assistance and exercised professional judgment in his decisions at trial. This Court finds the Solicitor provided sufficient race-neutral reasons for the preemptory strikes he used at trial. This Court dismisses Applicant's application for the reasons set out below:

A. Ineffective Assistance of Counsel

In evaluating allegations of ineffective assistance of counsel, the court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668, 669 (1984). First, Applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). "The proper measure of counsel's performance remains whether he has provided representation within the range of competence required of attorneys in criminal cases." Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, Counsels' deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

1. Failure to call witnesses to rebut the State's reply witness.

Counsel requested a surrebuttal and the trial court denied Counsel's request. Tr. 355. This Court finds Applicant failed to prove Counsel was deficient. Further, Counsel testified the surrebuttal witness was also a liability to Applicant's case. At the evidentiary hearing, Applicant called Samuel Greene to as a witness. Samuel Greene testified he took the fishing tackle out of Applicant's car after Applicant murdered one victim and wounded the other. This Court finds the

prejudicial value of the excluded testimony was miniscule and Counsel's performance in requesting a surrebuttal was not deficient. Therefore, this Court finds Applicant failed to prove he was prejudiced by the surrebuttal witness's failure to testify.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for not calling Samuel Greene as a witness. This Court also finds Applicant failed to prove Counsel's actions prejudiced Applicant such that there was a reasonable probability the result of the trial would have been different. Accordingly, this Court denies and dismisses this allegation.

2. Failure to request a *Batson* hearing.

At the evidentiary hearing, the Solicitor testified and provided sufficient race-neutral reasons for his jury strikes. He testified Juror 44 was struck because the Solicitor knew the Dobson family and didn't think highly of anyone in that family. Juror 105 was struck because the Solicitor prosecuted his brother for assault and battery. Juror 146 was struck because the Solicitor had independent knowledge Juror 146 was involved in the drug business. Therefore, there was no potential prejudice from Counsel's failure to request a *Batson* hearing. Further, this Court finds Counsel's decision not to request a *Batson* hearing where he believed the State had race-neutral reasons for their jury strikes was not deficient. Counsel should not make motions he believes are frivolous. As shown by the Solicitor's testimony, any *Batson* motion would have been easily defeated by the State.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for deciding not to request a *Batson* motion. This Court also finds Applicant failed to prove Counsel's decision not to request a *Batson* motion prejudiced Applicant under Strickland. Accordingly, this Court denies and dismisses this allegation.

3. Failure to strike Juror 55.

This Court finds Counsel and Applicant discussed the pros and cons of striking Juror 55 and made a trial strategy decision not to strike Juror 55 because he had previously been charged with an assault charge. Counsel testified it is rare to be able to seat a juror who had previously gone through the process of being charged with the crime for which the defendant was being tried. Counsel testified he and Applicant wanted Juror 55 on the jury because Juror 55 might better understand how Applicant felt. "Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Here, Counsel gave competent advice to Applicant and a knowing and intelligent decision was made. This Court cannot and will not use the advantage of hindsight to criticize Counsel's reasonable trial strategy decisions.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for deciding not to strike Juror 55. This Court also finds Applicant failed to prove Counsel's decision not to strike Juror 55 prejudiced Applicant under Strickland. Accordingly, this Court denies and dismisses this allegation.

4. Failure to move for a mistrial when juror 172 was removed from the jury panel.

Juror 172 was dismissed from the jury at Counsel's request before the jury began deliberations. Juror 172 caused no potential prejudice to Applicant's case because deliberations had not yet begun when he was removed. "To prove prejudice resulting from counsel's failure to move for a mistrial, an applicant must demonstrate that, had counsel moved for a mistrial, the trial court's denial of the motion would have amounted to an abuse of discretion." Earley v. State, 418 S.C. 255, 266, 792 S.E.2d 226, 232 (2016). "The granting of the motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial

effect can be removed in no other way." State v. Patterson, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct. App. 1999). This Court finds any mistrial motion would have been properly denied. This Court finds Applicant's case was not prejudiced by a juror who was never part of deliberations. Further, Counsel testified the alternate who replaced juror 172 was a juror who he wanted seated. This Court finds Applicant failed to prove Counsel's decision not to move for a mistrial prejudiced Applicant such that there was a reasonable probability the result of the trial would have been different.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for not moving for a mistrial. This Court also finds Applicant failed to prove Counsel's decision not to move for a mistrial prejudiced Applicant under Strickland. Accordingly, this Court denies and dismisses this allegation.

5. Failure to object to the Solicitor's remarks regarding Applicant's unlawful possession of a firearm, during the State's opening statement.

Applicant alleges the jury could have inferred Applicant had a criminal history from the Solicitor's statement and he was prejudiced by the potential inference. During his opening statement, the Solicitor stated, "Not only that, even though he's not charged with it, there's a law in South Carolina that you can't possess a gun. So right there, Brandon Greene is breaking the law by possessing that gun." Tr. 66, ll. 2-5. Counsel testified Applicant's defense relied on Applicant's testimony. Therefore, Applicant's applicable criminal history was going to come into evidence for the purpose of impeaching his testimony. Further, Counsel testified he did not believe the statement was prejudicial.

This Court also finds Applicant failed to prove he was prejudiced by the statement. In South Carolina, it is illegal to carry a gun on your person without a concealed weapons permit. S.C. Code Ann. §16-23-20. This is common knowledge. At trial, no evidence was presented that

Applicant had a concealed weapon permit. This Court believes it unreasonable to assume the jury would infer Applicant had a criminal history from the Solicitor's comment. Further, Applicant's criminal history was before the jury because Applicant testified. Thus, any potential prejudicial value of the statement was removed.

This Court finds Counsel's decision not to object to the Solicitor's statement did not fall below the standard of professional norms. This Court also finds Applicant failed to prove Counsel's decision not to object to the Solicitor's statement prejudiced Applicant under Strickland. Accordingly, this Court denies and dismisses this allegation.

6. Failure to object to the State pitting Applicant against other witnesses.

The Solicitor's question during cross-examination prompted Applicant to call the witnesses testifying against him liars.

Q: "It didn't happen?"
A: "It never happened."
Q: "They lied about that?"
A: "That was – that was a total lie."
Tr. 334, ll. 21-25.

Counsel testified the question and the response were not harmful to Applicant's case. Applicant's version of events was in direct contradiction to the witnesses. This Court agrees with Counsel. The Solicitor's question, while potentially objectionable, had negligible prejudicial value. Applicant's version of events was obviously in direct contradiction with other witnesses' accounts. The Solicitor's question merely permitted Applicant to directly contradict the witnesses testifying against him. Therefore, this Court finds Counsel's decision not to object was not deficient nor was it prejudicial to Applicant's case.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for not objecting to the Solicitor's question. This Court also finds Applicant failed to prove Counsel's

decision not to object prejudiced Applicant such that there was a reasonable probability the result of the trial would have been different if Counsel had objected. Accordingly, this Court denies and dismisses this allegation.

7. Failure to request the lesser-included charge of voluntary manslaughter.

Counsel testified Applicant turned down a plea offer of voluntary manslaughter and wanted to proceed forward with an all or nothing strategy. Applicant's current allegation is merely the result of hindsight. This Court finds Counsel and Applicant discussed the pros and cons of requesting a voluntary manslaughter charge and made the strategic decision not to request voluntary manslaughter. "Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Stokes, 308 S.C. at 419 S.E.2d at 778. This Court finds Applicant made the knowing and intelligent decision not to request an instruction on voluntary manslaughter based on competent advice from Counsel.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for not objecting to the Solicitor's question. Accordingly, this Court denies and dismisses this allegation.

8. Failure to object to the pronounced sentence.

The trial court's sentence was lawful and any objection would have been rightfully overruled. The sentencing range for murder is thirty years to life imprisonment. S.C. Code Ann. §16-3-20(A). Judge Dennis appropriately sentenced Applicant to forty years. Tr. 432.

Accordingly, this Court finds Applicant failed to prove Counsel deficient for not objecting to the sentence nor was Applicant prejudiced by his failure to do so. Accordingly, this Court denies and dismisses this allegation.

VI. CONCLUSION

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

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

IT IS THEREFORE ORDERED:

1. The Application for post-conviction relief is denied and dismissed with prejudice; and

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

AND IT IS SO ORDERED this 7th day of November, 2017.

THOMAS A. RUSSO
Presiding Judge
14th Judicial Circuit

Florence, South Carolina