WALLER LAW GROUP

April 9, 2018

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

Re: Shawn Reaves vs. State of South Carolina
C/A No: 2016-CP-33-0071

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Reaves in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-520-7278.

Sincerely,

Jonathan D. Waller

Cc: Lindsey A. McCallister, South Carolina Office of Attorney General

Enclosures

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STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM MARION COUNTY
Michael G. Nettles, Circuit Court Judge

2016-CP-33-0071

Shawn Reaves, # 343643,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Shawn Reaves, # 343643, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed March 8, 2018, issued by the Honorable Michael G. Nettles, Presiding Judge, Twelfth Judicial Circuit.

Jonathan D. Waller

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April 9, 2018

Other Counsel of Record:

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S.C. SUPREME COURT

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, Lindsey A. McCallister, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this day, to her office located at P.O. Box 11549, Columbia, SC 29211.

M. David Scott

April 9, 2018

STATE OF SOUTH CAROLINA COUNTY OF MARION	)	IN THE COURT OF COMMON PLEAS OF THE TWELFTH JUDICIAL CIRCUIT
Shawn Reaves, #343643, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2016-CP-33-0071 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed February 8, 2016. Respondent made its Return on February 2, 2017. An evidentiary hearing into the matter was convened on November 15, 2017, at the Florence County Courthouse. Jonathan Waller, Esquire, represented Applicant. Lindsey McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. Thurmond Brooker, Esquire, testified on behalf of the State. After hearing testimony and the arguments of counsel, the Court took this matter under advisement and requested proposed orders from both Applicant and Respondent. This Court now denies and dismisses the application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Marion County Clerk of Court. Applicant was indicted at the August 2010 term of the Marion County Grand Jury for one count each of murder and assault and battery with intent to kill (ABWIK) (2010-GS-33-0375). Applicant was represented by Thurmond Brooker, Esquire. On August 24, 2010, a jury trial was commenced in the Marion County Court of General Sessions with the Honorable William H. Seals, Jr., presiding.

However, that trial ended in a mistrial. On November 8, 2010, Applicant again proceeded to trial before the Honorable William H. Seals, Jr., and a jury. Applicant was thereafter convicted of the lesser-included offense of voluntary manslaughter and acquitted of murder and ABWIK. Judge Seals sentenced Applicant to a term of imprisonment of twenty-five years.

Applicant filed a timely Notice of Appeal. An appeal was perfected by LaNelle Cantey DuRant, Esquire, of the South Caroline Commission on Indigent Defense - Appellate Defense Division. The South Carolina Court of Appeals affirmed Applicant's conviction. State v. Reaves, Op. No. 2014-UP-057 (S.C. Ct. App. filed February 12, 2014). Applicant's Petition for Rehearing was denied in an Order filed March 21, 2014.

Applicant then petitioned the Supreme Court of South Carolina for a Writ of Certiorari to the Court of Appeals on June 23, 2014. The Supreme Court of South Carolina granted the Petition in an order filed August 22, 2014, and affirmed Applicant's conviction on September 2, 2015. State v. Reaves, Op. No. 27569 (S.C. Sup. Ct. filed September 2, 2015). The Remittitur was returned on September 18, 2015.

On November 18, 2015, Applicant filed a petition for Writ of Certiorari in the Supreme Court of the United States. The Supreme Court of the United States denied the petition on January 11, 2016.

SUMMARY OF FACTS ADDUCED AT TRIAL

Around 10:00 p.m. on the evening of May 13, 2007, officers with the Marion Police Department received a report of a fight in progress and began responding to East Mullins Street in Marion, South Carolina. Tr. pp. 103, 105-06, 108-09, 111-12, 139, 467. A few minutes later, Lieutenant Walker Davis, Sr., of the Marion Police Department was notified shots were fired at the location of the fight, and he hurried to the scene. Tr. pp. 103-04. Upon arriving, he observed

a large crowd of people and a white car parked on the side of the road with a man slumped over inside on the back passenger seat. Tr. pp. 106, 117-18. Lieutenant Davis discovered the man in the vehicle, Ramel Keshawn Applewhite (Victim), had been shot, so he requested emergency medical assistance and secured the scene. Tr. pp. 106-07, 368. Shortly thereafter, paramedics arrived and transported Victim to a hospital. Tr. p. 107. However, Victim died as a result of the shooting. Tr. pp. 380, 384.

Following the shooting, additional officers arrived at the scene, including Lieutenant Farmer Blue of the Marion Police Department. Tr. pp. 453-54. Lieutenant Blue began investigating the incident and received information that potential suspects might have entered a nearby residence on East Mullins Street. Tr. p. 454. Lieutenant Blue obtained a search warrant, and officers entered the residence. Tr. pp. 456-57. When they did so, they found several people hiding inside of the home, including Joemilla Wilson-Dozier, Brandon Deshawn Bellamy, and Rodney McElveen. Tr. pp. 457-58. Thereafter, Detective Larry Woods of the Marion County Sheriff's Office performed gunshot residue testing on each of the individuals, which were all later determined to be negative. Tr. pp. 223-24, 228-31, 458. Meanwhile, Lieutenant Davis spoke with several witnesses at the scene, including Travis Lane and Jackie McGill, Jr., to find out what happened during the incident. Tr. pp. 116-17. Lieutenant Davis provided McGill with paper, asked him to write out a statement, and instructed him to return the statement to him when it was completed. Tr. p. 124. However, McGill never returned a completed statement to the officer. Tr. pp. 124-25.

McGill testified about the shooting, stating he met up with Victim, who was in town for Mother's Day, on the day of the incident and rode to Bellamy's house on East Mullins Street with Victim, Lane, and Victim's cousin, Karen Graves. Tr. pp. 274-77, 281. McGill indicated

ten people were congregating in the yard of the residence when they arrived and Victim asked to speak with Wilson-Dozier, who was Victim's girlfriend. Tr. pp. 282-83. McGill testified Victim then walked to the street with Wilson-Dozier, who was initially reluctant to come outside of the residence. Tr. pp. 283-84. After they did so, McGill stated Victim and Wilson-Dozier argued and began physically fighting before Victim threw Wilson-Dozier to the ground. Tr. pp. 284-85. Eventually, McGill indicated he was able to separate Victim and Wilson-Dozier and return Victim to the car. Tr. p. 286. However, he said Wilson-Dozier came over to Victim, spat on him, and then walked to the residence's porch. Tr. pp. 287-88. McGill testified Victim followed her, he saw Applicant, and then he heard gunshots. Tr. pp. 290, 293, 295-96. After the gunshots, McGill stated Victim fell to the ground, he heard clicking sounds that sounded like a gun was out of bullets, and Applicant took off running.[1] Tr. pp. 296-97, 302. McGill testified he then tried to move Victim to the car, law enforcement officers arrived on the scene, and he provided a statement to Lieutenant Davis. Tr. pp. 301-02, 308-09, 321. He stated he testified to everything contained in the statement and also claimed Lane and Graves provided statements that night as well. Tr. pp. 308-09, 321-22. However, he denied the statement introduced at trial with his and Lane's names on it was his statement. Tr. pp. 322-24. Significantly, McGill repeatedly identified Applicant as the shooter and indicated he was certain Applicant was the person he saw shoot Victim.[2] Tr. pp. 333, 363.

[1] During trial, Dan Defreese, the SLED firearms expert who examined the bullets recovered from Victim's body, testified a revolver would make a clicking noise if the trigger was pulled after its ammunition was exhausted but a semi-automatic pistol ordinarily would not. Tr. pp. 405-06.

[2] In addition to McGill's testimony identifying Reaves as the shooter, Tyler Connor, who was incarcerated in the Department of Juvenile Justice in May of 2007, testified he was placed in a cell with Applicant after the incident and spoke with him about why he was incarcerated. Tr. pp. 436-39. Connor claimed Applicant stated he was incarcerated because he shot someone with a revolver, his friend shot the person with a nine-millimeter gun, and he left town. Tr. pp. 440-41.

Latoya Davis, who lived near the scene of the shooting, also testified about the incident during trial. Tr. pp. 560-61. On the night of the shooting, Davis said she was with Wilson-Dozier at the residence on East Mullins Street but went home after Wilson-Dozier and Victim began fighting. Tr. pp. 558-61. She indicated she did not see the shooting but heard gunshots and then saw Applicant, whom she knew as "Mister," get into a vehicle and drive away. Tr. pp. 561-62. She further testified she spoke with Lieutenant Blue on the day after the shooting and provided him with a written statement. Tr. pp. 569, 574.

Furthermore, Wilson-Dozier testified about her altercation with Victim and the subsequent shooting. Tr. pp. 579-80. She stated she was in a relationship with Victim in May of 2007 but had broken up with him a month earlier. Tr. pp. 576-77, 579. Wilson-Dozier indicated she went to visit Bellamy, with whom she was involved in an intimate relationship at the time, at East Mullins Street on the day of the incident and Victim came over several times while she was there. Tr. pp. 576-79, 591-92. She testified, when Victim came over the second time, she attempted to avoid him but eventually went outside to speak with him. Tr. pp. 578-79. She stated when she did so, they argued and began physically fighting in the yard and street where approximately ten people had gathered. Tr. pp. 579-80. She stated after the fight ended, one of Victim's friends tried to get him to leave, and she walked towards the residence. Tr. pp. 581-82. Wilson-Dozier testified as she was walking up the steps to the residence, Victim pushed Applicant, whom she knew as "Mister," and grabbed Applicant's chains, at which point Applicant pulled out a silver revolver and began firing. Tr. pp. 582-83. She indicated she then hid behind a car and checked on Victim before going into the residence and remaining there. Tr. pp. 583-85. Wilson-Dozier further testified after the incident she selected Applicant from a

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Connor stated Applicant said the incident occurred after he argued with someone who purchased drugs from him. Tr. pp. 447-49.

photographic line-up as the shooter, wrote a statement for Captain Gray, and had her injuries photographed by law enforcement officers. Tr. pp. 586-87, 611, 617.

Around 1:30 a.m. on the morning following the shooting, Agent Ken Kensey, a special agent with the SLED crime-scene unit, arrived at the location of the shooting to aid in processing the crime scene. Tr. pp. 142, 144. While processing the crime scene, Agent Kensey collected various pieces of evidence, including a black hat, a white hat, three gold chains, three cell phones, a mobile-phone headset, a pair of black slippers, and a credit card with the name "William A. Bellamy" on it, in the vicinity of where the shooting occurred. Tr. pp. 149, 154-56, 176, 180-81. He then provided the gold chains and cell phones to the Marion Police Department upon request and transported the other gathered evidence, along with a black t-shirt, a blue jean jacket, and the three gunshot residue kits collected by Detective Woods to the SLED crime lab for processing and analysis. Tr. pp. 149, 157-66.

Later that day, Dr. Cynthia Schandl, a forensic pathologist at the Medical University of South Carolina and an expert in forensics, performed an autopsy on Victim. Tr. pp. 365, 368. While conducting the autopsy, Dr. Schandl located five different gunshots wounds to Victim's body. Tr. p. 377. Three of the wounds – one to the right side of Victim's back, one to Victim's stomach, and one to Victim's left side – resulted from bullets that entered and exited Victim's body. Tr. pp. 377-78. The fourth wound occurred when a bullet entered and remained in Victim's shoulder. Tr. p. 378. The final gunshot wound occurred when a bullet entered Victim's upper back, struck his lung, aorta, and liver, and stopped in his colon. Tr. pp. 378-79. Both of the bullets were recovered from Victim's body during the autopsy, and Dr. Schandl concluded the bullet removed from Victim's colon led to his death. Tr. pp. 382, 386-87.

Subsequently, Dan Defreese, a SLED firearms experts, examined the bullets recovered during the Victim's autopsy. Tr. p. 395-97, 399. He concluded the bullet recovered from Victim's colon was consistent with a .38-caliber or .357-caliber cartridge and was most likely fired from a revolver. Tr. pp. 400-02. He further determined the bullet recovered from Victim's shoulder was consistent with a nine-millimeter cartridge and was most likely fired from a semi-automatic pistol. Tr. pp. 402-03. Based on his examination, he concluded the two bullets were not fired by the same gun. Tr. p. 403.

As the investigation into the incident progressed, Lieutenant Blue discovered the primary suspect in the shooting was known as "Mister," which was Applicant's alias. Tr. p. 460. Lieutenant Blue learned Applicant was observed at the scene of the shooting with a weapon and was seen fleeing from the area after the incident.[3] Tr. p. 461. As a result, officers obtained warrants for Applicant's arrest, and he was apprehended in Philadelphia, Pennsylvania, several days after the shooting. Tr. pp. 140-41. Following his arrest, Applicant was transported back to South Carolina and indicted for murder and assault and battery with intent to kill. Tr. p. 6, 140.

Additionally, Lieutenant Blue testified about his involvement in the investigation into the shooting. (R. pp. 432-433). He indicated he was assigned as the lead investigator in the case two days after the shooting, obtained arrest warrants for Reaves as a result of his investigation, and was still looking for the second shooter involved in the incident. Tr. pp. 454-55, 460-62, 464. Regarding the evidence collected during the investigation, he noted his department requested the return of several items without any analysis being conducted because the owners of those items had already been identified through other means. Tr. pp. 466, 498-99, 505. He

[3] During the investigation, Lieutenant Blue prepared a photographic line-up containing Applicant's photograph and showed it to McGill and Lane. Tr. pp. 522-23, 530-31. However, they did not identify Applicant as the shooter at that time and, instead, selected another photograph from the line-up. Tr. pp. 524, 530-31.

further indicated he did not know what happened to Victim's clothing after the shooting and believed another officer picked the clothing up from the hospital, but stated he had no idea where the clothing was located at that time.[4] Tr. pp. 511-13. Additionally, Lieutenant Blue testified the credit card recovered at the scene of the shooting was released to Bellamy after he identified it as his brother's card, and he admitted he did not know where the gold chains discovered at the scene were located. Tr. pp. 498-99, 509-11. Regarding McGill's statement, Lieutenant Blue indicated the statement introduced during trial with McGill and Lane's names on it was the statement McGill provided to him after the shooting. Tr. pp. 534-35. During his testimony, Lieutenant Blue also stated he would have done many things differently if he had been in charge of the investigation from the outset, and he indicated the process of collecting evidence could have been handled in a better fashion. Tr. pp. 455-56.

At the conclusion of the State's case, Counsel moved for the charges against Applicant to be dismissed "based on the State's misconduct in connection with [Applicant's] case." Tr. p. 619. In support of the motion, Counsel argued the testimony established several witnesses had provided written statements on the night of the shooting, including McGill, Lane, Graves, Wilson-Dozier, and Davis, but those statements were not provided to him, which he maintained impacted his ability to cross-examine those witnesses. Tr. pp. 619-21. Counsel further asserted Applicant was prejudiced by the "substantial and severe negligent handling" of his case. Tr. pp. 622-23. In response, the solicitor indicated Applicant was provided with everything in the State's possession and was allowed to review the investigator's entire file. Tr. p. 623. However, he conceded Applicant was likely entitled to a charge on spoliation of evidence. Tr. p. 623. After

[4] When asked whether the clothes of a victim could "sometimes" have evidentiary value in connection to a case, Lieutenant Blue responded: "It could. All evidence could be valuable." Tr. p. 512.

considering the arguments of counsel, the trial judge denied the motion, finding the alleged loss of the evidence impacted the credibility of the State's case but did not warrant dismissal. Tr. pp. 623-24.

Following the trial judge's ruling on Counsel's motion to dismiss the case, Counsel renewed the speedy trial motion he made prior to the beginning of trial, arguing the delay in bringing the case to trial resulted in substantial prejudice to Applicant due to the loss of various pieces of evidence. Tr. pp. 624-26. The solicitor pointed out Applicant did not seek a speedy trial until the preceding term of court, and the case was immediately scheduled for trial. Tr. pp. 626-27. Once again, the trial judge denied the speedy trial motion. Tr. pp. 627.

After the trial judge denied his motions, Counsel called several witnesses in Applicant's defense, including Captain Jim Gray, who was the chief investigator for the Marion Police Department in May of 2007. Tr. p. 667. Captain Gray stated he did not recall if he took a statement from Wilson-Dozier on the night of the shooting and indicated he did not take any statements from anyone at the scene. Tr. pp. 677, 679. However, he confirmed he photographed Wilson-Dozier on the night of the incident and placed the photographs in the case file. Tr. pp. 677-78. Captain Gray further asserted he did not receive Victim's clothing during the course of the investigation and did not know where it might be located. 679-80.

At the conclusion of the evidentiary phase of trial, the parties presented their closing arguments to the jury. Tr. pp. 708-09. During the defense's closing, Counsel repeatedly called the jury's attention to numerous mistakes he asserted were made during the investigation into the shooting and noted numerous items of evidence collected at the scene of the crime were never tested or analyzed. Tr. pp. 716-18, 729-30. Thereafter, the trial judge instructed the jury on the applicable law and explained: "When evidence is lost or destroyed by a party you may infer that

the evidence which was lost or destroyed by that party would have been adverse to that party." Tr. pp. 750, 753. The jury convicted Applicant of the lesser-included offense of voluntary manslaughter and acquitted him of the charges of murder and ABWIK. Tr. p. 774. The trial judge then sentenced Reaves to a twenty-five year term of imprisonment, and Reaves appealed his conviction. Tr. p. 785.

ALLEGATIONS

In his application, Applicant alleges he is being held unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel
   a. "A failure to investigate facts of the case."
   b. "Labored under a conflicting interests." (sic)
   c. "Trial judge involvement prior to case investigation"
   d. "Illegal search warrant"
2. Ineffective Assistance of Appellate Counsel
3. 6th and 14th Amendment Due Process Violations
   a. "Right to a speedy trial"
   b. "Right to due process"
      i. "Lack of due process based on misconduct of the state in producing evidence."

On November 10, 2017, counsel for Applicant provided Respondent with an updated and amended list of allegations via email, which was also presented to this Court at the start of the evidentiary hearing. The amendment to the application includes the following allegations:

1. Failure to object to redirect examination outside of the scope of cross-examination;
2. Failure to object to improper question about whether witness believed defendant;
3. Failure to object or make motion based on undisclosed non-testifying witness who was a confidential informant;

4. Failure to argue the non-disclosure of the confidential informant witness during Counsel's motion to dismiss;
5. Failure to request trial judge rule specifically on the factors required to sustain an objection based on Rule 403;
6. Failure to move for direct verdict as to the ABWIK charge;
7. Failure to properly object to jury charge of voluntary manslaughter;
8. Failure to object to misstatement of law regarding jury's role;
9. Failure to request curative instruction or move for mistrial following sustained objection for improper comments made by solicitor;
10. Failure to poll the jury in light of the verdict form not being filled out and signed;
11. Failure to object to the verdict form;
12. Failure to file a motion under the Protection of Persons and Property Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. Sec. 17-27-80 (2003).

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, an applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial

process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. 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 689. An 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, an applicant must prove that counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland, 466 U.S. at 688). 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.

A. Ineffective Assistance of Trial Counsel

Regarding Applicant's claims of ineffective assistance of counsel, this Court finds Applicant has failed to meet his burden of proof. "Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Strickland, 466 U.S. at 690. There is a strong presumption that trial counsel's decisions are based on tactical strategy rather than neglect, and "[t]hat presumption has particular force where a petitioner bases his ineffective-assistance claim solely on the trial

record, creating a situation in which a court 'may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive.'" Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). Counsel's strategy is reviewed under "an objective standard of reasonableness." Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004).

1. Failure to investigate and failure to formulate defense based on the Protection of Persons and Property Act

Applicant testified he was arrested in Pennsylvania and brought back to South Carolina to face these charges. Applicant testified he had an attorney prior to Counsel taking over the case, which was approximately one year after Applicant's arrest. Applicant further testified his first trial ended in a mistrial, and then he was convicted of voluntary manslaughter after the second trial. Applicant testified he did not realize he could be convicted of anything other than murder because he and Counsel never discussed lesser-included offenses, and Applicant did not understand how there could be multiple charges for the same incident. Applicant testified he might have pleaded guilty if he had known voluntary manslaughter was a possibility.

Applicant also testified he and Counsel did not discuss any defenses, including a "stand your ground" defense under the Protection of Persons and Property Act. Applicant testified he

was not aware that defense could potentially offer him immunity from prosecution. Applicant also stated he and Counsel did not discuss any possible defenses or challenges to the search warrant after the first trial. Applicant testified he did not know he could have made a motion to have the trial judge recused because Counsel never mentioned it.[5] Applicant further testified he and Counsel did not discuss his constitutional rights at trial nor did they review any discovery. Applicant stated Counsel told him this was a fact-driven case with no concrete evidence against Applicant and other potential suspects. Applicant testified he and Counsel did not discuss issues with the collection and processing of evidence, nor was Applicant aware of the missing witness statements until the witnesses testified at trial.

Counsel testified he was retained by Applicant's mother approximately one year after Applicant had been arrested. Counsel testified Applicant was sixteen-years old at the time of the incident and seventeen when Counsel took over his representation. Counsel explained the shooting arose out of an incident involving Victim and his ex-girlfriend, who got into a physical altercation at a house party in Marion, and Victim was shot in the yard and died.

Counsel testified he always discusses discovery with clients, and he took copies to the detention center to review it with Applicant, including witness statements. Counsel also testified he conducted further investigation on his own, such as visiting the incident location, interviewing the occupants of the house, including Victim's ex-girlfriend, and a witness who lived in the house across the street. Counsel agreed the case was "fact-driven" in that Applicant was charged because multiple witnesses gave statements naming him as the shooter.

Counsel further testified there were significant issues with the State's investigation of the case, particularly with the collection and retention of evidence. Counsel stated multiple items

[5] Judge Seals, who presided at both trials, signed a search warrant in this case in his capacity as a magistrate judge prior to his election to the circuit court in 2009.

which were listed as having been collected from the scene could not be located, including a credit card with another person's name on it and Victim's clothing. Additionally, witnesses testified the statements introduced by the State were incorrect or did not match the statement they had given. Counsel further testified there was an issue with the photo line-up in that one witness did not identify Applicant as the shooter, although several witnesses testified at trial and identified him. Counsel noted all of the evidence collection issues were addressed on direct appeal.

Regarding the issue of self-defense and the Defense of Persons and Property Act, Counsel explained the testimony at trial was that Victim was going up the stairs to the house after his ex-girlfriend, and it was an issue at trial as to exactly where Victim was standing when he was shot. Counsel testified this was an important fact in determining whether Applicant had an argument under the Defense of Persons and Property Act because Applicant needed to be acting in defense of a "dwelling," and it was not clear that the yard would be covered under that definition. Counsel further testified there was some evidence Victim had pushed Applicant and grabbed or ripped some gold chains from Applicant's neck. Counsel also stated Victim was a much larger man than Applicant. However, Counsel also testified there was no evidence Victim had a weapon or that he was threatening Applicant with great bodily harm.

Further, Counsel testified the Act would not apply if Applicant was engaged in an unlawful act, and Applicant was carrying an unlicensed firearm at the time. Counsel testified, in his opinion, given the witness statements saying the shooting took place in the yard and Applicant's possession of an unlicensed firearm, the situation did not fall within the scope of the Act. Counsel testified he had dealt with this issue before, and he knew at least one judge's opinion was that the Act was simply a codification of self-defense, and the defendant needed to

have clean hands in order to invoke it. Counsel explained there was conflicting testimony as to who started the fight, where exactly Victim was standing, and whether Victim was threatening Applicant, and in that situation, a judge usually cannot make a determination on whether immunity would apply prior to trial. Finally, Counsel testified he made the decision not to file a motion for immunity and instead ask for a self-defense instruction at trial because he did not see a reasonable possibility of success on the motion.

This Court finds Counsel provided effective assistance in this case. Specifically, this Court finds Counsel met with Applicant and reviewed discovery with him. Further, this Court finds credible Counsel's testimony he discussed with Applicant the myriad issues with law enforcement's investigation and the collection and retention of evidence. This Court also finds Counsel conducted a reasonable investigation into the facts and circumstances of the case, including independent interviews of various witnesses, and Counsel fully explored the issues of self-defense and immunity under the Protection of Persons and Property Act.

"[S]trategic choices made after a thorough examination of law and facts relevant to plausible options are virtually unchallengeable. . . ." Id. at 690. This Court finds Counsel's reading of the Protection of Persons and Property Act, and his conclusion Applicant could not avail himself of the presumptions of Section 16-11-440(A) because he was engaged in unlawful activity by possessing an unlicensed firearm, and because there was conflicting evidence as to whether Victim was in the yard or in the house at the time of the shooting, to be reasonable. See S.C. Code Ann. § 16-11-430(1) ("'Dwelling' means a building or conveyance of any kind, including an attached porch. . . which has a roof over it, including a tent, and is designed to be occupied by people lodging there at night."); S.C. Code Ann. § 16-11-440(B) (instructing the presumptions established by Section 16-11-440(A) do **not** apply if the person "who uses deadly

force is engaged in an unlawful activity or is using the dwelling, residence, or occupied vehicle to further an unlawful activity"); see generally In re Tracy B., 391 S.C. 51, 71, 704 S.E.2d 71, 81 (Ct. App. 2010) ("Although [unlawful possession of a weapon] alone does not automatically bar a self-defense charge, it is evidence of an unlawful activity which can preclude the assertion of self-defense."). Accordingly, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in the investigation of the facts of Applicant's case or in his preparation of Applicant's defense.

Further, the Court finds Applicant has not met his burden of proving he was prejudiced by Counsel's conduct. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691, 104. To establish prejudice, Applicant is required to show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. In this instance, self-defense was presented to the jury, and the trial court gave a thorough and appropriate jury instruction on that issue, which Applicant has not challenged. Tr. pp. 760-63.

2. Failure to object to questioning beyond the scope of cross-examination; failure to move for a mistrial on the basis of State's nondisclosure of confidential informant; failure to properly preserve Rule 403 objection; failure to effectively argue motion for directed verdict; failure to properly object to jury charge on lesser-included offense of voluntary manslaughter; failure to object to improper comments during solicitor's closing argument

Counsel also testified regarding his overall trial strategy. Counsel stated his strategy was not to concede anything and force the State to put up evidence showing Applicant had a gun and

actually fired it. Counsel further explained if the State did put up such evidence, Applicant's argument was that the unidentified second shooter fired the fatal shot, since there was some evidence Applicant and Victim were face-to-face at the time, and the testimony at trial was that the fatal bullet entered Victim from the back. Counsel stated there was no evidence of conspiracy because the second shooter has never been identified, so the jury would be forced to choose whether Applicant caused Victim's death or merely harm. Counsel testified the trial court gave a self-defense instruction, but he chose to focus his argument on the problems with the investigation and evidence.

Regarding the allegation Counsel failed to object to a question regarding Applicant's arrest which was outside the scope of cross-examination, Counsel testified he does not object if a statement is not important to the case. In this instance, Counsel testified evidence of Applicant's flight out of state was not important. In addition, a review of the transcript reveals this same information was also presented through another witness. Tr. p. 461.

Counsel testified he was not aware law enforcement had interviewed a confidential informant in connection with this case until Lieutenant Blue mentioned it during his testimony. See Tr. p. 543. Counsel testified he did not move for a mistrial on the basis of further undisclosed information for two reasons. First, Counsel explained he did not feel the information the informant allegedly gave Blue was helpful to Applicant as it was only that the people in the house across the street were not involved in the shooting. Counsel testified he had no knowledge of the informant other than what Blue said in testimony, but Blue's information did not indicate the informant had anything to do with the shooting. Second, Counsel explained he liked the jury, he felt the trial was going well for Applicant, and he thought Applicant had a good chance of acquittal.

As to Counsel's performance in arguing the motion for a directed verdict at the close of the State's case, Counsel testified he did not raise the confidential informant issue in his argument because he felt it was minor compared to much more damning exculpatory evidence that had been introduced, and the nondisclosure did not affect his ability to defend the case. Counsel further testified he could only speculate as to whether the informant had helpful information, which he did not think would be enough to grant the motion. Additionally, Counsel testified he did not make a motion for a directed verdict on the ABWIK charge, or a motion for the State to elect, because the defense's alternate theory, if the jury decided Applicant was one of the shooters, was Applicant fired non-fatal shots. Counsel stated the defense's opinion was the murder charge was the improper charge, and he felt the evidence presented supported the ABWIK charge.

Counsel also testified regarding his strategy for objections during closing arguments. Counsel testified he did not object to the solicitor telling the jury it was their job to determine who killed Victim because he did not feel it crossed the line, and the statement could be interpreted as telling the jury to determine the facts. Counsel further stated he objected at several other points during the State's closing when he felt the solicitor did cross a line with personal appeals to the jury, but he did not request curative instructions or make a motion for a mistrial because he felt the trial had gone well for Applicant. Counsel testified he felt he had made a good record for appeal, and he would have pressed those issues further if he had felt the trial had gone badly, but he made a strategic decision not to do so here.

This Court finds Counsel articulated a valid trial strategy, both overall, and in response to the specific allegations Applicant has raised regarding Counsel's performance at trial. As discussed above, "A fair assessment of attorney performance requires that every effort be made

to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Strickland, 466 U.S. at 689.

First, although the solicitor's question regarding Applicant's arrest in Pennsylvania was objectionable, it is a valid trial strategy not to object at every opportunity. "Trial counsel is repeatedly required during any trial... to make split-second decisions on many subjects, including whether to object to testimony. There are a variety of reasons counsel may soundly choose not to make such an objection.... Under certain circumstances, therefore, counsel may employ a strategy of not objecting – even when counsel has a good argument for exclusion – if counsel reasonably perceives the benefits of doing so are outweighed by some other consideration." Stone v. State, 419 S.C. 370, 383, 798 S.E.2d 561, 568 (2017). Additionally, Applicant was not prejudiced because the same information was introduced through other witnesses. Tr. p. 461. Accordingly, this allegation is denied and dismissed.

Regarding Counsel's handling of the confidential informant issue, this Court finds Counsel's decision not to move for a mistrial was reasonable as it was speculative that the informant's information was exculpatory, and Counsel felt the trial was going well for Applicant at that time. Additionally, a mistrial is granted only in rare circumstances so it is unlikely the trial court would have done so or that Applicant would have prevailed on the issue on appeal. "The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes." State v. Kirby, 269 S.C. 25, 28-

29, 236 S.E.2d 33, 34-35 (1977). On appeal, Applicant would have to meet the high bar of showing the Court's denial of the motion for a mistrial amounted to an abuse of discretion. "The decision to grant or deny a motion for a mistrial is a matter within the sound discretion of the trial judge, whose decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. . . . Further, before a defendant may receive a mistrial, he or she must show both error and resulting prejudice." State v. McEachern, 399 S.C. 125, 145-46, 731 S.E.2d 604, 614 (Ct. App. 2012) (internal citations omitted). A "PCR applicant's mere speculation is insufficient to establish prejudice and, accordingly, the applicant must put forth further evidence to support his claim." Glover v. State, 318 S.C. 496, 501, 458 S.E.2d 538, 541 (1995) (Waller, J., dissenting). Therefore, this allegation is denied and dismissed.

As to Counsel's handling of the Court's ruling on the State's Rule 403 objection to Counsel's questions regarding Lieutenant Blue's employment records, this Court finds Counsel's performance was not deficient. Counsel explained he believed the trial court's reasoning in sustaining the objection was correct, and this Court finds Counsel is not required to pursue the admission of evidence he knows is improper or the preservation of an issue which is not error. See, e.g., Starnes v. State, 307 S.C. 247, 251, 414 S.E.2d 582, 584 (1991) ("Since we find no violation of the respondent's rights, counsel's performance was not deficient in failing to object or pursue objections that were made on appeal."). This allegation is therefore denied and dismissed.

"When ruling on a criminal defendant's motion for a directed verdict, the trial court is concerned with the existence of evidence, not its weight. If there is any direct or substantial evidence tending to prove the guilt of the accused, or from which guilty may be fairly and logically deduced, the case should be submitted to the jury." Sellers v. State, 362 S.C. 182, 188-

89, 607 S.E.2d 82, 85 (2005) (abrogated on other grounds by Smalls v. State, ___ S.C. ___ (2018)). After a review of the transcript, this Court finds there was evidence presented which created a fact issue for the jury as to whether Applicant and Victim were face-to-face when Victim was shot or if Applicant's shot could have hit Victim in the back. Tr. pp. 296-97, 592. This Court also finds there was evidence presented to support all three charges – murder, voluntary manslaughter, and ABWIK – which were submitted to the jury. Therefore, this Court finds no deficiency in Counsel's handling of the directed verdict motion, although this Court agrees with Applicant Counsel's argument that voluntary manslaughter is not a lesser-included offense of murder is incorrect as a matter of law. State v. Sams, 410 S.C. 303, 764 S.E.2d 511 (2014) ("Voluntary and involuntary manslaughter are both lesser-included offenses of murder. Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation.") (citations omitted). Therefore, even if Counsel was deficient in handling the directed verdict motion, Applicant was not prejudiced because the trial court would have been wrong to grant it. Similarly, the Court was correct to charge voluntary manslaughter because there was evidence presented to support that charge. Id. at 308, 764 S.E.2d at 513 ("The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than the greater, offense."). Therefore, this allegation is denied and dismissed.

Finally, this Court finds Counsel was not deficient in his handling of objections during the solicitor's closing arguments. As discussed above, Counsel is not required to object at every opportunity if there Counsel has a valid explanation for not doing so. In this case, Counsel did object to several statements where he felt the solicitor crossed the line. Further, "[i]mproper comments do not automatically require reversal if they are not prejudicial. . .," and Applicant

"has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. This Court finds the challenged statements do not rise to that level, and Applicant has presented no evidence that the jury was influenced by the statements. This Court finds "it [is] not reasonably likely" that the solicitor's comment in his opening statement caused the jury to act in a "manner inconsistent with the notion that the State has the burden of proof beyond a reasonable doubt." State v. Daniels, 401 S.C. 251, 260, 737 S.E.2d 473, 477 (2012). Therefore, Applicant has not met his burden of showing he did not receive a fair trial due to the allegedly improper comment, and this allegation is denied and dismissed.

3. Failure to request to poll jury; failure to object to configuration of verdict form or jury's failure to complete form correctly

Counsel testified he does not automatically ask to poll the jury absent some suggestion the jury struggled to come to a verdict. In this instance, no Allen[6] charge was given, so he did not feel it was necessary. Regarding the verdict form, Counsel testified he does not have an independent recollection of reviewing the form, but it is his normal practice to do so to make sure it is not suggestive. Counsel stated if he felt it was overly suggestive, he would have objected. The transcript reflects the jury form was distributed to Counsel prior to closing arguments and jury instructions, and the trial judge specifically asked Counsel if he had reviewed the form. Tr. p. 708. Counsel responded he had no objection. Tr. p. 708. Counsel also testified he did not think it was an issue that the jury initially marked only the guilty line for the voluntary manslaughter charge and did not mark anything for the murder or ABWIK charges. Counsel

[6] Allen v. United States, 164 U.S. 492 (1896).

testified he felt it was helpful for Applicant to have the not guilty lines marked, so he did not object when the judge sent the form back to the jury for correction.

A review of the transcript indicates, at the conclusions of the jury charge, the trial judge specifically noted "the order in which the choices of verdict appear on the verdict form are not suggestive of any verdict by this court," and "[t]he verdict is to be determined by. . . the jury, and not the court." Tr. p. 766. Additionally, when the trial judge noticed the error on the form, he returned it to the foreperson and indicated only that something must be checked for each charge, but did not give any further instructions. Tr. p. 773. The bailiff then published the verdict by reading from the corrected form, and the trial court inquired of the jurors if that was their verdict; all of the jurors affirmed it was. Tr. p. 773-74.

This Court finds Counsel's conduct was not deficient as he has "no affirmative duty to request the trial judge to poll the jury," particularly where, as here, there was no indication the verdict was not unanimous. Green v. State, 351 S.C. 184, 196, 569 S.E.2d 318, 324 (2002). Further, the Court find no error in the verdict form as it contained all three charges that were submitted to the jury, along with not guilty and guilty options for each charge. This Court additionally finds Applicant has not produced any evidence Applicant was prejudiced by the verdict form. Applicant offered no testimony from any juror showing the form confused them or contributed to the verdict that was rendered, much less that any juror was not in agreement with the verdict. This is a failure of proof which is insufficient for a finding of prejudice. See Foye v. State, 335 S.C. 586, 590, 518 S.E.2d 265, 267 (1999) (upholding denial of PCR because applicant's claim was "not supported by any probative evidence and [was] based on pure speculation"). Accordingly, this allegation is hereby denied and dismissed.

B. Waiver of All Other Allegations

This Court finds Applicant raised several allegations in his application which were not addressed at the evidentiary hearing on this matter. Specifically as to Applicant's allegations regarding the performance of Appellate Counsel, a potential conflict of interest for Counsel, and a violation of his right to a speedy trial, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient, nor was Applicant prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice. This Court also finds, as to all allegations relating to Appellate Counsel, Applicant failed to present evidence of such claims and thus, this Court deems them abandoned.

The Court notes Applicant must file and serve a notice of appeal within thirty 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 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, Applicant must serve and file a notice of appeal on his own behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 1 day of March, 2018.

MICHAEL G. NETTLES
Presiding Judge
Twelfth Judicial Circuit

Florence, South Carolina.

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