The Law Office of Tristan M. Shaffer

Litigation • Injury Law • Criminal Defense

May 3, 2018

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

Re: Tyrone Davis v. State 2012-33-0590

Dear Mr. Shearouse,

Please find the enclosed Notice of Appeal, Certificate of Service, and Order of Dismissal in the above referenced case.

Sincerely,

Tristan M. Shaffer

CC: Marion County Clerk of Court
Lindsey McCallister

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM MARION COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Case No. 2012-33-0590

Tyrone Davis # 194567,

Petitioner,

v.

The State of South Carolina, Respondent.

NOTICE OF APPEAL

Petitioner appeals the order dismissing his post-conviction relief action filed March 23, 2018 and received by Petitioner on April 5, 2018.

May 3, 2018

Tristan M. Shaffer (SC Bar # 77565)
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(803) 941-7514
Attorney for Petitioner

Other Counsel of Record:
Lindsey McCallister
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Attorney for Respondent

THE STATE OF SOUTH CAROLINA
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APPEAL FROM MARION COUNTY
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CERTIFICATE OF SERVICE

I certify that on the date below I served the Notice of Appeal on The State of South Carolina by mailing a copy to the Respondent at the address below.

May 3, 2018

Tristan M. Shaffer (SC Bar # 77565)
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MARION COUNTY SC
CHRISTY M GRAY
CLERK OF COURT

STATE OF SOUTH CAROLINA COUNTY OF MARION	IN THE COURT OF COMMON PLEAS OF THE TWELFTH JUDICIAL CIRCUIT
Tyrone Davis, #194567, Applicant, v. State of South Carolina, Respondent.	Case No.: 2012-CP-33-590 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed August 17, 2012.[1] Respondent made its Return on or about April 24, 2014. An evidentiary hearing into the matter was convened on March 16, 2017, at the Florence County Courthouse. Tristan Shaffer, 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. Wanda H. Carter, Esquire, of the South Carolina Commission on Indigent Defense – Appellate Defense Division, Applicant's appellate counsel, also testified via telephone. Trial counsel did not testify, as he is now deceased. After hearing testimony and the arguments of counsel, the Court requested post-trial briefs on the issue of whether refusing a curative instruction at the expense of preserving an issue for appellate review can be a valid trial strategy. The 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. In November 2008, the Marion

[1] Applicant's PCR application was not received by Respondent until September 24, 2013.

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County Grand Jury indicted Applicant for distribution of cocaine base and distribution of cocaine base within the proximity of a school or park (2008-GS-33-291). Jack W. Lawson, Jr., Esquire, (Counsel) represented Applicant. On November 12, 2009, Applicant was tried in his absence before the Honorable William H. Seals, Jr., and a jury. On November 13, 2009, the jury found Applicant guilty as indicted, and Judge Seals issued a sealed sentence. On February 22, 2010, Applicant was brought before the court, and Judge Seals pronounced concurrent sentences of twenty years for distribution of cocaine base and fifteen years for distribution of cocaine base within the proximity of a school or park.

Applicant filed a timely notice of appeal, and Wanda H. Carter, Esquire, (Appellate Counsel) of the South Carolina Commission on Indigent Defense - Appellate Defense Division perfected the appeal. The South Carolina Court of Appeals found the sole issue raised was not preserved and affirmed Applicant's conviction on May 9, 2012. State v. Davis, Op. No. 2012-UP-289 (S.C. Ct. App. filed May 9, 2012). The remittitur was returned to the circuit court on May 25, 2012.

ALLEGATIONS

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

1. "Denial of Effective Assistance of Counsel"
    a. "Appellate Counsel failed to perfect a Petition for Rehearing to the South Carolina Court of Appeal; Trial Counsel failed to Investigate the case; Trial Counsel failed to adequately present a proper meaningful Defense; and Trial Counsel did not protect my right to be present to assist in a meaningful Defense."
2. "Denial of Right to Confrontation"
    a. I was tried in my absence and not given the proper opportunity to appear in court for Trial based on no notice of when Case would be called for Trial."
3. "Denial of Right to Due Process of Law"

a. "Resulting from Judicial and Prosecutorial Misconduct"

In November 2016, PCR counsel provided Respondent with an updated and amended list of allegations via email. At the evidentiary hearing in this matter, Applicant moved to amend his application to include the following issues:

1. Trial Counsel was ineffective for failing to request a continuance.
2. Trial Counsel was ineffective for failing to object to the trial moving forward in absentia.
3. Applicant was denied his right due process when the Trial Court relied on unsworn testimony from trial counsel to find that Applicant was given proper notice of trial.
4. Appellate Counsel was ineffective for failing to argue that the trial court abused its discretion in finding that Applicant was given proper notice of trial based on unsworn statements from trial counsel.
5. Trial Counsel was ineffective for failing to object to the "we are here to seek the truth" argument made by the State. Tr. 31, ll. 6-16.
6. Trial Counsel was ineffective for failing to object to the vouching/bolstering argument contained in Tr. 141, ll. 16-17 and Tr. 144, ll. 20-23.
7. Trial Counsel was ineffective for failing to move for a curative instruction based the bolstering comments.
8. Trial Counsel was ineffective for failing to move to be relieved when Counsel had previously prosecuted cases using the confidential informant.
9. Applicant was denied his right to conflict free counsel in violation of his Sixth and Fourteenth Amendment rights when trial counsel had previously prosecuted cases using the confidential informant.
10. Trial Counsel was ineffective in failing to make a contemporaneous objection after the question asked at Tr. 95, ll. 2-3.

Applicant proceeded primarily on two issues: (1) whether Counsel was ineffective for failing to properly notify Applicant his case was being called for trial, and (2) whether Counsel was ineffective for refusing a curative instruction, thus failing to preserve for appellate review the issue of improper bolstering comments made by the solicitor. As to any and all allegations that were raised in the application or at the hearing on this matter and not addressed in this Order, specifically Applicant's allegations regarding the performance of Appellate Counsel and Applicant's allegations regarding a potential conflict of interest for Counsel, 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.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has reviewed the testimony and arguments presented. This Court has further had the opportunity to observe each witness who testified at the PCR 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 conclusions 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." Id. at 117-18, 386 S.E.2d at 625.

A. Trial In Absentia

Applicant testified he only spoke with Counsel twice, and Counsel merely tried to persuade him not to go to trial. Applicant stated that he had been on community supervision for a prior distribution charge, was incarcerated for a violation, and then released, at which time he resided at Wildwood Loop in Florence. The address on Wildwood Loop is Applicant's mother's house, where she still resides. Applicant further testified that around the time of trial, he moved to Gibson Street. Applicant testified he did not speak to Counsel to inform Counsel he had moved, did not forward his mail, and did not change his address with his probation officer. On cross examination, Applicant agreed it would have been important to keep his attorney updated of his whereabouts so he could be contacted by Counsel.

Applicant testified Counsel contacted him at some point prior to trial to relay a plea offer, which Applicant rejected. Applicant further stated he knew by rejecting the plea, his case would be put on the jury trial docket. Applicant testified he went to court one time, but his case was continued until the next term. Applicant further stated he went to Counsel's office sometime after that, and Counsel told him his case would go to a jury trial, but Counsel never contacted him again with a date and time. Applicant acknowledged he was living at the Wildwood Loop address at the time of that conversation with Counsel but thought he was living on Gibson Street by the time of trial. Applicant denied ever seeing the letter from Counsel's file informing him of the trial date, but Applicant agreed the letter was addressed to him at Wildwood Loop. Applicant

could not say whether or not he was living at that address at the time the letter was mailed. Further, Applicant stated the telephone numbers contained in Counsel's notes were his mother's phone number and his aunt's, respectively. Applicant testified that he could "maybe" have been reached at his mother's number at the time, and Applicant admitted that his mother's phone number was a landline that rang at her house on Wildwood Loop. Applicant stated that he did not learn he had been tried in his absence until a few days after the trial had concluded.

It is well established that, although the Sixth Amendment of the United States Constitution guarantees the right of an accused to be present at every stage of his trial, this right may be waived, and a defendant may be tried in his absence. State v. Fairey, 374 S.C. 92, 99, 646 S.E.2d 445, 448 (Ct. App. 2007). In order to claim the protection afforded by the rule of law, a criminal defendant may be tried in his absence only upon a trial court's finding (1) the defendant has received notice of his right to be present, and (2) he was advised the trial would proceed in his absence if he failed to attend. State v. Williams, 292 S.C. 231, 232, 355 S.E.2d 861, 862 (1987). Notice of the term of court in which a defendant will be tried is sufficient notice to enable the defendant to make an effective waiver of his right to be present at his trial. Ellis v. State, 267 S.C. 257, 261, 227 S.E.2d 304, 306 (1976); Fairey, 374 S.C. at 99, 646 S.E.2d at 448. Further, a bond form that provides notice that a defendant can be tried in absentia may serve as the requisite warning that he may be tried in his absence should he fail to appear. Fairey, 374 S.C. at 101, 646 S.E.2d at 449.

Although the South Carolina Supreme Court has held that trial counsel's failure to request a continuance, in some circumstances, will be considered ineffective assistance of counsel, this Court finds Applicant's case is distinguishable. See Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006). In Morris, the applicant had accepted a favorable plea offer, but left the

courthouse before the guilty plea could be put on the record. Id. at 280-81, 639 S.E.2d at 54. The Supreme Court found the applicant was prejudiced by his counsel's failure to request the continuance because he received a significantly longer sentence after he was tried in his absence than he would have received under the plea. Id. at 281, 639 S.E.2d at 54. In this case, Applicant rejected the State's plea offer, knowing that doing so would mean his case would be on the next trial docket. Further, the Court of Appeals has clarified the holding in Morris, saying "to read Morris to require a trial judge to grant a continuance anytime a defendant intentionally absents himself from trial of which he has notice would subvert the rule and case law specifically allowing a trial *in absentia* under the proper circumstances...." State v. Ravenell, 387 S.C. 449, 458, 692 S.E.2d 554, 559 (Ct. App. 2010).

This Court finds Applicant's testimony regarding Counsel's deficiency is not credible. This Court finds Counsel provided effective assistance in this case. The record reflects Counsel conferred with Applicant on multiple occasions and conveyed all plea offers to Applicant, who rejected them in favor of maintaining his innocence. This Court finds Counsel made reasonable efforts to notify Applicant of the trial date using the contact information provided by Applicant by sending a letter and by attempting to contact Applicant by phone. The Court further finds, by Applicant's own admission, Applicant knew or should have known he needed to notify Counsel of his address change, and Applicant failed to do so. Furthermore, the trial judge made the required findings on the record that Applicant had received notice that his case was up for trial, he had a right to be present at trial, and he could be tried in his absence if he failed to appear. That Counsel's statements on the record at trial were unsworn is not persuasive as Counsel is an officer of the court, and Respondent introduced evidence at the PCR hearing from Counsel's file which supports this Court's, and the trial court's, finding Counsel made appropriate efforts to

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notify Applicant. At the evidentiary hearing, Applicant offered no excuse for his absence except to say *maybe* he had moved to a different address by the time of trial.

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 his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. Applicant also failed to present any evidence or witnesses that he was unable to present at trial due to his absence or the lack of a continuance. See Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (finding where Applicant presented no witnesses or any specific testimony establishing he would have had a defense if he had had additional time to prepare for trial Applicant failed to demonstrate prejudice as required by Strickland). This Court concludes Applicant has not met his burden of proving Counsel rendered ineffective assistance by failing to object to Applicant's trial in absentia or to request a continuance. The allegation is denied and dismissed.

B. Waiver of Curative Instruction

The record reflects Applicant's charges arose out of a controlled drug buy that was captured on video by a confidential informant (CI). At trial, the State called the officer who set up the CI with recording equipment and supplied money for the transaction. During redirect, the solicitor asked the officer whether the CI had previously testified in court for Counsel when he was a prosecutor. See Tr. p. 95. At the end of the solicitor's redirect questioning, Counsel made a motion for a mistrial on the basis of improper bolstering. See Tr. pp. 96-97. The Court "overruled" the objection, but nevertheless offered to give a curative instruction. See Tr. pp. 97-

98. Counsel refused the curative instruction several times, stating, "[I]f you're overruling the objection, I'm not sure a curative instruction would cause more problems.... I would rather not have a curative instruction if the objection is overruled." Tr. p. 98. The denial of the motion for a mistrial was the only issue raised on appeal, and the Court of Appeals found it was waived when Counsel refused the curative instruction. State v. Davis, Op. No. 2012-UP-289 (S.C. Ct. App. filed May 9, 2012).

Appellate Counsel testified she was appointed to represent Applicant through the Office of Appellate Defense. She filed a brief on his behalf, raising the issue of improper bolstering of the State's informant by the solicitor, but the Court of Appeals ruled Counsel had not preserved the issue for review and declined to address the merits of Applicant's argument. Appellate Counsel testified that although Counsel objected to the solicitor's question and moved for a mistrial, the judge declined to grant the motion and offered a curative instruction instead. Because Counsel rejected the curative instruction, the issue was not preserved for review. Appellate Counsel testified that if the issue had been preserved, she would have filed a petition for writ of certiorari to challenge the decision of the Court of Appeals. Appellate Counsel acknowledged Counsel articulated his reasoning for rejecting the curative instruction – that doing so tends to call more attention to the issue – and stated she had encountered the same issue in other cases. Appellate Counsel further acknowledged that trial strategy and appellate strategy are different and can be at odds.

"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

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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).

This Court finds Counsel articulated a valid trial strategy in refusing the Court's offer to give a curative instruction.[2] Specifically, this Court finds Counsel refused the instruction

[2] The Court of Appeals found Counsel waived his objection by refusing the curative instruction. However, the judge repeatedly asserted that the objection was *overruled*, and the State argues that language is crucial for understanding and evaluating Counsel's trial strategy at the time. "When an objecting party is *sustained*, the trial court has rendered a favorable ruling, and therefore, it becomes necessary that the sustained party move to cure, or move for a mistrial if such a cure is insufficient, in order to create an appealable issue. Moreover, as the law assumes a curative instruction will remedy an error, failure to accept such a charge when offered, or failure to object to the sufficiency of that charge, renders the issue waived and unpreserved for appellate review. . . . On the other hand, when an objection has been *overruled*, the objecting party has suffered an adverse ruling which can be appealed without any further allegation of error." State v. Wilson, 389 S.C. 579, 583–84, 698 S.E.2d 862, 864 (Ct. App. 2010) (internal citations omitted) (first emphasis added). In this case, the trial judge said he was overruling the objection, and Counsel responded, "[I]f you're overruling the objection, I'm not sure a curative instruction

because he did not want to call more attention to the issue. Tr. p. 98. In Caprood v. State, the South Carolina Supreme Court reversed the PCR court's finding that trial counsel was ineffective for failing to move to strike or request limiting instructions after his objection to hearsay was sustained. 338 S.C. 103, 108-09, 525 S.E.2d 514, 516-17 (2000). At the evidentiary hearing, trial counsel testified he did not request curative instructions "as a trial strategy... because they tend to bring into focus precisely the item the objector has kept out." Id. at 110, 525 S.E.2d at 517. The Supreme Court found because trial counsel "articulated a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Id.

Further, the Court finds Applicant has not met his burden of proving he was prejudiced by Counsel's conduct. This Court has previously held an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a post-conviction relief claim alleging ineffective assistance of counsel. McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013) (citing McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003); Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999)). However, to be entitled to relief on such a claim, an applicant must establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability. McHam, 404 S.C. at 475–76, 746 S.E.2d at 47 ("Since the Fourth Amendment issue was not considered on direct appeal because it was unpreserved, an examination of the merits of the issue is appropriate in analyzing the prejudice prong in McHam's PCR claim.") Therefore, before a post-conviction relief court can find an applicant has prevailed on a claim of ineffective assistance of trial counsel for failing to preserve a ground for

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would cause more problems. . . . I would rather not have a curative instruction *if the objection is overruled.*" Tr. p. 98 (emphasis added). Regardless, this Court finds no error.

appellate review, the court must determine the underlying claim was meritorious and that there was a reasonable probability it would have resulted in reversal and a new trial.

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. A mistrial should be granted only when absolutely necessary. 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).

The Court finds Applicant has provided no evidence Applicant was prejudiced by Counsel's decision to decline the curative instruction. Appellate Counsel's testimony is purely speculation, 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, Applicant's allegation Counsel was ineffective for failing to preserve for appellate review the issue of whether the solicitor's question constituted improper bolstering is denied and dismissed.

Applicant also raises the claim that Counsel was ineffective for failing to make a contemporaneous objection to the improper question. However, the decision by the Court of Appeals clearly found the issue was not preserved due to Counsel's refusal of a curative instruction, not because of the timing of the objection. State v. Davis, Op. No. 2012-UP-289

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(S.C. Ct. App. filed May 9, 2012). Therefore, this Court finds Applicant's allegation Counsel was ineffective for failing to make a contemporaneous objection is without merit, and it is denied and dismissed.

C. Solicitor's "Seek the truth" argument

In his opening statement, the solicitor told the jury, "we are here to seek the truth, bottom line." Tr. p. 31. The solicitor continued by explaining what he meant by that statement – "not trying to reward people, not trying to punish people, but trying to call things as they are, impartially, without emotion." Tr. p. 31. Applicant contends this was improper, and Counsel should have objected.

As discussed above, "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, 540 U.S. at 8 (quoting Massaro v. United States, 538 U.S. 500 (2003)). 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.

In State v. Aleksey, the South Carolina Supreme Court explained the problem with these comments is the potential for unconstitutional burden shifting to the defendant. 343 S.C. 20, 538 S.E.2d 458 (2000). In the present case, the trial judge explained the State had the burden of proving Applicant guilty beyond a reasonable doubt and then described the jurors' role as being "judges of the facts" who decide which witnesses are credible by determining "who is telling the truth and who is not telling the truth," immediately before the solicitor began his remarks. Tr. pp. 25-26. As in Aleksey, the "seek the truth" language was used in the context of judging the credibility of witnesses, which is a proper jury function, and in that context, is harmless error. 343 S.C. at 259-60, 538 S.E.2d at 477.

Additionally, Counsel's opening statement immediately followed the solicitor's, and Counsel repeatedly emphasized the State's burden of proof beyond a reasonable doubt and the presumption of innocence afforded to Applicant. Tr. pp. 32-35. Finally, at the conclusion of the trial, the judge gave thorough jury instructions on the jury's role as factfinder, determining the weight of evidence, and the State's burden of proof. Tr. p. 153-166. Applicant has not alleged any error in the instructions. 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.

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

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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 15th day of March, 2018.

FILED
2018 MAR 23 AM 9:43
MARION COUNTY, SC
CHRIS AMICK
CLERK OF COURT

PAUL M. BURCH
Presiding Judge
Twelfth Judicial Circuit

Chesterfield, South Carolina

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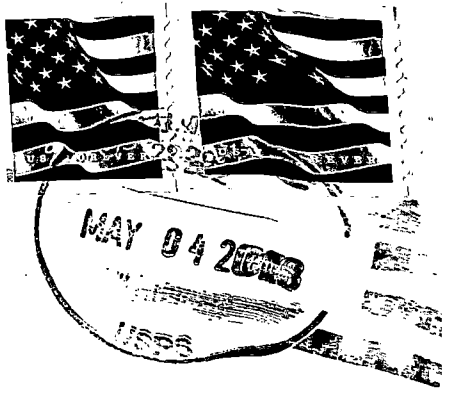

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