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May 7, 2018

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

RECEIVED

MAY 11 2018

S.C. SUPREME COURT

RE: David J. Penn v. State of South Carolina, Case No.: 2016-CP-08-1425

Dear Mr. Shearhouse:

Enclosed for filing is the Notice of Appeal (original and clocked copy) in the above Post Conviction Relief (PCR) case. Also enclosed are the following:

- (1) Proof of service of the Notice of Appeal on the respondent;
- (2) The Order of Dismissal &
- (3) A Request for Representation on Appeal.

The Applicant-Appellant was represented by me as an indigent pursuant to my contract with the South Carolina Commission on Indigent Defense (SCCID) to handle PCR cases. By copy of this letter, I am forwarding a duplicate set of documents to the SCCID.

The Request for Representation on Appeal and the Affidavit in Support thereof are signed by me as attorney for Applicant-Appellant. If you need anything further, do not hesitate to contact me. Thank you for your time and attention to this matter.

Sincerely,

Rodney D. Davis
South Carolina Bar #: 12396
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CC: Johnny James, Jr.
Assistant Attorney General

Paula Murdoch
Appellate Division, SCCID

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Maite D. Murphy, Circuit Court Judge

Case No.: 2016-CP-08-1425

David J. Penn,

Appellant,

v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

David J. Penn appeals the denial of his Post Conviction Relief application in this case. The Application for relief was denied, following an evidentiary hearing before the Honorable Maite D. Murphy on January 29, 2018. Counsel for the Appellant received a filed copy of the Order of Dismissal on or about April 23, 2018.

May 7, 2018



Rodney D. Davis
101 Meeting Street, 5th Floor
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Attorney for Appellant

Other Counsel of Record:
Johnny James, Jr., Assistant Attorney General
Office of the Attorney General, State of South Carolina
P.O. Box 11549
Columbia, SC 29211-1549
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
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Maite D. Murphy, Circuit Court Judge

Case No.: 2016-CP-08-1425

David J. Penn,

Appellant,

v.

State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State by mailing a copy of it to the address of record, Johnny James, Jr., P.O. Box 11549, Columbia, South Carolina 29211-1549, on 5/9, 2018.

5/9, 2018


Rodney D. Davis

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Attorney for Appellant

Other Counsel of Record:

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P.O. Box 11549

Columbia, SC 29211-1549

Attorney for Respondent

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

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FILED

Handwritten initials

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Maite D. Murphy, Circuit Court Judge

Case No.: 2016-CP-08-1425

David J. Penn,

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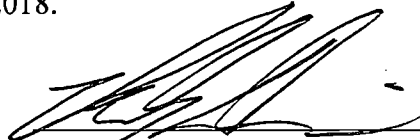
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May 7, 2018



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Columbia, SC 29211-1549
Attorney for Respondent

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

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FILED

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
 COUNTY OF BERKELEY)
)
 David J. Penn,) Case No.: 2016-CP-08-02428
 S.C.D.C. No. 312196,)
)
 Applicant,)
) **ORDER OF DISMISSAL**
 v.)
)
 State of South Carolina,)
)
 Respondent.)

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 MARY P. BROWN
 CLERK OF COURT
 BERKELEY COUNTY, S.C.
 FILED
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This matter comes before the Court by way of an application for post-conviction relief filed by David J. Penn (“Applicant”) on June 29, 2016. Respondent made its return on or about August 14, 2017. The Court convened an evidentiary hearing into the matter on Monday, January 29, 2018, at the Berkeley County Courthouse in Moncks Corner, South Carolina. Applicant was present at the hearing and represented by Rodney D. Davis, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General’s Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant’s trial counsel, Cody Groeber, Esq. (“Counsel”) also testified. The Court had before it Applicant’s records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Berkeley County Clerk of Court regarding the subject convictions, Applicant’s direct appeal records, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. Applicant was indicted at the April 2012 term of the Berkeley County Grand Jury for murder (2012-GS-08-00501), and grand larceny,

value more than \$2,000 but less than \$10,000 (2012-GS-08-00502). Cody Groeber, Esq. and David Schwacke, Esq. represented Applicant. Anne Williams and Colleen Dixon, of the Ninth Circuit Solicitor's Office, prosecuted the case. On September 30, 2013, Applicant proceeded to trial before the Honorable R. Markley Dennis, Jr. and a jury. The jury found Applicant guilty as indicted on October 1, 2013. Judge Dennis sentenced Applicant to imprisonment for concurrent terms of 35 years for murder, and 5 years for grand larceny.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Robert M. Dudek, Esq., who raised the following four issues to the South Carolina Court of Appeals:

1. Whether the court erred by instructing the jury that "an overt act threatening act" against the defendant was required to reduce murder to voluntary manslaughter since this was an erroneous instruction on the law?
2. Whether the court erred by refusing to charge the jury on examples of legal provocations as cited in State v. Gallman, 79 S.C. 229, 240, 60 S.E. 682, 687 (1908) since this was a correct instruction on the law, the purpose of jury instructions are to enlighten the jury and lead it to a correct verdict, and the only issue in this case was whether appellant was guilty of murder or voluntary manslaughter?
3. Whether the court erred by refusing to give the State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013), instruction on circumstantial evidence since the Supreme Court held a defendant, as here, is entitled to the instruction when requested by the defense?
4. Whether the court erred by charging the jury that words alone could never be sufficient to constitute a legal provocation since defense counsel correctly stated that certain words also can be "fighting words" [known] to incite violence, there was evidence in this case of the most provocative fighting word in the English language?

The parties proceeded to oral arguments on January 6, 2016. Applicant was represented by Mr. Dudek, Esq., and Garoline M. Scrantom, of the South Carolina Attorney General's Office, represented Respondent. By opinion decided March 2, 2016, the South Carolina Court of

Appeals affirmed Applicant's convictions. State v. Penn, Op. No. 2016-UP-114 (S.C. Ct. App. 2016). Applicant initially sought to petition the Supreme Court of South Carolina for a writ of certiorari, but subsequently informed appellate counsel that he did not wish to pursue the petition. Mr. Dudek informed the Court that further appeal would not be pursued by letter dated June 16, 2016. The Remittitur was issued on July 13, 2016.

Present Application

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

1. "Sixth Amendment Violation"
 - a. "Impartial Jury"

At the evidentiary hearing, Applicant, by and through counsel, orally amended his application to proceed *only* on the following allegations:

1. Ineffective assistance of counsel, in that:
 - a. Trial counsel promised the jury that Applicant would testify;
 - b. Trial counsel failed to adequately prepare Applicant to testify;
 - c. Trial counsel misadvised Applicant to not testify at trial;
 - d. Trial counsel failed to have Applicant's potential impeachment exposure explained in a colloquy on the record.

Respondent did not object to Applicant's amendment.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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.” Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

“[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Butler at 442, 334 S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). “Judicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). “[W]hen 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)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel’s performance was deficient. Under this

prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry at 117, 386 S.E.2d at 625 (citing Strickland 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 at 117-18, 386 S.E.2d at 625 (citing Strickland at 694).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 696-97.

1. Failure to Prepare, Call Applicant as a Witness

Applicant alleges Counsel was deficient in failing to prepare and call Applicant as a witness at trial, despite informing the jury in his opening statement that Applicant would testify. The right of a criminal defendant to testify or not to testify is fundamental to our system of jurisprudence, and every defendant is privileged to either testify in his own defense or refuse to do so. State v. Rivera, 402 S.C. 225, 241-42, 741 S.E.2d 694, 702-03 (2013). The ultimate decision of whether to testify is not one for defense counsel to make, but lies exclusively with the accused. Id., 402 S.C. at 243, n.2, 741 S.E.2d at 703, n.2.

i. Trial

Counsel, during his opening statement at trial, informed the jury in no uncertain terms that Applicant would take the stand and testify:

You will hear Mr. Penn, from the stand, talk about he lost control. You will hear evidence from him how he lost control and how he did not mean to do it. He’s

not saying that he didn't mean to actually kill her. He's saying that he didn't intend that when he got over there, he didn't intend it when they started to argue.

(Tr. 160, ll. 1-8). Counsel then summarized Applicant's version of events—that he was provoked into an uncontrollable rage when the victim called him a racial epithet and spat in his face, and so killed her by strangling her with a phone cord still plugged into the wall. (Tr. 160, ll. 9-25). The issue at trial was not whether Applicant killed the victim, but only whether it constituted murder or voluntary manslaughter. (Tr. 157, 162).

After the lunch recess on the second day of trial, the Court inquired as to whether Applicant would testify, to which Counsel replied that Applicant would not. (Tr. 353-54). The Court asked Applicant if he had opportunity to discuss the matter with Counsel, if he had been able to ask questions concerning his right, whether they had discussed the strategies that accompanied each available choice, and whether he understood his right to testify; in each instance, Applicant answered in the affirmative. (Tr. 354-56). Applicant affirmed that it was his decision not to testify. (Tr. 356, ll. 11-13). Applicant stated that Counsel advised that not testifying was in Applicant's best interest. (Tr. 356, ll. 18-24). Applicant indicated he was satisfied with Counsel's advice on the subject. (Tr. 357-58). The Court accepted Applicant's decision as freely and voluntarily made, and Counsel called no witnesses in Applicant's defense. The Court instructed the jury to not consider or infer anything from Applicant's assertion of his right to remain silent. (Tr. 415-16). Applicant's prior record was not discussed on the record until sentencing. (Tr. 456-57).

ii. Evidentiary Hearing Testimony

At the evidentiary hearing, Counsel testified he met with Applicant at least five to six times prior to trial. Counsel stated that the overarching strategy at trial was to show and argue that Applicant was provoked into killing the victim. Counsel explained that at the time of his

opening statement, he intended to call Applicant as a witness. Counsel recalled meeting with Applicant on September 18, 2013, shortly before trial, and preparing him to testify. Counsel could not recall if he discussed the strategic consideration of "last argument" prior to trial, but was sure that he did so at trial. Counsel explained that, as a general matter, he never tells clients that they absolutely must or must not testify. Counsel expressed his belief from the time of trial that most of the benefit that Applicant would have received from testifying was already covered by the introduction of Applicant's recorded statement. Counsel agreed that Applicant's potential impeachment with his prior record would have been important, but did not have a specific recollection of discussing the subject at trial, though he expressed a firm belief that he did so. Counsel recalled worrying that Applicant would say something to bring in his prior convictions for criminal domestic violence and cocaine convictions. Counsel explained that the entirety of his discussions with Applicant during the lunch recess focused on whether or not Applicant would testify. Applicant ultimately indicated he would not testify.

On cross-examination, Counsel recalled Applicant was upset prior to trial about not receiving copies of certain e-mails and consequently cut short a preparatory pre-trial meeting. Applicant expressed to Counsel his belief that retained counsel would do a superior job and that race would be a factor at trial. Counsel noted that he had more time to give to Applicant to prepare, and that he was unable to review a portion of discovery with Applicant due to his leaving the meeting. Counsel noted that in most cases he gets a ruling on prior record impeachment and that he would have sought such a ruling had Applicant asked for one. Counsel more firmly asserted that he discussed with Applicant the subject of impeachment with his prior record. Counsel believed at the start of trial that Applicant was going to testify, but formed the opinion after the State rested that Applicant's main concerns were addressed in his confession

and that Applicant's testimony would lead to his prior convictions coming out. Counsel denied ever telling Applicant not to testify or that he could not testify.

Applicant testified he met with Counsel six or seven times at the jail. Applicant recalled that the question of whether he would testify was discussed at every meeting, and that Applicant thought he was going to testify. Applicant expressed he was sure he discussed the right not to testify with Counsel. Applicant testified he wasn't prepared on *how* to testify: speaking volume, what to do during an objection, or what questions he could expect the State to ask, for example. Applicant recalled talking about "opening the door," but could not remember whether or not Counsel discussed how to avoid doing so. Applicant could not recall discussing whether to testify with the Judge at trial, or the specifics of Counsel's advice during the lunch recess. Applicant testified he changed his mind on testifying after Counsel warned that his prior convictions could come in. Applicant recalled discussing priors before trial and talking about which ones would come in.

Applicant then proffered the testimony he would have given at trial. The victim picked Applicant up on the day of the incident and paid Applicant half of what she owed him for work he had performed. They drank coffee and discussed the remaining work that was needed around the victim's residence, but ultimately the conversation drifted to the subject of Applicant's girlfriend. The victim did not believe Applicant should be in a relationship with her and disliked the girlfriend. The victim became increasingly agitated until she called Applicant the "N-word" and spat on him. Applicant claimed the victim picked up a pocket knife that Applicant had been using to clean his fingernails. Applicant denied ever feeling angry, just shocked. Applicant testified he struck the victim, grabbed a cord, and wrapped it around the victim's neck.

Applicant testified he only took things from the residence that had been previously given to him, but held by the victim.

On cross-examination, Applicant testified he left out any mention of the knife in his confession, but told both Counsel and law enforcement about it. Applicant stated he repeatedly asked Counsel about the knife being in evidence. Applicant affirmed that he changed his mind about testifying and that it was his decision not to testify.

Respondent called Counsel as a witness as part of its own case in response. Counsel confirmed discussing the knife with Applicant, but did not recall the victim ever having the knife. Counsel confirmed that the facts as proffered would have changed, or at least impacted his opinion, and that the knife being in the victim's hand at the moment of provocation would have been an important factor in determining whether Applicant should testify. On cross-examination, Counsel reaffirmed that Applicant never told him a version of events where the victim possessed the knife.

iii. Findings

The Court finds no deficiency on the part of counsel, nor prejudice therefrom. The testimony at the evidentiary hearing was consistent that both Applicant and Counsel expected Applicant to testify at the time Counsel presented his opening statement. The Court finds that the trial judge asked Applicant, prior to the defense resting whether he wished to testify and that Applicant stated he did not. The trial judge also instructed the jury that they could not take into consideration a defendant's decision not to testify. The Court finds that Applicant was not prejudiced by the opening statement and any error was cured by the jury charge. Furthermore, Applicant affirmed at the evidentiary hearing that the decision not to testify was his own. The

Court can find no deficiency on the part of Counsel for the consequences of a decision that was Applicant's and Applicant's alone.

2. Failure to Request Ruling on Impeachable Prior Bad Acts

As to Counsel's alleged failure to request a ruling on the admissibility of impeachable convictions, though there is considerable case law on the subject, there is no requirement that defense counsel request a Rule 609 hearing prior to the defendant deciding whether to testify. The burden of establishing the admissibility of such evidence is on the party attempting to impeach the witness with prior convictions. State v. Scriven, 339 S.C. 333, 340, 529 S.E.2d 71, 74 (Ct. App. 2000); see also U.S. v. Cunningham, 638 F.2d 696 (4th Cir. 1981). Therefore, where the State does not inform the court of its desire to question the defendant about his or her prior convictions, as was the case here, no Rule 609 hearing needs to occur. There is no affirmative requirement for defense counsel to request a hearing on the admissibility of the defendant's prior convictions before the defendant makes a decision whether to testify. Accordingly, the Court finds that it was not an error for Counsel not to request a ruling from the trial judge as to the admissibility of defendant's prior convictions as impeachment evidence.

[Conclusion and signature on following page]

III. CONCLUSION

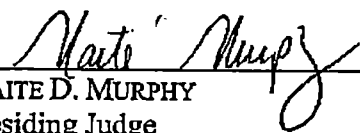
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel 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 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

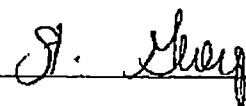
IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 29 day of March, 2018.



MAITE D. MURPHY
Presiding Judge
Ninth Judicial Circuit


_____, South Carolina


STATE OF SOUTH CAROLINA) IN THE SUPREME COURT OF SOUTH CAROLINA
)
 COUNTY OF BERKELEY)
) Case No.: 2016-CP-08-1425
)
 DAVID J. PENN,)
 Applicant.)
)
 -versus-) REQUEST FOR REPRESENTATION ON APPEAL
)
 STATE OF SOUTH CAROLINA,)
)
 Respondent.)

On behalf of the request of the above-named Applicant, to be represented by the South Carolina Commission of Indigent Defense, Appellate Division (SCCID), the undersigned attorney would show unto this Honorable Court that:

1. He is the attorney for the Applicant-Appellant in the above captioned case. The Applicant-Appellant was in custody during and taken into custody immediately following the Post Conviction Relief (PCR) hearing and was not available to personally sign this request;
2. The Applicant-Appellant was represented by the undersigned attorney as an indigent, pursuant to a contract with the SCCID;
3. The Applicant-Appellant has been informed that he may request assistance from the SCCID Appellate Division in perfecting his appeal;
4. A timely Notice of Intent to Appeal has been filed on the Applicant-Appellant's behalf;
5. The Applicant-Appellant has been informed that nothing requires SCCID Appellate Division to pursue this appeal unless that office's Chief Attorney is satisfied that there is arguable merit to this appeal and that he cannot afford to hire an attorney.

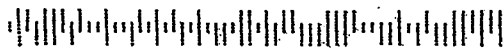
At this time, the Applicant-Appellant requests the aid of the SCCID Appellate Division in perfecting his appeal to the South Carolina Court of Appeals.

Respectfully Submitted,

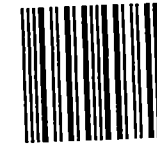


Rodney D. Davis
 South Carolina Bar #: 12396

5/7, 2018
 Charleston, South Carolina.



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The Honorable Daniel E. Shearhouse
Clerk, Supreme Court of South Carolina
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