

STATE OF SOUTH CAROLINA  
COUNTY OF SUMTER

RECORDED IN THE COURT OF COMMON PLEAS  
THIRD JUDICIAL CIRCUIT  
2018 JAN 16 PM 3:38

Vernon Goodwin, #311752,

JAMES C. GARDNER  
CLERK OF COURT  
SUMTER COUNTY, S.C.

2013-CP-43-1889

Applicant,

v.

**ORDER OF DISMISSAL**

State of South Carolina,

Respondent.

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on October 1, 2013. Respondent submitted its Return on May 20, 2014. An evidentiary hearing was convened on April 17, 2015, at the Sumter County Judicial Center. Applicant was present at the hearing and was represented by Reginald I. Lloyd, Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office.

At the evidentiary hearing, Applicant testified on his own behalf. Applicant also presented testimony from Calvin Hastie, Jr., Esquire (hereinafter "Trial Counsel") and Deborah Missouri.<sup>1</sup> The Court has reviewed the trial transcript, the records of the Sumter County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, and the pleadings.

**I. PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. Applicant was indicted during

<sup>1</sup> The evidentiary hearing was presented with a separate PCR hearing for Applicant's codefendant, Cameren Kelley, as both parties had similar issues and arguments presented on their behalf by the same attorney, Mr. Lloyd. The testimony summarized and addressed in this Order was presented in relation to Applicant's application.

the May 2011 term of the Sumter County Grand Jury for murder, first degree burglary, eight counts of kidnapping, two counts of assault and battery with intent to kill, five counts of assault with intent to kill, two counts of armed robbery, and six counts of attempted armed robbery (2011-GS-43-0881). Applicant was represented by Calvin Hastie, Jr., Esquire.

Applicant proceeded to a jury trial with his co-defendant Cameren L. Kelley and on September 23, 2011 was found guilty of the lesser-included offense of voluntary manslaughter, and was found guilty as indicted on the remaining charges. The Honorable Howard P. King sentenced Applicant to forty year term of imprisonment for first degree burglary, a thirty year term of imprisonment for each count of armed robbery, a thirty year term of imprisonment for each count of kidnapping, a thirty year term of imprisonment for voluntary manslaughter, a twenty year term of imprisonment for each count of attempted armed robbery, a twenty year term of imprisonment for assault and battery with intent to kill, and a ten year imprisonment for each count of assault with intent to kill. All sentences were to run concurrently for an aggregate sentence of forty years.

A timely notice of appeal was filed on Applicant's behalf by Reginald Lloyd, Esquire. On May 6, 2013, Appellate filed a motion to withdraw his appeal. On May 14, 2013, the South Carolina Supreme Court dismissed Applicant's appeal. The Remittitur was issued on June 20, 2013.

## II. ALLEGATIONS

In his application, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel
  - a. Failure to investigate
2. Denial of Due Process



At the evidentiary hearing, Applicant raised the following allegations:

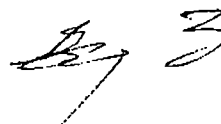
1. Trial Counsel failed to move to quash the indictment based on its lack of a reference to the theory of accomplice liability (hand of one, hand of all).
2. Trial Counsel failed to argue in his directed verdict motion or during the charge conference that a conviction under the accomplice liability theory requires proof of the defendant's physical presence at the scene of the crime.
3. Trial Counsel failed to pursue alibi defenses.

### III. APPLICABLE LAW

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, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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.



#### IV. SUMMARY OF RELEVANT PCR HEARING TESTIMONY

##### *Trial Counsel's testimony*

At the evidentiary hearing, Trial Counsel testified that Applicant was convicted as the principal of these crimes through the "hand of one, hand of all" doctrine. He stated the State's theory of the case was that Applicant planned the armed robbery of a drug house with three codefendants, including the Bracey brothers. He stated Applicant was accused of dropping off the Bracey brothers at the crime scene, and the brothers robbed the house and shot the victims while inside. He stated the State's theory was that Applicant was the mastermind behind the plan to rob the house. Trial Counsel testified that even though the State had technically presented evidence of the elements of accomplice liability at trial, he did not believe Applicant was guilty or that the jury would find the evidence convincing.

Trial Counsel stated the State theorized the plan to rob the house started at Applicant's house, where the Bracey brothers and codefendant Cameren Kelley met to plan the robbery. Trial Counsel maintains the only reason Applicant became involved was because the Bracey brothers called him and asked him to drive them to the drug house so they could buy marijuana. He testified Applicant then asked Kelley to drive because Kelley had a driver's license and he did not. Trial Counsel stated Applicant told him he believed the Bracey brothers were going to the house only to buy marijuana, not to rob anyone.

Trial Counsel testified Applicant was not inside the house during the commission of the crimes, and he tried to establish that neither Applicant nor his codefendant Kelley was present during the robbery and murder. Trial Counsel testified he did not seriously consider an alibi defense because the State did not contend Applicant was present at the crime scene; rather, the State argued that Applicant was the mastermind behind the crime, provided the weapons to the

Bracey brothers, and called Kelley to get a ride. Trial Counsel testified Applicant told him he did provide weapons to the Bracey brothers before the robbery but that Applicant did not know of the plan to commit the robbery. Trial Counsel testified the State also contended Applicant gave the Bracey brothers his extra cell phone so they could contact him after the robbery so Applicant and Kelley could return and pick them up. Trial Counsel stated he did not believe the State could prove Applicant was part of the plan to rob the victims.

Trial Counsel testified that at the time of the trial, he did not think he should have raised an objection to the State's theory of "hand of one, hand of all," and he is still not sure whether he should have now, in hindsight.

Trial Counsel testified Applicant admitted to him that he went to the scene of the crime to drop the Bracey brothers off, and the central question came was whether he provided weapons and helped them plan the robbery. He stated Applicant clearly told him that he went there with the Bracey brothers, dropped them off, and went home, but Applicant told him he did not know about the plan to rob the house.

*Deborah Missouri's testimony*

Deborah Missouri is Applicant's mother. She testified she lived in Camden with Applicant, Applicant's wife, and her six-year old daughter Millia. She stated on December 14, 2009, Applicant returned home around 8:00 P.M. She testified she was thirsty for a glass of milk around 7:45 p.m.; the milk in the refrigerator belonged to her Applicant's wife, so she called Applicant to ask for permission to drink some. She testified Applicant never answered the phone, but fifteen minutes later, she saw him and Cameren Kelley in her kitchen. She testified that after a quick conversation with them, Kelley left the house to go home and Applicant went into his room with his wife. She stated Applicant has a car that is listed in her name, but he does not

drive because he does not have a driver's license. Ms. Missouri testified she told Trial Counsel about seeing Applicant and Kelley in her kitchen, but Trial Counsel did not use it as an alibi.

*Applicant's testimony*

Applicant testified he did not tell Trial Counsel he gave the Bracey brothers his guns for this crime. He stated he told him that he gave them guns a couple of days before the robbery for a situation the Bracey brothers were involved in but with which he was not involved. He stated the Bracey brothers tried to buy the guns from him well before the night of the robbery.

**V. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Court has reviewed the record in its entirety and has considered the testimony presented at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, pass upon their credibility, and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

As a matter of general impression, this Court finds Trial Counsel's testimony to be credible and persuasive. In contrast, this Court finds Applicant's testimony to be not as credible. The Court concludes Ms. Missouri was credible; however, her testimony did not reach the issues relevant to this proceeding, as the State's theory of guilt was never dependent upon the whereabouts of Applicant and Kelley at the time of the crimes. The Court has applied these credibility findings to the Court's findings and conclusions set forth below.

*Failure to move to quash indictment based on its lack of reference to accomplice liability theory*

Applicant alleges Trial Counsel was ineffective for failing to challenge the indictments based on the ground they did not reference the accomplice liability theory of "the hand of one is the hand of all." This allegation has no merit. South Carolina case law firmly stands for the



proposition that Applicant could still be convicted on the theory of accomplice liability even if the indictment charges him only as a principal. State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000) (“It is well-settled that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense.”) (citing State v. Leonard, 292 S.C. 133, 136, 355 S.E.2d 270 (1987); State v. Cox, 258 S.C. 114, 187 S.E.2d 525 (1972); State v. Hicks, 257 S.C. 279, 185 S.E.2d 746 (1971); State v. Hunter, 79 S.C. 73, 60 S.E. 240 (1908)). Trial Counsel cannot be ineffective for failing to challenge something that simply is not the law. A motion to quash the indictment on this ground would have failed as a matter of law. Therefore, the Court denies relief on this ground.

*Failure to argue during directed verdict motion or charge conference that a conviction under the accomplice liability theory requires proof of the defendant's physical presence at the scene of the crime*

Applicant alleges Trial Counsel was ineffective for failing to argue to the trial court that the State must prove Applicant's physical presence at the scene of the crime when the crime took place in order to convict him on an accomplice liability theory. Relief on this ground is denied because this is not the law in South Carolina.

A conviction under the accomplice liability theory is appropriate if there is proof beyond a reasonable doubt that a defendant participated with others in the pursuit of a common design to commit an unlawful act and took the part agreed upon or assigned to him in an effort to insure the success of the common undertaking. State v. Gilbert, 107 S.C. 443, 93 S.E. 125 (1917); State v. Blackwell, 220 S.C. 342, 67 S.E.2d 684 (1951); State v. Chavis, 277 S.C. 521, 290 S.E.2d 412 (1982); State v. Thompson, 374 S.C. 257, 647 S.E.2d 702 (2007); State v. Gibson, 390 S.C. 347, 701 S.E.2d 766 (2012); State v. Reid, 408 S.C. 461, 758 S.E.2d 904 (2015). In such an instance,



the defendant is presumed to be present and is guilty as if physically present. Chavis at 522, 290 S.E.2d at 412-13 (citing State v. Gilbert, 107 S.C. 443, 93 S.E. 125 (1917)).

South Carolina courts have held proof of presence alone is not by itself enough evidence for a conviction and that proof of mere presence and prior knowledge that a crime was going to be committed, without more, is not enough to prove guilt. See State v. Harry, 420 S.C. 290, 803 S.E.2d 272 (2017). The defendant's presence at the scene by pre-arrangement to aid, encourage, or abet in the perpetration of the crime indeed constitutes guilt as a principal. See Gibson, 390 S.C. at 354, 701 S.E.2d at 770; State v. Hill, 268 S.C.390, 395-96, 234 S.E.2d 219, 221 (1977). However, these concepts cannot be construed to mean that the State must actually prove presence as a precursor to guilt under the accomplice liability theory. In Blackwell, the Supreme Court upheld a guilty verdict when the defendant planned the commission of the crime with others and waited out of town during the commission of the crime by the physical perpetrators. Blackwell, 220 S.C. 342, 67 S.E.2d 684. Similarly, in Chavis, the defendant met with three other men to plan a robbery, supplied two of them with masks, guns, and gloves, and drove them to the scene. Chavis at 522, 290 S.E.2d at 412. He left them there to commit the robbery and went to play cards three miles away from the robbery scene. Id. He was found guilty of robbery, and the conviction was upheld under the accomplice liability theory. Chavis at 523, 290 S.E.2d at 413. The facts in Chavis are very similar to the evidence presented at Applicant's trial.

During the directed verdict stage, Trial Counsel did not move for a directed verdict on the ground that Applicant was not physically present at the scene of the crime or that the accomplice liability theory had not been established. Trial Counsel generically argued to the trial court that the State had not proven its case. While on the surface this could appear deficient, the Court finds Applicant is not entitled to relief for two reasons. First, if the motion had been made on the



ground now urged by Applicant, the motion would have been justifiably denied in light of the case law referenced above. Second, during the course of his ruling on the directed verdict motions, the trial court covered the accomplice liability issue and ruled there was evidence that Applicant, Kelley, and the Bracey brothers "had planned and discussed what was going down and what they were going to do." (Tr., p. 572). Since the trial court actually ruled on the issue Applicant now raises, any deficiency in Trial Counsel's motion was cured.

Trial Counsel testified at the PCR hearing that in hindsight, he should have argued lack of physical presence as part of the directed verdict motion. This testimony does not afford a basis for relief for the foregoing reasons.

The evidence presented by the State at trial required the jury to largely accept as true the testimony of the Bracey brothers. Their credibility was indeed suspect; however, the jury obviously believed critical portions of their testimony, however suspect it was. Trial Counsel put it best when he testified at the PCR hearing that based on the State's theory, there was enough evidence to go to the jury on the theory of accomplice liability, but he did not think the jury would find Applicant guilty. Accordingly, Applicant has failed to prove ineffective assistance of counsel on this ground.

*Failure to pursue alibi defense*

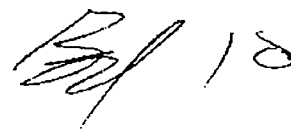
Applicant claims Trial Counsel should have pursued an alibi defense at trial. At the PCR hearing, Applicant offered the above-summarized testimony of his mother, Deborah Missouri. To review, Ms. Missouri testified at the PCR hearing that she had called Applicant around 7:45 to ask him if she could drink some of his wife's milk, but he didn't answer the phone. She testified Applicant returned home a little after 8:00 p.m. Applicant was in the kitchen with her, and Cameren Kelley surprised her when he came into the kitchen through a

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curtain separating the kitchen from another room. She testified she spoke briefly to Applicant in the kitchen before he went back into his room with his wife. She said he did not leave the house again.

The criminal acts occurred in Rembert. According to various witnesses, the criminal events occurred anywhere from 8:00 p.m. to 9:15 p.m. or perhaps a little later. The record reflects the distance between the scene of the crime in Rembert to Applicant's house and then to Cameren Kelley's house was such that the drive from the scene to Applicant's home would have been up to 30 minutes or more. On the surface, the testimony of Ms. Missouri would tend to establish that Applicant and Kelley could not have been in the vicinity of where Carlton and Calderone Bracey were dropped off and then perpetrated the crimes. However, Applicant's theory ignores the very important fact that both Applicant and co-defendant Kelley stated to law enforcement that they were in the car with the Bracey brothers the night of the crimes and that Kelley was driving and Applicant was in the front seat. Both Applicant and Kelley told law enforcement they dropped off the Bracey brothers near the scene of the crime "to buy weed" and then left to go to their respective homes. At trial, Applicant stipulated his statement to law enforcement was freely and voluntarily given, and the trial judge ruled that both statements were freely and voluntarily given. In addition, Applicant told Trial Counsel he and Kelley dropped off the Bracey brothers near the scene of the crime. Applicant's sole defense was that they did not know the Bracey brothers were going to do anything other than buy marijuana.

The alibi testimony of Applicant's mother would have added nothing to the statements given by Applicant and Kelley to law enforcement and Applicant's account to Trial Counsel. Trial Counsel testified that in his judgment, the best defense to put forward was that Applicant did, in fact, drop the Bracey brothers off near the scene of the crime so the Bracseys



could buy marijuana but that Applicant had no idea the Bracey brothers were planning a robbery. In light of Applicant's and Kelley's statements to law enforcement, this was the only defense logically available to Applicant.

Trial Counsel testified at the PCR hearing that in hindsight, he perhaps should have called alibi witnesses. However, he also testified that in his mind, whether Applicant was present or not at the time of the crime was not an issue. He is correct on that latter point, and at the PCR stage, hindsight of trial counsel does not establish ineffective assistance of counsel. See Yarborough v. Gentry, 540 U.S. 1, 6, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003) (“[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.”).

Applicant argues his mother's testimony would have established that he and Kelley separated from each other after dropping off the Bracey brothers and that this would have created reasonable doubt that there was a plan for them to pick up the Bracey brothers after the crime. The Court concludes Trial Counsel was not deficient in failing to call Applicant's mother to establish that point, and that even if Trial Counsel were deficient, there is not a reasonable probability that the outcome of the trial would have been different had the testimony been introduced and this theory argued to the jury. Therefore, Applicant has failed to meet his burden of proving either prong of the Strickland test; therefore, relief is denied on this ground.

## VI. CONCLUSION

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

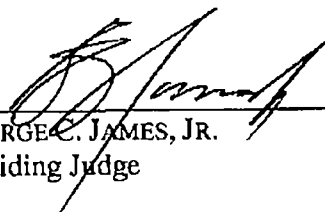
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Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), Applicant has a right to appellate assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's 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 is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Respondent.

**AND IT IS SO ORDERED** this 15 day of January, 2018.

  
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GEORGE C. JAMES, JR.  
Presiding Judge

Sumter, South Carolina

