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S.C. SUPREME COURT

MAC | VANCE ATTORNEYS, LLC

May 29, 2018

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

RE: **Jovan Mitchell v. State of South Carolina**
2016-CP-24-1893

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal along with the accompanying Order for the above-referenced matter. By way of this letter I am copying the Office of Appellate of Defense, as I was appointed to represent Mr. Mitchell.

Best regards,

Ashley A. McMahan
Attorney at Law

AAM/qpk

Enclosures

cc: Jovan Mitchell
Megan H. Jameson, Sr. Asst. Dep. Attorney General
Greenwood County Clerk of Court
Office of Appellate Offense

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STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
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S.C. SUPREME COURT

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

The Honorable W. Mark Hayes, II, Circuit Court Judge

Case No. 2016-CP-24-1893

Jovan Mitchell,.....Petitioner,

v.

State of South Carolina,.....Respondent.

NOTICE OF APPEAL

Applicant, Jovan Mitchell, appeals the order of the Honorable W. Mark Hayes, II, dated February 27, 2018, and filed April 25, 2018.

5/29, 2018

ASHLEY A. MCMAHAN, ESQUIRE
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Opposing Counsel:
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v.

State of South Carolina, ... Respondent.

PROOF OF SERVICE

I, Quinda P. Kershaw, certify that I have served the within Notice of Appeal on Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Megan H. Jamieson, Sr. Assistant Deputy Attorney General
Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

I further certify that all parties required by Rule to be served have been served.

May 29, 2018

QUINDA P. KERSHAW
PARALEGAL
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STATE OF SOUTH CAROLINA COUNTY OF GREENWOOD	)	IN THE COURT OF COMMON PLEAS OF THE EIGHTH JUDICIAL CIRCUIT
Jovan Mitchell, Applicant, v. State of South Carolina, Respondent.	)	2016-CP-24-1893 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed December 12, 2016. Respondent made its Return on April 10, 2017. Applicant filed an amended PCR application dated September 13, 2017. An evidentiary hearing into the matter was convened on Tuesday, February 27, 2018, at the Laurens County Courthouse in Laurens County, South Carolina. Applicant was present at the hearing and represented by Ashley A. McMahan, Esquire. Justin Hunter, Esquire, of the South Carolina Attorney General's Office represented Respondent. At the hearing, Applicant testified on his own behalf. Applicant's trial counsel, Carson Henderson, Esquire, and his former trial counsel Megan Flannery, Esquire testified. This Court had before it a copy of Applicant's records from the Greenwood County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's PCR Application and Amendment, the exhibits introduced at the PCR hearing, and Respondent's Return.

I. PROCEDURAL HISTORY

Applicant was indicted at the September 2013 term of the Greenwood County Grand Jury for grand larceny (2013-GS-24-1568). Carson Henderson, Esquire, represented him. Cam Morrow, Esquire, represented the State. On October 2, 2013, Applicant proceeded to a trial

before the Honorable Donald B. Hocker, after which he was found guilty. Applicant was sentenced to imprisonment for five years provided that upon the service of eighteen months the balance is suspended with two years' probation.

A Notice of Appeal was timely filed on Applicant behalf and an appeal was perfected by Appellate Defender Carmen Ganjehsani. Ms. Ganjehsani raised the following issues on appeal:

1. Appellant is entitled to a directed verdict on the indicted charge of grand larceny where the State did not prove the allegations set forth in the indictment; the State alleged that Appellant took and carried away the "personal goods of Stan Gaines," but the evidence at trial established that the goods were not personally owned by Gaines but by a corporation named Synehi Castings, Inc.

2. Appellant is entitled to a directed verdict on the jury's finding of guilty on the charge on grand larceny in an amount between $1,000.00 and $5,000.00 where after the jury rejected the property's valuation of over $22,000.00 by finding Appellant not guilty of grand larceny in an amount greater than $5,000.00, the only evidence remaining showed that the value of the property was worth under $1,000.00.

3. The Trial Court erred in failing to give Appellant's requested full charge on the law of mistake of fact and good faith and erred in particular by failing to explain to the jury that any belief by Appellant that the property was abandoned did not have to be objectively reasonable to preclude a conviction for grand larceny.

The South Carolina Court of Appeals affirmed Applicant's conviction and sentence by an unpublished opinion. State v. Jovan Mitchell, Op. No 2015-UP-543 (Ct. App. Filed Nov. 25, 2015). The Court of Appeals ruled the circuit court properly submitted the case to the jury. The Court also found the second issue was not preserved for appeal as Mr. Henderson did not make a timely objection. The Court further found the circuit court did not err in declining to give Applicant's full requested jury charges because the court's instructions sufficiently charged the jury on the law of mistake of fact. The remittitur was sent December 21, 2015.

PCR Application

In his application for post-conviction relief, Applicant alleged grounds of ineffective assistance of counsel. On September 15, 2017, Applicant filed an Amended PCR Application,

alleging the following grounds of relief:

1. Ineffective Assistance of Counsel of Megan J. Flannery, Esquire:

    a. Counsel never discussed with the Applicant who would be called as witnesses at trial, nor did she attempt to talk to those potential witnesses.

    b. Counsel had multiple mental health evaluations done on the Applicant resulting in the Applicant being sent to the facility on Farrow Road in Columbia for almost 21 days, all in her attempt to get an insanity defense for the Applicant.

    c. Counsel told the Applicant that he could not attend his preliminary hearing

2. Ineffective Assistance of Counsel of Carson Henderson, Esquire:

    a. Counsel failed to argue prosecutorial vindictiveness. Only after the Applicant decided to run for County Council did the Solicitor decide to try to dispose of the Applicant's case. There is a reasonable likelihood that the Solicitor tried the Applicant on the charges only after he announced he was running for County Council. See i.e. State v. Odom, 412 SC 253 (2015). In this case, Applicant was not indicted for three years, and then finally was indicted late in September 2013, and tried in October 2013.

    b. Trial Counsel did not attempt to mitigate the Applicant's sentence by using the mental health evaluations and other information that Ms. Flannery had obtained. Furthermore, Trial Counsel did not even have a copy of Ms. Flannery's file.

    c. Trial Counsel failed to call two witnesses on Applicant's behalf: Henry Fuller and Felicia LaGroom.

    d. Trial Counsel told the Applicant that he couldn't testify because he would go to jail if he did.

    e. Trial Counsel did not bring up the conflict of interest Ms. Odom had in trying this case because she used to be an employee of Mr. Henderson's.

    f. Trial Counsel failed to request voir dire asking if anyone knew the Applicant. Had he done so he would have stricken juror 137, Patia Thomas, who used to work with the Applicant at Chic-Fil-A and did not care for Applicant.

    g. Trial Counsel failed to timely raise an objection to the court charging the three levels of larceny at the trial. Had counsel done so, the issue would have been preserved for trial and Applicant would have been successful on appeal in having a judgment of acquittal on the larceny $1,000-$5,000 charge.

II. APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in their 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, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (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.

III. 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 Clerk of Court records regarding the subject

convictions, the trial transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief and amendment, the exhibits received at the PCR hearing, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

Ineffective Assistance of Counsel as to Megan Flannery, Esquire

Ms. Flannery never discussed with Applicant who would be called as witnesses at trial, nor did she attempt to talk to those potential witnesses

Applicant alleged Ms. Flannery was ineffective for failing to discuss with Applicant who would be called as witnesses at trial and talk to those potential witnesses. Applicant testified he showed Ms. Flannery pictures and evidence to investigate. Ms. Flannery testified she met with Applicant for the first time in May 2010 and got his side of the story. She testified Applicant had a lot of issues with property rights and said nothing can be owned. She testified she received pictures Applicant took of the site, but needed to know what the property looked like at the time of the crime. Ms. Flannery testified she was not far along as far as a trial posture is concerned. She testified Applicant spoke about potential witnesses, and she spoke to a woman who only knew information concerning the date of the arrest and not the full date range that the misconduct occurred.

This Court finds Applicant has failed to meet his burden of proving Ms. Flannery was deficient for failing to discuss and investigate potential witnesses. This Court finds Ms. Flannery did speak to one of the witnesses Applicant provided her. This Court further finds Applicant has failed to show what witnesses Ms. Flannery should have investigated and what these witnesses would have said that would impact the outcome of his trial. Furthermore, this Court finds Ms. Flannery was not deficient for failing to discuss the trial witnesses, when her testimony revealed

they were not in trial preparation posture during the extent of her representation. This Court finds Applicant has failed to meet his burden of proving Ms. Flannery was deficient and that the outcome of his trial would have otherwise been different, and this allegation must be dismissed.

Ms. Flannery had multiple mental health evaluations done on Applicant resulting in the Applicant being sent to the facility on Farrow Road in Columbia for almost 21 days, all in her attempt to get an insanity defense for the Applicant

Applicant alleged Ms. Flannery was ineffective for having mental evaluations done on Applicant that resulted in a twenty-one stay at a mental facility. Applicant testified Ms. Flannery sent him to a mental hospital and got a seventy-two hour hold on him. He testified he was in another hospital for twenty-one days, but a judge sentenced him to sixty more days.

Ms. Flannery testified she had "concerning" conversations with Applicant that caused her to be concerned about his mental health. She testified Applicant said he wanted to just "go on through with it" which raised a concern when he also said he tried to commit suicide before. She testified Applicant talked about how he could find the city of gold, control the weather, and predict the future. Ms. Flannery testified all of this caused her to get an order to have him mentally evaluated and she went with him to the evaluation. She said once he was being evaluated there was not much she could do until his evaluation was complete. She testified Applicant was found to be competent. Ms. Flannery testified the hold on Applicant was by order of a judge. She testified the nurse said he recanted so they stopped giving him treatment. She testified Applicant ultimately said he did not trust her and moved for her to be relieved.

This Court finds Applicant has failed to meet his burden of proving Ms. Flannery was deficient for having him evaluated and for not releasing the hold on Applicant. This Court finds Ms. Flannery's testimony credible that she had concerns about Applicant's mental health and it was not unreasonable for Ms. Flannery to use her judgment and seek an evaluation. This Court finds both Ms. Flannery and Applicant testified that the hold was put on Applicant by order of a

judge, and this Court finds it was not unreasonable for Ms. Flannery to fail to remove the hold when Applicant was ordered for further mental treatment. This Court finds Applicant has failed to meet his burden of proving Ms. Flannery's performance was deficient regarding his mental evaluation. Furthermore, this Court finds Applicant has failed to meet his burden of proving the outcome of his trial would have been different had Ms. Flannery not sought an evaluation. As Applicant has failed to meet his burden, this allegation must be dismissed.

Ms. Flannery told the Applicant that he could not attend his preliminary hearing

Applicant alleged Ms. Flannery was ineffective for telling him he could not attend his preliminary hearing. He testified he never knew when the hearing was scheduled. Ms. Flannery testified her office's policy concerning preliminary hearings was that they waived the hearings unless a defendant specifically requested one.

This Court finds Applicant has failed to meet his burden of proving Ms. Flannery was deficient for failing to advise Applicant about his preliminary hearing and for telling him that he could not attend the preliminary hearing. This Court finds, given Ms. Flannery's testimony, that it is likely she waived the preliminary hearing because Applicant did not specifically request one. This Court finds Applicant has failed to meet his burden of proving he was prejudiced by Ms. Flannery's actions in this regard. This Court finds Applicant has failed to show a preliminary would have resulted in the dismissal of his charges as there appears to be sufficient probable cause to support the charge as Applicant was found at the scene with the stolen material and gave a statement to law enforcement admitting to taking material from the property over several days. Applicant was ultimately true-bill indicted on the charge and he has failed to show a likelihood that the result of the proceeding would have been different had he attended a preliminary hearing. Accordingly, this allegation must be dismissed.

Ineffective Assistance of Counsel as to Carson Henderson, Esquire

Counsel failed to argue prosecutorial vindictiveness

Applicant alleged Mr. Henderson was ineffective for failing to argue prosecutorial vindictiveness. He alleged the solicitor only decided to try Applicant after he decided to run for Greenwood County Council as he was not indicted for three years, and then finally was indicted late in September 2013, and tried in October 2013 – thirty days after he decided to run for Council. Respondent provided this Court with a notarized affidavit of Christopher A. Morrow, Esquire, the assistant solicitor who tried Applicant's case. Mr. Morrow asserted he was hired by the Eighth Circuit Solicitor's Office in January 2013 and was assigned a caseload of approximately one thousand cases. He asserted he proceeded to try and handle the oldest cases on his docket first. He asserted Mr. Mitchell declined the State's offer of a plea deal in September 2013 so he drafted an indictment and placed it on the trial roster. Mr. Morrow further asserted he was unaware that Applicant had ever expressed any interest or intention to run for County Council, as he was unaware of any candidate running for County Council the entire time he lived in Greenwood, South Carolina. He further indicated he indicted Applicant because his case was old and had not yet been presented to the Greenwood County Grand Jury. Lastly, Mr. Morrow indicated he first became aware of Applicant's intention to run for County Council when Applicant filed this PCR application. Mr. Henderson testified at the PCR hearing he was never aware that Applicant was running for County Council until the filling of this PCR application.

This Court finds Applicant has failed to meet his burden of proving Mr. Henderson was ineffective for failing to argue prosecutorial vindictiveness. This Court finds there is no credible evidence that the prosecuting solicitor knew of Applicant's intention to run for County Council

or that any knowledge affected his decision to proceed with Applicant's case. This Court finds Applicant's case was outstanding for some time after his arrest, and finds the prosecuting solicitor submitted the case to the Grand Jury and placed it on the trial docket after Applicant decided not to plead guilty. This Court finds Applicant has failed to meet his burden of proving prosecutorial misconduct and failed to show Mr. Henderson was deficient for not raising the issue. Furthermore, this Court finds Applicant has failed to meet his burden of proving the outcome of his trial would have been different had Mr. Henderson raised this issue. Accordingly, this allegation must be dismissed.

Mr. Henderson did not attempt to mitigate Applicant's sentence by using the mental health evaluations and other information that Ms. Flannery had obtained and did not have a copy of Ms. Flannery's file

Applicant alleged Mr. Henderson did not attempt to mitigate Applicant's sentence by using the mental health evaluations and other information that Ms. Flannery had obtained and did not have a copy of Ms. Flannery's file.

Mr. Henderson testified he reviewed the mental evaluation reports but did not use them, for mitigation because there were not really mental issues present but simply Applicant's unique perspective. Mr. Henderson testified he got portions of Ms. Flannery's file but received much more information through subpoenas and the discovery process.

This Court finds Applicant has failed to meet his burden of proving Mr. Henderson was ineffective for not having a copy of Ms. Flannery's file. This Court finds Mr. Henderson received part of Ms. Flannery's file but received full discovery from the State and through subpoenas. This Court finds Ms. Flannery testified she had not received discovery during her representation. Applicant has failed to meet his burden of proving there were essential documents in Ms. Flannery's file that Mr. Henderson did not receive, and has failed to prove the outcome of his trial would have been different had Mr. Henderson received Ms. Flannery's

complete file.

This Court finds Applicant has failed to meet his burden of proving Mr. Henderson was ineffective for failing to use the mental evaluation during mitigation. This Court finds Mr. Henderson reviewed the mental evaluation reports and did not find use them in mitigation because there were no competency issues reported. This Court finds Ms. Flannery testified the report came back that Applicant was competent after he recanted his concerning statements. Applicant has provided no evidence to show that any competency issues existed or that the mental evaluations contained statements that would have been helpful to him in mitigation. As Applicant has failed to meet his burden, this Court will not speculate as to how Mr. Henderson's mitigation would have been different had he used the evaluation reports. This Court finds Mr. Henderson was not deficient and Applicant has failed to show that the outcome of his trial would have been different had Mr. Henderson used the mental evaluation during mitigation, and this allegation must be dismissed.

Mr. Henderson failed to call two witnesses on Applicant's behalf: Henry Fuller and Felicia LaGroom

Applicant alleged Mr. Henderson was ineffective for failing to call witnesses Henry Fuller and Felicia LaGroom.

Mr. Henderson testified he does not have the name Henry Fuller in his case file notes. Mr. Henderson testified he had an investigator thoroughly interview Ms. LaGroom. He testified Ms. LaGroom's version of events did not match Applicant's or Applicant's statement to police. He testified Ms. LaGroom would have convicted Applicant with her testimony had she testified at trial.

This Court finds Applicant has failed to meet his burden of proving Mr. Henderson was ineffective for failing to call Mr. Henry Fuller as a witness. This Court finds Mr. Henderson had

nothing in his file to indicate he had ever received information about this witness. Furthermore, Applicant has failed to provide this Court with any information about what Mr. Fuller would testify to at trial. Our Supreme Court has held, "a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial." Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). Bannister further held, the "applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." Id. Here, Applicant has failed to show what Mr. Fuller's testimony would have been at trial and this Court will not speculate as to its contents. As Applicant has failed to meet his burden, this allegation must be dismissed.

This Court finds Applicant has failed to meet his burden of proving Mr. Henderson was ineffective for failing to call Mr. Felicia LaGroom as a witness. This Court finds Mr. Henderson had his private investigator interview Ms. LaGroom and her story did not match up with Applicant's. This Court finds it was not unreasonable for Mr. Henderson to abstain from calling Ms. LaGroom as a witness when he believed her testimony would not have aided Applicant and would have actually hurt his case. See Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding counsel was not ineffective where he had a valid reason for not calling a potential witness to testify as he found the witness had credibility issues and its testimony would not have aided the applicant's case).

Furthermore, Applicant has failed to provide this Court with any information about what Ms. LaGroom would testify to at trial. Our Supreme Court has held, "a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure

to testify at trial." Bannister, 333 S.C. at 303. The "applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." Id. Here, Applicant has failed to show what Mr. LaGroom's testimony would have been at trial and this Court will not speculate as to its contents. As Applicant has failed to meet his burden, this allegation must be dismissed.

Mr. Henderson told Applicant that he couldn't testify because he would go to jail if he testified

Applicant alleged Mr. Henderson was ineffective for telling Applicant he could not testify at trial because he would go to jail if he did testify. Applicant testified he did not testify at trial and did not know he had the right to testify.

Mr. Henderson testified he discussed with Applicant the right to testify and advised him not to risk testifying because of the statement he made to law enforcement.

This Court finds Applicant has failed to meet his burden of proving Mr. Henderson was ineffective for telling Applicant he could not testify. This Court finds Mr. Henderson advised Applicant against testifying, but discussed these rights with him. Furthermore, the trial record reflects the trial judge undertook a thorough colloquy advising Applicant of his right to testify and Applicant responded that he understood the judge's advice and did not have any questions. Tr. 173-175. The trial judge then asked Applicant if he needed more time to discuss his right to testify with Mr. Henderson, and the two conferred for a moment. Tr. 175. After his discussion with Mr. Henderson, Applicant informed the court he would not testify. Tr. 175. This Court finds Mr. Henderson did not give deficient advice, and Applicant was not prejudiced as he was also thoroughly informed of his right to testify by the trial judge. Furthermore, this Court finds Applicant has failed to meet his burden of proving the outcome of his trial would have been different had he testified at trial or had Mr. Henderson given different advice. As Applicant has

failed to meet his burden of proving Mr. Henderson was ineffective in this regard, this allegation must be dismissed.

Mr. Henderson did not raise the conflict of interest Assistant Solicitor Shannon Odom had in trying the case

Applicant alleged Mr. Henderson was deficient for failing to raise to the trial court a conflict of interest issue with Assistant Solicitor Shannon Odom as she used to be an employee of Mr. Henderson's.

Mr. Henderson testified Ms. Odom worked for attorney Billy Garrett while she was in law school. He testified he shares an office with Mr. Garrett. He testified Mr. Garrett primarily does real estate work and Ms. Odom worked exclusively in Mr. Garrett's real estate law department. Mr. Henderson further testified he does not do any real estate work.

Applicant has failed to meet his burden of proving a conflict of interest existed and that Mr. Henderson should have raised this to the trial judge. This Court finds the testimony presented does not show that any conflict of interest existed that would preclude Ms. Odom from prosecuting Applicant. The testimony shows Ms. Odom worked for another attorney in a real estate section and had no shared work with Mr. Henderson while she clerked for Mr. Garrett in law school. Furthermore, the South Carolina judicial directory website indicates Ms. Odom graduated from law school in 2009 and Applicant's alleged grand larceny did not occur until 2010. There is no indication that either Mr. Henderson or Ms. Odom had a conflict of interest in this matter, and Applicant has failed to show the outcome of his trial would have been different had another prosecutor worked on his case. Accordingly, this allegation must be dismissed.

Mr. Henderson failed to request voir dire asking if anyone knew Applicant, and failed to strike Juror 137

Applicant alleged Mr. Henderson was ineffective for failing to request voir dire asking if anyone knew Applicant. He alleged if Mr. Henderson had done so, Juror 137, Patia Thomas,

would have been stricken from the jury because she knew Applicant from previous employment at Chick-Fil-A and did not care for Applicant.

Mr. Henderson testified he never knew about Applicant's prior working relationship with Ms. Thomas. He testified the trial judge asked all members of the jury pool if they knew Applicant and no one stood up. Mr. Henderson testified he always consults his clients on every juror presented during jury selection and Applicant did not indicate there was an issue with Ms. Thomas.

Applicant has failed to meet his burden of proving Mr. Henderson was deficient for failing to request voir dire asking if anyone knew Applicant. The record reflects the trial judge asked the appropriate questions. The trial judge had Applicant stand up, named Applicant by name, and asked the jury pool if anyone was related to Applicant and asked if anyone had close personal or social relationship and no one responded. Tr. 5. The trial judge asked if anyone had any bias toward Applicant and no one responded. Tr. 7. The trial judge asked if anyone could not be fair and impartial and no one responded. Tr. 8. Given the judge's questions, Mr. Henderson was not deficient for failing to ask if any potential juror knew Applicant. Further, it is clear the trial judge asked if any potential juror could not be fair or impartial and had bias against Applicant, indicating that if Ms. Thomas did not care for Applicant enough to affect the outcome of the trial, she would have so indicated. Furthermore, Applicant's apparent silence to Mr. Henderson when Ms. Thomas was presented as a juror casts doubt to his argument that Ms. Thomas would have been stricken from the jury had Mr. Henderson acted differently. This Court finds Applicant has failed to meet his burden of proving Mr. Henderson was deficient where the judge did ask the appropriate voir dire, and there is no evidence to support Applicant's assertion that Ms. Thomas held bias against Applicant. Accordingly, this allegation must be dismissed.

Mr. Henderson failed to timely raise an objection to the court charging the three levels of larceny at the trial. Had counsel done so, the issue would have been preserved for appeal and Applicant would have been successful on appeal in having a judgment of acquittal on the larceny $1,000-$5,000 charge

Applicant alleged Mr. Henderson was ineffective for failing to raise a timely objection to the trial court charging the jury with three levels of larceny (less than $1,000; $1,000 to $5,000; more than $5,000). He alleged Mr. Henderson's failure to do so prevented the issue from being preserved for appeal. Applicant testified there was no evidence the items stolen were worth between $1,000 and $5,000.

Mr. Henderson testified the State alleged the items' worth totaled $20,000 based on the victim's valuation. He testified the items were scrapped by Applicant and the scrap receipts totaled $8000. Mr. Henderson testified the values presented were essentially the $20,000 purchase price of several pieces of metal, and the $800 scrap price the scrapyard paid Applicant for the metal. He testified the victim's valuation was questionable as he claimed valuable items were simply lying in his field. Mr. Henderson testified they had a conference in the judge's chambers concerning the jury charges, and he forgot to object on the record.

This Court finds Mr. Henderson was deficient for failing to timely object to the jury charge of grand larceny $1,000 to $5,000. This Court finds the Court of Appeals ruled this issue was not preserved because of Mr. Henderson's failure to object.

This Court finds, however, Applicant was not prejudiced by Mr. Henderson's failure in this regard. This Court finds the trial judge's jury charge was correct and his reasoning for giving the charge was also correct. After the charges were given, Mr. Henderson untimely objected to the middle larceny amount arguing there was no evidence to support a valuation between those amounts. Tr. 216-217. The trial judge stated the valuation amount is a question for the jury and the jury can determine they do not believe the items' worth to be $800 as the defense argued, but

they also do not believe the items to be worth $20,000 as the State argued. Tr. 218. While Mr. Henderson made a strong argument that his trial strategy was to discredit the victim by showing he was grossly padding the value of restitution by including metal that clearly could not have been taken by the applicant (a strategy that was clearly successful given the jury's decision and the amount of restitution awarded by the judge), the trial judge was still correct in charging the grand larceny $1,000 to $5,000 amount as the value remained a question of fact for the jury. Thus, Mr. Henderson's failure to object was not prejudicial to the applicant because the trial judge was going to overrule the objection. Additionally, even if the record of Mr. Henderson's objection had been properly made so that it could have been addressed on appeal, the argument would not have been successful on appeal. Applicant has failed to meet his burden of proving Mr. Henderson's failure to object affected the outcome of his case, and thus he has failed to prove he was prejudiced. As Mr. Henderson's conduct did not result in prejudice to Applicant, he was not ineffective and this allegation must be dismissed.

IV. CONCLUSION

Based on the foregoing facts, the Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Applicant failed to demonstrate that his counsels' performances were unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's 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, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

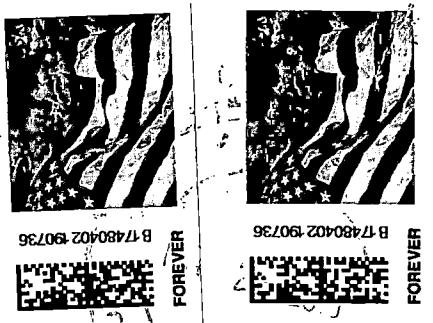
1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 17 day of April, 2018.

J. MARK HAYES, II
Presiding Judge
Eighth Judicial Circuit

Greenwood, South Carolina

MAC | VANCE ATTORNEYS, LLC
PO Box 5501
West Columbia, SC
29171



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