

Kristy Grafton Goldberg, LLC

ATTORNEY AT LAW

January 1, 2016

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

RE: Elbert Wallace, SCDC # 264322, vs. State of South Carolina
Appeal of Case No. 2013-CP-40-07559

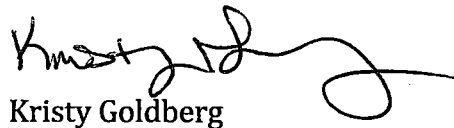
Dear Mr. Shearouse,

Enclosed for filing is a Notice of Appeal in the above referenced case. Also enclosed are a certificate of service and a copy of the original court order which is to be challenged on appeal. I would appreciate it if you could file the Notice of Appeal and mail a date-stamped copy back to me in the enclosed pre-stamped envelope.

By copy of this letter I am informing the Office of Appellate Defense of this Appeal so that they may begin representation of Mr. Wallace, as I was appointed to represent him in this PCR action. I am also hereby requesting that Appellate Defense obtain a copy of the court transcript within the time required by this court.

Please let me know if you have any questions or concerns regarding this matter.

Respectfully,


Kristy Goldberg

CC: Clay Mitchell
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549

RECEIVED

JAN 13 2016

S.C. SUPREME COURT

Elbert Wallace, SCDC # 264322
Lieber Correctional Institution
136 Wilborn Avenue
P.O. Box 205
Ridgeville, South Carolina 29472

Jeanette McBride, Clerk of Court
1701 Main Street, Room 205
Post office Box 2766
Columbia, South Carolina 29202

Office of Appellate Defense
Chief Appellate Defender - Robert Dudek
PO Box 11433
Columbia, SC 29211-1433

RECEIVED

JAN 13 2016

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2013-CP-40-07559

RECEIVED

JAN 13 2016

S.C. SUPREME COURT

Elbert Wallace, SCDC # 264322, Appellant

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Applicant Elbert Wallace hereby appeals from the Order of the Honorable G. Thomas Cooper presiding Judge for the 5th Judicial Circuit, filed December 29, 2015 and received by counsel for the Applicant on January 8, 2016 in the matter of Elbert Wallace v. State of South Carolina, Case No. 2013-CP-40-07559.

January 11, 2016


Kristy Goldberg
Attorney for Plaintiff

Law Office of Kristy Goldberg, LLC.
1720 Main Street, Suite 303
Columbia, SC 29201
Phone (803) 667-6633
kristy@kristygoldberglaw.com

Other Counsel of Record:
Assistant Attorney General, Clay Mitchell
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2013-CP-40-07559

Elbert Wallace, SCDC # 264322, Appellant

v.

State of South Carolina, Respondent.

PROOF OF SERVICE

Personally appeared before me, Kristy Goldberg, Esquire, who being duly sworn, deposes
and states:

She is the counsel of record for Applicant;
Service by mail is proper in this instance; and
She has served the NOTICE OF APPEAL on the following party on January 11, 2016 by
depositing one copy in the U.S. Mail, postage prepaid:

Assistant Attorney General, Clay Mitchell
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211



Kristy Goldberg
Attorney for Plaintiff

Law Office of Kristy Goldberg, LLC.

RECEIVED

JAN 13 2016

S.C. SUPREME COURT

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Other Counsel of Record:
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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: **2013CP4007559**

Elbert #264322 Wallace

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled |
|---|---------------------------------------|--------------------------------|
| | | \$ |
| | | \$ |
| | | \$ |

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 31 day of DEC, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Elbert #264322 Wallace

Kristy Grafton Goldberg

Megan Harrigan Jameson

James Clayton Mitchell III

Elbert #264322 Wallace

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeannette Williams

RICHLAND COUNTY
FILED
2013 DEC 29 AM 11:30
JEANNETTE WILLIAMS
CLERK OF COURT

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Elbert Wallace, #264322,)
)
Applicant,)

Docket Number: 2013-CP-40-7559

vs.)

ORDER OF DISMISSAL

State of South Carolina,)
)
Respondent.)

FILED
RICHLAND COUNTY
JANET W. BRIDE
CLERK
APR 14 2015
5:50 PM
JANET W. BRIDE
& ASSOCIATES
P.C.

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed December 16, 2013. Respondent made its Return on April 7, 2014, requesting an evidentiary hearing be convened. Kristy G. Goldberg, Esquire, was appointed by the Richland County Clerk of Court. Application filed an amended application on June 9, 2015, a second on July 6, 2015, and a third on July 15, 2015. An evidentiary hearing was held of July 15, 2015, at the Richland County Courthouse. Applicant was present and represented by Counsel Goldberg. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent.

At the PCR hearing, Applicant testified on his own behalf. Also testifying was Richland County Assistant Solicitor Joanna A. McDuffie, Applicant's trial counsel Tivis C. Sutherland, IV, Esquire, Grover Derrick, Sr., and Vernell Wallace. The Court had before it the Richland County Clerk of Court records, Applicant's South Carolina Department of Corrections records, the PCR application, the Return, the trial transcript, and the appellate records.

I. PROCEDURAL HISTORY

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

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SCANNED

the March 2009 term of the Richland County Grand Jury for Burglary in the First Degree (2009-GS-40-0988), Armed Robbery (2009-GS-40-0989), Assault and Battery with Intent to Kill (2009-GS-40-0997), Burglary in the First Degree (2009-GS-40-1225), Armed Robbery (2009-GS-40-1228), and Murder (2009-GS-40-1229). He was also indicted during the April 2010 term for Burglary in the Second Degree (2010-GS-40-1229). Applicant was represented by Counsel Sutherland. On July 18-21, 2011, Applicant proceeded to jury trial before the Honorable Clifton B. Newman, where he was convicted as indicted. Judge Newman sentenced Applicant to life without the possibility of parole pursuant to S.C. Code Ann. § 17-25-45.

A notice of appeal was filed on Applicant's behalf and an appeal was perfected by Appellate Defender Susan B. Hackett. Following briefing, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences. The Remittitur was sent on May 31, 2013

In this action, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel:
 - a. Failure to object to jurors' answers during jury qualifications;
 - b. Failure to request a mistrial when a juror who knew the victim's family was allowed to serve on the jury, failure to properly preserve the argument for appeal, and failure to properly preserve and use his peremptory challenges;
 - c. Failure to assert a Batson motion;
 - d. Failure to object to testimony regarding a K-9 track;
 - e. Failure to call witnesses;
2. Ineffective assistance of appellate counsel:
 - a. Failure to challenge Judge Newman's ruling that the victim's autopsy report was admissible; and
 - b. Failure to raise the issue of improper joinder.

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

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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 transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the appellate records, and the legal

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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.

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. This Court also finds Vernell Wallace's testimony to be not credible. These credibility findings have been applied to the Court's findings and conclusions set forth below.

Overwhelming Evidence of Guilt

This Court finds Applicant can show no prejudice in regards to any of the allegations of ineffectiveness because there is clear overwhelming evidence of his guilt. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), cert. denied, 535 U.S. 1114, 122 S.Ct. 2332, 153 L.Ed.2d 162 (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of the defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt); cf. Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (holding respondent failed to prove prejudice from trial counsel's failure to request an alibi charge where there was overwhelming evidence of guilt). "There must be a substantial likelihood of a different result." Harrington v. Richter, 562 U.S. 86, 90, 131 S. Ct. 770, 779 (2011). This Court also finds that a harmless error analysis would apply to the determination of whether Applicant could meet his burden in proving appellate counsel was ineffective.

Notably, Applicant was identified by Carolyn Webb as the person who forced his way into her home, beat her, stabbed her, and robbed her. She had seen Applicant two times earlier the preceding day. She remembered Applicant's name as something similar to Albert and the last name beginning with a W. She recounted that Applicant returned to her residence later that day



around 6:00pm soliciting money. Webb identified Applicant from a photo lineup the day after her attack and positively identified him at trial. Applicant blood was found at the Christ Lutheran Church which is in close proximity to Webb's home. The same night, Linda Derrick was beaten and murdered. Blood and blood stains were found throughout her home. DNA testing concluded that several of the blood stains contained Applicant's blood. Derrick's home was also in close proximity to Webb's home and to Christ Lutheran Church. Derrick's car was found abandoned. DNA testing was conducted on several blood stains found on the car door panel and steering wheel of the car. The DNA testing determined the blood was Applicant's.

The afternoon after Derrick was murdered, Applicant pawned her gold ring and necklace. Applicant was recorded on video. Applicant also signed a pawn receipt while at the shop and provided his identification to the shop employee. Furthermore, a blood stain was found on Applicant's shoes which contained Derrick's DNA. This Court also notes the jury was out for approximately 1 hour 36 minutes. See Dugas v. Coplan, 428 F.3d 317, 335 n.28 (1st Cir. 2005) (The court looked not only to the strength of inculpatory evidence, but also to the brevity of the jury's deliberations). Based on the foregoing, this Court finds there is clear evidence of overwhelming guilt. As a result, Applicant can show no prejudice from any of the allegations raised in his PCR application as no deficiency on behalf of trial counsel could have reasonably changed the outcome of trial

Ineffective Assistance of Trial Counsel

Failure to object to jurors' answers during jury qualifications

Applicant alleges Counsel Sutherland was ineffective in failing to object to jurors' comments during qualification. Judge Newman asked the potential jury panel whether anyone has been the victim of a violent crime. Four (4) jurors answered that they had been victims of

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crimes such as murder, armed robbery, and burglary. (Trial Tr. p. 77-80). Judge Newman then asked the panel whether any family members had been the victim of violent crimes. Three (3) jurors responded that their family had experiences with crimes such as armed robbery, attempted murder, and murder.

This Court finds Applicant has failed to meet his burden. As an initial point, Applicant has failed to provide this Court with any precedent or applicable law to show that conducting jury qualification in this manner is not proper. Nevertheless, Applicant has not proven deficiency. Counsel Sutherland acted within the professional norms in not challenging the manner of jury qualification. Further, Applicant has failed to show how the result of the trial would have been different if jury qualification was conducted a different way. This Court notes that the jurors in this case affirmed and reaffirmed their duties to remain fair and impartial. An issue arose later during the trial where Judge Newman thoroughly questioned the jurors on whether they would remain fair and impartial. All jurors stated that they would remain fair and impartial after Judge Newman's questioning. This allegation is denied and dismissed.

Failure to request a mistrial when a juror who knew the victim's family was allowed to serve on the jury, failure to properly preserve the argument for appeal, and failure to properly preserve and use his peremptory challenges

Applicant next alleges Counsel Sutherland was ineffective in his handling of jury selection. Specifically, Applicant argues Counsel Sutherland should not have allowed a juror who stated that he knew the victim's family to remain on the jury. Juror number 53 responded to Judge Newman's question of whether any jurors knew any potential witnesses that he did know potential witness Grover Derrick¹. (Trial Tr. p. 96, line 9 – p. 97, line 2). Juror 53 was then

¹ Grover Derrick was the victim, Linda Derrick's, former husband. At the hearing, Grover Derrick testified that he worked with Juror 53 at SCE&G for a number of years but that the juror had never met Linda. He also testified that he did not have a personal or social relationship with Juror 53. He testified that he and Linda had been divorced for many years prior to her murder.

brought before the court during jury selection. Counsel Sutherland challenged the juror for cause. Judge Newman then inquired into Juror 53's ability to be fair and impartial and denied the challenge. At the hearing, Counsel Sutherland testified that he believed Judge Newman would strike Juror 53 for cause because he knew the victim's family.

This Court finds Counsel Sutherland was not ineffective in failing to move for a mistrial when Juror 53 was seated. Applicant also failed to meet his burden in proving Counsel Sutherland was ineffective in failing to properly use his peremptory challenges. A defendant has a constitutional right to be tried by competent jurors, which implies a tribunal both impartial and mentally competent to afford a hearing. U.S.C.A. Const.Amend. 6. State v. Bell, 374 S.C. 136, 646 S.E.2d 888 (Ct. App. 2007). "[A] criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." Palacio v. State, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999). "To protect both parties' right to an impartial jury, the trial judge must ask potential jurors whether they are aware of any bias or prejudice against a party." State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001). A decision on whether to dismiss a juror and replace her with an alternate is within the sound discretion of the trial court, and such decision will not be reversed on appeal absent an abuse of discretion. Id at 147, 894. Granting a mistrial is a serious and extreme measure which should be taken only where an incident is so grievous that the prejudice can be removed no other way. State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999). This Court finds Applicant failed to meet his burden in proving that Counsel Sutherland was ineffective in any regard. Counsel Sutherland's conduct was within the reasonable professional norms in using his peremptory challenges. He also properly moved to have Juror 53 struck due to his relationship with the victim's family. Judge Newman took note of the argument and allowed the juror to be seated over objection.

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This Court finds a motion for a mistrial would have been unsuccessful because the juror swore that he would remain fair and impartial. Importantly, Applicant has failed to produce any evidence to the contrary. Judge Newman was also careful to remind the jury of its obligation to deliberate solely on the evidence presented. In addition as noted above, there is overwhelming evidence of Applicant's guilt. This allegation is denied and dismissed with prejudice.

Failure to assert a Batson motion

Applicant withdrew this allegation at the hearing.

Failure to object to testimony regarding a K-9 track

Next, Applicant alleges Counsel Sutherland was ineffective in failing to object to Deputy Chris Alexander's testimony regarding a K-9 track. Deputy Alexander testified that he assisted with the K-9 track as a backup unit. (Trial Tr. p. 282, lines 3-5). He testified he observed the K-9 picking up a track and leading them to a nearby church, Christ Lutheran. (Trial Tr. p. 283, lines 5-9). He then testified the K-9 was unable to reestablish the track. (Trial Tr. p. 284, lines 23-24).

This Court finds Applicant failed to meet his burden in proving Counsel Sutherland was deficient. The testimony given by Deputy Alexander was not improper expert testimony as Applicant argues. Deputy Alexander was not offered as an expert witness. The testimony he gave was as to his direct observations of what happened that night. He was not the dog's handler nor was he trained in conducting the track. It is clear from the testimony and record that Counsel Sutherland's strategy in handling Deputy Alexander was to question his knowledge and recollection of his involvement. Counsel Sutherland emphasized on cross examination and in closing argument that Deputy Alexander did not have any personal recollection of what happened that night and was merely reciting what was written in another deputy's report. (Trial Tr. p. 290, line 17-25; p. 1014, line 22 – p. 1015, line 7). Specifically, in closing he argues that



the State did not present the deputy who wrote the report because they did not want the jury to hear Webb's statement that she was 80% sure the assailant was the same man who appeared at her door earlier that day. This is consistent with what Counsel Sutherland testified to at the hearing in that his major focus on his cross examination of Deputy Alexander was to get this confidence assessment before the jury. This was a reasonable strategy.

Applicant has failed to show how he was prejudiced by this alleged deficiency. The State argued Applicant first attacked Carolyn Webb, then went to the Christ Lutheran Church, and then went to Linda Derrick's house where he brutally beat her and murdered her. The dog tracking evidence tied the Webb and church incident together, but the break in at the church would have been discovered inevitably, along with the blood drops that contained Applicant's DNA. This Court also notes that Applicant has not presented the Court with any evidence to show that the dog or its handler would *not* have been qualified to give this challenged testimony. Applicant cannot prove prejudice for a number of reasons including that there exists overwhelming evidence of his guilt.

Failure to call witnesses

Applicant alleges Counsel Sutherland was ineffective in failing to call witnesses in his case in chief. Specifically, Applicant argues Counsel Sutherland was ineffective in failing to call Applicant's sister, Vernell Wallace (Vernell). Counsel Sutherland testified that he decided not to call her as a witness because he did not believe she would be a credible witness. He noted that Vernell was interviewed by his investigator in preparation for the trial. He further testified that Applicant attempted to explain that he cut his pinky the day before and that he wandered into the crime scene. He was also told by Applicant that he took Linda Derrick's car for a joyride. Counsel Sutherland also testified that Vernell said she was sleeping that night.

At the hearing, Vernell testified that Applicant was living with her at the time of the incidents. Vernell emphasized that she remembered the events of that day vividly because Applicant drove her to pick up her tax return that day. She recalled that she and Applicant returned between 8:30-9:00pm. She testified that she took Nyquil and went to sleep that night. She noted that she woke up through the night and did not notice Applicant leave the house. Applicant testified that he never left Vernell's home that night.

Criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (internal citations omitted). This Court finds Counsel Sutherland's testimony on the issue to be credible and persuasive. This Court finds Vernell's testimony to be not credible and not believable. Applicant has failed to present this Court with any credible evidence of an alibi. Notably, Applicant has given various versions of what happened that night. Applicant's testimony is not credible in the slightest. Furthermore, Vernell's testimony is especially questionable because she stated she took medicine to help her sleep and was unable to provide testimony that would amount to an affirmative alibi. Applicant has also failed to show any resulting prejudice. Therefore, this allegation is denied and dismissed with prejudice.

Ineffective Assistance of Appellate Counsel

Applicant alleges Counsel Hackett was ineffective for failing to raise two issues. Counsel Hackett raised the issue of whether Judge Newman erred in refusing to grant a mistrial when a number of jurors were allegedly harassed. Applicant's appeal was affirmed in a per curiam unpublished opinion. This Court will address each issue in turn.

Failure to challenge Judge Newman's ruling that the victim's autopsy report was admissible

Applicant alleges Counsel Hackett was ineffective for failing to raise the issue of the admissibility of the victim's autopsy report. Applicant argues if raised, the appellate courts would have likely reversed the conviction and remanded the case for a new trial. This Court finds otherwise and finds Applicant failed to prove Counsel Hackett was deficient or any resulting prejudice. Applicant argues it was error to allow the autopsy report to come in through Coroner Gary Watts. Dr. Clay Nichols, the chief medical examiner for Richland County at the time of the incident, performed and authored the autopsy was not available to testify.

This Court finds the case of State v. Cutro, 365 S.C. 366, 618 S.E.2d 890 (2005) is on point. The court in Cutro held that autopsy reports are not hearsay pursuant to Rule 803(8). The court reasoned that Rule 803 exempts from hearsay records and reports if there is a duty to report.

The court also noted:

subsection (9) of Rule 803 'specifically exempts from hearsay records of vital statistics, including 'reports . . . of . . . death . . . if the report thereof was made to a public office pursuant to requirements of law.' Autopsy reports are required to be kept by the medical examiner's office. S.C. Code Ann. § 17-5-280 (2003). Accordingly, an autopsy report is not inadmissible hearsay.

State v. Cutro, 365 S.C. at 378, 618 S.E.2d at 896.

Applicant argues Judge Newman erred in allowing the coroner to testify concerning the pathologist's autopsy report. Autopsy reports are mandated by statute and kept as a public record. Here, South Carolina Code Ann. § 17-7-10 (1993) requires an autopsy be performed to ascertain the cause of death in cases like this. Section 17-5-280 mandates that the medical examiner keep all autopsy reports. Thus, the autopsy report is not hearsay pursuant to Rule 803(8) and (9). Counsel Hackett cannot be held to be ineffective for failing to raise this issue.

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This Court further finds that the victim's cause of death was never at issue. It was clear the victim was murdered. Even assuming any deficiency with regards to the autopsy report's admission, there is no question that the death certificate was properly admitted. Applicant has failed to show that this issue would have required reversal. This Court finds it is not meritorious. Therefore, Applicant has failed to present the Court with any evidence of prejudice.

Failure to raise the issue of improper joinder

Finally, Applicant alleges Counsel Hackett was ineffective for failing to raise the issue of joinder on appeal. At trial, Counsel Sutherland argued the cases should not be joined and should be severed and trial separately. He argued that they were three separate distinctive cases. Judge Newman ruled that the incidents were "related in kind, place and character involving the closely connected transaction of offenses." (Trial Tr. p. 67, lines 18-25).

"Charges can be joined in the same indictment and tried together where they 1) arise out of a single chain of circumstances; 2) are proved by the same evidence, 3) are of the same general nature; and 4) no real right of the defendant has been prejudiced." State v. Beekman, 405 S.C. 225, 229, 746 S.E.2d 483, 486 (2013). An abuse of discretion standard applies to a trial judge's discretion to deny a motion for severance. State v. Beekman, 405 S.C. at 229, 746 S.E.2d at 487. This Court finds Applicant has failed to prove that Counsel Hackett was deficient. Judge Newman was sure to research the issue before ruling as he quotes the standard from State v. Rice² in making his ruling. This Court concurs with Judge Newman in that the incidents were related in kind, place, and character in a closely connected transaction of offenses because the evidence shows Applicant went from Webb's home to Christ Lutheran Church and then to Derrick's home all within a few hours. This Court finds the cases were all properly joined and tried together.

² 368 S.C. 610, 629 S.E.2d 393 (Ct. App. 2006).

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Applicant cannot show that this issue would have been successful on appeal and therefore cannot prove prejudice.

All Other Allegations

As to any and all allegations that were raised in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate counsels' performance was 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), SCRCF, 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.

67-2-13

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 23 day of December, 2015.



G. THOMAS COOPER, JR.
Presiding Judge

COLUMBIA, South Carolina