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RECEIVED

AUG 24 2018

S.C. SUPREME COURT

August 22, 2018

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

RE: Robert J. Phipps, #334249
Lower Court Case No: 2014-CP-42-2049

Please find enclosed for filing:

- Notice of Appeal
- Proof of Service of the Notice of Appeal
- Copy of the final Order being appealed

If you have questions or concerns, please do not hesitate to contact me.

Sincerely,

s/ Brandt Rucker

Brandt Rucker, Esq.

CC:

Alan Wilson, Esq.
S.C. Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

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AUG 24 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Circuit Court

The Honorable Paul M. Burch, Circuit Court Judge

Case No. 2014-CP-42-2049

Robert J. Phipps, #334249,

Appellant,

v.

The State of South Carolina,

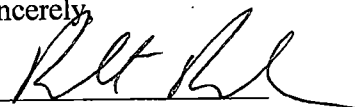
Appellant.

Notice of Appeal

Robert J. Phipps appeals the order of the Honorable Paul M. Burch, dated May 24, 2017.
Appellant received written notice of entry of this order on August 14, 2018.

August 16, 2018

Sincerely,



Brandt Rucker
128 Millport Circle, Suite 200
Greenville, South Carolina 29607
(864) 271-9925
Attorney for Appellant

cc:
Other Counsel of Record:

Alan Wilson, Esq.
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211

RECEIVED

AUG 24 2018

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Circuit Court

The Honorable Paul M. Burch., Family Court Judge

Case No. 2014-CP-42-2049

Robert J. Phipps, #334249

Appellant,

v.

State of South Carolina,

Respondent.

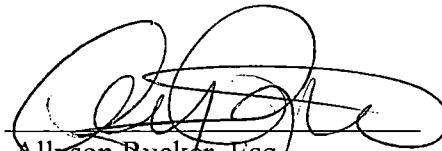
PROOF OF SERVICE

I certify that I have served the Notice of Appeal in this matter by depositing a copy of it in the United States Mail, postage prepaid, on August 16, 2018, addressed to:

Alan Wilson, Esq.
S.C. Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

And on August 22, 2018, addressed to:

Hope Blakely,
Clerk of Court for Spartanburg County
PO Box 3483
Spartanburg, SC 29304



Allyson Rucker, Esq.
Brandt Rucker, Esq.
The Rucker Law Firm, LLC
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Greenville, SC 29607
(864) 271-9925
Attorney(s) for Appellant

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Robert J. Phipps, #334249)

Case No. 2014-CP-42-2049

Applicant,)

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

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H. HOPE ELAURLEY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed May 19, 2014, and amended application filed October 3, 2014. Respondent made a Return on October 27, 2014, and an amended return and motion for more definite statement on July 22, 2016. The Court convened an evidentiary hearing into the matter on September 19, 2016, at the Spartanburg County Courthouse. Applicant was present at the hearing and represented by J. Brandt Rucker, Esquire. Ruston W. Neely, Esquire, of the South Carolina Attorney General’s Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant’s trial counsel, N. Douglas Brannon, Esquire (“Trial Counsel”), also testified. The Court had before it a copy of the trial transcript, the records of the Spartanburg County Clerk of Court regarding the subject conviction, Applicant’s records from the South Carolina Department of Corrections, the pleadings in this matter, the record on appeal, and the exhibits introduced at the hearing. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the June

2007 term of the Spartanburg County Grand Jury for murder (2007-GS-42-2902). N. Douglas Brannon, Esquire, and Brac Turnipseed, Esquire,¹ represented Applicant. Applicant was tried before the Honorable Roger L. Couch and a jury April 13-16, 2009. On April 16, 2009, the jury found Applicant guilty as indicted. Judge Couch sentenced Applicant to imprisonment for life.

A timely notice of appeal and brief was filed on Applicant's behalf. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Phipps, Op. No. 2012-UP-018 (S.C. Ct. App. filed January 25, 2012). A Petition for Writ of Certiorari was filed to the South Carolina Supreme Court, which was denied on August 8, 2013. The Remittitur was returned on August 12, 2013.

II. ALLEGATIONS

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

1. Ineffective assistance of trial counsel; specifically
 - a. Counsel presented a significant obstacle in preparing adequate defense.
 - b. Failure to afford the representation within the range of competence, demanded of attorneys in criminal cases.
 - c. If defense counsels are unprepared to try a case they are also inadequately prepared to advise their client to testify in a case that is calling for a substantial sentence.
 - d. Counsel did not articulate any strategy for not challenging the state on indictments that [were] over two years old.
 - e. Counsel failed to oppose the State's case throughout specific points in the trial and at the sentence proceeding.
 - f. Counsel failed to make a motion when the trial court failed to charge the jury on a lesser included offense.
 - g. Counsel failed to make the required contemporaneous objection, to the court, as to

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¹ Mr. Turnipseed is now deceased.

require the trial court to order for an competency evaluation, and criminal responsibility.

- h. "for my trial counsel's unprofessional errors, . . . the outcome of my trial would have been different. The cumulative effect of which I was deprived the level of legal assistance guaranteed by the Sixth Amendment to the United States Constitution"

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III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court reviewed the record in its entirety and heard the testimony and arguments presented at the evidentiary hearing. The Court further had the opportunity to observe each witness who testified at the hearing, and to closely appraise his individual credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

IV. SUMMARY OF TESTIMONY

Applicant testified the State offered him a plea deal of thirty years. Applicant stated Trial Counsel was hired a matter of months before trial and he met with counsel about three times. Applicant stated Trial Counsel discussed the discovery and evidence the State had provided. Applicant testified he wanted a trial eventually, but wanted a continuance because DNA evidence was given to Trial Counsel within a month before trial. Applicant stated he wanted a team of experts to review the DNA evidence and have further investigation done. Applicant stated Trial Counsel told him the DNA evidence couldn't be used against him. Applicant also testified Trial Counsel told him the strategy was to attack missing evidence, specifically a tape. Applicant stated he told Trial Counsel of potential third parties who admitted to the crime. Applicant admitted the potential suspects were never identified and he knew of their existence only from conversations with other inmates in the county jail. Applicant stated Trial Counsel

should have asked for a mental evaluation for Applicant because of his drug use. Applicant stated Trial Counsel encouraged him to testify.

Trial Counsel testified his trial strategy was based around the version of events that Applicant relayed to him during their meetings. Namely, there was a third unidentified party, who went by the alias "New York." New York got into a fight with the deceased, at which point Applicant left the scene. Trial Counsel testified that the fingerprint found at the scene of the crime was consistent with Applicant's story and testimony. Applicant admitted he was at the scene of the crime. Trial Counsel believed the forensic evidence reinforced the story Applicant presented and was not harmful to the defense strategy. Trial Counsel testified there was no discussion between himself and Applicant about a continuance in order to hire a team of DNA experts, nor did he believe such a team would have been helpful. Trial Counsel also credibly testified he never encouraged Applicant to testify. Applicant's position from the beginning of Trial Counsel's representation was always that Applicant wanted to tell his side of the story.

A. **Ineffective Assistance of Trial Counsel**

In a PCR action, 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, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386

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S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Failure to Challenge Indictments

Applicant alleges Trial Counsel was ineffective for failing to challenge his indictment because it was two years old. This Court finds Applicant has failed to prove either deficiency or prejudice with respect to this allegation.

An indictment is a "notice document." State v. Tumbleston, 376 S.C. 90, 95, 654 S.E.2d 849, 852 (Ct. App. 2007) (citing S.C. Const. art. I, § 11; S.C. Code Ann. § 17-19-10 (2003)). An indictment is sufficient if "it contains the necessary elements of the offense intended to be charged and sufficiently appraises the defendant of what he must be prepared to meet." State v. Ham, 259 S.C. 118, 129, 191 S.E.2d 13, 17 (1972) (citing State v. McIntire, 221 S.C. 504, 509, 71 S.E.2d 410, 412 (1952) ("The general rule on this question is that the offense must be so described that the accused may know how to answer the charge, the court what judgment to

pronounce, and conviction or acquittal thereon may be pleaded in bar to any subsequent prosecution.”).

Applicant was indicted in June 2007 and tried less than two years later in April 2009 on a charge of murder. This Court finds Applicant has set forth no evidence to show that Trial Counsel was deficient for failing to challenge the indictment or that he had any basis for doing so.

Regardless, this Court finds Applicant has failed to show there is a reasonable probability that the challenge would have been successful. South Carolina courts have long held that there is no strict limit to the time by which indictments are brought. See State v. Wade, 306 S.C. 79, 85, 409 S.E.2d 780, 783 (1991) (noting “that [South Carolina] [is] not alone in approving of lengthy indictment periods when the circumstances of the case demand it.” (citing United States v. Roman, 728 F.2d 846 (7th Cir.1984) (eleven year and five month indictment period approved); People v. Patrick, 38 Ill.2d 255, 230 N.E.2d 843 (1967) (two years, twenty days approved); Waitt v. Commonwealth, 207 Va. 230, 148 S.E.2d 805 (1966) (sixteen months approved))).

Applicant has failed to carry his burden to prove Trial Counsel’s failure to challenge the indictment was deficient or that such deficiency prejudiced him. Accordingly, this allegation is denied and dismissed.

Failure to Prepare or Investigate

This Court finds Applicant made no showing that Trial Counsel's preparation fell below an objective standard of reasonableness and has therefore failed to overcome the presumption that Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. See Strickland v. Washington, 466 U.S. 668, 690 (1984). Counsel had a duty to conduct an investigation that was reasonable under the circumstances.

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Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011) (citing Daniels v. State, 676 S.E.2d 13 (Ga. 2009)). In addition, failure to conduct an independent investigation is not *per se* ineffective assistance of counsel, especially where an investigation would not have uncovered any helpful information. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998).

Here, Trial Counsel reviewed all discovery in Applicant's case and went over that discovery with Applicant. Trial Counsel testified that he was hired by Applicant's family to take Applicant's case to trial. Applicant testified that he met with Trial Counsel three or so times for over an hour and went over discovery and potential trial arguments and defenses. This Court finds Trial Counsel conducted a reasonable investigation under the circumstances, and Applicant has failed to satisfy his burden of proving any deficiency as to this allegation.

Furthermore, Applicant presented no evidence that he was prejudiced by the alleged failure to Counsel to prepare for trial. See Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (holding PCR applicant was not entitled to relief where he failed to show how counsel's lack of preparation prejudiced him); See also Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (holding, where applicant alleged counsel was ineffective for failing to call certain witnesses, applicant's "mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice."). Applicant has presented absolutely no evidence of what information Counsel failed to uncover or what defense was not pursued. Therefore, Applicant has failed to prove prejudice with respect to this allegation. Because Applicant has failed to demonstrate either deficiency or prejudice, this allegation is denied and dismissed.

Failure to Move for Continuance

Applicant has failed to show Counsel was deficient for failing to seek a continuance. Applicant has presented no evidence to show that Trial Counsel had any basis to move for a continuance. Trial Counsel had over a month to prepare and received discovery shortly after taking Applicant's case. Trial Counsel reviewed that discovery and discussed it with Applicant. He also discussed trial strategy and any available defenses and prepared Applicant for trial. Trial Counsel credibly testified he understood the short time frame to prepare for trial when he was retained to represent the Applicant and that he adequately prepared for trial during that time frame.

Applicant has made no showing that Trial Counsel's failure to request a continuance prejudiced him because he has failed to show there was a reasonable probability that a continuance would have been granted or changed the outcome of the trial. Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) ("Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial.").

Failure to Obtain DNA Expert

Applicant likewise failed to show either deficiency or prejudice with respect to this allegation. Trial Counsel testified he did not believe there was a need to hire a DNA expert to counter the State's expert witness. He testified the DNA evidence that the State presented did not contradict his strategy of presenting his client's story to the jury. Trial Counsel further testified he never told Applicant that DNA experts were not available due to lack of funding and never discussed opposing DNA expert witnesses with Applicant. Therefore, Applicant has failed to show that Trial Counsel was deficient for failing to present or obtain an expert. Likewise,

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Applicant presented no expert or other evidence at the PCR hearing to demonstrate that he was prejudiced by Counsel's decision not to present or obtain an expert. See Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence." (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995))).

Failure to Investigate Third Party Guilt

Applicant presented no evidence that Trial Counsel "failed to investigate possible third party guilt. To the contrary, Trial Counsel testified and the record reflects that the entire strategy or theory of the case was that someone other than Applicant was responsible for the murder. In fact, the alleged third party, New York, was a key part of the trial and closing argument by Trial Counsel. Therefore, Applicant has presented no evidence to show either deficiency or prejudice with respect to this allegation and it is therefore denied and dismissed.

Failure to Request a Jury Charge on a Lesser Included Offense

To mitigate a charge of murder to the offense of voluntary manslaughter, a defendant must show that the killing occurred "in sudden heat of passion upon sufficient legal provocation," Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000), which "must be such as would render the mind of an ordinary person incapable of cool reflection, and produce . . . 'an uncontrollable impulse to do violence.'" State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993). Applicant's testimony at trial, which mirrored his discussions with Trial Counsel, was his complete innocence and lack of involvement with the murder. Accordingly, Trial Counsel moved forward with the strategy to present Applicant's story as the truth. Based on this strategy, trial counsel presented no mitigating evidence. See Strickland v. Washington, 466 U.S. 668, 691, 104

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S. Ct. 2052, 2066, 80 L. Ed. 2d 674 (1984) (“The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.”).

At the evidentiary hearing, the only potential mitigation evidence offered by the Applicant was his intoxicated state at the alleged time of the incident. PCR counsel correctly mentioned that voluntary intoxication is not a defense in South Carolina. State v. Vaughn, 268 S.C. 119, 125, 232 S.E.2d 328, 330–31 (1977) (“We adopt the rule that voluntary intoxication, where it has not produced permanent insanity, is never an excuse for or a defense to crime, regardless of whether the intent involved be general or specific. Reason requires that a man who voluntarily renders himself intoxicated be no less responsible for his acts while in such condition.”). Therefore, no evidence was presented at trial to mitigate the charge from murder to voluntary or involuntary manslaughter. Furthermore, Trial Counsel testified there was no way to argue for a lesser included without weakening his argument for complete innocence. Applicant provided no valid explanation how any lesser included offense could have been charged. Accordingly, Applicant has failed to prove either deficiency or prejudice with respect to this allegation. Nor has Applicant shown there is a reasonable probability he would have been convicted of the lesser included offense had the charge been given. Therefore, this allegation is denied and dismissed.

Failure to Obtain Competency Evaluation

Applicant presented no evidence that he lacked competency at the time of trial. Applicant testified he had a serious drug addiction that affected his mental capacity. However, Trial Counsel testified Applicant had been in jail for a number of months, providing plenty of time for

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Applicant to become sober. Trial Counsel likewise testified he was never concerned with Applicant's mental capacity. He felt Applicant understand his questions and participated in his own defense and preparation for trial and has therefore failed to demonstrate that his competency was in question. Applicant has therefore failed to overcome the presumption that "counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. 668, 690 (1984).

Applicant has also failed to present evidence that he was prejudiced by the alleged deficiency. Prior to Applicant's decision to testify, the trial judge reviewed Applicant's rights and potential dangers of testifying at trial with him and was satisfied with his responses. Applicant did not seek an evaluation as part of this action and has not presented any testimony to show that he lacked the ability to participate in his defense. Therefore, Applicant's mere speculation that he would have been found incompetent is insufficient to show prejudice. See Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (holding, applicant's "mere speculation what [a] witness['] testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice.").

B. All Other Allegations

As to any and all allegations that were raised in the application or at the hearing 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.

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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 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, his post-conviction relief attorney must serve and file a notice of appeal on Applicant's behalf. Applicant and his attorney are directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

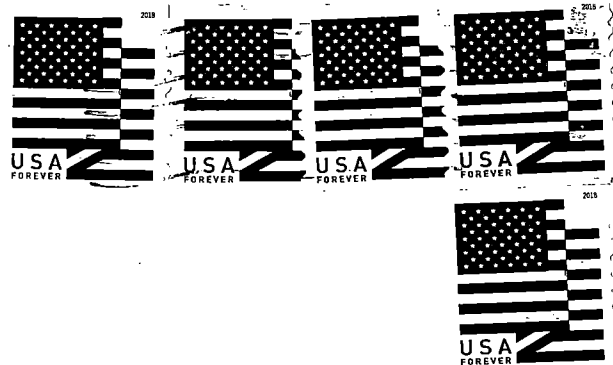
1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 24th day of May 2017.

HOPE DLACKEY
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PAUL M. BURCH
Presiding Judge
Seventh Judicial Circuit

Dillon, South Carolina

The Rucker Law Firm, LLC
128 Millport Circle, Suite 200
Greenville, SC 29607



The Honorable Daniel E. Shearouse
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