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August 28, 2018

RECEIVED
AUG 30 2018
S.C. SUPREME COURT

Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

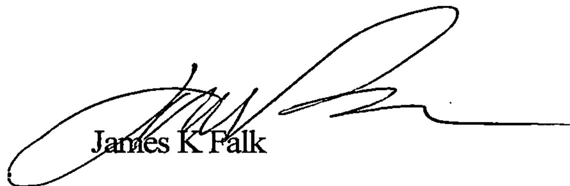
Re: Demetrius Price 338142 v State, 2015-CP-07-1771

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Beaufort County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,



James K Falk

Thank you for your assistance.

Cc:
Christian Saville, Esq.
Demetrius Price 338142.

THE STATE OF SOUTH CAROLINA

In The Supreme Court

RECEIVED
AUG 30 2018
S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Honorable Diane Schafer Goodstein, Circuit Judge

Case No.: 2015-CP-07-1771

Demetrius Price 338142..PETITIONER

V.

State of South Carolina...RESPONDENT

NOTICE OF APPEAL

The Petitioner Demetrius Price appeals the Honorable Diane Schafer Goodstein's August 14, 2018 Order of Dismissal. Undersigned counsel received notice of entry of the order on August 27, 2018. A copy of the order on appeal is attached hereto.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

August 28, 2018

Christian Saville, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
AUG 30 2018
S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Honorable Diane Schafer Goodstein, Circuit Judge

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Demetrius Price 338142..PETITIONER

V.

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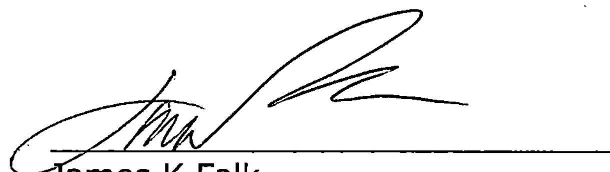
CERTIFICATE OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Christian Saville Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this August 28, 2018.



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STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

Demetrius Price, #338142,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

2015-CP-07-1771

ORDER OF DISMISSAL

2018 AUG 20 PM 12:11

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on July 17, 2015, and amended on May 29, 2018. An evidentiary hearing into the matter was convened on June 6, 2018, at the Beaufort County Courthouse. Applicant was present at the hearing and was represented by James K. Falk, Esquire. Respondent was represented by Assistant Attorney General Christian Saville of the South Carolina Attorney General's Office.

Before this Court were the records of the Beaufort County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the record on appeal, Applicant's appellate records, the State's return, Applicant's original application, and Applicant's amended application. Based on these records and the testimony presented, the Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Beaufort County Clerk of Court's orders of commitment. Applicant was indicted by the December 2008 term of the Beaufort County Grand Jury for first-degree burglary (2009-GS-07-0068) assault and battery with intent to kill ("ABWIK") (2009-GS-07-0066), and possession of a weapon during a violent crime (2009-GS-07-0069). Applicant was also indicted by the June

2009 term of the Beaufort Grand Jury for possession of a weapon by a prohibited person (2009-GS-07-1365). Christopher J. Geier, Esquire ("Trial Counsel"), represented Applicant at trial. On November 16, 2009, Applicant proceeded to a jury trial along with his codefendant and was found guilty as indicted. The Honorable Thomas W. Cooper, Jr. sentenced Applicant to confinement for life without the possibility of parole for the counts of first-degree burglary and ABWIK. Applicant was sentenced to five years for each count of possession of a weapon during commission of a violent crime and possession of a weapon by a prohibited person. These sentences were run concurrently.

Applicant filed a notice of appeal. An appeal was perfected on his behalf by Kathrine H. Hudgins, Esquire. In the appeal, Applicant argued the trial court committed reversible error when the jury was instructed that inferred malice may arise when the deed is done with a deadly weapon under State v. Belcher, 385, S.C. 597, 685 S.E.2d 802 (2009). The South Carolina Court of Appeals affirmed Applicant's conviction and sentence, as their review of the record revealed no evidence that could reduce, mitigate, excuse, or justify the crime. State v. Price, 400 S.C. 110, 732 S.E.2d 652 (Ct. App. 2012). Applicant subsequently filed a petition for writ of certiorari, which was initially granted, but dismissed as improvidently granted on December 23, 2014. The remittitur was issued December 23, 2014.

II. ALLEGATIONS

At the PCR hearing, Applicant enumerated his allegations as follows:

1. Ineffective Assistance of Counsel
    a. "Failure to advise that Applicant could testify at his Jackson v. Denno hearing without waiving his 5th Amendment right to not testify during the trial."
    b. "Failure to move for severance and have the two codefendants tried separately."
    c. "Failure to object to inappropriate comments made by the court in the presence of the jury at Tr. p. 360, ll. 7-11."

d. "Failure to seek voir dire of officers Calhoun and Holmes whether they coached each other during the Jackson v. Denno hearing at Tr. p. 154, l. 13 – p. 155, l.7
e. "Failure to object to ABWIK verdict form."
f. "Failure to object to Solicitor's closing argument in which he vouched for the credibility of the State's witnesses at Tr. p. 883, ll. 6-10."
g. "Failure to seek a mistrial based on the State's destruction of potentially exculpatory evidence. Officer Holmes testified that he took notes of Applicant's statements to police officers. The State did not provide these notes to the defense as part of their Rule 5 obligations. Based upon the testimony of Officer Holmes, the notes were destroyed."
h. "Once the court agreed to charge on assault and battery of a high and aggravated nature ("ABHAN"), Trial Counsel was ineffective for not objecting to the court charging on inferred malice."

Applicant also raised an issue in his testimony that he desired the jury to have a different racial composition.

III. SUMMARY OF TESTIMONY PRESENTED

Trial Counsel testified at the PCR hearing, and Applicant testified on his own behalf.

Applicant

Applicant testified he felt from the beginning that he was "fighting a lost cause" in this case. He testified Trial Counsel advised him his testimony was not really needed at the Denno hearing. Applicant also explained he wished he could have replaced some members of the jury to make things more "even."

Trial Counsel

Trial Counsel testified he met with Applicant approximately a dozen times prior to trial. Trial Counsel recalled reviewing discovery with Applicant and discussing possible defenses. Recounting the evidence against Applicant at trial, Trial Counsel recalled there was video footage of Applicant's car, registered to Applicant, leaving the apartment complex after the

incident, testimony from multiple eyewitnesses, and the victims were able to identify Applicant in a photo lineup. Trial Counsel also explained the codefendant had given a very detailed statement post-Miranda of what went on that day. The defense theory was Applicant was not actually involved in this crime.

Trial Counsel testified Applicant gave a statement to police in which he denied involvement in the incident and denied being present. A Jackson v. Denno hearing was held. Trial Counsel could not specifically recall advising Applicant that he could testify at the Denno hearing without waiving his right to not testify at trial, but testified he would assume there was a discussion. Regardless, Trial Counsel explained he did not recall any significant issues of voluntariness. Trial Counsel explained there was nothing incriminating about Applicant's statement as he denied all involvement. According to Trial Counsel, they did discuss whether Applicant should testify at trial, but his criminal history which could have then been used against him would have been problematic. Trial Counsel testified it was Applicant's decision not to testify at trial.

Trial Counsel recalled Applicant was alleged to have ridden with his codefendant in Applicant's car to the apartment to possibly engage in a drug transaction. The armed codefendants then forced their way into the apartment at which point Applicant shot a victim who was walking downstairs in the neck and point-blank range. The codefendants then fled together and shot another victim who had left the apartment on their way away from the scene. Regarding a severance, Trial Counsel testified he probably did not think a severance would have been granted at the time and acknowledged the facts and evidence involving both codefendants were essentially the same. Trial Counsel did recall discussing the possibility of a severance with the codefendant's counsel. However, as Trial Counsel noted, codefendant had given a detailed

statement post-Miranda of what happened that day, so he was concerned the codefendant would have testified against Applicant if the cases were severed.

Trial Counsel was questioned about the alleged "inappropriate comments made in the presence of the jury." The alleged inappropriate comment arose when Trial Counsel was cross-examining one victim about his involvement in a gang. The solicitor objected and argued this type of evidence was not permitted under Rule 404(a)(2), SCRE. The trial judge overruled the solicitor's objection and clarified, "I take it that there's going to be more to this issue than that. I will take it that the defense is not going to raise the issue that, that being a member of a gang somehow or another denies a person his right not to be shot by somebody else." Tr. p. 360, ll. 6-11. While Applicant alleges Trial Counsel should have objected to this statement by the trial judge, Trial Counsel disagreed. Trial Counsel testified he did not feel this was prejudicial as there was no dispute that the victims were shot, and Applicant's defense was simply that he was not one of the men who shot them. Furthermore, Trial counsel testified he felt it was beneficial to Applicant that the judge had acknowledged the victim was in a gang in front of the jury.

Trial Counsel recalled the Jackson v. Denno hearing took place over two days. Trial Counsel testified he did not recall Applicant telling him about the alleged "coaching" between Officers Calhoun and Holmes at the hearing and he did not notice it. As Trial Counsel recalled, the codefendant told his attorney that he had noticed some sort of body language from Investigator Calhoun, and the codefendant's attorney raised the issue. Trial Counsel did not consider a voir dire of the officers. Trial Counsel also noted the alleged "coaching" between the officers took place during testimony regarding the codefendant's statements, not Applicant's, and Investigator Calhoun testified at length about codefendant's statements after the allegation had been addressed by the judge.

Trial Counsel opined the notes Officer Holmes took of codefendant's statements which Officer Holmes then memorialized in a report probably would have been discoverable. Trial Counsel noted, contrary to Applicant's allegation, the record reflects codefendant's counsel did in fact move for a mistrial on this basis, and Trial Counsel joined in his objection. Tr. p. 408, ll. 2-7; p. 411, ll. 6-11. Nevertheless, the trial judge denied the motion, explaining the notes had been reduced to summary fashion and disclosed, and the trial judge could not find there had been any intentional failure to disclose. The trial judge also directed the parties to State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001).

Trial Counsel testified he knew the trial judge was going to charge on inferred malice. Trial Counsel noted the record reflects he told the trial judge after the jury charge, "I just wanted to ensure that you[r] instruction on the ABWIK didn't include the language that was excluded by State v. Belcher." Tr. p. 943, l. 21. However, as Trial Counsel recalled, the trial judge did not feel that Belcher applied to the facts of this case, as the trial judge explained at length while noting Trial Counsel's exception. Tr. p. 943, l. 24 – p. 946, l. 15. Trial Counsel observed that the Court of Appeals recognized there was substantial question as to whether the issue was preserved for appeal, but chose to address the merits. As noted, the Court of Appeals agreed with the trial judge that there was no evidence of self-defense or anything else which could excuse or justify this crime.

Regarding the allegation for failure to object to the ABWIK verdict form, Trial Counsel testified it was a straightforward verdict form and while he can see how it could be confusing as to which victim it was referring to, there was no question Applicant was arrested and indicted for the shooting of victim Deon. Moreover, Trial Counsel noted the verdict form listed the correct corresponding indictment number for ABWIK (2009-GS-07-00066), and the indictment clearly

alleged that Applicant, with malice aforethought, did commit an unlawful act of a violent nature upon the victim Deon. Trial Counsel recalled the indictment was read to the jury. Trial Counsel also testified there was never testimony at trial to suggest the codefendant shot victim Deon, and the testimony at trial was that Applicant shot victim Deon in the neck at close range.

Trial Counsel was also briefly questioned about the jury in this case and whether he considered making a motion pursuant to Batson v. Kentucky, 476 U.S. 79 (1986). Trial Counsel observed the State exercised three of their four strikes on African-Americans, but did not recall being concerned at the time. As he recalled, he was not particularly pleased with the jury but it was "not the worst jury he'd ever had" either. Trial Counsel noted both Applicant and the victims in this case were African-American.

IV. APPLICABLE LAW

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption 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. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). 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.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

INEFFECTIVE ASSISTANCE OF COUNSEL

This Court finds Applicant has failed to prove he is entitled to post-conviction relief on any of his allegations of ineffective assistance of counsel. This Court finds Trial Counsel rendered competent and calculated representation before and during Applicant's trial, and Applicant has failed to satisfy his burden of proving prejudice from Trial Counsel's performance.

Failure to advise Applicant he could testify at Denno hearing without testifying at trial

Applicant alleges Trial Counsel was ineffective for failing to advise him that he could testify at his Jackson v. Denno hearing without waiving his right to not testify at trial. This Court finds this allegation to be meritless. The record and testimony from the PCR hearing reveals Applicant gave a post-Miranda statement to police in which he denied any involvement in the crimes, and even denied being in town. Tr. p. 129, ll. 12-17. Trial Counsel testified the two did

discuss the ramifications of Applicant testifying at trial, but he was concerned about Applicant's criminal history that could have been used against him. Trial Counsel also noted Applicant's statement was not incriminating anyway, and there were no apparent issues of voluntariness with Applicant's statement. This Court also notes Applicant's statement was not incriminating to begin with, and there are no challengeable issues of voluntariness which arise from the record. Therefore, Trial Counsel was not deficient in his performance regarding the issue of Applicant testifying at the Jackson v. Denno hearing.

Moreover, Applicant cannot meet his burden of proving he was prejudiced by Trial Counsel's performance regarding this allegation. There is no evidence in the record to suggest that but for Trial Counsel's alleged deficiency, the result of the proceedings would have been different. There are no significant issues regarding the voluntariness of Applicant's statement to support suppression, and Applicant's statement is not incriminating in itself regardless. Therefore, Applicant has failed to satisfy either prong of Strickland regarding this allegation. Accordingly, this allegation is dismissed with prejudice.

Failure to move for severance

Applicant also alleges Trial Counsel was ineffective for failing to move for a severance and have the two codefendants tried separately. This Court finds this allegation to also be meritless. Criminal defendants indicted for connected crimes are not entitled to separate trials as a matter of right. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001) (citing State v. Dennis, 337 S.C. 275, 281, 523 S.E.2d 173, 176 (1999)). In fact, a severance is warranted only when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgement about a co-defendant's guilt. Id. at 559. The federal system as well as the South Carolina Supreme Court have observed that joint

trials play a vital role in the criminal justice system by promoting efficiency and serving "the interests of justice by avoiding the scandal and inequity of inconsistent verdicts. Zafiro v. U.S., 506 U.S. 534 (1993) (citing Richardson v. Marsh, 481 U.S. 200 (1987)). See also Dennis, 337 S.C. at 282 (holding the principles espoused in Zafiro are consistent with South Carolina Supreme Court precedent). The rule allowing joint trials applies with equal force even when a defendant's severance motion is based upon the likelihood he and his co-defendant will present mutually antagonistic defenses. Hughes, 346 S.C. at 560. See also State v. Walker, 366 S.C. 643, 657, 623 S.E.2d 122, 129 (Ct. App. 2005) (holding the rule allowing joint trials is not impugned simply because codefendants may present evidence accusing each other). Furthermore, it is will settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials. Zafiro, 506 U.S. at 541.

Trial Counsel testified they discussed possibility of moving for a severance in this case. However, Trial Counsel wisely considered codefendant had given a detailed statement to law enforcement detailing the events of the entire day of the incident. As Trial Counsel explained, he was concerned the codefendant would testify against Applicant at trial if the cases were severed. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). This Court finds Trial Counsel's decision to not move for a severance to be a valid and prudent strategic decision. Therefore, Applicant has failed to satisfy his burden of proving deficiency for failure to move for severance. Applicant has also failed to establish prejudice from this allegation as, had a severance been granted, he would have faced the great risk of his codefendant testifying against him at trial. Notwithstanding, any existing prejudice from a joint trial will often be sufficiently cured by less drastic measures such as limiting instructions. See

Zafiro, at 539. In Applicant's case, such instructions were given which instructed the jury to consider the codefendants wholly separately.

In this case, Trial Counsel was also right to suspect a severance would not have been granted. As Trial Counsel explained at the PCR hearing, the facts and evidence surrounding Applicant and his codefendant were essentially the same. The testimony and evidence presented at trial supported facts that Applicant and his codefendant rode together to the apartment, both forced their way into the apartment where Applicant shot one victim in the neck, both fled together while shooting at the second victim, and both were videotaped leaving the apartment complex in a car registered to Applicant. Moreover, both were identified by eyewitnesses in photo lineups. Clearly, the facts and circumstances of this case strongly favor the courts' presumption in favor of joint trials. Applicant has provided no compelling extraordinary circumstances which would have justified a severance in this case. For these additional reasons, Trial Counsel was not deficient for failing to request a severance, nor was Applicant prejudiced by Trial Counsel's decision to not request a severance. Accordingly, this allegation is dismissed with prejudice.

Failure to object to inappropriate comments in the presence of the jury

Applicant alleges Trial Counsel was ineffective for failing to object to comments made by the trial judge in the presence of the jury found at Tr. p. 360, ll. 7-11. This Court finds this allegation to be meritless.

Trial Counsel cross-examined victim Deon, who Applicant was charged with shooting in the neck at close range. Trial Counsel questioned victim Deon about whether he was in a gang, to which victim Deon responded he was. Tr. p. 359, ll. 6-8. At that time, the State objected under Rule 404(a)(2), SCRE. The trial judge respectfully overruled the State's objection, explaining

that in these circumstances, the rule would allow Trial Counsel to question the witness about gang involvement. The trial judge then made the following comment which Applicant now challenges:

> I take it that there's going to be more to this issue than that. I will take it that the defense is not going to raise the issue that, that being a member of a gang somehow or another denies a person his right not to be shot by somebody else. So, I'm assuming there's going to be more to it than just that. Tr. p. 360, ll. 6-11.

As Trial Counsel testified, he did not have concerns of these statements prejudicing Applicant as there was no question the victims were shot. It was just Applicant's defense that they were not shot by him.

This Court finds Trial Counsel was not deficient regarding this allegation as there was no reason for him to object to this statement which does nothing to conflict with Applicant's defense. Moreover, this Court finds Trial Counsel's testimony reasonable that he felt it may even have been helpful to Applicant's case for the trial judge to describe the victims as gang members.

Applicant has also failed to prove prejudice from this allegation as the comments do nothing to implicate Applicant in the crime, do not conflict with his defense theory, and perhaps further impeached a State's witness who was testifying against Applicant. Accordingly, this allegation is dismissed with prejudice.

Failure to seek voir dire of officers Calhoun and Holmes

Applicant alleges Trial Counsel was ineffective for failing to seek voir dire of Investigators Calhoun and Holmes regarding whether they "coached" each other during the Jackson v. Denno hearing. This Court finds the allegation to be meritless.

The record reveals alleged "coaching" was addressed by codefendant's counsel after codefendant claimed to notice "what looked like some sort of body language" from Investigator Calhoun during Investigator Holmes's testimony, and codefendant's counsel therefore asked the

court to be cognizant of their appearance. Tr. p. 154, l. 13 – p. 155, l. 7. At the PCR hearing, Trial Counsel did not recall considering a voir dire and did not notice the alleged conduct between the investigators. Trial Counsel did note the Denno hearing was over the span of two days, and the codefendant's allegation was addressed by the trial judge before a significant amount of substantive testimony about codefendant's statements.

This Court finds Applicant has failed to satisfy his burden of proving Trial Counsel was deficient here. Applicant has offered no probative evidence to support the allegation the investigators were coaching each other at the hearing and Trial Counsel credibly testified he did not notice anything. Applicant has provided no reason Trial Counsel should have been compelled to take further action regarding this allegation, nor has Applicant presented any evidence as to what this voir dire would have revealed. Furthermore, as Trial Counsel noted, much of the substantive testimony regarding the codefendant's statements took place after the issue, if any, had already been addressed by the trial judge. Moreover, the codefendant's statement was redacted to omit any mention of Applicant, and Applicant's statement was not incriminating regardless. For these reasons, Applicant has failed to satisfy either prong of Strickland regarding this allegation. Accordingly, this allegation is dismissed with prejudice.

Failure to object to ABWIK verdict form

Applicant alleges Trial Counsel was ineffective for failing to object to the ABWIK verdict form given to the jury. This Court finds this allegation to be meritless. At the PCR hearing, Applicant indicated the ABWIK verdict form could be misleading because it does not specifically denote which victim in this case the jury is finding Applicant guilty of committing ABWIK against. When questioned, Trial Counsel testified he understood how things could possibly get confusing as two people were shot in this case, but this Court agrees with Trial

Counsel that this is a straightforward ABWIK verdict form. As Trial Counsel noted and the verdict form clearly provides, the form indicates the jury found Applicant guilty of ABWIK labeled as Indictment Number 2009-GS-07-00066. This indictment clearly states Applicant is alleged to have shot victim Deon Cannick. This same indictment also cites to Arrest Warrant Number J-336917, which clearly alleges Applicant shot victim Deon Cannick. Trial Counsel testified there was no question Applicant was arrested and indicted for shooting Deon Cannick. Furthermore, as Trial Counsel observed, the consistently repeated testimony at trial was that both Applicant and his codefendant forced their way into the apartment where it was Applicant who then shot unarmed Deon Cannick in the neck while his hands were in the air. This Court finds Applicant has failed to satisfy his burden of proving both deficiency and prejudice from not objecting to this verdict form, as the jury clearly had ample indications as to who they were finding Applicant guilty of committing ABWIK against and this conclusion was supported by consistent testimony from various witnesses at trial.

Failure to object to vouching in Solicitor's closing argument

Applicant alleges Trial Counsel was ineffective for failing to object to the following comment from the Solicitor's closing argument which Applicant alleges was improper vouching for State's witness Devin Cannick:

> One of the things that makes your job so tough is you have to decide from the witness stand who's telling the truth and who's not. You saw Devin's demeanor. You saw how it was for him to talk about seeing his brother get shot. I submit to you that he was telling the truth. Tr. p. 883, ll. 6-10.

This Court finds this allegation to be meritless. First, this Court notes it does not seem the Solicitor was actually indicating he felt Devin's testimony in general was truthful, but it is more reasonable to interpret the statement to suggest merely that Devin was telling the truth about how hard it was to see his brother get shot, as suggested by his emotions displayed at trial. Moreover,

a solicitor may not vouch for the credibility of a State's witness based on personal knowledge or other information outside the record. Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002). However, a solicitor may argue the credibility of State's witnesses if the argument is based on the record and its reasonable inferences. Id. The latter case applies here, as the Solicitor's comment in this closing argument did not refer to anything outside the record or reasonable inferences therefrom, nor did the Solicitor imply he knew more than what the jury could perceive at the trial or refer to his position as an agent of the State to vouch for the testimony. In fact, the statement explicitly refers to the evaluation of witness credibility being the job of the jury. Tr. p. 883, ll. 6-8. Furthermore, the statement is based on the actual testimony and behavior of the witness at trial, which the jury was able to view. This Court finds the Solicitor's comment did not rise to improper vouching, and Trial Counsel is therefore not deficient for failing to object.

Notwithstanding, this Court finds Applicant has also failed to satisfy his burden of proving prejudice from the alleged vouching. The trial judge repeatedly instructed the jury in the opening instructions that evidence must prove the defendants' guilt beyond a reasonable doubt, and neither opening statements nor closing arguments are evidence. Tr. p. 222, ll. 2-11; p. 226, l. 24 – p. 227, l. 1. The trial judge explained to the jury only the "answers themselves" from the witnesses are evidence. Tr. p. 227, ll. 1-3; p. 905, ll. 1-7. The trial judge further repeatedly explained to the jury that it was their duty to evaluate the credibility of testimony in both the opening instruction and jury charge after closing arguments. Tr. p. 223, ll. 11-16; p. 898, l. 18; p. 906, l. 15 – p. 907, l. 18. Also, Trial Counsel's earlier testimony repeatedly suggested to the jury that the witness was lying and part of a lie shared among many other witnesses. Tr. p. 844, l. 16; p. 844, l. 24; p. 848, l. 7; p. 851, 9; p. 853, l. 17; p. 856, l. 7.

Furthermore, even if the witness Devin's testimony at trial were to be entirely discounted, there was ample probative evidence in the record to support the jury's conviction of Applicant. Applicant was identified as the shooter in a photo lineup conducted prior to trial. Tr. p. 286, l. 22. The victim who Applicant shot at close range in the neck identified Applicant. Tr. p. 325, ll. 18-25. Then, video surveillance footage showed a car registered to Applicant leaving the apartment complex following the incident. Tr. p. 434, l. 3.

For these reasons, the Solicitor's statements did not arise to improper vouching. Furthermore, Applicant has failed to prove that but for the alleged statements, the result of the proceeding would have been different. This allegation is accordingly dismissed with prejudice.

Failure to seek a mistrial based on State's destruction of potentially exculpatory evidence

Applicant alleges Trial Counsel was ineffective for failing to seek a mistrial based on the State's destruction of potentially exculpatory evidence in investigating officers' notes from Applicant's statements to police officers. This Court finds this allegation to be meritless. First, this Court notes that codefendant's counsel formally moved for a mistrial for this very reason and was denied. Tr. p. 408, l. 2 – p. 411, l. 3. Furthermore, this Court notes Trial Counsel himself joined in the objection. Tr. p. 411, l. 6. Notwithstanding, this issue was thoroughly addressed at trial in which Trial Counsel, codefendant's counsel, and the Solicitor discussed the notes at length. Testimony from trial established the investigating officer took notes by hand during his interviews in order for him to memorialize them in formal reports later. Tr. p. 188, ll. 1-13; p. 488, l. 16. The trial judge denied the motion for a mistrial and directed the parties to Rule 5(a)(1)(a), SCRCP, and State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001). The trial judge explained in a situation like this case where the notes have been reduced to summary fashion and been disclosed, the trial judge could not find intentional misconduct. Tr. p. 410, ll.

15-18. The trial judge also found the elements of Cheeseboro had not been met to even justify a jury charge regarding destruction of evidence. This Court finds Applicant has failed to prove both deficiency and prejudice regarding this allegation, as a mistrial was in fact requested and denied, and Applicant has offered no probative evidence of impropriety or destroyed exculpatory evidence. Accordingly, this allegation is dismissed with prejudice.

Failure to object to charge on inferred malice

Applicant alleges Trial Counsel was ineffective for failing to object to a jury charge on inferred malice once the trial judge agreed to charge the jury on ABHAN. It is possible this issue was not preserved for appellate review, but this is inconsequential in this case. This Court finds the allegation to be meritless.

A jury charge instructing that malice may be inferred from the use of a deadly weapon where evidence is presented that would reduce, mitigate, excuse, or justify the crime is not good law in South Carolina following the ruling of State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). Applicant's trial occurred roughly a month following the Supreme Court's decision in Belcher. The record reveals Trial Counsel actually did express concern to the trial judge that the charge not include language excluded by Belcher, but the trial judge explained Belcher was not applicable to the facts of this case. Tr. p. 943, l. 21 – p. 944, l. 6. At the PCR hearing, Trial Counsel also recalled the trial judge did not feel Belcher applied to this case.

The Court of Appeals also agreed with the trial judge that Belcher did not apply to this case as there was no evidence of self-defense "or anything else to excuse or justify ABWIK." State v. Price, 400 S.C. 110, 114, 732 S.E.2d 652, 654 (Ct. App. 2012).

This Court agrees with the Court of Appeals conclusion as nothing in the record serves to mitigate, excuse, or justify this offense. In fact, the Court of Appeals found the trial judge

actually erred in giving the ABHAN charge as there was nothing to indicate an absence of malice in this case. The record reflects Applicant was convicted of entering an apartment without consent before shooting an unarmed victim at close range in the neck where there was no testimony or evidence to suggest this was a scenario involving self-defense or any other type of mitigation. As the Court of Appeals correctly noted,

> It is undisputed that someone shot Deon in the neck, causing him serious injury. The shooter raised the gun, pointed it at Deon, approached him, and shot him at close range as he stood with his hands up. There was no evidence to the contrary. There may have been conflicting evidence as to who did these things, but it is not possible to interpret the evidence to support any conclusion other than that the person who shot Deon committed ABWIK. State v. Price, 400 S.C. at 114.

Applicant's case is devoid of any evidence to mitigate the crime of ABWIK, and therefore Belcher, as confirmed by the Court of Appeals, does not apply to the facts of this case. Moreover, this Court notes the jury would have undoubtedly found express malice in such a case. For these reasons, Trial Counsel was not deficient for not objecting to a jury charge not warranted by the facts, and Applicant cannot meet his burden of proving prejudice when, as multiple courts have now established, Belcher did not apply and there was evidence of express malice regardless. Accordingly, this allegation is dismissed with prejudice.

Jury Issue

Although this allegation was not enumerated in his application, Applicant did complain of the racial composition of the jury during his testimony at the PCR hearing. This Court finds Applicant's objections to the jury makeup to be meritless. The record reveals the State struck four potential jurors, three African-Americans and one Caucasian. Trial Counsel credibly testified the jury makeup did not concern him at the time, and while he was not particularly pleased with the jury, he described the make up as "not the worst jury" Trial Counsel has had.

Furthermore, Trial Counsel explained the victims in this case were also African-American. Applicant presented no probative evidence to raise suspicion of impropriety on the part of the Solicitor regarding this allegation. In fact, Applicant conceded he now knows Trial Counsel cannot strike jurors based on their ethnicity. For these reasons, this Court finds Applicant has not met his burden of proof regarding this allegation. Accordingly, the allegation is dismissed with prejudice.

[Conclusion and signature on following page]

VI. CONCLUSION

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

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

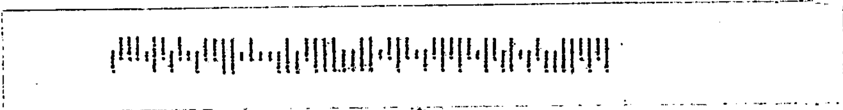
IT IS THEREFORE ORDERED:

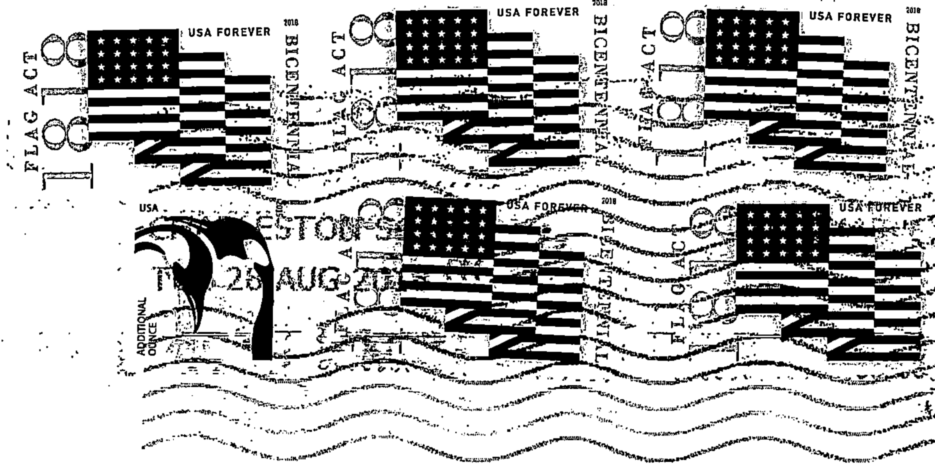
1. That the application for Post-Conviction Relief is denied and dismissed with prejudice in regard to all allegations; and
2. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 14 day of August, 2018.

DIANE SCHAFER GOODSTEIN
Presiding Judge
Fourteenth Judicial Circuit

Dorchester, South Carolina





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