ROSS AND ENDERLIN, PA
ATTORNEYS AT LAW

August 29, 2018

Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Bryan Holder v. State
2016-CP-42-3627

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondent and the Order of Dismissal. These matters are being referred to the Office of Appellate Defense.

Sincerely,

Susannah Ross
Attorney at Law

enclosure

cc: Office of the Attorney General
Office of Appellate Defense
Spartanburg County Clerk of Court

330 E. COFFEE ST.• GREENVILLE/SC • 29601
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
AUG 31 2018
S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

2016-CP-42-3627

Bryan Holder, ... Appellant,
v.
The State, ... Respondent.

NOTICE OF APPEAL

Bryan Holder appeals the Honorable Grace Gilchrist Knie's Amended Order of Dismissal with Prejudice filed August 21, 2018.

This 29 day of August, 2018.

Susannah Ross, Attorney at Law
330 E. Coffee St.
Greenville, SC 29601
(864) 242-0029
Attorney for Appellant

Other Counsel of Record:
Jordon Cox, Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970
Attorney for Respondent

RECEIVED

AUG 31 2018

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
BRYAN HOLDER ,)
APPELLANT,)
)
)
VS.)
)
)
)
THE STATE OF SOUTH CAROLINA,)
RESPONDANT.)
)

IN THE SUPREME COURT

CERTIFICATE OF SERVICE BY MAIL

1. I am the attorney for the Applicant in the above-captioned matter.

2. Regular communication by mail exists throughout the state of South Carolina and this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Notice of Appeal** on the above-captioned matter on the following person by depositing the same in the United States mail with proper postage affixed thereto:

Office of the Attorney General
Assistant AG Jordan Cox
P.O. Box 11549
Columbia, SC 29211

Attorney for Defendant

This 28 **day of** August **, 2018**

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Bryan Holder, #337574,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

2016-CP-42-3627

AMENDED ORDER OF DISMISSAL WITH PREJUDICE

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by Bryan Holder (Applicant) on October 3, 2016. The State (Respondent) made its return requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on February 2, 2018 at the Spartanburg County Courthouse. Applicant was present and represented by Susannah C. Ross, Esquire. Valerie Garcia Giovanoli, Esquire, of the Office of the Attorney General represented Respondent.

At the hearing, Applicant testified on his own behalf. Christopher Thompson, Esquire, (Counsel) also testified. This Court had before it a copy of the Spartanburg County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the trial transcript, the direct appeal records, the PCR application and amendment, and Respondent's return.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. Applicant was indicted by the December 2012 term of the Grand Jury for Spartanburg County for grand larceny (2012-GS-42-5761) and malicious injury to real property (2012-GS-42-5762). Applicant was later

indicted by the May 2013 term of the Grand Jury for Spartanburg County for three counts of attempted murder and possession of a weapon during the commission of a violent crime (2012-GS-42-5370, -5371, -5372). Applicant was represented at trial by Christopher Thompson, Esquire. Seventh Circuit Solicitor Barry Barnette and Assistant Solicitor Prina C. Tailor of the Seventh Circuit Solicitor's Office represented the State.

On May 6, 2013, before proceeding to jury selection and trial, Applicant pled guilty as indicted to grand larceny and malicious injury to real property before proceeding to trial for the other charges. Sentencing for the guilty pleas was deferred until the end of the jury trial on the remaining charges. On May 9, 2013, Applicant was convicted of two counts of the lesser included offense of 1st degree assault and battery (2012-GS-42-5370, -5372), the lesser included offense of assault and battery of a high and aggravated nature ("ABHAN") and possession of a firearm during the commission of a violent crime under (2012-GS-42-5371). Applicant was sentenced by the Honorable J. Derham Cole to imprisonment of five years for grand larceny (-5761), five years for malicious injury to real property (-5762), twenty years for ABHAN (-5371) to be served consecutively to the sentence for (-5761), five years for possession of a firearm during the commission of a violent crime (-5371) to be served consecutively to the sentence for count one of (-5371), ten years for 1st degree assault and battery (-5372) to be served consecutively to the (-5371) sentences, and ten years for the remaining 1st degree assault and battery (-5370).

Applicant filed a timely notice of appeal. An appeal was perfected by Appellate Defender Kathrine H. Hudgins of the South Carolina Commission on Indigent Defense-Office of Appellate Defense. On appeal, Applicant argued the trial court erred in instructing the jury with the law on accomplice liability, "hand of one is the hand of all," when there was no evidence that Applicant and the co-defendant or anyone else acted together with a common purpose and plan to shoot at people and

shooting at people is not a natural and probable consequence of agreeing to go target shooting in a vacant field with woods in the background." (FBOR). Following briefing, the South Carolina Court of Appeals affirmed Applicant's conviction by unpublished opinion filed on June 3, 2015. State v. Holder, Op. No. 2015-UP-273 (S.C. Ct. App. 2015). Applicant petitioned for rehearing. The petition for rehearing was denied by order on August 20, 2015. Applicant petitioned for writ of certiorari. The South Carolina Supreme Court denied the petition by order filed on May 5, 2016. The Remittitur was returned on May 16, 2016.

ALLEGATIONS RAISED IN APPLICATION AND AT HEARING

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

1. Ineffective Assistance of Counsel
   a. "Applicant was denied due process by plea and at trial by [trial counsel].
   b. "Counsel never informed Applicant that his guilty plea to the grand larceny of the firearm that was used in the shooting could and would be used by the prosecutor against him in his upcoming trial."

2. "Due Process"[1]
   a. "Applicant was denied due process by plea and trial counsel."
   b. "Counsel did not do any pre-trial investigation of the crime scene."
   c. "Counsel's failure to conduct an independent investigation of crime scene or call expert witness at trial to rebut the state expert testimony."

At the start of the hearing, Respondent objected to the late addition of eleven new allegations at the hearing without any pleading beforehand, arguing it prejudiced the State in not allowing time to prepare to defend the allegations. Applicant provided a Supplemental Application filed the morning of the hearing. The new allegations included:

1. Ineffective Assistance of Counsel, in that:

[1] Respondent also interprets these allegations to be effectively claims of ineffective assistance of counsel, although Applicant listed them as due process violations in his application.

a. Counsel called lead investigator Lorin Williams in defense case and failed to object to statement being used against him after Applicant invoked his right to remain silent;
b. Counsel recalled co-defendant (pp. 337-44) and then failed to ask him why plead guilty if he had no idea Applicant was planning to shoot;
c. Counsel had no exceptions to jury instructions and failed to preserve argument made on page 408 that no testimony supported had of one;
d. Counsel failed to argue in closing that co-defendant plead guilty to charges of attempted murder because he alone was guilty;
e. Counsel failed to provide Applicant discovery, to investigate, and to present expert witness;
f. Counsel failed to effectively cross-examine witness David Hamilton;
g. Counsel sat juror no. 19 who was the victim of a violent crime and who became the jury foreman;
h. Counsel failed to object to the Solicitor's appeal to the emotions of the jury when handing Applicant the gun and "yelling" how did you shoot it;
i. Counsel failed to move to reconsider grounds for reconsideration including the excessive sentence imposed
    i. The sentence requested by Solicitor for acquitted charges and punishing Applicant for exercising his trial right when he attempted to plead two times which were not accepted, though co-defendant also claimed not shooter and allowed to plead and received ten years;
j. Counsel failed to effectively object to witness not on jury list, mother of co-defendant (p. 292); and

2. Due Process Violation, in that:
    a. When the Solicitor asked the judge to sentence for attempted murder; and
    b. Sentence was cruel, unusual, and excessive for asserting his right to trial.

Respondent requested this Court to strike the late amendments. Argument was heard by both parties. This Court allowed Applicant to proceed on his late allegations.

SUMMARY OF FACTS ADDUCED AT TRIAL

The State presented evidence Applicant stole rifles, shotguns and ammunition from a home in Spartanburg County on June 29, 2012.[2] The guns included a Marlin 30-30 lever action rifle,

[2]Prior to trial, Applicant pled guilty to grand larceny and malicious injury to property in connection with the stolen property, and those convictions are not at issue in this appeal.

and a Remington 30-06 bolt action rifle, both with mounted scopes. (Trial Transcript [TT], pp. 77-101; Record on Appeal [R.], pp. 17-41).

That night, Applicant and a co-defendant, Tyler Schomer ("Schomer"), took the 30-30 and 30-06 rifles out to a field to shoot at targets. The field was located across from a Raceway convenience store and an Ingles store. They shot the rifles toward the woods and in the opposition direction from the stores, and took the rifles to Schomer's house after they finished. (TT, pp. 108-111; R., pp. 48-51).

Schomer testified he and Applicant went back to the field the next night. Applicant used the 30-06 rifle to shoot at a road sign, and then aiming with the rifle's scope, fired shots toward the Raceway and Ingles stores. (State's Exhibits 47-50 [Photographs]). Applicant told Schomer he thought he hit someone in a car at the Raceway, so they listened to a police scanner to see if a call went out about a shooting there. When they heard the call go out, they returned to Schomer's house and put the rifles on Schomer's front porch.[3] After Applicant's arrest, Schomer sold the 30-06 to a man in exchange for drugs. (TT, pp. 111-118, 122; R., pp. 51-58, 62).

Bonnie Raines was shot that night while sitting in the passenger seat of a car parked outside the Raceway store. The bullet entered through the car door, passed through Ms. Raines and went into the car's center console, which kept it from striking the driver, Bobby Swigert. In addition, two bullets hit concrete outside the Ingles store, bounced up and struck the front windows of two stores next to Ingles. Forensic evidence established all the bullets were fired from the 30-06 rifle Applicant stole two days before the shootings occurred. (TT, pp. 222-277; R., pp. 162-167).

[3] Schomer eventually told law enforcement what happened, and prior to Applicant's trial, he pled guilty to three counts of attempted murder, but had not been sentenced at the time he testified. (TT, pp. 118-122; R., pp. 58-62).

Mark Swanger testified he was pressure washing the gas pumps in front of Ingles early on the morning of July 2, 2012, when he heard what sounded like a gunshot very close to him. A few seconds later he heard another shot go by him, and he hid until police arrived. He stated he heard a total of four to five shots, and saw a girl lying in the Raceway parking lot holding her side. (TT, pp. 284-290; R., pp. 224-230).

Applicant testified he only went to shoot the rifles once, both he and Schomer shot the 30-06 rifle, they shot at the lid of a five gallon bucket, and he never shot toward the Raceway and Ingles stores. He stated he never said anything to Schomer about shooting anyone. (TT, pp. 344-385; R., pp. 274-325).

The State requested a jury charge on the "hand of one is the hand of all." Applicant objected, arguing there was no evidence he and Schomer acted in concert in the attempted murders. Applicant then requested a mere presence charge in the event the court gave a "hand of one is the hand of all" charge. After a recess, and without ruling on the accomplice liability charge issues, the circuit court indicated it would charge the lesser included offenses of assault and battery of a high and aggravated nature as to Ms. Raines, and assault and battery first degree as to Mr. Swanger and Mr. Swanger. (TT, pp. 407-411; R., pp. 347-351).

During closing argument, Applicant asserted Schomer was the shooter. The State argued Applicant and Schomer essentially pointed the finger at the other as the shooters, but even if the jury believed Schomer was the shooter, Applicant testified they did everything together and Applicant supplied the stolen guns and ammunition, so at a minimum, Applicant was guilty as an accomplice. (TT, pp. 412-436; R., pp. 352-376). The circuit court charged the jury on "hand of one is the hand of all," mere presence, and the lesser included offenses.

SUMMARY OF TESTIMONY AT EVIDENTIARY HEARING

I. Applicant testified to the following:

Applicant testified the hand of one jury instruction issue was not preserved for appeal. Applicant testified his co-defendant, Schomer, testified at trial that Applicant was the shooter, but he had also made several different statements. Schomer pled guilty to the charge and received a ten year sentence. Applicant went to trial for the same charge and received a forty-five year sentence.

Applicant testified he met with Counsel a few times prior to trial. Applicant believed Counsel should have gone to the scene and investigated. Applicant maintained he was truthful during his testimony at trial and re-asserted he was not present at the scene at the time of the shooting. Applicant attempted to plead guilty, but the court would not accept his plea because he insisted he did not shoot the gun.

Applicant testified he did not give any statements to law enforcement. Applicant believed Counsel should have objected when Lorin Williams testified to statements made by Applicant. Applicant claimed Counsel did not object until after Williams testified to his statements.

Applicant testified Counsel reviewed his discovery with him, but not much. Applicant wanted his mother to testify to where he was that night, but she could not make it to his trial due to disabilities. Applicant wanted Counsel to hire a gun expert since the case involved guns and night vision scopes. Applicant recalled the Solicitor handing him a gun during his testimony and testified that the tone of the Solicitor's voice made it seem like Applicant shot the gun.

Applicant testified he never asked Counsel to file a motion to reconsider because he was not familiar with the law.

II. Counsel testified to the following:

Counsel has been practicing criminal law for 14 years. Counsel testified he received the discovery in the case and made copies to provide to Applicant. He met with Applicant a number of times and they discussed the case and the strength of the State's evidence. The State's evidence of the theft of the guns was strong and Applicant admitted guilt to that charge. Counsel advised him to plead to those charges because he was in fact guilty and because he believed it would help establish credibility with the jury – that Applicant accepted responsibility for the crime he committed, but was going to trial on the crime for which he was innocent.

Counsel testified that in addition to reviewing all of the evidence and discovery, he went out to the scene 2-3 times. He also researched and learned a lot about guns, specifically the 30-30 and 30-06 involved in this case. Counsel did not feel a gun expert would have helped the defense at all.

Counsel testified he believed the jury may have deliberated for ten hours.[4] Counsel did not ask for a mistrial, but recalled the judge giving an Allen charge before the jury returned a verdict. Counsel advised Applicant to plead guilty. However, he was brought to court to plead guilty and his plea would not be accepted because he denied shooting the gun. Applicant did plead guilty to the grand larceny charges because he admitted he was guilty of them. Counsel testified the sentencing range for the charges Applicant was facing was 5-105 years and he advised Applicant of this.

Counsel agreed he argued against a hand of one charge, but felt that in the event it was read, he was entitled to a mere presence charge, which he requested and received. Although

[4] The record indicates the jury deliberated for one hour in the morning, returned to the courtroom to hear some testimony played back, then deliberated for another four and a half hours. Total deliberations approximated five and half hours.

Counsel did not take exception to the charges read to the jury, he believed the issue was preserved for appeal.

Counsel testified he called the lead investigator because he wanted to present evidence of sloppy police work. Counsel had experience with Lorin Williams before. Counsel explained the purpose of calling Lorin Williams was to discuss the shooting of the sign in the field. Counsel also testified he objected to testimony regarding Applicant's oral statements to police. Counsel objected in anticipation that testimony would be elicited regarding statements made after Applicant had invoked his right to an attorney.

Counsel testified his strategy at trial would be to attack the credibility of the State's primary witness and Applicant's co-defendant, Schomer. Schomer gave multiple different statements and Counsel cross-examined him on those statements to undermine his credibility. Counsel did not argue to the jury that Schomer had pled guilty.

Counsel testified that he decided to seat juror no. 19, Mr. Blankenship, despite being the victim of a violent crime, because he personally knew him from playing ball together. Counsel felt his friendly relationship with the juror would outweigh his having been the victim of a crime and potentially even benefit Applicant. Counsel testified he also filed a motion for reconsideration of Applicant's sentence and offered to submit a brief with case law regarding co-defendant sentencing discrepancies. However, Counsel testified the co-defendant received the benefit of a lowered sentence by both pleading guilty and for testifying against Applicant. Counsel conceded he probably should have objected to the Solicitor's comments during sentencing.

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 had the opportunity to observe the

witnesses presented at the hearing, and has weighed their testimony and credibility accordingly. Specifically, this Court finds that counsel was credible when he testified at the evidentiary hearing. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017). Applicant has failed to prove by a preponderance of the evidence that Counsel was deficient or that he was prejudiced by any deficiency. A Post-Conviction Relief application is not a venue for questioning each and every decision of trial counsel. Rather, the Applicant must demonstrate by a preponderance of the evidence that trial counsel was deficient and that the deficiency prejudiced the outcome of his trial. Applicant has failed to do so.

This Court will note Applicant has attempted to pick apart every detail of Counsel's performance and make ample recommendations of what should have or could have been done differently, in hindsight. But, the purpose of PCR is to highlight errors significant enough to carry with them constitutional implications, such that would cause this Court to question the fairness of the trial and undermine this Court's confidence in the outcome. For the Sixth Amendment does not exist for its own sake. The fundamental purpose of the Sixth Amendment is *not* to assess overall attorney performance, but to ensure the adversarial process functions fairly and reliably and that an accused receives a fair trial.

I. Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). 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 v. State, 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, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). 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 (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.

Failure to advise Applicant his guilty plea to grand larceny would be used against him at trial for attempted murder

Applicant alleged Counsel was ineffective for advising him to plead guilty to grand larceny prior to trial and failing to advise him that evidence of the grand larceny would still be used against him at trial. Counsel testified he advised him to plead to those charges because he was in fact guilty and because he believed it would help establish credibility with the jury – that Applicant accepted responsibility for the crime he committed, but was going to trial on the crime for which he was innocent. Counsel articulated a reasonable trial strategy, and therefore, this Court finds he was not deficient in his performance. "Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." Abney v. State, 408 S.C. 41, 46, 757 S.E.2d 544, 546–47 (Ct. App. 2014) (citing Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995).

When counsel articulates a strategy, it is measured under an objective standard of reasonableness. Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002).

Failure to investigate, provide discovery to Applicant, and present an expert witness

Applicant alleged Counsel was ineffective for failing to investigate. However, this Court finds Counsel's testimony on the issue more credible than Applicant's. Counsel's thorough investigation of the case involved reviewing all of the discovery, researching guns, and visiting the scene on more than one occasion to investigate. His investigation is evident from his trial performance. He was prepared to cross-examine and directly examine witnesses on the relevant issues and make relevant arguments.

Furthermore, to show ineffective assistance in this regard, Applicant must present evidence to show what counsel could have discovered had he more fully investigated. Jackson v. State, 329 S.C. 345, 354, 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 conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). Applicant has failed to show what beneficial information could have been discovered had Counsel done more investigation.

Applicant also alleged Counsel was ineffective for not presenting an expert witness. First, this Court finds Counsel's testimony, that he did not believe an expert witness would have been of benefit to the defense, to be credible as well as reasonable. Secondly, this Court notes any claims surrounding the failure to present testimony from a witness assumes the testimony from the witness

would have been favorable to the defense and therefore affected the outcome of the trial. However, this contention is based on pure conjecture and speculation. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Because Applicant failed to produce the testimony of an expert witness, any prejudiced derived from any of Counsel's actions leading to her not testifying is purely speculative.

Applicant also alleged Counsel failed to provide him discovery. Again, Counsel's testimony is credible. Applicant even admitted Counsel reviewed the discovery with him. This Court finds Counsel fulfilled his duty and performed reasonably with regard to his review of the discovery with Applicant. Although this Court believes Counsel did provide Applicant with a copy of discovery, Counsel is not necessarily required to provide Applicant his own copy. He is just required to make sure he knows and understands the evidence against him.

Counsel's failure to object to testimony regarding Applicant's statements made after invoking his right to counsel

Applicant alleged Counsel was ineffective for failing to properly object to testimony regarding statements Applicant made after invoking his right to an attorney. However, the record before this court refutes these allegations. The record shows Counsel made a successful objection and prevented any testimony regarding his statements made after invoking his rights. Counsel

testified he objected in anticipation of such testimony. Counsel provided this court with the incident report in which it indicated at what point during Applicant's questioning he invoked his rights. Counsel was not deficient.

Counsel failed to ask co-defendant why he pled guilty to the same charges

Applicant alleged Counsel was ineffective in failing to ask Schomer why he pled guilty to three counts of attempted murder, if he did not know Applicant was planning to shoot. While this may or may not have been a good question for the witness, this Court cannot find Counsel deficient on this issue. There are many questions that could have been asked of Schomer. But, a review of Counsel's questions to Schomer, in whole, reveal his questioning was reasonable. Applicant cannot overcome the strong presumption of reasonableness required to be given to Counsel's performance by simply pointing out other good questions he could have asked. The standard for effective assistance is reasonableness, not perfection. There could have been a dozen other good questions a dozen other attorneys may have asked, but that does not necessarily render Counsel's performance deficient in this regard. Also, this Court does not believe it would have reasonably affected the outcome of the trial. Counsel thoroughly impeached and undermined Schomer's credibility. But, the jury still believed him over Applicant. Asking this additional question was not likely to change the jury's mind.

Failure to preserve hand of one issue for appeal

Applicant alleged Counsel failed to preserve his objection to the hand of one jury instruction. However, the record conclusively refutes this allegation. The issue was taken up on appeal to both the Court of Appeals and on certiorari to the Supreme Court. Although the State did make an argument that the issue was not preserved, neither the Court of Appeals nor the Supreme Court affirmed on that ground. Both courts issued orders dismissing the appeal and citing

support for their decision which did not include any lack of preservation issues. Therefore, based on the appellate records and on the trial record, this Court finds Counsel did not fail to preserve the issue for appeal.

Failure to argue in closing that co-defendant had pled guilty to attempted murder because he, alone, was guilty

Applicant alleged Counsel was ineffective for not arguing in closing that Schomer pled guilty to the same charges because he was guilty, not Applicant. Again, Applicant cannot overcome the presumption favoring Counsel's performance and meet his burden of proving Counsel was ineffective, simply by alleging *other* arguments Counsel could have made that may or may not have bode well. PCR is not meant to second guess each and every action or inaction of counsel with the benefit of hindsight. This Court reviews Counsel's performance as a whole and finds it was reasonable. Counsel made intelligent and persuasive arguments in closing, despite not making the particular statement that Schomer pled guilty because he, alone, was guilty. Counsel's strategy was to discredit Schomer by showing his testimony was unreliable and not credible. Counsel executed this strategy well. Unfortunately, for Applicant, it was unsuccessful, but that does not equate to deficiency.

Failed to effectively cross-examine David Hamilton

Applicant has alleged that trial counsel was ineffective for failing to effectively cross-examine David Hamilton, a witness called by the State. This Court finds Applicant has failed to establish any ineffectiveness of counsel in handling Hamilton. The record reveals that counsel vigorously and effectively cross examined Hamilton at trial. Therefore, this allegation must be denied and dismissed with prejudice.

Counsel sat juror number 19 who was victim of a violent crime and who became foreman

Applicant has alleged that trial counsel was ineffective for failing to strike a juror who claimed to be a victim of a violent crime. During voir dire, juror 19 indicated that neither the fact that he was previously the victim of a violent crime nor the fact that he knew trial counsel would have any bearing upon his decision in this case. In fact, juror 19 indicated that he had not spoken to trial counsel in years. During the evidentiary hearing, trial counsel testified that he knew the juror personally and the two had a friendly relationship. Based upon this prior relationship, trial counsel felt this outweighed any possible disadvantage of the juror previously being the victim of a violent crime. "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). The validity of counsel's strategy is viewed under an "objective standard of reasonableness." Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008).

Trial counsel weighed the advantages of seating the juror or striking his attendance at trial. Trial counsel was reasonable in his strategic decision to not strike juror 19. Applicant has failed to meet his burden of proof. The allegation is denied and dismissed with prejudice.

Counsel failed to object to Solicitor's appeal to the emotions of the jury when handing the defendant the gun and "yelling" how did you shoot it

Applicant alleges his trial counsel was ineffective for failing to object when Solicitor Barnette handed an unloaded pistol to Applicant on cross-examination. Trial counsel testified that it is common practice for prosecutors to employ theatrical methods during cross-examination and that every attorney makes strategic decisions during trial. Trial counsel testified that he saw no basis to object to the Solicitor's question or action during cross-examination. Applicant failed to provide any evidence as to the effect of the Solicitor's actions or questions during cross-

examination of Applicant at trial and therefore has failed to prove any prejudice by any alleged action. Trial counsel testified that he chose not to object, because there was no basis to do so. Applicant has failed to show how trial counsel was deficient for not objecting and has failed to show any prejudice. The allegation is denied and dismissed with prejudice.

Counsel failed to move to reconsider. Grounds for reconsideration including the excessive sentence imposed.

Applicant argues that his trial counsel was ineffective for failing to move to reconsider his sentencing. During the evidentiary hearing, trial counsel testified that he did file a Motion to Reconsider Applicant's sentence on May 17, 2013. Trial counsel testified that within the Motion to Reconsider, he included case law concerning the difference in sentencing between two codefendants and the benefit of testifying against a codefendant. Trial counsel testified that the Motion to Reconsider Sentencing was denied.

Applicant has failed to show that trial counsel was deficient for failing to move to reconsider, as the record is clear that trial counsel did, in fact, move to reconsider. The allegation is denied and dismissed with prejudice.

Counsel failed to effectively object to witness not on the witness list read to the jury who was the mother of the co-defendant

Applicant argues that trial counsel was ineffective for failing to effectively object to a witness testifying at trial who was not on the witness list and was the mother of the co-defendant. At the evidentiary hearing, trial counsel testified credibly that Ms. Jennifer Blackwell Thompson was called as a witness for the State, even though she had not been listed as a potential witness during voir dire. Trial counsel objected to her being allowed to testify, but the objection was not sustained. Applicant had failed to show what other grounds trial counsel should have objected to for this particular witness. Applicant has further failed to show how he was prejudiced by this

witness' being allowed to testify, as the trial transcript shows Judge Cole questioning the jury's knowledge of the witness prior to her testimony. No juror indicated they knew the witness prior to her testimony and Applicant has failed to show any prejudicial effect of her being allowed to testify at trial. Applicant has failed to meet his burden of proof. The allegation is denied and dismissed with prejudice.

The Solicitor asks the judge to sentence for attempted murder (when jury acquitted on that charge)

Applicant argues trial his due process rights were violated when the Solicitor asks the judge to sentence for attempted murder, when the jury acquitted on that charge. Applicant has failed to set forth with specificity how he was denied due process of law, other than claiming the Solicitor asked the judge to sentence him attempted murder.

The jury convicted Applicant for the lesser included offense of 1st degree assault and battery, as well as assault and battery of a high and aggravated nature ("ABHAN"). Judge Cole sentenced the Applicant to ten years for 1st degree assault and battery and twenty years for ABHAN. This sentence was within the statutorily mandated range for the offenses that Applicant was convicted. Therefore the sentence was not cruel, unusual or excessive.

The Solicitor also did not request that Judge Cole sentence for attempted murder. Solicitor Barnette stated the following during the sentencing phase of Applicant's trial:

> "I know you know the facts, and I won't go through because you've heard it, and you've heard my closing argument. To me if this is not attempted murder, I don't know what is. But the jury has spoken. And I know the Court will take that into consideration and give a sentence appropriate for that action."

Solicitor Barnette never requested the Court to impose a sentence of which Applicant was no convicted. Nonetheless, the Court sentenced Applicant in accordance with South Carolina law on

the charges of which he was convicted. Applicant has failed to meet his burden of proof. The allegation is denied and dismissed with prejudice.

Cumulative Error

Applicant argues in his Motion to Alter or Amend Judgment that this Court should grant post-conviction relief based upon a cumulative error analysis. Specifically, if each allegation may not amount to ineffective assistance of counsel standing alone, the cumulative effect of counsel's performance was deficient and prejudiced him to the degree that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Before an alleged error may be considered as a factor contributing to cumulative prejudice, a court first must find that the alleged error is, in fact, error. Green v. State, 351 S.C. 184, 196-97, 369 S.E.2d 318, 324-25 (2002) ("While it is unsettled law whether individual errors, which may not be independently prejudicial, may be prejudicial when taken as a whole, we recognize the threshold to asking the cumulative prejudicial question is to first find multiple errors"). South Carolina courts have consistently declined to apply a cumulative error analysis in PCR actions. See, e.g., Green, 351 S.C. at 197, 569 S.E.2d at 325 (declining to address whether applicant was entitled to relief based on supposed cumulative effect of counsel's alleged errors); Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) (finding PCR court did not err in failing to conduct a cumulative error analysis where only one allegation had merit and the "record simply did not contain 'several errors' for the judge to cumulatively assess."). Moreover, the Fourth Circuit has held that "ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively" and, therefore, does not recognize a cumulative error analysis. Fisher v. Angelone, 163 F.3d 835, 852 (4th Cir. 1998).

Applicant has failed to satisfy his burden of proving ineffective assistance of counsel on any issue, therefore the record has failed to contain anything for this Court to cumulatively assess. This allegation is without merit. The allegation is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any violations that would require this Court to grant his application. This Court finds Applicant has failed to prove any deficiencies on the part of Counsel and further, Applicant has failed to prove prejudice from any alleged deficiencies in Counsel's representation of him. Therefore, as Applicant has failed to meet his burden of proof in this post-conviction relief action, his application is denied and dismissed with prejudice.

This Court notifies Applicant he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCP. You must look at Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;

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 20 day of August, 2018.

GRACE GILCHRIST KNIE
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina

FILED
CLERK OF COURT
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2018 AUG 21 AM 9:30
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Clerk of Court

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Megan Holder #337574

Applicant

VS

State

Respondent

IN THE COURT OF COMMON PLEAS

7TH JUDICIAL CIRCUIT

CASE# 2018CP42-3627

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the Amended Ord. of Dismissal w/prejudice
In this action dated 8-20, 2018 on 8-21-18

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Megan Jamison

Susannah Ross

8-21-18
(Date)

Carrie Seay
(Signature)

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