THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM COLLETON COUNTY
Court of Common Pleas
Honorable Thomas A Russo, Circuit Judge

Case No.: 2015-CP-15-00444

Desmond J Sams 332938.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Desmond Sams appeals the Honorable Thomas A Russo's July 30, 2018 orders Granting Respondent's Motion to Reconsider and Amended Order Denying Post-Conviction Relief. Undersigned counsel received notice of entry of the order on August 23, 2018. A copy of the orders on appeal is attached hereto.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 294

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SC Court of Appeals

September 4, 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

APPEAL FROM COLLETON COUNTY

Court of Common Pleas

Honorable Thomas A Russo, Circuit Judge

Case No.: 2015-CP-15-0444

Desmond A Sams 332938.....PETITIONER

V.

State of South Carolina.....RESPONDENT

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 September 4, 2018.

James K Falk
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Charleston, SC 29402

FALK LAW FIRM, LLC.

James K. Falk

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September 4, 2018

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

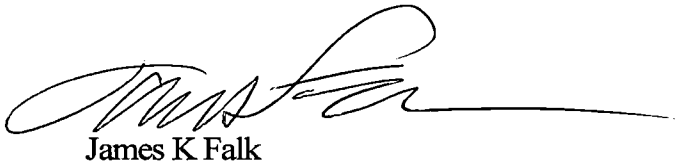
Re: Desmond A Sams 332938 v. State of South Carolina

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and orders Granting Respondent's Motion to Reconsider and Amended Order Denying Post-Conviction Relief in the above Colleton 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
Desmond J Sams 332938.

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF COLLETON	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
Desmond J. Sams,	)	
	)	
Applicant,	)	Case No. 2015-CP-15-00444
vs.	)	
	)	**ORDER GRANTING**
State of South Carolina,	)	**RESPONDENT'S MOTION TO**
	)	**RECONSIDER**
Respondent.	)	
	)	

PATRICIA C. GRANT
COLLETON COUNTY
COMMON PLEAS
2018 AUG 17 AM 11:19

THIS MATTER is before the Court on Respondent's Rule 59(e) Motion to Amend and Motion to Reconsider, dated April 27, 2018. Having considered its original Order and the submissions of the parties pursuant to SCRCP 59(f), the Court does find it necessary to issue an amended order to reverse its original decision for the reasons outlined therein.

Based on the forgoing, Respondent's 59(e) motion is GRANTED. The Court will issue an Amended Order in this case.

AND IT IS SO ORDERED.

THE HONORABLE THOMAS A. RUSSO
Presiding Judge
Fourteenth Judicial Circuit

July 30, 2018
Florence, South Carolina

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF COLLETON	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
Desmond J. Sams,	)	
	)	
Applicant,	)	Case No. 2015-CP-15-00444
vs.	)	
	)	**AMENDED ORDER**
State of South Carolina,	)	**DENYING POST-CONVICTION**
	)	**RELIEF**
Respondent.	)	
	)	

THIS MATTER comes before the Court via an Application for Post-Conviction Relief (PCR) filed by Mr. Desmond J. Sams. Applicant is currently incarcerated with the South Carolina Department of Corrections pursuant to the Colleton County Clerk of Court's Orders of Commitment.

This Court convened an evidentiary hearing during the PCR term of court for October 2017 in the Fourteenth Judicial Circuit. Applicant was present at the hearing and was represented by Mr. James K. Falk, Esquire. Mr. Ruston Neely, Esquire, of the South Carolina Attorney General's Office represented Respondent. For the reasons set forth below, Mr. Sams' Application for Post-Conviction Relief is hereby DENIED.

PROCEDURAL HISTORY

Applicant was indicted by the October 2008 term of the Colleton County Grand Jury for Murder, 2008-GS-15-0370, and Assault and Battery of a High and Aggravated Nature (ABHAN), 2008-GS-15-0371.

Applicant proceeded to a jury trial and was represented by David Mathews, Esquire, of the Colleton County Public Defender's Office ("trial counsel"). In its indictment, the State alleged that Applicant murdered the victim, Jake Frazier, by means of choking. See S.C. Code Ann. § 16-3-

10 (2003) (defining "murder" as the "killing of any person with malice aforethought, either express or implied."). The jury found Applicant guilty of the lesser-included offense of voluntary manslaughter. The jury also acquitted Applicant of ABHAN. On January 29, 2009, the Honorable Perry M. Buckner sentenced Applicant to confinement for twenty-four (24) years suspended upon the service of eighteen (18) years followed by five (5) years of probation.

A Notice of Appeal was filed on Applicant's behalf and an appeal perfected. Joseph L. Savitz, Esquire, of the Office for Appellate Defense ("appellate counsel") represented Applicant on appeal. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Sams, No. 2011-UP-205, 2011 WL 11734316 (S.C. Ct. App. May 4, 2011). Applicant then filed a petition for writ of certiorari in the Supreme Court of South Carolina, which was granted on October 17, 2012. Applicant was represented by Tristan Shaffer, Esquire. On February 4, 2014, the Supreme Court affirmed the decision of the Court of Appeals. State v. Sams, 410 S.C. 303, 764 S.E.2d 511 (2014). The Remittitur was issued on November 7, 2014.

On March 27, 2015, Applicant filed a timely application for Post-Conviction Relief with the Colleton County Clerk of Court. In his application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "(5) amendment violation"
    a. "Grand jury violation"
2. "(6) amendment violation"
    a. "Ineffective counsel violation"
3. "(14) amendment violation"
    a. "Due process violation Brady violation"

On October 20, 2015, J. Rutledge Johnson, Esquire, filed a Return on behalf of the State, through which it asserted that Applicant's PCR Application raised no genuine issues of material fact and therefore sought a summary dismissal of Applicant's claims. In the alternative, the State sought

an evidentiary hearing to resolve all factual issues that could not be conclusively refuted by the record.

An evidentiary hearing in this matter was held on October 10, 2017, in the Beaufort County Courthouse before the Honorable Thomas A. Russo. James K. Falk, Esquire, was appointed to represent Applicant in this matter. Prior to the commencement of the hearing, Applicant's counsel advised the Court that Applicant was amending his PCR Application to include a claim of ineffective assistance of appellate counsel. Present and testifying at the hearing were Applicant and Applicant's trial counsel. At the time of the hearing, appellate counsel was no longer employed by the Office of Appellate Defense, but was able to testify via telephone.

THE UNDERLYING GENERAL SESSIONS CASE

During the early morning hours of April 12, 2008, Applicant and his girlfriend, Lisa Strickland, were drinking at Strickland's residence in Walterboro along with Jake Frazier (victim) and Frazier's girlfriend, Stephanie Ballard. At some point, Frazier accused Applicant of inappropriately touching Ballard, and a fight ensued. During the struggle, Applicant put Frazier into a choke hold while lying on top of him. According to Strickland and Ballard, Frazier repeatedly stated that he could not breathe and asked Applicant to let him go. Applicant refused to release Frazier, and allegedly struck Ballard several times when she tried to separate the two men. Around 4:36 a.m., Strickland made the last of several calls to 911 to report the fight and request assistance.

Law enforcement was dispatched at 4:38 a.m. When they arrived on scene around 4:46 a.m., Frazier was face down on the floor and Applicant was on top of him, also facing downward. Applicant was still trying to restrain Frazier when law enforcement ordered Applicant to release his hold. Applicant did not respond. Again, law enforcement instructed Applicant to get off of

Frazier; this time, Applicant responded by saying, "No, he'll want to fight." Upon a third request by the officer, Applicant complied and released his hold on Frazier, but Frazier remained unresponsive on the floor. The responding officer observed Frazier was not breathing and had a blue cast to his skin. Frazier was later declared deceased.

The case went to trial on January 28, 2009. Dr. Susan Erin Presnell, a forensic pathologist who performed the autopsy on Frazier, testified that she determined the cause of death to be "asphyxiation, or lack of oxygen, due to strangulation." Tr. p. 148, l. 4-5. The State also called Stephanie Ballard and Lisa Strickland to testify as fact witnesses. The State rested after calling seven witnesses.

Trial counsel called Detective Allen Inabinett as its second witness. Detective Inabinett testified that he was the case officer and was present at the scene sometime shortly after the incident occurred. Trial counsel then asked whether any video statements were taken in the case, to which Detective Inabinett replied that video statements were taken from both Ballard and Strickland. Tr. p. 169, l. 16-25. Trial counsel immediately requested to approach the bench for a bench conference, where both he and Deputy Solicitor Sean Thorton claimed they had never seen the videos and were not aware of their existence. Tr. p. 194, l. 16 – p. 195, l. 11. Despite this, testimony continued until after the jury was dismissed for the day, whereupon trial counsel moved for a mistrial. Tr. p. 196, l. 7 – p. 197, l. 3. The trial court withheld ruling on the motion, instead ordering trial counsel and the State to review the videotaped statements overnight for any discrepancies between the written statements and the video. Tr. p. 197, l. 4-10. The next morning, trial counsel renewed his motion for a mistrial, arguing that he would have prepared for the case differently and would have taken a different approach on cross examination with Ballard and Strickland had he known about their videotaped statements prior to trial. Tr. p. 200, l. 15-24. The

trial court ultimately denied that motion for a mistrial, opting instead to require the State to re-call Ballard and Strickland so that the defense could re-cross-examine them. Tr. p. 203, l. 24 – p. 205, l. 18.

At the conclusion of all the evidence, the trial judge charged the jury on murder, voluntary manslaughter, ABHAN, and self-defense. The jury acquitted Applicant of murder and ABHAN, but found him guilty of voluntary manslaughter.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having heard the testimony of the witnesses and arguments of counsel, this Court makes the following findings of fact and conclusions of law:

A. Ineffective Assistance of Appellate Counsel

Applicant raises two issues with regard to appellate counsel's scant brief to the Court of Appeals.[1] First, Applicant argues appellate counsel failed to properly preserve the argument that the first definition of involuntary manslaughter (unlawful activity not naturally tending to cause death or great bodily harm) should have been charged. Second, Applicant argues appellate counsel failed to raise the issue of the trial court's denial of his motion for a mistrial.

Applicant is constitutionally entitled to effective assistance of both trial counsel and appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). "Nominal representation on appeal—like nominal representation at trial—does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better

[1] Here, appellate counsel's final brief to the Court of Appeals was a mere six pages long, including the cover page, table of contents, and signature page. The argument section consisted of two substantive paragraphs, prompting the Court of Appeals to write in a footnote: "We are disturbed by the brevity of the legal argument in Sam's appellate brief, which consists of less than a page." During his testimony at the PCR hearing, appellate counsel explained that he was "cranking briefs out" during the time of this case, and that he could not argue with the Court of Appeal's conclusion that his brief was too short.

position than one who has no counsel at all." Id. at 396. In order to be effective, appellate counsel must give assistance of such quality as to make the appellate proceedings fair. Id. "However, appellate counsel is not required to raise every non-frivolous claim, but may select among them in order to maximize the likelihood of a favorable outcome." Smith v. Robbins, 528 U.S. 259, 288, 120 S.Ct. 746 (2000).

In deciding a claim of ineffective assistance of counsel, the focus is on "the fundamental fairness of the proceeding whose result is being challenged." Strickland v. Washington, 466 U.S. 668, 685, 696 (1984). First, the burden of proof is on the petitioner to show that counsel's performance was deficient as measured by the standard of reasonableness under prevailing professional norms. Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Second, "the petitioner must prove that he or she was prejudiced by such deficiency to the extent of there being a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. (citing Strickland, 466 U.S. 668).

i. **Failure to Preserve Argument on Involuntary Manslaughter Charge**

Applicant argues that appellate counsel was ineffective in failing to preserve argument on one definition of involuntary manslaughter. This Court respectfully disagrees.

Voluntary and involuntary manslaughter are both lesser-included offenses of murder. State v. Williams, 399 S.C. 281, 731 S.E.2d 338 (Ct. App. 2012). In South Carolina, involuntary manslaughter is defined as: (1) the intentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. State v. Wharton, 381 S.C. 209, 672 S.E.2d 786, 789 (2009).

While appellate counsel's entire argument on this one and only issue consisted of just two paragraphs and only addressed the second definition of involuntary manslaughter, this Court finds the ultimate outcome on appeal would not have been different had appellate counsel adequately briefed the court on the first definition. Unlike most PCR cases alleging ineffective assistance of appellate counsel, we know definitively what the Court of Appeals would have held on this issue because the appellate judges analyzed both definitions of involuntary manslaughter and affirmed the trial court.[2] Here, appellate counsel's failure to raise the first definition of involuntary manslaughter in his brief amounted to harmless error. Thus, Applicant has failed to satisfy the second prong of Strickland as to this ground of his PCR application.[3]

ii. **Failure to Raise Issue of Trial Counsel's Motion for Mistrial**

Next, Applicant argues that appellate counsel was ineffective in failing to raise the issue regarding trial counsel's motion for mistrial in his appellate brief, and that the trial court should have granted that motion. This Court respectfully disagrees.

In the trial of Applicant's case, it was revealed on the stand that law enforcement had videotaped statements of two eyewitnesses in its possession that were not turned over to the prosecutor or trial counsel. Trial counsel moved for a mistrial based on the State's failure to comply with Rule 5 and Brady. The trial judge took the matter under advisement overnight to give both

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[2] The Supreme Court later found this to be in error: "[W]e conclude the Court of Appeals should not have considered the first definition of involuntary manslaughter as it was not properly preserved." State v. Sams, 410 S.C. 303, 310, 764 S.E.2d 511, 514-15 (2014).

[3] In Respondent's Motion to Amend, the State asks this Court to deny Applicant's PCR application based on overwhelming evidence; the Court declines to fully address this argument because it ruled in favor of the State on other grounds, and because "the existence of 'overwhelming evidence' does not automatically preclude a finding of prejudice." Smalls v. State, 422 S.C. 174, 189, 810 S.E.2d 836, 844 (2018).

sides a chance to review the videotapes, then ruled as follows the next morning when trial counsel renewed his motion:

> I think I have to find, for purposes of your motion, Mr. Mathews, that there is some manifest injustice here that requires the Court to grant a mistrial. I recognize that, sometimes, even though there's a good faith on both parts, that mistakes are made in discovery. . . . However, I am fortunate enough, number one, that we're still in your case, and I can require the Solicitor to bring the witnesses back to this courtroom, and allow you to cross-examine them, and confront with whatever information you feel was on the tapes, that you should have brought out during your earlier cross-examination. In other words . . . I'll put them back on the stand as State's witnesses and allow you to lead them and cross-examine them. For that reason, I do not believe that what has occurred here results in the type of injustice necessary, nor has any showing been made to me of that injustice, other than the fact that [trial counsel] has reviewed the tapes and would like to have had them earlier in your cross-examination, because you might have handled the witness differently. But I'm going to give you, which is extraordinary in a criminal case, a second bite at the apple in the cross-examination, which I think cures any problem that may have occurred from what was obviously nothing intentional but a mistake.

Tr. p. 203, l. 24 – p. 205, l. 2. Subsequently, trial counsel was able to re-cross-examine Ballard and Strickland and play their videotaped statements for the jury. Tr. p. 211, l. 1 – p. 221, l. 24.

a. **Violation of Rule 5 and *Brady***

The State is required to disclose evidence in its possession favorable to the accused and material to guilt or punishment. Brady v. Maryland, 373 U.S. 83 (1963). This includes impeachment evidence. State v. Gunn, 313 S.C. 124, 437 S.E.2d 75 (1993). Rule 5(a)(1)(C) of the South Carolina Rules of Criminal Procedure provides that "[u]pon request of the defendant, the prosecution shall permit the defendant to inspect and copy . . . documents, photographs, [and] tangible objects . . . which are material to the preparation of his defense[.]" The rule also provides the available remedies for a failure to comply with a discovery request:

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, *the court may order such party to permit the discovery or inspection*, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

Rule 5(d)(2), SCRCrimP (emphasis added). Failure to disclose Brady material is reversible error only when its omission deprives the defendant of a fair trial. State v. Gunn, 313 S.C. 124, 437 S.E.2d 75 (1993).

This Court does not have the benefit of viewing the videotaped statements of Strickland and Ballard, but from a review of the transcript, it appears that any discrepancies between the women's video statements and in-court testimony or written statements were minimal. Even when viewing the record before it in a light most favorable to Applicant, it is clear that the trial court selected a remedy from the options available to it in its discretion pursuant to Rule 5. The trial court also found that the Solicitor's Office was not aware of the existence of the videotapes, i.e. the non-disclosure did not rise to the level of prosecutorial misconduct, and Applicant would not be deprived of a fair trial after remedying the situation.

b. Denial of Motion for a Mistrial

"A motion for a mistrial is, by its very nature, both an allegation of error and an allegation of prejudice sufficient to warrant a mistrial." State v. Wilson, 389 S.C. 579, 585, 698 S.E.2d 862, 865 (Ct. App. 2010). Therefore, "[a] mistrial should only be granted when absolutely necessary, and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial." State v. Harris, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009). "The granting of a motion for a mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way." Id. (citing State v. Stanley, 365 S.C. 24, 33-34, 615 S.E.2d 455, 460 (Ct. App. 2005)).

"The decision to grant or deny a mistrial is within the sound discretion of the trial court." State v. Harris, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009). Our Supreme Court "favors the exercise of the wise discretion of the circuit judge in determining the merits of such

motion in each individual case." State v. Thompson, 276 S.C. 616, 621, 281 S.E.2d 216, 219 (1981) (citing State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976)). "The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." State v. Harris, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009).

Here, it does not appear that the trial court made an error of law. Instead, the trial court was able to remedy the discovery issue in accordance with the Rules of Criminal Procedure and preserve the integrity and fairness of the trial. South Carolina case law is clear that the trial court is given substantial deference on appeal absent an error of law. Thus, had appellate counsel briefed the mistrial issue to the Court of Appeals, this Court finds it unlikely that the trial judge would have been overturned. Again, appellate counsel is not required to raise every non-frivolous claim, but may select among them in order to maximize the likelihood of a favorable outcome. Smith v. Robbins, 528 U.S. 259, 288, 120 S.Ct. 746 (2000).

In conclusion, because the trial court was able to remedy the failure of the State to disclose the videotapes, this Court finds Applicant was not prejudiced, and the fairness of his trial was preserved. The trial court also acted within its discretion in denying trial counsel's motion for a mistrial. Finally, because appellate counsel is under no duty to raise unsuccessful arguments, and because there is not a reasonable likelihood that the appellate courts would have reached a different outcome had the mistrial issue been briefed, this Court finds Applicant has failed to satisfy the second prong of Strickland as to this ground of his PCR application.

V. CONCLUSION

Based on 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 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 71.1g, 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. This 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 30th day of July, 2018.

THE HONORABLE THOMAS A. RUSSO
Presiding Judge
Fourteenth Judicial Circuit

Florence, South Carolina

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Charleston, SC 29402

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