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November 14, 2018

RECEIVED

NOV 19 2018

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

S.C. SUPREME COURT

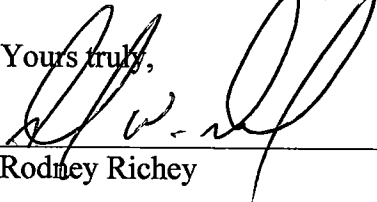
RE: David Adam Young vs. The State of South Carolina
Case No: 2017-CP-23-6470

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and an affidavit of service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Please clock and file the copies and return them to me. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,


Rodney Richey

RWR/
Enclosures
cc: DeShawn H. Mitchell, Esquire

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

HONORABLE ALEX KINLAW, JR.

2017-CP-23-6470

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S.C. SUPREME COURT

DAVID A. YOUNG, SCDC# 146369

APPELLANT,

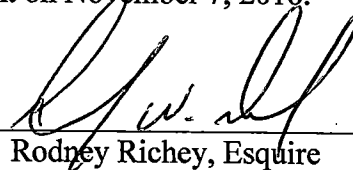
vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

David A. Young appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Alex Kinlaw, Jr., Circuit Judge on October 23, 2018 and Order issued on November 5, 2018 and filed on November 7, 2018. The Appellant received notice of the judgment on November 7, 2018.



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Other Counsel of Record:
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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
HONORABLE ALEX KINLAW, JR.
2017-CP-23-6470

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S.C. SUPREME COURT

DAVID A. YOUNG, SCDC# 146369

APPELLANT,

vs.

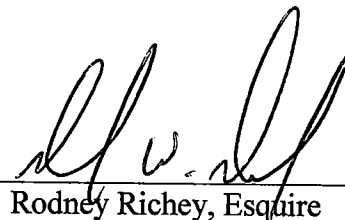
STATE OF SOUTH CAROLINA,

RESPONDENT.

AFFIDAVIT OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on November 14, 2018, addressed to their attorney of record, DeShawn H. Mitchell, Esquire Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: November 14, 2018



Rodney Richey, Esquire
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PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenville County Clerk of Court. In November of 2013, the Greenville County Grand Jury indicted Applicant for murder and possession of a weapon during the commission of a violent crime (2013-GS-23-0607). Applicant was also indicted for failure to stop for a blue light (2013-GS-23-0608). Randall L. Chambers, Esquire, represented Applicant. Applicant proceeded to trial on February 9 2015, before the Honorable R. Keith Kelly, and a jury. The jury found Applicant guilty as indicted to all charges. The state had served its notice of intent to seek a life sentence if Applicant was convicted of murder. Thereafter, Judge Kelly sentenced Applicant to life imprisonment and imposed a one year concurrent term for failure to stop for a blue light.

Applicant filed a timely notice of appeal. Robert M. Dudek, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals dismissed Applicant's appeal after review pursuant to Anders v. California¹ on February 1, 2017. State v. Young, Op. No. 2017-UP-168 (S.C. Ct. App. filed April 19, 2017). The remittitur was returned to the circuit court on May 8, 2017.

FACTUAL HISTORY

The shooting in this case occurred at about 5:30 a.m. at Bobby T's tavern on Whitehorse Rd. in Greenville where the decedent's dead body lying between two cars in the parking lot Tr. 88-95.

Elisha Green was the decedent's girlfriend. She did not know Applicant and she admitted that her deceased boyfriend was a drug dealer. Tr. 124-125. Green knew Porchae Adams, Applicant's co-defendant as "Chop." She remembered that boyfriend sold cocaine to Chop on

¹ 386 U.S. 738 (1967).

the night before he was killed hours later. Tr. 126-128. He sold Chop cocaine that evening for \$1,350. The purchase price was \$1,400 but Chop was \$50 short. Tr. 128-130. Chop was very upset because the cocaine was either of very poor quality or it was fake. Green remembered that Chop "blew up his phone" telephoning the victim repeatedly to complain about the drugs that evening. Tr. 137-138. The victim later left Green alone at her house, and Green said she did not know where he was going.

Robert Bowens was the bouncer at Bobby T's that evening. Bobby T's was in a strip mall on Whitehorse Rd. Bowen's job was to "pat down" everyone before they went into the bar. Tr. 144-147. Bowens knew the victim from working security at different clubs in the area. He remembered the victim came to the bar about four or five in the morning. Bowens did not know Applicant. He did remember Applicant coming into the club, and then leaving. He said Applicant walked back into the club a second time, and walked past him. Tr. 147-152. Bowens maintained that while the victim was talking to "a few girls" he heard someone say to the victim: "I told you motherfuckers about fucking with me." Bowens then heard several gunshots. "I think it was three shots." Bowens said he saw the victim fell to the ground after being shot Tr. 153-155.

Porchae Adams testified that after the victim sold her bad drugs she called him about eight times that evening. She wanted the drugs replaced with real or better cocaine. Adams recalled she went with Applicant who was often her "driver" to Bobby T's about 4:30 or 5:00 in the morning. She saw the victim's car in the parking lot. Adams testified Applicant got out of the car and told her "he would handle it." Adams said she heard three or four gunshots, and she testified that Applicant came back outside and said he had killed the victim. Tr. 227-237.

Applicant would later testify that he was with Adams and another man "Jack Frost" at Bobby T's that morning. Applicant told the jury that he was standing nearby when either Adams

or Jack Frost shot the victim. Applicant said he saw the victim reach for something, and then Adams or Frost shot the victim. Tr. 372-374.

ALLEGATIONS

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

1. Ineffective Assistance of Counsel
 - a. Trial Judge erred by allowing gun into evidence. Failure to object by counselor
 - b. Insufficient evidence
 - c. Failure to investigate
 - d. Counselor failure to protect clients due process rights, 6th and 14th const. Amend
 - e. Failure to investigate for the person who shot the deceased, the victim.
2. Failure to call witness
3. Failure to object to officer being qualified as voice expert
4. Failure to investigate the person that remove items / and weapons

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTARY HEARING

Applicant's Testimony

Applicant testified he was convicted following a jury trial. He testified Trial Counsel represented him on his charges. Applicant testified prior to trial, Trial Counsel came and discussed the case with him a week before trial and that Trial Counsel did not review the discovery in his case with him. He testified however that he did have a copy of the discovery. Applicant testified he received a plea offer a week before trial for thirty years but that he rejected the offer. He testified the incident was a shooting over a bad drug transaction. Applicant testified he saw his co-defendant purchase drugs from the victim and the drugs were of a bad quality. He testified he was his co-defendant's cousin so he went to confront the victim. Applicant testified a shooting took place but that he did not shoot the victim. He testified his co-defendant or a man named Jack Frost did the shooting. Applicant testified the issue of who shot the victim came out during the day of trial. He testified he told Trial Counsel he was not the shooter. Applicant



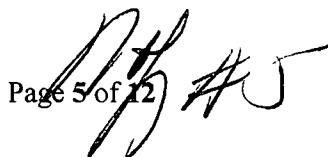
testified during trial there were phone calls introduced from the jail that were made by him in which he confessed to the shooting. He testified he told Trial Counsel that he confessed to protect his cousin who was his co-defendant. Applicant testified the State did not prove it was his voice on the recording prior to them being introduced into evidence. Applicant testified Trial Counsel did not talk about trial strategy with him or investigate his case. He testified he would have taken the plea offer if he would have heard the recordings.

On cross-examination, Applicant testified Trial Counsel met with him three times before going to trial. He testified during their meetings they never discussed possible defenses for Applicant. Applicant testified he confessed to the shooting on recordings from the jail he was housed in. He testified the issue of whether the recordings were properly authenticated prior to being admitted into evidence was raised in his direct appeal and the Court of Appeals affirmed his conviction. Applicant testified his co-defendant also testified against him at trial.

On redirect, Applicant testified Trial Counsel did not visit him enough during the course of his representation. He testified the trial strategy initially was self-defense. Applicant testified he asked Trial Counsel to get his witnesses to testify at his trial but Trial Counsel failed to do so.

Trial Counsel's Testimony

Trial Counsel testified he had practiced law in South Carolina since 1992 and all of that time had been devoted to criminal law. He testified he was appointed to represent Applicant on his charges. Trial Counsel testified the victim in the case was a drug dealer who was shot after a drug transaction involving Applicant and his co-defendant. He testified he met with Applicant between eight or ten times during the course of his representation. Trial Counsel testified during those meetings he discussed the indictments and the possible punishments Applicant was facing, Applicant's constitutional rights and the State's burden of proof. He testified Applicant never

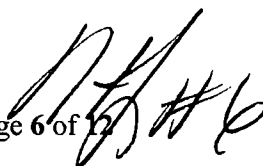
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pointed out any witnesses he wanted him to call or interview. Trial Counsel testified the State felt as though they had a good case and never made a formal plea offer. He testified there were discussion between him and the State for a plea deal of twenty years but the State would not offer that number. Trial Counsel testified Applicant was looking for a deal of less than thirty years in order to consider pleading guilty. He testified the State had numerous recordings of Applicant's jail calls in which he identified himself as the shooter. Trial Counsel testified Applicant indicated to him that his co-defendant was the shooter on the day of trial. He testified his theory of the case and strategy was that Applicant was acting in self-defense and the victim was armed and a drug dealer. He testified however the jail recordings came into the trial over his objection.

On cross-examination, Trial Counsel testified Applicant's co-defendant was the one who brought drugs prior to the incident. He testified he did not play the recordings of Applicant confessing to the shooting for Applicant while he was incarcerated but that he and Applicant had numerous discussions about the existence of the recordings and what they contained. Trial Counsel testified Applicant decided to testify at trial once his co-defendant decided to testify against him.

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 can weigh their testimony and credibility accordingly. These credibility findings have been applied to the Court's findings and conclusions set forth below. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017).

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In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel’s performance was deficient. Id. Under this prong, the court measures an attorney’s performance by its “reasonableness under professional norms.” Id. (quoting Strickland v. Washington, 466 at 688). 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.

After careful review of the entire record, including the testimony presented at the evidentiary hearings, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action regarding any of his allegations of ineffective assistance

of counsel. This Court finds as follows on the following grounds presented by Applicant at the evidentiary hearing:

Ineffective Assistance of Counsel

Failure to Investigate

Applicant alleges Trial Counsel was ineffective in failing to investigate his case. 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 Trial Counsel done more investigation. Even so, Trial Counsel testified credibly that he reviewed all of the discovery and met with Applicant on numerous occasions. Notwithstanding, this court finds Applicant has failed to produce any information that Trial Counsel would have found had he done more investigation. This Court finds Trial Counsel’s investigation was reasonable. Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Trial Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Trial Counsel’s performance. This



Court concludes Applicant has not met his burden of proving Trial Counsel failed to render reasonably effective assistance. The allegation is denied and dismissed with prejudice.

Failure to Call Witnesses

Applicant alleges Trial Counsel was ineffective in failing to call certain witnesses during his trial. Applicant testified he asked Trial Counsel to get his witnesses to testify at his trial but Trial Counsel failed to do so. Trial Counsel testified Applicant never pointed out any witnesses he wanted him to call or interview. This Court finds Applicant has failed to show that Trial Counsel was ineffective for either not interviewing or calling witnesses for his trial. First, 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 any witness, sufficient prejudice cannot be demonstrated by Applicant.

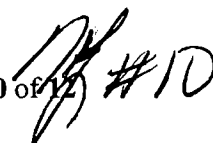
Secondly, this Court finds Trial Counsel's testimony on the issue more credible than that of Applicant. Trial Counsel testified Applicant did not provide him with the names of any

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potential witnesses and therefore he did not know about them. Trial Counsel cannot be expected to interview a witness he does not know exists. Therefore, Applicant has failed to prove Trial Counsel was deficient or that he was prejudiced by any alleged deficiency. The allegation is denied and dismissed with prejudice.

Failure to Object

Applicant alleges Trial Counsel was ineffective in failing to object to an officer being qualified as a voice expert. Applicant testified during trial there were phone calls introduced from the jail that were made by him in which he confessed to the shooting. He testified he told Trial Counsel that he confessed to protect his cousin who was his co-defendant. Applicant testified the State did not prove it was his voice on the recording prior to them being introduced into evidence. Trial Counsel testified the State had numerous recordings of Applicant's jail calls in which he identified himself as the shooter. He testified he did not play the recordings of Applicant confessing to the shooting for Applicant while he was incarcerated but that Applicant and he had numerous discussions about the existence of the recordings and what they contained. This court finds Applicant has failed to show Trial Counsel was ineffective for failing to object to the introduction of the recordings at trial. A review of the record shows when the State sought to introduce the recordings into evidence, Trial Counsel objected to their introduction. (Tr.p.334). Here, Trial Counsel argued to the trial judge that the State had not properly authenticated the recordings and because of this they should not be admitted into evidence. (334-335). This court finds while ultimately unsuccessful, there is no question Trial Counsel attempted to keep the recordings from coming into evidence. Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to

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present compelling evidence that Trial Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Trial Counsel’s performance. This Court concludes Applicant has not met his burden of proving Trial Counsel failed to render reasonably effective assistance. The allegation is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that 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.

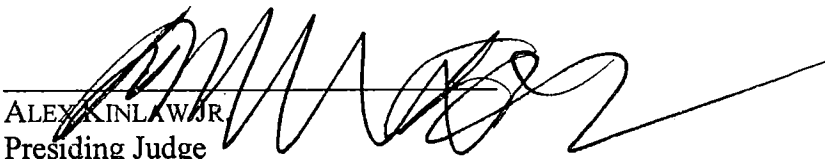
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel’s assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant’s behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

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IT IS THEREFORE ORDERED THAT:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 5 day of April, 2018.


ALEX KINLAW JR.
Presiding Judge
Thirteenth Judicial Circuit

, South Carolina

Copy mailed to
Attorney Richey and A.G.
on 11 / 7 / 2018.

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The Honorable Daniel E. Shearouse
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