



December 7, 2018

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

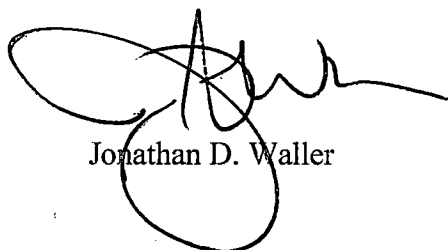
Re: Larry Brayboy vs. State of South Carolina
C/A No: 2014-CP-21-03757

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Brayboy in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-520-7278.

Sincerely,



Jonathan D. Waller

Cc: Lindsey A. McCallister, South Carolina Office of Attorney General

Enclosures

RECEIVED
DEC 12 2018
S.C. SUPREME COURT

Waller Law Group
1116 Blanding Street, Suite 2B
Columbia, SC 29201

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jonathan@wallergroupsc.com

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
Michael G. Nettles, Circuit Court Judge

2014-CP-21-03757

RECEIVED

DEC 12 2018

S.C. SUPREME COURT

Larry Brayboy, #336486,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Larry Brayboy, #336486, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed November 20, 2018, issued by the Honorable Michael G. Nettles, Presiding Judge, Twelfth Judicial Circuit.



Jonathan D. Waller

Waller Law Group
SC Bar No.: 76290
1116 Blanding Street
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Columbia, SC 29201
803-520-7278 (phone)
jonathan@wallergroupsc.com
ATTORNEY FOR PETITIONER

December 7, 2018

Other Counsel of Record:

Lindsey A. McCallister, Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3319

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
Michael G. Nettles, Circuit Court Judge

RECEIVED

DEC 12 2018

2014-CP-21-03757

S.C. SUPREME COURT

Larry Brayboy, #336486,

Appellant,


v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, Lindsey A. McCallister, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this day, to her office located at P.O. Box 11549, Columbia, SC 29211.


Christopher Leventis

December 10, 2018

Office of Appellate Defense
Chief Appellate Defender – Robert Dudek
PO Box 11433
Columbia, SC 29211-1433

STATE OF SOUTH CAROLINA
 COUNTY OF FLORENCE
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2014CP2103757

Larry B Brayboy

South Carolina State Of

NOV 20 PM 4:16
 DORIS POULOS O'HARA
 CCCP & GS
 FLORENCE COUNTY, SC

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.
 Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge

Judge Code

11/20/2018
 Date

For Clerk of Court Office Use Only

This judgment was entered on **November 20, 2018**, and a copy mailed first class or placed in the appropriate attorney's box on **November 21, 2018**, to attorneys of record or to parties (when appearing pro se) as follows:

CERTIFIED: A TRUE COPY
 Clerk of Court, C.P. & G.S.
 FLORENCE COUNTY, S.C.
Doris Poulos O'Hara

Jonathan D Waller 1116 Blanding Street Suite 2B
Columbia, SC 29201

Samuel Leonard Key PO Box 11549. Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Doris P. O'Hara

Court Reporter

Doris Poulos O'Hara - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Fileers or who are appearing pro se. See Rule 77(d), SCRPC.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE)

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT

Larry Brayboy, #336486,)

C.A. No. 2014-CP-21-3757

Applicant,)

ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

FILED
2018 NOV 20 PM 2:07
DORIS POULOS O'HARA
C.C.C.P. & G.S.
FLORENCE COUNTY, SC

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Larry Brayboy (Applicant) on December 31, 2014. Respondent made its Return on October 28, 2016. An evidentiary hearing into the matter was convened on January 31, 2018, at the Florence County Courthouse before the undersigned. Jonathan Waller, Esquire, represented Applicant. Lindsey A. McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. Barbara W. Pratt, Esquire, Applicant's trial counsel also testified. This Court also had before it a copy of the records of the Florence County Clerk of Court, Applicant's appellate records, records from the South Carolina Department of Corrections, the application, Respondent's Return, and the trial transcript.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. Applicant was indicted at the April 2009 term of the Florence County Grand Jury on one count each of armed robbery, kidnapping, and assault and battery of a high and aggravated nature (ABHAN) (2009-GS-21-

CERTIFIED: A TRUE COPY
Doris Poulos O'Hara
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

0398). Barbara W. Pratt (Counsel) and Shanna Jones-Burgess,¹ Esquires, represented Applicant. On August 24-26, 2009, Applicant proceeded to a jury trial before the Honorable Thomas A. Russo. The jury convicted Applicant as indicted. Judge Russo sentenced Applicant to imprisonment for concurrent terms of eighteen years each for armed robbery and kidnapping and ten years for ABHAN.

Applicant filed a timely Notice of Appeal, and an appeal was perfected by Kathrine H. Hudgins, Esquire. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence on December 12, 2012. State v. Brayboy, 401 S.C. 207, 736 S.E.2d 679 (Ct. App. 2012). Applicant's Petition for Writ of Certiorari was denied on May 11, 2014. The Remittitur was returned on June 26, 2014.

SUMMARY OF FACTS ADDUCED AT TRIAL

On December 6, 2008, around 11:00 pm, three male intruders entered a Pizza Hut in Lake City, South Carolina. One of the men had a pistol while another had a sawed-off shotgun. The man with the shotgun hit an employee in the head with the gun and ordered him to open the cash register. Meanwhile, the man with the pistol hit the other employee on the head with his gun as well. The men forced the employees to undress and to surrender their wallets, cell phones, and keys. The intruders were unable to open the cash register, and when they realized police were on the way, they fled.

When police arrived they found, among other things, a loaded sawed-off shotgun hidden behind the Pizza Hut. Two of the perpetrators were captured by police as they fled the scene, and they each confessed and informed police Applicant was the third person involved in the robbery. Both codefendants claimed Applicant carried the sawed-off shotgun. After receiving a tip about

¹ Ms. Jones-Burgess is now deceased.

Applicant's location, police found Applicant hiding under a bed in a friend's house, and he was arrested. Applicant was subsequently indicted for armed robbery, kidnapping, and ABHAN. The two codefendants agreed to plead guilty to lesser charges and testify against Applicant.

ALLEGATIONS

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

1. "Ineffective Assistance of Trial Counsel," in that:
 - a. "Trial counsel failed to interview an alibi witness, when the Petitioner specifically requested counsel to interview the witness and call him to testify at trial on Petitioner's behalf."
 - b. "Trial counsel failed to test evidence."
 - c. "Trial counsel failed to properly argue and preserve Direct Verdict [sic] motion."
 - d. "Trial counsel failed to argue illegal search and seizure of Petitioner."
 - e. "Trial counsel failed to object to erroneous burden shifting jury instructions."
 - f. "Trial counsel failed to contact, interview and investigate co-defendants, witnesses and victims."
 - g. "Trial counsel failed to prepare for Petitioner's case by not investigating the facts and circumstances of the case."
 - h. "Trial counsel failed to object to prosecutor's unconstitutional, improper, prejudicial and burden shifting closing arguments."
 - i. "Trial counsel failed to present good character witnesses and good character evidence for petitioner [sic]."
 - j. "Trial counsel failed to contact, interview and subpoena potential witnesses."
 - k. "Trial counsel failed to object to prosecutor's blostering [sic] of co-defendants [sic] testimony."
 - l. "Trial counsel failed to impeach co-defendants at trial on statements made."
 - m. "Trial counsel was ineffective for not objecting to the state [sic] using a federal inmate's testimony; who was offered a deal in exchange for his testimony."
 - n. "Trial counsel failed to challenge/argue the insufficiency of the Multiple Count Indictment."
2. "Ineffective Assistance of Appeal [sic] Counsel," in that:

- a. "Appellant [sic] counsel ineffective for not raising on appeal the issue of 'The trial court erred by not granting the Directed Verdict of Acquittal Motion.'"
 - b. "Appellant [sic] counsel ineffective for not raising on appeal the issue of 'There was insufficient evidence from which a reasonable juror would have convicted Petitioner of the crimes.'"
3. "Newly/After Discovered Evidence," in that:
- a. "There is a witness that can testify to the fact that Petitioner's co-defendant told this witness that he lied at trial and placed the crimes on Petitioner."

At the evidentiary hearing, counsel for Applicant informed the Court he intended to proceed only on the allegations of ineffective assistance of counsel for failure to investigate the facts and circumstances of the case, failure to test evidence, failure to properly argue the directed verdict motion, and failure to contact and investigate Applicant's codefendants, the victims, and other witnesses. Further, counsel for Applicant reported he had located the witness requested by Applicant, for which this Court had previously granted funding, and decided not to call him as a witness at this evidentiary hearing. Therefore, this Court finds Applicant has waived and abandoned all the other claims against trial counsel listed in his original application, all allegations against appellate counsel, and all claims of newly discovered evidence. Those allegations are hereby denied and dismissed with prejudice.

SUMMARY OF TESTIMONY

Applicant testified he was arrested at a friend's house on New Year's Day 2009, one month after the incident took place. Applicant testified his family hired Counsel to defend him, and he was able to be released on bond while awaiting trial. Applicant further testified he met with Counsel several times, and although they discussed some facets of his case, he did not understand everything. Applicant testified Counsel told him the State had no evidence against him, and he went along with whatever Counsel said to do, so he went to trial. Applicant testified he and Counsel listened to the codefendants' statements, and she took him to visit the scene. Applicant

admitted Counsel discussed the fact that forensics had not been done on the shotgun and it could not be linked to him that way. However, Applicant claimed Counsel did not investigate the gun further or discuss how it could be linked to him via his codefendants, nor did Counsel talk to his alibi witness.

According to Applicant, he and Counsel never discussed any potential defenses because he did not know the law, and she did not explain to him what would happen at trial. Applicant testified she told him to take notes and let her know if he had questions. Applicant testified he did speak with Counsel during the trial and pointed out when witnesses were lying, but he could not remember the details of any conversations because he was nervous. Applicant further testified he thought the trial was going well until the last day, when Counsel told him he could get eighteen years, and he should take a plea. Applicant testified Counsel told him she was “a bad lawyer on PCR,” but he did not know what that meant, and he thought he was “winning” up until that point.

Applicant testified he felt Counsel mishandled the clothing evidence at trial because one of the victims identified a jacket as an item worn by one of the robbers inside the Pizza Hut, but, according to Applicant, his codefendant was wearing that jacket. The codefendant testified at trial he never entered the building. Applicant testified Counsel did not adequately cross-examine the victim on this discrepancy. Further, Applicant testified Counsel told him it was a good thing the shotgun had not been tested and did not ask to have any tests performed on it, even though Applicant felt that should have been done. Finally, Applicant testified Counsel did not contact an alibi witness as he requested; Counsel did not meet with the codefendants to interview them prior to the trial; and Counsel did not play the tape of the codefendants’ statements, which Applicant felt would have better highlighted the inconsistencies in their statements.

Counsel testified she has a private practice in Horry County, and she became involved in this case through her co-counsel, who was a friend of Applicant's family. Counsel explained the basic facts of the case as she understood them: two or three people came into the Pizza Hut, one of whom was carrying a shotgun, and they robbed the employees inside. When the police were called, the robbers fled, and two were captured on scene. Applicant was the third person, and he was not arrested until sometime later. Counsel confirmed there was no DNA or fingerprints or other forensic evidence to link Applicant to the crime, only the statement of his codefendants. Counsel also testified the victims could not identify any of the assailants, as they were wearing masks and covered their faces and heads.

Counsel further testified her co-counsel handled most of the contact with the family, but Counsel reviewed discovery, visited the scene with Applicant, and spoke with attorneys for the codefendants. Counsel testified she reviewed all discovery with Applicant, particularly the codefendants' statements, and discussed the elements of the crimes and the possible sentences with him. She testified she felt he understood their conversation well enough to help her prepare for trial. Counsel also testified Applicant maintained his innocence, and he wanted to pursue a trial and was not interested in any plea offers. Counsel testified Applicant dictated the defense in that he admitted knowing the codefendants, but claimed he was not involved in the crime.

Counsel testified she represented Applicant for at least six months prior to trial and received about a month's notice of the trial date. Counsel testified she prepared extensively for trial by speaking with the solicitor, interviewing Applicant and visiting the scene with him, talking to the codefendants' attorneys, and reviewing all discovery, particularly the codefendants' statements, and preparing detailed cross-examination. According to Counsel, the two statements were contradictory to some degree, and she felt she effectively cross-examined the codefendants

on that issue, as well as the fact each codefendant received a plea deal in exchange for testimony. Counsel further testified, based on notes in her defense file, she contacted Applicant's alibi witness, a man named Tony, but his testimony would have placed Applicant near the scene, he could not give the exact time he was with Applicant, and Applicant was later arrested at his home, so she chose not to call him. Counsel testified Applicant did not give her any other names or avenues to investigate, and her co-counsel spoke to the family, but they were also unable to provide a defense.

Additionally, Counsel explained because no testing was done, but Applicant was alleged to have been carrying the gun, it was easier to attack what the police did not do and helpful to point out there were no fingerprints. Counsel testified she did not consider or discuss with Applicant obtaining independent testing of the shotgun because she was concerned with creating an ethical dilemma for herself if the testing confirmed Applicant's involvement. Counsel also testified she did not hire an investigator because that is not her usual practice, and she did not attempt to speak with the victims because she did not want them to feel intimidated or give them a chance to make an identification of Applicant. Finally, Counsel explained she cross-examined the victim regarding the identification of the jacket, and she was trying to tie the jacket to the shotgun, but the witness did not give the answer she was hoping to receive. Counsel testified she did not feel the testimony was harmful to Applicant's case in any event, because neither victim could identify Applicant at all.

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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility. This

Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. § 17-27-80.

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, an applicant must prove “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. Butler, 286 S.C. at 442, 334 S.E.2d at 814. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. An 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, an applicant must prove 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, 466 U.S. 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.

Ineffective Assistance of Trial Counsel

Regarding Applicant’s claims of ineffective assistance of counsel, this Court finds Applicant has failed to meet his burden of proof. “Counsel’s performance is accorded a favorable

presumption, and a reviewing court proceeds from the rebuttable presumption that counsel ‘rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.’” Strickland, 466 U.S. at 690. There is a strong presumption that trial counsel’s decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003). “Accordingly, when 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)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). Counsel’s strategy is reviewed under “an objective standard of reasonableness.” Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004).

1. Failure to investigate facts and circumstances of case

“[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case.” Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012) (reversed on other grounds by Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014)). 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), abrogated on other grounds by Smalls v. State,

422 S.C. 174, 810 S.E.2d 836 (2018) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)).

This Court finds Counsel visited the scene, met with Applicant, and investigated Applicant's witness, Tony, as Applicant requested. Counsel also reviewed discovery with Applicant, particularly the codefendants' statements, and prepared extensive cross-examination on the inconsistencies between them. This Court finds Counsel's investigation into the facts and circumstances of the case was reasonable. Further, this Court finds credible Counsel's testimony she discussed with Applicant the evidence received in discovery, the elements of the charges, and possible defenses, and he chose to maintain his innocence and proceed to trial. This Court finds Counsel was not deficient in her investigation of the facts and circumstances of this case, and Counsel provided effective assistance in this case. Accordingly, this allegation is denied and dismissed with prejudice.

2. Failure to test evidence

In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 521-22 (2003). Further, to establish counsel failed to adequately prepare for trial, Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. See Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (finding trial counsel not ineffective for failing to timely request discovery because the contents of the documents were not presented at the PCR hearing); Moorehead, 329 S.C. at 334, 496 S.E.2d at 417 (holding trial counsel's failure to conduct an independent investigation does not constitute ineffective assistance

of counsel when the allegation is supported only by mere speculation as to the result); Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing applicant would have had a defense with additional time to prepare for trial); Skeen v. State, 325 S.C. 210, 217, 481 S.E.2d 129, 133 (1997) (finding applicant was not entitled to relief where no evidence was presented at the PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

This Court finds Counsel's decision not to conduct independent testing on the shotgun was reasonable. Counsel explained her valid concern with creating an ethical dilemma should the tests definitively link Applicant to the gun. Further, this Court finds reasonable Counsel's stated strategy of pointing out the steps law enforcement could have taken to test the item but did not. See Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992) ("Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective."). This Court will not second guess her trial tactics, especially because Applicant has not met his burden of proving he was prejudiced by Counsel's performance. The South Carolina Supreme Court "has repeatedly held a PCR 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. . . ." See, e.g., Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). In this case, Applicant did not call any witnesses or present any defense that he was unable to present at trial due to Counsel's alleged deficiencies, and therefore, this Court finds he has not met his burden of proof as to either deficiency or prejudice. This allegation is therefore denied and dismissed with prejudice.

3. Failure to properly argue directed verdict motion

Although neither Applicant nor Counsel were questioned as to this allegation, Applicant's PCR counsel argued in closing Counsel's performance was deficient because the motion was too general, and Counsel should have made a motion as to each charge. This Court has reviewed the relevant portion of the transcript and finds no deficiency in Counsel's handling of this motion. This Court also finds there was a clear factual issue for the jury at the close of the State's evidence, and the trial court correctly denied the motion. This allegation is therefore denied and dismissed.

4. Failure to investigate codefendants, victims, and other witnesses

In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). The applicant's mere speculation about what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice. Id. Further, in Stokes v. State, trial counsel stated he chose not to use certain witnesses at trial because, "in his judgment at the time, their testimony would not have been of value to [Applicant's] case." 308 S.C. 546, 419 S.E.2d 778 (1992). The Supreme Court affirmed the lower court's ruling and found "trial counsel adequately put forth a defense by calling the only witness whom he believed to be credible and supportive of the defense strategy." Id. Similarly, in Edwards v. State, the Supreme Court held that "[a] witness's credibility and demeanor is crucial to an attorney's trial strategy, and an

attorney cannot be said to be deficient if there is evidence to support his decision to not call a witness with serious credibility questions.” 392 S.C. 449, 458, 710 S.E.2d 60, 65 (2011).

This Court finds the trial strategy articulated by Counsel in this case in choosing not to call Tony as an alibi witness. Counsel testified Tony could not recall the exact time he was with Applicant, the testimony would have placed Applicant very close to the scene of the crime, and Applicant was later arrested hiding at Tony’s house. The Court finds this is similar to the types of strategic decisions upheld in the cases above, and Counsel’s decision was reasonable given that the testimony was arguably harmful to Applicant’s case and potentially opened the door to adverse testimony. Further, because Applicant did not produce the alibi witness he alleges Counsel should have called at trial, Applicant has failed to establish any prejudice resulting from Counsel’s performance.

This Court also finds Counsel was not deficient in her handling of the codefendants’ statements. Counsel testified she reviewed the statements and prepared detailed cross-examination. The record reflects Counsel engaged in thorough cross-examination of all of the State’s witnesses, including pointing out various inconsistencies in the stories of the codefendants and highlighting them in her closing argument. Tr. pp. 302, 343.

Therefore, this allegation is denied and dismissed with prejudice.

CONCLUSION

For all the foregoing reasons, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Counsel was not deficient in any manner, nor was Applicant prejudiced by counsel’s

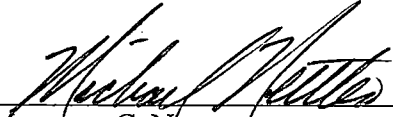
representation. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. the application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall be remanded to the custody of the Respondent.

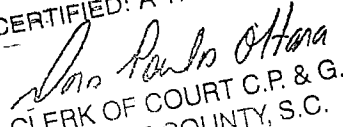
AND IT IS SO ORDERED.


MICHAEL G. NETTLES
Presiding Circuit Court Judge
Twelfth Judicial Circuit

11-20, 2018

2018 NOV 20 PM 2:08
DORIS POULOS O'HARA
CCCP & GS
FLORENCE COUNTY, SC

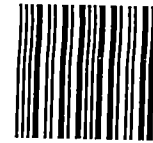
FILED

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