

THE BOOZER LAW FIRM, LLC

RECEIVED

Lance S. Boozer, Esq.*
*Also admitted in Florida

1419 Pendleton Street
Columbia, SC 29201

Telephone: 803-608-5543
Fax: 803-926-3463

Email: lsh@boozerlawfirm.com
Website: www.boozerlawfirm.com

DEC 18 2018
S.C. SUPREME COURT

December 15, 2018

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

The Honorable Mary Brown
Clerk of Court
300 California Drive
Moncks Corner, SC 29461

RE: Shana Robinson, #360268, v. State of South Carolina
2016-CP-08-300

Dear Mr. Shearouse and Ms. Brown:

Enclosed for filing is a Notice of Appeal in the above-referenced case. Also enclosed are the following:

- (1) Proof of Service of the Notice of Appeal;
- (2) A copy of the Order which is to be challenged on appeal; and
- (3) Prior Order of Appointment of Counsel.

As I was appointed to represent Ms. Robinson in her PCR proceeding, I anticipate that the Office of Appellate Defense will represent Ms. Robinson in this appeal.

Yours very truly,



Lance S. Boozer

Enclosures

cc: Johnny E. James, Jr., AAG
Loriene French, OAD
Shana Robinson, #360268

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DEC 18 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. SUPREME COURT

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Case No. 2016-CP-08-300

Shana Robinson, #360268,.....Petitioner,


v.

State of South Carolina,.....Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable Michael G. Nettles' Order dated December 5, 2018, denying post-conviction relief to the Petitioner. Undersigned counsel received notice of entry of the Order on December 14, 2018. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,



Lance S. Boozer
The Boozer Law Firm, LLC
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Columbia, SC 29201
Tele: 803-608-5543

December 15, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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DEC 18 2018

S.C. SUPREME COURT

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Case No. 2016-CP-08-300

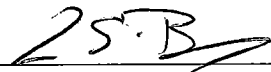
Shana Robinson, #360268,.....Petitioner,

v.

State of South Carolina,.....Respondent.

PROOF OF SERVICE

I, Lance S. Boozer, appointed attorney for Petitioner, certify that I have today served within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to Assistant Attorney General Johnny E. James, Jr., P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 15th day of December, 2018.


Lance S. Boozer
The Boozer Law Firm, LLC
1419 Pendleton Street
Columbia, SC 29201
Tele: 803-608-5543

STATE OF SOUTH CAROLINA)
 COUNTY OF BERKELEY)
 Shana Robinson,)
 S.C.D.C. No. 360268,)
 Applicant,)
 v.)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLAS
 FOR THE NINTH JUDICIAL CIRCUIT
 MARY P. BROWN
 CLERK OF COURT
 BERKELEY COUNTY, S.C.
 Case No.: 2016-CP-08-00300
ORDER OF DISMISSAL

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This matter comes before the Court by way of an application for post-conviction relief filed by Shana Robinson (“Applicant”) on February 5, 2016. Respondent made its return on or about June 13, 2016. The Court convened an evidentiary hearing into the matter on Monday, October 1, 2018, at the Berkeley County Courthouse in Moncks Corner, South Carolina. Applicant was present at the hearing and represented by Lance S. Boozer, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General’s Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant’s trial counsel, Aaron C. Mayer (“Counsel”) also testified. The Court had before it Applicant’s records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Berkeley County Clerk of Court regarding the subject convictions, Applicant’s direct appeal records, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. Applicant was indicted at the April 2014 term of the Berkeley County Grand Jury for felony driving under the influence resulting in death (2014-GS-08-00313). Aaron C. Mayer represented Applicant. Mason West, Esq., and Bryan

Alfaro, Esq., of the Ninth Circuit Solicitor's Office, prosecuted the case. On June 2, 2014, Applicant proceeded to trial before the Honorable Deadra L. Jefferson and a jury. The jury found Applicant guilty as indicted on June 6, 2014. Judge Jefferson sentenced Applicant to imprisonment for a term of 17 years.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Kathrine H. Hudgins, Esq. filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. State v. Robinson, Op. No. 2016-UP-036 (S.C. Ct. App. filed Jan. 20, 2016). The Remittitur was issued on February 5, 2016.

Present Application

In her post-conviction relief application, amended by and through PCR counsel by filing dated September 27, 2018,¹ Applicant alleges he is being held unlawfully for the following reasons:

1. Ineffective assistance of trial counsel, in that:
 - a. "Prejudicial testimony was allowed that should have been disregarded and prejudicial asst [sic] prosecution atty [sic] with hx [sic] of family matter"
 - b. "Counsel was in failing to subpoena the records custodian from Verizon Wireless in order to introduce cell phone records of decedent showing that [sic]"
 - c. "Counsel was ineffective in his calling of an expert witness."
 - d. "Applicant believes counsel was ineffective for failing to secure and preserve a final ruling as to the questioning of a witness regarding marijuana when there [was] an agreement between the State and Defendant to not discuss this information."
 - e. "Applicant believes counsel should have challenged the chain of custody of the blood samples."
 - f. "Counsel failed to highlight throughout trial the presence of marijuana in the other driver's system and that the driver was otherwise distracted."

¹ The amendment was not actually filed until October 2, 2018, after the hearing. However, the parties agreed upon the allegations at the outset of the hearing.

- g. "Applicant believes counsel should have requested that the prosecuting attorney be removed due to a conflict of interest."
- h. "Applicant believes counsel should have objected to jury instructions regarding a motorist's duties. (App. p. 1104-1107)."

This Court interprets the first allegation, restated above as 1.a., to be subsumed by the subsequent amendments, in particular 1.d and 1.g.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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." Butler, 286 S.C. at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

“Judicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). “[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)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (citing 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 (citing Strickland, 466 U.S. at 694).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id. at 696-97.

1. Failure to Subpoena Records Custodian for Cell Phone Records

Applicant alleges Counsel was ineffective in failing to subpoena a records custodian to lay a foundation for the Victim's cell phone records. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801, SCRE. "Hearsay is not admissible except as provided" by the Rules of Evidence, or by other rules prescribed by the South Carolina Supreme Court, or as permitted by statute. Rule 802, SCRE. Records "kept in the course of a regularly conducted business activity" may be admissible under an exception to the rule prohibiting hearsay if a foundation is properly laid "by the testimony of the custodian or other qualified witness[.]" Rule 803(6), SCRE.

However, the 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 from the witness' failure to testify at trial." Bannister v. State, 333 S.C. 298, 304, 509 S.E.2d 807, 809 (1998) (citations and emphasis omitted). "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." Id. (quoting Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995)).

At trial, Counsel called his paralegal, Christopher Robertson, as a witness to testify that he had obtained certified records from Victim's cell phone provider; the State objected. (Tr. 789-91). The trial court instructed Counsel that the paralegal could not pull certified records, and that "[t]he only person that can testify as to [Victim's] phone records would be somebody from the cell phone company who would then give an exception under the hearsay rule." (Tr. 791, ll. 16-19). Counsel contested that the records were certified such that they "did not need a sponsoring witness." (Tr. 792, ll. 13-15). The trial court shot down Counsel's assertion, and

further explained the records did not appear to be relevant in the absence of any testimony to show Victim had left her lane such that she contributed to the accident. (Tr. 792-803). Counsel thereafter proffered the testimony and records he sought to introduce. (Tr. 804-09). After brief argument, the trial court sustained the State's objection, finding the testimony was neither relevant nor admissible under any exception to the rule prohibiting hearsay. (Tr. 810-13).

At the evidentiary hearing, Counsel admitted the case was possibly his first attempt to try and introduce phone call logs in a trial, and that he had genuinely believed a certification from Verizon Wireless was adequate to indicate the truthfulness and authenticity of the records. Counsel also noted that he had found the witness who had been on the phone with Applicant at the time of the collision, but was unable to secure her presence at trial.

The Court finds Applicant has failed to meet his burden of showing prejudice. No records custodian was presented at the PCR hearing, and this Court cannot assume any such custodian would have affirmed the authenticity of the records any more than the trial court could have. As such, Applicant's request for relief by way of this allegation is **DENIED**.

2. Calling of Expert Witness Dr. Robert Bennett

Applicant alleges Counsel was ineffective in calling Dr. Robert Bennett as an expert witness in his defense. As noted above, "when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith, 386 S.C. at 567, 689 S.E.2d at 632. However, "strategic choices made by counsel after an incomplete investigation are reasonable only to the extent that reasonable professional judgment supports the limitations on the investigation." McKnight v. State, 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008) (quoting Von Dohlen v. State, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004)). Calling a witness where said witness contradicts the defense's theory of the case may constitute ineffective assistance. Ingle v. State, 348 S.C. 467, 560 S.E.2d 402 (2002) (finding ineffective

assistance of counsel where defense counsel called a witness whose testimony contradicted the defense's theory of the case).

Trial

At trial, Applicant took the stand in her own defense. (Tr. 823-72). Applicant testified that she met with a friend at Applebee's and ordered drinks starting "just before 5 o'clock[.]" (Tr. 832-33). Applicant ordered two vodka cranberries. (Tr. 833-34). Applicant ordered a third vodka cranberry around 7:15 P.M. at Geronimo's Bar and Grill, but could not recall much else of what she did there. (Tr. 835, ll. 1-17). Despite the three drinks in two hours, Applicant asserted she was not impaired at all after the third drink. (Tr. 835-36). Applicant and Victim's vehicles collided at around 8:30 P.M. (Tr. 237-42).

At trial, Counsel called as a witness Dr. Robert Bennett. (Tr. 872-927). Bennett testified to receiving a pharmacy degree from the Medical University of South Carolina in 1980 and that he worked full time as a forensic toxicologist. (Tr. 873, ll. 6-16). Bennett noted he had been qualified as an expert in "[m]any, many other cases." (Tr. 873, ll. 17-22). Upon voir dire by the State, Bennett indicated he regularly read "toxicology and scientific journals as a regular part of my practice" but that he had not attended any classes since graduating in 1991. (Tr. 876-77). The State asked if Bennett's work had been subject to peer review and, after some initial confusion, Bennett offered that anybody could review his work. (Tr. 877-78). Bennett offered that he speaks at seminars and trainings, most commonly to lawyers. (Tr. 878-89). The State did not object to Bennett's qualification as an expert in forensic toxicology, and he was so qualified. (Tr. 879, ll. 12-17).

Bennett denied specifically testing Applicant's blood alcohol level, but approximated her BAC to be "anywhere between zero and .01, .015" given the number of drinks she had consumed, her size, and the time that had passed. (Tr. 880-84). Asked how such a BAC would

impact a person, Bennett testified “[i]t would make them impaired to a slight degree. Any amount of alcohol is going to cause some amount of impairment.” (Tr. 884, ll. 9-14). Bennett thereafter testified that on “an impairment scale of zero to 100 percent” where zero is full function and 100 is comatose, Applicant would have clocked in at a “five, ten percent impairment rate level at that amount of alcohol.” (Appx. 884-85). Counsel asked if a person would even notice such a low impairment, and Bennett agreed that a person’s “self-perception of impairment would be that they feel not impaired because the level of impairment is not that high.” (Tr. 885, ll. 10-14). Asked if Applicant would be capable of safely driving a vehicle at that level of impairment, Bennett declined to answer conclusively as to Applicant specifically, but offered that most people would be able to drive a vehicle, and noted the legal limit for intoxication was set at .08. (Tr. 886, ll. 8-20). Counsel noted SLED’s testing produced a different BAC result,² and Bennett noted Applicant had a cyst on her liver, that SLED may have swabbed the blood draw site with ethanol, and that Applicant received blood transfusions at the hospital after the accident. (Tr. 886-90). Bennett also postulated Applicant’s blood could have fermented in the vial. (Tr. 890-95).

After a successful proffer, Counsel elicited through Bennett that Victim’s blood tested positive for marijuana. (Tr. 910-13). Bennett testified Victim would have been impaired by her level of marijuana intoxication at the time of the collision. (Tr. 913, ll. 6-22).

On cross-examination, Bennett testified he did not prepare any report pursuant to Counsel’s request, and that though he had not yet produced a bill that he charges \$300 per hour for his services. (Tr. 915, ll. 3-22). Bennett agreed the elimination rate of alcohol through the body is somewhere between .015 and .02 per hour. (Tr. 916, ll. 17-22). Bennett agreed that a

² SLED testing found Applicant had a blood alcohol concentration of .09 about four hours after the collision, from which they estimated Applicant had a BAC of 0.15 at the time of the collision. (Tr. 377, ll. 12-13; Tr. 389, ll. 3-22).

person with a blood alcohol content of .15 would be significantly impaired. (Tr. 916-17). Bennett agreed his conclusions as to Applicant's intoxication were based on her reporting the consumption of three standard drinks, and that where mixed drinks were involved, the amount of vodka in the drink would dramatically affect the accuracy of his calculations. (Tr. 917, ll. 6-18). Bennett, upon prompting by the State, explained that alcohol, as well as all of the other drugs found in Applicant's system, were depressants, which reduce a person's ability to respond to stimuli. (Tr. 917-18). Bennett agreed the use of a Betadine wipe to clean the draw site would not impact the accuracy of SLED's blood draw. (Tr. 918-19).

Bennett admitted to having never worked in law enforcement or attending the South Carolina Criminal Justice academy, and the State noted his curricula vitae indicated experience in crime scene analysis, fingerprinting, and gunshot residue. (Tr. 919-20). Bennett admitted to representing himself as a registered pharmacist for a decade despite the expiration of his license in 1999. (Tr. 920-21). Bennett admitted the South Carolina Board of Pharmacy had issued him a cease and desist order to stop calling himself a registered pharmacist, but offered that he was still registered with the South Carolina Board of Pharmacy, inactive though his license may be. (Tr. 921, ll. 8-17). Bennett acknowledged an article from the Charleston Post and Courier describing the reliability of his findings as suspect or controversial, and that most of his training in other fields was self-taught from reading journals and books. (Tr. 921-22). The State confronted Bennett with a case where a mother temporarily lost custody based upon his findings, which were later contested by a physician. (Tr. 922, ll. 7-11). Bennett testified "[t]here are constantly questions about the practice that I have. Questions do not implicate a wrong doing; it's just questions." (Tr. 923, ll. 2-4). Bennett rejected the condemnation of the Post and Courier, arguing the newspaper's job was "to sell newspapers." (Tr. 923, ll. 9-11).

On redirect, Counsel emphasized SLED performed the tests in question and did so in an accurate fashion. (Tr. 924-25). Bennett again asserted that “keeping up with the licensure is necessary if you fill prescriptions at a pharmacy and that’s all.” (Tr. 926, ll. 1-8). Bennett noted that subsequent to his training as a pharmacist, he had studied and received a Ph.D. “in pharmaceutical drug sciences, which includes toxicology and pharmacology.” (Tr. 926, ll. 16-22).

In closing argument, Counsel laid blame for the collision upon Victim:

The State drew Ms. Zoll’s blood immediately after the accident. She was not given any substances. She was not operated on. She did not receive six plus liters of fluid. She did not receive 28 different medications and fluids. She did not receive an injection of THC. That was in her system when she was driving that car. She was high when she was driving that car.

(Tr. 1030, ll. 4-10).

Testimony at PCR Hearing

At the evidentiary hearing, Applicant testified she very frequently met with Counsel but that they did not much discuss Bennett, and that Counsel had simply found him to testify in her defense. Applicant testified the defense strategy for trial was that she was not intoxicated at the time of the collision. Applicant recalled the cross-examination of Bennett was a train wreck, and that he was completely discredited. Nonetheless, Applicant expressed her opinion that Counsel “put his heart and soul into this case.” Separately, Applicant recalled that Grover Seaton, Esq.,³ briefly assisted Counsel in her defense but was promptly at an early stage removed from the case due to a conflict of interest.

Counsel testified he received voluminous discovery in the case, including the MAIT report and hospital records. Counsel noted Applicant’s memory of the collision was very, very

³ No testimony clearly indicated whether this was the elder or junior Seaton.

bad, such that she had a very limited recollection of what occurred the night of the collision. Counsel described his strategy as “reasonable doubt,” and that he felt strongly that he could show Victim was under the influence of marijuana, and was further distracted by a phone call and her dog.

Counsel testified he knew of Bennett from his work in family court, and described Bennett as a heralded expert witness in family court matters, such that he commands the respect of the family court bench and is often specifically requested by judges. Counsel explained that his background investigation of Bennett was circumscribed by that sterling reputation, but noted that he did speak to others before hiring Bennett, and that he may have used Bennett in the past in his family court practice. Counsel vaguely recalled Seaton telling him not to use Bennett as an expert, but that Seaton did not articulate a reason why he shouldn't, only telling him “don't.” Nonetheless, Counsel acknowledged Bennett was a “terrible choice.” On cross-examination, Counsel testified he would not have called Bennett had he known about his deficiencies. Counsel noted that despite prior preparation, Bennett had never brought up the percentage-scale portion of his testimony, and that it was very confusing when he did bring it out at trial. On re-direct, Counsel explained that Bennett's testimony at trial, as compared to their pre-trial discussions, was new, “supplemental” testimony.

Findings

The Court finds no deficiency on the part of Counsel, nor any prejudice to Applicant. The Court observes that the present case is not an instance where defense counsel failed to investigate an expert witness at all, but that the scope of his investigation did not reveal the information relied upon by the State at trial. Counsel discussed the use of Bennett with others and evidently found him to be well regarded. A cursory search of South Carolina caselaw would appear to support Counsel's report of a positive reputation. See, e.g. Hall v. Desert Aire, Inc.,

276 S.C. 338, 354-56, 656 S.E.2d 753, 761-62 (Ct. App. 2007) (noting in a worker's compensation case the great weight afforded to Dr. Bennett's opinion as to intoxication, to the benefit of the injured worker who offered him). No such similarly negative result there appears. The case cited by the State during trial, Boyd v. ExamOne World Wide, Inc., 2010-CP-10-09670, appears to have been a trial matter in which the affidavit referred to by the State was deeply buried. The Court finds that Dr. Bennett is well-regarded by many members of the bench and bar.

The Court finds Applicant has not shown precisely how Counsel could have known of Bennett's alleged deficiencies as a witness, or that he should have been on notice to look for them. Counsel did note a vague word of caution from Seaton that he should not use Bennett, but in the absence of some explanation as to why he should not have done so, the warning was insubstantial. The State, at trial, referred to an article out of the Charleston Post and Courier which was evidently critical of Bennett. Notwithstanding this Court's taking of judicial notice of the article,⁴ this Court observes no reason why Counsel could have or should have been aware of a single newspaper article published eight years prior. The Court finds Counsel's investigation into the background of Dr. Bennett was reasonable under the circumstances and, as such, he was not deficient in that investigation and subsequent calling of Dr. Bennett as a witness.

The Court finds Counsel had no notice of the allegedly confusing characteristics of Dr. Bennett's testimony. Counsel credibly testified that although he had conversed with Dr. Bennett in preparing for trial, and discussed his findings, that Dr. Bennett made no indication that he would testify as to his zero-to-one-hundred scale of intoxication. Counsel did not and could not have known that Dr. Bennett would have testified in a fashion beyond the scope of their pre-trial

⁴ The article referenced by the State was not offered at the hearing, but the Court takes judicial notice that the Charleston Post and Courier published such an article in July 2006 containing the substance of the prosecution's cross-examination.

discussions. As such, the Court finds Counsel was not deficient in calling Dr. Bennett as a witness due to his unexpected testimony.

The Court also can find no prejudice to Applicant resulting from the alleged deficiency. Assuming, *ad arguendo*, that the prosecution's cross-examination of Dr. Bennett totally discredited him, as asserted by Applicant, then the jury would have given little to no consideration to his testimony argued to be confusing or harmful to Applicant. If Dr. Bennett was otherwise held credible by the jury, then it could have considered his testimony that Applicant's level of intoxication was minimal, that Applicant's BAC should have been much lower than indicated in the blood draw, that a person at her level of intoxication could safely drive a vehicle, and perhaps most importantly, that Victim was substantially under the influence of marijuana at the time of the accident. Given Applicant's own admission to having *some* amount of alcohol that evening prior to the collision, the Court does not find Dr. Bennett's admission of *some* effect to be contrary to trial strategy—indeed, had he doubled-down on her own assertions of “no impairment” despite at least⁵ three alcoholic beverages in the preceding hours, he would have discredited himself.

The Court finds Dr. Bennett's testimony was consistent with trial strategy. The strategy was, as Counsel articulated, “reasonable doubt,” with a mind to Victim's status leading into the collision, as articulated by both Counsel and in Applicant's Anders brief. Dr. Bennett effectively testified in a manner so as to give the jury *some* evidence as to minimize Applicant's level of intoxication at the time of the accident. Dr. Bennett testified that Victim was under the influence of marijuana at the time of the accident. Absent Dr. Bennett's testimony to that effect, Applicant would not have had that argument before the jury at all. That the witness was something less

⁵ As noted at trial, the drinks were all mixed-drinks, and there was no testimony as to the precise strength of the beverages. The abandonment of mini-bottles in favor of free-pour drinks in this State renders the potency of such drinks entirely uncertain. They could have been largely cranberries or they could have been barely flavored vodka.

than Saint Albert, and that the State was able to find means of effective cross-examination, does not diminish the import and value of his testimony in the context of Counsel's intended strategy.

The sum total of the allegation before the Court is that an imperfect expert witness provided imperfect testimony in a case that offered Applicant imperfect facts for a defense. No witness is perfect, and where a defendant's expert witness has testified numerous times over a career it is unlikely the prosecution will be unable to obtain some valid means of challenging their credibility. Here, Dr. Bennett provided testimony consistent with defense strategy, freckled by a zealous prosecutorial effort to discredit him. Counsel is not rendered ineffective thereby. For all the reasons set forth above, Applicant has failed to meet her burden as to either prong of Strickland, and her request for relief by way of this allegation is **DENIED**.

3. Failure to Secure Final Ruling Regarding Marijuana Testimony

Applicant alleges Counsel was ineffective in failing to secure a final ruling as to the admissibility of testimony that marijuana was found on Applicant's person by a paramedic after the collision.

During pre-trial testimony, Officer John Poston testified marijuana was recovered from Applicant's person after the collision by a paramedic.⁶ (Tr. 82-83; Tr. 89-90; Tr. 106-07; Tr. 112, ll. 3-6). After extensive pre-trial motions, and discussions off-the-record between Counsel and the prosecution, the State "agreed to instruct [its] witnesses that we are not going to mention the marijuana collected from the defendant's pocket." (Tr. 200, ll. 7-25). Thus, the only substantive testimony to this end before the jury was a fleeting, vague reference to "a green leaf material" properly objected to by Counsel before the witness could slip in that it looked like marijuana. (Appx. 496-97). At the evidentiary hearing, Counsel testified that he did not seek

⁶ The paramedic wound up charged and fired for possession of the marijuana. (Tr. 90, ll. 2-9).

further cure of the testimony after balancing the benefit of the cure against the prejudice of highlighting the testimony in question.

The Court finds no deficiency on the part of Counsel, nor any prejudice to Applicant by way of the alleged error. The marijuana was kept out by stipulation and no meaningful testimony was introduced to that effect. To the extent that a witness almost testified to the marijuana found on Applicant, Counsel articulated a valid strategic reason to not seek a cure of the testimony to which he objected. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

4. Failure to Challenge Blood Sample Chain of Custody

Applicant alleges Counsel was ineffective in failing to challenge the chain of custody of her blood samples. At the evidentiary hearing, Applicant testified she did not understand why there was no challenge to the chain of custody of her blood samples, but that she did not question her attorney's decision at the time. Counsel testified that his concerns about the blood samples was the long delay between the collision and the blood draw, not the chain of custody. Counsel talked through the chain of custody with SLED and had no concerns that the samples were adulterated.

The Court finds no deficiency on the part of Counsel, nor any prejudice to Applicant by way of this alleged error. First, there is no evidence before this Court to show any deficiencies in the chain of custody of Applicant's blood samples. No witnesses even speculated as to what may have been wrong with the chain, such that the Court has even less than the "mere speculation" that would be insufficient to support a grant of relief. Second, the Court finds credible Counsel's testimony that he reviewed the chain of custody and found no deficiencies or concerns. Accordingly, Applicant has failed to meet her burden under either prong of Strickland, and her request for relief by way of this allegation is **DENIED**.

5. Failure to Emphasize Victim's Contributory Negligence: Marijuana, Distractions

Applicant alleges Counsel was ineffective in failing to adequately emphasize Victim's deficiencies in operating her own vehicle; to wit: her intoxication by marijuana, and her distractions from a phone call and a dog purportedly in the vehicle at the time of the accident.

At trial, Counsel dedicated a portion of his opening statement to explaining that Victim was potentially at fault for the collision:

So what we've tried to do is tried to go back and figure out what did happen. In the other car, not my client's car, in the other car we have evidence that would suggest the driver was on the phone, that there was a dog in the car, that she was driving someone else's car that she may not have been familiar with, and that she just recently had gotten back her drivers license. There may be some other evidence to as to what was going on in the car but hopefully the witnesses will bring that out.

(Tr. 220, ll. 1-9).

Counsel elicited some of the predicted testimony at points throughout trial. Scott Lee, of the Moncks Corner Rural Fire Department, testified on cross-examination that a dog was pulled from the passenger floorboard of Victim's car after the collision. (Tr. 270-71). Montorony Jenkins, station supervisor for Berkeley County EMS, also testified a dog was found in Victim's vehicle. (Tr. 294, ll. 19-22).

Counsel approached Victim's marijuana impairment gingerly under regular skepticism from the trial court. On cross-examination, Tracy McKinnon, the State's forensic toxicologist, testified no marijuana was found in Applicant's blood sample, but further testified that the active component of marijuana, THC, "acts similar to the way ethanol would as a central nervous system depressant." (Tr. 434, ll. 3-13). Counsel attempted to question further as to impairment thresholds, but was cut short by a sustained objection from the prosecution. (Tr. 434, ll. 14-23). During the defense case, as was the case during pre-trial motions, the trial court expressed its

opinion that she hadn't "heard any testimony that would make any marijuana use germane. The only testimony that is uncontroverted at this point is that the incident impact took place in [Victim's] lane." (Tr. 773, ll. 10-16). The trial court described Victim's marijuana use as not relevant and misleading, but declined to "deal with it right now." (Tr. 773, ll. 17-21). Discussing the forthcoming testimony of Dr. Bennett, the State again argued its opposition to "the introduction of any evidence or elicit any testimony on the subject of marijuana as nothing has been brought to the court's attention that would make that in any way probative." (Tr. 815, ll. 6-15). Only after Applicant testified to seeing lights in her lane, and only after a proffer of Dr. Bennett's testimony, did the trial court finally find that evidence of Victim's marijuana intoxication was relevant and admissible. (Tr. 907, ll. 1-14). However, the trial court circumscribed testimony on the subject, explaining "that expert witnesses are not to testify specifically as to any particular party" and that Dr. Bennet could not "testify what it would do in [Victim's] body. He can only say generally what happens." (Tr. 907-08). Immediately after the jury was returned to the courtroom after a brief, mid-testimony departure, Dr. Bennett testified Victim tested "[s]pecifically positive for marijuana" with a "quantitative measurement of 7.1 micrograms per liter." (Tr. 912-13). Dr. Bennett testified that Victim's THC concentration level was associated with impairment, and explained "[i]t could affect someone's ability to respond to stimuli around them. It could affect their reaction time. It could affect their judgment. It could affect their skill level. It could affect their cognitive function, their mental functioning." (Tr. 913, ll. 8-20).

Counsel was less successful with respect to the phone. Officer John Poston, of the South Carolina Highway Patrol, denied recovering a cell phone from Victim's vehicle. (Tr. 549-50). As previously discussed, Counsel's efforts to bring in call logs from Verizon Wireless for Victim's phone number were unsuccessful. (Tr. 789-814). David Hill, Applicant's accident

reconstruction expert, agreed with Counsel that a driver's reaction time would potentially be longer if they were on a cell phone or if they were distracted by a dog in a car. (Tr. 726, ll. 9-20).

In closing arguments, Counsel noted Victim "had a dog in the front seat with her." (Tr. 1029, ll. 18-19). Counsel questioned whether the dog was rambunctious or calm, and whether the dog leaped onto Victim's lap or sat quietly in the passenger's seat. (Tr. 1029-30). Counsel thereafter noted Victim's blood draw, and emphasized Victim "was high when she was driving that car." (Tr. 1030, ll. 4-10). The State, in reply, noted "[t]he dog was found in the front passenger floorboard." (Tr. 1064, ll. 7-11). The prosecutor questioned if Counsel was arguing the dog barked, and emphasized there was no evidence that Victim swerved into Applicant's lane. (Tr. 1064, ll. 11-17).

At the evidentiary hearing, Applicant emotionally testified that she did not want to bash the Victim. Counsel testified that he thought Victim's use and intoxication by marijuana was so incendiary that he only needed to get the subject in once. Counsel expressed concern about dragging Victim "through mud," but offered his retrospective thought that he miscalculated. Counsel explained he did not wish to look like a bully before the jury. As to the phone, Counsel admitted the case was possibly his first attempt to try and introduce phone call logs in a trial, and that he had genuinely believed a certification from Verizon Wireless was adequate to indicate the truthfulness and authenticity of the records. Counsel also noted that he had found the witness who had been on the phone with Applicant at the time of the collision, but was unable to secure her presence at trial.

The Court finds no deficiency on the part of Counsel, nor any prejudice to Applicant by way of his treatment of the distractions at trial. The Court finds Counsel effectively and adequately elicited testimony to establish, to the extent possible, that Victim had a dog in her

vehicle which could have distracted her, and that Victim was under the influence of marijuana at the time of the accident. Under the trial court's rulings, Counsel was unable to more substantively approach the subject of Victim's intoxication prior to Applicant's testimony because there was no evidence Victim had exited her lane until Applicant testified to seeing oncoming lights in her own lane. Once that anchor was lifted, Counsel promptly went into the subject with Dr. Bennett. Counsel argued both the marijuana intoxication and the dog in his closing arguments. The Court finds Counsel articulated valid strategic reasons and considerations he weighed in determining how vociferously he should approach the subjects, and exercised valid judgment in determining the evidence of marijuana intoxication while driving was so inflammatory that he did not have to more loudly beat that drum. Indeed, Applicant's own emotional response at the evidentiary hearing on the subject of attaching blame to Victim is evidence to show the risks inherent in victim-blaming in any case. As to Victim's use of a phone, the Court is again constrained by the absence of testimony at the evidentiary hearing of either (1) a records custodian from Verizon Wireless sufficient to show testimony that would have supported the admission of Victim's call logs at trial or (2) the testimony of the witness whose presence Counsel was unable to obtain. The Court is left with mere speculation as to the potential distraction of Victim's phone. For all of these reasons, Applicant has failed to show either deficiency on the part of Counsel, or any prejudice to Applicant, and her request for relief by way of this allegation is **DENIED**.

6. Failure to Seek Recusal of Prosecuting Attorney

Applicant alleges Counsel was ineffective in failing to seek the recusal of prosecutor Bryan Alfaro, Esq., on the basis of a conflict of interest. Applicant testified at the evidentiary hearing that Alfaro was in a relationship with a distant relative such that he had a role in a

paternity dispute with said distant relative. Counsel testified Applicant raised the concern to him before trial but that he perceived no conflict or animus on the part of the State.

The Court agrees with Counsel's judgment and can also discern no conflict of interest or animus on the part of the prosecution. Applicant offered only her own fleeting, less-than-clear testimony on the subject, and no other witnesses testified to the existence of any dispute sufficient to give rise to a conflict of interest. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

7. Failure to Object to Jury Instruction: Motorist's Duties

Applicant alleges Counsel was ineffective in failing to object to the trial court's instructions to the jury relating to a motorist's duties. "The law to be charged to the jury is to be determined by the evidence presented at trial." State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 836 (1989) (citations omitted). "The trial judge should only charge the law applicable to the case." Id., 298 S.C. at 364, 380 S.E.2d at 836 (citations omitted). "The purpose of a jury instruction is 'to enlighten the jury and to aid it in arriving at a correct verdict. It is error to give instructions which are calculated to confuse or mislead the jury.'" State v. Blurton, 352 S.C. 203, 207-08, 573 S.E.2d 802, 804 (2002) (quoting State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987)). "The trial court commits reversible error when it fails to give a requested charge on an issue raised by the indictment and evidence presented." Lee, 298 S.C. at 364, 380 S.E.2d at 836 (citations omitted).

Applicant was indicted for felony driving under the influence resulting in death. The law prohibits that act as follows:

A person who, while under the influence of alcohol, drugs, or the combination of alcohol and drugs, drives a motor vehicle and when driving a motor vehicle does *any act forbidden by law or neglects any duty imposed by law* in the driving of the motor vehicle, which act or neglect proximately causes great bodily injury or

death to another person, is guilty of the offense of felony driving under the influence[.]

S.C. Code Ann. § 56-5-2945(A) (emphasis added).

The trial court instructed the jury at some length regarding the duties imposed by law and the acts forbidden by law in the context of the operation of a motor vehicle. (Tr. 1104-07). This Court perceives no errors in the instructions, nor confusing or misleading elements, and upon consideration of the trial record as a whole, finds the instructions were well given. As such, there was no basis for objection on the part of Counsel. Accordingly, Applicant cannot meet either prong of Strickland by way of this allegation, and her request for relief is **DENIED**.

[Conclusion and signature on following page]

III. CONCLUSION

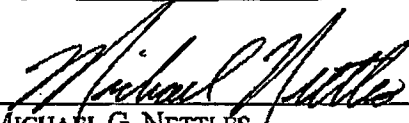
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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, 409 S.E.2d 395 (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.

IT IS THEREFORE ORDERED:

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 Dec, 2018.


MICHAEL G. NETTLES
Presiding Judge
Ninth Judicial Circuit

D. Lawrence, South Carolina

THE BOOZER LAW FIRM, LLC
1419 Pendleton Street
Columbia, SC 29201

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S.C. SUPREME COURT

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



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