

RECEIVED

JAN 28 2019

S.C. SUPREME COURT

January 25, 2019

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

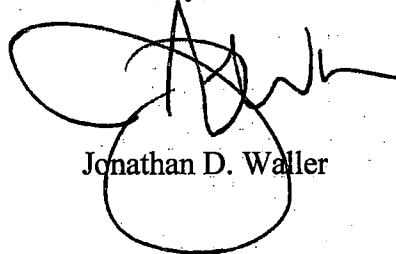
Re: Tyrone Joseph Whatley vs. State of South Carolina
C/A No: 2016-CP-21-1120

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. Whatley 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

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STATE OF SOUTH CAROLINA
In The Supreme Court

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

2016-CP-21-1120

RECEIVED

JAN 28 2019

S.C. SUPREME COURT

Tyrone Joseph Whatley, # 208735,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Tyrone Joseph Whatley, # 208735, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed January 16, 2019, issued by the Honorable Michael G. Nettles, Presiding Judge, Twelfth Judicial Circuit.



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ATTORNEY FOR PETITIONER

January 25, 2019

Other Counsel of Record:
Lindsey A. McCallister, Assistant Attorney General
Post Office Box 11549
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(803) 734-3319

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JAN 28 2019

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

S.C. SUPREME COURT

2016-CP-21-1120

Tyrone Joseph Whatley, # 208735,

Appellant,

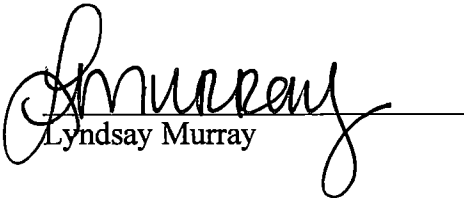
v.

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.


Lyndsay Murray

January 25, 2019

FILED

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP2101120

IN THE COURT OF COMMON PLEAS PH 2: 57

Tyrone Joseph Whatley

South Carolina State Of

DORIS POULOS O'HARA

CCCP & CS

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

1/16/2019

Date

For Clerk of Court Office Use Only

This judgment was entered on January 16, 2019, and a copy mailed first class or placed in the appropriate attorney's box on January 17, 2019, to attorneys of record or to parties (when appearing pro se) as follows:

CPFORM4Cm
SCCA SCRPC Form 4C (Revised 2/17)

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

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

Samuel Leonard Key / Lindsey McAllister
Rembert C. Dennis Building
1000 Assembly Street
Columbia, SC 29201

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-Filers 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.

FILED

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF FLORENCE 2019 JAN 18 PM 2:12 TWELFTH JUDICIAL CIRCUIT

Tyrone Joseph Whatley, #208735, DORIS POUROS C'HARA C.A. No. 2016-CP-21-1120
CCCP & GS

Applicant, FLORENCE COUNTY, SC)
ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Tyrone Joseph Whatley (Applicant) on May 20, 2016. Respondent made its Return on January 30, 2017. An evidentiary hearing into the matter was convened on January 30, 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. Scott P. Floyd, 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 July 2010 term of the Florence County Grand Jury for one count of first-degree burglary, two counts of armed robbery, and one count of conspiracy (2010-GS-21-1008). Applicant was represented by Scott P. Floyd (Counsel), Esquire. On January 31 - February 2, 2011, Applicant proceeded to

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

trial before the Honorable D. Craig Brown, and he was convicted as indicted on all four charges. Judge Brown sentenced Applicant to life imprisonment without parole for first-degree burglary and both counts of armed robbery, plus five years' imprisonment for conspiracy. The sentences were all to be served concurrently.

Applicant filed a timely Notice of Appeal. An appeal was perfected by Susan B. Hackett, Esquire. On January 31, 2012, Applicant's counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), raising the following issue: "Did the trial court erred in refusing to permit [Applicant] to question [Jessica] Ussery, an alleged co-conspirator, regarding the sentencing range for her pending charges where the [S]tate dismissed two counts of armed robbery after she cooperated with law enforcement?" On September 7, 2012, Applicant's counsel provided to the Court of Appeals State v. Gracely, 399 S.C. 363, 731 S.E. 2d 880 (2012). On December 20, 2012, the Court denied Applicant's counsel's petition to be relieved and directed the parties to brief the following issue: "Did the circuit court improperly limit the scope of Applicant's cross-examination of the State's witness, Jessica Ussery, regarding the mandatory minimum sentences she avoided by testifying against Applicant?" On March 19, 2014, the South Carolina Court of Appeals affirmed Applicant's conviction in a published opinion. State v. Whatley, 407 S.C. 460, 756 S.E.2d 393 (Ct. App. 2014). Applicant's request for rehearing was denied on April 25, 2014. On March 4, 2016, the Supreme Court denied Applicant's Petition for Writ of Certiorari. The Remittitur was returned on March 16, 2016.

SUMMARY OF FACTS ADDUCED AT TRIAL

On July 21, 2009, Brandon Cross and Ciera Davis were asleep in their motel room when Davis heard a knock on the door. Tr. pp. 59, 76-78. She looked through the peephole and saw a woman. Tr. p. 78. As she opened the door, two men burst through. Tr. pp. 78-79. One man was

carrying a gun and both demanded money. Tr. p. 63- 65, 79- 80. Cross was able to get out of the motel room, and he ran downstairs and asked a man in an Explorer to call the police. Tr. pp. 66- 67. Cross saw the men come downstairs with bags and a gun and jump into a small, burgundy, two-door car and drive away. Tr. pp. 67- 68.

As Sergeant John F. McLaurin of the Florence County Sheriff's Office was responding to the 911 call, he saw the burgundy car pull out right in front of him. Tr. p. 92. He activated his blue lights and initiated a traffic stop. Tr. p. 93. After initially failing to stop, Jessica Ussery, the driver, eventually stopped, and Applicant and John Barfield ran from the stopped car. Tr. pp. 93- 94, 97. Ussery was arrested at the scene, and Barfield and Applicant were eventually arrested later in the investigation. Tr. pp. 123, 142, 171-72, 174.

At trial, the State called Ussery to the stand. Tr. p. 109. She testified she drove her boyfriend, Barfield, to a trailer park to pick up Barfield's friend, Rom, also known as Jamal Bryant, who Ussery identified as Applicant. Tr. pp. 114-17. Ussery testified when they picked Applicant up, he had a shotgun with him, which he put in the trunk of Ussery's car. Tr. pp. 115-17. She testified Barfield told her he needed to stop at the Days Inn to pick up some money from someone who owed him. Tr. p. 118. She recounted that when they arrived at the motel room, Barfield told her to knock on the door and then Barfield pushed his way into the room and Applicant followed him. Tr. pp. 119-20. She explained that after they arrived at the motel, Barfield had the gun. Tr. p. 119. Ussery testified both Barfield and Applicant were carrying bags, pocketbooks, and clothes when they came out of the motel room. Tr. pp. 121-22. She drove them away from the motel and saw blue lights behind her. Tr. pp. 121-22. She turned into the Merita Bread parking lot and both men told her not to say anything, jumped out of the car, and ran. Tr. p. 121.

On cross-examination, Counsel asked Ussery about her original charges, and she explained she was charged with two counts of armed robbery with a deadly weapon, failure to stop for a blue light, and falsification of information to the police. Tr. pp. 129-30. Ussery further testified her two armed robbery charges were dropped to accessory before the fact and after the fact. Tr. p. 130. Counsel later asked Ussery if she knew what her exposure was on her pending accessory charges, and she answered that she did not know. Tr. pp. 141-42. The State objected to Counsel questioning Ussery regarding the amount of time she faced on those charges, and the trial court sustained the objection. Tr. p. 142. Counsel then asked Ussery if she was aware of what kind of time she faced on the armed robbery charges. Tr. p. 142. She testified, "No, sir, not of the full extent, no, sir. It carries a long sentence." Tr. p. 142. Counsel then asked, "So nobody's ever told you what arm[ed] robbery carries?" Tr. p. 142. Ussery answered, "I'm not aware of or how long the year term is." Tr. p. 142. The State made no objection to this line of questioning. Counsel then questioned Ussery about whether she had received a plea bargain in exchange for her testimony, and she testified she was not aware of any plea bargain or deal for her testimony. Tr. pp. 142-43.

The State then called Barfield. Tr. p. 143. Barfield testified he and Applicant talked about committing a robbery, and Applicant brought a gun with him when Barfield and Ussery picked him up. Tr. pp. 148-49. He testified he put the gun in his pants when he got out of the car at the motel room. Tr. p. 151. He testified he and Applicant entered the motel room and asked the victims, "Where is the dope and the money?" Tr. pp. 151-52. Barfield testified when they left the motel in Ussery's car, law enforcement got behind them. Tr. p. 155. When they reached a Merita Bread store, he and Applicant jumped out of the car and ran. Tr. p. 155.

On cross-examination, Counsel asked Barfield about his original charges and what charges had been disposed of. Tr. pp. 158-59. Barfield explained he was originally charged with conspiracy, possession of a weapon, first-degree burglary, and two counts of armed robbery. Tr. p. 158. He further testified all of those charges were dismissed, and he pleaded guilty to two counts of attempted armed robbery, receiving a seven-year sentence. Tr. pp. 158-59. Counsel then asked Barfield, "Did you know what you were facing for arm[ed] robbery?" Tr. p. 159. At that point, the State objected to his questioning him regarding the amount of time he was subjected to, and the trial court sustained the objection after an off-the-record bench conference. Tr. pp. 159-60. Counsel continued with his cross-examination by asking Barfield if he was aware he could receive substantially more time for the armed robbery and burglary charges that were dismissed than what he received for attempted armed robbery, and Barfield confirmed he was aware. Tr. p. 160.

Next, the State called Investigator Alvin Powell of the Florence County Sheriff's Office. Tr. pp. 166-67. He testified he interviewed Ussery and Barfield, and Barfield gave him Applicant's name and address. Tr. pp. 173-74. Powell testified Davis confirmed Barfield's identity through a photo lineup; eventually, Barfield then confirmed Applicant's identity through a photo identification. Tr. p. 174. Investigator Powell testified he was the officer who arrested Applicant and collected evidence in the case. Tr. p. 174.

After Investigator Powell's testimony, the trial judge met with the attorneys in chambers. Tr. p. 184. The trial judge then announced on the record that he had determined, based on State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004), aff'd as modified on other grounds, 373 S.C. 601, 646 S.E.2d 872 (2007), Counsel should have been able to ask about the amount of time Barfield faced. Tr. p. 184. Specifically, the trial judge found questioning of that nature could go to the bias or prejudice of the witness, and he decided to allow Counsel to question Barfield

regarding the amount of time he was facing. Tr. pp. 184-85. Counsel then recalled Barfield and asked whether he understood he was facing “from minimum ten to maximum thirty years on those two counts,” and Barfield answered he did after speaking to his lawyer. Tr. p. 189. Counsel also asked if Barfield understood he was facing fifteen years to life imprisonment for the first-degree burglary charge, and Barfield stated he did. Tr. pp. 190-91. Counsel did not recall Ussery to the stand.

Ultimately, the jury found Applicant guilty on all counts, and the trial judge sentenced him to concurrent terms of life without parole for burglary and both counts of armed robbery, plus five years’ imprisonment for conspiracy. Tr. pp. 249-50.

ALLEGATIONS

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

1. Ineffective Assistance of Counsel
 - a. “Counsel was ineffective for failing to investigate this case by failing to interview potential witnesses.”
 - b. “Counsel failed to properly investigate and conduct any meaningful pretrial discovery.”
 - c. “Conflict of interest”
 - d. “Defense counsel did not object to anything.”
 - e. “Failed to acquaint himself with the laws and the facts surrounding Applicant’s case.”

On January 25, 2018, Applicant, through PCR counsel, amended his application to include the following allegations:

1. Counsel was ineffective for failing to convey a plea offer from the State to Applicant for his consideration, resulting in the offer being withdrawn.
2. Counsel was ineffective for failing to properly secure discovery, and provide to Applicant, in adequate advance of trial as to have time to properly prepare.
3. Counsel was ineffective for failing to properly question law enforcement about their investigation as it related to unindicted individuals.

At the evidentiary hearing, counsel for Applicant informed the Court he intended to proceed only on the following allegations from the original complaint and the amendments: (1) conflict of interest; (2) failure to object to improper closing argument; (3) failure to move to suppress statements turned over during trial; (4) failure to convey plea offer; (5) failure to secure discovery (statement); (6) failure to properly question law enforcement regarding unindicted individuals; and (7) failure to properly investigate the facts and circumstances of Applicant's case. Accordingly, this Court finds Applicant has waived and abandoned all the other claims against trial counsel listed in his original application, and those allegations are hereby denied and dismissed with prejudice.

SUMMARY OF TESTIMONY

Applicant testified Counsel was appointed to represent him on these charges, and they met a total of three times – twice in the county jail and once at the courthouse prior to trial. Applicant testified he was not aware of any plea offer made by the State until after he had been convicted and was in prison. According to Applicant, he first found out about a plea offer when he received documents from the clerk of court after his conviction.

Applicant further testified the State's witnesses at trial, his codefendants, gave a different name for him, but identified him at the defense table at trial. Applicant testified he and Counsel discussed potential defenses, and Counsel said it would be his word against Barfield's. Applicant testified he was not aware law enforcement and the victims would testify; he thought only the codefendants would testify. Applicant testified the issue of the codefendants receiving reduced charges was brought up at trial, and Counsel asked them about it, but the State objected. Applicant averred this issue was raised on appeal.

Applicant further testified he was not arrested until eight months after this incident, based on codefendants' testimony. Applicant testified he did not receive a copy of his discovery until the day of trial, so he was not aware of the individual named Rose mentioned in the discovery or any text messages. Applicant testified he did not talk to Counsel about these issues because he did not know about them until after the trial. Applicant testified he felt Counsel should have asked law enforcement about the text messages, and Counsel did not object to "anything" and only did limited cross-examination.

Applicant testified he was aware the State had served notice of its intent to seek life without parole (LWOP) approximately four to five months prior to trial. Applicant testified he tried to discuss the notice with Counsel and called Counsel's office, but Counsel did not return his call. Applicant testified he had a chance to talk with Counsel during breaks in the trial, and they discussed his right to testify and the fact the State could bring up his prior record. Applicant confirmed he had a prior conviction which qualified him for LWOP.

On cross-examination, Applicant testified he gave Counsel the names of potentially helpful witness; specifically, his girlfriend and a man named David. However, Applicant testified he did not know an address or phone number for David. Applicant reiterated his testimony he did not know about the plea offer until after he was sentenced and also testified he never asked for one or ever told Counsel he was willing to plead guilty. Applicant also testified Counsel never gave him a copy of his discovery or any papers, and the only thing they talked about during their meetings was how it would be Barfield's word against his.

Counsel testified the State made an offer of twenty years, which was included in the Rule 5 discovery. According to Counsel, the solicitor brought Applicant up to the courthouse months before trial and wanted to know if Applicant was going to accept the offer. Counsel testified the

solicitor said if Applicant did not accept the offer, it would be withdrawn, and the State would serve notice of intent to seek LWOP. Counsel then testified he and Applicant talked about the offer, but Applicant did not want to plead guilty, so the State served the LWOP notice to them on the record.

Counsel testified he prepared for trial by reviewing the discovery and meeting with Applicant. Counsel also testified he attempted to investigate the person named Rose, and he had the name "Allen" but no address for Allen. Counsel testified he knew the general area where Allen might be, and he and an investigator attempted to locate him but were unsuccessful. Counsel testified it was his understanding Allen might have known who the people discussed in the text messages were, but they were not able to get that information. Counsel testified Applicant never offered an alibi and could not remember with certainty what he was doing on the night of the robbery. Counsel also testified there was some physical evidence, but no DNA, which was part of the defense.

Counsel also testified he tried to ask both codefendants about any plea deals and the potential sentences they were facing, but the trial judge did not let him at first. Counsel testified the court eventually reversed its original ruling, so he recalled Barfield on that issue. Counsel explained he did not also recall Ussery because he felt he established the potential range with only the one witness. Counsel testified he was able to cross-examine both Ussery and Barfield on the fact that they both received a reduction in their charges. Counsel further testified Ussery gave a statement when she was first arrested, but he did not recall any subsequent statements. In the first statement she named Applicant as "Jamal." Counsel testified his understanding of the law is that the State does not have to turn over witness statements until the witness actually testifies.

Finally, Counsel testified he did not remember Applicant filing a motion to relieve him as counsel, nor did Applicant ever tell him Applicant did not want him as his attorney.

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. § 17-27-80.1

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

¹ The Court notes Applicant raised seven distinct issues, and the Court has considered all issues separately. However, for the sake of clarity, it has combined some of Applicant’s issues for the sake of clarity in its ruling below.

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. Conflict of interest

This Court finds Applicant has not established Counsel had a conflict of interest. “The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction.” State v. Gregory, 364 S.C. 150, 152–53, 612 S.E.2d 449, 450 (2005). This Court finds credible Counsel’s testimony he did not recall Applicant ever filing a motion to relieve him as counsel, nor did Applicant ever tell Counsel he did not wish for him to continue as his attorney. Therefore, Applicant has failed to meet his burden of proof as to deficiency or prejudice, and this allegation shall be dismissed.

2. Failure to object to State’s improper closing argument

This Court finds no deficiency in Counsel’s failure to object to the State’s closing argument on the basis of vouching. On such claims, Applicant has the burden of proving “the solicitor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). The Court finds no error when read in the context of the entire argument. While the State’s closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence, “[a] solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony.” Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004); State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). Accordingly, this Court finds Counsel’s conduct was not deficient in failing to object, nor was Applicant prejudiced by the remarks. This allegation shall therefore be denied and dismissed.

3. Failure to move to suppress statements turned over during trial/ failure to secure discovery (statement)

This Court finds no deficiency in Counsel’s handling of witness statements turned over to the defense for the first time during trial. Pursuant to Rule 5(a)(2), SCRCrimP, witness statements

must only be provided after the witness testifies. This Court has reviewed the transcript and notes the trial court offered Counsel a break in which to review the statement, which was only seven pages. Tr. p. 134. When the trial resumed, Counsel informed the court he had “ample time” to review the statement, and he was ready to go forward. Tr. pp. 134-35.

This Court finds Applicant has not offered any evidence of what else Counsel should have done or would have discovered had he taken more time to review the statement, and the timing of the disclosure comports with the rules of criminal procedure in this State. Further, Applicant testified he was aware his codefendants would testify against him; it was the testimony of the victims Applicant claims he was unaware of. Therefore, because Applicant has not proven either deficiency or prejudice, this allegation shall be denied and dismissed.

4. Failure to convey plea offer

As to this issue, this Court finds Counsel’s testimony credible. Although this Court does not have the record of the hearing reported by Counsel, Counsel recalled his handling of the plea offer and the circumstances giving rise to the hearing with great detail. This Court finds Counsel discussed the plea offer with Applicant and the solicitor, and Applicant’s rejection of the offer was put on the record along with the State’s notice of intent to seek LWOP. Therefore, because Counsel was not deficient, this allegation shall be denied and dismissed with prejudice.

5. Failure to properly question law enforcement regarding unindicted individuals/ failure to properly investigate the facts and circumstances of the 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 met with Applicant multiple times, obtained the name of a potential witness from Applicant, and investigated Applicant's witness, "Allen," as far as possible given Applicant did not have any contact information for the witness. Counsel explained "Allen" was the person Applicant believed could lead to "Rose," but Counsel was unable to locate either Allen or Rose. This Court therefore finds Counsel's investigation into the facts and circumstances of the case was reasonable.

Further, in order for Applicant to satisfy his burden of proof as to this allegation, the witness he claims Counsel should have called has to be proffered at the evidentiary hearing, which Applicant has failed to do. See Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). (holding that in order to support a claim 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). 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. This Court therefore finds Counsel was not deficient in his 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.

CONCLUSION

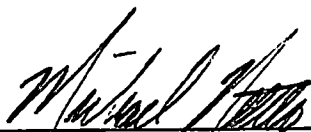
For all the foregoing reasons, this Court finds and concludes Applicant has not established any constitutional violations or deprivations which would require this court to grant his application. Counsel was not deficient in any manner, nor was Applicant prejudiced by Counsel's representation. Therefore,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

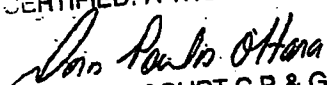
1. The application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall be remanded to the custody of the Respondent.

AND IT IS SO ORDERED.



MICHAEL G. NETTLES
Presiding Circuit Court Judge
Twelfth Judicial Circuit

1-10, 2019

FILED
2019 JAN 16 PM 2:12
DORIS POULOS O'HARA
CCCP & GS
FLORENCE COUNTY, SC
CERTIFIED: A TRUE COPY

CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.



ALAN WILSON
ATTORNEY GENERAL

2019 JAN 16 PM 2:12

FILED

DORIS POULOS O'HARA
CCCP & GS
FLORENCE COUNTY, SC

January 4, 2019

The Honorable Michael G. Nettles
Presiding Judge, Twelfth Judicial Circuit
South Carolina Circuit Court
180 North Irby Street, MSC-XX
Florence, South Carolina 29501

Re: Tyrone Joseph Whatley, #208735 v. State of South Carolina
2016-CP-21-1120

Dear Judge Nettles:

Enclosed please find the State's original proposed **Order of Dismissal** in the above-captioned case. If this order meets your approval, please sign and forward to the Florence County Clerk of Court to be filed and served.

Sincerely,

Lindsey McCallister
Assistant Attorney General

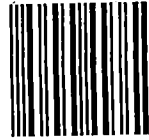
LM/can
Enclosures

cc: Jonathan D. Waller, Esquire

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Clerk of Court C.P. & G.S.
FLORENCE COUNTY, S.C.
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