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February 6, 2019

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

Re: James A Gardner 177263 v State, 2017-CP-25-0006

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and ORDER OF DISMISSAL Mike off in the above Hampton County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,



James K Falk

Thank you for your assistance.

Cc:

DeShawn M Mitchell, Esq
James Gardner 177263
Hampton County Circuit Court Clerk

RECEIVED
FEB 11 2019
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
FEB 11 2019
S.C. SUPREME COURT

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Honorable R. Lawton McIntosh, Circuit Judge

Case No.: 2017-CP-25-0006

James A. Gardner 177263PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner James A. Gardner appeals the Honorable R. Lawton McIntosh's April 10, 2018 Order of Dismissal. Undersigned counsel received notice of entry of the order on February 5, 2019. A copy of the order on appeal is attached hereto.



James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

February 6, 2019
DeShawn H. Mitchell, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

Clerk of Court- Hampton CP
PO Box 7
Hampton, SC 29924

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HAMPTON COUNTY

Court of Common Pleas

Honorable R. Lawton McIntosh Circuit Judge

Case No.: 2017-CP-25 – 0006

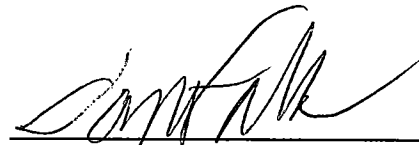
James A Gardner 177263PETITIONER

V.

State of South Carolina.....RESPONDENT

CERTIFICATE OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, DeShawn Mitchell Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549 and the Hampton County Clerk of Court. I further certify that all parties required by Rule to be served have been served this February 6, 2019.



James K Falk
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PO Box 1058
Charleston, SC 29402

RECEIVED
FEB 11 2019
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
 COUNTY OF HAMPTON)
)
)
 James A. Gardner, #177263,)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOURTEENTH JUDICIAL CIRCUIT

2017-CP-25-0006

ORDER OF DISMISSAL

FILED
 301 AM/PM

APR 24 2018
 OPC
 MYLINDA D NETTLES
 CLERK OF COURT
 HAMPTON COUNTY, SC

This matter comes before the Court by way of an application for post-conviction relief filed on January 9, 2017 by James A. Gardner (Applicant) with amendments filed on January 13, 2017 and May 1, 2017. Respondent made its Return on or about August 3, 2017. An evidentiary hearing into the matter was convened on January 29, 2018, at the Beaufort County Courthouse in Beaufort, South Carolina. Applicant was present and represented by James K. Falk, Esquire. Respondent was represented by DeShawn H. Mitchell, Esquire of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Applicant's Trial Counsel Cory Fleming, Esquire also testified. This Court had before it a copy of the records of the Hampton County Clerk of Court regarding the Applicant's convictions, the transcript from Applicant's trial, the PCR application, Respondent's Return, Applicant's records from the Department of Corrections and Applicant's appellate records. After reviewing the record and everything presented, this Court finds Applicant has failed to establish any constitutional deprivations entitling him to post-conviction relief and denies this application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Hampton County Clerk of Court. In August 2013, the Hampton

County Grand Jury indicted Applicant for three counts of attempted murder (2013-GS-25-0073, -0075, -0079), four counts of pointing and presenting firearms at a person (2013-GS-25-0074, -0076, -0077, -0078), and possession of a weapon during a violent crime (2013-GS-25-0080). Applicant was subsequently indicted in October 2014 for pointing and presenting firearms at a person (2014-GS-25-0374)]. All five of the pointing and presenting firearms at a person charges were subsequently dismissed. Cory Fleming, Esquire, represented Applicant. Assistant Solicitor Tameaka Legette, Esquire, prosecuted the case. On February 2-4, 2015, Applicant proceeded to trial before the Honorable Perry M. Buckner. The jury found Applicant guilty as indicted. Judge Buckner sentenced Applicant to imprisonment for concurrent terms of twenty-five years for each of the three attempted murder charges and five years for possession of a weapon during a violent crime.

Applicant filed a timely notice of appeal. Katherine Hudgins, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals dismissed Applicant's appeal on July 20, 2016. State v. Gardner, Op. No. 2016-UP-369 (S.C. Ct. App. filed July 20, 2016). The remittitur was returned to the circuit court on August 5, 2016.

ALLEGATIONS

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

1. "Ineffective Assistance of Trial Counsel"
 - a. "Trial counsel was ineffective and denied Applicant due process of law and denied him his right to a fair trial. There was also a breach in communication from the very beginning of this case."
 - b. "Trial counsel violated Applicant's constitutional rights in one or all of the following ways, which prejudiced the case:"
 - i. "Failure to object to the jury composition because Juror Alice Scott is biologically related to the alleged victim."
 - ii. "Failure to investigate case or interview witnesses and failed to file motions to additional funding to hire an investigator and also investigate

- the medical records of alleged victims to properly assess the extent of their claimed injuries. The radiologist wasn't subpoenaed to testify to the extent of the alleged bullet wound, Applicant was denied his substantial right to confrontation and also compulsory."
- iii. "Counsel failed to object and file timely motions to object to the indictment being multiplicities, because the indictment has several counts for one fire arm.
 - iv. "Counsel was ineffective for stipulating to the involuntary statement made by Applicant to investigators. Counsel should have motioned for a Jackson Denno hearing because the stipulation was used when the judge instructed the jury."
 - v. "Trial counsel was ineffective for failing to object to the use of Applicant's prior convictions because they were beyond ten years old and was remote and he didn't investigate the validity of the prior convictions."
 - vi. "Due to the breakdown of communication [Applicant] ended up going to trial, he was willing to enter a plea to a lesser included offense for a sentence under nine years, but trial counsel would not hire and investigator to investigate the case to show there's evidence of a lesser included offense. As a result of such poor legal strategies, Applicant ended up going to trail which subjected him to a greater sentence."
2. "Ineffective Assistance of Appellate Counsel"
- a. "Counsel was ineffective for failing to request jury instructions on lesser included offenses of attempted murder because the court denied motion for directed verdict (which was definitely preserved for appellate review and should have been raised by appellate counsel to avoid procedural default when raised on a post-conviction. The appellate brief was inadequate by not raising this claim on appeal. As a result of this error, this prejudiced the outcome of Applicant's case and confuse and mislead the jury. The jury instructions was constitutionally invalid, had the jury been instructed on 1st, 2nd, or 3rd degree assault, Applicant may have been convicted of a lesser offense."
3. "Actually Factually Legal Innocence"
- a. "Applicant is actually, factually, and legally innocent of attempted murder because the laws of the State of South Carolina require the State to prove their case 'beyond a reasonable doubt.' It is well established law in the State of South Carolina, the 'due process clause' requires that the prosecution in any case must prove beyond a reasonable doubt every essential element of the crime charged."
 - b. "Reasonable doubt instructions will confirm such."

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTARY HEARING

Applicant's Testimony

Applicant testified Trial Counsel was a friend of his stepson and he did not become aware of this until after he hired him. Applicant testified during a jail visit by Trial Counsel, some of

the other inmates told him they knew Trial Counsel from Wade Hampton High School where Trial Counsel had played basketball. Additionally, Applicant testified he found a picture of Trial Counsel in his stepson's room. Applicant testified he tried to fire Trial Counsel and get his money back but the trial judge told him he had to go forward with his trial. He testified after he hired Trial Counsel, Trial Counsel informed him about the statements the victim had made. Applicant testified he did not like the way Trial Counsel handled his case. He testified Trial Counsel did not interview any witnesses and did not do anything at trial. Applicant testified one of the jurors, Alice Scott, was related to the victim. When asked if he told his lawyer about Mrs. Scott, Applicant first testified he did not believe he did then testified he thought he told Trial Counsel. Applicant also testified Trial Counsel told him he could get him a deal on attempted murder but he told Trial Counsel he would not plead guilty to attempted murder. Applicant testified he told Trial Counsel he would take a plea offer for anything less than nine years.

On cross-examination, Applicant testified that besides the picture he found of Trial Counsel in his stepson's room, guys who were in jail with him told him Trial Counsel went to Wade Hampton High School and they knew Trial Counsel. Applicant testified that he asked Trial Counsel if Trial Counsel knew his stepson and Trial Counsel told him he did not know his stepson. Applicant also testified Trial Counsel came to him with a plea offer for attempted murder for nine years. Applicant testified he was in court during jury selection but did not remember if the juror, Mrs. Scott stood when asked by the trial judge whether any jury member was related to the victim.

Trial Counsel's Testimony

Trial Counsel testified he did not know Applicant's stepson and had never even been to Hampton, South Carolina until 1993. Trial Counsel testified he did not play basketball during

high school. Trial Counsel testified he could not conceive a notion that he would not strike a juror if that juror said they were related to a victim in a case or if his client told him that. Trial Counsel testified his trial strategy was to do everything he could to suppress the statement Applicant gave confessing to the incident while also showing Applicant did not mean to shoot anybody. Trial Counsel testified during trial he was trying to show the jury Applicant was drunk and lead them to the conclusion that this incident was a mistake. Trial Counsel testified if he would have requested a lesser included charge of attempted murder the trial judge had put that conversion on the record. Trial Counsel testified Applicant was difficult to deal with and Applicant would not talk to him at times even as he explained the evidence to him the State had. Trial Counsel testified he was able to get a plea offer of nine years at eighty-five percent which was the best the State was offering. Trial Counsel testified Applicant said he was not pleading to nine years. Trial Counsel testified he told Applicant the only way to get less than nine years was to go to trial and try for "all or nothing". Trial Counsel testified Applicant wanted to relieve him and that he received a grievance letter and fee dispute letter from the South Carolina Bar filed by Applicant. Trial Counsel testified he and Applicant went in front of trial judge and Trial Counsel said he was not asking to be relieved. Trial Counsel testified trial judge stated on the record that pursuant to the Chief Justice of South Carolina, a grievance was not enough to be relieved. Trial Counsel testified that trial judge ruled the case would not be delayed any further. Trial Counsel testified Applicant was charged with attempted murder and that assault and battery of a high and aggravated nature was a lesser included offense of attempted murder. Trial Counsel testified that the sentence for assault and battery of a high and aggravated nature was also so steep that given Applicant's advanced age, going for the "all or nothing" verdict on the attempted murder was his trial strategy.

On cross-examination, Trial Counsel testified about the facts surrounding Applicant's case. Trial Counsel testified Applicant had a long term girlfriend that Applicant considered his common law wife. He testified Applicant became increasingly upset with her because Applicant believed she was having an affair because she would leave on Saturdays and be gone for some time. Trial Counsel testified that Applicant's girlfriend had actually adopted a highway and would go clean it up on Saturdays. Trial Counsel testified Applicant had a conversation with his girlfriend's sister and ended up grabbing a rifle and shooting his girlfriend's sister in the leg. Trial Counsel testified the evidence was overwhelming in this case. Trial Counsel testified the State had an extremely thorough confession from Applicant and Applicant engaged in a shootout with the police after shooting his girlfriend's sister. Moreover, Trial Counsel testified the hardest thing to overcome was the confession because the police asked Applicant if he really wanted to kill those people and Applicant said he wanted them dead. Trial Counsel also testified he was not aware of any issue with a potential juror. Trial Counsel also testified that if Applicant's stepson who was the son of the victim, walked into the courtroom right now he would not know who Applicant's stepson was. Lastly, Trial Counsel testified it was his trial strategy to not request a lesser included charge of attempted murder as they were going for the "all or nothing" verdict.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and can weigh their testimony and credibility accordingly. These credibility findings have been applied to the Court's findings and conclusions set forth below. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017).

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

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland v. Washington, 466 at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 (1985).

After careful review of the entire record, including the testimony presented at the evidentiary hearings, based on the standard discussed above, this Court finds Applicant has

failed to carry his burden in this action regarding any of his allegations of ineffective assistance of counsel. Applicant proceeded on only the following grounds for relief:

Failure to object to the jury composition

Applicant alleged Trial Counsel failed to object to the jury composition as one of the members of the jury was related to the victim. Applicant testified one of the jurors, Alice Scott, was related to the victim. When asked if he told his lawyer about Mrs. Scott, Applicant first testified I do not believe I did then testified he thought he did tell Trial Counsel. Trial Counsel also testified he was not aware of any issue with a potential juror. Trial Counsel testified that he could not conceive a notion that he would not strike a juror if that juror said they were related to a victim in a case or if his client told him that.

This Court finds Applicant has failed to present any credible evidence that Mrs. Alice Scott was related to the victim other than his own testimony. Notwithstanding Applicant's testimony, the record clearly shows the trial judge asked the jury panel during voir dire if any member was related to any of the witnesses for trial including the victim. (ROA p.55). No juror responded in the affirmative. Based on the record and Trial Counsel's testimony that he was not aware of any issue with a potential juror during voir dire, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. Applicant has failed to show the outcome of his trial would have been different had Trial Counsel struck Mrs. Scott from the jury. This Court concludes Applicant

has not met his burden of proving Trial Counsel failed to render reasonably effective assistance. Accordingly, the allegation is denied and dismissed.

Failure to request lesser included charge

Applicant alleged Trial Counsel was ineffective for failing to request the lesser included charge of assault and battery of a high and aggravated nature. Applicant testified Trial Counsel told him he could get him a deal on attempted murder, but he told Trial Counsel he would not plead guilty to attempted murder. Applicant testified he told Trial Counsel he would take a plea offer for anything less than nine years. Trial Counsel testified he was able to get a plea offer of nine years at eighty-five percent which was the best the State was offering. Trial Counsel testified Applicant said he would not plead guilty to nine years. Trial Counsel testified he told Applicant the only way to get less than nine years was to go to trial and try for "all or nothing." Trial Counsel testified Applicant was charged with attempted murder, and assault and battery of a high and aggravated nature would have been a lesser included offense but the sentence for it was so steep that given Applicant's age, going for the "all or nothing" verdict on the attempted murder was the trial strategy.

This Court finds Trial Counsel articulated a valid trial strategy by not requesting a lesser included charge as to avoid a compromised verdict. Trial counsel must be given leeway to make reasonable strategic decisions. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland, 466 U.S. at 688-689. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of counsel's performance must be highly

deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. Applicant has failed to show the outcome of his trial would have been different had Trial Counsel requested the lesser included charge of assault and battery of a high and aggravated nature. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. The allegation is denied and dismissed.

Trial Counsel's Connection to Applicant's Stepson

Applicant alleged Trial Counsel had a conflict of interest in his representation of Applicant in that Trial Counsel was a friend of his stepson (Adonis Coker). Trial Counsel testified one of the victims in this case was Applicant's long term girlfriend whom Applicant considered his common law wife. Applicant testified Trial Counsel was a friend of his stepson (victim's son) and did not become aware of this until after he hired him. Applicant testified during a jail visit by Trial Counsel, some of the other inmates told him they knew Trial Counsel from Wade Hampton High school where he had played basketball. Additionally, Applicant

testified he found a picture of Trial Counsel in his stepson's room. Applicant testified he tried to fire Trial Counsel and get his money back but the trial judge told him he had to go forward with his trial. Trial Counsel testified he did not know Applicant's stepson and had never even been to Hampton, South Carolina until 1993. Trial Counsel testified he did not play basketball during high school. Additionally, Trial Counsel testified that if Applicant's stepson walked into the courtroom right now Trial Counsel would not know who he was.

This Court finds Applicant has failed to present any credible evidence that Trial Counsel had a conflict of interest in his case or that Trial Counsel even knew his stepson. Additionally, this Court finds Trial Counsel's testimony to be credible while finding Applicant's testimony to not be credible. Furthermore, Applicant has presented no witnesses who can substantiate this allegation. Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test –that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. The allegation is denied and dismissed.

Overwhelming Evidence

This Court finds the evidence of Applicant's guilt was overwhelming. See Harris v. State, 377 S.C. 66, 79, 659 S.E.2d 140, 147 (2008) (applicant cannot prove prejudice where there is overwhelming evidence of guilt). Trial Counsel testified the State had an extremely thorough confession from Applicant and Applicant engaged in a shootout with the police after shooting his common law wife's sister. Moreover, Trial Counsel testified the hardest thing to overcome was

the confession because the police asked Applicant if he really wanted to kill those people and Applicant said he wanted them dead. Additionally, after a review of the record there were several witnesses to the shootout with the police. This Court finds the evidence against Applicant was overwhelming. Therefore, this Court finds Applicant is unable to prove there was a reasonable probability any deficiency of Counsel would have changed the result of the proceeding. Accordingly, this Court denies and dismisses these allegations.

CONCLUSION

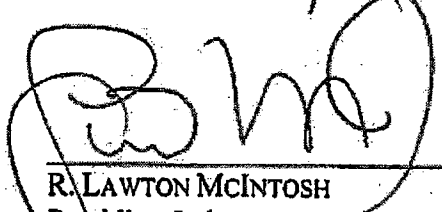
Based on all the foregoing, this Court finds and concludes that Applicant has not established any violations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCR. Refer to Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

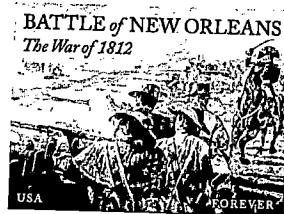
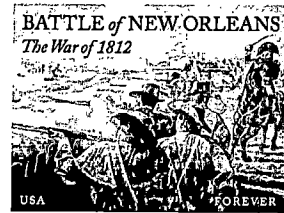
1. The application for Post-Conviction Relief is denied and dismissed with prejudice;
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 10 day of April, 2018.



R. LAWTON MCINTOSH
Presiding Judge
Fourteenth Judicial Circuit

Anderson, South Carolina



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