

RECEIVED

APR 09 2019

S.C. SUPREME COURT

April 2, 2019

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

Re: Victor D. Smith vs. State of South Carolina
C/A No: 2014-CP-40-4334

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. Smith 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

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APR 09 2019

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

S.C. SUPREME COURT

2014-CP-40-4334

Victor D. Smith, # 348112,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Victor D. Smith, # 348112, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed February 18, 2016, and the Order Denying Applicant's Motion to Alter or Amend filed March 29, 2019, issued by the Honorable G. Thomas Cooper, Jr., Presiding Judge, Fifth Judicial Circuit.



Jonathan D. Waller
Waller Law Group
SC Bar No.: 76290
1116 Blanding Street
Suite 2B
Columbia, SC 29201
803-520-7278 (phone)
jonathan@wallergroupsc.com
ATTORNEY FOR PETITIONER

April 2, 2019

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

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

2014-CP-40-4334

RECEIVED

APR 03 2019

S.C. SUPREME COURT

Victor D. Smith, # 348112,

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

April 2, 2019

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

2014-CP-40-4334

Victor D. Smith, # 348112,

Appellant,

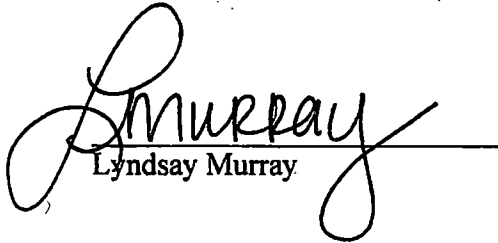
v.

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

April 2, 2019

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2014CP4004334

Victor D #348112 Smith

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or 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.
- 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 _____
- 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
		\$
		\$
		\$

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.

Circuit Court Judge _____ Judge Code 2126 Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 19 day of Feb, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Victor D #348112 Smith

Jonathan D Waller

James Clayton Mitchell III

Victor D #348112 Smith

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jonathan D Waller

FILED
2016 FEB 18 AM 9:19
RICHLAND COUNTY
COURT CLERK'S OFFICE

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Victor D. Smith, #348112,

2014-CP-40-04334

Applicant,

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

RICHLAND COUNTY
FILED
2016 FEB 18 AM 9:17
JEANETTE WOODBRIDGE
C.C.P. 806 S.

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed July 9, 2014. Respondent file a Return on July 23, 2015, requesting an evidentiary hearing be convened. Jonathan D. Waller, Esquire, was appointed by the Richland County Clerk of Court. An evidentiary hearing was held on December 11, 2015, at the Richland County Courthouse. Applicant was present and represented by Counsel Waller. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent.

At the PCR hearing, Applicant testified on his own behalf. Also testifying was Applicant's trial counsel, Christopher R. Hart, Esquire. The Court had before it the Richland County Clerk of Court records, Applicant's South Carolina Department of Corrections records, the PCR application, the Return, the trial transcript, and the appellate records.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Applicant was indicted at the February 2010 term of the Court of General Sessions for Richland County for Murder (2010-GS-40-12999). Applicant was represented by Christopher R. Hart, Esq. Applicant proceeded to

trial on September 19-23, 2011. He was convicted as indicted. On October 6, 2011, the Honorable Casey L. Manning sentenced Applicant to confinement for life.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Kathrine Hudgins, Esq. Following the submission of a brief pursuant to Anders v. California, 386 U.S. 738 (1967), the South Carolina Court of Appeals dismissed the appeal. State v. Smith, No. 2013-UP-423 (filed November 20, 2013). The Remittitur was issued on December 6, 2013.

In this action, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Trial counsel was ineffective in:
 - a. Failing to properly object to the victim's death certificate admission into evidence;
 - b. Failing to object to Applicant's jail records from the Mississippi Department of Corrections;
 - c. Failing to investigate the victim's date of death;
 - d. Failing to object to an alleged improper comment by Judge Manning;
 - e. Failing to object to improper testimony given by Stan Smith;
 - f. Failing to object to improper testimony given by Stan Richards;
 - g. Failing to object to Deputy Coroner Bill Stevens allegedly testifying outside the scope of his expertise;
 - h. Failing to object to alleged bolstering testimony given by Investigator Travis Holdorf.

II. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (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, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.



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. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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." Id. at 117-18, 386 S.E.2d at 625.

III. 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 Clerk of Court records regarding the subject convictions, the transcripts, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the appellate records, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds Counsel's testimony to be credible. These credibility findings have been applied to the Court's findings and conclusions set forth below.

6/23

Ineffective Assistance of Trial Counsel

I. Failing to properly object to the victim's death certificate admission into evidence

First, Applicant alleges Counsel was ineffective in failing to properly object to the victim, Ernest Robinson's death certification being admitted into evidence. The State offered the victim's death certificate into evidence as a self-authenticating document. (Trial Tr. p. 516, lines 16-22). Counsel objected on the grounds that the State has not been able to prove with certainty that the person found near Applicant's apartment complex was Ernest Robinson. (Trial Tr. p. 517, line 24 – p. 520, line 12). Counsel argued that the death certificate was not true and accurate and that it would allow the jury to rely on an official State document in finding that the body recovered was in fact Robinson's body. The objection was overruled and the death certificate was admitted into evidence.

This Court finds this allegation without merit. Death certificates are mandated by statute and kept as a public record. Here, South Carolina Code Ann. § 44-63-74 (1976) requires a death certificate to be filed with the Bureau of Vital Statistics within five (5) days after death. Thus, the death certificate is not hearsay pursuant to Rule 803(8) and (9).

Counsel testified that he made an objection to the death certificate's admission under Rule 403, SCRE. This Court finds Counsel's testimony credible. At trial, Counsel argued the death certificate was prejudicial because it contained the State's seal and was not probative because it could mislead the jury. Counsel testified he believed that was a proper argument under Rule 403, SCRE. This Court agrees and finds a proper argument was made to exclude the death certificate. This allegation is denied and dismissed.

GR 4

II. Failing to object to Applicant's jail records from the Mississippi Department of Corrections

Next, Applicant alleges Counsel was ineffective in failing to object to Applicant's jail records from the Mississippi Department of Corrections being admitted. He argues those records were prejudicial to his case.

Counsel testified that he consented to the jail records admission because it provided an alibi after October 21, 2008. While the State alleged the murder took place on September 27, 2008, Counsel testified he argued that it had to have taken place sometime after that because authorities responded to the apartment where the murder occurred days after and did not see any signs of a murder. He testified he was able to argue that the State could not prove when the murder took place and if the jury believed it was after October 21, 2008, then Applicant could not have participated in the murder and must be acquitted. This Court finds Counsel made a reasonable strategic decision in allowing the jail records to be admitted. 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). This Court will not second guess Counsel's strategy. This allegation is denied and dismissed.

III. Failing to investigate the victim's date of death

Next, Applicant alleges Counsel was ineffective in failing to investigate the victim's date of death. Applicant suggests that Melissa Rowe saw the victim after the date the State alleged the murder occurred. Applicant testified that Rowe saw the victim after September 27, 2008.

"Criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation

ES
me 5

of the facts and circumstances of the case.” Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (internal citations omitted). Applicant has not provided this Court with any admissible testimony as to an alternative date of death. This allegation rests entirely on speculation because Rowe was not produced at the hearing. See Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) (“failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result.”). Applicant failed to present any evidence to this Court as to how this investigation could have changed the result of the trial.

IV. Failing to object to an alleged improper comment by Judge Manning

Applicant next argues Counsel was ineffective in failing to object to a comment Judge Manning made to the jury during his opening remarks. Judge Manning stated: “If at any time I should make any comments regarding the facts, you are to at liberty to disregard my comments.” (Trial Tr. p. 105, lines 16-18). Applicant argues that the jury *must* disregard any comment on the facts. Counsel testified that Judge Manning later expounds upon those comments and made clear that the jury must determine the facts independently. This Court finds, taking the opening comments as a whole, Judge Manning correctly conveyed that the jury was to be the sole judge of the facts. This allegation is denied and dismissed.

V. Failing to object to improper testimony given by Stan Smith

Applicant next argues Counsel was ineffective for failing to object to improper bolstering testimony given by Major Stan Smith of the Richland County Sheriff’s Department. Specifically, Applicant alleges Counsel should have objected to the following exchange:

Q: You talked about someone who is a supervisor over these kinds of incidents, would it have been your job to conduct every last detail of the investigation in this case or would that have been assigned?”

CL 6

A: That's virtually impossible with the number of homicides that we have of violent crimes, unfortunately, but I sort of supervise them in an overview type – I was a little more involved in this one maybe more than some of the others. But I rely on experienced detectives, such as Investigator Holdorf to make the right call. I have the most confidence in individuals like Holdorf that work these homicides.

(App. p. 293, line 16 – p. 294, line 2).

Counsel testified he will normally base his decision on whether to object to such comments if they weigh in on the evidence. He noted that it did not and that he did not want to bring attention to an isolated comment by making an objection. This Court finds Applicant failed to show Counsel was ineffective. The comment that Smith had the confidence in Holdorf does not rise to the level of improper bolstering and Counsel had the full opportunity to cross examine Smith on his actions in the case. Applicant also cannot show that if this testimony was objected to that the result of the trial would have been different.

VI. Failing to object to improper testimony given by Stan Richards

Applicant alleges Counsel was ineffective for failing to object to Sergeant Stan Richard's testimony regarding the existence of a blood stain at the apartment where the murder took place. Applicant argues that although Richards was qualified as an expert, he was not qualified to testify to whether a stain was actually a blood stain.

Richards was qualified and admitted as an expert in crime scene investigation and blood stain analysis. (Trial Tr. p. 335, line 4 – p. 336, line 22). Counsel testified that Richards was qualified to give an opinion on whether certain stains were blood stains. He testified that Richards performed a presumptive test which gives an initial reading of whether there is any blood present. This Court finds Richards's testimony was not objectionable because it was within his qualifications as a blood stain analysis expert.

Applicant also argues Counsel was ineffective in failing to object to alleged speculative testimony given by Richards. The relevant testimony is as follows:

Q: Based upon all the evidence that you examined in the apartment over a three day period, the swabs that were taken, photos that were taken, search that was conducted, the numerous hours that you spent there, how would you classify the event that took place in that front right bedroom?

A: First of all, I would say that assessing the scene and then going through the processing techniques that we do, I found, number one, I did not find any overlapping events in the bedroom. I found a major event with overlapping event segments, small segments that happened. I had spatter on the walls. Spatter means force. Bloodstains put into flight with some type of force at the blood source. I had large blood stains on the carpets that saturated through the padding, that saturated through the cement. I even had stains on the adjacent bedroom. So with all that being said, and all those things that come into play in a bloodstain analysis, that was a dynamic blood letting event inside that room.

(Trial Tr. p. 370, line 22 – p. 371, line 15). Applicant argues that Counsel was ineffective in failing to object to Richards's testimony that there was a "blood letting event."

Counsel testified he did not believe this was objectionable and that these comments amounted to Richards giving his ultimate opinion as an expert. This Court agrees and finds the testimony proper.

Applicant also alleges Counsel was ineffective for failing to object to Richards's testimony that the blood spatter was "consistent with a blunt force trauma pattern." (Trial p. 389, lines 23-24). Counsel testified he believed Richards was qualified to give an opinion as to force. This Court finds the testimony is within the scope of qualifications. The Court also notes that Richards testified the injury was consistent with blunt force trauma which is proper testimony admissible through an expert in blood stain analysis. These allegations are denied and dismissed.

VII. Failing to object to Deputy Coroner Bill Stevens allegedly testifying outside the scope of his expertise

CLB

Next, Applicant argues Counsel was ineffective in failing to object to Deputy Coroner Bill Steven's testimony regarding wind patterns as outside the scope of his qualifications. Stevens testified at trial that it would not be unusual for the residents of the apartment complex to not notice the smell of the victim's decomposing body in a nearby ditch. The portion of his testimony that Applicant believes is objectionable is as follows:

Also the back of Building 16, right here, is on the slope which leads down to a pond and a low lying area, and so I looked into some of the literature on air currents and – show the next slide. Air currents coming upslope and off of ponds produce eddies and they produce swirling wind currents, so it's likely that at certain times that odor would not have ever been carried up that slope toward those buildings, based on my review of the literature on that.

(App. p. 551, lines 18-25). Specifically, Applicant argues the testimony regarding the wind currents was outside the scope of his qualifications.

While this testimony was outside of the witness's expertise and qualifications, this Court finds that Applicant was not prejudiced by this testimony regarding wind currents. The result of the trial would not likely have been different had this testimony been excluded. The eyewitness testimony given by Applicant's codefendants is insurmountable. There is overwhelming evidence of Applicant's guilt considering the fact that the murder took place in his apartment and that he confessed to his girlfriend. This allegation is denied and dismissed.

VIII. Failing to object to alleged bolstering testimony given by Investigator Travis Holdorf

Finally, Applicant alleges Counsel was ineffective in failing to object to alleged bolstering testimony given by Investigator Travis Holdorf. Specifically, Applicant alleges the following should have been objected to: "Dottie Cronise has done a fantastic job." (App. p. 685, line 18). Counsel testified that he did not wish to bring attention to the comment in explaining why he did not object. This Court finds that was a reasonable strategic decision. Furthermore,

G. Z. 9

this isolated comment would not have had any bearing on the jury's determination of Applicant's guilt.

All Other Allegations

As to any and all allegations that were raised in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate counsels' performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) 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), SCRCP, 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 THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice; and

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 12 day of FEBRUARY, 2016.



G. THOMAS COOPER, JR.
Presiding Judge

COLUMBIA, South Carolina

SC-11-177

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 Victor D. Smith, #348112)
)
 Applicant...)
)
 v.)
)
 State of South Carolina)
)
 Respondent.)


IN THE COURT OF COMMON PLEAS
 C/A No. 2014-CP-40-04334

**ORDER DENYING APPLICANT'S
 MOTION TO ALTER OR AMEND**

2019 MAR 29 AM 11:58
 FILED
 CLERK OF COURT

After careful consideration of the Respondent's Rule 59(e) Motion, and the record in this case, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. This Court is of the opinion that the issues raised in Applicant's Motion do not, and would not have met the burdens established in Strickland v. Washington (466 U.S. 668) to warrant relief. Accordingly, this Court hereby DENIES Respondent's Motion pursuant to Rule 59(e) SCRPC to Alter or Amend this Court's Order of Dismissal entered on or about February 18, 2016. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

AND IT IS SO ORDERED.


 G. Thomas Cooper, Jr.
 Presiding Judge, Fifth Judicial Circuit

March 27, 2019