

STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM FLORENCE COUNTY
George M. McFaddin, Jr., Circuit Court Judge

2016-CP-21-2267

Justin R. Simms, # 358130,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Justin R. Simms, # 358130, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed October 7, 2020, issued by the Honorable George M. McFaddin, Jr., Presiding Judge, Twelfth Judicial Circuit.



Jonathan D. Waller

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October 21, 2020

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FORM 4

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

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2016CP2102267

Justin Simms		South Carolina State Of
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PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> 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: _____

FILED
 2020 OCT -7 PM 4:09
 DOUGLAS O'HARA
 CLERK OF COURT C.P. & G.S.
 FLORENCE COUNTY, SC

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:

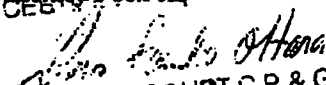
The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time 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	Date
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For Clerk of Court Office Use Only

This judgment was entered on **October 7, 2020**, and a copy mailed first class or placed in the appropriate attorney's box on **October 8, 2020**, to attorneys of record or to parties (when appearing pro se) as follows:

TRUE COPY

 DOUGLAS 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 PO Box 11549 Columbia SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Doris P. O'Hara

Court Reporter

Doris Poulos O'Hara - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-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.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF FLORENCE)
)
 Justin Simms, # 0358130,)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE TWELFTH JUDICIAL CIRCUIT

Case No.: 2016-CP-21-2267

**ORDER DENYING APPLICATION
 FOR POST-CONVICTION RELIEF**

DORIS POUSSON
 CCCP CLERK
 FLORENCE COUNTY, SC

2020 OCT - 7 PM 3: 30

FILED

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed September 19, 2016. Respondent made its Return on February 15, 2017. An evidentiary hearing into the matter was convened on April 6, 2018, at the Florence County Courthouse, and again on August 23, 2018, at the Sumter County Courthouse, before the Honorable George M. McFaddin, Jr. Jonathan D. Waller represented Applicant. Assistant Attorney General Lindsey A. McCallister, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. Applicant also presented testimony from Applicant's trial counsel, Cheveron T. Scott (Scott) and Robert Stucks (Stucks). At the close of all the evidence, the Court indicated it would take this matter under advisement and asked the parties to submit proposed orders. This Court now denies and dismisses the application with prejudice.

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 October 2010 term of the Florence County Grand Jury on one count each of murder, attempted armed robbery, and possession of a weapon during commission of a violent crime (2010-GS-21-1427).

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

Applicant was represented by Cheveron T. Scott (Scott) and Robert Stucks (Stucks). On December 9-13, 2013, Applicant proceeded to trial before the Honorable R. Knox McMahon and a jury, and he was convicted as indicted. Judge McMahon sentenced Applicant to a term of imprisonment for forty years for murder, twenty years for attempted armed robbery, and five years for possession of weapon, all to be served concurrently.

Applicant filed a timely Notice of Appeal. An Anders¹ brief was, thereafter, submitted by David Alexander, of the South Carolina Commission on Indigent Defense – Appellate Defense Division. The brief raised the sole issue of whether the trial court erred in refusing to charge voluntary manslaughter. The South Carolina Court of Appeals affirmed Applicant’s conviction on June 15, 2016. State v. Simms, Op. No. 2016-UP-296 (S.C. Ct. App. 2016). The remittitur was returned to the circuit court on July 7, 2016.

SUMMARY OF FACTS ADDUCED AT TRIAL

The shooting death of Marcus Weaver (Weaver) arose out of at a “drug deal gone wrong” in the parking lot of a Day’s Inn in Florence. Weaver ultimately died from a gunshot wound to the back. Tr. p. 193. Weaver; his brother, Shane Graham (Graham); and his friend, Squan Davis (Davis) traveled together in one car to buy marijuana from a man named Curtis Joe (Joe). Tr. p. 278. Davis had purchased marijuana from Joe in the past. Tr. p. 278. Graham drove; Weaver sat in the front passenger seat; and Davis sat behind Graham. Tr. p. 279.

Davis testified that after their group parked at the hotel, a man he did not know approached his side of the car. Tr. p. 281. Davis directed the man to the other side. Tr. pp. 281-82. The man opened the door, pulled out a gun, and punched Davis in the face. Tr. p. 282. The man then held a gun on everyone and told them to “give it up.” Tr. p. 282. The man struck Weaver with the gun. Tr.

¹ 386 U.S. 738 (1967).

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p. 282. Davis then heard shooting coming from inside the car, and he ran. Tr. pp. 282-83. On cross-examination, Davis testified Weaver was the first one to shoot. Tr. p. 294.

Joe testified and claimed he did not know Davis, but he received a call from "a boy from Lake City" who wanted some marijuana. Tr. pp. 338-39. Joe arranged to meet the caller at the Florence Day's Inn, along with Applicant and a friend, Joshua Carraway (Carraway). Tr. p. 339. Joe testified he never had any marijuana, but they went to meet the "buyer" anyway because Carraway planned to rob the purchasers. Tr. p. 341. According to Joe, Applicant and Carraway went to the purchasers' car while he stayed behind. Joe testified he heard gunshots, and only Applicant returned to the car. Tr. p. 344. Applicant told Joe, "the boy started shooting and Josh was still in the car." Tr. p. 345. Applicant never told Joe he shot Weaver. Tr. p. 346.

Carraway also testified. He explained that he and Applicant planned together to rob the men in the other car. Tr. p. 413. Carraway testified he went to the car, but he did not take a gun. Tr. p. 392. According to Carraway, Applicant carried had a .380 pistol. Tr. p. 392. On cross-examination, Carraway's prior statements were admitted in to evidence. Tr. pp. 418, 424. In the first statement, Carraway stated he and Joe went to the Day's Inn to sell drugs, Joe talked with the men, and the men in the car fired first. Tr. pp. 420-22.

Graham testified a man opened the front passenger door of the car he was riding in with Davis and Weaver, stuck a .380 inside, and yelled "give it up." Tr. pp. 366-67. Graham saw Weaver jump at the man, and then Graham put his head down and heard gunshots. Tr. p. 368. When Graham lifted his head, he saw Weaver lying on his stomach on the ground. He pulled Weaver into the car and drove him to the hospital. Tr. p. 370.

Investigator McFadden, of the Florence County Sheriff's Office, testified he obtained surveillance video from the Sleep Inn, next door the Day's Inn, which clearly showed two people

approach the car, one at the front and one at the back. Tr. pp. 445-48. McFadden also testified he conducted a photo lineup with Davis, who identified Carraway as the man who got into the back seat next to him. Tr. pp. 448. Investigator Bird, the crime scene investigator, testified the victim's car was impounded from the scene, in order to conduct forensic testing. Tr. p. 209-10. Bird explained he placed rods in the car to determine the trajectories of the various bullets fired. Tr. p. 219. Bird testified there were multiple shots fired from the front of the car to the back, likely from Weaver's gun, but none were fired from the back – where Carraway was seated – to the front. Tr. pp. 219-22. Lieutenant Lutcken testified the shot from outside the car to the inside was the shot that killed Weaver. Tr. pp. 237, 243-44. Further, Lutcken testified he conducted a gunshot residue (GSR) test on Carraway, which was negative. Tr. pp. 234, 241-42.

ALLEGATIONS

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

1. Ineffective Assistance of Counsel
 - a. "Prosecution destruction of evidence made counsel ineffective" (sic)
 - b. "Counsel failed to object to Judges (sic) charge to Jury (sic)"
 - i. Trial court charge on Reasonable (sic) doubt/hands of one confused jury"

At the evidentiary hearing, PCR counsel for Applicant explained the allegations consisted of ineffective assistance of counsel for: (1) failure to properly prepare for trial, in that counsel failed to anticipate the State's theory of the case; (2) failure to object to an incomplete copy of the jury instructions being sent back to the jury; (3) failure to request the jury be polled; and (4) failure to timely file a motion to inspect the vehicle. To the extent the allegations in Applicant's original

application can be construed as additional grounds for relief, this Court finds those allegations are waived, and they are hereby denied and dismissed with prejudice.

SUMMARY OF TESTIMONY

Applicant testified he was arrested for these charges along with two codefendants – Carraway and Joe – but he was the only defendant who opted to go to trial. Applicant explained Carraway and Joe both testified against him. Applicant testified he understood the State’s alleged theory of the case. Applicant explained the State alleged the charges arose from a drug deal, in which he and his friends were the sellers, and the victim and his two friends were the buyers, but each group intended to rob the other rather than actually complete a transaction. However, Applicant maintained he had no knowledge of the planned robbery at the time, and he was only there to “support” a drug deal.

Applicant testified Scott was his lead attorney on the case, and Stucks – who is Applicant’s father – was assisting. Applicant testified he and Scott never discussed the elements of the charges or the potential penalties, but Applicant knew them from other sources. Applicant testified he and Scott talked about pleading guilty, but Applicant did not want to do so because he was not guilty. Applicant also stated he asked Scott to investigate the victim’s car because he felt the car would have “something” in it to prove he was not the shooter. However, Applicant testified the State had already released the car by the time he had a preliminary hearing, and although he directed Scott to file a motion to inspect it, there was nothing Scott could do.

Applicant further testified he was released on bond for approximately thirty-six months before his trial, and although he waited on Scott every day to come see him, Scott never did. Applicant testified he did not see Scott or speak to him about a defense until the week before trial. Applicant testified he and Scott did not discuss “anything really,” including the concept of accomplice liability or “the hand of one/hand of all.” Applicant testified he asked Scott about the

car on the morning of trial because Scott told him the State had experts to testify about evidence from the car. Applicant explained his defense was that he thought this was to be a drug deal, not a robbery, and it was not murder because there was no "aforethought." Applicant testified Scott did not explain how he could be found guilty as a participant in the crime even if he did not pull the trigger.


However, on cross-examination, Applicant testified he had conversations with Scott while in jail before making bond, which is when Scott told him his codefendants would testify against him and that the State had expert witnesses to testify as well. Applicant testified he personally called Scott "maybe three times" from April 2011 until December 2013, when the trial began. Applicant further stated he was able to speak with Scott on the phone, but Scott did not know what to do to help him. Applicant testified he told Scott he wanted Scott to show the codefendants were lying, and they received a deal from the State. Applicant agreed Scott cross-examined his codefendants at trial with their previous statements to highlight the inconsistencies in their testimony, and Scott impeached them by asking questions about their motivation for testifying.

Applicant further testified he knew from early in the case that his codefendants had written statements implicating him. Applicant stated Scott repeatedly advised him it would be hard to win the case with the codefendants testifying against him, and he knew it would be hard to dispute the codefendants' testimony. However, Applicant testified he did not know he could be convicted based on the codefendants' statements that he "aided and abetted and helped them commit this crime."

Scott testified he got involved in Applicant's case shortly after it happened, when he received a call from Stucks asking for guidance. Scott testified, at that time, Applicant had not been charged with murder, but Applicant had charges for armed robbery and possession of weapon.

Further, Scott testified he had many conversations with Applicant, even after Applicant was released on bond. Scott stated most of their conversations were by phone, but they spent a significant amount of time discussing the issues and preparing the case for trial. Scott testified he believed Applicant should agree to plead guilty, and he explained his position to Applicant, but Applicant insisted he wanted to go to trial. Scott stated once Applicant made that decision several week before the trial date, he put in his full effort to prepare the case for trial. Scott testified, in the conversations leading up to Applicant's decision to go to trial, they discussed the discovery and what he felt the State could prove, including the codefendants' statements and their expected testimony. Scott also testified he and Applicant discussed the possible punishments and consequences if Applicant were to be found guilty. Scott stated there was no question in his mind Applicant understood what the State was going to have to prove against him for a conviction. On cross-examination, Scott further testified he explained to Applicant the trial would be a credibility contest with Applicant's word against his codefendants.

Scott explained his understanding of the allegations by the State were that the two groups came together for a drug transaction which ended up being deadly. According to Scott, when he received discovery, he became aware the State was alleging Applicant was the gunman who fired the fatal shot. Scott testified nothing in the discovery indicated his client got into the car, but he believed otherwise after speaking with Applicant. Scott explained the defense theory was that Applicant was not the person who fired the fatal shot, nor was he part of the robbery. Scott agreed he did not discuss the "hand of one/hand of all" theory with Applicant prior to the trial because the testimony of the witnesses was inconsistent, but once it became apparent during trial the State was presenting that theory, he and Stucks had extensive conversations with Applicant about it.

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Scott agreed they found out around the time of the preliminary hearing the victim's vehicle had already been released. Scott testified he did not think there was any point in pursuing it at that time because there would have been problems with authenticating any evidence obtained, and the State's evidence was included in the discovery. Scott explained he waited to move to view the vehicle until just prior to trial because he did not want to "show his hand," and he filed the motion to ensure he had received all the discovery relating to that issue. Scott stated he was satisfied the State had turned over all of the evidence they obtained from the car, and he received it in discovery. Scott explained he and Stucks discussed hiring their own expert to review the pictures and testing, but ultimately they did not feel it would be a good use of their financial resources because they had witness statements they believed verified their version of the facts.

Scott further testified the jury deliberated for approximately twenty hours over the course of two days. He explained the jury asked for copies of the murder charge and the hand of one/hand of all charge, and he did not object to only those portions of the instructions being sent back to them. Scott stated they felt confident the jury would not find the intent necessary for murder, so it was a strategic decision not to object. On cross-examination, Scott reviewed the transcript and explained the jury's note indicated they had reached a verdict on the other charges, so there was no need for the rest of the jury instructions to be sent back. He also testified he did not ask for the jury to be polled after the verdict because he did not believe it would make anyone change their mind.

Scott testified once he understood accomplice liability was going to be one of the State's theories, he discussed with Applicant that Applicant could still be convicted of the charges even if he was only participating in the drug deal. Scott explained on cross-examination this conversation occurred while the trial was ongoing and evidence was being received. Scott explained he talked at length with Stucks and Applicant once the judge gave them proposed jury charges about whether

they should object to the hand of one/hand of all charge, but they decided not to because, based on the testimony that had been presented, there was no reason to do so. Scott explained he was not concerned about the hand of one/hand of all charge because they did not believe the jury would find the requisite intent for murder. Scott testified there were numerous inconsistencies between the physical evidence, the expert testimony, and the victims; it was clear the men in the other group also had a gun; and they were confident based on the expert witness testimony the State had not established Applicant had a gun in his hand.

Stucks testified he was admitted to the Illinois Bar in 2010 and to South Carolina in 2011. He explained Applicant is his son. Stucks further testified he did not actively participate in the trial; he assisted Scott in preparing the case and formulating a defense strategy. Stucks explained he was in a tenuous position representing his son, which is why he asked Scott to try the case instead. Stucks stated he met with Applicant many times, usually without Scott, and if they spoke to Scott together, it was usually at the courthouse for some type of appearance. Stucks further testified he and Scott met many times without Applicant, and he believed Scott met with Applicant without Stucks present at least once.

Stucks stated, based on the witness statements and evidence they received in discovery, he and Scott felt the State would not be able to prove Applicant had gone to the victim's car or that Applicant was the shooter. Stucks testified he never discussed accomplice liability with Applicant or Scott because Applicant was the only codefendant going to trial, and they knew the codefendants would testify against him. According to Stucks, he stayed in the courtroom while Scott and the solicitors went to the judge's chambers to discuss the jury charge. When Scott returned, he said the judge would charge hand of one/hand of all, but they did not discuss it with Applicant. However, on cross-examination, Stucks conceded there was evidence through Carraway's testimony and that of

the expert witness from which the jury could have convicted Applicant as the principal – as the shooter.

Finally, Stucks testified the State offered Applicant a plea to voluntary manslaughter immediately before trial, but Applicant refused the offer.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This Court finds Applicant’s allegations of ineffective assistance of counsel are without merit. This Court has had the opportunity to review the record in its entirety and has heard the testimony at the PCR hearing. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

In a PCR action, an applicant bears the burden of proving the allegations in his 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, Applicant must prove “counsel’s conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). 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. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the

exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced 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.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

1. Failure to properly prepare for trial and anticipate the State’s theory of the crime

Applicant alleges his trial counsel was ineffective in preparing for trial and failed to anticipate the State’s theory of the crime. Specifically, Applicant contends trial counsel was unprepared for the State’s hand of one/hand of all argument. For the reasons explained below, this Court disagrees and finds this allegation should be denied and dismissed.

The testimony given by Scott and Stucks as to whether they discussed the hand of one/hand of all theory with Applicant is at best confusing, and, at times, contradictory. However, this Court finds credible Scott’s testimony he did not discuss the theory with Applicant until it became apparent at trial the State was arguing it as an alternative way for the jury to convict Applicant. Scott further credibly testified he reviewed the State’s evidence and discovery, which indicated the State believed Applicant fired the fatal shot – i.e. Applicant was the principal in the murder, not a mere accomplice. Scott further testified he explained to Applicant – and Applicant testified he

understood – this case would be difficult to win because both codefendants would testify against him. As both Scott and Stucks explained, however, the defense believed the number of contradictions between the witness statements and the forensic evidence created reasonable doubt as to whether Applicant even went to the victim's car, and certainly that he was not the shooter. This Court finds trial counsel were not deficient in preparing for trial by focusing on the most obvious theory suggested by the discovery and evidence.

Additionally, this Court finds Applicant has failed to prove he was prejudiced by trial counsels' allegedly deficient conduct. Both Scott and Applicant testified Applicant adamantly refused to plead guilty because he was not the shooter and did not know anything about the plan to rob Weaver's group. Scott credibly testified, once he realized the State was arguing accomplice liability in the alternative to presenting Applicant as the shooter, he and Applicant had an extensive discussion. Scott stated this discussion occurred while the trial was ongoing and evidence was still being received; thus, Applicant had the opportunity to stop the trial to plead guilty, but he chose to continue. At the conclusion of Applicant's trial when he was given the opportunity to speak prior to sentencing, Applicant again stated he was innocent and had not committed these crimes. Moreover, Applicant never testified at the evidentiary hearing that he would have changed his mind and pleaded guilty had he known about hand of one/hand of all theory.

Most significantly, this Court finds ample evidence in the record supported the State's contention Applicant was the shooter. During the State's closing argument, the solicitor's focus was on arguing the evidence showed Applicant was the shooter, and it could not have been Carraway because Carraway did not have a gun and was in the wrong position to have fired the fatal shot. Tr. pp. 511-14. This argument was supported by the testimony of multiple witnesses, including Carraway, Davis, and Investigators Bird and McFadden. This Court therefore finds, although the

jury asked for the instruction regarding hand of one/hand of all in connection with deliberating the murder charge, it is at least equally likely Applicant was ultimately convicted as a principal given the strength of the State's evidence to that point. In any event, Applicant had no jurors present to testify at the evidentiary hearing, and the record contains no indication as to which theory the jury ultimately used to convict Applicant. Thus, Applicant has failed to prove how he was prejudiced by the hand of one/hand of all argument.

Because Applicant has proven neither deficiency nor prejudice as to this allegation, it is denied and dismissed.

2. Failure to object to an incomplete copy of the jury instructions being sent back to the jury

This Court finds this allegation is without merit. As evidenced by the transcript, at the time the jury requested the instructions on murder and hand of one/hand of all, it had already reached a verdict on the charges of armed robbery and possession of weapon. Tr. pp. 597-98. Therefore, the only relevant jury instructions were the ones the jury requested – instructions related to the murder charge. Additionally, Scott credibly testified the defense decided not to object to the request because that was not the theory the defense was concerned about regarding the murder. This Court has reviewed the jury instructions and finds they were correct and proper. The jury did not request instructions on any other issues, and the other charges had been decided. Therefore, this Court finds Applicant has failed to prove either deficiency in counsel's conduct or prejudice resulting therefrom. This allegation is denied and dismissed.

3. Failure to request the jury be polled

The Court finds this allegation to be wholly without merit. Nothing in the record of the trial or the evidentiary hearing suggests the jury's verdict was not unanimous. After the trial court announced the verdict, all jurors raised their hands to indicate it was their verdict. Tr. p. 601. This

Court agrees with Scott that verbally polling the jury would have made no difference in the outcome. This Court finds trial counsels' conduct was not deficient as a defense attorney has "no affirmative duty to request the trial judge to poll the jury," particularly where, as here, there was no indication the verdict was not unanimous. Green v. State, 351 S.C. 184, 196, 569 S.E.2d 318, 324 (2002). Because Applicant has proven neither deficiency nor prejudice, this allegation is denied and dismissed.

4. Failure to timely file a motion to inspect the vehicle

Applicant alleges his trial counsel was ineffective for failing to file a motion to inspect the vehicle before trial. However, Scott credibly testified he found out the vehicle had been released around the time of Applicant's preliminary hearing, so he did not pursue it further because he believed any evidence obtained at that point would likely have problems with admissibility at trial. Scott further credibly testified he filed the motion solely as a precaution to make sure the State did not have any additional discovery regarding the vehicle; the State assured him it did not, and Scott testified he was satisfied he received everything the State had collected. Therefore, this Court finds trial counsel were not deficient for failing to file the motion prior to the beginning of trial.

Moreover, although Applicant speculated there was additional helpful evidence to be found in the car, Applicant did not produce any such evidence or the testimony of any expert witnesses at the evidentiary hearing. See, e.g., Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (finding trial counsel not ineffective for failing to timely request discovery because the contents of the documents were not presented at the PCR hearing); Moorehead, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1999) (holding trial counsel's failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result); Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998)

("This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. . . ."); Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing applicant would have had a defense with additional time to prepare for trial); Skeen v. State, 325 S.C. 210, 217, 481 S.E.2d 129, 133 (1997) (finding applicant was not entitled to relief where no evidence was presented at the PCR hearing to show how additional preparation would have had any possible effect on the result at trial)

Therefore, this Court finds Applicant has failed to meet his burden of proving he was prejudiced by his trial counsels' failure to file the motion. Accordingly, this allegation is denied and dismissed.

CONCLUSION

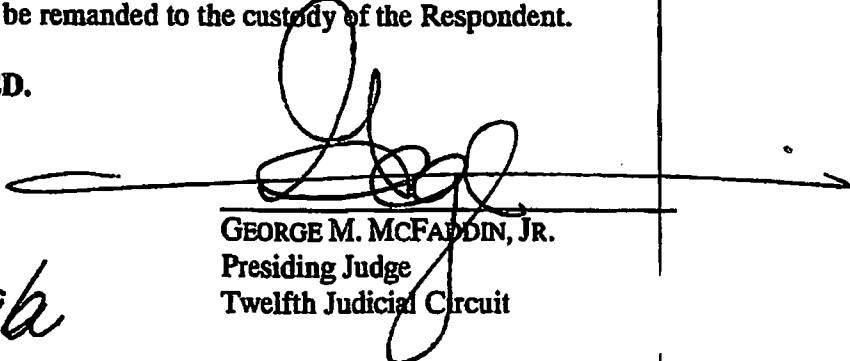
Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this court to grant relief. Counsel was not deficient in any manner, nor was Applicant prejudiced by his representation. Therefore, this application 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 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.



GEORGE M. MCFADDIN, JR.
Presiding Judge
Twelfth Judicial Circuit

S. Mauld 2006
2019
Rec'd pro tunc
for Sept 29, 2020

FILED
2020 OCT -7 PM 3:30
DORIS POULOS O'HARA
CCCP & GS
FLORENCE COUNTY, SC

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