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October 21, 2019

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

RE: Bobby Joe Artflin vs. The State of South Carolina
Case No: 2017-CP-04-02103

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and an affidavit of service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Please clock and file the copies and return them to me. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,

Rodney Richey

RWR/
Enclosures
cc: Taylor Z. Smith, Esquire

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM ANDERSON COUNTY

Court of Common Pleas

HONORABLE EUGENE C. GRIFFITH, JR.

2017-CP-04-02103

BOBBY JOE ARFLIN, SCDC# 365273

APPELLANT,

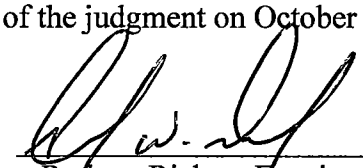
vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Bobby Joe Arflin appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Eugene C. Griffith, Jr, Circuit Judge on August 12, 2019 an Order issued on October 10, 2019 and filed on October 17, 2019. The Appellant received notice of the judgment on October 21, 2019.



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THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM ANDERSON COUNTY

Court of Common Pleas

HONORABLE EUGENE C. GRIFFITH, JR.

2017-CP-04-02103

BOBBY JOE ARFLIN, SCDC# 365273

APPELLANT,

vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

AFFIDAVIT OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on October 21, 2019, addressed to their attorney of record, Taylor Z. Smith, Esquire Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: October 21, 2019

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STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	)	IN THE COURT OF COMMON PLEAS FOR THE TENTH JUDICIAL CIRCUIT
Bobby Joe Arflin, #365273, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2017-CP-04-02103 **ORDER OF DISMISSAL**

This matter comes before this Court by way of an Application for Post-Conviction filed on October 9, 2017, by Bobby Joe Arflin (Applicant). The State (Respondent) filed its Return on January 19, 2018. An evidentiary hearing in the matter was held before the undersigned on August 12, 2019, at the Anderson County Courthouse. Applicant was present and was represented by Rodney W. Richey, Esquire (PCR Counsel). Respondent was represented by Assistant Attorney General Taylor Z. Smith of the South Carolina Attorney General's Office. At the hearing, Applicant testified on his own behalf and called Druanne Dykes White, Esquire, (Counsel) as a witness. Respondent cross-examined Applicant and Counsel. Following a thorough review of the record in its entirety and the testimony and evidence presented at the evidentiary hearing, this Court finds that Applicant has failed to meet his requisite burden of proof and denies this application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. During its March of 2014 term, the Anderson County Grand Jury indicted Applicant for murder (2014-GS-04-00426) and possession of a weapon during the commission of a violent crime (2014-GS-04-00426). During its

March of 2015 term, the Grand Jury then indicted Applicant for three counts of solicitation to commit a felony (2015-GS-04-00340 to -00342). The first two indictments stemmed from a shooting that occurred on December 11, 2013. The later indictments stemmed from Applicant's attempt to solicit an informant to kidnap and/or kill the eyewitnesses of the 2013 shooting while he was awaiting trial on the earlier indictments. Counsel and Ashlea M. White, Esquire, represented Applicant at trial. Assistant Solicitors Lauren D. Price and Catherine T. Huey prosecuted the case on behalf of the State. On August 24-27, 2015, Applicant proceeded to trial before the Honorable R. Scott Sprouse and a jury. At the conclusion of trial, the jury found Applicant guilty as indicted on all charges. Judge Sprouse sentenced Applicant to imprisonment for thirty years for murder, twenty years each for two of the solicitation charges, ten years for the third solicitation charge, and five years for the possession charge, with all sentences running concurrently.

Counsel filed a timely notice of appeal, and the appeal was perfected by Sarah Ganss Drawdy, Esquire. Assistant Attorney General Sherrie Butterbaugh, of the South Carolina Attorney General's Office, represented Respondent. Applicant argued on appeal that Judge Sprouse erred in denying Applicant's right to introduce evidence that the victim in the shooting had previously been arrested for criminal domestic violence in rebuttal to the State's character evidence. Final Brief of Appellant at 3, State v. Arflin, Op. No. 2017-UP-303 (S.C. Ct. App. filed July 26, 2017) (per curiam). The South Carolina Court of Appeals affirmed Applicant's convictions. State v. Arflin, Op. No. 2017-UP-303 (S.C. Ct. App. filed July 26, 2017) (per curiam). The Remittitur was issued on August 11, 2017.

CURRENT PROCEEDING

On October 9, 2017, Applicant filed an Application for Post-Conviction Relief, in which he alleged that he was being held in custody unlawfully based upon the ineffective assistance of counsel, "sentencing", and state misconduct. At the time, Applicant failed to include any supporting details in his Application. At the evidentiary hearing before the undersigned on August 12, 2019, Applicant specified that he would be moving forward only upon two allegations: 1) Counsel was constitutionally ineffective for failing to investigate the possibility that a bullet from Applicant's gun ricocheted off of the victim's car before striking the victim and 2) Counsel was constitutionally ineffective for advising Applicant not to testify about his suspicion that one of his bullets had ricocheted off of the victim's car and struck the victim. Although these two allegations were not included in the Application for Post-Conviction Relief and no amended pleading was filed, Applicant was allowed to proceed at the hearing upon these two allegations because Respondent had no objection.[1] Applicant explicitly waived all other allegations and they will not be addressed in this Order.

Applicant testified on his own behalf at his PCR hearing. He testified that the events giving rise to his arrest took place on a road near his driveway. He was on the way home from visiting his mother when he accidentally hit the side mirror of the victim's truck with his own truck while passing the victim's unoccupied, parked truck. He testified that he then accidentally backed into the victim's truck while reversing his own truck to see what he had hit. As Applicant testified that he had a history of bad relations with the Williamsons, at whose house the victim's truck was parked, he anticipated trouble because of the collision. He testified that he retrieved his gun from his truck and then informed the Williamsons of the collision. He said that multiple people came

[1] Respondent informed the Court that PCR Counsel had provided sufficient notice about the two new allegations by email before the hearing.

out of the Williamson home. He was on the phone with 911 at the time. He testified that, as soon as the 911 call ended, the victim put himself between Applicant and Applicant's truck, began to hit Applicant, and told applicant that he would "kick [Applicant's] ass." According to Applicant, the victim knocked Applicant to the ground and Applicant shot him with the gun. When the victim continued to come towards Applicant, he shot the victim again. He testified that he did not shoot the victim in the back. Applicant testified that he had told Counsel that he believed that one of the two bullets that he had shot had ricocheted. He testified that Counsel did not take any steps to investigate this possibility. Due to his experience in automobile mechanics, Applicant testified that he thinks that he would have been able to evaluate whether a bullet ricocheted if he had been allowed to see the truck or a photograph thereof for himself. He claimed to have asked Counsel to, at the very least, take photographs of the victim's truck or bumper so that he could look for evidence of a ricochet. He believes that the State destroyed evidence when it took apart the victim's truck during its investigation. He testified that he did not think that anyone looked at the back bumper of the victim's truck or took photographs thereof. He said that Counsel told him not to bring up his theory of the bullet ricochet while testifying at his trial and that he did not do so at her advice. He testified at the PCR hearing that he thinks that the jury would have believed his version of events if they had heard his theory on the ricochet, and that he was prejudiced since the jury did not hear his testimony on that point. On cross-examination, Applicant admitted that he fired his gun twice during the incident, and that he was scared of the victim, feared for his life, and shot both times in self-defense. Applicant testified that he did not have any choice but to shoot the victim. Applicant also testified that the forensic pathologist who testified at his trial incorrectly identified the first bullet as the one that Applicant shot second.

Counsel also testified at the PCR hearing. She has been practicing law since around 1985, and she has been a Judge Advocate General, a South Carolina Circuit Solicitor, and an attorney in private practice. She testified that she went with the solicitor to inspect Applicant's and the victim's vehicles on multiple occasions, and that they only observed evidence that one of the bullets shot by Applicant had struck the victim's truck. She said that that bullet was recovered from the truck by the State and was the subject of testing. She testified that the other bullet was never recovered from the scene of the victim's truck. She testified that she and Applicant discussed the possibility that the bullet that was recovered had penetrated the victim's body and then entered and lodged in the victim's truck. Although she did not have any memory of Applicant's telling her that he believed that one of his bullets ricocheted off of the victim's truck before striking the victim, she did not have enough of a recollection to deny that he had shared this suspicion with her. She testified that she believes that she had photographs of the victim's truck, and that she would have reviewed them with Applicant if she did have them. She testified that she reviewed all of the discovery in the case with Applicant. She testified that, had Applicant shared this suspicion with her, she likely would have told Applicant that the possibility that one of the two bullets that he fired at the victim first ricocheted off of the victim's truck was irrelevant to his defense since Applicant admitted to shooting the victim twice, admitted to doing so intentionally and in self-defense. She specifically mentioned that she did not think that Applicant would have been entitled to a jury instruction on voluntary manslaughter at trial in light of the evidence and their defense.

She testified that her trial strategy was to have Applicant acquitted of murder, and that she did not seek a lesser-included offense because, due to his advanced age and poor health, any such conviction would have resulted in a de facto life sentence. She also offered that her estimation of Applicant's defense was that she believed that his trial had a good chance of resulting in an

acquittal until the jailhouse informant came forward to say that Applicant had solicited him to kidnap and/or kill the eyewitnesses of the shooting.

Counsel testified that she believes that the forensic pathologist's referring at trial to "shot one" and "shot two" was meant to distinguish between the two shots rather than identify which injury was sustained first by the victim. She agreed that the medical evidence at trial indicated that either of Applicant's shots would have probably been fatal to the victim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses, which allowed the Court to scrutinize their credibility. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Applicant, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Applicant has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove that "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, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Applicant must prove that 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 v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "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 Petitioner 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.

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. Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney. Id. at 690.

Based on this standard set forth above, and the reasoning below, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel. The allegations are addressed fully below:

Counsel was constitutionally ineffective for failing to investigate the possibility that a bullet from Applicant's gun ricocheted off of the victim's car before striking the victim.

By making this allegation, Applicant was arguing that Counsel's preparation and investigation into the possibility that one of the bullets that struck the victim after ricocheting off of the victim's truck was ineffective.

This Court finds that Counsel's testimony regarding her investigation of the possibility that one of the bullets ricocheted off of Applicant's truck into the victim's body was more credible than Applicant's assertions that Counsel did not investigate the matter or discuss it with him. Applicant testified at the PCR hearing that he shared his concerns with Counsel and that she failed to look into his theory of a bullet ricochet or share any photographs of the victim's truck with him. While on the stand during his trial, Applicant testified that he did not remember firing two shots at the victim. Trial Tr. 872. He later testified at trial that he fired two shots because he was acting in self-defense, and "was under full impression that this guy was going to beat [him] to death . . . ." Trial Tr. 890. Applicant's testimony during the PCR hearing was more definite as to the shooting, and it presents as self-serving that he could not remember the events of the shooting at trial but his testimony before this Court was void of lapses in memory.

Applicant has not put before this Court any evidence that one of the bullets fire by Applicant ricocheted off of the victim's truck and then struck the victim. Instead, Applicant has merely speculated that such a ricochet could have happened. A defense attorney's "[f]ailure 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." Moorehead v. State, 329 S.C.

329, 334, 496 S.E.2d 415, 417 (1998) (citing Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976)). An applicant alleging that his attorney failed to prepare for the case must show how additional preparation would have resulted in a different outcome. See Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997). A bullet lodged in the victim's truck was recovered and admitted in evidence at trial. There was no evidence then or now that there a second bullet had struck the victim's truck. Therefore, Applicant has failed to demonstrate that there existed some ricochet evidence for Counsel to discover.

Counsel testified that she did not have an independent memory as to whether she discussed the theory of a bullet ricochet with Applicant, but she did testify that she conducted an adequate investigation in preparation for trial. Counsel's testimony was that her investigation included multiple visits to view the victim's car, but her testimony did not indicate that there was any evidence that would have corroborated Applicant's speculation that one of his two bullets ricocheted off of the victim's truck before striking the victim. She also indicated that she believed that she reviewed photographs of the victim's truck with Applicant, but was firm that she reviewed all discovery with him. Justin Richey, a forensic investigator with the Anderson County Sheriff's Department, testified at Applicant's trial that he had searched the victim's truck and discovered "a bullet hole" that indicated that one of Applicant's fired bullets had passed through multiple layers of metal in the victim's truck before lodging therein. Trial Tr. 532-39. The State also introduced photographs (State's Exhibits 64 through 75) taken of the victim's truck that showed the bullet hole. Trial Tr. 535. Since this Court finds that Counsel's testimony about reviewing regarding discovery is more credible than Applicant's, it is reasonable to assume that the photographs constituting the State's Exhibits 64 through 75 would have been shown by Counsel to Applicant before trial. A defense attorney has a duty to undertake reasonable investigations or to make a

decision that renders a particular investigation unnecessary. Id. at 691. Thus, "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). This Court finds that Counsel conducted an adequate and thorough investigation into the evidence in the case, which included a visual inspection of the victim's truck.

Moreover, counsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006). "[C]ounsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions. . ." Strickland, 466 U.S. at 691. "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690; Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 633-34 (Ct. App. 2014). Applicant has failed to demonstrate what further benefit would have accrued from any additional investigation or preparation on the part of Counsel, and Counsel testified that she did not think that a ricochet, had one happened, would have affected the defense strategy in the case. Applicant admitted during the PCR hearing that he had fired two shots. He also testified that he did so in self-defense and believed that he had no other choice. "'Murder' is the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10. A defendant has to show the following in order to establish a defense of self-defense:

> (1) [T]he defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life of sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, [the] defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he

> was actually in imminent danger and that the circumstances were such as would warrant a person or ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger.

State v. Day, 341 S.C. 410, 416, 535 S.E.2d 431, 434 (2000) (citing State v. Bryant, 336 S.C. 340, 520 S.E.2d 319 (1999)).

If Applicant admits that he fired two shots at the victim, and claims that he did so intentionally in self-defense, then it matters not whether that bullet launched straight from the barrel of his handgun and into the body of the victim or whether it took a detour on its flight path in ricocheting off of the victim's truck and then striking the victim's body. Applicant made it clear at the PCR hearing that he was not arguing that he would have been entitled to or wanted an instruction on a lesser-included offense. Therefore, since the existence of a ricochet would have not been material to the case at hand in light of Applicant's reliance upon self-defense, it would have been reasonable from a strategic viewpoint for Counsel to decide to not do any additional investigation into Applicant's ricochet theory beyond the investigation that she did, as it would not have contributed much to his defense.

This Court finds that Counsel was not constitutionally ineffective for failing to investigate or prepare for trial since Applicant has failed to show any deficiency in Counsel's performance or resulting prejudice. As such, this claim of ineffective assistance of counsel is denied and dismissed with prejudice.

Counsel was constitutionally ineffective for advising Applicant not to testify about his suspicion that one of his bullets ricocheted off of the victim's car before striking the victim.

By making this allegation, Applicant was arguing that Counsel was deficient in advising him not to testify about his theory that one of his bullets had ricocheted off of the victim's truck before striking the victim because the jury would have found this testimony credible, and he was deprived of this boost to his credibility due to his reliance upon Counsel's advice. He testified that

he was not alleging that he was prejudiced because he was deprived of an instruction on a lesser-included offense. Counsel testified that she did not have an independent memory regarding her alleged advice to Applicant not to volunteer his ricochet theory at trial. She testified that she would never ask a client to lie on a subject at trial, and she testified that she would have advised Applicant, had he mentioned it to her, that his defense would not have benefitted at trial if he have shared his theory of a ricochet. Her testimony was that Applicant intentionally shot the victim twice in an alleged act of self-defense, and the elements of murder could have been proven by the State notwithstanding any bullet ricochet.

This Court finds that Counsel's performance with regard to her advice to Applicant was not deficient. Although Counsel cannot remember advising Applicant not to offer his theory of a bullet ricochet, her testimony about what she probably would have said is not dissimilar to Applicant's explanation for why he did not offer the theory at trial. This Court finds that Counsel has given a reasonable and valid strategic reason for not eliciting testimony from Applicant about his theory of the ricochet. Counsel testified that she did not see how the ricochet would have been material to the case, particularly since the defense did not want a lesser-included offense, but sought an acquittal of the murder charge based on self-defense. "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 has not shown any reason that this Court should find deficiency in Counsel's advice as to testifying about his ricochet theory, which may have been inadmissible anyway in light of his lack of expertise in bullet trajectories, would have been irrelevant in light of the legal issues and his testimony about the shooting, and would have been subject to cross-examination based upon the lack of evidence that one of the two bullets fired by Applicant ricocheted off of the victim's truck before striking the

victim. Furthermore, this Court finds that Applicant did not suffer any prejudice by not offering this testimony at trial as Applicant's unsupported theory has not altered the legal issues in his case and has not made any other aspect of his testimony more credible.

This Court finds that Counsel was not constitutionally ineffective in making a valid and strategic judgement that Applicant's bullet ricochet theory would not be of benefit to Applicant at trial and finds that Applicant did not suffer any prejudice by not offering this testimony before the jury. As such, this claim of ineffective assistance of counsel is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds Applicant has not established any constitutional violations or deprivations that would require this Court to grant his Application for Post-conviction Relief. Therefore, this application is denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203 and 243, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and

2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 10th day of October, 2019.

EUGENE C. GRIFFITH, JR.
Presiding Judge

Newberry, South Carolina

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Anderson SC COC CP/GS

A TRUE COPY
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The Honorable Daniel E. Shearouse
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