

STATE OF SOUTH CAROLINA  
COUNTY OF COLLETON

IN THE COURT OF COMMON PLEAS  
FOR THE FOURTEENTH JUDICIAL CIRCUIT

Derrick Fishburne, #341860,

2012-CP-15-00814

Applicant,

SUPPLEMENTAL ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

COLLETON COUNTY  
COMMON PLEAS COURT  
2019 DEC -2 PM 3:28

This matter comes before the Court by way of an Application for Post-Conviction Relief filed by Mr. Derrick Fishburne ('Applicant') on October 16, 2012. An evidentiary hearing on this matter was convened before this Court on October 27, 2014, at the Beaufort County Courthouse. Applicant was present at the hearing and was represented by Mr. Tristan M. Shaffer, Esquire. Ms. Ashleigh Wilson, Esquire, of the South Carolina Attorney General's Office represented Respondent.

**I. PROCEDURAL HISTORY**

This Court denied Applicant Post-Conviction Relief in an Order of Dismissal filed with the Colleton County Clerk of Court on December 21, 2015. The Order of Dismissal addressed Applicant's allegation that trial counsel failed to call an alibi witness. However, the Order was silent as to Applicant's allegation that he was prejudiced by trial counsel's statements to the jury that Applicant was at roll call for another criminal charge and trial counsel's characterization of Applicant as a "usual suspect." Applicant did not file a Rule 59(e), SCRCR motion asking this Court to rule on this issue. Applicant, through PCR counsel Tristan M. Shaffer, filed a notice of appeal on November 22, 2016.<sup>1</sup> Applicant filed the petition for writ of certiorari on October 19, 2017, asking the Supreme Court of South Carolina to

<sup>1</sup> PCR counsel received notice of the Order of Dismissal on October 24, 2016.

address whether his case should be remanded to this Court to make sufficient findings of fact as mandated by statute. The return petition for writ of certiorari was filed by Respondent on March 5, 2018. The South Carolina Supreme Court granted Applicant's petition for writ of certiorari, and in an Opinion filed July 31, 2019, remanded this case back to this court to make sufficient findings of fact and conclusions of law relating to Applicant's unaddressed allegation in a supplemental order. *Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019). The Remittitur was returned to the circuit court on September 27, 2019.

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court relies on the testimony presented at the evidentiary hearing, through careful review of the evidentiary hearing transcript, and the record before it to make the following findings of fact and conclusions of law pursuant to S.C. Code Ann. Section 17-27-80 (2003), and hereby incorporates by reference its earlier findings in this matter:

## III. APPLICABLE LAW

In order to receive relief for ineffective assistance of counsel, an applicant has the burden to make two showings. First, that counsel's performance was deficient meaning that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Edwards v. State*, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011) (citing *Strickland v. Washington*, 466 U.S. 668, 687, (1984)). Second, he must demonstrate that counsel's deficiency prejudiced him to the point that the outcome of trial cannot be relied on as having provided a just result. *Id.*

### *Introduction of Prior Bad Acts and Characterization as a "Usual Suspect"*

"There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing *Strickland*, 466 U.S. at 689). "When counsel articulates a *valid* reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of

counsel. The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'" *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008). A court reviewing counsel's performance at trial must only use the prevailing norms of the profession as a guideline in their determination into whether counsel's performance was reasonable. *See Strickland*, 466 U.S. at 688. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Id.* at 688-89. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Id.* at 691.

At the evidentiary hearing, trial counsel said the following when asked why he pointed out to the jury that Applicant was at roll call for an unrelated matter when he was arrested for murder and why he characterized him as a "usual suspect":

I tried to find a way to explain why he lied to the police. You know, you've got somebody that has you leaving the scene before this happens, so why would you deny that you're there? And you know, you don't need to do that; and it's a lie, and it's an unnecessary lie. And so, how do you explain that? You've got to give the jury – in my – my strategy... juries don't like lies, whether the police tell them or whether the defendants tell them or whether witnesses tell them, and you've got to explain it, somehow. And that was my way to explain why he would lie about being in the club... [Y]ou want to present some evidence that, you know, somebody doesn't trust the police, then you have to show prior involvement with the police, which, normally, you work to try not to do. But, yeah, it's a risk. But I don't know how – but you've got to explain a lie.

App'x p. 470, ln. 1-12; 17-22.

Trial counsel's testimony clearly demonstrates the challenge he faced on how to handle Applicant's false statement to law enforcement. It was trial counsel's strategic decision to present to the jury Applicant's presence at roll call and that he was a "usual suspect," because trial counsel had no other way to explain Applicant's dishonesty with the police. The only other option available to trial counsel

would have been to ignore the false statement and provide no explanation of the lie to the jury in the hopes Applicant would nevertheless be acquitted. Here, Applicant has failed to show how trial counsel's statements to the jury constituted deficient performance. Applicant did not suggest what trial counsel could have done to both explain his false statement to police and to avoid any mention of his prior involvement with police or criminal history to the jury.

Moreover, even if this Court were to find that trial counsel's performance was deficient, Applicant suffered no prejudice. "To establish the requisite prejudice necessary to prove a claim of ineffective assistance of counsel, [Applicant] must demonstrate that his attorney's errors had an effect on the judgment against him." *Edwards*, at 459, 710 S.E.2d at 65; *Strickland*, 466 U.S. at 691. Here, Applicant has failed to show that had trial counsel withheld those statements to the jury, the jury would have acquitted him of murder. While trial counsel's statements may have cast Applicant in a bad light, they must be evaluated against the strong evidence of Applicant's guilt presented at trial. Two eyewitnesses identified Applicant as the shooter. These eyewitnesses first identified Applicant by name and subsequently identified him in a lineup. After his arrest, Applicant gave law enforcement a statement in which he denied being at the club on the night of the murder, claiming to have stayed the night at his girlfriend's house. This statement was shown to be a lie. It is readily apparent from review of the record before this Court that Applicant has failed to establish the requisite prejudice for a claim of ineffective assistance of counsel. Accordingly, Applicant's request for relief by way of this allegation is DENIED and DISMISSED.

#### IV. CONCLUSION

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

This Court notifies Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel 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), an Applicant has the right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRPC, provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 20<sup>th</sup> day of November, 2019.



EDGAR W. DICKSON  
Presiding Judge  
Fourteenth Judicial Circuit

Orangeburg, South Carolina