STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Grace Gilchrist Knie, Circuit Court Judge

2017-CP-40-4450

Maurice Roberts, # 359058,

Appellant,

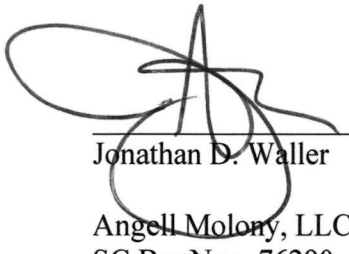
v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Maurice Roberts, # 359058, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed May 5, 2022, issued by the Honorable Grace Gilchrist Knie, Presiding Judge, Fifth Judicial Circuit.



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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Maurice Roberts, #359058, Applicant, v. State of South Carolina, Respondent.	)	2017-CP-40-4450 **ORDER OF DISMISSAL**

This matter is before this Court by way of an application for post-conviction relief (PCR) filed on July 26, 2017. The State made its return on May 14, 2018. A hearing was held at the Richland County Courthouse on March 28, 2022, with all participants, including Applicant, physically present. Applicant was represented by Jonathon D. Waller, Esquire. The State was represented by Senior Assistant Attorney General David Spencer. Keshia Reed was the Court Reporter for the proceeding.

This Court heard testimony from the Applicant and his trial counsel, Tivis C. Sutherland, IV, Esquire. This Court had before it the PCR application and its amendment, memorialized in an e-mail from PCR counsel on May 24. This Court also has before it the State's return, the Applicant's records from the South Carolina Department of Corrections, the Clerk of Court's records regarding the subject convictions, and the transcript of Applicant's trial, dated February 24-28, 2014.

PROCEDURAL HISTORY

Maurice Roberts ("Applicant") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. In February 2013, the Richland County Grand Jury indicted Applicant for two counts of attempted

murder (2013-GS-40-01458, 2013-GS-40-01460), murder (2013-GS-40-01452), attempted armed robbery (2013-GS-40-01481), and first-degree burglary (2013-GS-40-01449). These charges resulted from a home invasion and armed robbery attempt that resulted in a murder and two counts of attempted murder. The State's theory of the case at trial was Applicant was one of four participants, and one of two that entered the house and made an attempted robbery. Once ejected from the house, Applicant shot and killed a bystander in the driveway outside the house.

On February 24, 2014, Applicant's case was called to trial before the Honorable Doyet A. Early, III, circuit court judge. Tivis C. Sutherland, IV, Esquire represented Applicant. Assistant Solicitors Luck Campbell, Nicole M. Simpson, and Meghan L. Walker of the Fifth Circuit Solicitor's Office prosecuted the case. On February 28, 2015, the jury found Applicant guilty as indicted of all charges. Judge Early sentenced Applicant to imprisonment for concurrent terms of forty-five years for first-degree burglary, thirty years for each count of attempted murder, forty-five years for murder, and twenty years for attempted armed robbery.

Applicant appealed. Chief Appellate Defender Robert M. Dudek of the South Carolina Commission filed a brief on Applicant's behalf. The South Carolina Court of Appeals affirmed Applicant's conviction on July 13, 2016. State v. Roberts, Op. No. 2016-UP-358 (S.C. Ct. App 2016). The remittitur was returned to the circuit court on August 11, 2016.

At the hearing, Applicant raised several allegations of ineffective assistance of counsel. Applicant did not pursue any allegations of ineffective assistance of appellate counsel, prosecutorial misconduct, or due process, and this Court finds those allegations were waived.

FACTS AT TRIAL

Applicant's friend, Jwaun Duckett, and all the codefendants: Demetrice James, Vincent Nelson, Jr., and Deshawn McClary, testified against Applicant. Testimony conflicted on the

exact membership of the group, but Applicant and his codefendants were alleged to be members of a rap group named "600." Tr. p. 403; pp. 410-11; pp. 663-64. Duckett testified Applicant, James, Nelson, and McClary were present when Applicant discussed committing a robbery. Duckett declined to participate. Tr. pp. 408-12.

The robbery discussed was the robbery of the Davis's. Trenton Scott, one of the two sons who became victims of the burglary and robbery, explained that the household had a recording studio, hair salon, and athletic room on the first floor of the house, with the living quarters upstairs. Brandon Jones, the murder victim, was a cousin who recorded at the house. The Davis household was a place youth would hang out at and the family members helped friends that were having a hard time by providing food and clothes or maybe paying them for household cleaning. Trenton's mother took Nelson under her wing and the family helped him out. They treated him like family. Tr. pp. 324-27.

Joshua Williams testified he spent a lot of time at the Davis's and saw Nelson there on occasion. Nelson came over around 10 p.m. He testified Nelson's demeanor seemed odd and when Nelson answered his phone, he said, "I'm inside." Then William, Nelson, and Brandon (the murder victim) went outside to smoke. While outside, Williams saw three men in a sort of formation headed to the house. One of them giggled, then made a sudden turn and pointed a gun at Williams and told him to get on the ground. Williams was then hit with a pistol. Tr. pp. 231-40. The gunman went in the house and Williams heard glass breaking. Meanwhile, two individuals were beating on Victim. Williams then heard Nelson yelling "let's go, let's go." Williams heard someone say "600, don't do it" before he then heard gunshots. Tr. pp. 242-43.

Applicant was identified by both Trenton and Troy Scott and one of two men who broke into the house and engaged in a fight with them. Trenton testified Nelson was acting "out of

character"—he was pacing back and forth, and he received a number of phone calls, which was odd since Nelson did not normally have a cell phone. Tr. p. 331, lines 2–16. Nelson pressured Jones to go outside to smoke a cigarette, and Jones eventually gave in. Tr. pp. 331-32.

Trenton carried some hangers when he ran into Applicant, who pointed a gun at him. Applicant hit Trenton with a gun, but Trenton got up, hit Applicant and Applicant fell through a glass table and dropped his gun. Demetrice James picked up the gun and passed it to Applicant. Trenton did not know James, but recognized him from the neighborhood. Trenton then fought with James and Applicant passed the gun to James. When Trenton's brother, Troy, joined the fight, they pushed James and Appicant out of the room, tried to push the door as the gun poked out, and then opened the door and rushed James and Applicant, who both fled. However, James fired the gun as he departed and shot Trenton in the arm. Tr. pp. 332-41. Trenton picked both James and Applicant out of photo lineups. Tr. pp. 347-49.

Troy testified how they treated Nelson like family. He likewise noticed Nelson acted nervous that night and wanted a smoke. Troy heard glass breaking and went into the basement room to see Trenton and Applicant fighting. He testified similarly as Trenton, although when he first ran into the room, James had the gun. Troy confirmed Trenton was shot, but they managed to eject Applicant and James from the house. Troy then heard five or six more shots outside the house. When he went outside, he discovered Brandon (Victim). They called for help. Tr. pp. 448-53. Troy also picked Applicant and James out of photographic lineups. Tr. pp. 459-60.

Nelson testified he told the group about studio equipment in Davis's house. Applicant gave him Applicant's phone. The plan was for Nelson to visit the Davis's house and call once he was inside. Tr. pp. 521-30. When things did not go as planned, Nelson ran away and heard shots fired as he fled. He later met Applicant and McClary back at Applicant's house. Applicant

went upstairs and used bleach on the clothes Applicant wore during the burglary. Tr. pp. 543-548.

Chandler Davis, father to the two Davis brothers, found Victim and called EMS. Tr. pp. 252-55. Cari Pearson dated Troy. She testified similarly that Nelson acted strange. She told this to law enforcement, and she pulled up Nelson's Facebook page which talked about robbing people. Tr. pp. 468-77.

James testified he agreed to go with Applicant and McClary to meet Nelson at the studio. James admitted becoming involved in an altercation inside the house because Applicant was a "dear friend." James testified Applicant had a gun, dropped the gun during fighting, and James picked it up. James testified his arm was caught in the door and the gun went off while they were trying to leave the house. James testified as he ran away, he saw Applicant standing over the victim and fire a shot. He heard more shots as he ran away. Tr. pp. 489-97.

McClary testified he remained outside during the failed robbery. He heard a gunshot a couple of minutes after Applicant and James entered the house. Then applicant and James ran out of the house. Applicant had the gun at this point. McClary saw Applicant standing over Victim, shooting. Tr. pp. 672-77. McClary admitted he has a "600" tattoo on his arm and counsel argued McClary's nickname was 600 and he was the shooter. Tr. p. 219; p. 663.

Applicant's statement to law enforcement admitted he was at his house with Nelson, McClary, and James, when Nelson discussed doing a lick at a house with a studio. Nelson left five minutes before everyone else with Applicant's phone. Applicant confirmed, "the plan was that [Nelson] would get inside and then call us to let us know when to come." Tr. pp. 740-41. Applicant claimed McClary went with James in the house. He admitted though to helping his codefendants when they were "tussling" with someone in front of the house. He claimed during

the tussle, he was hit in the eye. Tr. p. 741. Trenton previously testified he hit Applicant in the face. Tr. p. 334. Applicant testified McClary shot Victim. Applicant also claimed he accidently bleached his clothes while washing the dishes. Tr. p. 741.

Investigator McDonald, who took Applicant's statement, confirmed that law enforcement found bleached clothes at Applicant's residence. He also confirmed that Applicant had a black eye. Tr. pp. 744-45.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. 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).

DISCUSSION

In a post-conviction relief action, an applicant carries the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, an applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to

receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989); Padilla v. Kentucky, 559 U.S. 356, 371 (2010) ("Surmounting Strickland's high bar is never an easy task.").

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

This Court will now address each allegation of ineffective assistance of counsel:

Impeachment of Jwaun Duckett

Duckett was present at the Roberts' house when law enforcement arrived looking for codefendant Vincent Nelson, who was an immediate suspect in the burglary. Duckett was found hiding in the closet with Applicant's cell phone. Previously, he was present when the plan to rob the Davis residence came about, but he declined to participate. Tr. pp. 400-10. At trial, the prosecution agreed Duckett should be impeached with his recent conviction for purse snatching, but objected to defense counsel eliciting testimony that he was originally charged with common law robbery. The trial court sustained the prosecution's objection and allowed Duckett to be impeached only with purse snatching and not the fact that he was originally charged with common law burglary. Tr. pp. 397-99. Applicant alleges counsel was ineffective for failing to preserve the issue for appeal.

This Court finds that Applicant was not prejudiced by the alleged deficiency. Duckett testified not only to the purse snatching conviction, but also to several other convictions,

including possession with intent to distribute cocaine, resisting arrest, receiving stolen goods, second degree burglary, and petty larceny. Tr. pp. 427-29. This Court notes there is no indication the reduction of Duckett's charge from common law robbery to purse snatching was connected to his cooperation in the present case. Further, this Court does not believe that impeachment for common law robbery instead of purse snatching carries any more weight for impeachment purposes. Finally, although it is easier to determine this issue on prejudice, this Court does not believe counsel's performance was deficient. Counsel did inquire about the possibility of referencing the original common law robbery charge, and the trial court declined to allow it. This Court does not believe that the ruling would constitute an abuse of discretion such as would alter the result. The admission or exclusion of evidence is a matter addressed to the trial court's sound discretion and will not be reversed absent a manifest abuse of the trial court's discretion and probable prejudice. State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). "An error without prejudice does not warrant reversal." State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005). "A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." State v. Stephens, 398 S.C. 314, 320, 728 S.E.2d 68, 71 (Ct. App. 2012).

Accordingly, this Court finds Applicant failed to meet either prong of Strickland and denies this allegation.

"Missed objections during the testimony of Demitrice James and Vincent Nelson."

Applicant makes a general claim about missed objections by two codefendants that testified against Applicant – James and Nelson. James seemed to minimize his own conduct

during his trial testimony, leading trial counsel to ask: "The way that I hear your testimony here today is that this is all sort of by happenstance. That you were just in the wrong place at the wrong time, and that you had no criminal intent. Is that what your testimony is?" Tr. p. 508, line 22 – p. 509, line 3. Applicant failed to point to specific testimony requiring an objection and this Court finds little worthy of objection.

As for Vincent Nelson, at trial, Nelson would not answer questions. The trial court recessed during direct examination to allow Nelson's attorney to confer with him. Upon returning to the stand, Nelson improved somewhat, but remained a hesitant witness for the State and the State asked leading questions throughout to pull answers out of Nelson. Trial counsel testified he felt Nelson not cooperating on the stand was good for the defense. This Court notes in reviewing the trial transcript, Nelson's level of cooperation with the State remained tenuous and halting; and the frustration from the prosecution is apparent even in the cold record. From Applicant's presentation at the PCR hearing, it appears perhaps the complaint was with the prosecution asking leading questions without objection. This Court notes under Rule 611 (c), SCRE, leading is allowed for a witness identified with an adverse party. In the present case, Nelson admitted to being close friends with Applicant and may properly be identified with Applicant as an adverse party. Further, under Rule 611(a), the trial court is allowed to control the mode of interrogation of a witness to "(1) make the interrogation and presentation effective for the ascertainment of the truth."

This Court finds that for both witnesses, the prosecution's presentation fell short of what it would expect and trial counsel's assessment of the situation was reasonable. This Court finds that trial counsel did not make any omissions during direct examination that fell below professional norms and finds his performance was not deficient. Further, this Court finds

Applicant did not meet his burden of showing prejudice, especially in light of the overwhelming evidence of guilt in this case. McClary and Duckett confirmed Applicant's role in the burglary and robbery, and Applicant's admission incriminates him for all the crimes committed by himself and his confederates. Applicant was picked out of the photographic lineup by both Troy and Trenton as the intruder with the gun that they ejected from the house. Evidence of guilt was overwhelming.

Testimony of Investigator McDonald

Applicant complains trial counsel should have objected to testimony from Investigator McDonald concerning his interrogation of Applicant. Investigator McDonald testified as follows:

> [Applicant] initially told us he didn't have any involvement or knowledge in this incident. We talked a little bit about this, kind of laid it out. . . . Sergeant Isenhoward would periodically check back with us. He was interviewing Mr. Duckett, as well as Major Smith and Investigator Boland were interviewing Nelson. So, information was starting to flow about the incident, and we're starting to get some more information about parties involved. Of course, both of those parties indicated Maurice was involved in this incident. As we started to confront Maurice with some of these facts, his story started to change.

Tr. p. 738, line 21 – p. 739, line 9.

Trial counsel explained the testimony was not significant to him because both Nelson and Duckett testified at trial and were cross-examined. Applicant contends the testimony was hearsay. However, this Court notes the testimony was not for the truth of the matter asserted, but rather to explain the context leading to Applicant's admissions, which included his involvement in the robbery and the struggle that ensued. This Court finds trial counsel made a reasonable professional judgment in declining to object to the testimony. Further, this Court finds the statement was not for the truth of the matter asserted, but to explain what led to Applicant's

subsequent admission to his involvement in the burglary. Finally, this Court does not believe Applicant was prejudiced because Investigator McDonald did not relate specifically what Nelson or Duckett said about Applicant's involvement in the case. This Court finds Applicant did not meet either prong of Strickland and denies the allegation.

Counsel's impeachment of Deputy Smith (p. 810)

The prosecutor went through the steps with Deputy Smith that he took during the investigation and asked Deputy Smith, "And from the credible evidence, [who was] the shooter?" Deputy Smith responded it was the Applicant. Tr. p. 810, lines 1-2. On cross-examination, counsel interrogated Deputy Smith as follows:

> Q: Well, you testified that the credible evidence points to Maurice as shooting outside?
>
> A: Yes.
>
> Q: And that's – those fellows right there, Deshawn McClary, Demetrice James, and Vincent Nelson ---
>
> A: I believe they all indicate that.
>
> Q: Okay, and so they're credible to you?
>
> A: In this particular instance they are, yes, sir.
>
> Q: Okay. Fair enough.
>
> A: They all defined their involvement. Demetrice James ---
>
> Court: All right. Hold, hold on one second. Let's – listen, fellows, ladies. This jury determines the credibility of the witnesses. Not the witnesses. So, that is y'all's sole responsibility to determine who's telling the truth. Not this witness. So, move on to another area.
>
> Sutherland: Yes, indeed. Thank you, Your Honor.

Tr. p. 810, line 16 – p. 811, line 6.

Applicant alleges counsel was ineffective by attempting to elicit testimony from the deputy about the credibility of the codefendants. This Court finds "and so they're credible to you?" is clearly a rhetorical question that is calculated to undermine the prosecution by focusing on the prosecution's dependence on co-defendants the jury might find unsavory in character. This is clearly a reasonable trial strategy. Counsel, in hindsight, testified he should have objected rather than "mock" the deputy. This Court, however, believes it was an effective display of advocacy for his client and does not find his performance in this regard deficient. It was well done, and was a reasonable approach the prosecution's question about the "credible evidence." In the end, as counsel acknowledged, the trial court provided a curative instruction that only the jury determined the credibility of witnesses, a curative instruction defense counsel adopted by thanking the trial court. Neither prong of Strickland was proved. Accordingly, this allegation is denied.

Jury instruction for attempted murder that only a general intent was required

Applicant alleges counsel was ineffective for failing to object to a jury instruction that only a general intent was required for attempted murder. This trial occurred in 2014. In 2015, the Court of Appeals determined that a specific intent to commit murder was required to prove attempted murder. State v. King, 412 S.C. 403, 410-12, 772 S.E.2d 189, 193 (Ct. App. 2005). Subsequently, the Supreme Court affirmed as modified the Court of Appeals' opinion. State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017). However, the opinion was not unanimous as to whether attempted murder was a specific intent crime. Justice Kittredge noted:

> The majority and I agree that the statutory language creates an ambiguity – "with intent to kill" speaks to a specific intent crime while "malice aforethought, either expressed or implied" points to a general intent crime. I would resort to legislative history to resolve the tension between the two phrases.

Id. at 72, 810 S.E.2d at 31 (Kittredge, J., concurring). Justice Kittredge favorably cited State v. Foust, 325 S.C. 12, 14-15, 479 S.E.2d 50, 51 (1996), which held the then-existing offense of assault and battery with intent to kill (ABWIK) required only a general intent. Justice Kittredge found section 16-3-29 was the "verbatim" codification of the common law offense of ABWIK, and then queried, "If the legislature intended to create a specific intent crime, why did it use verbatim the language of the repealed common law offense of ABWIK that had a settled understanding as a general intent crime?" Id. at 73, 810 S.E.2d at 32. Justice Kittredge concluded he would find the legislature intended for the offense to be a general intent crime. Id. at 74, 810 S.E.2d at 32.

This Court understands that a central tenet of Strickland is it must eliminate the distorting effects of hindsight in analyzing counsel's conduct. In keeping with this, both the Fourth Circuit and our own State court understands Strickland does not require counsel to be clairvoyant and anticipate changes in the law. Harden v. State, 360 S.C. 405, 409, 602 S.E.2d 48, 50 (2004). The Supreme Court found the lower court erred in granting relief on the basis that defense counsel should have objected to an instruction contrary to State v. Daniels, 401 S.C. 251, 254, 737 S.E.2d 473, 474 (2012), five years before Daniels was issued. Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016). The Supreme Court held "that the PCR court erred in finding trial counsel ineffective for failing to object to the jury instruction when no case law existed rendering the instruction improper per se." Id. In reaching this result, the Supreme Court declared the following:

> This Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law. E.g., Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) ("We have never required an attorney to be clairvoyant or anticipate changes in the law. . . ." (citing Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764,

> 765 (1993))), *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999); Thornes, 310 S.C. at 309-10, 426 S.E.2d at 765 ("This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.").

Id.; see Kornaharens v. Evatt, 66 F.3d 1350 (4th Cir. 1995) (holding "the case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law.").

In the present case, Justice Kittredge's disagreement on the intent element is proof that in 2014, counsel could believe that only a general intent was necessary to prove attempted murder. Justice Kittredge's opinion is consistent with the State's argument referenced in the Court of Appeals' opinion. Reasonable minds back in 2014 certainly could disagree on what the statute required – the issue was not finally settled until 2017. Therefore, counsel's failure to object to the general intent language does not fall below professional norms. Further, in light of the overwhelming evidence of guilt, including that his codefendant fired the shots constituting the charge while they were engaged in a violent home invasion and burglary, this Court finds Applicant was not prejudiced by the alleged error. Therefore, this claim, and the application itself, are denied.

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 his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of appeal within thirty 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 (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 that 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. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 25th day of April, 2022.

GRACE GILCHRIST KNIE
Presiding Judge
Fifth Judicial Circuit

Spartanburg, South Carolina