

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas
HONORABLE G.D. MORGAN
2021-CP-11-0783

JERRY DAVIS, #304100

APPELLANT,

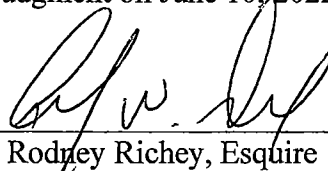
vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Jerry Davis appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable G.D. Morgan, Circuit Judge on April 22, 2022 an Order issued on June 8, 2022 and filed on June 8, 2022. The Appellant received notice of the judgment on June 10, 2022.



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JUN 21 2022

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
COUNTY OF CHEROKEE)

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Jerry Davis, #304100,)
Applicant,)

Case No.: 2021-CP-11-0783

v.)

ORDER OF DISMISSAL

State of South Carolina,)
Respondent.)

BRANDY W. MCBETH

2022 JUN - 8 AM 11:48

FILED IN OFFICE OF -
CLERK OF COURT
CHEROKEE COUNTY, S.C.

This matter comes before this Court by way of Applicant's post-conviction relief application filed December 13, 2021. Respondent made its return on February 17, 2022, requesting an evidentiary hearing be convened. An evidentiary hearing was held on April 19, 2022, at the Spartanburg County Courthouse. Rodney Richey, Esquire, represented Applicant. Assistant Attorney General Chelsey Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Counsel Andrea Price also testified. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. Findings of fact and conclusions of law are set forth below.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Cherokee County Clerk of Court. During its March 2019 term, the Cherokee County Grand Jury indicted Applicant for first degree domestic violence (2019-GS-11-00367). On June 17, 2019, Applicant appeared before the Honorable Grace Gilchrist Knie, circuit court judge, and pled guilty. Applicant was represented by Matthew Craft, Esquire, and Toria Smith, Esquire, represented the State. Judge Knie sentenced Applicant to ten years'

imprisonment, suspended upon service of one hundred and fifty-six days' time served and three years' probation.

On March 26, 2020, Applicant appeared before the Honorable R. Keith Kelly, circuit court judge, for a probation hearing. Clay Allen and Andrea Price represented Applicant. The Court revoked Applicant's probation in full.

Applicant filed a timely notice of appeal on April 8, 2020, that was perfected by Joanna Delany, Esquire, through filing a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. *State v. Davis*, 2021-UP-413 (S.C. Ct. App. filed Nov. 17, 2021). The remittitur was issued on December 20, 2021.

Summary of Relevant Facts

Concerning the probation violations committed, Applicant committed first degree domestic violence on the victim, giving her a large bruise, after being released on probation. (Tr. 8). Texts and photographs existed where Applicant admitted to hitting her with a belt. (Tr. 8). Applicant also did not enroll in batterers' treatment and texted his probation agent asking why he lied on him, put him on television, and lied that he hit his child's mother. (Tr. 8-9). Applicant was then arrested on other charges. (Tr. 9). Applicant did not do much on probation in terms of meeting the conditions of his probation requirements, had a prior domestic violence conviction, and was sentenced to three years' probation. (Tr. 9). The probation agent stated at the probation revocation hearing that Applicant could not do probation well. (Tr. 9).

Current Action Before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully because of ineffective assistance of counsel in that:

1. "Because the revocation was not right because the continuance was denied and she did not have time for my case."

At the PCR hearing, Applicant proceeded forward on the following allegations:

1. Ineffective assistance of Counsel for:
 - a. Failure to obtain a continuance until after an administrative hearing was held; and
 - b. Failure to adequately prepare for the hearing.

All other allegations raised in his initial application and amendments are deemed waived and abandoned and, accordingly, will not be addressed in this order.

Summary of the Testimony

Applicant Testimony

Applicant stated he thought Counsel was ineffective for failing to obtain the requested continuance, for not having sufficient time to prepare his case, and for failure to get him an administrative hearing. Applicant stated that he thought if Counsel spent enough time with him on the probation matter, he would not have gone back to jail. Applicant stated that probation was revoked because of subsequent charges he obtained that were later dismissed. Applicant stated he did enroll in batterers' classes and was unsure why the State stated that he did not enroll at the probation hearing because he went to classes on this matter.

Counsel Testimony

Counsel testified that she requested a continuance from the Court, which was denied. However, she did state on cross-examination that she felt she had enough time to handle the hearing effectively. Counsel stated that typically an administrative hearing is held before the probation hearing but thought the Court was handling things differently than normal at the time because of COVID. She stated that Applicant's strong armed robbery charge, which he incurred while out on probation, was dismissed. She stated that Applicant's probation was revoked because of the subsequent charges incurred, as well as for other violations of his probation.

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 and arguments presented at the PCR hearing. Before this Court are the Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the probation hearing transcript, direct appeal records, and this PCR action's records. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "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, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. See also Rule 71.1(e), SCRPC ("The applicant

has the burden of establishing his entitlement to relief by a preponderance of the evidence.”).

Reasonableness is determined by the “variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant,” and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.”

Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel’s performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually “countless” ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel’s deficient performance must have prejudiced the applicant so 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. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters “only in the rarest case” because “[t]he likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

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. *Strickland*, 466 U.S. at 696. 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. *Id.* at 696-97.

With respect to probation revocation counsel, though an Applicant has no Sixth Amendment right to counsel in a probation revocation proceeding, the same analysis for ineffectiveness that applies in other PCR proceedings involving claims against counsel apply in PCR proceedings against probation revocation counsel. *Turner v. State*, 384 S.C. 451, 455-56, 682 S.E.2d 792, 794 (2009).

Failure to Obtain Continuance

Applicant alleges Counsel was ineffective for failure to obtain a continuance of the probation matter until after an administrative hearing was held. Counsel requested a continuance until after the administrative hearing when at the probation hearing, and this request was denied. (Tr. 4). Accordingly, Counsel was not ineffective because a continuance was, in fact, requested, and Applicant failed to show what more Counsel could have done to secure a continuance or how that continuance would have impacted the results of the proceedings. Thus, this Court finds the allegation without merit and relief is denied on this ground.

Inadequate Preparation Time

Applicant's claim of ineffective assistance of counsel because of inadequate preparation time is without merit. "[B]revity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation." *Smith v. State*, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (2012). Applicant must show evidence indicating "how additional preparation or communication would have resulted in a different outcome." *Id.* See *Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (where application failed to show ineffective assistance of counsel based on lack of preparation by neglecting to show evidence of what counsel failed to discover or what defenses counsel could have pursued had he more fully prepared for the case);

Skeen v. State, 325 S.C. 210, 214-15, 481 S.E.2d 129, 132 (1997) (where applicant failed to show ineffective assistance of counsel when he did not present evidence showing how additional preparation would have impacted the trial).

This Court finds Applicant's allegation of ineffective assistance of counsel because of inadequate preparation time is without merit. This Court finds probation counsel credibly testified that she had sufficient time to handle the hearing effectively. Additionally, Applicant has failed to show how more time spent in preparation would have changed the results of the proceedings. Thus, Applicant has failed to meet his burden of proof on this ground and relief is denied as a result.

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Conclusion

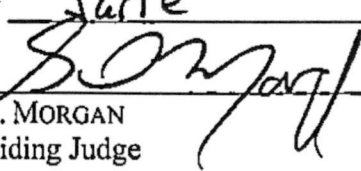
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty days of receipt by counsel of the judgment entry's written notice to secure 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 appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant's attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

IT IS THEREFORE ORDERED:

1. The PCR application be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 8th day of June, 2022.



G.D. MORGAN
Presiding Judge
Seventh Judicial Circuit


_____, South Carolina.

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S.C. SUPREME COURT