

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

G. D. Morgan, Circuit Court Judge

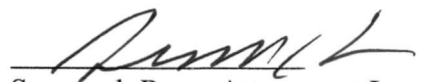
2020-CP-42-01699

Ashley L. Hammitt Appellant,
v.
The State, Respondent.

NOTICE OF APPEAL

Ashley L. Hammitt appeals the Honorable G. D. Morgan's Order of Dismissal filed August 30, 2022.

This 1 day of Sept., 2022.


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Other Counsel of Record:
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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Ashley L. Hammitt, #362283,)
Applicant,)

Case No.: 2020-CP-42-01699

v.)

ORDER OF DISMISSAL

State of South Carolina,)
Respondent.)

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SPARTANBURG COUNTY
AMY W. COLE

This matter comes before this Court by way of Applicant's post-conviction relief application filed May 22, 2020. Respondent made its return on September 22, 2020, requesting an evidentiary hearing be convened. An evidentiary hearing was held on April 20, 2022, at the Spartanburg County Courthouse. Susannah C. Ross, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto represented Respondent.

Applicant testified on her own behalf at the evidentiary hearing. Counsel J. Roger Poole, Esquire, and Assistant Solicitor James E. Hunter, Esquire, 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 of the Spartanburg County Clerk of Court. In July 2017, the Spartanburg County Grand Jury indicted Applicant for distribution of methamphetamine (2017-GS-42-3779). Applicant was represented by J. Roger Poole, Esquire. Assistant Solicitor James E. Hunter, Esquire, of the Seventh Circuit Solicitor's Office prosecuted the case. On January 10, 2018, Applicant proceeded to trial before the Honorable J. Derham Cole, circuit court judge, and

a jury. Applicant was found guilty as charged and Judge Cole sentenced Applicant to fifteen years' imprisonment.

Applicant filed a timely notice of appeal on January 16, 2018, that was perfected by Lanelle C. Durant, 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. Hammitt*, 2020-UP-037 (S.C. Ct. App. filed Feb. 12, 2020). The remittitur was issued on February 28, 2020.

Summary of Relevant Facts

On October 6, 2016, a scheduled drug buy occurred between Applicant and the confidential informant, Brady Rhodes. (Tr. 49). Rhodes was equipped with audio and video recording equipment. (Tr. 51-52). The drug sale occurred at a hotel. (Tr. 53). Rhodes was equipped with fifty dollars and bought a crystal rock-like substance from Applicant. (Tr. 50, 53). Methamphetamine was the drug purchased during this transaction. (Tr. 56). Though Rhodes originally met with Applicant to obtain a full gram of methamphetamine, it was tested to only weigh 0.03 grams. (Tr. 94, 107).

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. "Ineffective assistance of counsel."
 - a. "Failure to prepare for trial with client."¹
 - b. "Failure to have alternative trial strategy by painting holes in the evidence or creating doubt."
 - c. "Failure to file motion to suppress evidence of DVD (date, time, year – not noted on same) which was a state exhibit used against defendant."

¹ Respondent interprets this allegation to be an ineffective assistance of counsel claim for failure to prepare with Applicant through failing to meet, communicate and otherwise discuss evidence and trial strategy with Applicant.

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- d. "Failure to recognize defendant's constitutional rights (mitigating circumstances) based on the facts and circumstances surrounding said crime of methamphetamines distribution."
 - e. "Failure to call witnesses (on the issues of drug addiction experts, extreme emotional disturbance due to death of grandmother, prior or current character of defendant. A criminal defendant's right to present witnesses is protected by the compulsory process clause of the Sixth Amendment)."
 - f. "Failure to investigate. Said motel room which was not in defendant's name. The drugs could have belonged to whomever paid for the room or the name of said individual."
 - g. "Failure to note and address issue of how the controlled purchase was conducted and said 'undercover buy report' not signed by confidential informant (Brady Donald Rhodes)."
 - h. "Failed to object to credibility of informant or question said informant if he was using drugs or under the influence of drugs during said controlled purchase and during his testimony."
 - i. "0.03 grams (This is clearly a simple possession quantity) not a distribution quantity - failed to suppress evidence of same."
2. "Trial Judge erred."²
- a. "Failed to question defendant if she was under the influence of drugs at the trial (being her record clearly shows she is an addict.)"
 - b. "Defendant's request to release her attorney Mr. J. Roger Poole, Public Defender and the request of a continuance being denied prejudiced defendant."
 - c. "Judge denied motion for direct verdict concerning said drugs/money not seen on CI's DVD."
3. "Prosecutorial Misconduct."
- a. "Prosecutor failed to note in Rule 5 Motion of Discovery evidence submitted to defense had numerous errors to include DVD and said 'undercover buy report' not filled out properly and signed by informant."

Applicant, through PCR Counsel, made their amended application on January 31, 2022,

alleging:

- 1. Ineffective assistance of counsel for:
 - a. Failing to prepare and review trial testimony with the Applicant;
 - b. Failing to argue in closing that the case was attempt to distribute rather than arguing possession which was counter to the Applicant's trial testimony and that she did not know any drugs were in the room; and
 - c. Failing to move for a mistrial when the Solicitor elicited testimony about a prior drugs sale.

² Respondent interprets point 2(a) as an ineffective assistance of counsel claim for failure to raise the issue of addiction as a mitigating factor in sentencing Respondent interprets points 2(b) and 2(c) as ineffective assistance of counsel claims for failure to successfully secure a granted motion for continuance, motion to relieve counsel and proceed *pro se*, and motion for directed verdict.

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

1. Ineffective Assistance of Counsel:
 - a. Failure to move for a continuance.
 - b. Failure to prepare Applicant to testify at trial.
 - c. Failure to address drug weight discrepancy.
 - d. Failure to point out Applicant did not rent the hotel room.
 - e. Failure to move for a mistrial.
 - f. Failure to enter phone evidence at trial.
 - g. Failure to use defense that Applicant did not intend to deal to the confidential informant.

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 she understood the PCR proceedings. She stated she was sick and high when she testified at trial. She stated she requested Counsel move for a continuance, but that this was denied. She also stated she wanted to fire Counsel, but that this was denied. Applicant stated she was unwilling to plead because she was not guilty. She stated she did not discuss the proceedings and discovery with Counsel, but that he rushed her to get the discovery. She stated that the State said the drugs weighed .03 grams in a motion and a different weight was stated at trial. She stated she did not speak with Counsel about this discrepancy. She stated she testified that she used drugs in the past. Applicant stated that there was a set up buy between her and the confidential informant and that they had stolen from each other before. She stated that the drugs were paid for in twenty-dollar bills and that she told Applicant this. Applicant stated that Counsel told her that she could not bring in evidence from her phone.

On cross-examination, Applicant stated she told the Court she wanted to continue with her representation by Counsel because she did not want to proceed forward *pro se*. She stated she

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had a history of drug use and dealing. She stated she thought a drug deal was hand-to-hand but confirmed she did not have drugs in the hotel room. She stated she called the confidential informant to her hotel room to rob him, not to deal to him. Applicant stated she did not want to plead, despite Counsel's advice to plead. She stated she decided to go to trial instead. On re-direct, Applicant stated video footage of the buy was entered at trial.

Counsel Testimony

Counsel testified he recalled the case very well and that it was a controlled buy case. Counsel testified that Applicant admitted to contacting the confidential informant. Specifically, he stated that the State's theory of the case was that Applicant intended to sell drugs to the confidential informant. At trial, Counsel stated that regarding evidence, the State had video footage of the deal, they had the drugs, and the testimony of the confidential informant. Counsel testified that the issue of who rented the hotel room was irrelevant.

Applicant was made a plea offer, but Applicant refused to plead. Counsel testified he thought the chances of success at trial were slim. Counsel testified he did not move for a mistrial in the case and did not think that motion would be successful. Concerning testifying, Counsel stated he told Applicant to tell the truth.

Counsel testified he did not remember Applicant stating she was high at trial, but that he could not tell if she was clear minded at trial. Counsel testified that Applicant had a history of drugs and that this was undisputed.

On cross-examination, Counsel testified that it would be speculation to state that the issue of who rented the hotel room was important. Counsel testified that one can always present a defense at trial. He stated that he did not think Applicant's phone evidence was beneficial at trial. On re-direct, Counsel testified that the texts in question were incriminating.

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Prosecutor Testimony

The prosecutor stated that evidence consisted of a video and audio recording of the drug deal, the drugs themselves, and the chemist's report. He stated that evidence showed that the drugs were on the table and that the deal was not hand-to-hand. Applicant's history of drug use and dealing was brought up at trial, objected to by Counsel, and then not brought up again. Prosecutor stated that Applicant admitted to knowing drugs were in the room, that she took the hundred dollars from the confidential informant, and that evidence of the deal was clear. Prosecutor stated that the issue of who rented the hotel room was not probative in the case. Based on the pictures of Applicant shown and her appearance in Court, Prosecutor stated that Applicant looks healthier now and like she is no longer using drugs.

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 trial 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

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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), SCRCP (“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

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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.

Move for Continuance

Applicant claims Counsel was ineffective for failure to request a continuance. However, she stated during pre-trial proceedings that Counsel requested a continuance on her behalf and informed her when it was denied. (Tr. 8). She also asked for a continuance on the day of trial to procure new counsel and this was denied. (Tr. 14-15). Applicant claimed she was sick and high at trial, but Counsel credibly testified that he did not see any indication she was high at trial, nor did he recall being informed by Applicant that she was high. 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.

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Prepare Applicant's Testimony

Applicant claims Counsel was ineffective for failure to properly prepare Applicant for testifying at her trial. Counsel credibly testified he talked to Applicant about testifying and told her to tell the truth. There has been no showing as to why this was unreasonable and, accordingly, deficient. There has also been no showing on what additional preparation would have consisted of or how that would have made a difference on the trial outcome. Thus, Applicant has not established prejudice. Accordingly, relief is denied on this ground.

Drug Weight Discrepancy

Applicant testified that she thought Counsel was ineffective for failure to address the fact that the State said the drugs weighed .03 grams in a motion and a different weight was stated at trial. Whether failure to assert a defense constitutes deficient performance ultimately hinges on whether failure to explore the decision was a strategic decision. *Strickland*, 466 U.S. at 680. If there is only one line of defense, counsel must conduct a "reasonably substantial investigation" into that line of defense. *Id.* (quoting *Washington v. Strickland*, 693 F.2d at 1252). However, if there are several lines of defense, counsel may still be effective even if every single line is not explored. *Id.* "[W]hen counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense that he has chosen not to employ at trial." *Id.* at 681 *Id.* (quoting *Washington v. Strickland*, 693 F.2d at 1255). Further, "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough*, 540 U.S. at 5 (citing *Strickland*, 466 U.S. at 690).

Regarding failure to alert the Applicant of a defense specifically, Counsel will not be

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found ineffective if there was inadequate evidence to support the defense, if the defense did not exist at the time of trial, or another avenue of defense existed. See *McCray v. State*, 317 S.C. 557, 455 S.E.2d 686 (1995) (stating that failure to state an entrapment defense was not ineffective when the applicant denied any wrongdoing); *Arnette v. State*, 306 S.C. 556, 413 S.E.2d 803 (1992) (stating that failing to inform of a defense was not ineffective when there was no evidence at trial that supported the defense); *Robinson v. State*, 308 S.C. 361, 417 S.E.2d 361, 417 S.E.2d 88 (1992) (stating that Counsel was not ineffective when failing to state a defense that was not recognized by the Court until six years later and was just recently acknowledged by the scientific community).

At the PCR hearing, Counsel credibly testified that the evidence shown at trial showed that the State had video footage of the deal, they had the drugs, and the testimony of the confidential informant. The weight of the drugs is irrelevant to whether Applicant intended to distribute drugs. Thus, Counsel was not ineffective for failing to raise this as an issue because it is irrelevant and, accordingly, non-prejudicial. Thus, relief is denied on this ground.

Hotel Rental Issue

Applicant claims Counsel was ineffective for failure to point out at trial that Applicant did not rent the hotel room personally. However, Counsel credibly testified he did not do so because it was irrelevant. Additionally, because Applicant was the person recorded on tape engaging in the drug deal, the hotel rental issue was seemingly of no consequence and, thus, any failure to raise this issue was non-prejudicial. Accordingly, relief is denied on this ground.

Move for Mistrial

Applicant claims Counsel was ineffective for failure to move for a mistrial. To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions

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fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. "To prove prejudice resulting from counsel's failure to move for a mistrial, an applicant must demonstrate that, had counsel moved for a mistrial, the trial court's denial of the motion would have amounted to an abuse of discretion." *Earley v. State*, 418 S.C. 255, 266, 792 S.E.2d 226, 232 (2016).

Counsel acted reasonably in his decision not to move for a mistrial when testimony concerning a prior deal was elicited. Counsel objected when the prosecutor asked about the prior deal, a bench conference was held, the objection was sustained, and the issue was not revisited. (Tr. 79-80). Counsel credibly testified that he did not request a mistrial because he did not think it would be granted. This Court finds Counsel's approach was reasonable concerning this issue and declines to find him deficient on this ground.

Concerning prejudice, this Court does not find that if the trial court denied the motion it would have amounted to an abuse of discretion. Instead, this Court finds that this issue was adequately dealt with without a mistrial being needed. See *State v. Patterson*, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct. App. 1999) ("[t]he granting of [a] motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way."). Thus, relief is denied on this ground.

Entry of Phone Evidence

Applicant claims Counsel was ineffective for failure to enter evidence off of Applicant's phone at trial. This evidence consisted of photographs of Applicant at the time. However, Counsel credibly testified that he did not think the phone evidence would have made a difference at trial. Counsel is not deficient for failing to pursue a fruitless defense at trial and, because the evidence is irrelevant, Applicant is not prejudiced as a result. Accordingly, relief is denied on

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this ground.

Intent to Deal

Applicant claims ineffective assistance of counsel for failure to assert a defense that Applicant did not intend to deal to the confidential informant. However, Applicant testified to this at trial. Specifically, she testified at trial that the confidential informant stole money from her several times, and she wanted to get the informant to the hotel room so she could take his money. (Tr. 116-18). She testified that she told him she would deal him drugs as an excuse for getting him to go to the hotel room, but that she had no intent to deal. (Tr. 116-18). She testified that she acted like she was going to deal to him, but that she never had any intent of doing so. (Tr. 116-18, 122-23). She testified she never gave the informant any drugs. (Tr. 122). Thus, this Court finds that the defense was asserted at trial and Applicant's own testimony was the best source for that defense. Counsel is not deficient because he presented that defense, and no prejudice is found flowing therefrom. Accordingly, relief is denied on this ground.

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 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. Your attention is directed to

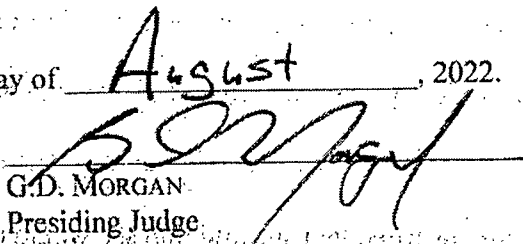
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South Carolina Appellate Court Rule 243 for appropriate appellate procedures:

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 23rd day of August, 2022.


 G.D. MORGAN
 Presiding Judge
 Seventh Judicial Circuit

Spartanburg, South Carolina.

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