

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM SUMTER COUNTY

Court of Common Pleas

Honorable Clifton Newman, Circuit Judge

Case No.: 2020-CP-43-0933

Gene D Evans, Jr. 375509.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Gene D Evans, Jr. appeals the Honorable Clifton Newman's September 26, 2022 Order of Dismissal. Undersigned counsel received notice of entry of the order on November 3, 2022. A copy of the order on appeal is attached hereto.



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November 11, 2022

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S.C. SUPREME COURT

evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations or deprivations entitling him to relief and, accordingly, denies and dismissed this action with prejudice. Specific findings of fact and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 are set forth below:

FACTUAL AND PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined within the South Carolina Department of Corrections. On February 12, 2017, Applicant was driving an older-model recreational vehicle (RV) on a public roadway in Sumter while under the influence of methamphetamine. While he was driving, Applicant lost control of the vehicle and ran into a tree, fatally killing the sole passenger, his friend Robert Skidmore. An analysis of Applicant's blood sample taken approximately three hours after the wreck established Applicant was under the influence of methamphetamine. Applicant was arrested in April of 2017, and during the October 2017 term, the Sumter County grand Jury indicted Applicant for felony DUI resulting in death (2017-GS-43-1104). Applicant was originally represented by the Sumter County Public Defender's Office but was eventually appointed Timothy Griffith, Esquire, to represent him in December of 2017. The case was prosecuted by Deputy Solicitor John P. Meadors of the Third Circuit Solicitor's Office.

Upon order of the court, Applicant was evaluated by the South Carolina Department of Mental Health for competency and deemed competent.

At Applicant's request, counsel filed a motion for a speedy trial on January 23, 2018, and the State called the case to trial on February 20, 2018, before the Honorable Howard P. King, circuit court judge. At the outset of the trial, Applicant, though counsel Griffith, moved to suppress

the drug analysis of Applicant's blood based on a failure to comply with statutory requirements and a lack of consent to take Applicant's blood sample. Following a pre-trial hearing, Judge King denied this motion. Applicant's case proceeded to trial and he testified in his own defense, arguing that he was not driving the RV when the wreck occurred. On February 22, 2018, the jury convicted Applicant as indicted. Judge King sentenced Applicant to twelve years imprisonment.

Applicant timely sought direct appellate review and was represented on appeal by Appellate Defender David Alexander of the South Carolina Commission on Indigent Defense-Office of Appellate Defense, who submitted a brief pursuant to Anders v. California, 386 U.S. 738 (1967) along with a petition to be relieved as counsel. Applicant then submitted his own *pro se* brief of appellant. Following a review of the entire record as required by Anders, the South Carolina Court of Appeals dismissed the appeal and granted appellate counsel's request to be relieved. State v. Gene David Evans Jr., Unpub. Op. No. 2020-UP-119 (Ct. App. filed April 29, 2020). The remittitur was issued on June 30, 2020.

ALLEGATIONS BEFORE THE COURT

In his *pro se* application for post-conviction relief, filed on June 24, 2020, Applicant alleges he is being held in custody unlawfully based on the following grounds:

1. Ineffective Assistance of Counsel
 - a. "For Not Challenging the Blood Draw and Test as a Fourth Amendment Violation"
 - b. "Failure to Prepare for Trial" and specifically, failing to challenge the blood draw and failing to ensure Applicant was competent to stand trial
 - c. "For Failing to Request the Reckless Driving Charge"
2. "Whether the Driving under the Influence with Death Resulting Statute is Unconstitutionally Unreasonable, Arbitrary, and Ambiguous?"

As requested relief, Applicant states he is seeking vacation of his sentence and a new trial.

In response to the application, Respondent served a return and partial motion to dismiss,

asking for a hearing to resolve Applicant's claims of ineffective assistance of counsel and moving for summary dismissal of Applicant's claims challenge the statute as a claim not proper for post-conviction relief. Attached to this return and before this Court are the records from Applicant's general sessions proceedings, his appellate records (including the record on appeal with a complete copy of the trial transcript), his SCDC records, and the records from this current PCR proceeding.

James K. Falk, Esquire, was appointed to represent Applicant in this proceeding pursuant to Re: Appointment of Counsel in Post-Conviction Relief Cases before the Circuit Court (S.C. Sup. Ct. Order filed Oct. 6, 2008) and Rule 71.1(d), SCRCP (providing for appointment of counsel only where there is a question of law or fact which necessitates a hearing). Counsel did not amend the application.

At the evidentiary hearing Applicant proceeded forward on the grounds as set forth in his *pro se* application.

SUMMARY OF THE EVIDENTIARY HEARING

An evidentiary hearing was convened before this Court at the Sumter County Courthouse on June 28, 2022. Applicant was present alongside counsel Falk. Respondent was represented by Senior Assistant Deputy Attorney General Megan Harrigan Jameson. Testimony was taken from Applicant and trial counsel Timothy L. Griffith.

At the start of the hearing, Respondent renewed its motion to dismiss the constitutional challenge to the felony DUI statute for failure to state a claim upon which relief could be granted in post-conviction relief, arguing the claim was improper and that the claim lacked merit as a matter of law. Respondent also moved to dismiss the allegation that counsel was ineffective for failing to request a jury instruction on reckless driving as a lesser-included offense of felony DUI

resulting in death as the claim failed as a matter of law. Specifically, Respondent argued that reckless driving is not a lesser-included offense of felony DUI causing death, but rather, it is a distinct offense requiring proof of different elements. In support of this argument, Respondent cited State v. Cribb, 310 SC 518, 426 S.E.2d 306 (1992), which expressly holds that reckless driving is not a lesser-included offense of felony DUI. Respondent also cited to State v. Easler, 322 SC 333, 471 S.E.2d 745 (1996), reaffirming the holding in that reckless driving is not a lesser-included offense of felony DUI.

In response, Applicant conceded that Respondent was entitled to summary dismissal on both of those allegations.

Accordingly, both of these allegations were denied and dismissed with prejudice. Applicant then proceeded forward solely on the claims that counsel was ineffective for failing to adequately challenge and move to suppress the evidence obtained from the draw of his blood, that counsel failed to adequately ensure he was competent to proceed to trial, and that counsel failed to present favorable defense witnesses at trial.

Applicant testified first on his own behalf. He testified that immediately prior to his trial, he was transported to a mental health facility (Just Care) for mental health treatment at the request of the county detention center because his medication was not working properly. He testified he spent several weeks at the hospital, a week at Just Care, and then was transported back to the county detention center for his trial. He testified he was diagnosed with lack of sufficient to make reasonable decisions and this stemmed from the head injury he suffered during the wreck. He testified the attached an order from the probate court pertaining to his mental health issues to his *pro se* brief of appellant, which scheduled a hearing on an unrelated probate matter for February 20,

2018, the same day his trial began. He testified trial counsel failed to obtain any of this documentation regarding the unrelated probate matter. He elaborated that counsel failed to have him evaluated before trial. He testified counsel came to visit him the Saturday before his trial began and told him that he would have an upcoming court appearance but did not explain that it would be his trial. He testified he does not know what happened in the unrelated probate proceeding. He testified he was in-custody the entire time before trial following his arrest and he was under suicide watch.

Applicant testified his family came to visit him at the hospital shortly after the wreck and that he was severely injured in the wreck to such an extent that he has no recollection of the wreck the subsequent three days following the wreck. He testified he does not remember talking to law enforcement following the wreck but conceded he would have given consent for a blood sample to be drawn to help investigate the wreck. He asserted it would not have been physically possible for him to give consent based on the severity of his injuries but stated he has no recollection of the few days following the wreck so he cannot testify with any certainty as to whether he did or did not consent.

Applicant testified that he was not driving during the wreck and insisted that the victim was the driver. He testified he was helping assist the victim and his girlfriend move the RV because they were evicted from the RV park where they had been living in the RV. Applicant testified that he believes the accident was caused by the tires malfunctioning due to dry rot based on the poor condition of the RV. He testified that the only way he could be extracted from the RV was through the driver's side because of the extensive damage from impact to the passenger side of the RV.

Applicant testified counsel only visited with him twice before trial. He testified the first

visit was in December of 2017 shortly after counsel was appointed to represent him. He described this visit as a "new client" visit but stated they did review the accident report. Applicant testified the next visit was the Saturday immediately before trial and counsel did not have discovery or anything available for Applicant to review. He testified he did not have any conversations with counsel during trial.

Applicant testified he wanted counsel to present witnesses at his trial, including the victim's girlfriend and the first person who arrived on the scene of the wreck, Edward Vipperman. He testified that the victim's girlfriend was cooperative and supportive at the time to trial but now is unsupportive of Applicant and asserts he stole the RV that was wrecked. He later acknowledged the State informed the trial court that it could not locate the victim's girlfriend at the trial despite efforts to find her. He testified that he had a statement from Vipperman indicating that Vipperman left the scene before law enforcement arrived because there were pending warrants for his arrest due to unpaid child support. Applicant did not present any of these witnesses at the hearing.

On cross-examination, Applicant testified that counsel was his third attorney, as two prior public defenders had been relieved from his case. He testified that he never requested counsel file a motion for a speedy trial on his behalf and he did not want a speedy trial. He testified he was ambivalent as to whether he wanted a trial or not. He testified he was not arrested until two months following the wreck, well after his release from the hospital. He testified he was not even aware that he was proceeding to trial on the day his trial began because he had only recently been transported back to the detention center from Just Care. He acknowledged that his prior attorney had requested he be evaluated for competency and a court order required the Department of Mental Health to evaluate him. He testified he was evaluated by Dr. Donna Maddox and he remembers

this evaluation. He denied knowing that he was deemed competent for trial until his trial started. He acknowledged that his competency was discussed on the record prior to the start of his trial and that his counsel informed the trial court that he believed Applicant was competent and could assist in his defense. He also acknowledged that counsel brought up his mental health concerns during sentencing in mitigation and support of a lesser sentence.

Applicant testified he is not sure whether counsel moved to suppress any evidence related to blood sample taken immediately after the wreck. He testified that he testified during trial but cannot recall if he testified at any pre-trial motions hearings. He testified that Trooper Boland informed the trial court that Applicant had consented to a blood draw but there is no way that Applicant could have given consent based on his physical condition following the wreck. He also testified that he does not remember anything following the wreck for a four-day span. He testified he did not learn that the victim was killed in the wreck until the fourth day following the wreck. He testified he was severely injured, including a concussion and multiple broken bones.

Applicant testified that he testified in his own defense at trial and he readily conceded at trial that he was under the influence of methamphetamine during the wreck but insisted he was not the driver. He testified that he told the jury the victim was driving and he was standing behind the driver's seat when the wreck occurred. He acknowledged the State presented a witness who identified Applicant as the driver immediately before the wreck, as well as another witness who testified Applicant was pulled from underneath the crushed steering wheel while in a seatbelt.

Applicant then presented testimony from trial counsel, Timothy Griffith. Counsel testified that although Applicant was receiving in-patient medical care for his suicidal behavior prior to trial, he was still able to prepare for trial with Applicant sufficiently. He detailed the numerous

interactions he had with Applicant and his family members immediately prior to trial. He testified that he was not involved in any probate proceedings involving Applicant and did not have any details regarding that unrelated matter.

Counsel testified that he moved to suppress the evidence obtained from Applicant's blood sample based on several grounds, including that the State failed to comply with the necessary statutory provisions governing blood draws following suspected DUIs and that Applicant could not have given consent based on the severity of his injuries and the numerous medications he was under the influence of immediately following the wreck. He elaborated that the State argued Applicant had given consent for his blood sample, and that in response, he argued consent was not physically possible based on Applicant's injuries and could not have been knowing and voluntary based on the influence of the medications to treat him following the wreck. He testified his pre-trial motion was denied following a hearing but acknowledged that he did not renew this motion. He testified that he did not have any good faith basis to challenge the chain of custody of Applicant's blood sample. When asked about this issue on cross-examination, counsel elaborated that the law enforcement officer who took the sample, Trooper Boland, testified at the suppression hearing that Applicant was not under arrest at the time of the blood draw. He elaborated that Applicant was not arrested until two months after the accident. He testified that Trooper Boland also testified at the suppression motion that Applicant unambiguously and unequivocally gave consent to the blood draw and that he challenged this on cross-examination by highlighting the severity of Applicant's injuries and his medications at the time of the blood draw. Counsel testified that the Court explicitly asked Applicant if he wanted to testify in support of suppression but that Applicant declined to do so because he had no memory of this time period and could not offer any

useful testimony.

On cross examination, counsel testified that he was appointed to represent Applicant after a conflict with the public defender's office. He testified he was appointed to represent Applicant in December of 2017. He briefly discussed the factual background of the case, including that a witness, Shona Brown, identified Applicant as the driver immediately prior to the wreck, that another witness, Andrew Moye, testified he pulled Applicant from underneath the driver's steering wheel while Applicant was wearing a seat belt, that photographs of the wreckage showed the victim positioned towards the passenger seat, and that the drug analysis established that Applicant was under the influence of methamphetamine.

Counsel testified he filed a motion for a speedy trial at Applicant's request. He testified he traditionally does not file such motions unless a client requests that he do so and particularly would not have done so here if Applicant had not demanded it because he had only been appointed approximately a month prior to making the motion. He testified that he always wants more time to prepare for a trial but that he felt prepared and ready to try Applicant's case. He elaborated that he would have moved for a continuance if he did not believe he was prepared for trial.

Counsel testified he fully investigated the case, including discussing the case with Applicant and speaking with several witnesses. He elaborated that he got more complete statements from witnesses on the scene, including getting notarized affidavits and statements, none of which were helpful to Applicant. He testified he did not hire a private investigator because he was able to personally do the investigation and track down the necessary witnesses. He testified that he also spoke with the law enforcement witnesses. He testified that based on his investigation, he developed a defense strategy that Applicant was not the driver at the time of the wreck, which

was supported by Applicant's testimony at trial.

Regarding Applicant's competency, counsel testified that Applicant's prior counsel had moved for Applicant to be evaluated and an evaluation for competency to stand trial was ordered. He elaborated that Applicant was evaluated by the Department of Mental Health and found competent to stand trial. He elaborated the results of the competency evaluation performed by the Department of Mental Health diagnosed Applicant as having a stimulant use disorder as a result of his drug use and nothing else. He testified that he did not personally have any doubts as to Applicant's competency and that Applicant was able to assist him with the defense, echoing what counsel told the trial court during Applicant's trial. He testified Applicant's mental health challenges pertained more to suicidal behavior, which led to his hospitalizations and treatment, but did not impact his ability to interact with Applicant or prepare for his defense.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged three instances of ineffective assistance of trial counsel and asserts that as a result of counsel's purported errors, he is entitled to have his conviction reversed and proceed back to the court of general sessions for a new disposition of his case.

Standard of Review

Under the Uniform Post-Conviction Procedures Act, an applicant may seek post-conviction relief upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;

4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1(e), SCRPC.

The three grounds for relief upon which Applicant proceeded at the evidentiary hearing pertain to ineffective assistance of counsel. The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, post-conviction relief allegations are centered upon an allegation that the applicant did not receive effective assistance of counsel guaranteed by the Sixth Amendment. See generally S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in post-conviction relief actions). The allegation of denial of such representation sets forth a prima facie violation of this constitutional right and raises a question of fact that can only be determined by an evidentiary hearing. Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient

to warrant granting relief. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction or sentence. 466 U.S. at 687. First, the applicant must show that counsel's performance was deficient; and second, that the deficient performance prejudiced the applicant. Id. at 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." Padilla v. Kentucky, 559 U.S. 356, 366 (2010). In order to prove deficient performance, the applicant must show counsel's representation fell below an objective standard of "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland, however, "does not guarantee perfect representation[—]only a 'reasonably competent attorney.'" Harrington v. Richter, 562 U.S. 86, 110 (2011) (quoting Strickland, 466 U.S. at 687). Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Strickland, 466 U.S. at 686. Just as there is "no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." Harrington, 562 U.S. at 110.

Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential, as

it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689; see also Yarborough v. Gentry, 540 U.S. 1, 6 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Id. (quoting Strickland, 466 U.S. at 690).

Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Id. Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Butler, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Reviewing courts "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct." Strickland, 466 U.S. at 690. An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. The reviewing court must then "determine whether, in light of all the circumstances, the identified acts

or omissions were outside the wide range of professionally competent assistance.” Id.

The Strickland standard must be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-690; see also Harrington, 562 U.S. at 105 (cautioning that an ineffective assistance of counsel claim could potentially function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial). Even under *de novo* review, the standard for judging counsel’s representation is a most deferential one. Harrington, 562 U.S. at 105. Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney’s representation amounted to incompetence under “prevailing professional norms,” **not** whether it deviated from best practices or most common custom. Id. (quoting Strickland, 466 U.S. at 690) (emphasis added).

The second, or “prejudice” prong of Strickland is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Id. at 691–92. In order to prove prejudice, an applicant must demonstrate counsel’s deficient performance 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. A reasonable probability is a probability “sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694. Thus, it is not enough “to show the errors had some conceivable effect” on the outcome of the proceeding—counsel’s errors must be “so serious as to deprive the defendant of a fair trial.” Id. at 687 (emphasis added).

The performance and prejudice standards, however, “do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” *Id.* at 696. Moreover, “there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.” *Id.* at 697. The court “need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *Id.* If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. *Id.*

Findings as to Specific Claims Raised

Applicant has alleged three specific claims of ineffective assistance of trial counsel and asserts that as a result of counsel’s purported errors, he is entitled to a new trial. This Court finds has failed to meet his requisite burden of proof as to each allegation. Each allegation is addressed below:

Allegation #1: Trial Counsel was ineffective for failing to adequately challenge move to suppress the evidence obtained from the draw of Applicant’s blood

Applicant first asserts trial counsel was constitutionally ineffective for failing to adequately challenge and move to suppress any evidence obtained from the draw of Applicant’s blood. This claim is directly refuted by the record, which conclusively establishes that trial counsel moved to suppress this evidence on several grounds, including that the State failed to comply with the proper statutory authorities for conducting a blood draw following a suspected DUI and that Applicant could not have knowingly, voluntarily, and intelligently given consent for law enforcement to obtain a

sample of his blood based on his physical and mental state. The trial court conducted a through pre-trial hearing on this motion, and, after weighing the evidence presented and the argument from both parties, denied the motion to suppress. (ROA. P. 28-66). This Court finds that this motion was not denied based on any failure of counsel regarding argument or presentation, but rather, was based on the uncontradicted evidence presented establishing that Applicant unequivocally and unambiguously gave knowing, intelligent, and voluntary consent to give a blood sample. This is consistent with Applicant's testimony at the evidentiary hearing that although he cannot remember entire days following the accident, he would have given consent if requested. This Court finds Applicant cannot establish any deficiency of counsel, as counsel properly made a motion to suppress, offered the best arguments available, and the motion was ultimately denied on the merits. Moreover, this Court finds Applicant cannot establish any resulting prejudice, as he has failed to show that a motion to suppress would have been granted had counsel made additional argument or that the issue would have been successful on appeal. Accordingly, this Court denies and dismisses this allegation with prejudice.

Allegation #2: Trial Counsel was ineffective for failing to adequately ensure Applicant was competent to proceed to trial

Next, Applicant asserts that trial counsel was ineffective for failing to ensure that he was competent to proceed to trial. This Court finds Applicant has failed to meet his requisite burden of proof as to this allegation. Initially, this Court notes the uncontradicted evidence before this Court establishes that Applicant was competent to stand trial. He was evaluated by the Department of Mental Health and deemed competent with a diagnosis of substance use disorder. Counsel testified he had no trouble communicating with Applicant and Applicant was able to assist him in trial preparation and his defense, echoing what counsel told the trial court at the time of Applicant's trial. Applicant failed to present any evidence that he lacked competency at the time of trial, and,

accordingly, he has failed to meet his burden of proof. See e.g. Matthews v. State, 358 S.C. 456, 459, 596 S.E.2d 49, 50–51 (2004) (holding that in order to find trial counsel ineffective for refusing to request a Blair hearing on petitioner’s competency to stand trial, petitioner must show that counsel was deficient and that the deficiency prejudiced the outcome of petitioner’s proceedings and to show prejudice within the context of counsel’s failure to fully investigate the petitioner’s mental capacity, an applicant need only show a reasonable probability that he was either insane at the time the crime was committed or incompetent at the time of the plea) (citing Jeter v. State, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992)). Accordingly, this Court denies and dismisses this allegation with prejudice.

Allegation #3: Trial Counsel was ineffective for failing to present favorable witnesses at trial

Finally, Applicant asserts that trial counsel was ineffective for failing to present favorable defense witnesses at trial. This claim fails as a matter of law, as Applicant failed to present any witnesses or otherwise offer evidence to support this allegation. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (“This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness’ failure to testify at trial.”) (citing Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998) (applicant established prejudice where nurse’s notes presented at PCR hearing corroborated lack of penetration in sexual assault case); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (where witnesses applicant claimed could have provided an alibi defense did not testify at the PCR hearing, he could not establish any prejudice from counsel’s failure to contact these witnesses); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (where applicant did not offer witnesses at PCR hearing but merely alleged they would have provided him with alibi defense and testified victims had recanted their trial testimony, he failed to establish

prejudice); Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (applicant failed to establish prejudice from counsel's failure to investigate criminal backgrounds of victims and witnesses where he failed to substantiate at PCR hearing that victims and witnesses had criminal records)). Accordingly, this Court denies and dismisses this allegation with prejudice.

CONCLUSION

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

This Court notes that if Applicant wishes to appeal this order, Applicant, though his counsel of record, must file and serve a notice of appeal within thirty days from the receipt of this Order. 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 Gene D. Evans Jr. shall remain remanded to the custody of the State of South Carolina.

AND IT IS SO ORDERED this 26th day of September, 2022.

Columbia, South Carolina


CLIFTON NEWMAN
Presiding Judge - Third Judicial Circuit

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