RECEIVED
Feb 15 2023
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas
Post Conviction Relief

Daniel D. Hall, Circuit Court Judge

Case No.: 2020-CP-29-0632

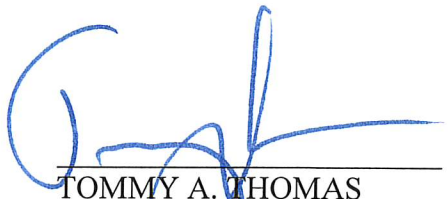
Demario Thompson #323258,..... Petitioner,

vs.

State of South Carolina, ...Respondent.

NOTICE OF APPEAL

Demario Thompson #323258 appeals the order of the Honorable Daniel D. Hall dated October 14, 2022 and filed on October 28, 2022. Appellant received written notice of entry of this order on January 20, 2023.



TOMMY A. THOMAS
Attorney for Petitioner
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

Irmo, South Carolina
February 15, 2023

STATE OF SOUTH CAROLINA COUNTY OF LANCASTER	IN THE COURT OF COMMON PLEAS FOR THE SIXTH JUDICIAL CIRCUIT
Demario Thompson, #323258, Applicant, v. State of South Carolina, Respondent.	Case No.: 2020-CP-29-0632 **ORDER OF DISMISSAL**

This matter comes before the Court by way of Applicant Demario Thompson's application for post-conviction relief (PCR) filed April 4, 2020. On September 8, 2020, Respondent filed a return and motion to dismiss. On August 4, 2021, the Court issued an order denying Respondent's motion to dismiss. Thereafter, Respondent filed an amended return on February 8, 2022, requesting an evidentiary hearing.

On September 2, 2022, an evidentiary hearing convened before the Honorable Daniel D. Hall at the Lancaster County Courthouse. Applicant was present and represented by Tommy Thomas, Esquire. Assistant Attorney General Danielle Dixon represented Respondent. Applicant testified and called as a witness his trial attorney T. Brandon Steen, Esquire. During cross-examination of Steen, the State played for the Court a 911 call of the victim that was entered into evidence at trial. Following a thorough review of the trial transcript and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant did not meet his burden of proof. Thus, this Court denies relief and dismisses this application with prejudice.

Procedural History

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lancaster County Clerk of Court. In October 2014, the Lancaster Grand

Jury indicated Applicant for first-degree burglary (2014-GS-29-1321), attempted murder (2014-GS-29-1322), two counts of pointing and presenting a firearm, and possession or display of a firearm or knife during the commission of a violent crime. These charges arose after Applicant entered the apartement of his girlfriend, Keasha Drafton, and they got into an argument, resulting in Drafton and a neighbor calling 911.

On January 5-6, 2015, Applicant proceeded to a jury trial before the Honorable Brian M. Gibbons. Applicant was represented by T. Brandon Steen. Assistant Solicitor Andy Cook prosecuted the case. Prior to trial, Applicant moved to exclude testimony from the apartment complex manager regarding a trespass notice banning Applicant from the property. Applicant raised several grounds, including improper character evidence under Rule 404(B), SCRE, and undue prejudice under Rule 403, SCRE. The Court denied the motion. (Tr. 23-35).

During trial, Deputy Rueben Silberman testified he responded to a disturbance call at an apartment complex between 4:00 and 5:00 a.m. on July 2, 2014. When he arrived, he spoke with Drafton, who was very upset. Deputy Silberman averred Drafton had been in a physical alteration, explaining she had wounds on her head and neck and her clothes were torn. Deputy Silberman also noticed Drafton's apartment door had been kicked in and was hanging off the hinges; he took pictures of the door, which were entered into evidence. Applicant was not present, but Deputy Silberman spoke with Drafton's neighbors. (Tr. 52-61).

Dominique Huff testified he lived across the hallway from Drafton and was in his apartment the morning of July 2, 2014, when he heard a disturbance coming from Drafton's apartment. He went outside and saw Drafton's apartment door hanging off the hinges. Huff stated it was dark inside the apartment, but he heard "a whole bunch of commotion." He initially returned to his apartment but heard someone yell "he had a gun," so Huff grabbed his gun and went back

outside. Huff testified he saw Applicant downstairs arguing with another neighbor. He also saw Drafton come out of her apartment crying hysterically. (Tr. 62-70).

Jamie Hunt, who lived with Huff and their three children, recalled waking early on the morning of July 2, 2014, after hearing "the disturbance and someone kicking in doors and stuff." She testified Huff went outside and then returned and told her to call 911. (Tr. 71-73).

The apartment complex manager testified Applicant had never been a resident. She testified she prepared a letter on March 18, 2014, advising Drafton that Applicant was banned from the complex, and Drafton signed the letter acknowledging she understood it. (Tr. 73-76). The letter, which was entered into evidence over objection, stated Applicant was banned from the complex and would be charged with trespassing if he returned. It also advised Drafton that her lease would be terminated if she allowed Applicant to enter her apartment or was found in Applicant's presence on the property.

Drafton did not appear at trial. The State moved to enter a 911 call Drafton placed the night of the incident. Applicant objected, raising several arguments including that it violated the Confrontation Clause. After hearing argument and listening to the recording, the Court overruled Applicant's objection and allowed the call into evidence. (Tr. 77-83).

After the State rested, the court granted Applicant's directed verdict motion on both pointing and presenting charges but submitted the possession of a weapon charge to the jury. (Tr. 91-98, 103). The jury convicted Applicant of first-degree burglary and, on the attempted murder indictment, the lesser-included offense of third-degree assault and battery. The jury acquitted Applicant of possession or display of a firearm during a violent crime. Judge Gibbons sentenced Applicant to fifteen years' imprisonment for first-degree burglary and time served for third-degree assault and battery.

Applicant timely appealed, and Appellate Defender John Strom submitted a brief asserting the tiral court erred in (1) admitting the no-trespass notice letter because it was irrelevant, unfairly prejudicial, hearsay, and impermissible bad act evidence; (2) admitting the 911 call because it was not properly authenticated and it violated the Confrontation Clause; (3) denying a directed verdict on the burglary charge when the State failed to present evidence that Applicant intended to commit a crime inside the apartment or injured the victim while committing a burglary; and (4) denying his new trial motion when the cumulative effect of the errors was so prejudicial as to deprive Applicant of a fair trial. On June 29, 2017, the Court of Appeals issued an opinion affirming. State v. Thompson, 420 S.C. 386, 803 S.E.2d 44 (Ct. App. 2017). Thereafter, Applicant petitioned for a writ of certiorari to the Supreme Court of South Carolina. The Supreme Court initially granted certiorari but later dismissed it as improvidently granted. State v. Thompson, 426 S.C. 325, 826 S.E.2d 871 (2019). The remittitur was sent April 3, 2019.

Current Application

Applicant untimely commenced this PCR action on April 8, 2020.[1] In his original application, Applicant alleged counsel was ineffective for (1) not presenting Drafton as a witness and (2) failing to object to portions of the State's closing argument concerning Applicant possessing and pointing a firearm when the court dismissed those charges and no evidence supported the argument. Prior to the PCR hearing, Applicant amended his application to allege counsel was ineffective for not presenting evidence to contravene the allegations that he entered the victim's dwelling by kicking in the door. At the close of the hearing, counsel for Applicant

[1] The State filed a motion to dismiss, which was denied after the Court found equitable tolling should apply pursuant to Mose v. State, 420 S.C. 500, 803 S.E.2d 718 (2017).

also argued plea counsel was ineffective for not objecting to testimony by Deputy Silberman that the victim had been strangled, contending this was improper lay testimony.

Testimony Presented at the Evidentiary Hearing

At the PCR hearing, Applicant testified he never bonded out and was detained for six months prior to his trial. He stated plea counsel was appointed to represent him and visited him twice. Applicant averred he did not have the opportunity to discuss defenses with plea counsel; he explained it "came up a couple of times but was so brief."

Applicant testified Drafton was his girlfriend, and her door was damaged prior to the incident giving rise to the burglary charge. Applicant explained police had kicked in the door after being notified of a prior altercation involving Applicant and Drafton. Applicant believed plea counsel should have obtained the incident report to show the door was previously damaged. He maintained he did not damage the door on the night of the incident giving rise to the burglary charge. Applicant admitted Drafton could not tell the apartment manager about the damaged door because she would be evicted due to prior altercations between her and Applicant. He also admitted he was not on Drafton's lease and was aware of the no-trespass letter.

Applicant recalled reviewing the discovery with trial counsel. He testified he did not plead guilty because he was told the trial would not go forward if Drafton did not appear, and Applicant's understanding was Drafton was not going to appear. He explained Drafton did not want the case to be prosecuted and had signed a document to that effect. Applicant also contended he was charged with the wrong offense; he believed malicious injury to property and possibly assault and battery would be the proper charges. When asked why he believed malicious injury to property would be the appropriate charge, he replied, "Because I was hitting it." Applicant acknowledged Drafton told him to leave when he went to the door on the night of the incident giving rise to the

burglary charge. He also acknowledged telling the trial court during sentencing that Drafton would not let him into the apartment that night. When asked what he did when she did not let him in, he replied, "Beat on the door until it came open."

Although Applicant stated he did not plead guilty because he was told the trial would not go forward if Drafton did not appear, he also contended trial counsel should have presented Drafton as a witness. He acknowledged Drafton was subpoenaed by the State but did not appear at trial.

Trial counsel testified he was appointed to represent Applicant shortly after Applicant was arrested and had ample time to prepare for trial. He stated Drafton called him frequently because she wanted the charges dropped. However, he clarified that Drafton never told him the incident did not occur. Plea counsel stated his strategy was to attempt to keep Drafton's statements out so there would be insufficient evident to convict Applicant. He acknowledged Drafton did not appear for trial and explained he never considered calling her as a witness because he believed the case was better off without her. However, he explained he had prepared for both if she appeared and if she did not appear.

Trial counsel stated he discussed the plea offers with Applicant, but Applicant was not willing to plead to anything other than time served. He further averred Applicant may have pled to injury to the door, trespassing, and simple assault. Regarding the broken door, trial counsel stated he did not further investigate that issue because Drafton told him the door had been kicked in during a prior altercation with Applicant. Trial counsel did not recall Applicant raising this issue with him. Trial counsel acknowledged the State presented evidence and made argument about the door being kicked in. He averred combatting evidence that the door was kicked in that night could be useful for the attempted murder charge.

Trial counsel acknowledged he did not object when Deputy Silberman testified, "I took a picture to show that there was a wound on her neck, it appeared to be the result of some sort of strangulation." (59-60, 24-25). He also acknowledged the evidence pertaining to the gun charges was very weak. Trial counsel agreed the 911 call was the strongest evidence and noted made several arguments to have it excluded.[2] He further agreed the 911 call was sufficient to support a finding that Applicant had a gun. Trial counsel believed he did everything he could to keep out the 911 call. He stated he also challenged the introduction of the no-trespass letter.

Findings of Fact and Conclusions of Law

This Court had before it the Lancaster County Clerk of Court records, Applicant's records from the Department of Corrections, the trial transcript, Applicant's appellate records, and the records of this PCR action. This Court has had the opportunity to review the trial transcript in its entirety and has heard the testimony at the PCR hearing. This Court also had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony. After a careful review based on the Strickland standard set forth below, this Court finds Applicant has failed to carry his burden of proof. Below are this Court's findings of facts and conclusions of law as required by section 17-27-80 of the South Carolina Code (2017).

Ineffective Assistance of Counsel

In a PCR action, an applicant bears the burden of proving the allegations. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). An applicant alleging ineffective assistance of counsel must prove "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. at 441, 334 S.E.2d at 813.

[2] The 911 call was played during the PCR hearing; during the call, the caller identifies herself as Drafton, identifies Applicant as the perpetrator; and states Applicant had a gun.

"The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." Watson v. State, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. at 441, 334 S.E.2d at 813. An applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Strickland, 466 U.S. at 687–88; Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625. To establish prejudice, the applicant must prove "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.

Failure to call Drafton as a witness

Applicant contends counsel was ineffective for not calling Drafton as a witness. This Court finds Applicant has failed to prove counsel was ineffective in this regard. At the PCR hearing, trial counsel stated he did not plan to call Drafton because he believed the case would be better without her testimony. He testified that although Drafton wanted the charges dropped, she never indicated it did not happen. This Court finds credible the trial counsel's testimony that Drafton never indicated this incident did not occur. Considering that, this Court finds trial counsel articulated a valid strategy for not calling Drafton as a witness and thus was not deficient. See Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) ("[W]here counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel."). Further—and critically—Drafton did not testify at the PCR hearing; thus,

Applicant did not prove prejudice from counsel's failure to call her as a witness. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) ("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."). Based on the foregoing, this claim is denied and dismissed with prejudice.

Failure to object to closing argument

In his application, Applicant contends plea counsel was ineffective for failing to object to portions of the State's closing argument concerning Applicant possessing and pointing a firearm when the trial court dismissed those charges and no evidence supported the argument. During closing argument, the State argued, "It was 4:00 in the morning, he comes in with a gun and beats her, and by the time law enforcement gets there he's gone." (Tr. 106). When discussing the attempted murder, the State argued, "She also said he had a gun. Luckily, he didn't use the gun on her, but she said on that 911 call that he's got a gun. . . . [I]f you think he went in there, chocked her, had a gun with him its ABHAN, nothing else." (Tr. 108). When discussing first-degree burglary, the State argued:

> [H]e went in the dwelling without consent to commit a crime, and either when going in the house he or somebody else participated in the crime, it was just him, is armed with a deadly weapon. You heard Ms. Drafton's 911 call, she's screaming, "He's got a gun." He has a gun. . . .
>
> Or uses or threatens the use of a dangerous instrument. A gun is a dangerous instrument. You heard on the 911 call, she's terrified. She said he's standing there with the gun in his hand. It couldn't be much clearer than he's standing there with the gun in his hand. "He's got a gun, he's in my apartment." Or displays what appears to be a pistol, revolver, knife, shotgun, machine gun. She knew exactly what it was, she told 911 it's a gun. . . .
>
> [Y]ou could say he went in the house without consent to commit a crime and he had a gun. Or he went in the house without consent to

commit a crime and he showed a gun." (Tr. 112-13). Finally, when discussing whether Drafton was the 911 caller, the State argued, "But a call comes in, says he kicked in my door, he's got a gun." (Tr. 114).

This Court finds these statements were supported by evidence presented at trial. Specifically, in the 911 call, the caller—who identified herself as Drafton—indicated Applicant had a gun. Thus, evidence supported these arguments, and there was no basis to object. Because there was no basis to object, counsel was not deficient for not objecting. Likewise, Applicant did not suffer prejudice from counsel's failure to object, as this Court finds it is not reasonably likely the outcome would have been different had counsel objected. Thus, this claim is denied and dismissed with prejudice.

Failure to submit evidence of prior damage to the door

Applicant focused much of his PCR testimony and argument on trial counsel's failure to investigate and introduce evidence that the door had been previously damaged. At the PCR hearing, trial counsel recalled Drafton told him the door was previously damaged, but counsel explained he did not further investigate that issue because he understood it was damaged during a prior altercation involving Applicant. Trial counsel further testified Applicant never asked him to investigate that issue. This Court finds credible counsel's testimony that Applicant never asked him to investigate this issue. This Court further finds trial counsel articulated a valid reason for not further investigating the damage to the door. Specifically, counsel explained his understanding was the door had been damaged during a prior altercation between Applicant and Drafton. Because Applicant was facing attempted murder charges related to Drafton, this Court finds counsel's decision to not further pursue this evidence was reasonable and consistent with prevailing professional norms. Thus, Applicant did not prove counsel was deficient.

Likewise, Applicant did not prove prejudice. This Court finds it is not reasonably likely the outcome would have been different had Applicant presented evidence that the door was previously damaged by police during an altercation between Applicant and Drafton. In fact, such evidence could have made it *more* likely the jury would convict Applicant on these charges. Based on the foregoing, this claim is denied and dismissed with prejudice.

Failure to object to testimony by Deputy Silberman

At the PCR hearing, Applicant asserted counsel was ineffective for not objecting when Deputy Silberman testified, "I took a picture to show that there was a wound on her neck, it appeared to be the result of some sort of strangulation." (59-60, 24-25). Specifically, he asserted this was improper expert testimony. This Court finds this allegation lacks merit. The foregoing testimony by Deputy Silberman described what he observed; he was not making a medical conclusion. This Court finds this was proper lay testimony. See Rule 701, SCRE ("If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training."). Thus, there was no basis to object and counsel was not deficient for not objecting. Likewise, this Court finds it is not reasonably likely an objection to this testimony would have changed the outcome, and Applicant has not shown prejudice. Thus, this allegation is denied and dismissed with prejudice.

CONCLUSION

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. Thus, this application is denied and dismissed with prejudice.

Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty days of receipt by counsel of written notice of entry of judgment. See Rule 203, SCARC. Pursuant to Austin v. State, 305 S.C. 453, S.E.2d (1991), an applicant has the right to an appellate counsel's assistance is seeking review of the denial of PCR. Pursuant to Rule 71.1(g), SCRCP, if an applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on the applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for PCR is denied and dismissed with prejudice; and

2. Applicant must be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED this 14th **day of** October **, 2022.**

DANIEL D. HALL
Presiding Judge
Sixth Judicial Circuit

York, South Carolina

RECEIVED
Feb 15 2023
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
COUNTY OF LANCASTER
IN THE COURT OF COMMON PLEAS

DEMARIO THOMPSON Applicant,

v.

STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon Opposing Counsel by mailing one copy in the United States mail, postage prepaid, addressed to his counsel of record:

Tommy A. Thomas, Esquire
Post Office Box 88
Irmo, SC 29063

This 20th day of January, 2023.

Summer Etheredge
Legal Assistant for Respondent