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Aug 15 2023

SC Court of Appeals



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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

August 15, 2023

The Hon. Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Julius C. Curry v. State, App. Case No. 2019-002004

Dear Ms. Kitchings:

Please allow this letter to respond to the Court's letter dated August 11, 2023, requesting the date PCR counsel received written notice of the Order of Dismissal in this case. Mr. Curry's PCR counsel was L. Sherril Davis. I contacted Ms. Davis upon receiving the Court's letter. She very promptly responded.

While Ms. Davis does not recall the exact date she received the Order of Dismissal, she located in her file the Attorney General's letter sending it to her along with a certificate of service. The Attorney General's letter and certificate are dated November 21, 2019. I have attached that letter and certificate for the Court's review. Ms. Davis served her Notice of Appeal on the State on December 4, 2019, and it was filed on December 9, 2019, in this Court. This makes the service and filing of the Notice of Appeal well within the thirty-day filing requirement.

If the Court has any further questions or concerns, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink, appearing to read "D. Alexander", is written over the typed name and title.

David Alexander
Appellate Defender

c. L. Sherril Davis, Esq. (w/o enclosures)
Don Zelenka, Esq.



ALAN WILSON
ATTORNEY GENERAL

November 21, 2019

L. Sherril Alford, Esquire
The Law Offices of L. Sherril Alford, LLC
1735 Heckle Boulevard
Suite 103-253
Rock Hill, South Carolina 29732

**Re: Calvin J. Curry, Sr., #327963 v. State of South Carolina
2016-CP-13-00652**

Dear Ms. Alford,

Enclosed please find a copy of the **Order of Dismissal** for the above-captioned post-conviction relief application; signed by the Honorable Brooks P. Goldsmith Judge for the Fourth Judicial Circuit.

Sincerely,

Jacob A. Isenberg
Assistant Attorney General

JAI/ec
Enclosure

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

CALVIN J. CURRY, SR.,

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 the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

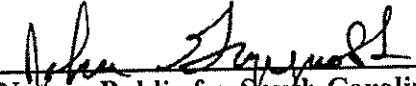
L. Sherril Alford, Esquire
The Law Offices of L. Sherril Alford, LLC
1735 Heckle Boulevard
Suite 103-253
Rock Hill, South Carolina 29732

This 21st Day of November, 2019.



EVA COOK
LEGAL ASSISTANT FOR RESPONDENT

SWORN to before me this 21st day of November, 2019.



Notary Public for South Carolina.
My Commission Expires: 8/2/28

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHESTERFIELD) FOR THE FOURTH JUDICIAL CIRCUIT

Julius Calvin Curry Sr.,) Case No.: 2016-CP-13-00652
S.C.D.C. No. 327963,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

ORDER OF DISMISSAL

2019 OCT 21 AM 11:18
Wanda C. Miles
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.

This matter comes before the Court by way of an application for post-conviction relief filed by Julius Calvin Curry, Senior ("Applicant") on August 13, 2016. Respondent made its return on or about June 8, 2017. The Court convened an evidentiary hearing into the matter on August 21, 2019, at the Chesterfield County Courthouse in South Carolina. Applicant was present at the hearing and represented by Sherril Alford, Esquire. Jacob A. Isenberg, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Matthew Swilley, Esquire ("Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Chesterfield County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and appropriate pleadings. Accordingly, after a thorough review of all evidence and testimony in the record, this Court finds the application shall be dismissed with prejudice.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Chesterfield County. Applicant was indicted at the January 2014 term of the Grand Jury for Chesterfield County for criminal domestic violence of a high and aggravated nature (20 13-GS- 13-0697), assault and battery, second degree (20 13-GS- 13-0698), resisting arrest with a deadly weapon, first offense (20 13-GS- 13-0699), and attempted murder (2013-GS-13-0700). Matt Swilley, Esquire represented Applicant. Kernard Redmond and Adam Foard, of the Fourth Circuit Solicitor's Office, prosecuted the case. Applicant proceeded to trial before the Honorable Paul M. Burch and a jury on March 3, 2014. The jury acquitted Applicant of indictment -0697, but found Applicant guilty as indicted on indictments -0698 and 0699, and of the lesser included offense of assault and battery in the first degree on indictment 0700. Judge Burch sentenced Applicant to imprisonment for consecutive terms totaling at twenty one and one-half years.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Katherine H. Hudgins, Esquire. By opinion decided June 1, 2016, the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Curry. Op. No. 2016-UP-224 (S.C. Ct. App. filed June 1, 2016). The Remittitur was issued on July 21, 2016.

II. PRESENT APPLICATION

In his amended post-conviction relief application, Applicant alleges he is he
unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. "Counsel did not provide adequate information or time to prepare for trial."

2019 OCT 21 AM 11:18
Wanda C. Miles
CLERK OF COURT
CHESTERFIELD COUNTY, SC

- b. "Counsel failed to object to State's prejudicial comments during opening remarks."¹
- 2. Jury was stacked
 - a. "Six of the members of my jury was related to or acquainted with two of the plaintiffs."

Applicant requests relief as follows:

- "Retry"

At the evidentiary hearing, Applicant withdrew his claim of ineffective assistance of counsel based upon the failure to object to improper jury relations.

2019 OCT 21 AM 11:18
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 CHESTERFIELD COUNTY, S.C.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "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.

¹ Tr. 51, L. 19-25. Tr. 52, L. 1-8.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove that counsel's performance was deficient. Strickland, 466 U.S. at 686; Cherry v. State, 300 S.C. 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). 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. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). "When 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 v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Cullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington v. Richter, 562 U.S. 86, 109-10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough at 6; see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced 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. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the

2018 OCT 21 11:18 AM
Wanda C. Miles
CLERK OF COURT
CHRISTENFIELD COUNTY, N.C.

evidence before the judge or jury.” United States v. Basham, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting Elmore v. Ozmint, 661 F.3d 783, 858 (4th Cir. 2011)).

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.

I. Failure to Prepare for Trial

Applicant alleges Counsel deficiently failed to review discovery with him in preparation for trial. In reviewing a claim that defense counsel failed to properly investigate a defense to a crime, a court's principle concern is whether the investigation “was itself reasonable.” Taylor v. State, 404 S.C. 350, 364, 745 S.E.2d 97, 104 (2013). Additionally, Counsel is not deficient in conducting a reasonable investigation as long as they interview potential witnesses “when it is reasonable to do so.” Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011).

Here, Applicant testified Counsel began representing him a month before trial. Applicant further testified Counsel only met with him three or four times for about forty-five minutes each. Thereafter, Applicant testified Counsel only ever reviewed incidents reports and arrest warrants with him.

On the other hand, Counsel credibly testified he had enough time to prepare for this case. Counsel credibly testified they reviewed all available discovery when meeting in preparation for trial. Counsel credibly testified reviewing the discovery led to him to independently investigating the case. Specifically, Counsel credibly testified he independently interviewed Marshall Wright.

Wanda C. Miles
CLERK OF COURT
WESTERFIELD COUNTY, S.C.
2019 OCT 21 AM 11:18



Additionally, Counsel credibly testified Wright gave him a tour of the house where everything took place. Thereafter, Counsel credibly testified he anticipated she was going to be a favorable witness at trial. However, Counsel credibly testified Wright provided unfavorable testimony at trial which was not disclosed during their interview.

Wanda G. Miles
CLERK OF COURT
WESTFIELD COUNTY, S.C.
199 OCT 21 AM 11:18

Additionally, Counsel credibly testified jailhouse phone calls were not made available until shortly before trial. However, Counsel credibly testified he had sufficient time to review everything with Applicant.

Accordingly, this Court finds Counsel provided credible testimony on his preparation for this trial. The record reflects Counsel made an objection to jailhouse phone calls based upon a discovery violation. (Tr. 32-6). Thereafter, he consented to a continuance to ensure proper time was afforded to review them. (Tr. 38). After an appropriate recess, Counsel notified the trial court he reviewed the jailhouse recordings with Applicant as well as withdrew the objection based upon a discovery violation.² (Tr. 40). Applicant has failed to explain how this pretrial review was insufficient. Moreover, the record also reflects Counsel cross-examined Wright on previously undisclosed statements. (Tr. 78, 86). Therefore, this Court finds Counsel reasonably investigated this case in preparation for trial. Moreover, this Court finds Counsel reasonably reviewed evidence with Applicant in preparation for trial. As a result, this Court finds Applicant has failed to overcome the burden to prove Counsel was deficient in preparing for trial.

Applicant contends Counsel's alleged failure to review discovery with him prejudiced their preparation for trial. To prove prejudice in an alleged failure to prepare the case, an applicant must show how additional preparation would have made a difference in the outcome. Skeen v. State,

² Counsel did object to their admissibility based upon 403. (Tr. 40).

325 S.C. 210, 481 S.E.2d 129 (1997) (finding no prejudice where applicant could not show how moving for a continuance would have been helpful to his case).

The issue is whether the jailhouse phone-call disclosure necessitated a continuance in preparation for trial. The phone-calls were apparently between Applicant and Wright (Tr. 75). During those conversations, Applicant apparently pressured Wright to not move forward with the case. (Tr. 75). Moreover, Applicant apparently requested Wright encourage the minor victim to not move forward with their case. (Tr. 75). Wright testified Applicant did this over the course of two or three phone calls. (Tr. 76). Subsequently, Counsel objected to allowing the jury to hear these recordings based upon the following: 1) Rule 403; and 2) Hearsay. (Tr. 163). The trial court overruled both objections. (Tr. 163). Thereafter, Applicant testified Wright did not want him to be prosecuted. (Tr. 188). He further testified she came to see him as much as possible until the Sheriff's Office intervened. (Tr. 188). Applicant also testified Wright wrote him letters while he was in jail. (Tr. 188). Finally, Applicant testified they still intended to get married after this incident. (Tr. 188). During closing arguments, Counsel highlighted Wright was still Applicant's girlfriend during these jailhouse conversations. (Tr. 217).

Accordingly, the record indicates Applicant reviewed the relevant phone-calls with Counsel before Counsel notified the trial court a continuance was not necessary. (Tr. 40). It also reflects the Court of Appeals held the trial court did not commit error in allowing the jury to hear them. Finally, the jury acquitted Applicant on the criminal domestic violence charge regarding Wright. (Tr. 264). Therefore, this Court finds Applicant has not provided any credible evidence to prove additional preparation would have impacted the outcome. As a result, Applicant has failed to overcome the burden to prove prejudice suffered from alleged deficiencies in trial preparation.

2019 OCT 31 AM 11:11
Wanda C. Miles
CLERK OF COURT
CHESTERFIELD COUNTY, MO



2. Failure to Object to Opening Statements

Applicant contends Counsel's failure to object to improper remarks opening statements about law enforcement prejudiced him.³ To establish ineffective assistance of counsel based upon objecting to opening statements, Applicant must show there is reasonable probability the result of proceedings would have been different; in such context, "reasonable probability" is one sufficient to undermine confidence in outcome. German v. State, 325 S.C. 25, 478 S.E.2d 687 (1996) (finding counsel was ineffective where he failed to object to improper opening remarks about applicant's character).

The statement, from the Assistant Solicitor, at issue is as follows:

Let me just say this: rely on law enforcement to protect and serve. There's a problem, we feel threatened, we call 911 and law enforcement arrives. We rely on them. But we also owe them, and that I mean in a situation like this when you have a defendant that endeavors to take the life of a law enforcement officer we all should regard that as a slap against us all. As a strike against all of us because we have asked them to serve and protect us. And then we find ourselves faced in courtroom today because this defendant, rather than respecting the authority and submitting to an arrest, that was lawful decided to in essence take - *try to take the life of Sergeant Combs.*

So this is our chance to protect them and thank them for protecting us.

(Tr. 51, L. 19-25)(Tr. 52, L. 1-8)(emphasis added).

Applicant was on trial for the following crimes where Sergeant Combs was the victim: 1) Resisting arrest with a deadly weapon; and 2) Attempted murder. During deliberations, the jury asked for clarification about the difference between attempted murder and the lesser-included

³ However, this Court notes Applicant credibly testified the statements did not actually prejudice him at trial.

Wanda C. Miles
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2019 OCT 21 AM 11:19



offense of assault and battery in the first degree. (Tr. 260). The trial court then defined both statutes. (Tr. 260-1). Thereafter, the jury convicted Applicant of the lesser-included offense of first degree assault and battery.

Accordingly, the Assistant Solicitor claimed Applicant tried to take the life of Sergeant Combs. Later on, the trial court instructed that attempted murder requires the intent and attempt to kill. (Tr. 260-1). However, the jury acquitted Applicant on attempted murder. Therefore, this Court finds it is reasonable to infer the jury concluded Applicant did not try to take the life of Sergeant Combs. Moreover, this Court finds there is no reasonable probability the alleged inappropriate opening remarks undermined the outcome of this trial. As a result, Applicant has failed to overcome the burden to prove he suffered prejudice from these remarks.

III. 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 application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRPC provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

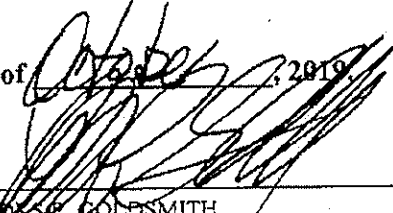
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Yonda C. Miles
CLERK OF COURT
CHRISTIANFIELD COUNTY, S.C.



IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 9th day of October, 2019



BROCK S. GOLDSMITH
Presiding Judge
Fourth Judicial Circuit

Wanda C. Miles
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.

2019 OCT 21 AM 11:19