THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

Appeal from Charleston County
Court of Common Pleas

Honorable Kristi F. Curtis, Circuit Court Judge

Case No.: 2020-CP-10-0902

GERALD ANCRUM, # 276401 .... Appellant,

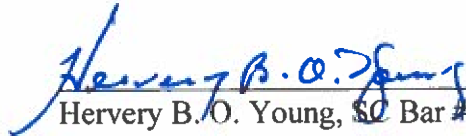
v.

THE STATE .... Respondent.

NOTICE OF APPEAL

Gerald Ancrum, #276401, appeals the order dated October 3, 2023, of the Honorable Kristi F. Curtis denying his Post-Conviction Relief application. Appellant received written notice of entry of this order on October 12, 2023.

November 6, 2023



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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
GERALD ANCRUM, #276401 Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2020-CP-10-0902 **ORDER OF DISMISSAL**

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This matter comes before this Court by way of Applicant Gerald Ancrum's Application for Post-Conviction Relief and Amended Application for Post-Conviction Relief filed February 19, 2020 and February 24, 2022, challenging his conviction for Distribution of Heroin. Respondent State of South Carolina filed a return August 3, 2020 seeking to require an amended application specifically setting forth the grounds upon which the application was based. The Amended Application alleged "ineffective assistance of counsel" as the grounds for the Application. An evidentiary hearing on this action was convened June 24, 2022, before this Court. Applicant appeared with his counsel, James K. Falk. Respondent State of South Carolina was represented by Lauren Mims of the South Carolina Attorney General's Office. Applicant proceeded forward on the claims raised in his Application and Amended Application. This Court heard testimony from Applicant and his former trial counsel, Melisa Gay ("Counsel").

Following a review of the record and the testimony and 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 dismisses this action with prejudice. Specific findings of fact and conclusions of law as required pursuant to S.C. Code Ann.

2015-GS-1002966; 2015-GS-1002970; 2015-GS-1002971; 2015-GS-1002974

§ 17-27-80 are set forth below:

FACTUAL AND PROCEDURAL HISTORY

The records before this Court establish Applicant is currently incarcerated in the South Carolina Department of Corrections.

This case began when, on February 5, 2015, during a recorded call from a confidential informant to Applicant, the Applicant agreed to meet and sell heroin to the CI, in exchange for cash. Prior to the meeting, the CI was searched and found to have no drugs or money on her. She was given money and placed in an undercover car with an undercover officer, who drove to the location the Applicant suggested, which was "kind of near" the Dunkin' Donuts area in West Ashley in Charleston County, South Carolina. In addition to the CI riding with law enforcement to the location, she was wired (audio and video) so law enforcement could clearly see and hear the exchange. There was both audio and video evidence of the CI getting out of the undercover car, going to Applicant's car, and returning with the heroin that Applicant had agreed to sell to her. The audio wire reflects she called the Applicant by name ("Gerald"). Additionally, multiple other officers were around the area to see and hear the portions of the exchange that were visible and audible (via the wires) to them. Following the deal, the CI returned to the undercover officer and car, and placed the drugs in the car's center console as previously instructed. She then was driven back to a "secure location" where she was again searched and found to have no drugs or cash on her, having used the cash she was provided to buy the drugs and having turned the drugs over to law enforcement personnel.

Following the events above, in July 2015, a Charleston County Grand Jury indicted Applicant for two charges of distribution of heroin (2015-GS-10-02966 and -02970), distribution

of crack cocaine (2015-GS-10-02971), and trafficking in heroin (2015-GS-10-02972). On May 23 and 24, 2017, a jury trial was held in Charleston County in front of the Honorable William P. Keesley. The trial was on one of the charges of distribution of heroin and the charge of distribution of crack cocaine. Applicant was represented by Melisa Gay, Esquire. Assistant Solicitors' Stephanie B. Linder and Whit Sowards represented the State.

Following testimony, which included the facts above as well as the CI's identification of Applicant, the jury convicted Applicant of one count of distribution of heroin. A mistrial was declared on the distribution of cocaine. Following the verdict, Applicant conceded that the heroin conviction was his third offense. The trial judge sentenced Applicant to a term of 15 years imprisonment.1

Applicant then filed a notice of appeal, challenging his trial conviction for distribution of heroin. The South Carolina Court of Appeals affirmed Applicant's conviction by unpublished opinion No. 2019-UP-075, filed on February 13, 2019. The Remittitur was issued to the lower court on June 28, 2019. This PCR followed.

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1 Following this conviction, Applicant still faced multiple drug charges in Charleston County. Applicant subsequently pled guilty to several of these charges, in exchange for a sentence of twelve years run concurrent, and dismissal of several other distribution charges. Tr. p. 5, l. 3 – 9; Id. at p. 8, l. 8 – 13. At the PCR evidentiary hearing in this case, there was some discussion of Applicant desiring to contest both the May 23 and 24, 2017 trial result and the subsequent guilty plea in this one proceeding. PCR Hrg. Tr. p. 5, l. 23 to p. 6, l.5. After discussing with counsels the issues raised during the testimony of the Applicant, and after PCR Counsel talked with the Applicant, Applicant's PCR counsel indicated "since we're talking about two separate events; the adjudication on the pleas and the twelve year sentences (resulting from the pleas) and the adjudication on the 15 year trial (which was the trial held May 23 and 24, 2017) … it's in my client's best interest to bifurcate this at this time and just go forward today on the issues that I raised in the amended PCR relative to the trial. . . my client should have an opportunity to bring these issues as far as being sort of an involuntary guilty plea that he should immediately file a PCR on those three claims and then we'd have discussion with the Court at another time about whether or not some equitable toll should apply so that he can still go forward with those." Tr. p. 27, l. 11-1825. Thereafter, this court limited the current PCR proceeding to the issues raised in Applicant's amended application for post-conviction relief pertaining to the jury trial only and not the guilty plea. Any matters regarding the subsequent guilty pleas are not issues before the court at this time. Tr. p. 27, l. 11 – p. 28, 3-6.

ALLEGATIONS BEFORE THE COURT

In the original application, filed February 19, 2020, the pro se Applicant raised the following:

1. "Ineffective assistance of counsel."
    a. Denial of a fair trial due to ineffective assistance o counsel.
2. "6th Amendment violation."

In his amended application for post-conviction relief, filed on February 24, 2022, Applicant, through appointed counsel James Falk, alleged his trial counsel provided ineffective assistance of counsel because:

1. Counsel failed to object to testimony by an ATF investigator that confidential informants ("CI's") are chosen because they "have a history" with the targets of the drug investigation;
2. Counsel's cross-examination of the ATF investigator opened the door that it was because of the CI's drug history that she had a prior relationship with the Appellant; and
3. Counsel cross-examined the CI regarding the nature of her prior relationship with Appellant, which opened the door for the State's re-direct examination.

The State's return was filed before Appellant's amended return, which listed the issues above. Before this Court are the records from Applicant's general sessions proceedings, his appellate records, his SCDC records, and the records from this current PCR proceeding.

At the evidentiary hearing Applicant proceeded forward on the grounds above, which were

set forth in his Amended Application.

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 vacated with prejudice.

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).

The ground for relief upon which Applicant proceeded at the evidentiary hearing pertains to alleged 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). It is common that 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), SCRCP; 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 "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."). 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 trial 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). "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Id. at 668. In determining prejudice, the reviewing court must consider the totality of the evidence before the jury. Id. at 695.

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 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 have his conviction vacated with prejudice. This Court finds Applicant has failed to meet his requisite burden of proof as to each allegation. Each allegation is addressed below:

Allegation #1: Counsel was ineffective for failing to object to testimony by an ATF

investigator that confidential informants ("CI's") are chosen because they "have a history" with the targets of the drug investigation.

Applicant first asserts Counsel was constitutionally ineffective for failing to object to the testimony of ATF investigator Frank Preston that confidential informants are chosen because they have "a history" with the targets of the drug investigation. Investigator Preston further testified that "Ms. Morris (the CI) had information about her past dealings, about her past drug uses and drug purchases. She identified several individuals who she's gone to before, who she's purchased drugs before." Trial transcript, p. 89, l. 1 – p. 90, l.5. Applicant argues that since this CI was used as a CI to make a controlled purchase from him, this testimony allowed the jury to infer that the CI had personal knowledge that Applicant had sold drugs in the past.

Counsel testified that she did not object to this testimony because the ATF investigator was not talking of the specific informant in Applicant's case, but rather, in general, about using informants. PCR hearing transcript, p. 34, l. 1-2. At the PCR hearing, Counsel indicated she did not object because "it (the testimony) wasn't specifically discussing the informant and Mr. Ancrum (the Applicant). ...he's describing what the process is and how they set up people for drug buys and I was dealing with a drug buy case. So I did not object." Id. at p. 34, l. 7-13.

Counsel testified that she has been practicing law thirty years, with the majority of her practice being criminal. Id. at p. 40, l. 8-12. She was retained by Applicant and had represented him on multiple charges, including his first trafficking case which they won. Id. at p. 40, l. 12-18. They met before trial and talked trial strategy and "there is no part of me (Trial counsel) that thought I didn't talk to him enough. I felt that we had prepared for both trials." Id. at p. 41, l. 1-10.

This Court finds Counsel's testimony on this issue credible. Counsel has been engaged in

the practice of criminal law in this State for thirty years and has significant experience trying cases before juries and evaluating trial tactics and strategy. In the instance above, Counsel did not object because she did not believe the testimony describing, in general, how drug buys are set up was objectionable as it did not relate specifically to the transaction between her client and the CI. "During his testimony, he didn't say that she had had transactions with Mr. Ancrum in the past. He was just talking broadly about targets." Id. at p. 39, l. 2-5. When counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010). This Court finds Applicant has not established any deficiency of Counsel regarding this allegation.

Moreover, Applicant has not established any resulting prejudice from Counsel's failure to object to the testimony, which does not relate to or implicate Applicant. Applicant argues this testimony allowed the jury to infer the CI knew he had sold drugs in the past. Counsel disagreed. Applicant was recorded on video selling the drugs and didn't dispute that it was him. There was no prejudice shown by the general comment.

Accordingly, this Court denies and dismisses this allegation with prejudice.

Allegation #2: Applicant's Counsel was ineffective for opening the door "that because of (the CI's) drug history she had a prior relationship with Applicant."

Next, Applicant asserts that trial counsel was ineffective for opening the door to a relationship between Applicant and the CI. On this point Counsel testified that she asked the Investigator the question "She's the one day (sic) who said, I can call Mr. Ancrum?' to set the CI up for Counsel to argue that the CI was throwing Applicant under the bus because she was mad at him because they had been lovers and he had spurned her. Id. at p. 35, l. 9- 19; p. 43, l. 3-7. Counsel had been

told by Applicant that he and the CI had had a sexual relationship and, with the purchase on tape, Counsel felt the best strategy to pursue was that the CI had set the Applicant up. Id. at p. 35, l. 11-p. 36, l. 19. With the undercover tape, there wasn't any question about the CI's purchase of drugs from Applicant. Instead, Counsel put on a "set-up" defense. Further, Counsel testified "I don't see it as a problem question." Id. at p. 36, l. 10. Counsel discussed the strategy with Applicant and Counsel articulated valid reasons for the strategy.

This Court finds Counsel had a valid reason for asking the Investigator the question regarding the CI being the first person to bring up Applicant's name when she offered to make undercover buys for law enforcement. When counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010). This Court finds Counsel was not deficient for asking the question in an attempt to show the buy was a malicious revenge set up. Further, Applicant failed to establish any prejudice resulted from Counsel's question.

Accordingly, this Court denies and dismisses this allegation with prejudice.

Allegation #3: Counsel was ineffective for cross-examining the CI regarding the nature of her prior relationship with Applicant, which opened the door for the State's re-direct examination.

Applicant next asserts that Counsel was ineffective for cross-examining the CI regarding the nature of her prior relationship with Applicant because it opened the door for the State to ask about the parties' relationship on redirect. As stated above, Counsel's theory of the case was that the CI and the Applicant had had a prior relationship, sexual in nature, and that the CI was out to get Applicant and threw him under the bus the moment she began making controlled buys. Counsel attempted to

bring these points out on cross-examination. Thereafter, the state was allowed a redirect examination. On redirect, the State asked, "you knew him for several years?", to which the CI witness responded, "yes from purchasing drugs." Id. at p. 37, l. 9-11.

Counsel immediately noticed the issue and made a motion for a mistrial. The State and Defense had covered the issue pre-trial and had agreed that the prosecution would not ask questions relating to prior purchases. Id. at p. 37, l. 16-25; p. 44, l. 5 – l. 15. In this instance, however, the witness just blurted the information out. Id. at p. 44, l. 12-14. There was no intent of the State to elicit that answer.[2] Id. at p. 44, l. 7-8. Counsel immediately requested a mistrial and, when the presiding judge denied the motion, asked for a curative instruction, which was granted. Id. at p. 37, l. 24- p. 38, l. 24.

This Court finds Counsel articulated prudent, strategic reasons for her decision to cross-examine the CI. When counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010). Moreover, this Court notes that Applicant has not established any resulting prejudice from Counsel's failure to object to the instruction.

Accordingly, this Court denies and dismisses this allegation with prejudice.

CONCLUSION

After careful consideration of Applicant's Amended Application for Post-Conviction Relief, the Record of the case, the arguments of Attorneys Falk and Mims, and the testimony of witnesses, this Court finds Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. To

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2 This was a specific finding of the trial court: that there was no prosecutorial misconduct. The court specifically found that it was not the question asked, but the way the witness responded that created the problem. Trial transcript, p. 154, l. 22-25.

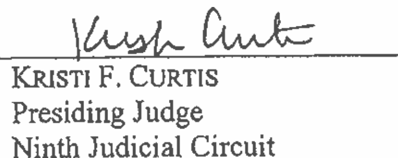
satisfy the two prongs of Strickland, the Applicant must show that counsel was deficient and also show the deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). The Applicant has not met this burden on any of the allegations made. Therefore, the Court denies Applicant's requested relief in this matter.

This Court notes if Applicant desires to appeal this Order, he must file and serve a notice of appeal within thirty days from the receipt of this Order through his counsel of record. 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 shall remain in the custody of the State.

AND IT IS SO ORDERED this 3rd day of October, 2023.



KRISTI F. CURTIS
Presiding Judge
Ninth Judicial Circuit

Sumter, South Carolina