STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

The Honorable Daniel Coble, Circuit Court Judge

Case No. 2021-CP-36-00464

Sterling Maybin, ...Petitioner,

v.

State of South Carolina, ...Respondent.

NOTICE OF APPEAL

Petitioner, Sterling Maybin, appeals the order of the Honorable Daniel Coble, dated October 17, 2023 and filed October 20, 2023. Petitioner received written notice of entry of this order on November 9, 2023.

11/9, 2023

Michael H. Lifsey
Post Office Box 548
Chester, South Carolina, 29706
(803) 899-5040
ATTORNEY FOR PETITIONER

Opposing Counsel:
Zachary W. Jones
Assistant Attorney General
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

STATE OF SOUTH CAROLINA COUNTY OF NEWBERRY	)	IN THE COURT OF COMMON PLEAS FOR THE EIGHTH JUDICIAL CIRCUIT
Sterling Maybin, #302306, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2021-CP-36-00464 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief ("PCR") filed by Sterling Maybin ("Applicant") on November 5, 2021, and amended on May 19, 2023. The Court convened an evidentiary hearing into the matter on July 17, 2023, at the Newberry County Courthouse. Applicant was present at the hearing and represented by Michael H. Lifsey, Esq. Zachary W. Jones, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Charles Verner, Esq. ("Counsel"), also testified. After reviewing all records and evidence before the Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is currently confined in the South Carolina Department of Corrections (SCDC). During its July 2019 term, the Newberry County Grand Jury indicted Applicant for three counts of Petit Larceny (2019-GS-36-00429, -00430, -00431) and two counts of Burglary, Second Degree (2019-GS-36-00432, -00433). Applicant was represented by Charles Verner, of the Eighth

Circuit Public Defender's Office. Deputy Solicitor Dale Scott, and Assistant Solicitor Taylor Daniel of the Eighth Circuit Solictor's Office prosecuted the case.

On August 26-28, 2019, Applicant appeared for a jury trial before the Honorable Donald B. Hocker, circuit court judge, and a jury. At the conclusion of Applicant's trial, the jury found Applicant guilty as indicted. Judge Hocker sentenced Applicant to imprisonment for two consecutive terms of ten years for the petit larceny charges ending in -00429, and -00430, for a total of twenty years of imprisonment. Judge Hocker also sentenced Applicant to imprisonment for ten years for the petit larceny charge ending in -00431, and eight years for each Burglary, Second Degree charge; these sentences were to run concurrent to the two consecutive sentences for Petit Larceny.

Applicant timely filed a notice of appeal, and an appeal was perfected on August 25, 2020, by Sarah Shipe of the South Carolina Commission on Indigent Defense, Appellate Defense Division. In Applicant's brief to the South Carolina Court of Appeals, Applicant raised the following issue:

1. Whether the trial court erred by denying Appellant's motion for a directed verdict as to second-degree burglary where video evidence at trial showed a detatched, open-air carport, which did not meet the statutory definition of a "building" for purposes of the burglary statute?

Following briefing the South Carolina Court of Appeals affirmed Applicant's conviction and sentence in an unpublished opinion, *State v. Sterling Maybin* 2021-UP-358 (Filed October 20, 2021). The Remittitur was issued on November 12, 2021.

Factual Summary

On April 24, 2019, Larry Hazel, a member of the Newberry community, reviewed security camera footage of his property after noticing that items from the shop in his yard were disappearing. Tr. pp. 78-79. Following his review of the footage, Mr. Hazel saw an individual

leaving the shop with a chainsaw that belonged to Mr. Hazel. Tr. p. 79. Mr. Hazel proceeded to call the police to allow them to review the footage. Tr. p. 79. Officer Jason Bell arrived at Mr. Hazel's house and reviewed the footage. Tr. p. 86. Officer Bell saw an individual wearing a red colored skull cap, a burgundy hoodie, a white t-shirt, and dark navy pants with cargo pockets. Tr. pp. 102-03. Officer Bell sent still shots from the footage to his supervisor who identified the individual as Applicant. Tr. p. 103.

Mr. Hazel reviewed additional footage from his cameras and noticed an individual taking more property from his shop on April 23, 2019. Tr. p. 87. Officer Bell returned to Mr. Hazel's house to watch the additional footage and confirmed that the same individual was recorded in both videos. Tr. pp. 106-08.

Bessie Mathis, who also lived in Newberry, installed a camera after realizing she was missing weed eaters and some other tools from her property. Tr. p. 56. On April 24, 2019, Ms. Mathis reviewed the footage on her camera and saw a man, later identified as Applicant, taking a weed eater out of her shed. Tr. pp. 60-61. Ms. Mathis reported the incident to the police, and Officer Justin Weaver of the Newberry Police Department arrived to review the videos. Tr. pp. 74-76.

Captain Kevin Goodman of the Newberry Police Department reviewed the surveillance videos taken from Ms. Mathis and Mr. Hazel and identified the individual in the footage as Applicant. Tr. p. 130. After Applicant was identified, Officer Bell encountered him on a bicycle while Applicant was wearing the same clothes he had on in the videos collected from Ms. Mathis and Mr. Hazel. Tr. pp. 109-13. Applicant was ultimately arrested and charged with two counts of Burglary, Second Degree, and three counts of Petit Larceny.

Present Application

Applicant commenced this PCR action on November 5, 2021. In his application for post-conviction relief, Applicant asserts he is being held in custody unlawfully for the following:

1. Ineffective Assistance of Counsel
2. Ineffective Assistance of Appellate Counsel
3. Prosecutorial Misconduct, Abuse of Discretion

As requested relief, Applicant is seeking "new trial and/or vacate sentence."

On May 19, 2023, Applicant amended his application to include the following allegations of ineffective assistance of counsel:

1. Counsel refused to let Applicant plead guilty shortly after his arrest despite Applicant's desire to do so and despite the solicitor's willingness to allow him to plead guilty solely to three counts of petty larceny.
2. Counsel did not meet with Applicant a sufficient number of times prior to his trial, did not explain the elements of the crime, did not explain possible defenses, and did not adequately prepare for trial.
3. Counsel did not move for a continuance despite Applicant only being informed that he was charged with burglary on the day his trial began.
4. Counsel did not object to his client being seated in the courtroom at one point prior to trial in view of potential jurors while shackled and wearing SCDC clothing.
5. Counsel failed to request that one juror, who was excused after she commented that she already believed the defendant was guilty, be examined to determine what she may have said in the presence of other jurors that may have prejudiced Applicant.
6. Counsel was ineffective because his theory of the case based on the definition of "building" in the burglary statute was not consistent with existing South Carolina law.
7. Counsel failed to object to portions of the solicitor's opening statement that referenced preliminary determinations of the facts.
8. Counsel failed to object to portions of the solicitor's closing statement that were designed to inflame the passions and prejudices of the jury.
9. Appellate Counsel failed to argue as persuasive authority cases from other jurisdictions in support of the argument that the carports from which Applicant stole the items were not "buildings" for the purposes of the burglary statute.

At the evidentiary hearing, Applicant proceeded on the allegations raised in his amended application.

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, and weighed the testimony accordingly. Before the Court are

Applicant's records from the South Carolina Department of Corrections, the transcript of Applicant's trial, the records of the Newberry County Clerk of Court regarding the subject convictions, Applicant's appellate records, and the original and amended applications for post-conviction relief. This Court has reviewed the records submitted to it by the parties, the legal arguments made by the attorneys, and the pleadings. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented:

Ineffective Assistance of Trial 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). Applicant must prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRCP. 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.

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. 115, 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*, 540 U.S. 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.").

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. "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Harrington*, 562 U.S. at 111–12 (quoting *Strickland*, 466 U.S. at 697). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the 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 court need not examine both deficiency and prejudice in every case; if it is easier to dispose of a claim of

ineffective assistance on the ground of lack of prejudice, that course should be followed. *Strickland*, 466 U.S. at 697.

In some cases, overwhelming evidence of guilt will preclude a finding of prejudice. "A reasonable probability of a different result does not exist when there is overwhelming evidence of guilt." *Hillerby v. State*, 431 S.C. 323, 333, 847 S.E.2d 500, 505 (Ct. App. 2020) (citing *Geter v. State*, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991)). For evidence to be "overwhelming," such that it categorically precludes a finding of prejudice, the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of "a reasonable probability . . . the factfinder would have had a reasonable doubt" cannot possibly be met. *Smalls v. State*, 422 S.C. 174, 191, 810 S.E.2d 836, 845 (2018).

Absence of Prejudice

The Court finds Applicant cannot prove he was prejudiced by any of the alleged deficiencies of Counsel because, at his trial, the State presented overwhelming and conclusive evidence of his guilt in the form of surveillance videos depicting Applicant committing the thefts. Applicant's face could be seen on the video, and he was wearing distinctive clothing that matched the clothing he was wearing when he was later arrested. Applicant never denied he was the culprit: he admitted he was guilty of the petty larceny charges, and his defense at trial was merely that the carports from which the items were stolen did not count as "buildings" for the purposes of the burglary statute. As Counsel told the jury in his opening statement, "Sterling admitted from the beginning, I stole this stuff. He is guilty of a felony larceny. . . . From the very first day they got him, he said, yeah, I stole it." Tr. p.48, lines 10–13.

Applicant argues that, even though there is no dispute concerning his guilt of the larceny charges, he was still prejudiced because Counsel failed to adequately challenge the burglary charges. However, Applicant's sentences for the larceny charges—three ten-year sentences, two of which were consecutive, for a total of twenty years—were far more severe than the total of eight years, concurrent, he received for the burglary charges. Even if Applicant had been acquitted of burglary, he would have received the same aggregate sentence of twenty years for the larcenies he admitted committing.

Finally, because there was no question that Applicant entered the carports without consent and with the intent to commit larceny, and his prior convictions for burglary were a matter of public record, the only possible defense Applicant could have made to the second-degree burglary charges was to argue that the carports were not "buildings" as that term is defined in the burglary statute. Since this argument is based on the language of the statute, it presents a matter of law rather than fact. *See, e.g., State v. Tennant*, 394 S.C. 5, 17, 714 S.E.2d 297, 303 (2011) ("Statutory interpretation is a question of law."). The matter of whether the carports at issue are "buildings" was raised to the South Carolina Court of Appeals on direct appeal from Applicant's conviction. The court of appeals ruled against Applicant on that ground, and this Court cannot contradict the court of appeals on an issue of law. Therefore, because Applicant is concededly guilty of stealing the items from the carports, he is also guilty of burglary as a matter of law. Accordingly, there is not a reasonable probability that the result of the trial would have been different but for the alleged deficiencies of Counsel.

For these reasons, Applicant cannot show that he was prejudiced by any of the alleged deficiencies of Counsel. Because a showing of prejudice is required to succeed on an ineffective assistance claim, Applicant's failure to prove prejudice is dispositive of this PCR action, and there

is no need to evaluate the deficiency prong of the ineffective assistance analysis. *See Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed."). Nevertheless, for the sake of completeness, the Court will briefly address Applicant's specific allegations of ineffectiveness:

1. Refusal to allow Applicant to plead guilty

Applicant claims Counsel refused to allow him to accept the solicitor's offer of a guilty plea solely to the petty larceny charges for a ten-year sentence. The Court finds this claim is refuted by the record: in the transcript, the solicitor denies that there was ever an offer for Applicant to plead solely to the petty larceny charges for a ten-year sentence. Tr. p.197, lines 15–22.

2. Failure to adequately meet with Applicant and prepare for trial

Applicant claims that Counsel did not meet with him a sufficient number of times, did not explain the elements of the crime, did not explain possible defenses, and did not adequately prepare for trial. However, Applicant has not explained what other defenses he would have offered or evidence he would have introduced had Counsel more thoroughly met with him and prepared for trial—in other words, Applicant has not shown that the result of the proceeding would be any different had Counsel acted differently. In addition, at the evidentiary hearing, Counsel testified he had represented Applicant many times before, including in a prior prosecution for burglary, so there was no need to redundantly explain the elements of the crime or the trial process. Finally, the Court notes the open-and-shut nature of this case—as already explained, the facts were not in dispute, so the case depended on the legal issue of whether the carports constituted "buildings" or not. This was not a complicated case, and the Court finds Counsel was reasonably well-prepared for trial under the circumstances.

3. Failure to seek a continuance

Applicant claims Counsel was ineffective for failing to seek a continuance on the burglary charges because he received no notice that he had been charged with burglary until the day of the trial. At the evidentiary hearing, however, Counsel testified that the solicitor had threatened to charge Applicant with burglary during the unsuccessful plea negotiation process, and Applicant knew he would be facing burglary charges if he went to trial. The Court finds Counsel's testimony credible, and Applicant's testimony not credible, as to this issue. In addition, the burglary indictments in the record were dated "July 19, 2019," over a month in advance of the trial on August 26, 2019. This further corroborates Counsel's account that the defense received notice of the burglary charges well in advance of the trial.

4. Shackling issue

Applicant claims he was seated in the courtroom at one point prior to the trial in his SCDC uniform and shackles. He claims that the doors of the courthouse were opened and the potential jurors in the jury pool, who were outside the courtroom, could see him. He claims Counsel was ineffective for failing to object to his being seated in the courtroom while shackled and in SCDC clothing. However, Counsel testified that he recalled having a hearing on the issue. Regardless of whether Counsel raised the issue, the Court finds Applicant was not prejudiced: at the evidentiary hearing, Applicant admitted that, by the time the trial actually began, he had changed into street clothes and was no longer shackled in view of the jury. In addition, during *voir dire*, the potential jurors were examined by the trial court as to whether any of them had formed any premature opinion of the issues in the case or harbored any bias for or against Applicant. Tr. pp.8–15. All of the jurors selected to serve in Applicant's trial represented to the trial court that they could be fair and impartial and were not biased for or against Applicant. The mere possibility that unidentified potential jurors, who might not have even served on Applicant's jury, could at one

point see Applicant through the courthouse doors, briefly and at a distance, while he was shackled and in SCDC clothing prior to trial, does not create a reasonable likelihood that the result of the proceeding would have been different had Counsel acted differently.

5. Juror 75

Applicant claims Counsel was ineffective for failing to require jurors to be examined after one alternate juror, Juror 75, was excused for commenting that she had prematurely decided Applicant was guilty. The transcript reflects that the jury foreman promptly informed the trial court of Juror 75's comment, and the court immediately ruled that Juror 75 would be excused from serving on Applicant's jury. Tr. p.32, line 15–p.33, line 4. There has been no further evidence presented of premature deliberations or other juror misconduct in the case. Without such evidence, Applicant's contention that Juror 75's comment might have prejudiced him is merely speculative.

6. Counsel's theory of the case

Applicant claims Counsel's theory of the case—that the carports from which the items were stolen did not constitute "buildings" under the burglary statute—was inconsistent with state law. However, Applicant has not pointed to any state law existing at the time of Applicant's trial that unequivocally refuted Counsel's position. Although Counsel's argument was ultimately unsuccessful, the Court finds it was a reasonable argument to make based on the law existing at the time. In addition, Applicant has not suggested any alternative theory of the case, much less established that Counsel's theory was so inferior to the alternative theories that pursuing it was unreasonable. Due to the overwhelming evidence that Applicant had stolen the items from the carports, the Court finds Counsel arguably pursued the best available course by attacking the applicability of the burglary statute to the facts of the case.

7. Solicitor's opening statement

Applicant claims Counsel should have objected the solicitor's opening statement when the solicitor commented that "our job is then to decide if there's enough evidence to proceed with a trial." In context, the solicitor was merely explaining the procedure for how cases get to the point of a jury trial. Tr. pp.40–41. Applicant also challenges the solicitor's comment that "we feel that we have enough evidence that will leave you firmly convinced of his guilt." Tr. p.47. Rather than substituting the solicitor's judgment for the jury's judgment, as Applicant claims, this comment emphasizes that the jury must be "firmly convinced" of Applicant's guilt, based on the evidence, before it can return a verdict of guilty. This is an accurate statement of the "reasonable doubt" standard, and it marches the reasonable doubt instruction given by the trial court. Tr. p.177, lines 4–14. Because neither comment was objectionable or prejudicial to Applicant, Counsel was not deficient for failing to object.

8. Solicitor's closing argument

Applicant claims Counsel should have objected to portions of the solicitor's closing argument that were intended to inflame the passions and prejudices of the jury. Applicant complains that the solicitor characterized him as a "taker" and an "opportunist" who takes things from their rightful owners. Tr. p.159, p.164. Since Applicant was on trial for larceny, which necessarily involves taking things from their rightful owners, the Court finds the challenged comments were not objectionable. While it is certainly unflattering to be described as a thief, that description is unavoidable in a larceny prosecution. The Court finds that the solicitor's comments were not substantially more inflammatory than the charges themselves.

9. "Persuasive" out-of-state case law

Applicant claims appellate counsel should have argued, as persuasive authority, cases from other jurisdictions to bolster the argument that carports should not be considered buildings for the

purposes of the burglary statute. Applicant does not explain how case law from other jurisdictions, which may have very different statutory language, necessarily apply to the provisions of South Carolina's burglary statute. In addition, the allegation itself recognizes that any such cases would be merely "persuasive" authority, not binding. Finally, as explained above, the application of the statutory definition of "building" to the carports in this case has already been decided by the South Carolina Court of Appeals. Applicant is effectively inviting this Court to overrule the decision of the court of appeals on the basis of non-binding, out-of-state cases. The Court declines the invitation and finds appellate counsel was not deficient.

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), Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant's attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief be denied and dismissed with prejudice; and

2. The Applicant be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 17 **day of** Oct **, 2023.**

DANIEL COBLE
Presiding Judge
Eighth Judicial Circuit

Fairfield, South Carolina