

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM JASPER COUNTY
Court of Common Pleas
The Honorable Kristi F. Curtis, PCR Action Judge
2020-CP-27-00163

RECEIVED

Dec 13 2023

S.C. SUPREME COURT

JOSHUA POACHER, #372249,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Joshua Poacher appeals the denial of his post-conviction relief application. The post-conviction relief action was heard and denied by the Honorable Kristi F. Curtis, circuit court judge, on July 18, 2022, and was denied by written order issued filed on December 7, 2023.

Applicant received notice of the judgement on December 10, 2023.

/s Chelsey F. Marto
Chelsey F. Marto, Esquire
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FILED

2023 DEC -7 P 1:23

CLERK OF COURT
JASPER COUNTY

ALAN WILSON
ATTORNEY GENERAL

December 1, 2023

The Honorable Margaret Bostick
Jasper County Clerk of Court
Post Office Box 248
Ridgeland, South Carolina 29936

Re: Joshua Poacher, #372249 v. State of South Carolina
Case No.: 2020-CP-27-00163

Dear Ms. Bostick:

Enclosed please find the original Order of Dismissal signed by the Honorable Kristi F. Curtis, in the above-captioned case, for filing in your office. Please forward a time-stamped copy of this order back to our office for our file.

In addition, please substitute undersigned counsel as counsel of record for the State in this post-conviction relief case and remove former Assistant Attorney General Samantha Jo Weidauer, who is no longer with our office, as counsel of record for the State. Please let me know if I may provide anything additional at this time.

Sincerely,

Danielle Dixon
Assistant Attorney General

DD/vh

cc: Chelsey F. Marto, Esquire

STATE OF SOUTH CAROLINA)
 COUNTY OF JASPER)
)
)
 Joshua Poacher, #372249,)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 FOR THE FOURTEENTH JUDICIAL CIRCUIT

Case No.: 2020-CP-27-00163

ORDER OF DISMISSAL

2023 DEC -7 P 1:23
 FILED
 CLERK OF COURT
 JASPER COUNTY

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by Joshua Poacher (Applicant) on April 10, 2020. Respondent made a return requesting an evidentiary hearing. On July 18, 2022, an evidentiary hearing convened before this Court. Applicant was present and represented by James K. Falk, Esquire. Assistant Attorney General Lauren Mims represented Respondent. Applicant did not testify at the hearing but called as a witness trial counsel Stephen Plexico, Esquire. Respondent did not call any witnesses. After reviewing all records and evidence before this Court, this Court finds Applicant failed to meet his burden of proof and denies and dismisses this application with prejudice.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections serving a life sentence. In December 2015, the Jasper County Grand Jury indicted Applicant for two counts of murder (2015-GS-27-00378, -00379), armed robbery (2015-GS-27-00490), and possession of a weapon during the commission of a violent crime (2015-GS-27-00491). On April 10-13, 2017, Applicant proceeded to a jury trial before the Honorable R. Lawton McIntosh. Stephen Plexico, Esquire represented Applicant. Solicitor Issac McDuffie Stone and Assistant Solicitor Mary Jones prosecuted the case. Applicant was found guilty as indicted and sentenced concurrently to life for each murder charge, thirty years for armed robbery, and five years for the weapon charge.

Applicant filed a timely notice of appeal that was perfected by Appellate Defender Kathrine H. Hudgins through filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed pursuant to Anders. The remittitur was sent May 3, 2019.

Summary of Relevant Facts

At trial, the State presented evidence that Applicant robbed and fatally shot two housekeepers at a Best Western hotel; both were deceased when emergency personnel arrived. (Tr. 138). One victim suffered two gunshot wounds: one to the wrist and the other to the neck. (Trial Tr. 338). The other victim suffered four gunshot wounds: three on the left arm or shoulder and the fourth entering through the left side of the back and exiting through the base of the neck. (Tr. 344-47). Several hotel guests heard gunshots and gave a description of the man leaving that was consistent with Applicant's appearance, and an eyewitness identified him from a lineup. (Tr. 163-71, 217-19). Police recovered a gun from Applicant's room in a different hotel; an expert in tool markings and firearm identification testified cartridges recovered from the scene and a cartridge recovered from one of the victims were fired by the gun. (Tr. 300-05). The State also presented evidence showing Applicant attempted to use one of victim's debit cards fifteen times the day following the murder. Additionally, Applicant's fingerprints were found on paperwork in the room where the victims were shot. (Tr. 262-66). Finally, Applicant gave a statement to law enforcement acknowledging he was present at the crime scene, but claiming he did not intend to rob anyone.

Current Action Before this Court

On April 10, 2020, Applicant timely filed this PCR application generally alleging ineffective assistance of counsel. Prior to the hearing, he amended his application to allege:

- I. Ineffective assistance of counsel:
 - a. Failed to object to testimony that Kimberly Mears' latent print analysis was peer reviewed. The statement impermissibly bolstered agent Mears' testimony. Additionally, since defendant

had no opportunity to confront the other SLED agents that peer-reviewed agent Mears' analysis, the testimony that her work was peer reviewed violated the Confrontation Clause.

- b. Failed to request a hearing pursuant to State v. Council, 335 S.C. 1 (1999) to challenge the reliability of SLED agent Suzanne Cromer's expert testimony in the field of toolmarks and firearm identification.

At the PCR hearing, Applicant proceeded only on the allegations of his amended application. Applicant also asserted counsel should have more rigorously cross-examined Cromer's testimony. This Court finds any other allegations raised in his initial application are deemed waived and abandoned and, accordingly, will not be addressed in this order.

Summary of the Testimony

Trial Counsel testified he met with Applicant at least thirteen times and discussed the charges with Applicant the first time he met him. (PCR 20-21). He stated he spoke with Applicant before even he was appointed. Trial Counsel advised him not to talk to law enforcement. Applicant disregarded this advice, however, and initiated a lengthy interview with law enforcement on his own, wherein he admitted to being on scene with a gun. (PCR 7-8, 21-22). Trial Counsel averred the case's trajectory was effectively set once Applicant provided statements to police, and he did not see a way of excluding the confession at trial. (PCR 20, 22 22). He stated his trial strategy was to try and capitalize on any error the State made at trial. (PCR 22)

Trial Counsel testified the State had fingerprint evidence, and he rigorously cross-examined the fingerprint expert Mears about the difference between the European standard and the American standard. (PCR 9). He explained the European standard requires sixteen common points whereas the American standard requires fewer points, and he was trying to convey to the jury that the American standard is less rigorous. (PCR 9). He averred this line of questioning would lead to doubt in the jurors' minds. (PCR 9). Counsel testified he did not know anything

about Mears's work being peer reviewed but stated "that's pretty much their standard practice." (PCR 10). He agreed the testimony that her report had been peer-reviewed amounted to vouching for her work. (PCR 10-11). He agreed he did not have the opportunity to cross-examine any peer-reviewers. (PCR 11).

Trial Counsel testified he tried to cross-examine Mears about the issues involved in fingerprint analysis and cast doubt on her testimony. (PCR 23-25). He stated he raised the issues with the fingerprint analysis during closing argument. (PCR 26). Trial Counsel testified it is sometimes a better strategy not to object at trial, so that more attention is not brought to something problematic for the defense. (PCR 27). He stated he never brought an independent expert in at trial to testify regarding fingerprint analysis. (PCR 27). Trial Counsel averred this would be a poor trial strategy because the independent expert would likely just vouch for the State's expert. (PCR 27-28).

Trial Counsel testified the State called Suzanne Cromer to testify as a ballistics expert from SLED. (PCR 11). He did not recall her credentials or know what testing she was subject to in determining if her results led to false positives in the past. (PCR 11-12). When asked, "[W]ould it have been helpful to know what type of false positives she's generated through her testing?", counsel replied, "In retrospect, that would have been helpful. I don't know the quality of how helpful it would have been." (PCR 12). He stated he did know SLED's testing procedure. (PCR 13). He agreed he did not know how many similar points were required for a match in firearms markings and it was a subjective test. (PCR 14).

Trial Counsel stated he had never reviewed the report "Forensic Science and Criminal Courts, Ensuring Scientific Validity of Feature Comparisons Methods," generated by the President's Counsel of Advisers on Science and Technology. (PCR 15). He acknowledged the

report effectively stated that firearm analysis falls short of the criteria required for foundational validity because there was only one study conducted supporting this analysis. (PCR 16). Trial Counsel testified had he seen this report, he would have requested a Council hearing pretrial. (PCR 16-17). He stated he was unaware of United States v. Monteiro, 407 F.Supp. 2d 351 (2005), and United States v. Green, 405 F. Supp. 2d (2005), which limited an “expert’s ability to opinion that a particular bullet came from a particular gun.” (PCR 17-18). Trial Counsel explained, “In all my years of doing this, I haven’t heard anything . . . about that.” (PCR 19). He stated he would have conducted a similar cross-examination of the firearms expert as he did the fingerprint expert if he knew of the report. (PCR Tr. 30). He stated he never heard of a directive in South Carolina specifically challenging firearm analysis. (PCR Tr. 29).

Findings of Fact and Conclusions of Law

This Court has had the opportunity to review the records before it, including the Jasper County Clerk of Court records of the underlying convictions, Applicant’s records from the South Carolina Department of Corrections, the trial transcript, Applicant’s appellate records, and the records from this PCR action. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. After a careful review based on the Strickland standard set forth below, this Court finds Applicant has failed to carry his burden of proof.

Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). In a PCR action, an applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d

peer reviewed violated the Confrontation Clause.

This Court finds Applicant failed to prove counsel was deficient. Initially, Mears's testimony that all of the cases in her office were peer-reviewed did not improperly bolster her testimony, and no Confrontation Clause violation occurred based on Mears's mere passing statement that her work had been peer-reviewed—especially when Mears never commented on what that peer review revealed. (Tr. 275, 278, 280-81). Further, counsel articulated a valid strategy in not objecting because certain objections may draw more attention to the testimony for the jury, which is not helpful to the defense. Ultimately Mears's statement was a mere, passing statement that her work had been peer-reviewed, and counsel's credible testimony that he did not want to draw attention to this was reasonable within prevailing professional norms. Finally, this Court finds counsel's strategy in cross-examining Mears was reasonable under prevailing professional norms. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (where "counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel"). Specifically, Trial Counsel's decision to focus his cross-examination on the less rigorous American standard for fingerprint comparison was reasonable. Ultimately Applicant did not prove counsel was deficient in this regard.

Further, Applicant did not prove prejudice in light of Applicant's own statement to law enforcement that he was present at the crime scene. Initially, this Court finds it is not reasonably likely the fingerprint evidence itself would have been excluded based upon an objection of improper bolstering or a Confrontation Clause violation. This Court further finds the State had a strong case against Applicant that included Applicant's incriminating statements, several eyewitnesses describing a man matching his description, a witness identification from a photo-lineup, and the fact Applicant was caught using the victims' ATM cards. Based on the foregoing,

this Court finds it is not reasonably likely the outcome would be different had Trial Counsel raised this objection. Thus, Applicant did not prove prejudice, and this claim is denied.

Cromer's expert testimony

This Court finds Applicant did not prove Trial Counsel was ineffective for failing to request a pre-trial hearing on Cromer's expert testimony or in his cross-examination of Cromer. "[T]he proper analysis for determining admissibility of scientific evidence is now under the SCRE." State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999). "When admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." Id. To determine reliability, the trial judge should apply the Jones factors. Id. "[U]nder the Jones standard, the Court looks at several factors, including: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved ; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." Id. at 1, 515 S.E.2d at 517.

Initially, this Court finds the expert testimony presented by Cromer related to identifying firearm markings on cartridge casings is common testimony in South Carolina by experts in this field; thus, Trial Counsel's failure to challenge the reliability of this testimony did not fall outside of prevailing professional norms and was not deficient. Likewise, Applicant did not show a reasonable likelihood this testimony would have been excluded under Jones. Although Applicant cited to a single article that he alleged "found firearm analysis falls short of the criteria required for a foundational validity because there was only one study conducted backing this analysis," the standard under Jones and Council does not require universal acceptance.¹ Thus, this singular

¹ Applicant's reliance on United States v. Monteiro, 407 F.Supp. 2d 351 (D. Mass. 2005), and United States v. Green, 405 F. Supp. 2d 104 (D. Mass. 2005) is misplaced because these cases applied the Daubert standard that was rejected

article standing alone does not foreclose the reliability of this expert testimony.² Because Applicant did not show a reasonable likelihood this expert testimony would have been deemed unreliable under Jones and thus excluded, he did not prove counsel was deficient for not challenging its reliability. This Court further finds Trial Counsel's cross-examination of Cromer was reasonable within prevailing professional norms, and Applicant did not set forth what more counsel should have done that would have reasonably changed the outcome. Thus, he did not prove deficiency in counsel's conduct related to Cromer.

Likewise, Applicant did not prove prejudice from Trial Counsel's failure to further challenge Cromer's testimony. As noted, even if Trial Counsel had challenged the reliability of this testimony under Jones—the proper standard in South Carolina—it is not reasonably likely it would have been excluded as unreliable. Finally, based on the overwhelming evidence against Applicant, it is not reasonably likely the outcome would have been different had Trial Counsel successfully excluded Cromer's expert testimony. Specifically, Applicant provided incriminating statements to police; several eyewitnesses heard the gunshots and saw a person matching Applicant's description leaving the area; an eyewitness selected Applicant from a lineup; and police recovered Applicant's fingerprints from paperwork at the scene. Based on the foregoing, it is not reasonably likely the outcome would have been different had Trial Counsel objected to Cromer's expert testimony, and this claim is denied.

Conclusion

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

by our Supreme Court in Council. This Court further notes both courts found the underlying methodology of firearms identification sufficiently reliable to be admitted. Monteiro, 407 F. Supp. 2d at 372; Green, 405 F.Supp.2d at 124.

² This Court further notes Applicant did not enter this report into evidence at the PCR hearing, making any conclusion about whether Cromer's testimony would have been excluded by this report speculative at best.

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, SCACR. applicant has the right to an appellate counsel's assistance in seeking review of the denial of PCR. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). If Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on applicant's behalf. Rule 71.1(g), SCRCR. Attention 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 shall be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED THIS 27th day of November, 2023.



KRISTI F. CURTIS
Presiding Judge
Fourteenth Judicial Circuit

Sumter, South Carolina.