

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM HAMPTON COUNTY

Court of Common Pleas
The Honorable Eugene C. Griffith, Jr., PCR Judge
2018-CP-25-00501

RECEIVED

Dec 19 2023

S.C. SUPREME COURT

SIDNEY HOLMES, #335918,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Sidney Holmes appeals the denial of his post-conviction relief application. The post-conviction relief action was heard by the Honorable Eugene C. Griffith, Jr., circuit court judge, on August 13, 2021, and was denied by written order issued filed on December 7, 2023.

Applicant received the order on December 19, 2023.

/s Chelsey F. Marto
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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HAMPTON) FOR THE FOURTEENTH JUDICIAL CIRCUIT

Sidney Holmes, #335918,)
Applicant,)

FILED
AM/PM Case No.: 2018-CP-25-0501

v.)

State of South Carolina,)
Respondent.)

DEC -7 2023
ORDER OF DISMISSAL

MYLINDA D NETTLES
CLERK OF COURT
HAMPTON COUNTY, SC

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by Sidney Holmes (Applicant) on December 12, 2018. Respondent made its return requesting an evidentiary. On August 13, 2021, an evidentiary hearing convened before the Honorable Eugene C. Griffith, Jr. Applicant was present and represented by James K. Falk, Esquire. Assistant Attorney General Samantha J. Weidauer represented Respondent. At the hearing, Applicant testified on his on behalf and called as a witness trial counsel Robert Hughes, Esquire. 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. Findings of fact and conclusions of law are set forth below.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections serving a cumulative fifty-one-year sentence. In April 2016, the Hampton County Grand Jury indicted Applicant for murder (2015-GS-25-00265), unlawful carrying of a pistol (2015-GS-25-00266), discharging a firearm at or into a dwelling or a structure (2015-GS-25-00267), and possession of a weapon during the commission of a violent crime (2015-GS-25-00268). On March 13, 2017, Applicant proceeded to a jury trial before the Honorable Perry M. Buckner, III. Robert Hughes, Esquire, represented Applicant, and Randolph Murdaugh and R. Alexander Murdaugh, Esquires,

prosecuted the case. The jury convicted Applicant as indicted, and Judge Buckner sentenced him consecutively to forty years for murder, five years each for possession of a weapon and discharging a weapon, and one year for unlawful carrying of a pistol.

Applicant filed a timely notice of appeal that was perfected by Appellate Defender Susan B. Hackett through filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The Court of Appeals dismissed pursuant to Anders. The remittitur was sent December 13, 2018.

Summary of Relevant Trial Testimony

On August 1, 2015, Steve Cochran (Victim), the maintenance man at Hampton Garden Apartments, was shot after running off a group of men. (R. 49-52). At trial, Officer Jake Sullivan testified Victim had called him that evening to ask him to send an officer to check the apartment complex; Sullivan told him he had run off a group of men that were drinking and wanted to make sure they did not return. Sullivan testified that while he was on the phone with Victim, Victim began screaming, "Help me, Jake! They shot me." Sullivan testified he also heard screaming in the background and a woman say, "They shot him." Sullivan responded to the scene. (R. 49-50).

Zandra Bryant testified she was at the apartment complex that evening and saw a group of people outside drinking. She stated Victim approached them and told them to leave. (R. 55-57). Bryant testified the group left but appeared to be mad about leaving. (R. 57). She stated about twenty minutes later she "observed an individual walk from behind the building, stop directly in front of [Victim], and just start[] shooting." (R. 58). Bryant identified Applicant as the shooter, whom she knew as "Banger." (R. 58-59). Bryant stated she initially did not provide Applicant's name to law enforcement because she was scared. (R. 61, 65). However, she stated he ran right past her and she recognized him. (R. 61).

Another witness, Courtney Russell, was standing outside the apartment talking to Bryant

and two others when she heard gunshots. (R. 210-11). She ran inside for several minutes before checking on Cochran and dialing 911. (R. 210-11). She repeatedly stated she did not see who shot Cochran. (R. 211-12, 214, 216). She then stated that the shooter was in a red shirt. (R. 212). Thereafter, she stated that an unknown person shot the deceased. (R. 217).

Cochran suffered four gunshot wounds, including a fatal one to his chest. (R. 104-05, 107). Five shell casings were recovered from the scene, and they were determined to have been fired from the same gun. (R. 121, 153). The State also presented a jail call placed using Applicant's pin number; in the call he asked, "Did you sell that whistle" or "Did you get rid of that whistle." (R. 165). An investigator testified that based on his training, the term "whistle" is street slang for a firearm. (R. 165-66).

Applicant called his cousin, Benjamin Holmes, to testify. He stated that he and Applicant were at the apartment complex between 6pm and 7pm that night before returning to Holmes' house for the night. (R. 219-20, 224).

Current Action Before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully because of ineffective assistance of counsel in that:

1. Ineffective assistance of counsel.
2. Due Process Violations.
3. Failure to investigate.---

At the PCR hearing, Applicant proceeded forward on the following allegations:

1. Ineffective assistance of counsel for:
 - a. Failure to request a *Liverman* or *Biggers* hearing.
 - b. Failure to object to hearsay.
 - c. Failure to prepare Benjamin Holmes' testimony.
 - d. Failure to object to the State's improper closing argument.

All other allegations raised in his initial application and amendments are deemed waived

and abandoned and, accordingly, will not be addressed in this order.

Summary of PCR Testimony

Counsel testified he was appointed Applicant's case while at the Public Defender's Office. (PCR 6). He stated the trial defense was to challenge the identification based on low lighting and distance identification. (PCR 6). Counsel testified Bryant's identification was not compelling because it was very impeachable and there was a lot of room for error when making the identifications. (PCR 6). Counsel testified the State introduced a six-pack photo lineup at trial. (PCR 7). He stated he did not consider a Biggers hearing because he wanted the witness to testify at trial to show the jury that she could not have seen what she thought she saw, and he wanted to focus on cross-examining her. (PCR 8, 22). Counsel testified there was very little other evidence implicating Applicant. (PCR 8). Ultimately, as his strategy, he wanted to stress to the jury that the identification was flawed because it was done at night in low light and from a distance. (PCR 8, 22). He stated he made this argument during closing argument. (PCR 23). Counsel acknowledged, however, that had he had an in-camera hearing with Bryant, he could have tried to impeach her and, ultimately, preserved the issue on appeal. (PCR 24).

Counsel testified Jake Sullivan was one of the first officers on the scene. (PCR 9-10). He acknowledged he did not object to Sullivan testifying about the phone call he received from the victim. (PCR 10). Counsel averred he could have excluded a portion of the call, but several other witnesses could have testified about the prior altercation. He explained that by allowing evidence of the altercation through the phone call, the jury may "not have paid that much attention to it." (PCR 10-11). Counsel further explained, "[T]he primary thing is it did not really hurt the low-light identification that I was working on." He did not believe he could keep out the entire phone call and explained, "I did not want to keep that testimony out because if I kept out any part of it a



juror would be more questioning about what was said and what I was hiding.” (PCR 11). Counsel averred Sullivan’s testimony was not harmful and did not identify his client in any way. (PCR 23).

Counsel testified that he did not object to the State’s closing argument because the prosecutor was long winded and boring, and the “last thing [he] wanted to do was to wake a juror up.” (PCR 13). He stated that he thought the jury was ignoring the prosecutor. (PCR 13-14).

Counsel testified Applicant wanted to call his brother to testify at trial, but he did not prepare his testimony because he thought the brother would perjure himself. He explained, “[T]he last thing I wanted to do was to get any solid information that he would perjure himself so I would avoid putting perjury testimony up.” Counsel stated he discussed this with Applicant. (PCR 15). He stated he did not plan on calling any witnesses, but Applicant that they be called despite counsel’s advice to the contrary. (PCR 15).

Counsel stated Applicant’s alibi defense was he had been with Holmes playing video games, but the solicitor destroyed Holmes on cross-examination. (PCR 16-18). He stated Holmes ultimately was not helpful to the defense and bolstered the State’s case. (PCR 19). He stated he talked to Applicant about this witness months before trial, and he believed Applicant being at a relative’s house as his alibi was problematic because “[j]urors don’t trust relatives.” (PCR 19). He clarified it was Applicant’s decision to call Holmes to testify; counsel did not want to call him and did not believe his testimony helped the defense. (PCR 23-24).

On cross-examination, he stated he had this case for about a year or two before trial. (PCR 20). He stated he tried to meet with Applicant about once a month, and he did not meet with Applicant personally, his assistants did. (PCR 21). He stated he met with Applicant two or three times the week before trial and discussed the burden of proof and the strengths and weaknesses of the case. (PCR 21-22). Counsel testified that his investigation of the case consisted of having his

assistants talk to people, reading over the incident report, and assessing the strengths and weaknesses of the case. (PCR 22). He stated there was no forensic evidence, but the biggest weakness was Applicant was not local. (PCR Tr. 22). Counsel testified he discussed trial strategy with Applicant. (PCR 22).

Applicant testified counsel focused on the questionable nature of Bryant's identification and the lack of evidence beyond the identification. (PCR 25-26). He stated he asked counsel to call "Courtney," who was with Bryant and "didn't see nothing." (PCR 26-27). He testified he had never met Bryant. (PCR 27). Applicant averred counsel should have talked to Holmes more before he testified at trial. (PCR 28). He stated he expected Holmes to tell the truth; namely that Applicant was at his aunt's house when the incident occurred. (PCR 28).

Findings of Fact and Conclusions of Law

This Court has had the opportunity to review the records before it, including the Hampton County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, Applicant's appellate records, the trial transcript, and this PCR action's records. 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. Below are this Court's findings of fact and conclusions of law as required by S. C. Code Ann. § 17-27-80 (2017).

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 813 (1985). When the application alleges ineffective assistance of counsel, the applicant must prove “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, 466 U.S. 668. 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, 466 U.S. 668. First, an applicant must prove counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, courts measure 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 an 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). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, a PCR applicant must prove that 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.

Failure to Request Biggers Hearing

This Court finds Applicant failed to prove counsel was ineffective for not requesting a Biggers hearing. The United States Constitution’s Due Process clause prohibits police eyewitness identification techniques that are “so suggestive as to violate due process.” Manson v. Brathwaite,

432 U.S. 98, 105 (1977). An identification procedure must be *both* unnecessarily suggestive and conducive to irreparable misidentification in order to violate due process. State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). “Only if [the procedure] was suggestive need the court consider the second question—whether there is a substantial likelihood of irreparable misidentification.” State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 447-48 (2000). Factors considered in analyzing whether the identification was mistaken include “the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.” Neil v. Biggers, 409 U.S. 188, 199-200 (1972).

Initially, this Court finds it is not reasonably likely the identification testimony would have been excluded had counsel requested a Biggers hearing. Specifically, at trial, Bryant testified she saw Applicant—whom she knew as “Banger”—shoot Victim and run past her. Nothing about this testimony suggests she identified him from a lineup or shows police engaged in an unduly suggestive police procedure, and Applicant did not set forth at the PCR hearing *what* was unduly suggestive that could have excluded the identification.¹ Ultimately, Applicant failed to show a reasonable likelihood the identification would have been suppressed through a Biggers hearing and thus failed to prove prejudice.

Additionally, this Court finds counsel’s testimony to be credible to wit: that he chose to focus on cross-examining Bryant rather than conducting a Biggers hearing. Because nothing suggested an unduly suggestive identification procedure by police, this Court finds counsel’s decision in this case to focus on cross-examining Bryant rather than preparing for a Biggers hearing

¹ Notably, at the PCR hearing, Applicant did not introduce any lineups used or show how they were allegedly unduly suggestive. Thus, any finding about an unduly suggestive lineup would be pure speculation.



was reasonable under prevailing professional norms. Thus, Applicant did not prove deficiency or prejudice, and this claim is denied.

Failure to Object to Hearsay

This Court finds that Applicant has not met his burden of proving counsel was ineffective for failure to object to Officer Sullivan's testimony concerning the phone call he received from Victim on the grounds of hearsay. In support, he points to the following testimony from Officer Sullivan:

I answered the phone and [Victim] was on the other end of the line and he stated that he had been trying to call the police department and had tried several times and couldn't get anyone. I laughed at him and told him, you know, the police department is not open 24 hours a day. We have office hours and that he would have to call 9-1-1. He said, "Well, the office wasn't open, so I just decided to call you since I had your number." We continued to talk and I told him that in the future he could call our dispatch non-emergency number and he told me to text him that number after the phone call was over. I told him I would. He went on to say that the reason for the call was that he had approached a group of black males in the Hampton Garden Apartments a few minutes before. They were out there drinking and had loud music and potentially were smoking some illegal narcotics. He stated that he had run them off. He advised them that if they lived in the apartments to go back to their apartment. If they did not live there, to go to the apartment of the individual they were visiting. He said they left the scene and he just asked for us to have an officer come back through a little later just to make sure they didn't return.

(R. 48-49).

Initially, counsel articulated a reasonable, strategic decision for not objecting. Specifically, counsel credibly testified that he did not think Sullivan's testimony hurt his case or countered his defense. Additionally, he credibly testified the State had other witnesses who could have testified about the altercation, and he did not want to draw further attention to Sullivan's testimony about an altercation by objecting. This Court finds that counsel's decision was reasonable and not



deficient.

Additionally, Applicant failed to prove prejudice. Although some of the forgoing could have potentially been excluded under a hearsay objection, much of it—such as testimony about how Victim called the police department rather than 9-1-1—was not material to Applicant’s guilt and innocent. Thus, it is not reasonably likely the outcome would have been different had that testimony been excluded. Likewise, Sullivan’s testimony that Victim said he had run off a group of individuals was cumulative to Bryant’s testimony that she observed Victim run off a group of individuals; thus, it is not reasonably likely the outcome would have been different had that statement been excluded. Ultimately Sullivan never identified Applicant as a potential shooter. Applicant failed to point to testimony that likely would have been excluded based on hearsay *and* that would have made a difference in the outcome of trial. Thus, Applicant failed to prove prejudice, and this claim is denied.

Failure to Prepare Holmes’ Testimony

This Court finds that Applicant has not met his burden of proving counsel was ineffective for not further preparing Benjamin Holmes to testify at trial. Initially, this Court finds credible counsel’s testimony that he did not speak to Holmes before trial because he was concerned his conversations would reveal perjured testimony. (PCR 15). This Court further finds credible counsel’s testimony that he did not believe Holmes’s testimony would offer a credible alibi, but he ultimately called him at Applicant’s insistence. Based upon the foregoing, this Court finds counsel’s decision to not further prepare Holmes was reasonable under prevailing professional norms and not deficient.

Further, Applicant did not provide any evidence of what Holmes's testimony would have been had counsel further prepped his testimony and thus did not prove prejudice. Because Applicant has failed to meet his burden, this claim is denied.

Failure to Object to the State's Closing Argument

This Court finds Applicant failed to prove counsel was ineffective for not objecting to the State's closing argument. "To find whether the assistant solicitor's comments in closing argument violated the defendant's due process rights, we must determine whether the comments were improper, and if so, whether the improper argument so unfairly prejudiced the defendant as to deny him a fair trial." Fortune v. State, 428 S.C. 545, 549, 837 S.E.2d 37, 39 (2019). In determining whether an improper comment prejudiced a defendant, "[t]he relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986).

At the PCR hearing, Applicant averred counsel should have objected to the following:

So we know he had a gun at some point in time. Then, a lady who I have got all the admiration in the world for, that woman is scared to death her entire life. She's got four children that live out there. She is scared of these people, but she had the guts to walk into this courtroom and she had the guts to tell the truth. The truth being that Sidney Holmes walked up and shot Steve Cochran because he was teed off with him for running him off earlier. How she had the guts to do it, I don't know, but I admire her.

(R. 243).

And you will have all of this stuff in the jury room with you, so you don't have to worry about asking if it came in there. Right in there, ladies and gentlemen, I'm just going to point it out so you will know where to look. *"Then, an unknown person came from around the building and shot Mr. Steve."* And if y'all believe B.J. Holmes, we've got a sad state of affairs. Thank you.

(R. 255).²

² The italicized portion is the portion Applicant identified as objectionable.



Initially, this Court finds the forgoing are reasonable inferences from the trial testimony. Applicant did not identify any legal basis for objecting to these statements in his application or at the PCR hearing and thus did not meet his burden of proving deficiency. Further, this Court finds credible counsel's testimony that the jury was bored and seemingly tuning out during the State's closing argument, and an objection might have "woken them up." Counsel was present at trial and in the best place to ascertain how the jury was responding to the closing. Ultimately counsel articulated a valid reason for not objecting and was not deficient. Likewise, Applicant failed to identify what objection should have been made and thus did not prove deficiency.

Further, the foregoing comments did not "so infect the trial with unfairness as to make the resulting conviction a denial of due process." See Darden v. Wainwright, 477 U.S. 168 (1986) (finding prosecutor's improper comments—which included statements such as "He shouldn't be out of his cell unless he has a leash on him" and "I wish that I could see him sitting here with no face, blown away by a shotgun"—did not "so inject the trial with unfairness as to make the resulting conviction a denial of due process"). Applicant failed to prove deficiency or prejudice, 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 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), SCRCF. 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 15 day of November, 2023.



 EUGENE C. GRIFFITH, JR.
 Presiding Judge
 Fourteenth Judicial Circuit

North, South Carolina.



ALAN WILSON
ATTORNEY GENERAL

November 20, 2023

The Honorable Mylinda D. Nettles
Hampton County Clerk of Court
Post Office Box 7
Hampton, South Carolina 29924-0007

Re: Sidney Holmes, #335918 v. State of South Carolina
Case No.: 2018-CP-25-0501

Dear Ms. Nettles:

Enclosed please find the original Order of Dismissal signed by the Honorable Eugene C. Griffith, Jr., in the above-captioned case, for filing in your office. Please forward a time-stamped copy back to our office for our file.

Sincerely,

Danielle Dixon
Assistant Attorney General

DD/vh

cc: Chelsey F. Marto, Esquire