STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT

Melvin Durant, 177063

Applicant,

v.

State of South Carolina,

Respondent.

Case No.: 2019-CP-21-3468

ORDER OF DISMISSAL

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by Melvin Durant (Applicant) on December 11, 2019. Respondent filed a return requesting an evidentiary hearing. On December 14, 2023, an evidentiary hearing convened before the Honorable George M. McFaddin, Jr. Applicant was present and represented by Joshua A. Bailey, Esquire. Assistant Attorney General Danielle Dixon represented Respondent. Applicant and trial counsel Vick Meetze testified at the hearing. Following a thorough review of the records before this Court and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant did not meet his burden of proof. Thus, this Court denies relief and dismisses this application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections serving a twenty-year sentence. In March 2015, the Florence County Grand Jury indicted Applicant for attempted murder (2015-GS-21-211). On June 20-21, 2016, Applicant proceeded to a jury trial before the Honorable D. Craig Brown. Deputy Public Defender W. Vickery Meetze represented Applicant, and Assistant Solicitor David Richardson prosecuted the case. The jury convicted Applicant of the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN), and Judge Brown sentenced him to twenty years.

Applicant filed a notice of appeal, which was perfected by Appellate Defender Susan B. Hackett. On appeal, Applicant argued the trail court erred in permitting the prosecution to introduce Applicant's custodial statement. The Court of Appeals affirmed. State v. Durant, Op. No. 2019-UP-83 (S.C. Ct. App. Filed Feb. 20, 2019. Applicant filed a petition for rehearing, which was denied. Applicant then petitioned for a writ of certiorari in the South Carolina Supreme Court, which was also denied. The remittitur was sent August 16, 2019.

SUMMARY OF PERTINENT TRIAL TESTIMONY

At trial, the State presented evidence that Applicant and Wiley Jones got into an argument at a transitional shelter on November 12, 2014. Carl Wheeling, a resident of the shelter, testified Durant was complaining about Jones that evening and said he was going to hurt Jones. Wheeling stated Jones overheard the statement, and Jones and Applicant began arguing. He stated they walked off; about five minutes later, Wheeling heard "a rumble in the bathroom, . . . like individuals fighting." He went into the bathroom and saw Durant holding Jones against a urinal; Applicant had a knife and stabbed Wiley twice. Wheeling grabbed Applicant's arm to stop him from stabbing Jones again, which allowed Jones to escape. (R. 39-42).

Tommy Nesmith, another resident, testified he saw Applicant go outside and throw a knife across a fence. Nesmith stated he retrieved the knife a few days later and gave it to Jones. He recalled the knife had a red stain dried on it. (R. 59-63). An expert in DNA analysis later determined DNA from the substance on the knife matched Victim's DNA. (Tr. 174).

Jones testified he and Applicant had been arguing that evening. Jones went into the bathroom and shortly thereafter "felt someone behind" him. He stated Applicant began stabbing him. Jones called 911 and was transported to the hospital, where he was treated for four puncture wounds. (R. 65-75).

Shortly after the assault, Applicant was arrested at the scene by law enforcement. After

being *Mirandized*, Applicant spoke to Corporal Mark Happ and Investigator Howard Wynn and denied being involved. (R. 25-26). His statements were entered at trial over objection.

ALLEGATIONS RAISED AND RELIEF SOUGHT

In his PCR application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel:
   a. "Counsel fail[ed] to object to the charge of ABHAN after the judge admonished the jury on ABHAN Assault/battery [first] degree."
   b. "Counsel failed to adequately investigate the facts surrounding the charge of attempted murder."

Prior to the evidentiary hearing, Applicant filed an amended application alleging trial counsel was ineffective for failing to:

> a. Preserve for appellate review Investigator Wynn's promise to help Petitioner if Petitioner did not tell the truth;
>
> b. Object to the ABHAN charge.

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the records before it, including the Florence County Clerk of Court records of the underlying conviction, 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. Below are this Court's findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code (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.

Investigator Wynn's promise to Petitioner

Applicant first contends counsel was ineffective for failing to preserve an objection to the admissibility of his statement based upon a promise made by Investigator Wynn. Specifically,

he asserts Investigator Wynn informed him he could not help if Applicant did not tell him the truth. Applicant acknowledges counsel challenged the statement based upon Applicant's intoxication and invocation of his right to remain silent but avers counsel should have also moved to suppress the statement based upon the promise of help made by Investigator Wynn. This Court finds Applicant has failed to prove counsel was ineffective in this regard.

At the PCR hearing, Applicant testified counsel moved pretrial to suppress his statement based upon Applicant's intoxication, but the trial court denied that motion. When asked whether Investigator Wynn said he would help Applicant if he made a statement, Applicant responded that Investigator Wynn stated he would help Applicant the best he could. Counsel testified Applicant never told him that any promises were made to him.

This Court finds credible counsel's foregoing testimony that Applicant never told him any promises were made to him. Likewise, this Court finds not credible Applicant's testimony that Investigator Wynn stated he would help Applicant the best he could. Ultimately, this Court finds Applicant did not prove Investigator Wynn offered leniency in exchange for a statement. Thus, counsel was not deficient.

Further, Applicant did not enter the recording of his statement to Investigator Wynn at the PCR hearing, making this Court unable to discern what prejudicial effect—if any—this statement had.[1] Finally, even if Investigator Wynn informed Applicant he could not help Applicant if he did not tell the truth—as alleged in the amended application—this statement does not rise to the level of a promise of leniency that would require suppression of Applicant's statement. See State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 246–47 (1990) ("A statement induced by a promise of leniency is involuntary only if so connected with the inducement as to be a consequence of the promise."); id. (finding polygraph examiner's

[1] The trial court also admitted a prior statement Applicant made to Corporal Happ, which is not challenged in this PCR application. (R. 4-5, 16-17). According to the solicitor, Applicant denied involvement during both statements. (R. 25-26).

statement to defendant that it would be in his best interest to tell the truth was not a promise of leniency that induced the confession and thus did not require suppression of statement); contra State v. Peake, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987) (finding officer's statement to defendant that State would not seek death penalty if he provided statement was a promise of leniency that induced the confession and thus required suppression of statement). The alleged statement here (that Investigator Wynn could not help Applicant if he did not tell the truth) is more akin to the statement in Rochester, which did not rise to the level of a promise of leniency. Thus, it is not reasonably likely the trial court would have suppressed this statement based on this specific argument or that this issue would have been reversed on appeal had this argument been preserved. Based on the foregoing, Applicant did not prove deficiency or prejudice, and this claim is denied.

Failed to object to ABHAN charge

Applicant next contends counsel was ineffective for not objecting to the court's decision to charge ABHAN. This Court finds Applicant has failed to prove counsel was ineffective in this regard.

At the PCR hearing, Applicant testified counsel should have objected to the ABHAN charge because the evidence did not support it. Counsel relayed he believed Applicant would be convicted of something, and he hoped to get a conviction on a lesser-included offense.

This Court finds counsel's foregoing testimony credible. Further, this Court finds counsel articulated a reasonable strategy in requesting and not objecting to the ABHAN charge. Specifically, counsel relayed he believed Applicant would be convicted of something. Due to the evidence presented by the State, this was a reasonable belief. Counsel articulated a reasonable strategy in requesting the lesser-included offenses in the hope the jury would convict

Applicant of a lesser-included offense rather than attempted murder.[2] This was a valid, reasonable strategy, and counsel was not ineffective.

CONCLUSION

Based on the foregoing, this Court finds and concludes 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 on appeal. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). If Applicant wishes to appeal, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Rule 71,1(g), SCRCP. 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 December, 2023.

GEROGE M. MCFADDIN, JR.
Presiding Judge
Twelfth Judicial Circuit

_____, South Carolina

FILED
2023 DEC 27 PM 12:15
DORIS PHILLOS O'HARA
CLERK OF COURT
FLORENCE COUNTY, SC

[2] AHAN is a lesser-included offense of attempted murder. S.C. Code Ann. § 16-3-600(B)(3).