THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM YORK COUNTY
Court of Common Pleas
Post Conviction Relief

Walton J. McLeod, IV, Circuit Court Judge

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Lower Court Case No.: 2019-CP-46-1277

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Antonio Jordan #292329,..... Petitioner

vs.

State of South Carolina, .....Respondent.

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# NOTICE OF APPEAL

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The Appellant, Antonio Jordan #292329, appeals the Order of Dismissal signed by the Honorable Walton J. McLeod, IV on January 2, 2024. Appellant received written notice of this order on January 2, 2024.

Respectfully submitted,

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February 1, 2024

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| STATE OF SOUTH CAROLINA<br>COUNTY OF YORK | ) | IN THE COURT OF COMMON PLEAS<br>FOR THE SIXTEENTH JUDICIAL CIRCUIT |
| Antonio Jordan, #292329,<br><br>Applicant,<br><br>v.<br><br>State of South Carolina,<br><br>Respondent. | ) | Case No.: 2019-CP-46-1277<br><br>**ORDER OF DISMISSAL** |



This matter comes before the Court by way of an application for post-conviction relief ("PCR") filed by Tommy A. Thomas, Esquire, on behalf of Antonio Jordan ("Applicant") on April 8, 2019, and amended on August 3, 2020. The Court convened an evidentiary hearing into the matter on December 8, 2022, at the Moss Justice Center in York, South Carolina. Applicant was present at the hearing and represented by Mr. Thomas. Assistant Attorney General Zachary W. Jones, of the South Carolina Attorney General's Office, represented Respondent.

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:

## PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. In December 2014, the York County Grand Jury indicted Applicant for possession of a handgun by a person convicted of a crime of violence (2014-GS-46-3735) and possession of a stolen handgun (2014-GS-46-3777). In January 2015, the York County Grand Jury also indicted Applicant for first-degree burglary (2015-GS-46-1543), and possession of a firearm by a person convicted of a violent offense (2015-GS-46-00064).

On January 26, 2015, Applicant appeared before the Honorable Roger L. Couch and pled guilty to all of the charges as indicted except for the first-degree burglary. Applicant entered a plea of not guilty and proceeded to a jury trial solely on the first-degree burglary charge. David C. Cook, Esquire ("Counsel"), represented Applicant. Assistant Solicitors Christopher Epting and Ryan Newkirk of the Sixteenth Circuit Solicitor's Office prosecuted the case.

On January 26, 2015, Judge Couch proceeded with Applicant's guilty plea hearings on the three gun charges. At the conclusion of the plea hearing, Judge Couch sentenced Applicant to three years on each charge to run concurrently. Applicant was also given credit for 438 days.

On January 28, 2015, the jury found Applicant guilty of first-degree burglary. Following the verdict, Judge Couch sentenced Applicant to imprisonment for twenty-five years with credit for 440 days. Judge Couch ran this sentence concurrent to the sentences imposed on Applicant on January 26, 2015.

Applicant filed a timely notice of appeal. Appellate Defender Susan B. Hackett of the South Carolina Commission on Indigent Defense perfected Applicant's appeal solely on the first-degree burglary charge. Ms. Hackett submitted a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). She also petitioned the court to be relieved as counsel. The South Court of Appeals dismissed the appeal and granted appellate counsel's motion to be relieved. The remittitur was issued on January 17, 2018.

## FACTS GIVING RISE TO THE CONVICTION

On November 8, 2013, Derek Clark ("Victim") left his home between approximately 9:00 a.m. and 1:30 p.m.; when he returned home, he discovered his house had been broken into. Victim retrieved a firearm from his truck and proceeded through his residence, but did not locate anyone inside. Victim noticed the back door was open and the glass had been broken.

Victim's entire house had been ransacked, and he called police. Victim discovered four of his firearms were missing. Investigators used a K-9 unit to follow the burglar's trail from Victim's house through the nearby woods, finding numerous scattered items that were later identified as having been taken from Victim's house, including Victim's voter registration card. The K-9 unit also found a black skull cap along the trail.

On November 14, 2013, Applicant was pulled over while riding a moped after he drove through a stop sign. Officer Travis Shealy moved the moped farther to the side of the road in order to safely inspect the VIN number. After he did so, he noticed a firearm lying on the ground where the moped had been. The officer inferred the gun was dropped by Applicant because it appeared to be "fresh" and dry despite there being snow on the ground. At that point, Applicant was placed under arrest, and subsequent investigation revealed the serial number on the gun matched one of the guns stolen during the burglary at Victim's residence.

A buccal swab was taken from Applicant, and that DNA was compared to DNA found on the black skull cap discovered by the K-9 unit at the scene of the burglary. The DNA obtained from the cap was consistent with a mixture of at least two individuals, and the major DNA profile was consistent with Applicant's DNA profile. The probability of randomly selecting an unrelated individual with a matching DNA profile was determined to be anywhere from one in 190 quintillion to one in 8.8 sextillion.

## CURRENT APPLICATION

In his initial application for post-conviction relief, Applicant raised a single allegation of "Ineffective assistance of counsel" without additional detail. As his requested relief, Applicant requested a new trial. Respondent moved to dismiss the application as untimely. Following a hearing on August 12, 2019, the Honorable Roger E. Henderson found that Applicant's delay in

filing the application was due to extraordinary circumstances outside his control and directed that an evidentiary hearing be held on the merits of Applicant's allegations.

Applicant filed an amended application on August 3, 2020, raising the following grounds for relief:

1. Trial Counsel told Applicant that, if Applicant pled to the gun charges, then his plea could not be used against him in his trial on the burglary charge. Applicant was also informed that the burglary charge would be nolle prossed if he accepted the plea to the gun charges.
2. Trial Counsel was unprepared for trial and appeared to have no theory of defense.
3. Trial Counsel was ineffective for advising Applicant not to testify.
4. Trial Counsel failed to retain a DNA expert and appeared not to understand the DNA evidence.
5. Applicant believed he had accepted a plea offer for a negotiated sentence of seven years, but he was later told the offer was withdrawn due to an unexplained error.
6. Trial Counsel failed to investigate and present potential alibi defenses.

## 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 York County Clerk of Court regarding the subject convictions, Applicant's appellate records, the original and amended applications for post-conviction relief, and a post-hearing memorandum filed by Applicant. 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 Counsel, Generally

Applicant's allegations of ineffective assistance of trial 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. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "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 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." *Strickland*, 466 U.S. 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.*

## I. Advice concerning Applicant's plea to the gun charges

Applicant claims he believed he was pleading to the gun charges so that the burglary charge would be dismissed. At the PCR hearing, however, Counsel testified he never told Applicant his burglary charge would be dismissed, nor did he tell Applicant that the gun found at the traffic stop could not be used against him during the burglary trial. Instead, Counsel testified that he advised Applicant to plead to the gun charges—for which Applicant received a sentence of three years, concurrent—because Counsel believed Applicant would gain credibility with the jury during his burglary trial if he admitted to possessing the gun. Counsel testified that Applicant denied any involvement with the burglary but did not deny involvement with the gun in his conversations with Counsel. Counsel explained that the defense strategy was for Applicant to testify that he bought the gun from somebody else, rather than stealing it from the Victim; therefore, Counsel believed that Applicant needed to take responsibility for the gun charges to convince the jury that he was being honest about the gun. Applicant himself testified at the evidentiary hearing that he pled guilty to the gun charges for this reason:

> A. Yes, sir. We concentrated on the gun—on the gun charges. I took initiative that I, you know, they found a gun, so I plead to the gun.
> Q. All right. And it was your position that you'd bought that gun from somebody else?
> A. Yes, sir. (PCR Tr. 38, lines 8–13).

The Court finds Counsel credible as to this issue. Based on Counsel's account, the Court finds Counsel did not advise Applicant that the burglary charge would be dismissed if he pled to the gun charges. The Court finds Counsel's advice regarding the gun charges was not deficient: the evidence against Applicant on the gun charges was very strong, and there was a substantial risk that Applicant would have been convicted of those charges anyway if he had not pled guilty. In addition, he would have forfeited his ability to claim that he bought the gun from somebody

else, which would have deprived him of a plausible defense to the much more serious burglary charge he was facing. The Court finds Counsel's advice to Applicant to enter the guilty plea as to the gun charges was given in furtherance of a valid defense strategy.

Because Counsel's advice in this matter was not deficient, the Court finds Applicant has failed to satisfy the *Strickland* test as to this allegation. Accordingly, this claim is denied and dismissed with prejudice.

**II. Preparation and Theory of the Defense**

Applicant claims Counsel was unprepared for trial and appeared to have no theory of the defense. Applicant alleges Counsel was only retained to represent him in his attempt to secure a bond, not to represent him at his plea or trial. The Court finds this allegation meritless. Counsel credibly testified that he had a contract to represent Applicant throughout all proceedings regarding his charges, and he testified that his office used a separate contract in cases where his representation was limited to bond issues.

Moreover, as already discussed, Counsel had a theory of the case. Counsel's theory of the case was that Applicant had not stolen the gun that connected him to the burglary; rather, he had bought it from some third person. The only other evidence linking Applicant to the burglary was the DNA on the cap, which Counsel argued was inconclusive because it contained a mixture of DNA from at least two individuals. Unfortunately, Applicant's unexpected refusal to testify resulted in Counsel being unable to fully develop this theory.[1] Counsel also presented alibi witnesses for Applicant.

[1] As discussed further in response to Applicant's allegation 3, below, the Court finds Counsel was not to blame for Applicant's unanticipated decision not to testify.

The Court finds Counsel proceeded to trial with a sound defense theory and pursued a valid trial strategy. Moreover, from a review of the record, the Court is satisfied that Counsel was well prepared to defend Applicant at trial. Accordingly, the cCurt finds Applicant has failed to prove Counsel was deficient, and this allegation must be denied and dismissed with prejudice.

**III. Applicant's decision not to testify**

Applicant claims Counsel advised him not to testify because his prior convictions would be used against him. The Court finds this allegation is meritless. Counsel credibly testified that, while he did advise Applicant of the risks associated with testifying, the plan was always for Applicant to testify in his own defense and to explain that he had bought the gun from a third party. Counsel testified he did not expect that Applicant would refuse to testify. This is supported by the transcript of Applicant's trial: at the close of the State's case, the trial court explained Applicant's right to testify or to remain silent, as well as the risk of prior convictions coming in if he chose to testify. The trial court allowed Applicant a few minutes to discuss the matter with Counsel. After Applicant indicated that he had discussed the issue with Counsel and did not need to discuss it any further, the court asked him whether he intended to testify, and Applicant said he did. However, when the trial resumed the following day, Applicant indicated he had changed his mind and no longer wished to testify.

The Court finds Applicant has not met his burden of proving, by a preponderance of the evidence, that Counsel was deficient. Although Counsel advised Applicant that he risked having his prior convictions used against him if he testified, which was reasonable and necessary advice under the circumstances, Counsel did not tell Applicant not to testify and planned from the beginning of trial that Applicant would testify to buying the gun from a third party. Applicant's refusal to testify was not brought about by any deficient act or omission of Counsel. Therefore,

the Court finds Applicant has failed to prove Counsel was ineffective as to this issue, and this allegation is denied and dismissed with prejudice.

**IV. Failure to retain DNA expert or to understand DNA issues**

Applicant claims Counsel did not appear to understand the DNA evidence and should have retained a DNA expert to refute the State's expert testimony linking his DNA to the cap found at the crime scene. However, Applicant did not present any expert testimony to substantiate his claim. *See Dempsey v. State* 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (holding a PCR applicant failed to show prejudice from his trial counsel's failure to hire an expert because he did not have an expert testify at his PCR hearing), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). When asked, at the PCR hearing, to explain what was wrong with the State's DNA evidence, Applicant merely complained that the State represented that the DNA was taken from "a black hat," when it was actually taken from "a black Do-Rag." The Court finds that whether the garment in question is characterized as a hat, cap, or "Do-Rag" is immaterial. Therefore, Applicant has failed to prove prejudice. In addition, Counsel credibly testified that Applicant's family did not have enough money to pay for a DNA expert, and he had no reason to expect that analyzing the DNA a second time would be helpful to the defense. Therefore, the Court also finds Counsel's decision not to retain a DNA expert was not deficient. Accordingly, this allegation is denied and dismissed with prejudice.

**V. Acceptance of seven-year guilty plea offer**

Applicant claims he believed he accepted an offer to plead guilty to the burglary charge for a negotiated sentence of seven years, but the offer was subsequently withdrawn without explanation. The Court finds this claim meritless. At the beginning of his trial, Applicant insisted he had accepted a plea offer of zero-to-five years, but the solicitor denied ever making such an

offer and said the lowest offer was a negotiated cap of seven years. The trial court asked Counsel his understanding of the plea issues, and Counsel explained that Applicant had requested an offer of zero-to-five, but the lowest offer the State would give was a cap of seven, which Applicant would not agree to. Once the trial began, the seven-year offer was taken off the table, but Counsel spoke to the "higher-ups" in the solicitor's office and obtained another offer, which he relayed to his client. The trial court then asked Applicant if he had "accepted any offers that have been presented," and Applicant replied, "No, sir, Your Honor."

At the evidentiary hearing, Counsel testified that the lowest offer made to Applicant was the seven-year offer, which Applicant refused to take. Counsel told Applicant he had already been sentenced to three years on the gun charges, so he was only facing a few more years if he took the seven-year offer, whereas he was facing twenty-five years if he lost at trial. Nevertheless, Applicant insisted on a five-year offer. Counsel testified "the whole thing blew up over that two-year difference." The Court finds Counsel's testimony is consistent with the trial transcript and credible. Therefore, the Court finds Applicant did not attempt to accept the seven-year plea offer. This allegation is, therefore, denied and dismissed with prejudice.

**VI. Failure to present alibi defense**

Applicant claims Counsel failed to investigate and present potential alibi witnesses. At the evidentiary hearing, Applicant presented the testimony of his brother, Neil Jordan, who stated he picked Applicant up from his mother's house at 8:45 AM and dropped him off at his girlfriend's house at 5:00 PM on the day of the crime. Jordan testified he told Counsel this information and offered to take the stand in his brother's defense, but Counsel did not call him as a witness.

Counsel testified that he spoke to Jordan numerous times, and Jordan never asked him to call him as an alibi witness. The trial transcript reveals that Counsel did call two alibi witnesses:

Applicant's mother, Maryann Jordan, and Applicant's girlfriend, Eddielena Boyd. Counsel testified that he would have put up additional alibi witnesses if he had known about them. However, Counsel noted that Jordan's account did not match the timeline given by other two alibi witnesses, so he thought it might have been more inculpatory than exculpatory.

The Court finds Counsel's testimony credible, and Jordan's testimony not credible, as to this issue. At trial, Applicant's mother testified that she left home with Applicant to work at their family-owned store at 8:30 AM; because work was slow, she left with Applicant between 10:30 AM and 11:00 AM and dropped him off at his girlfriend's house. Applicant's girlfriend testified she got a call from Applicant at 10:45 AM saying he was at his mother's house. Applicant came to her house at 11:15 AM, and they stayed together until 3:15 PM. Jordan, who was not mentioned by either Applicant's mother or his girlfriend, testified he picked Applicant up at 8:45 AM and dropped him off at 5:00 PM, which is not consistent with the testimony of either alibi witness who actually testified at trial. Accordingly, the Court finds Applicant has failed to prove either that Counsel was deficient for failing to call Jordan to testify or that Applicant was prejudiced thereby. Therefore, this allegation is denied and dismissed with prejudice.

## 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. That Applicant be remanded to the custody of the South Carolina Department of Corrections.

**IT IS SO ORDERED this** 2nd **day of** January**, 2024.**

WALTON J. MCLEOD, IV
Presiding Judge
Sixteenth Judicial Circuit

Lexington South Carolina