RECEIVED
Jun 04 2024
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

The Honorable B. Alex Hyman, Circuit Court Judge

Case No. 2021-CP-36-00390

Ansel Bradley Wallen, #292474, ... Petitioner,

v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

Applicant, Ansel Bradley Wallen, appeals the order of the Honorable B. Alex Hyman, filed on or about May 28, 2024, and received by the undersigned on June 4, 2024.

June 4, 2024

ASHLEY A. MCMAHAN, ESQUIRE
MCMAHAN LAW, LLC
PO Box 50536
Columbia, SC 29250
803-219-1110
ashley@mcmahanlawsc.com
SC Bar No. 71676
ATTORNEY FOR APPLICANT

Opposing Counsel:
Zachary W. Jones, Asst. 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
Ansel Bradley Wallen, #292474 Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2021-CP-36-00390 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief ("PCR") filed by Ansel B. Wallen ("Applicant") on Septmber 30, 2021, and amended on November 17, 2023. The Court convened an evidentiary hearing into the matter on November 27, 2023, at the Newberry County Courthouse. Applicant was present at the hearing and represented by Ashley A. McMahan, Esquire. 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, Chief Public Defender Charles V. Verner. ("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. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is currently confined in the South Carolina Department of Corrections (SCDC). During its February 2019 term, the Newberry County Grand Jury indicted Applicant for Burglary, First Degree (2019-GS-36-00151), and Assault and Battery, First Degree (2019-GS-36-00152). Applicant was represented by Charles Verner, Esquire. Deputy Solicitor C. Dale Scott and

Assistant Solicitor Taylor Daniel of the Eigtht Circuit Solictor's Office prosecuted the case.

On April 22-23, 2019, Applicant appeared for trial before the Honorable R. Scott Sprouse, circuit court judge, and a jury. Following trial, Applicant was convicted of Burglary, First Degree, and Assault and Battery, First Degree. Judge Sprouse sentenced Applicant to imprisonment for a term of fifteen years for Burglary, First Degree, and ten years for Assault and Battery, First Degree, with the sentences to be served concurrently

Applicant filed a timely notice of appeal, and an appeal was perfected on his behalf by Appellate Defender Adam Ruffin of the Office of Appellate Defense, who filed a *Anders*[1] Brief of Appellant raising the following issue:

1. The trial judge erred in denying defense counsel's motion for a directed verdict on the burglary first degree charge because there was not direct or substantial circumstantial evidence that Appellant entered Saverance's home without consent with the intent to commit a crime therein.

Applicant filed two *pro se* responses to the *Anders* Brief of Appellant. Following a review of the record and briefs pursuant to *Anders*, the South Carolina Court of Appeals dimsissed Applicant's appeal and granted Counsel's request to be relieved. *State v. Wallen*, 2021-UP-139 (filed April 28, 2021). The Remittitur was issued on May 25, 2021.

Factual Summary

On December 7, 2018, Applicant went to Jennifer Saverance's house to confront her about rumors which were spread around town about Applicant. (Tr. p. 129, line 19–p. 130, line 3; p. 131, line 20–p. 132, line 5). Applicant was in a relationship with Saverance's mother for an extended period of time and knew Saverance for over thirty years. (Tr. p. 128, lines 13–22). When Applicant arrived at Saverance's house, he used an Allen wrench to tap on Saverance's front door. (Tr. p.

[1] *Anders v. California*, 386 U.S. 738 (1967).

131, lines 11–19; p. 132, lines 14–20). Saverance came to the door and Applicant demanded severance stop spreading rumors about him. (Tr. 132, line 22–p. 133, line 13). At trial, Saverance testified Applicant came over to her house and was banging on the glass of the front door. (Tr. p. 40, lines 3–5). Saverance testified she opened the door to see who was there, and Applicant pushed the door open and forced his way into her house. (Tr. p. 44, lines 4–7). Saverance testified Applicant got in her face with the Allen wrench in hand, and said "I'll kill you, you fucking bitch and he walks me backwards into the house." Saverance's son, C.J., testified he was lying in bed when he heard someone knock on the door. (Tr. p. 67, lines 5–8). C.J. testified that he heard his mom tell the person to leave because she and CJ were sick with the flu, then C.J. heard Applicant say "I'll fucking kill you bitch." (Tr. p. 67, line 22–p. 68, line 2). C.J. testified he got out of bed and went into the room where his mother and Applicant were, and Applicant backed out of the house. (Tr. p. 68, lines 2–7). Applicant entered the house a second time before leaving the property. (Tr. p. 49, lines 3–10; p. 68, lines 2–7).

Jermiah Sinclair of the Whitmire Police Department responded to the scene after receiving a call from Saverance. (Tr p. 85, line 17–p. 86, line 25). Sinclair located Applicant a short distance from Saverance's house speaking to Saverance's mother in the street. Applicant denied entering Saverance's house or threatening Saverance. Applicant was arrested later that evening after Sinclair obtained a witness statement from Saverance. (Tr. p. 97, lines 3–7; p. 99, line 23–p. 100, line 1).

Present Application

Applicant timely commenced this PCR action on September 30, 2021. In his application for post-conviction relief, Applicant alleges he is entitled to relief based on the following:

1. Ineffective Assistance of Counsel
2. "Sat a juror whos [sic] son had case in Solicitor's Office and my lawyer was his

lawyer."
3. "Did not enter ladies house."
4. "Not a burglary. Didn't assault her she was in house I'm on porch outside."
5. "No physical evidence. The police just take this ladies word for me entering her house. The corroborating witness is never questioned nor interviewed by the police."

On November 17, 2023, Applicant amended his application to raise the following claims:

1) Ineffective Assistance of Counsel of Deputy Public Defender Charles V. Verner
   (a) Failure to adequately argue the defense that the Applicant never actually entered the victim's home and therefore could not be convicted of burglary.
   (b) Failure to request the witnesses (particularly the son) be sequestered as they were able to build their testimony off each other's.
   (c) Failure to adequately cross examine the witnesses about their statements. What they said to police was different than their trial testimony.
   (d) Failure to raise a for cause strike on juror whose son was also represented by Mr. Verner.

At the evidentiary hearing, Applicant proceeded on the allegations as stated 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

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)).

Failure to argue that Applicant never entered the victim's home

Applicant claims Counsel was ineffective for failing to argue that he could not be guilty not burglary because he never entered the victim's home. The Court finds this allegation is conclusively refuted by the record.

At trial, Applicant testified in his own defense. On direct examination, he testified:

> I am going to tell you this right here. I never went in that woman's house. I never crossed that threshold because I have been in trouble before, you know, and I know better than to cross that dadgum threshold. I am going to tell you that now and because I knew if I crossed that threshold they would get me for burglary. You hear me, I know my law so that is why I didn't go in that woman's house.

(Tr. p. 133, lines 13–20). In his closing argument, Counsel presented three alternative reasons the jury could find Applicant not guilty. First, they could believe Applicant's testimony that he did not enter the house; second, they could find that he had consent to enter; and third, they could find

that he did not intend to commit a crime. (Tr. pp. 188–95). Regarding the first reason, Counsel argued:

> [Applicant] says I did not go in the house, this argument happened at the threshold. He is entitled to be believed . . . When somebody says I am not guilty that is evidence in and of itself that you can find somebody not guilty. If you think he is sincere and credible, somebody's denial of a crime, particularly when you have got the burden of the State to produce and persuade you of the evidence, somebody's denial that he committed the crime is evidence, the game is over. I believe the man, that is all you need.

(Tr. p. 191, lines 5–15). Counsel went on to argue "if you find . . . it happened on the porch he is not guilty of first degree burglary." (Tr. p. 195, lines 11–14).

It is clear from the transcript of Applicant's trial that Counsel did argue Applicant was innocent of the burglary charge because he never entered the home.[2] Therefore, the Court finds Applicant has failed to prove Counsel was ineffective as to this issue. Accordingly, this allegation is denied and dismissed with prejudice.

Failure to request sequestration of the victims

Applicant claims Counsel was ineffective for failing to request that Jennifer Saverance and her son, C.J., be sequestered to prevent them from hearing one another's testimony. The Court finds this allegation meritless.

As a matter of law, no person may be sequestered from a proceeding adjudicating an offense of which he or she was a victim. S.C. Code Ann. § 16-3-1550(B). As both Saverance and C.J. were living in the home when Applicant perpetrated the burglary, they are both victims of that

[2] To the extent Counsel suggested two alternative rationales whereby the jury could acquit Applicant of the burglary charge even if they disbelieved his testimony, the Court finds Counsel was pursuing a reasonable trial strategy. The State presented testimony from both Saverance and her son that Applicant *did* enter the home. It was reasonable for Counsel not to base his defense solely on the possibility the jury might credit Applicant's self-serving testimony over the testimony of the State's witnesses.

offense. Therefore, neither of them could be sequestered from Applicant's burglary trial, even if Counsel had requested it. In addition, Counsel testified that both Saverance and C.J. had already given statements to the police, so he would have been able to impeach them with those statements if either of them had changed their testimony at trial to conform to the other's testimony. Therefore, the Court finds Applicant cannot prove either deficiency or prejudice as to this issue, and this allegation is denied and dismissed with prejudice.

Failure to adequately cross-examine witnesses about their statements

Applicant claims Counsel was ineffective for failing to impeach Saverance and C.J. by cross-examining them as to inconsistencies between their testimony and their prior statements. The Court finds this allegation meritless.

The only "inconsistency" pointed out by Applicant was that Saverance, in her initial statement, stated that she opened the door when Applicant knocked on it, but at trial she testified Applicant pushed the door open. In context, however, the Court finds Applicant has failed to show that there was any material inconsistency in Saverance's account at trial and her initial statement. At trial, Saverance stated, "I opened it just this far to peek my head out, and he pushed the door open and come in." (Tr. p. 44, lines 6–7). Saverance did not deny opening the door but clarified that she only opened the door a small amount so that she could see who was knocking. (Tr. p. 44, lines 10–15). After she cracked the door in that way, Applicant pushed the door open and came inside, menacing her with the wrench and threatening to kill her. (Tr. p. 45, lines 2–6). At the evidentiary hearing, Counsel testified that the victims' stories did not change dramatically from the day of the incident until trial. The Court agrees and finds that Applicant has not met his burden of proving that Counsel was deficient for failing to more thoroughly cross-examine the victims or that the result of the trial would likely have been different if Counsel had questioned the victims

about this alleged inconsistency. Therefore, this allegation is denied and dismissed with prejudice.

Failure to move to strike juror whose son was represented by Counsel

Applicant claims Counsel was ineffective for failing to move to strike for cause a juror whose son had a pending criminal case and was represented by Counsel. The Court finds this allegation meritless.

The transcript reflects that, partway through Applicant's trial, the solicitor learned that Juror No. 101, Natasha Kinard, was the mother of Desmond Coleman, a defendant with a pending case. The solicitor argued Kinard should be removed and replaced with an alternate because she did not respond to the State's requested *voir dire* question about whether any juror had an immediate family member prosecuted by the Eighth Circuit Solicitor's Office. (Tr. p.172, line 22–p.173, line 17). Counsel informed the trial court that he did not believe Kinard's omission was intentional, but he agreed she should be removed and replaced with an alternate. (Tr. p. 173, lines 19–22). The Court questioned the juror, who admitted her son had a pending case but stated she thought the question was referring to "this case here." (Tr. p. 174, lines 6–13). The trial court relieved her from duty and directed that an alternate take her place. (Tr. p. 174, lines 16–22).

It is clear from the transcript that, as soon as the parties learned that Kinard had a son who was being prosecuted by the solicitor's office, they both informed the trial court and mutually requested that she be replaced by an alternate. There is no evidence that Counsel knew, or had any reason to know, that Kinard was related to one of his clients prior to that point in Applicant's trial. Counsel acted to remove Kinard as quickly as practicable under the circumstances. Therefore, the Court finds Applicant has failed to prove Counsel's performance was deficient on this point. In addition, there is no evidence that Applicant was prejudiced by Kinard's limited involvement in his trial up to that point. Kinard was replaced before the jury began deliberations,

so there is no reason to believe that her involvement had any effect on the verdict. In addition, the Court notes that the *State* initially requested the question to which Kinard failed to respond, and the solicitor joined Counsel's request that Kinard should be removed and replaced. Therefore, the Court also finds that Applicant has not met his burden of proving prejudice. Accordingly, this allegation of ineffective assistance is denied and dismissed with prejudice.

[*conclusion and signature on following page*]

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 for post-conviction relief. 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 21 **day of** May **, 2024.**

B. ALEX HYMAN
Presiding Judge
Eighth Judicial Circuit

Conway, South Carolina