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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. 2020-CP-36-00111

Matthew L. Jackson, #329032, ... Petitioner,

v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

Applicant, Matthew L. Jackson, 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

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STATE OF SOUTH CAROLINA COUNTY OF NEWBERRY	)	IN THE COURT OF COMMON PLEAS FOR THE EIGHTH JUDICIAL CIRCUIT
Matthew Jackson, #329032 Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2020-CP-36-00111 **ORDER DENYING POST-CONVICTION RELIEF AND GRANTING BELATED REVIEW OF DIRECT APPEAL ISSUES PURSUANT TO *WHITE V. STATE.***

This matter comes before the Court by way of an application for post-conviction relief ("PCR") filed by Matthew Jackson ("Applicant") on February 19, 2020, and amended on November 15, 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. James Casey Gregory and James Robert Peterson testified on the Applicant's behalf. 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. However, the Court finds Applicant is entitled to belated review of direct appeal issues pursuant to *White v. State*, 263 S.C. 110, 108 S.E.2d 35 (1974). The Court finds as follows:

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NEWBERRY COUNTY
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ELIZABETH P. COLE
CLERK OF COURT

I. PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections. In September 2018, the Newberry County Grand Jury indicted Applicant for Attempted Murder (2018-GS-36-00482). Applicant was represented by Assistant Public Defender Charles Verner. Deputy Solicitor Dale Scott and Assistant Solicitor Taylor Daniel of the Eight Circuit Solicitor's Office prosecuted the case.

On March 26, 2019, Applicant proceeded to a jury trial before the Honorable Donald B. Hocker, where he was convicted of the lesser included offense of Assault and Battery of a High and Aggravated Nature. Judge Hocker sentenced Applicant to fifteen years and three months imprisonment. Applicant did not appeal his conviction or sentence.

Factual Summary

On June 6, 2018, Victim Tony Jackson was at Sunset Boat Dock with his girlfriend Ashleigh Cockrell, their two daughters, his girlfriend's sisters, Alexis Cockrell and Ayleah Cook, two family friends, John and Ashley Platts, and their children. (Tr. 83-87). Applicant arrived at the dock and approached Victim's Family. (Tr. 91). Victim and Applicant had a verbal interaction where Victim told Applicant to stop touching or hugging his daughter. (Tr. 91-95). Applicant left the dock after speaking with Victim. (Tr. 96). Later that day, as victim and his family prepared to leave, Applicant returned with his mother (Sheila Jackson) and three friends, later identified as Cameron Goff, Casey Gregory and B.J. Lipscomb. (Tr. 102-104, 108-109, 385-386). A fight began between Sheila Jackson and Ayleah Cook. (Tr. 105-107). During the fight between Sheila Jackson Ayleah Cook, Applicant attacked Victim. (Tr. 110). During this altercation, Victim was cut multiple times with a knife. (Tr. 110-111, 235). Victim was taken to the hospital by John Platts to treat his wounds. (Tr. 111). Victim had to be transported to Richland County due to the severity of his injuries. (Tr. 46). Victim suffered muscular issues and developed a hernia as a result of his

injuries. (Tr. 441). Applicant and Sheila Jackson fled the scene before law enforcement arrived. (Tr. 111, 219). Applicant was later arrested in Sumter, South Carolina. (Tr. 345).

Present Application

In his original application for post-conviction relief, Applicant alleged that he is being held in custody unlawfully for the following reasons:

1) Ineffective Assistance of Counsel
   (a) "Public Defender was not supposed to be able to represent me due to the fact I had a previous ineffective counsel PCR against him."
   (b) "My witnesses were never subpoenaed."
      (i) "Newberry Sheriffs refused to transport two of my witnesses to court."
   (c) "My attorney said that he would file appeal and didn't."
2) Prosecutorial Misconduct
   (a) "Prosecution showed judge pictures of crime I wasn't convicted for during sentencing."
3) "Jury was compromised by witness."
4) Judicial Misconduct
   (a) "Presiding Judge had grudge against me, he stated that I should have gotten more time for a previous offense."
   (b) "Judge failed to charge all lesser included offenses."

As requested relief, Applicant requested "Mistrial declared, time reconsideration."

On November 15, 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 call James Gregory as a witness in the trial.
   (b) Failure to file a direct appeal from the conviction and sentence.

At the outset of the evidentiary hearing, Applicant raised an additional allegation of ineffective assistance of counsel for failure to call James Peterson as a witness during the trial. At the hearing, Applicant proceeded only on his allegations of ineffective assistance of counsel.[1]

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

[1] As Applicant provided no evidence or argument concerning his allegations of prosecutorial misconduct, juror misconduct, or judicial misconduct, the Court deems those issues abandoned.

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 conviction, 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 call James Gregory and James Peterson at trial

Applicant alleges Counsel was ineffective for failing to call James Gregory and James Peterson to testify on his behalf at trial. The Court finds this allegation is without merit.

At the evidentiary hearing, Applicant testified he had a dispute with Victim at the boat ramp, left the area, and returned after some time with his mother. He testified that, when he arrived, his mother was attacked by multiple people. When Applicant got out of the car to help her, he was attacked by three people, and he cut Victim with the knife in self-defense during the fight. Applicant claimed Peterson was with him during the first confrontation at the boat ramp, and Gregory was present at the second confrontation that turned violent. Applicant testified he told Counsel about Peterson and Gregory as potential witnesses, but Counsel did not call them at trial.

Both Peterson and Gregory testified at the evidentiary hearing. Peterson testified he was only with Applicant the first time he went to the boat ramp. He testified there were approximately thirty or forty people present, about half of whom were having words with Applicant. Peterson heard a lot of yelling back and forth, so he got back in the car and left. Gregory testified he was present for the second confrontation between Applicant and Victim. He claimed that, when he arrived at the boat ramp, Applicant's mother was already getting beaten up by multiple girls. Gregory testified that both the Applicant and his mother were rushed by people as soon as they got out of the car and that the Applicant's mother was "jumped." He also noted that when the Applicant got back into the car, the Applicant's face was bloody and bruised. However, Gregory later testified he could not see who was attacking Applicant or how many people were fighting him because Gregory, who was on probation and afraid of getting into trouble, remained in the car hiding his face. He further noted the Applicant's mother did not get back in the car.

Counsel testified the defense theory was that Applicant did not start the fight but only became involved to defend his mother who was being attacked and that he did not pull out the knife until Victim started beating him up. There were difficulties with this theory: the fight happened at the same location as Applicant's earlier confrontation with Victim, suggesting that Applicant had returned with intent to resume the altercation; Applicant gave several inconsistent statements to police about his reason for returning to the boat ramp (Trial Tr. 406–07); there was substantial evidence that Applicant's mother started the fight by assaulting Ayleah Cook, which complicated Applicant's claim that he was justified in defending his mother (Trial Tr. 152–53; 187–88; 214; 220; 319–20; 427–28); Applicant admitted during his police interview that he had armed himself with the knife before returning to the boat ramp (Trial Tr. 369–70); and there was testimony from multiple witnesses that Applicant did not try to break up the fight between his mother and Cook, but went straight toward Victim with the knife behind his back and struck the first blow. (Trial Tr. 214–17; 221; 229; 256–57; 287–90; 313; 429–30).

The Court finds Counsel was not ineffective for failing to call Peterson and Gregory. Peterson, by his own admission, was only present for the initial verbal altercation between Applicant and Victim and was not present at the later physical fight. The Court finds his testimony mostly concerned the undisputed fact that Applicant had a verbal confrontation with the people at the boat ramp; therefore, it was merely cumulative and could not have affected the outcome of the trial. Similarly, Gregory testified merely that Applicant's mother was fighting some girls when he arrived at the scene, and that Applicant got in a fight with Victim shortly after getting out of the car. This testimony was also largely cumulative to other testimony presented at trial. Moreover, Gregory did not explain who started the fight between Applicant's mother and the girls, why Applicant returned to the boat ramp, or when Applicant took out the knife. Gregory's testimony,

therefore, would not have addressed the most serious difficulties with the defense's theory of the case. In addition, Gregory's testimony was of limited probative value because he admitted he could not see the fight in detail as he stayed in the car hiding his face.[2]

For these reasons, the Court finds Applicant has not met his burden of proving he was prejudiced by Counsel's failure to call Peterson and Gregory.[3] Therefore, Applicant has failed to prove Counsel's performance was ineffective as to this issue.

Bias due to prior allegation of ineffective assistance

Applicant also claims Counsel was biased against him due to a previous PCR action in which Applicant claimed Counsel provided ineffective assistance. Applicant argues Counsel bore him a grudge and, consequently, did not represent him well. The Court finds this allegation is without merit. Counsel explained he had represented Applicant in six different cases since 2006. He stated he could not specifically remember the prior PCR action Applicant was talking about, but he testified that he never holds grudges against a PCR applicant if they claim that he was ineffective. The Court finds Counsel's testimony on this point credible. Moreover, the transcript of Applicant's trial reflects that Counsel energetically disputed the State's case, cross-examined the State's witnesses, and argued Applicant's version of the facts to the jury. Far from sabotaging Applicant's case, Counsel appears to have been instrumental in obtaining Applicant's acquittal on the attempted murder charge.

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[2] This testimony was contradicted by the testimony of multiple witnesses at the scene, who testified that Gregory was standing outside the car "mean-mugging" and acting as if he had a gun. (Trial Tr. 131; 155; 189; 217–18; 223–25; 240–41; 429). Due to these discrepancies, is not likely that a jury would have found Gregory credible.

[3] In addition, the Court notes that, during Applicant's trial, Counsel argued that the State could have called Gregory as a witness or introduced his recorded statement, implying that the State was not telling the jury the whole story. (Trial Tr. 385–87; 561, lines 10–15). Counsel could not have made this argument if Gregory had testified.

Accordingly, the Court finds Applicant has failed to prove Counsel's performance was ineffective as to this issue.

Failure to file notice of appeal

Finally, Applicant claims Counsel was ineffective for failing to file a notice of appeal from his conviction. The Court agrees, and finds Applicant is entitled to belated review of direct appeal issues pursuant to *White v. State*, 263 S.C. 110, 108 S.E.2d 35 (1974).

Counsel has a constitutionally imposed duty to consult with a defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). In *White*, the South Carolina Supreme Court held that where a PCR applicant does not voluntarily and intelligently abandon his appeal, the supreme court, upon an appeal of the post-conviction relief decision, will review the trial record and pass upon all issues properly raised and argued as if the direct appeal had been perfected. 263 S.C. 110, 108 S.E.2d 35. However, a PCR court may not grant post-conviction relief on this ground. *Davis v. State*, 288 S.C. 290, 291 n.1, 342 S.E.2d 60, 60 n.1 (1986).

At the evidentiary hearing, Counsel acknowledged that he should have filed an appeal and was surprised when, after reviewing his defense file, he realized he had not filed one. Counsel for the State conceded that, based on this testimony, *White v. State* review was merited in this case. Therefore, the Court finds Applicant has established that he did not voluntarily and intelligently abandon his right to a direct appeal and that he is entitled to *White v. State* review.

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. However, the Court finds Applicant has established he is entitled to belated review of direct appeal issues pursuant to *White*.

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