

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM COLLETON COUNTY
Court of Common Pleas
The Honorable J. Derham Cole, PCR Action Judge
2022-CP-15-00086

RECEIVED

Aug 16 2024

S.C. SUPREME COURT

KEVIN GANTT, #380542,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Kelvin Gantt appeals the denial of his post-conviction relief application. The post-conviction relief action was heard and denied by the Honorable J. Derham Cole, circuit court judge, on May 6, 2024, and was denied by written order issued filed on August 13, 2024.

Applicant received notice of the judgement on August 14, 2024.

/s Chelsey F. Marto
Chelsey F. Marto, Esquire
Attorney for the Applicant
The Law Office of Chelsey F. Marto, LLC
P.O. Box 8795
Columbia, SC, 29201
(864)-404-5583

Other Counsel of Record:
Bryan Hall, Esquire
Office of the Attorney General, State of SC
P.O. Box 11549
Columbia, SC, 29211-1549

STATE OF SOUTH CAROLINA)
)
 COUNTY OF COLLETON)
)
 Kelvin Gantt, SCDC #380542,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 The FOURTEENTH JUDICIAL CIRCUIT

ORDER OF DISMISSAL

Civil Action No. 2022-CP-15-00086

2024 AUG 12 PM 1:00

COLLETON COUNTY
 COMMON PLEAS COURT

This matter came before the Court on May 6, 2024 for an evidentiary hearing pursuant to an application for post-conviction relief (“PCR”) filed February 9, 2022 by Kelvin Gantt (“Applicant”). Applicant was present with counsel Chelsey F. Marto, Esq. Assistant Attorney General Bryan T. Hall represented Respondent.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections (“SCDC”) serving a twenty (20) year sentence. In its October 2017 term, the Colleton County Grand Jury indicted Applicant for attempted murder (2017-GS-15-00700) and possession of a weapon during the commission of a violent crime (2017-GS-15-00699). These charges arose from a shooting incident in which Herbert Brown (victim) was shot on or around June 24, 2017. On June 17-19, 2019, Applicant proceeded to a jury trial before Circuit Judge Stephen H. John. Assistant Solicitors Ceth Utsey and Katherine Orville prosecuted the case. Applicant was represented by Helen Dovell, Esq. (“Counsel”).

The jury convicted Applicant as indicted. Judge John sentenced Applicant to a concurrent sentence of twenty (20) years for attempted murder and five (5) years. On June 27, 2019, a notice of appeal was filed on Applicant’s behalf by Counsel. On appeal, Applicant was represented by Appellate Defender Katherine H. Hudgins, who filed a brief raising the following issue:

Did the trial judge abuse his discretion by not properly evaluating the *Colf* factors and admitting Appellant’s prior conviction for possession of cocaine?

Following briefing and without oral argument, the Court of Appeals affirmed Applicant's conviction and sentence, determining the trial court conducted a meaningful balancing test as required under Rule 609, SCRE, and *State v. Colf*, 337 S.C. 622, 525 S.E.2d 246 (2000). *State v. Gantt*, Op. No. 21-UP-392 (S.C. Ct. App. filed Nov. 3, 2021). The Remittitur was sent on November 11, 2021.

CURRENT APPLICATION

Applicant timely commenced this PCR action alleging he is being held in custody unlawfully due to the ineffective assistance of trial counsel for failure to adequately cross-examine the State's witnesses. On June 17, 2022, Respondent filed a return and a motion requesting a more-definite statement on Applicant's allegations. Applicant, through PCR counsel, amended his application to raise the following allegations:

Ineffective Assistance of Counsel

- a. Failure to investigate the State's witnesses before trial, including lay witnesses and investigators.
- b. Failure to properly prepare Applicant's alibi witness to testify.
- c. Failure to investigate GSR and fingerprint evidence.
- d. Failure to obtain a favorable plea offer.
- e. Failure to object to truth-seeking language in the solicitor's opening statement (Tr. 79).
- f. Failure to properly cross-examine and impeach Ms. Holmes and Mr. Brown.

At the evidentiary hearing, Applicant proceeded *solely* on the allegations contained in his amended application. Before this Court are the Colleton County Clerk of Court records of the subject conviction; Applicant's records from SCDC; the appellate record; the trial transcript; and the records of the current PCR action.

TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

Applicant's Testimony

At the evidentiary hearing, Applicant testified that he believed Counsel did well at trial but averred that Counsel should have impeached Ms. Holmes, who testified at trial that she saw Applicant at the crime scene. Applicant averred Ms. Holmes' testimony impacted his trial. Regarding investigations, Applicant averred Counsel should have investigated the crime scene and physical evidence, including GSR and bullets. Regarding the alibi witness, Jahleel Dubois, Applicant testified that he believed the testimony went "fine" but believed Counsel could have met with the witness earlier and prepared more. Regarding impeaching Mr. Brown, the victim, Applicant testified he believed Counsel should have questioned him more about the crime scene. Regarding a plea offer, Applicant testified that he wanted a plea offer but did not get one. Regarding the solicitor's opening statements, Applicant believed Counsel should have objected.

Trial Counsel's Testimony

Helen Dovell ("Counsel") testified she met with Applicant at least fifteen (15) times in preparation for trial. Regarding a plea offer, Counsel testified that after talking to the victim, the solicitor relayed an offer of twenty (20) years. Counsel testified she told the solicitor that she did not believe the twenty (20) year offer was a "real" offer. Counsel testified that she asked the solicitor for an offer of assault and battery of a high and aggravated nature ("ABHAN") for a five (5) to ten (10) year sentence, and the solicitor did not agree.

Counsel testified that the trial went as expected. Regarding the solicitor's use of truth-seeking language in opening statements, Counsel testified that, in hindsight, she believed she should have objected. Counsel also testified that she does not recall why she did not object but probably did not want to draw attention to the remarks. Counsel further testified that case law indicates it is improper for the trial judge to use truth-seeking language, and Counsel would have objected if the judge used such remarks.

Regarding Holmes, Counsel testified she learned a week before trial that Holmes would testify that she saw Applicant. Counsel testified that Holmes testified that she did not know whether she gave statements to law enforcement, and Counsel could have refreshed her recollection. Counsel testified that she believed she made good use of the 911 call in closing arguments by arguing that Holmes said she did not know Applicant. Regarding Brown, the victim, Counsel testified that she investigated Brown and spoke to people in the community but did not find anything to impeach him with. Counsel further testified that there were no statements made by Brown in discovery besides loose information. Counsel testified that she asked the State if she

could contact Brown and Holmes before trial, and both witnesses were uninterested in speaking to Counsel.

Regarding ballistics and physical evidence, Counsel testified that she understood the shooter came at the victim at an angle, and Counsel testified she believed that she could have done a better job of not belaboring the issue. Counsel testified that law enforcement did not conduct an adequate investigation. Regarding fingerprints, Counsel testified that she cross-examined the officer about whether bullet cartridges were checked for fingerprints. Regarding GSR, Counsel testified that she did not see a reason to investigate GSR because Applicant was arrested days after the shooting. Counsel testified that she did not believe investigations into GSR and fingerprints were necessary.

Regarding the alibi witness, Jahleel Dubois, Counsel testified she spoke with him two (2) months before trial. Counsel testified that Dubois came to Counsel's office with Applicant. Counsel testified that she spoke to Dubois alone and tried numerous times to get in contact with him after the meeting. Counsel testified that Dubois did not answer Counsel's calls, and his voice mailbox was always full. Counsel testified that Dubois was not eager to testify, which made it difficult for her to get in contact with him before trial.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the trial transcript in its entirety and has heard the testimony at the PCR hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony. 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 facts and conclusions of law as required by section 17-27-80 of the South Carolina Code (2017).

Ineffective Assistance of Counsel

In a PCR action, an applicant bears the burden of proving the allegations. Rule 71.1(e), SCRCPP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). An applicant alleging ineffective assistance of counsel must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 286 S.C. at 441, 334 S.E.2d at 813. "The test for effective assistance of counsel is whether the representation was within the range of competence

demanded of attorneys in criminal cases.” *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler*, 286 S.C. at 441, 334 S.E.2d at 813. An applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

To establish ineffective assistance of counsel, a PCR applicant must prove (1) counsel’s performance fell below an objective standard of reasonableness and (2) the applicant sustained prejudice as a result of counsel’s deficient performance. *Strickland*, 466 U.S. at 687–88; *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. Applicant must prove prejudice by showing “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 Investigate, Failure to Investigate Witnesses,
Failure to Investigate Physical Evidence***

This Court finds Applicant failed to prove Counsel was ineffective for failing to investigate, failing to investigate the State’s witnesses, and failing to investigate physical evidence. “A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.” *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). Counsel’s duty to investigate is limited to reasonable investigations or a reasonable decision that makes particular investigations unnecessary. *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007); *Strickland*, 466 U.S. at 691. In applying the *Strickland* standard to a claim of failure to investigate, counsel’s decision not to undertake a particular investigation must be evaluated with heavy deference to counsel’s judgment. *Bagwell v. State*, 410 S.C. 259, 265, 763 S.E.2d 630, 633 (Ct. App. 2014). To prevail upon a claim that counsel did not investigate a case, an applicant must present evidence of what counsel could have discovered. *Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998).

This Court finds Counsel’s investigations, and decision not to undertake certain investigations, were reasonable under prevailing professional norms and thus, was not deficient. This Court finds credible Counsel’s testimony that that she investigated Brown by speaking to people in the community but did not find any impeachment material. This Court also finds credible Counsel’s testimony that she attempted to speak to Holmes and Brown, who were both

uninterested in speaking to her. This Court finds credible Counsel's testimony that that she did not believe there was a reason to investigate GSR because Applicant was arrested days after the shooting and GSR would not have been present. This Court finds credible Counsel's testimony that she did not believe investigations into GSR and fingerprints were necessary. This Court finds credible Counsel's testimony that she did not believe law enforcement investigated Applicant's whereabouts on the night of the shooting, and Counsel cross-examined law enforcement regarding whether fingerprints were found and processed on shell casings (R. 84). This Court further finds Applicant failed to prove he was prejudiced by Counsel's performance by producing any evidence of what information further investigations would have uncovered that would have changed the result of trial to a reasonable probability. Thus, Applicant failed to meet his burden.

Failure to Properly Prepare Applicant's Alibi Witness to Testify

This Court finds Applicant failed to prove Counsel was ineffective for failing to properly prepare alibi witness, Jahleel Dubois, to testify at trial. To prevail on a claim that counsel was not adequately prepared, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop if counsel had more fully prepared. Jackson, 329 S.C. at 353-54, 495 S.E.2d at 772; see Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (providing an applicant must produce witnesses at a PCR hearing to support a claim that counsel was ineffective for failing to interview or call potential witnesses). This Court finds credible Counsel's testimony that she made numerous attempts to get in contact with Dubois before trial but was unsuccessful. This Court finds credible Counsel's testimony that she spoke to Jahleel Dubois before trial but Dubois was not eager to testify and did not answer or return her phone calls. This Court finds Counsel's performance was reasonable under prevailing professional norms and thus, was not deficient. This Court further finds Applicant failed to prove prejudice by presenting evidence of information Counsel could have discovered from Jahleel Brown if Counsel had more adequately prepared and failed to produce the witness at the evidentiary hearing. Thus, Applicant failed to meet his burden.

Failure to Obtain a Favorable Plea Offer

This Court finds Applicant failed to prove Counsel was ineffective for failing to obtain a favorable plea offer. This Court finds Counsel's performance was reasonable under prevailing professional norms and thus, was not deficient. This Court finds credible Counsel's testimony that she engaged in plea bargaining with the solicitor. This Court find credible Counsel's testimony

that the solicitor made an offer of twenty (20) years for a plea, and Counsel asked for an offer of five (5) to (10) years for AHAN, which the solicitor rejected. Further, this Court finds Applicant failed to prove prejudice by showing a reasonable probability he would have accepted a favorable plea offer if offered, but for Counsel's failure to obtain a favorable offer. Thus, Applicant failed to meet his burden.

Failure to Object to Truth-Seeking Language in Solicitor's Opening Statements

This Court finds Applicant failed to prove Counsel was ineffective for failing to object to the solicitor's use of truth-seeking language in opening statements. Improper comments by a solicitor do not automatically require reversal if they are not prejudicial; the inquiry is whether the solicitor's comments so infected the trial with unfairness as to result in a denial of due process. *Fortune v. State*, 428 S.C. 545, 837 S.E.2d 37 (2019). In *Aleksey*, the Supreme Court held a trial judge's jury charge that stated the jury's single objective was to seek the truth did not warrant reversal because the charge did not prejudice the defendant by violating his due process rights when the charge was given in the context of witness credibility, was not given the court's charge on the state's burden of proof or the direct and circumstantial evidence charge, and was prefaced by a full and proper charge on the burden of proof and direct and circumstantial evidence. *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000).

In opening remarks, the solicitor stated the following:

However, at the end of this trial, I am going to come back, and we are going to do a closing argument, and I am going to ask you all for one thing, and the only thing I want, and it's you all's job to do this, that's why you all are here, *the only thing I want is the truth*, for you all to listen to the witnesses, listen to Herbert Brown who just stayed awake the entire time so he can speak his truth today."

(Tr. 79) (emphasis added).

This Court finds Applicant failed to prove he was prejudiced by Counsel's failure to object to the solicitor's comments. This Court finds the solicitor's opening remarks were prefaced by a full and proper remark by the trial judge on the State's burden of proof beyond a reasonable doubt. (Tr. 70:22-71:2; 71:11-72:8). Before closing arguments, the trial judge instructed the jury that arguments of counsel are not evidence. (Tr. 302:21-23). At the conclusion of trial, the trial judge charged the jury on the law and gave a full and proper jury charge on reasonable doubt and direct

and circumstantial evidence, in which there is no mention of truth. (Tr. 328-33). Further, this Court finds the solicitor's comments are distinguishable from *Aleksey* because the comments were merely opening remarks by counsel and not a charge on the law by the judge.

This Court also finds the solicitor's use of first-person language in opening remarks does not warrant reversal because the solicitor merely used "I" while speaking in his role as an advocate on behalf of the State.¹ This Court finds the solicitor's comments did not so infect the trial with unfairness as to result in a denial of due process and thus, the comments do not warrant reversal. Further, Applicant failed to prove he was prejudiced by the comments by showing a reasonable probability the result of trial would have been different but for Counsel's failure to object. Thus, Applicant did not meet his burden.

***Failure to Properly Cross-Examine and
Impeach Karen Holmes and Herbert Brown***

This Court finds Applicant failed to prove Counsel was ineffective for failing to properly cross-examine and impeach State witnesses Karen Holmes and Herbert Brown. *Strickland* requires that trial counsel be given leeway to make reasonable strategic decisions. *Strickland*, 466 U.S. at 688-89 (stating "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant"). Judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 689.

This Court finds Counsel's cross-examination of Karen Holmes was reasonable under prevailing professional norms, and thus was not deficient. The record reflects Counsel cross-examined Holmes on her business operations and memory regarding a written statement Holmes gave to law enforcement. (Tr. 105-08). This Court finds credible Counsel's testimony that she tried to refresh Holmes' memory about the statement given to law enforcement, and Counsel believed she made good use of Holmes' 911 call in closing arguments.

This Court finds Counsel's cross-examination of Herbert Brown was reasonable under prevailing professional norms, and thus was not deficient. The record reflects Counsel cross-examined Brown about statements he made to law enforcement, the medications he was taking

¹ Although decided after Applicant's trial, the Supreme Court cautioned prosecutors about using first-person language in all phases of trial, but held prosecutors are permitted to use first-person language when speaking in their role as an advocate. *State v. Busse*, 439 S.C. 104, 886 S.E.2d 208 (2023).

around the time of the shooting, and his meetings with the solicitor. (Tr. 197-98). This Court finds credible Counsel's testimony that she investigated Brown by speaking to others in the community and could not find impeachment material. Further, this Court finds Applicant failed to prove prejudice by showing a reasonable probability the result of trial would have been different but for Counsel's cross-examination. Thus, Applicant failed to meet his burden.

CONCLUSION

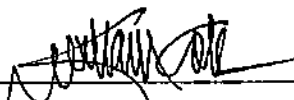
Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. Thus, this application is denied and dismissed with prejudice.

Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty (30) 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 an applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on applicant's behalf. Rule 71.1(g), SCRCR. 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 must be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED!



J. DERHAM COLE
Presiding Judge, Fourteenth Judicial Circuit

August 2, 2024
Spartanburg, South Carolina



STATE OF SOUTH CAROLINA
THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT

J. DERHAM COLE
JUDGE

180 MAGNOLIA STREET, 2ND FLOOR
POST OFFICE BOX 1744
SPARTANBURG, SOUTH CAROLINA 29304-
1744
TELEPHONE: (864) 596-2685
FAX: (864) 596-3592
E-MAIL: jcolej@sccourts.org

August 2, 2024

The Honorable Patricia C. Grant
PO Box 620
Walterboro, SC 29488-0028

Re: 2022-CP-15-00086
Kelvin Gantt, SCDC #380542 v. The State of South Carolina

Dear Clerk;

Enclosed please find for filing an order(s) with reference to the above-captioned case(s). Upon entry of the order(s), please serve notice upon the affected parties in accordance with *Rule 77(d) of the South Carolina Rules of Civil Procedure*. Thank you in advance for your usual and capable assistance in this matter.

With kindest personal regards, I remain,

Sincerely yours,

J. Derham Cole
Resident Judge
The Seventh Judicial Circuit