

PCR

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Albert Santanio Kelly,)
 S.C.D.C. No. 277334,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 THIRTEENTH JUDICIAL CIRCUIT
 C.A. No. 2008-CP-23-7212

FILED-CLERK OF COURT
 GREENVILLE, SOUTH CAROLINA
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ORDER OF DISMISSAL

ENTERED COMPUTER

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed September 25, 2008. The Respondent made its return on December 3, 2008. An evidentiary hearing into the matter was convened on November 15, 2010 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Elizabeth P. Wiygul, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's trial counsel, C. Timothy Sullivan, Esquire. The Court had before it the trial transcript, the records of the Greenville County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the Respondent's return, and the appellate records.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the August 2004 term of the Greenville County Grand Jury for murder (2004-GS-

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23-5966) and at the July 2005 term for armed robbery (2005-GS-23-2024, count 1) and possession of a weapon during commission of a violent crime (2005-GS-23-2024, count 2). He was represented by C. Timothy Sullivan, Esquire.

After the State called the case to trial, the Applicant was found guilty. On October 12, 2005, the Honorable G. Edward Welmaker sentenced the Applicant to consecutive terms of forty-five (45) years for murder, fifteen (15) years for armed robbery, and five (5) years for possession of a weapon during commission of a violent crime.

A notice of appeal was filed at the South Carolina Court of Appeals. Joseph L. Savitz, III, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the form of an Anders¹ brief. The Court of Appeals dismissed the appeal. State v. Kelly, Op. No. 2008-UP-530 (S.C. Ct. App. filed September 11, 2008).

ALLEGATIONS

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

1. Ineffective assistance of trial counsel:
 - a. Failed to object to false testimony given by Investigator Arterburn.
 - b. Failed to object to false testimony given by Shaun Edwards and Charlene Edwards.
 - c. Failed to object to comments in the State's closing argument.
 - d. Failed to request exculpatory evidence:
 - i. Failed to request the brown wallet found in the victim's car.
 - ii. Failed to request the .380 bullets purchased by Shaun Edwards before the murder.
2. Trial issues:
 - a. State witness Donna Wentz lied under oath.
 - b. The confession should have been void.
 - c. Trial judge should have instructed the jury on alibi.

The Applicant filed pro se amendments to the PCR application on December 4, 2008,

¹ Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

December 11, 2008, and December 12, 2008. In these amendments, the Applicant further explained the issues raised in the PCR application.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

The Applicant stated trial counsel failed to obtain exculpatory evidence from police and present it at trial. The Applicant stated trial counsel should have obtained the brown boots because they matched the shooter's boots (who the Applicant believed to be Shaundrecus Edwards). The Applicant stated trial counsel should have obtained a brown wallet because, while the State argued the Applicant took this wallet, police found it in the victim's car. The Applicant stated trial counsel should have obtained the .380 bullets that Edwards purchased two days before the shooting. The Applicant testified trial counsel should have hired a ballistics expert for the bullets and another expert witness regarding the boots and wallet. The Applicant testified he presented an alibi witness (Joyce Gordon) but that his alibi was destroyed because trial counsel failed to object to testimony from Edwards and Marcus Parks. The Applicant testified trial counsel should have requested an alibi charge.

Trial counsel testified he filed discovery motions and reviewed the State's evidence with the Applicant. Trial counsel testified the Applicant's two co-defendants had confessed first and pointed to the Applicant as the shooter. Trial counsel testified the Applicant had given a statement that he, Edwards, and Parks were all at the scene. Trial counsel testified the Applicant – upon being arrested in Atlanta – stated to police that he had shot someone. Trial counsel testified he did not recall asking to look at the boots, but that it did not matter because the Applicant had stated all three of them were at the scene. Trial counsel stated he did not recall an issue with the wallet, but that he probably looked at it if it was mentioned in the report. Trial counsel confirmed he did not hire an expert regarding the .380 bullets. Trial counsel stated he did not request an alibi charge because his strategy at trial was "all or nothing."

This Court finds the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court further finds trial counsel adequately conferred with

the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have obtained the boots, wallet, and bullets for presentation at trial. This Court finds the Applicant has failed to show any error in trial counsel's failure to either procure or examine these items. Regardless, this Court finds it is speculative to discuss whether further examination of such items would have impacted the Applicant's trial because they were not entered into evidence at the PCR hearing. See Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (holding that, since the contents of challenged documents were not presented at the PCR hearing, the Applicant could not demonstrate how the failure of counsel to obtain these documents prejudiced the defense).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have hired a ballistics expert for the .380 bullets. This Court notes the Applicant failed to articulate what benefit such an expert would have had upon his case. Regardless, as a ballistics expert did not testify at the PCR hearing, this Court cannot speculate about the possible outcome that ballistics evidence would have resulted at trial. See Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, as the applicant failed to have an expert testify at the evidentiary hearing, "any finding of prejudice is merely speculative").

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to his co-defendants' testimony because it destroyed his alibi witness. This Court finds that, while trial counsel did object to the co-defendants' actual testimony, he did vigorously cross-examine these witnesses about the details of the incident. In returning a guilty verdict, the jury merely found the State's witnesses to be more credible. See Craven v. Cunningham, 292

S.C. 441, 443, 357 S.E.2d 23, 25 (1987) (“The credibility of witnesses is for the triers of fact.”); see also Bruno v. State, 347 S.C. 446, 556 S.E.2d 393 (2001) (noting that, by its verdict, the jury clearly rejected the defendant’s account of what transpired).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have requested an alibi charge. During the charge conference, the trial judge specifically asked trial counsel if he wanted a charge of alibi. (Trial transcript, p.489). Trial counsel declined, stating “this is all or nothing.” (Trial transcript, p.489). The Applicant did not object. This Court finds trial counsel made a strategic decision not to ask for an alibi charge. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel).

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel’s performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant

waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

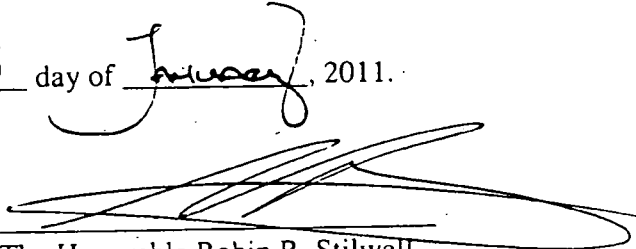
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient in any manner, nor was the Applicant prejudiced by counsel's representation. Therefore, this application for PCR must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 25 day of January, 2011.


The Honorable Robin B. Stilwell
Presiding Judge, Thirteenth Judicial Circuit

Greenville, South Carolina.

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2008CP2307212

Albert Kelly vs. South Carolina State Of

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded;
 Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this _____

Court Reporter: _____

PRESIDING JUDGE -

This judgment was entered on the 1st day of Feb, 2011, and a copy mailed first class this 1st day of Feb. 2011. to attorneys of record or to parties (when appearing pro se) as follows:

Elizabeth P Wiygul 101 Whitsett Street Greenville,
SC 29601

Karen Ratigan

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)