

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM JASPER COUNTY
Court of Common Pleas
The Honorable J. Derham Cole, PCR Action Judge
2022-CP-27-00249

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Jan 10 2025

S.C. SUPREME COURT

JONATHAN NIEVES, #386247,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Jonathan Nieves appeals the denial of his post-conviction relief application. Applicant was granted an *White* appeal and the remaining post-conviction relief allegations were heard and denied by the Honorable J. Derham Cole, circuit court judge, on May 7, 2024. The written order was filed on January 2, 2025. Applicant received notice of the judgement on January 6, 2025.

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Applicant timely commenced this PCR action on June 8, 2022, asserting he is being held in custody unlawfully due to ineffective assistance of counsel. Specifically, he avers he was

denied the effective assistance of trial counsel and/or appellate counsel and loss of direct appeal . . . as a result of either trial counsel or appellate counsel or both counsel's failure to perfect [his] direct appeal . . .

As relief, Applicant sought a belated appeal and an opportunity to amend his application to raise additional allegations of ineffective assistance of trial counsel once he receives the trial transcript.

Prior to the hearing, Applicant filed an amended application alleging counsel was ineffective for:

1. Failing to timely file a notice of appeal;
2. Failing to object to hearsay;
3. Failing to move to suppress, request a full findings of fact from the Court, and contemporaneously object to Applicant's police statement;
4. Failing to convey to Applicant the importance of testifying and erroneously telling him not to testify;
5. Failing to object to the court charging the jury on the hand of one hand of all;
6. Failing to effectively cross-examine Charles Brown on his comments regarding Jackpot's lack of involvement in the double homicide;
7. Failing to investigate Applicant's alibi defense;
8. Failing to effectively cross-examine Tyquisha Lee after the video impeaching her credibility was shown;
9. Failing to raise a proper defense at trial. Specifically, counsel was ineffective for not arguing Applicant was not in the vicinity of the shooting;
10. Failing to properly mitigate the sentence.

At the PCR hearing, Applicant proceeded on the allegations of his amended application. Additionally, Applicant alleged counsel was ineffective for not properly impeaching Micael Toomer and Vanessa Boyles.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the records before it, including the Jasper County of Clerk Court records of the underlying convictions; Applicant's records from the South Carolina Department

of Corrections; the trial transcript; Applicant's appellate records; and the records from this PCR action. This Court has further had the opportunity to observe the witnesses presented at the evidentiary hearing, closely pass upon their credibility, and weigh their testimony accordingly. 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 fact and conclusions of law as required by section 17-27-80 of the South Carolina Code.

Belated Appeal

Applicant claims counsel was ineffective for not filing a timely notice of appeal. "Following a trial, counsel must make certain the defendant is made fully aware of the right to appeal." Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (internal citations omitted). "To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." Wilson v. State, 348 S.C. 215, 217, 559 S.E.2d 581, 582 (2002). "In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in Anders v. California, 386 U.S. 738 (1967)." Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008) (internal citation omitted). Where an accused establishes in a PCR hearing that he was unconstitutionally deprived of his statutory right to a direct appeal, the South Carolina Supreme Court, upon an appeal of the PCR decision, will review the trial record and pass upon all issues properly raised and argued as if the direct appeal had been perfected. White v. State, 263 S.C. 110, 119, 108 S.E.2d 35, 39 (1974).

Here, while counsel for Applicant timely filed a notice of appeal, the appeal was dismissed for counsel's failure to timely request the transcript. Based on the foregoing, this Court finds Applicant did not knowingly and voluntarily waive his right to a direct appeal. This Court further finds Applicant is entitled to seek a late appeal pursuant to White.

Ineffective Assistance of Counsel

In a PCR action, an applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When the application alleges ineffective assistance of counsel, the applicant must prove "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, 466 U.S. 668 (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, 466 U.S. at 687-88. First, an applicant must prove counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, courts measure 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). “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, a PCR applicant must prove that counsel’s deficient performance prejudiced the 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.

Failure to Object to Hearsay Testimony

In his amended application, Applicant averred counsel should have objected to the following during State witness Michael Toomer’s testimony, “As she was walking to the back of the car, she came back, before she even got to the dirt road, and said, ‘Daddy, I’m going because’ excuse my language, ‘because dumbass is shooting,’ and that’s when I called the police.” (Tr. 232).

Based on this Court’s review of the transcript, counsel’s failure to object to this testimony was reasonable under prevailing professional norms and not deficient. Although technically hearsay, the testimony must be viewed in context. At trial, Toomer testified his daughter Vanessa Boyles stopped by his house at Whistle Stop Road with her boyfriend James Riley and another person that Toomer did not recognize. Toomer further testified Riley showed him a pistol and asked if he wanted to shoot it, but Toomer declined. Toomer stated Riley and the other man left while he and Boyle went inside. As Toomer and Boyle were talking, Toomer heard gunshots. (Tr. 225-32). He stated Boyles then stated, “Daddy, I’m going because . . . dumbass is shooting.” (Tr. 232). Critically, Toomer consistently stated he did not recognize or know the

other person. Further, the inference here is that Boyles was referencing Riley—not the man Toomer could not identify—when she relayed “dumbass is shooting.” Finally, Toomer had just testified to hearing gunshots, making Toomer’s testimony about Boyles’s statement largely cumulative. Because the information relayed here, in context, was cumulative to other proper testimony and not material to Applicant’s guilt or innocence, counsel’s failure to object was reasonable under prevailing professional norms and not deficient. For the same reason, there is no reasonable probability the outcome would have been different had counsel objected to this testimony.

Further, counsel articulated a valid reason for not objecting here. At the PCR hearing, counsel testified Toomer was not a material witness, and he focused his strategy on attacking the credibility of State witness Tyquisha Lee and the SLED investigation. Counsel’s stated strategy was reasonable under prevailing professional norms and not deficient. Critically, Lee told law enforcement that about a week before two bodies were discovered in a burned vehicle, she overheard Applicant, James “Jackpot” Riley, and Vanessa Boyles discuss a robbery. (Tr. 437). Lee further told law enforcement that after the incident, Applicant told Lee that he, Riley, and Boyles contacted the victims and arranged to meet them at Whistle Stop Road to purchase weed. Once there, Riley shot both victims multiple times, and Riley and Applicant beat the male victim over the head with a pistol until the pistol broke. Riley then drove the victims’ vehicle to the area it was later discovered, and Applicant and Lee followed in Applicant’s vehicle. Once at that location, Riley poured gasoline on the vehicle and lit it on fire. (Tr. 438-47). Lee’s statement to law enforcement was far more damaging to Applicant’s case than Toomer’s testimony. Based on the foregoing, counsel’s failure to object to Toomer’s hearsay testimony was not deficient, nor has Applicant demonstrated any resulting prejudice.

At the PCR hearing, Applicant asserted counsel should have raised additional hearsay objections to the following: During Toomer’s cross-examination, counsel asked, “[H]e asked you whether you wanted to shoot it.” (Tr. 242). In context, this questioning referenced Riley—not Applicant. The statement that Riley asked Toomer whether he wanted to shoot a gun was not material to Applicant’s guilt or innocence. Thus, counsel’s questioning here was reasonable under prevailing professional norms and not deficient.

Likewise, there is no reasonable probability the outcome would have been different had counsel not cross-examined Toomer about this.

Applicant likewise asserted counsel should have objected during Boyles' direct examination when she testified, "I went in the house to speak to my dad for a minute, and then I told him we was going to the store." (Tr. 307). Although technically hearsay, this statement was cumulative to Boyles's properly-admitted testimony that she, Riley, and Applicant went to the Handy Man convenience store. (Tr. 307). This testimony was further corroborated by surveillance footage from the Handy Man convenience store showing the trio at the Handy Man the evening of the murder. (Tr. 285-94, 375-76). Because Boyles's hearsay statement (that she told her father "we was going to the store") was cumulative to other properly-admitted evidence, counsel's failure to object was reasonable under prevailing professional norms and not deficient. Likewise, there is no reasonable probability the outcome would be different had counsel objected.

Finally, Applicant asserted counsel should have objected when Boyles testified that Applicant told her "James started shooting first, and he felt like he had to go along with it," and "he had to shoot them." (Tr. 316-17). These statements, however, were Applicant's statements to Boyles and are not hearsay. See Rule 801(d)(2) (providing a statement by a party-opponent is not hearsay). Applicant has failed to prove deficiency or prejudice. This claim is without merit and relief is denied.

Failure to Seek Suppression of Nieves' statement

Applicant contends counsel was ineffective for not moving to suppress his statement to police; for not requiring full findings of fact from the Court; and for not contemporaneously objecting when Applicant's statement was entered at trial. This allegation lacks merit.

Prior to trial, the Court held a Jackson v. Denno hearing to determine the admissibility of Applicant's statement to police. During the hearing, the State entered two Miranda wavier forms signed by Applicant and a video of his second statement. (Tr. 84, 94). Additionally, Lieutenant Charles Brown testified Applicant indicated he understood his Miranda rights. (Tr. 89). Although counsel did not object to or argue against the admissibility of the statement, Applicant has not set forth any viable argument counsel should have raised to the admissibility of the statement. Thus, Applicant did not prove deficiency. Likewise, based

on evidence presented by the State, it is not reasonably likely the statement would have been suppressed had counsel objected to it. In the absence of a compelling argument for suppressing this statement, Applicant has not met his burden of proving deficiency or prejudice. This claim is without merit and relief is denied.

Failure to Advise Applicant to Testify at Trial

Applicant next contends counsel was ineffective for failing to convey to Applicant the importance of testifying and erroneously telling him not to testify. This contention lacks merit. This Court finds credible counsel's PCR testimony that he discussed with Applicant whether he should testify. Further, at trial, Applicant waived on the record his right to testify after having an opportunity to consult with counsel. (Tr. 476-77). Ultimately it was Applicant's decision to not testify, and Applicant has not pointed to any advice from counsel that was deficient in this regard. Finally, and critically, this Court finds Applicant did not provide any credible, compelling testimony at the PCR hearing that would have a reasonable probability of changing the outcome of trial. Applicant thus failed to prove deficiency or prejudice. This claim is without merit and relief is denied.

Failure to Object Accomplice Liability Instruction

Applicant next contends counsel was ineffective for not objecting to the accomplice liability instruction. This allegation patently lacks merit here where evidence supported the charge. Critically, the State introduced evidence that Lee told police she overheard Applicant, Riley, and Boyles discuss a robbery, and Applicant later told her that Riley shot the victims before he and Riley beat the male victim over the head with a gun. The accomplice liability charge fit the evidence adduced at trial, and Applicant has not set forth a viable objection to the charge. Applicant has thus failed to prove deficiency or prejudice. This claim is without merit and relief is denied.

Failure to Effectively Cross-Examine Charles Brown

Applicant asserts counsel was ineffective for failing to effectively cross-examine lead investigator Charles Brown on his comments regarding Riley's lack of involvement in the double homicide. This claim lacks merit.

Initially, this Court has had the opportunity to review counsel's cross-examination of Investigator

Brown and finds it is reasonable under prevailing professional norms and not deficient. In support of his contention that counsel did not effectively cross-examine Investigator Brown, Applicant testified Riley was the primary suspect and questioned why Riley did not get charged with any crime. However, counsel credibly testified he *did* cross-examine Investigator Brown about why law enforcement did not pursue a case against Riley, and counsel's testimony here is corroborated by the trial transcript. (Tr. 403-15). Applicant has not pointed out any other specific thing counsel should have cross-examined Investigator Brown about and has thus failed to meet his burden of proving deficiency or prejudice. This claim is without merit and relief is denied.

Failure to Investigate and Raise a Defense¹

Applicant contends counsel was ineffective for failing to investigate Applicant's alibi defense. He likewise contends counsel was ineffective for failing to raise a proper defense at trial. Specifically, he avers counsel should have argued Applicant was not in the vicinity of the shooting. Applicant did not prove this claim.

At trial, counsel's defense strategy focused on attacking Lee's credibility based on her young age at the time she gave the recorded statement; pointing the finger at Riley and questioning the investigation of Riley and lack of charges against him; and arguing the State lacked evidence against Applicant. (Tr. 497-506). Based on the State's evidence, this was a reasonable defense strategy. Applicant has not set forth a better defense strategy counsel should have employe and thus did not prove deficiency or prejudice.

At the PCR hearing, Applicant averred counsel should have argued he was not at the crime scene. Specifically, Applicant stated he was in Hardeeville between 10:00 and 11:00 pm the night of the crime. He further averred he was at Duncan Donuts, but the video from Duncan Donuts was missing by the time of trial. Applicant testified Tillman and Jaspers are about fifteen minutes apart. He further testified the State never established a time of death for the victims.

To the extent Applicant sought to establish an alibi defense at the PCR hearing, this Court finds

¹ Due to the similarity of the allegations, this section combines allegations seven and nine.

Applicant failed to present credible evidence of an alibi. This Court finds not credible Applicant's testimony that he was not in the area of the crime. At trial, the State introduced a video from Handy Dan convenience store showing Applicant with Riley and Boyles in the vicinity of the crime at 8:00 pm the evening of the murder. Notably, the trio purchased a canister of gas, and according to Lee's statement, Riley later poured gasoline on the victims' vehicle before igniting it. On balance, assuming Applicant was in Hardeeville between 10:00 and 11:00 pm that night, that does not establish an alibi or otherwise show Applicant could not have been involved in the murder—especially here where the State, by Applicant's own admission, was unable to establish a time of death.² Finally, because the State introduced the surveillance video showing Applicant with Riley and Boyles around 8:00 pm the evening of the murder, and because the State could not establish the time of death, this Court finds counsel did not have a valid basis to argue Applicant was not in the vicinity of the crime. Applicant has failed to prove deficiency or prejudice. This claim is without merit and relief is denied.

Failure to Effectively Cross-Examine Tyquisha Lee

Applicant contends counsel was ineffective for failing to effectively cross-examine Tyquisha Lee after the video impeaching her credibility was shown. This Court finds Applicant did not prove this ground. At the PCR hearing, Applicant averred counsel should have recalled Lee after the State introduced her recorded statement at trial and asked her if those statements were true. He testified, "I know she would have said no." Applicant, however, did not call Lee at the PCR hearing.

Initially, without having Lee testify at the PCR hearing, it is speculative as to what she would have testified to, and Applicant did not meet his burden in this regard. Further, this Court finds counsel articulated a valid reason for not recalling Lee to cross-examine her in that the video spoke for itself, and he did not want to take the chance after the statement was played on opening the door to additional damaging testimony. Counsel did, however, use Lee's young age to attack the credibility of her statement in closing

² Trial testimony indicated the vehicle was found approximately six or seven miles from Tillman. (Tr. 120). According to Google, the driving time between Tillman, South Carolina, and Hardeeville, South Carolina is approximately 18 minutes. Applicant was captured on the surveillance video at approximately 8:00 pm that evening.

argument. (Tr. 501-02). Overall, this Court finds counsel's performance was reasonable under prevailing professional norms and not deficient. Finally, because this Court did not hear additional testimony from Lee and can only speculate as to what she would have said on further cross-examination, Applicant did not meet his burden of proving prejudice. This claim is without merit and relief is denied.

Failure to Properly Mitigate the Sentence

Applicant contends counsel was ineffective for failing to properly mitigate the sentence. Applicant did not prove this ground.

At the PCR hearing, Applicant asserted counsel should have mentioned his wife and daughter at sentencing and called character witnesses on his behalf. Applicant, however, did not offer any character witnesses at the PCR hearing.

Based upon this Court's review, counsel's mitigation—which included a statement from Applicant's mother—was reasonable under prevailing professional norms and not deficient. (Tr. 534-37). Further, and critically, Applicant did not offer any additional mitigation or witnesses that likely would have changed the sentence imposed. Applicant thus did not prove deficiency or prejudice. This claim is without merit and relief is denied.

Failure to Effectively Impeach Toomer and Boyles

At the PCR hearing, Applicant orally added as an additional claim that counsel was ineffective for not properly impeaching Toomer and Boyles. Specifically, Applicant averred counsel should have impeached the witnesses with evidence of their drug use, and referenced pages 242, 307, and 317 of the trial transcript. Applicant did not prove this ground. Initially, this Court finds counsel's cross-examination of these witnesses was reasonable under prevailing professional norms and not deficient. (Tr. 240-57, 319-37 339). At the PCR hearing, when questioned about this issue, Applicant referenced counsel's cross-examination of Toomer—where he did in fact cross-examine Toomer about whether he used marijuana when Boyles stopped by the evening of the murder. (Tr. 242). Applicant also referenced to Boyle's direct

examination, where Boyles admitted she smoked marijuana with Toomer that evening. (Tr. 307).³ Notably, counsel *did* cross-examine Boyles about whether she purchased weed in the past (to which she admitted). (Tr. 329). Applicant has not set forth a viable line of cross-examination that counsel did not already employ; thus, Applicant failed to prove deficiency or prejudice. This claim is without merit and relief is denied.

CONCLUSION

Based on the foregoing, this Court finds Applicant is entitled to seek a belated appeal pursuant to White v. State. This Court further concludes Applicant has not established any other constitutional violations that would entitle him to relief. The remaining allegations are without merit and dismissed with prejudice.

Should Applicant wish to appeal, he must file and serve a notice of appeal within thirty 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 Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on applicant's behalf. Rule 71.1(g), SCRCP. Attention is directed to Rule 243, SCACR, for appellate procedures.

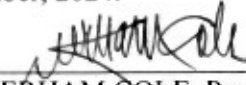
IT IS THEREFORE ORDERED:

1. Applicant is entitled to seek a belated appeal pursuant to White v. State;
2. The remaining allegations are without merit and dismissed with prejudice; and
2. Applicant shall be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED THIS 23rd day of December, 2024.



South Carolina



J. DERHAM COLE, Presiding Judge
The Fourteenth Judicial Circuit Court

³ Applicant also referenced page 317, but that page does not contain any reference to drug use. However, during that testimony (which is part of Boyles's direct examination), Boyles admitted she did not tell police the truth when she first spoke to them. (Tr. 317). Notably, counsel *did* cross-examine Boyles about whether she lied to police. (Tr. 319-20, 327, 335).



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

J. DERHAM COLE
JUDGE

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December 23, 2024

The Hon. Margaret Bostick
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Re: 2022-CP-27-00249
Jonathan A. Nieves, SCDC #386247 v. The State of South Carolina

FILED
2025 JUN -2 A 9:23
CLERK OF COURT
JASPER COUNTY, SC

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