STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF JASPER	)	
Euzema Maurice **AUSTIN**, SCDC #387106,	)	
Applicant,	)	**ORDER GRANTING *WHITE V. STATE* REVIEW and DISMISSING ALL OTHER CLAIMS**
v.	)	
	)	Civil Action No. **2022-CP-27-00437**
The **STATE** of South Carolina,	)	
Respondent.	)	

I. INTRODUCTION

The matter before this Court is an action for post-conviction relief (PCR) commenced by Euzema Austin ("Applicant") on September 19, 2022. On May 8, 2024, a hearing was held at the Beaufort County Courthouse. Applicant was present and represented by counsel Michael H. Lifsey, Esquire. Assistant Attorney General T. Cruise Mitchell represented the respondent. Testimony was taken from Applicant, Nancy Austin (Applicant's mother), and trial counsel Patrick A. Hall, Esquire ("Counsel").

After hearing the testimony at the PCR hearing and upon full review of the record, this Court finds Counsel was constitutionally ineffective with regards to informing Applicant about his right to a direct appeal. Applicant's remaining allegations regarding ineffective assistance of counsel are without merit. For the reasons discussed below, this Court denies relief and dismisses this action with prejudice.

II. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Jasper County Clerk of Court. During the May 2021 term, the Jasper County Grand Jury indicted Applicant for Burglary 1st Degree (2021-GS-27-00715) and Assault and Battery 3rd Degree (2 counts) (2021-GS-27-00445 and 00446). Patrick A. Hall, Esquire represented Applicant and Assistant Circuit Solicitor Mary Jordan Lempesis, Esquire, prosecuted the case. Applicant proceeded to trial before Circuit Judge Carmen T. Mullen and a jury on February 7, 2022. Applicant was found guilty as indicted and sentenced to fifteen years imprisonment for first degree burglary and concurrent sentences of 171 days

on the assault and battery convictions. Applicant did not appeal his convictions or sentences.

III. STATEMENT OF FACTS

On the night of August 25, 2020, Applicant broke into the home of Craig Scott ("Scott") where Ms. Aza Primus ("Primus") was sleeping. Primus had a relationship with both Applicant and Scott. A confrontation ensued in which Applicant hit Primus. Applicant then dragged Ms. Primus out of the house and left the scene with her.

IV. CURRENT APPLICATION

Applicant commenced this PCR application on February 25, 2022. In his application Applicant alleged he was entitled to relief based on the following grounds:

1. Ineffective Assistance of Counsel
    a. "Counsel told me before trial that when I bonded out that I wouldn't be going to trial until one or two years later the first time. Didn't have enough jury the first time....The only reason I went to court before time was mistaking identity. My son was arrested and went to jail. The prosecutor put my name on the court docket because they thought it was me, because my son and I have the same name. My counsel called me and ask me when I got out of jail, which it wasn't me, it was my son....I explain to [counsel] and also the head clerk of court and she said explain to judge. I explain to the judge November 1 before trial started and she told me I was going to pick a jury today. Because counsel failure to maintain adequate communication with me cause him not to prepare a proper defend."
    b. "Trial counsel failed to object to or properly challenge the State's evidence. "The pictures entered into evidence of the victim's doors [do] not show any damage to the door at all or any kind of imprint from a shoe to prove that the doors was actually kicked in, and the victim testified...that he was asleep in his bedroom when I was suppose to have entered the residence without consent." Counsel also failed to be adversarial about the arrest warrant and failed to challenge the indictments.
    c. Trial counsel failed to investigate and properly prepare for trial, move to suppress evidence, raise legal issues, negotiate a plea, introduce exculpatory evidence, and file a timely notice of appeal: "I explained to my counsel that I did not break into the victim's residence, but was actually given consent to come in by Ms. Primus....I explained that Ms. Primus was my girlfriend at the time and was living with me. When I knocked on the victim's door, she thought it was someone else and she said come in....If my counsel would have followed up on this information that I provided him at that time and interview Ms. Primus, then he would have been better prepare to effectively cross-examine her at trial to prove that I did not enter the victim's residence without consent."

On May 6, 2024, Applicant, through PCR counsel, amended his application to include the following allegations:

1. Ineffective assistance of counsel for

a. Applicant's trial counsel did not meet with Applicant a sufficient number of times prior to his trial, did not fully explain the strengths and weaknesses of the State's case, and did not explain the elements of the crimes of which he was charged.
b. Applicant informed Applicant's trial counsel that he entered the residence with permission. This would have been a complete defense to the charge of burglary. However, trial counsel insisted on arguing that the State could not prove his presence at the scene of the crime. This insistence on ignoring the account of his client and proceeding on his own theory constituted ineffective assistance of counsel.
c. Applicant's trial counsel did not properly cross-examine witnesses for the state and did not lodge appropriate and timely objections to inadmissible evidence.
d. Applicant's trial counsel acquiesced in the State's assertion that if he testified in his own defense, the state would be allowed to cross-examine him on a prior conviction for Assault and Battery. Applicant's trial counsel should have argued that his prior charge was too similar to the facts at trial and therefore more prejudicial than probative. This error, combined with trial counsel's decision described above in (b) prevented Applicant from testifying in his own defense.
e. Applicant informed counsel that he wished to file an appeal but Applicant never filed a direct appeal. Applicant requests that he be granted a belated appeal.
f. The ineffective assistance of counsel as described above, both individually and in cumulative effect, resulted in prejudice to the Applicant and absent such ineffective assistance of counsel, the results of his trial would have been different.

At the evidentiary hearing, Applicant only went forward on the allegations in his amended application.

V. INEFFECTIVE ASSISTANCE OF COUNSEL, GENERALLY

Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

The reviewing court applies the two-part test outlined in *Strickland v. Washington* to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). To obtain relief, 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. *Id.* at 687–88; *accord. Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could

not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

The applicant has the burden of establishing both deficiency and prejudice in order to be entitled to relief. *Hughes v. State*, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); Rule 71.1(e), SCRCP. To prove deficient performance, the applicant must establish that, in light of all the circumstances, the acts or omissions complained of "were outside the wide range of competence" demanded of attorneys in criminal cases. *Strickland*, 466 U.S. at 688. To prove prejudice, the applicant must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Id.* Significantly, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 696.

VI. FINDINGS OF FACT & CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the PCR hearing, observed the witnesses, passed upon their credibility, and weighed their testimony accordingly. After hearing the testimony presented and considering the legal arguments by counsel, as well as the record in this action incorporated by way of the State's return, this Court finds Counsel was constitutionally ineffective with regards to informing Applicant of his right to a direct appeal. This Court further finds Applicant's remaining claims to be without merit. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings of facts and conclusions of law based upon all of the probative evidence presented.

Failure to Properly Advise Applicant of His Right to an Appeal

Applicant contends Counsel was ineffective for failing to inform him of his right to an appeal. This Court agrees and finds Counsel did not properly inform Applicant of his right to a direct appeal or pursue an appeal on his behalf.

Applicant testified he asked Counsel to file an appeal. Nancy Austin testified Applicant wanted to appeal his conviction. Counsel testified he informed Applicant he could appeal. Counsel explained it is his standard practice to appeal if the request is made. Trial counsel should have made "certain that the

Defendant was fully aware of his rights and in the absence of an intelligent waiver by the defendant either pursue an appeal on his behalf or else, if deemed appropriate by counsel, complied with the procedure set forth in *Anders v. State of California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.E.2d 493." *White v. State*, 263 S.C. 110, 118, 208 S.E.2d 35, 39 (1974).

This Court finds Applicant has met his burden entitling him to a belated review of direct appeal issues pursuant to *White*.

Failed to Argue Permission to Enter and Failure to Cross-Examine Primus on this Issue

Applicant contends Counsel was ineffective for failing to argue Applicant had permission to enter the residence. Applicant avers this would have been a complete defense to burglary and would have resulted in a different outcome at trial. This Court finds this allegation is without merit.

At the evidentiary hearing, Applicant testified he told Counsel he had permission to enter the residence. Applicant explained he knocked on the door and Aza Primus ("Primus") let him in. Applicant admitted they got in an argument, and he hit her. Applicant stated he believed his defense at trial was that he had consent to enter the residence. Applicant testified Counsel should have cross-examined Primus that she let him in. Counsel testified Applicant maintained he had permission to enter the residence by Primus; however, it was not her home and the owner never gave Applicant consent. Counsel explained that Primus testified at trial that she was in the bedroom the entire time which was inconsistent with Applicant's assertion she let him in.

This Court finds Counsel was not deficient for failing to argue Applicant was given permission to enter the residence by Primus. According to S.C. Code Ann. § 16-11-310, "'enters without consent' means: (a) to enter a building without the consent of the person in *lawful possession*; or (b) to enter a building by using deception, artifice, trick, or misrepresentation to gain consent to enter from the person in lawful possession" (emphasis added). Even if Counsel had made this argument, it would not have been a complete defense to first degree burglary. First, Primus was not in lawful possession of the residence and, thus, was unable to give Applicant consent to enter the residence.

More importantly, Primus testified at Applicant's trial that Applicant came in through the front door which was unlocked. (Trial Tr. p. 82). Primus testified she was in the bedroom when Applicant entered the residence. (Trial Tr. p. 96). Primus never testified she gave Applicant permission to come in the residence. Additionally, the Solicitor impeached Primus with her prior statement to law enforcement in which she stated Applicant kicked the door in. (Trial Tr. p. 91). Craig Scott, the owner of the residence, testified at trial that Applicant kicked the front door in and entered his residence without his permission. (Trial Tr. p. 24). Applicant's defense would not have been furthered by making this argument since there was no testimony presented that Applicant was given permission to enter the home by the person in lawful possession, nor anyone else for that matter. Thus, this Court finds Counsel was not deficient for failing to argue Primus gave Applicant permission to enter the home.

Additionally, Primus did not testify at the evidentiary hearing, so it is unknown how she would have responded had Counsel further cross-examined her on this or any other issue. Thus, Applicant has failed to show a reasonable probability the outcome at trial would have been different had Counsel made this argument or cross-examined Primus on this issue.

Relief based upon his allegation is without merit and therefore DENIED.

Failure to Adequately Meet with Applicant Prior to Trial

Applicant contends Counsel was ineffective for failing to meet with Applicant a sufficient number of times prior to his trial, not fully explain the strengths and weaknesses of the State's case, and not explaining the elements of the crimes of which he was charged. This Court finds this allegation is without merit.

At the evidentiary hearing, Applicant testified he met with Counsel three times. Applicant stated that during those meetings, Counsel explained the potential sentence and elements of Burglary 1st Degree. Counsel testified that he met with Applicant where he reviewed the discovery and explained the elements of the crimes charged.

This Court finds the testimony from Applicant and Counsel refutes this allegation. There is no established "minimum number of meetings between counsel and client prior to trial necessary to prepare

an attorney to provide effective assistance of counsel." *United States v. Olson*, 846 F.2d 1103, 1108 (7th Cir.1988) (there is no constitutional minimum number of meetings between attorney and client and observes that an experienced attorney may get more out of a single meeting than a neophyte); *Moody v. Polk*, 408 F.3d 141, 148 (4th Cir. 2005); *Campbell v. Polk*, 447 F.3d 270, 279, n.2 (4th Cir. 2006) ("we cannot conclude that the fact that Campbell's counsel only met with him five times before trial made them ineffective."). "'[B]revity of consultation time between a defendant and his counsel, alone,' 'cannot support a claim of ineffective assistance of counsel.'" *Davis v. State*, 44 So. 3d 1118, 1130 (Ala. Crim. App. 2009) (quoting *Murray v. Maggio*, 736 F.2d 279, 282 (5th Cir. 1984)); *White v. Godinez*, 301 F.3d 796, 800 (7th Cir. 2002) ("A brief consultation does not by itself establish that counsel's performance was inadequate."); *Chavez v. Pulley*, 623 F. Supp. 672, 685 (E.D. Cal. 1985) ("brevity of consultation time between a defendant and his counsel alone cannot support a claim of ineffective assistance of counsel," especially where the defendant "fails to allege what purpose further consultation with his attorney would have served and fails to demonstrate how further consultation with his attorney would have produced a different result"). Applicant and Counsel both testified Counsel reviewed the State's evidence, and the elements and potential sentence for first-degree burglary. Thus, this Court finds Counsel was not deficient in this regard. Furthermore, Applicant has failed to show how further consultation with Counsel would have affected the outcome at trial.

Relief based upon his allegation is without merit and therefore DENIED.

Counsel Failed to Argue Against Prior Convictions Being Admitted if He Testified at Trial

Applicant contends Counsel acquiesced in the State's assertion that if he testified in his own defense, the state would be allowed to cross-examine him on a prior conviction for Assault and Battery. Applicant's trial counsel should have argued that his prior charge was too similar to the facts at trial and therefore more prejudicial than probative. This Court finds this allegation is without merit.

At the evidentiary hearing, Applicant averred he would have testified if his prior convictions were excluded. Applicant stated Counsel did not inform him they could argue his prior charges were too similar to be admitted for impeachment purposes. Counsel explained he advised Applicant against testifying

because Applicant would be required to admit being present at the scene. Counsel explained he strategically wanted the jury to believe Scott was biased against Applicant due to his relationship with Primus and, thus, not credible. This Court finds having Applicant testify and admit to being at the scene would have undermined this reasonable defense strategy. This Court finds this a valid reason for advising Applicant not to testify and for not arguing against the admission of Applicant's prior charges. Because Counsel advised Applicant against testifying for reasons other than his prior charges being admitted, Counsel was not deficient for failing to argue against the admission of the charges.

Although Applicant expressed that he would have testified if his prior assault charge was excluded, Applicant did not present what the entirety of his testimony would have been at trial had he testified. Based on Applicant's aforementioned allegation, it is inferable Applicant would have testified that Primus gave him permission to enter the home. This testimony would not have resulted in a different outcome at trial for the reasons explained above—it is not a defense to burglary and the testimony from Primus and Scott at trial contradicts Applicant's version of events. Therefore, Applicant has failed to prove he was prejudiced regarding this allegation.

Relief based upon his allegation is without merit and therefore DENIED.

Counsel Opened the Door to Prior Bad Act Testimony

Applicant contends Counsel was ineffective for opening the door to prior bad act testimony. This Court finds this allegation is without merit.

At Applicant's trial, during the cross-examination of Craig Scott, the following exchange occurred:

Q. All right, so there'd been some prior bad blood; is that what you're saying?

A. Correct.

Q. And did that bad blood center around Ms. Primus?

A. You'd have to ask him that.

(Trial Tr. p. 42).

Subsequently, on re-direct of Craig Scott, the following exchange occurred:

Q. - - you just testified that you're afraid of Mr. Austin, the Defendant?

A. Correct.

Q. Why are you afraid of Mr. Austin?

A. He attacked me with a gun prior - - two weeks prior to - -

Mr. Hall: Your Honor, I'm going to object, can we - -

The Court: Basis?

Mr. Hall: Relevance.

Ms. Lempesis: Mr. Hall just opened the door.

The Court: You did open the door. Go ahead.

Q. Go ahead.

A. Well, two weeks prior to this incident he - - I was in his neighborhood and I was just hanging out. All of a sudden he just attacked me with a gun, started trying to fight me, and I had to struggle to take it from him that night, and he had a gun definitely that night.

Q. And so the night of this incident, you did write in your statement that he had a gun. You testified that you didn't actually see a gun, but why did you believe he had a gun?

A. Because he threatened me with one two weeks prior, and he said it in my room. He came in my room and he said he had a gun. That's why I was hesitant on really trying to fight him, because he already attacked me with a gun two weeks prior.

(Trial Tr. pp. 48–49).

At the evidentiary hearing, Counsel testified his strategy at trial was to argue Craig Scott was biased against Applicant; therefore, was not a credible witness. The prior bad act testimony that Counsel opened the door to did not undermine this defense; in fact, it may have strengthened it. Additionally, the State presented two eyewitnesses, Craig Scott and Primus, who both testified that Applicant came into Scott's residence, at night, and assaulted Primus. Therefore, based on the strength of the State's evidence and because the prior bad act testimony did not undermine Applicant's defense at trial, Applicant has failed to demonstrate a reasonable probability the outcome at trial would have been different had this testimony been excluded.

Relief based upon his allegation is without merit and therefore DENIED.

VII. CONCLUSION

Based on the foregoing, this Court finds that Applicant is entitled to petition the Supreme Court for a belated appellate review pursuant to *White v. State*, 263 S.C. 110, 280 S.E. 2d 35 (1974). Regarding the remaining allegations, Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. This Court finds Counsel was not deficient in any manner, nor was Applicant prejudiced by Counsel's representation. Therefore, this Court denies relief on the remaining allegations and dismisses this PCR action with prejudice.

Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rule 203, SCACR. Applicant has a right to 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). 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 is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This Court grants Applicant belated review of his direct appeal issues pursuant to *White v. State*, 263 S.C. 110, 208 S.E. 2d 35 (1974).
2. The application for post-conviction relief be denied and dismissed with prejudice; and
3. Applicant be remanded to the custody of the State.

AND IT IS SO ORDERED this 16th day of December, 2024.

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