

STATE OF SOUTH CAROLINA)
 COUNTY OF SPARTANBURG)
)
)
 Brian Foster, #371789,)
 Applicant,)
)
)
 v.)
)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-42-03664

**ORDER GRANTING APPLICANT
 BELATED APPELLATE REVIEW
 PURSUANT TO *WHITE V. STATE*
 AND DISMISSING ALL OTHER
 CLAIMS WITH PREJUDICE**

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This matter comes before this Court by way of Applicant's post-conviction relief application filed October 16, 2019. Respondent made its return on April 16, 2020, requesting that an evidentiary hearing be convened. An evidentiary hearing was held on June 7, 2022, at the Spartanburg County Courthouse. Rodney Richey, Esquire, represented Applicant. Assistant Attorney General Chelsey Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Counsel Beverly Jones and Prosecutor Spenser Smith also testified. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. Findings of fact and conclusions of law are set forth below.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Spartanburg County Clerk of Court. During its May 2018 term, the Spartanburg County Grand Jury indicted Applicant for murder and possession of firearm during commission of a violent crime (2018-GS-42-2086), attempted murder and possession of a weapon during a violent crime (2018-GS-42-2087), and possession of a firearm

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or ammunition by person convicted of a violent crime (2018-GS-42-2080). Applicant was represented by Assistant Public Defender Beverly D. Jones of the Seventh Circuit Public Defender's Office. Assistant Solicitors Spenser H. Smith and Candace F. Clark of the Seventh Circuit Solicitor's Office prosecuted the case. On April 8-11, 2019, Applicant proceeded to jury trial before the Honorable J. Derham Cole. The jury convicted Applicant as indicted.¹ Judge Cole sentenced Applicant to life imprisonment for murder and possession (-2086), thirty years for attempted murder and possession (-2087), five years for possession, count two (-2089), and five years for possession of a firearm by a person convicted of a violent felony (-2090). All these sentences were set to run concurrently.

Applicant filed an untimely notice of appeal on April 25, 2019, that was dismissed by the South Carolina Court of Appeals for failure to timely serve the notice of appeal, as required by Rule 203, SCACR. Counsel filed a motion to reinstate the appeal on June 17, 2019. This was denied by written order filed July 30, 2019. The remittitur was issued on October 3, 2019.

Summary of Relevant Facts

On February 18, 2018, Eric Morris and Joel A. Campbell, Jr. were hanging out when Applicant appeared. (Tr. 140). Morris invited Applicant to stay and both men started showing one another their guns. (Tr. 140-41). A couple of Morris's friends, Darryl J. Lewis and Thomas Michael Koepke, showed up shortly thereafter. (Tr. 142, 187-88). Initially, they were standing around talking amiably in the parking lot. (Tr. 174, 189).

Applicant and Morris went into Morris's house to look at Morris's new gun. (Tr. 144, 175, 189). Shortly thereafter, the other people on scene started hearing gunshots from inside the

¹ The jury also acquitted Applicant of two counts of attempted murder and two counts of possession of a weapon during a violent crime (2018-GS-42-2089 and -2090).

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house. (Tr. 145, 175, 190). Upon hearing gunshots, Koepke ran into the house, thinking the gun was fired by accident. (Tr. 145-46, 190). Koepke, ran into the kitchen, where more shots rang out. (Tr. 146, 190). Applicant then came around the corner, holding a gun to Koepke's face. (Tr. 190). Koepke immediately began pleading with Applicant not to kill him. (Tr. 146, 190, 193). They went to the back porch, where Applicant, at one point, pointed the gun at Lewis and Campbell instead. (Tr. 193).

Lewis and Campbell began running away while Applicant fired more shots. (Tr. 147-50, 176-77). Campbell and Lewis told the neighbor to call the police because Morris was shot. (Tr. 150-51, 177). Koepke began running away and was shot in the hip, causing him to fall several times while attempting to flee. (Tr. 193-94). After being unable to run anymore due to blood loss, Applicant confronted Koepke again, who began pleading with Applicant not to shoot him again, while Applicant stood overtop him, pointing the gun at him. (Tr. 151, 197-98). The gun kept jamming, preventing it from firing. (Tr. 198). After the gun jammed several times, Applicant began running away. (Tr. 198). Koepke got up, ran to the neighbors' yard, and fell again, crying for help. (Tr. 199). Law enforcement arrived shortly thereafter. (Tr. 151-52, 177-78). Koepke was transported to the hospital and treated for his injuries. (Tr. 200).

Campbell and Lewis were separated from one another by law enforcement and asked to choose Applicant out of a lineup. (Tr. 152-54, 178). Both men chose Applicant. (Tr. 152-54, 178). Koepke was presented with a lineup while heavily medicated and in the hospital but could not pick Applicant out of a lineup. (Tr. 203). Two of the neighbors were also asked to pick Applicant out of a lineup. (Tr. 211-12, 222-23). They both chose Applicant. (Tr. 212, 223). The house had video surveillance that documented movement at the time the incident occurred including footage of a vehicle pulling into the parking lot and footage of Koepke Applicant

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running around the house. (Tr. 250-51, 470).

Current Action Before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully because of ineffective assistance of counsel in that:

- 1. "Trial Counsel was ineffective by failure to file its notice of appeal, *see White v. State*, belated appeal."

At the PCR hearing, Applicant proceeded forward on the following allegations:

- 1. Ineffective assistance of counsel
 - a. Failure to ensure Counsel was relieved prior to the hearing.
 - b. Brevity of time in consultation.
 - c. Failure to ensure Counsel had more than one month to prepare for trial.
 - d. Failure to discuss the case with Applicant.
 - e. Failure to secure a plea deal.
 - f. Failure to pursue an alibi defense.
 - g. Failure to file a timely notice of appeal.
 - h. Failure to ensure Applicant understood the discovery.
 - i. Failure to explain the facts of the case.

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Summary of the Testimony

Applicant Testimony

Upon the Court's questioning, Applicant stated he discussed with his attorney Applicant himself, his freedom, and how he was not getting the best representation. He stated that on the third visit he was under the impression he would get a hearing on a to relieve counsel.

On direct examination, Applicant stated Counsel visited him on March 18, 2019, which was about a month before his trial. He stated Counsel visited him five times within a month. Applicant stated that Counsel tried to get a motion for discovery and a mental health evaluation. He stated he got a discovery motion before the trial. He stated Counsel did not discuss his case with him. He stated he had a four-day trial. He stated Counsel had the trial covered. He stated that lack of communication with Counsel was a major issue for him. He stated he never

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provided a negotiated plea deal.

Applicant stated that he knew the allegations against him and that he talked to Counsel about his innocence. He stated that Counsel thought he committed the crime. He stated Counsel did not take his alibi into consideration. He stated that he filed a grievance against Counsel and the Supreme Court wrote him back, stating that Counsel was under investigation for disciplinary issues. He stated he did not know the outcome of the investigation. He stated that he thought his direct appeal was denied but that he wanted a belated appeal.

On cross-examination, Applicant stated he knew he wanted Counsel off his case the first time she visited him. He stated he received his discovery but did not understand it. He stated that he had people testify that he was the shooter. He stated he did not know the facts of the case, only that he was charged with murder. He stated he never provided Counsel with the name of his alibi witness. He stated he did not talk to Counsel once during the trial, nor did he tell the Court that he was satisfied with her services.

Counsel Testimony

Counsel stated that she was representing Applicant on another case when she inherited this matter. She stated they discussed his new charges, the facts of the case, and the discovery. She stated they discussed the facts, including that he allegedly went into the home of a young man who had surveillance cameras inside the home. She stated Applicant knew the people in the home and that he stayed in the home in the past. Counsel testified that there was surveillance camera footage captured Applicant handling a gun inside the home. Counsel testified that he never acknowledged his guilt. She testified that Applicant got his family and friends to threaten the victim's family on social media. She stated that Applicant gave her a list of family members to contact, but never provided her with any alibi witnesses. She testified that she

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investigator go to the jail to show the applicant the videos, but that Applicant did not want to see them. She testified that she made an error on the date of appeal, which led to it getting dismissed. She testified that she arranged a telephone conversation to tell Applicant to file a PCR application for a belated appeal.

On cross-examination, she testified that some of the witnesses knew Applicant. At least one of the victims identified Applicant. She stated she discussed this with Applicant. She stated a plea offer was open until the last day of the trial, but the offer was rejected. She testified that Applicant was acquitted of two counts of attempted murder. She testified that the State had a relatively strong case. She stated that the evidence of the crime was clear, especially given the surveillance footage.

Prosecutor Testimony

Prosecutor stated that evidence in the case consisted of 911 calls, a backpack with boxes, a gun that was identified as the murder weapon, another stolen gun, and jail calls. He stated that there was DNA evidence on the gun. He stated that this was a very strong case for the State and that the likelihood of success at trial was high for the State.

On cross-examination, Prosecutor testified that there was a period when there was no attorney representing Applicant. He stated that Counsel joined in on the case months later. He stated that he thought both sides had sufficient time to prepare the case. He stated that he thought Counsel could get up to speed within a month's time on this case but would have preferred more time. On re-direct, Prosecutor testified that he thought Counsel had the case for more than a month. He stated that she was also handling other cases at the time.

Findings of Fact and Conclusions of Law

This Court has had the opportunity to review the record in its entirety and has heard the

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testimony and arguments presented at the PCR hearing. Before this Court are the Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the trial transcript, and this PCR action's records. 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 conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "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. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. See also Rule 71.1(e), SCRPC ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence. Reasonableness is determined by the "variety of circumstances faced by defense counsel in the range of legitimate decisions regarding how to best represent a criminal defendant the

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scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel’s performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually “countless” ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel’s deficient performance must have prejudiced the applicant so 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. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters “only in the rarest case” because “[t]he likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Failure to Ensure Counsel was Relieved

Applicant claims he was under the impression that Counsel was relieved

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This Court finds this implausible on its face. Applicant was apparently willing to proceed to trial while being represented by Counsel. Even so, because there is no showing of deficiency or prejudice, relief is denied.

Brevity of Time in Consultation

Applicant alleges that Counsel was ineffective for failure to communicate with Applicant enough. “[B]revity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation.” *Smith v. State*, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (2012). Applicant must show evidence indicating “how additional preparation or communication would have resulted in a different outcome.” *Id. See Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (where application failed to show ineffective assistance of counsel based on lack of preparation by neglecting to show evidence of what counsel failed to discover or what defenses counsel could have pursued had he more fully prepared for the case); *Skeen v. State*, 325 S.C. 210, 214-15, 481 S.E.2d 129, 132 (1997) (where applicant failed to show ineffective assistance of counsel when he did not present evidence showing how additional preparation would have impacted the trial).

Applicant has failed to establish how additional communication would have resulted in a different outcome at trial. Applicant has failed to meet his burden of proof and relief is denied accordingly.

Failure to Ensure Counsel had Enough Time to Prepare for Trial

Applicant claims Counsel was ineffective for failing to ensure she had enough time to prepare for trial. Applicant failed to point to anything specific that Counsel should have prepared but did not. Counsel and Prosecutor both credibly testified that she had enough time to prepare for trial. Accordingly, Applicant has not met his burden of proof and relief is denied.

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Failure to Discuss Case

Applicant claims Counsel was ineffective for failing to discuss the case. Counsel credibly testified that she discussed the case, discover, and facts surrounding the case with Applicant. Applicant has failed to point to anything specific that Counsel should have discussed with him that would have changed the outcome at trial. Accordingly, Applicant has not met his burden of proof and relief is denied.

Failure to Secure a Plea Offer

Applicant claims Counsel was ineffective for failure to secure a negotiated plea offer. “[A] defendant has no constitutional right to plea bargain.” *Reed v. Becka*, 333 S.C. 676, 684, 511 S.E.2d 396, 400-01 (Ct. App. 1999). (citing *State v. Easter*, 322 S.C. 333, 471 S.E.2d 745 (Ct. App. 1996), *aff’d as modified*, 327 S.C. 121, 489 S.E.2d 617 (1997)). “Prosecutors have broad powers in the plea bargain process[.]” *Id.* Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser offense, or they can simply decide not to prosecute the offense in its entirety.” *Id.*, 333 S.C. at 684, 511 S.E.2d at 400-01. “The Judicial Branch is not empowered to infringe on the exercise of this prosecutorial discretion; however, on occasion, it is necessary to review and interpret the results of the prosecutor’s actions.” *Id.* Yet, plea offers must be analyzed within the bounds of judicial restraint. *Id.*

There have been no allegations of a failure to convey an offer, only that a an offer of a negotiated plea was never extended. Counsel credibly testified that there was an offer in the case that lapsed the day of trial. Applicant is not entitled to a negotiated plea offer. Accordingly, relief is denied on this ground.

Failure to Pursue an Alibi Defense

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Applicant claims Counsel was ineffective for failure to pursue an alibi defense. At a minimum, counsel must interview potential witnesses and make independent investigations regarding the facts and circumstances of the case. *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007). One component of the duty to reasonably investigate the case includes a “duty . . . to investigate alibi witnesses identified by a defendant, and the failure to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable.” *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014). To show counsel was ineffective by failing to call a witness, the witness(es) must be produced at the PCR evidentiary hearing or their testimony must otherwise be presented, consistent with the rules of evidence. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Mere speculation regarding the witness’s testimony is insufficient to establish prejudice. *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993). “In most PCR cases in which the applicant seeks relief for trial counsel’s failure to call witnesses, the PCR court’s analysis—and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks.” *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018).

Counsel’s performance is not deficient if he decided not to present a witness as a tactical and strategic move, nor if the witness was unlikely to appear or present testimony that could have made a difference at trial. *See e.g. Smith v. State*, 404 S.C. 493, 502, 745 S.E.2d 378, 383 (2012) (finding that counsel was not deemed ineffective when petitioner failed to introduce any evidence that established prejudice to the petitioner); *Edwards v. State*, 392 S.C. 449, 457-58, 710 S.E.2d 60, 65 (2011) (stating that counsel was not ineffective because the witness could not withstand cross-examination due to his prior vacillation and the cumulative nature of his

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testimony and he knew the petitioner's statement to the police would be entirely consistent with the supposed witness's statement at trial); *Glover*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding that counsel was in deficient by failing to call all alibi witnesses when two witnesses who testified did not establish the alibi).

Further, prejudice will generally be found if the testimony was significant and favorable enough to the Applicant so that the trial proceedings results may have been different because of the testimony. *See e.g. Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008) (finding that counsel was deficient by failing to call witnesses, for no other reason than lack of preparation, that may corroborated with the defendant or bolstered his credibility so that the findings at trial could have been favorable to the defendant); *Thomas v. State*, 308 S.C. 123, 417 S.E.2d 531 (1992) (finding that uncalled witness' testimony would have cast doubt on the sole witness' identification of the petitioner and, thus, would have made a difference at trial).

This Court finds Counsel was reasonable in concluding that an alibi witness was not an option because Applicant was caught on tape committing the crime and multiple eyewitnesses identified him as the perpetrator. Additionally, any attempt to create an alibi defense would have been deemed not credible in light of the overwhelming evidence and, accordingly, would not have impacted the outcome at trial. Accordingly, relief is denied on this ground.

Failure to Ensure Applicant Understood the Discovery

Applicant claims Counsel was ineffective for failure to ensure Applicant understood the discovery. Counsel credibly testified she explained the discovery to Applicant and that the evidence against him was strong and clear. Accordingly, relief is denied on this ground.

Failure to Explain the Facts of the Case

Applicant claims Counsel was ineffective for failure to explain the facts of the case.

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Counsel credibly testified she discussed the facts surrounding the incident and accompanying charges. Accordingly, relief is denied on this ground.

Belated Appeal Granted

Applicant alleges that counsel provided ineffective assistance when she failed to effectuate his direct appeal. This Court agrees that Applicant did not knowingly, voluntarily, and intelligently waive his right to a direct appeal, and therefore grants his request for relief on this narrow issue.

Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal. *Turner v. State*, 380 S.C. 223, 224-25, 670 S.E.2d 373, 374 (2008) (internal citations omitted). 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). *Id.*

South Carolina's Appellate Courts have no jurisdiction to entertain appeals when the notice of appeal is not timely given and served. *White*, 263 S.C. at 119, 208 S.E.2d at 40. Nevertheless, if a PCR court finds that an applicant has been denied his right to direct appeal from trial due to counsel's errors, his request for post-conviction relief may be denied, but he may be permitted to seek belated review of trial errors in conjunction with his appeal of the order dismissing his PCR application. *Id.*

At the PCR hearing, Counsel assumed responsibility for the failure to properly effectuate the appeal. Accordingly, this Court finds that counsel's failure to timely file and serve the notice of appeal deprived Applicant of an opportunity to seek appellate review of his conviction. The testimony shows that he did not knowingly, voluntarily, and intelligently waive this right. Therefore, this Court finds that he is entitled to belated review of his conviction, pursuant to *White*, 263 S.C. 110, 208 S.E.2d 35.

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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. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty days of receipt by counsel of the judgment entry's written notice to secure appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has the right to appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

IT IS THEREFORE ORDERED:

1. The PCR application be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 22 day of March, 2023.

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WILLIAM A. MCKINNON
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina.

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