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S.C. SUPREME COURT

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NOTICE OF APPEAL FROM A POST CONVICTION RELIEF IN THE COURTOF COMMON PLEAS

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Case No. 2022-CP-10-0760

Mark Blake, Appellant,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Mark Blake hereby appeals the denial and dismissal of his application for post conviction relief in this case. An evidentiary hearing in the matter was convened before the Honorable Jocelyn Newman. Following the hearing, Judge Neman issued a written order denying and dismissing the application with prejudice dated January 28, 2025 and filed February 5, 2025. Undersigned counsel received a written filed copy of said order via email on February 5, 2025.

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March 5, 2025

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
Mark Blake, SCDC #368687, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2022-CP-10-00760 **ORDER OF DISMISSAL**

This matter is before the Court pursuant to an application for post-conviction relief ("PCR") filed by Mark Blake ("Applicant") on February 16, 2022. On December 19, 2024, an evidentiary hearing convened. Applicant was present and represented by Denise Swope, Esquire. Assistant Attorney General Bryan T. Hall represented Respondent. At the hearing, Applicant testified on his own behalf. Respondent called as a witness Taylor Gilliam, Esquire. Following a thorough review of the trial transcript and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant did not meet his burden of proof. Thus, this Court denies relief and dismisses this application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections ("SCDC") serving a life sentence. In August 2013, the Charleston County Grand Jury indicted Applicant for attempted murder (2013-GS-10-4926). This charge arose from an incident in which an officer attempted a traffic stop on Applicant. Applicant stopped initially then fled and a chase ensued. At the conclusion of the chase, Applicant fled on foot and shot several times at the officer who was attempting to arrest him. The officer was shot and injured.

From November 13 to November 15, 2018, Applicant represented himself in a jury trial before the Honorable William P. Keesley. Assistant Solicitors Stephanie Linder and J. Whit

Sowards prosecuted the case. The jury convicted Applicant, and Judge Keesley sentenced Applicant to life imprisonment.

Applicant filed a timely notice of appeal. On appeal, Applicant was represented by Appellate Defender Taylor Gilliam ("Appellate Counsel"), who filed a brief raising the following issue:

> Whether the trial court erred in failing to exclude any mention of Appellant having lost his right to carry a firearm following prior convictions, where in a trial for attempted murder, the fact that he could not legally carry a firearm was irrelevant and highly prejudicial?

The South Carolina Court of Appeals affirmed Applicant's conviction, determining that Applicant failed to make a contemporaneous objection to references concerning his illegal possession of a firearm and that Applicant himself induced testimony about his not being permitted to legally possess a firearm several times throughout trial. *State v. Blake*, Op. No. 2021-UP-201 (S.C. Ct. App. filed June 9, 2021). The Remittitur was sent on June 28, 2021.

CURRENT APPLICATION

Applicant timely commenced this PCR action on February 16, 2022, alleging he is being held in custody unlawfully for the following reasons:

Ineffective Assistance of Appellate Counsel

a. Failure to raise appellate issues: *Langford*[1] issue for delay in prosecution.

On September 1, 2023, Respondent filed a Return and requested a more definite statement on Applicant's claims. On March 7, 2024, Respondent filed an Amended Return. At the evidentiary hearing, Applicant raised the following additional allegation:

[1] *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012).

Ineffective Assistance of Appellate Counsel

b. Failure to raise on appeal whether Applicant freely and voluntarily waived his right to counsel and was competent to represent himself at trial. [2]

Before this Court are the Charleston County Clerk of Court records of the subject conviction; Applicant's records from SCDC; the appellate records; 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 averred that Appellate Counsel failed to raise on appeal a *Langford* issue and a *Faretta*[3] issue. Regarding the *Langford* issue, Applicant testified that the trial of his case was delayed by five years. Applicant testified that at trial, he moved to quash the indictments on grounds that the documents were not presented swiftly, but the trial judge denied his motion. According to Applicant, he presented the issue to Appellate Counsel who did not raise it. Applicant testified that Appellate Counsel told him that he did not feel confident about raising the issue on appeal.

Regarding the *Faretta* issue, Applicant testified that although he does not recall having two *Faretta* hearings, he did remember the judge asking him if he wanted to proceed *pro se*. He stated that he asked for standby counsel to help assist him with trial and that, at the time, he was on medications for anxiety. Applicant testified that while testifying at trial, he was under stress and anxious and needed someone to raise objections for him. On cross-examination, Applicant admitted that the reason he needed someone to make an objection for him was due to logistical

[2] Although not plead in his PCR applicant, Applicant raised this issue at the evidentiary hearing.

[3] *Faretta v. California*, 422 U.S. 806 (1975).

complications (i.e., him having to simultaneously testify and raise objections) and not his competency. He also acknowledged that since he represented himself at trial, it was his responsibility to make objections and preserve issues for appeal.

Finally, although not plead in his PCR Application, Applicant complained that trial witness Kukila Wallace made inconsistent statements at trial. However, Applicant testified that he was able to cross-examine her about her statements.

Appellate Counsel's Testimony

Taylor Gilliam ("Appellate Counsel") testified that he has been practicing law for ten years, including seven or eight years as an Appellate Defender for the Commission of Indigent Defense. Appellate Counsel testified that when representing clients on appeal, he obtains and reviews the trial transcripts and finds issues with merit. Appellate Counsel testified that his opinion on whether an issue has merit depends on legal research and his general knowledge of the law. Appellate Counsel testified that he looks for objections in the record and whether an objection has been made affects whether an issue can be raised on appeal. Appellate Counsel testified that if an issue is not raised and ruled upon, the issue is unpreserved, and the appellate court is unlikely to grant review on the issue. He also testified that while he does not have an independent recollection of the *Langford* issue, he does not believe that the issue has merit since the multiple continuances of Applicant's trial were attributed to Applicant.

Regarding the *Faretta* issue, Appellate Counsel testified that since *Faretta* hearings had occurred, he did not raise this issue on appeal. Appellate Counsel testified that in reviewing the trial transcript, he had no concerns about Applicant's ability to represent himself. Appellate Counsel testified that since he was appellate counsel, he would not have known about any medications Applicant was taking at the time. Appellate Counsel testified that he raised the issue

of Applicant's right to carry a firearm because he believed the issue had the best chance of success on appeal.

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 S.C. CODE ANN. § 17-27-80 (2017).

Ineffective Assistance of Counsel

In a PCR action, an applicant bears the burden of proving the allegations. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). An applicant alleging ineffective assistance of counsel must prove that "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 that 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." *Id.*

Ineffective Assistance of Appellate Counsel

In analyzing ineffective assistance of appellate counsel, the court applies the *Strickland* test just as it would when analyzing a claim of ineffective assistance of trial counsel. *Bennett v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009) (providing an applicant must prove appellate counsel's performance was deficient and must prove prejudice by showing a reasonable probability the result of the proceeding would have been different but for counsel's errors). When an applicant contends appellate counsel rendered ineffective assistance for failing to argue a specific issue on appeal, he must show that failure to raise that issue was objectively unreasonable and that, but for this failure, applicant's conviction or sentence would have been reversed or remanded. *Southerland v. State*, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). An applicant must show that a particular nonfrivolous issue was clearly stronger than issues presented by appellate counsel and must show a reasonable probability that, but for counsel's failure to raise that particular claim, the applicant would have prevailed on appeal. *Smith v. Robbins*, 528 U.S. 259, 288 (2000).

Failure to Raise on Appeal a Langford Issue

This Court finds Applicant failed to prove Appellate Counsel was ineffective for failing to raise on appeal an alleged *Langford* violation. Whether a defendant's Sixth Amendment right to a speedy trial is violated is necessarily relative; it is consistent with delays and depends upon the circumstances. *State v. Langford*, 400 S.C. 421, 440-41, 735 S.E.2d 471, 481-82 (2012). Speedy

trial does not mean an immediate one, the State is entitled to reasonable time to prepare its case; speedy trial means a trial without unreasonable and unnecessary delay. *Id.* Factors the court weighs include the length of the delay, the reason for it, the defendant's assertion of his right to a speedy trial, and any prejudice he suffered. *Id.*

This Court finds credible Appellate Counsel's testimony that he did not believe the issue had merit since the continuances in Applicant's trial were attributed to Applicant. This Court finds that Appellate Counsel, based on his experience and legal research, articulated a reasonable strategic decision in not raising an issue that he believed was unlikely to be successful. Further, this Court finds Applicant failed to prove he was prejudiced by failing to prove there's a reasonable probability that the result of his appeal would have been different but for Appellate Counsel's failure to raise the issue. Thus, Applicant failed to meet his burden.

Failure to Raise on Appeal Whether Applicant Knowingly and Voluntarily Waived his Right to Counsel and was Competent to Proceed Pro Se

This Court finds that Applicant failed to prove that Appellate Counsel was ineffective for failing to raise as an issue on appeal whether Applicant knowingly and voluntarily waived his right to counsel and was competent to proceed *pro se*. Although it may be to a defendant's detriment to be allowed to proceed pro se, his knowing, intelligent, and voluntary decision must be honored. *Faretta v. California*, 422 U.S. 806, 834 (1975). Under *Faretta*, the trial judge has the responsibility to make sure the defendant is informed of the dangers and disadvantages of self-representation, and that he makes a knowing and intelligent waiver of his right to counsel. *State v. Reed*, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998) (holding the trial court did not err in accepting the appellant's waiver of his right to counsel where the trial court held several hearings to determine whether appellant understood, and the judge informed the appellant of the dangers and disadvantages of self-representation).

This Court finds the record supports a finding that Applicant knowingly, intelligently, freely, and voluntarily waived his right to counsel and proceed *pro se*. The record reflects the trial court held two separate *Faretta* hearings, both in which Applicant indicated his desire to represent himself at trial.

> The Court: I asked Mr. Blake if he was representing himself. My understanding is there's already been a full Faretta hearing.
>
> [Solicitor]: Yes, judge. Judge Dennis had two separate Faretta hearings after he requested to represent himself for this trial. And both of those times, he found Mr. Blake was going to be pro se.

(Tr. 20:7-13).

This Court finds credible Appellate Counsel's testimony that upon reviewing the trial transcript, he did not have any concerns about Applicant's ability to represent himself at trial. This Court also finds it credible that Appellate Counsel would not have known about any medications Applicant was taking around the time of trial. This Court finds credible Appellate Counsel's testimony that he raised the issue that he believed had the best chance of being successful. This Court finds Applicant failed to prove he was prejudiced by failing to show a reasonable probability that the result of his appeal would have been different but for Appellate Counsel's failure to raise a *Faretta* issue.

Additionally, this Court finds Applicant failed to meet his burden of proving he was incompetent at the time of the *Faretta* hearings or trial where the record shows Applicant demonstrated a reasonable degree of rational understanding before and during his trial. As supported by the trial transcript, Applicant answered the trial court's questions clearly and appropriately and made several arguments and objections. *See McLaughlin v. State*, 352 S.C. 476, 575 S.C. 841 (2003) (holding that the evidence did not suggest the applicant was incompetent due to medications before or during his trial where testimony established that the applicant had the

ability to consult with his lawyer with a reasonable degree of rational understanding and answered his lawyer's questions clearly and appropriately). Further, in the PCR hearing, Applicant admitted that his need for assistance to make an objection during trial was due to the fact that he was testifying on the stand at the time and not because of his competency. This also is reflected in the trial transcript as Applicant stated, "I didn't know I was allowed to object while testifying. I need somebody to object for me." (Tr. 547:9-10). Thus, Applicant failed to meet his burden.

Failure to Raise on Appeal Inconsistent Statements Made by Kukila Wallace

Although not pleaded, Applicant testified that Appellate Counsel should have raised on appeal an issue regarding prior inconsistent statements made by witness Kukila Wallace. This Court finds Applicant failed to prove Appellate Counsel was ineffective in this regard. This Court finds Applicant failed to prove he was prejudiced by failing to show a reasonable probability the result of his appeal would have been different but for Appellate Counsel's failure to raise this issue. Thus, Applicant failed to meet his burden.

[*Space left blank intentionally. Conclusion follows on next page.*]

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), SCRCP. 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 THIS 28th day of January 2025.

JOCELYN NEWMAN
Presiding Judge
Ninth Judicial Circuit

Columbia, South Carolina