STATE OF SOUTH CAROLINA COUNTY OF COLLETON	)	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
Maurio D. Rivers, #232669, Applicant, v. State of South Carolina, Respondent.	)	2016-CP-15-0647 **ORDER OF DISMISSAL**

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Colleton County Clerk of Court's orders of commitment. Applicant was indicted by the August 2011 term of the Colleton County Grand Jury for two counts of attempted murder (2011-GS-15-00549, -550) and possession of a weapon during the commission of a violent crime (2011-GS-15-551). John D. Bryan, Esquire, represented the Applicant. Solicitor Steven Knight prosecuted the case. On December 12-13, 2012, Applicant proceeded to trial before the Honorable Diane S. Goodstein. Applicant was found guilty as indicted of one count of attempted murder (2011-GS-15-549), and Applicant was found not guilty of attempted murder (2011-GS-15-550) and possession of a weapon during the commission of a violent crime (2011-GS-15-551). Judge Goodstein sentenced Applicant to incarceration for thirty years.

Applicant filed a timely notice of appeal. Carmen V. Ganjehsani, Esquire represented Applicant and filed an *Anders* brief. On December 3, 2014, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Rivers, Op. No. 2014-UP-441 (S.C. Ct. App., Filed December 3, 2014).

Applicant subsequently filed a petition for rehearing on December 4, 2014, and Applicant also filed a petition for writ of certiorari to the South Carolina Supreme Court. On December 17,

2014 the South Carolina Supreme Court issued an order stating that it would construe Applicant's notice of appeal as a petition for writ of certiorari and dismiss the petition without prejudice until the South Carolina Court of Appeals issued its decision on Applicant's petition for rehearing. The remittitur was sent down on December 31, 2014. On January 29, 2015, the South Carolina Court of Appeals issued an order recalling the remittitur. On January 30, 2015, the South Carolina Court of Appeals granted Applicant's motion to relieve his counsel. Thereafter, the Applicant proceeded pro se. On April 16, 2015, the South Carolina Court of Appeals denied Applicant's petition for rehearing.

On April 27, 2015, the South Carolina Supreme Court received Applicant's petition for writ of certiorari, and on November 19, 2015, certiorari was denied. The remittitur was sent down on December 7, 2015.

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
    a. "Failing to object to object to the jury instructions charging the hand of one is the hand of all."
    b. "Failing to motion for a directed verdict on the charge of accomplice liability in regard to Attempted Murder."
    c. "Failing to object to the inclusion of a criminal offense for which the defendant was not indicted (Burglary and a getaway driver) as an example to the jury defining accomplice liability/or the hand of one is the hand of all."

Findings of Facts and Conclusions of Law

This Court has thoroughly reviewed the record in its entirety. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses presented, which allowed the Court to scrutinize the witness credibility. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Applicant has alleged numerous instances of ineffective assistance of counsel against trial counsel, John Bryan. Each allegation is addressed fully below.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "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; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland does not guarantee perfect representation, only a "'reasonably competent attorney.'" 466 U. S. at 687 (quoting McMann v. Richardson, 397 U. S. 759, 770 (1970)). Representation is constitutionally ineffective only if it "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair trial. Strickland, 466 U.S. at 686. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities. See generally id.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, an applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures 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). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler, 286, 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (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, counsel's deficient performance must have 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.

Although courts may not indulge "post hoc rationalization" for counsel's decision making that contradicts the available evidence of counsel's actions, Wiggins, 539 U.S. at 526–527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (per curiam). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. Id. at 688; Harrington v. Richter, 562 U.S. 86 (2011).

With respect to prejudice, an applicant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of

the proceeding." Id. at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687; Harrington, 562 U.S. 86.

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U.S. at 689–690. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings knew of materials outside the record and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id. at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U.S at 690.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Wong v. Belmontes, 558 U. S. 15 (2009); Strickland, 466 U.S. at 693. Instead, Strickland asks whether it is "reasonably likely" the result would have been different. Id. at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." Id. at 693,

697. The likelihood of a different result must be substantial, not just conceivable. Id. at 693; Harrington, 562 U.S. 86.

Based on this standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel as to any of his various allegations. Applicant's allegation is addressed fully below:

Failure to Object to Hand of One is the Hand of All Jury Charge

Applicant alleges that counsel was deficient for failing to object to the hand of one is the hand of all jury instruction given to the jury. Applicant testified that his attorney is the one who requested the hand of one is the hand of all charge, and Applicant testified that he did not remember counsel objecting to the charge being given to the jury. Further, Applicant testified that counsel did not advise him of the law surrounding the hand of one is the hand of all. Counsel testified that he reviewed the hand of one is the hand of all with Applicant, and Counsel testified that he also reviewed accomplice liability with Applicant, prior to trial. Counsel testified that there was no way to discuss the case with Applicant without the hand of one is the hand of all being a part of the conversation. Additionally, Counsel testified that he did not recall objecting to the charge being given to the jury. This Court finds that Applicant has failed to meet his burden and that counsel was not deficient in regards to this allegation. Evidence in the record supports a charge on the hand of one is the hand of all and the charge was appropriately given to the jury. As counsel noted in his testimony, the hand of one is the hand of all was one of the more pivotal points of law in this case. Therefore, this Court finds that counsel was not deficient for failing to object to the charge being given and dismisses this allegation.

Failure to Move for a Directed Verdict

Applicant alleges that counsel was deficient for failing to move for a directed verdict on

the charge of accomplice liability in regard to Attempted Murder. This allegation is directly refuted by the trial transcript. Upon review of the record, this Court finds that counsel did in fact move for a directed verdict at trial. Counsel moved for a directed verdict and the trial court ruled against him. This Court therefore finds that Applicant has failed to meet his burden and this allegation is dismissed.

Failing to Object to Example Given of Accomplice Liability

Applicant alleges counsel was deficient for failing to object to the Solicitor giving an illustration of a burglary and a getaway car as an example of accomplice liability.

It is well settled that "the solicitor must confine his arguments to the evidence in the record and its reasonable inferences." State v. Tucker, 324 S.C. 155, 169, 478 S.E.2d 260, 267 (1996). "If a Solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs." State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) (internal citations omitted). "Undoubtedly, a Solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony." Id. Further, "[i]mproper comments do not automatically require reversal if they are not prejudicial to the defendant, and the [defendant] has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id.

In addition, the Court finds even if the comment was objectionable, Applicant suffered no prejudice. See State v. Rudd, 355 S.C. 543, 550, 586 S.E.2d 153, 157 (Ct. App. 2003) (appellate courts will review the alleged impropriety of an opening or closing argument in the context of the entire record). "A new trial will not be granted unless the prosecutor's comments so infected

the trial with unfairness as to make the resulting conviction a denial of due process," and [t]he burden of proof is on [Applicant] to show prejudice. " Tucker, 324 S.C. at 169, 478 S.E.2d at 267–68 (internal citations omitted). "In evaluating prejudice, a number of factors should be considered: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters." United States v. Mason, 344 F. App'x 851, 854 (4th Cir. 2009). When making this determination, courts "review the 'alleged impropriety of argument in the context of the entire record.'" State v. Liberte, 336 S.C. 648, 521 S.E.2d 744 (1999) (quoting Brown v. State, 383 S.C. 506 (2009)). This Court finds that Applicant has failed to meet his burden in regard to this allegation.

Applicant testified that counsel should have objected to the example being used by the Solicitor. Counsel testified he did not object to the example and did not feel the need to do so. This Court finds that counsel is given latitude in remarks made during closing argument and that the court corrected any potential error by charging the jury on the law of accomplice liability. This Court also finds that even if counsel did err in failing to object, the error would have been harmless and would not have prejudiced Applicant. This Court finds that Applicant has failed to meet his burden and this allegation is dismissed.

Failure to Object to Judge Instructions

Applicant alleges that counsel was deficient for failing to object to the trial judge's comments at the beginning of the trial that the jury should seek a true and just verdict. Counsel testified that he did not know that this was objectionable. This Court finds that any potential

error of counsel in not objecting to the comment made by the trial judge was harmless and did not prejudice Applicant. The mention of a true and just verdict was made only once by the trial court and was not repeated. The trial court also included all of the standard language concerning the State's burden of proof in criminal cases in its colloquy to the jury. This Court finds that Applicant has failed to meet his burden in regards to this allegation and dismisses this allegation.

CONCLUSION

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

The Court notes 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. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. 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 South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 21 day of December, 2019.

WILLIAM H. SEALS JR.
Presiding Judge
Fourteenth Judicial Circuit

ALAN WILSON
ATTORNEY GENERAL

December 31, 2019

The Honorable Patricia C. Grant
Colleton County Clerk of Court
Post Office Box 620
Walterboro, SC 29488-0028

Re: **Maurio D. Rivers, #232669 v. State of South Carolina**
2016-CP-15-0647

Dear Ms. Grant:

Enclosed please find the original Order of Dismissal signed by the Honorable William H. Seals, Jr., in the above-captioned case, for filing in your office.

In addition, please forward proof of service and a time stamped copy back to our office for our file.

Sincerely,

Benjamin H. Limbaugh
Assistant Attorney General

BHL/kmw

Cc: Leslie T. Sarji, Esquire (without enclosure)