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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse, Circuit Court Judge

Case No. 2019-CP-36-00334

Franklin Dell Hayes, #315053, Petitioner,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Applicant, Franklin Dell Hayes, appeals the order of the Honorable R. Scott Sprouse, filed on or about November 16, 2023.

December 11, 2023

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF NEWBERRY)	FOR THE EIGHTH JUDICIAL CIRCUIT
)	
Franklin Dell Hayes, #315053)	Case No.: 2019-CP-36-00334
)	
Applicant,)	
)	
v.)	
)	ORDER OF DISMISSAL
State of South Carolina,)	
)	
Respondent.)	
)	
)	
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)	

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 NEWBERRY COUNTY
 2023 NOV 16 PM 12:18
 ELIZABETH P. FOLLO
 CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief (“PCR”) filed by Franklin Dell Hayes (“Applicant”) on July 3, 2019, and amended on November 18, 2022. The Court convened an evidentiary hearing into the matter on November 28, 2022, at the Abbeville County Courthouse. Applicant was present at the hearing and represented by Ashley A. McMahan, Esquire. Assistant Attorney General Zachary W. Jones, of the South Carolina Attorney General’s Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant’s trial counsel, Chief Public Defender Charles V. Verner (“Counsel”), also testified. After reviewing all records and evidence before the 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. The Court finds as follows:

I. PROCEDURAL HISTORY

During the October 2017 term, the Newberry County Grand Jury indicted Applicant for possession of methamphetamine (2017-GS-36-00473). Chief Public Defender Charles V. Verner of the Eighth Circuit Public Defender’s Office (Counsel) represented Applicant. Deputy Solicitor

C. Dale Scott and Assistant Solicitor Taylor W. Daniel, of the Eighth Circuit Solicitor's Office, prosecuted the case.

On December 6, 2017, Applicant proceeded to a jury trial before the Honorable Eugene C. Griffith, Jr. At the conclusion of the trial, the jury found Applicant guilty as indicted. Judge Griffith sentenced Applicant to nine years imprisonment with credit for five days.

Applicant filed a timely appeal, and Appellate Defender Joanna K. Delany of the South Carolina Commission on Indigent Defense filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967) on Applicant's behalf. Following the review required by *Anders*, the South Carolina Court of Appeals dismissed the appeal and granted appellate counsel's motion to be relieved as counsel. *State v. Hayes*, 2019-UP-185 (S.C. Ct. App. Filed May 29, 2019). The remittitur was sent on June 14, 2019. By the time of the evidentiary hearing, Applicant was no longer incarcerated.

Factual Summary

On July 13, 2017, Applicant was the back passenger in a vehicle that was stopped at a traffic safety checkpoint in Newberry County at 1:59 AM. (Trial Tr. 21, 23.) While the vehicle was stopped, deputies noticed a "broken-down shotgun" on the front passenger floorboard. (Trial Tr. 24.) One of the deputies on scene got closer to the vehicle and detected the odor of marijuana coming from the vehicle. (Trial Tr. 25.) At that point, the occupants were ordered out of the vehicle. (Trial Tr. 26.) One of the deputies noted Applicant was "fidgeting around" and handcuffs were placed on the occupants for officer safety reasons. (Trial Tr. 27.) Deputy Miller found Applicant clinching a "baggy of meth" in his hand. (Trial Tr. 46.) A bluish clear meth pipe was found on the floorboard where Applicant's feet would have been in the truck. (Trial Tr. 46.) Deputies located another baggy of meth in a cigarette pack that was on the back seat where Applicant was sitting. (Trial Tr. 28.) Applicant was taken to the emergency room because he told

deputies he was diabetic and his blood sugar was low. (Trial Tr. 30.) Applicant was “acting out” at the hospital and cursing at the medical staff, so deputies took him to the jail. (Trial Tr. 31.) While at the jail, Applicant was stripped searched and another baggy of methamphetamine was located in Applicant’s underwear. (Trial Tr. 31-32.).

Present Application

On July 3, 2019, Applicant filed his initial PCR application, raising the following allegations:

1. “I was high during trial and got caught with meth while on trial.”
 - a. “I got caught with 4 grams of meth on trial and was high!”
2. “My brother was the narcotics officer in my case!”
 - a. “My brother is Sgt. of Narcotics for Newberry County!”
3. “The solicitors or public defender did not allow me to pick my jury. [They] put me in front of a jury picked by another defendant!”
 - a. “They did not allow me to pick my jury or compulsory process.”

On November 18, 2022, Applicant amended his application, raising no additional allegations but requesting leave to conform his allegations to the evidence presented at the evidentiary hearing.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, and weighed the testimony accordingly. Before the Court are Applicant’s records from the South Carolina Department of Corrections, the transcript of Applicant’s trial, the records of the Newberry County Clerk of Court regarding the subject convictions, Applicant’s appellate records, and the original and amended applications for post-conviction relief. This Court has reviewed the records submitted to it by the parties, the legal arguments made by the attorneys, and the pleadings. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented:

Failure to State a Cognizable Claim

The Court finds neither of Applicant's first two allegations in support of his application for post-conviction relief state a cognizable claim for relief under the Uniform Post-Conviction Procedure Act, S.C. Code Ann. §§ 17-27-10 to -160.

An applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.

S.C. Code Ann. § 17-27-20(A). Further, section 17-27-20(B) expressly states PCR "is not a substitute for . . . direct review of the sentence or conviction." A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993).

Applicant's allegation that he was high on meth during trial is not among the statutorily-enumerated grounds for post-conviction relief, unless it be construed, extremely loosely, as a claim that he was not competent to stand trial. It is clear from the transcript of Applicant's trial, as well as the credible testimony of Counsel at the evidentiary hearing, that Applicant was competent to

stand trial. After he arrived late to his trial, Applicant engaged in a lengthy and coherent colloquy with the trial court. (Trial Tr. pp. 53-65). After his conviction, he engaged in a similarly coherent conversation with the trial court regarding whether prison was an appropriate sentence. (Trial Tr. pp. 190-94). Applicant's alleged voluntary intoxication during the progress of his trial does not suffice to invalidate his conviction.

Applicant also complains that his brother was among the narcotics officers who participated in his case. Again, this is not a ground for post-conviction relief. Moreover, this matter was brought to the trial court's attention by Applicant himself during the trial. (Trial Tr. p. 56, line 23 – p.59, line 4). The trial court declined to take any action on Applicant's complaint, pointing out that Applicant's brother was not a fact witness in Applicant's trial. PCR is not the appropriate proceeding for raising an issue that could have been addressed at trial or on appeal. *Drayton* 312 S.C. at 8, 430 S.E.2d at 520.

Ineffective Assistance of Trial Counsel

Applicant further claims that his attorney was ineffective for not allowing him to pick his jury and requiring him to go forward with a jury picked for another defendant's case. Unlike Applicant's other claims, this is, on its face, a cognizable claim for post-conviction relief. However, it is meritless.

In a PCR action, Applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Applicant must prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRPC. Where the application alleges ineffective assistance of counsel as a ground for relief, 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 v. Washington*, 466 U.S. 668, 686 (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*. First, Applicant must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *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 the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 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). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109–10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough*, 540 U.S. at 6; *see also Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable.").

Second, counsel's deficient performance must have prejudiced 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. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466

U.S. at 694. “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.’” *Harrington*, 562 U.S. at 111–12 (quoting *Strickland*, 466 U.S. at 697). “The likelihood of a different result must be substantial, not just conceivable.” *Id.* at 112. “The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury.” *United States v. Basham*, 789 F.3d 358, 371–72 (4th Cir. 2015) (quoting *Elmore v. Ozmint*, 661 F.3d 783, 858 (4th Cir. 2011)).

The trial transcript conclusively refutes Applicant’s contention that his jury was picked for another defendant’s case. Although Applicant arrived late to his trial, after the jury selection process, Counsel was clearly involved in the *voir dire* process and exercised multiple strikes. (Trial Tr. pp. 5-19). The trial court, out of an abundance of caution, picked two extra alternates so that, if any of the jurors recognized Applicant when he showed up, they could be replaced. (Trial Tr. p.59, line 24 p. 8). This Court finds Counsel was not ineffective because the trial did not go forward with a jury picked by some other defendant.

At the evidentiary hearing, Applicant complained that he was late to his trial and unable to fully prepare because he was not given sufficient notice. The transcript reflects that, when Applicant did finally show up to his trial, Counsel asked for a continuance so that Applicant could have more time to prepare. The trial court questioned Applicant, who admitted he knew that his case was on the trial docket. (Trial Tr. p.60, lines 10–15). Nevertheless, Applicant complained that he had not had enough time to meet with Counsel. (Trial Tr. p.60, line 19–p.61, line 3). The trial court pointed out that “[Counsel]’s been here all week, last week. . . . He’s been here ready, willing, and able to talk to you, and you been hard to find.” (Trial Tr. p.61, lines 5–10). Applicant

admitted he had been told to come, but claimed he had a medical issue. (Trial Tr. p.61, lines 13–14). However, when he testified at the evidentiary hearing, Applicant admitted he had not prepared for trial or come to court on time because he had spent the days prior to his trial “partying.”

The Court finds Applicant’s failure to prepare for trial was not Counsel’s fault, but his own. Moreover, the record clearly shows that Counsel requested a continuance in order to better prepare for trial. Judge Griffith denied the request, at which point the issue was preserved for direct appeal. Again, PCR proceedings may not be used to raise issues that could have been raised on direct appeal. *Drayton* 312 S.C. at 8, 430 S.E.2d at 520. The Court also notes that Counsel vigorously argued his motion to suppress the drug evidence in the case, attacked the sufficiency of the State’s evidence in a directed verdict motion, and argued the State had failed to connect the seized drugs to Applicant during his closing argument to the jury; therefore, the Court finds Counsel appears to have been adequately prepared for trial, notwithstanding Applicant’s apparent lack of preparation.

Finally, Applicant has not pointed out any new evidence he would have presented or defenses he could have raised had he been given more time to prepare; therefore, he has failed to prove prejudice. Mere speculation as to how an alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. *Harris v. State*, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Accordingly, Applicant has not met his burden of proving ineffective assistance of counsel.

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III. CONCLUSION

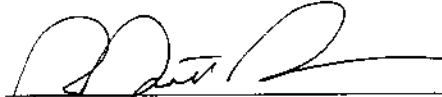
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel 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 an appellate counsel's assistance in seeking review of the denial of PCR. 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's attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief be denied and dismissed with prejudice; and
2. The Applicant be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 2 day of November, 2023.



R. SCOTT SPROUSE
Presiding Judge
Eighth Judicial Circuit

~~H. S. Walker~~ Walker, South Carolina
RS5

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ALAN WILSON
ATTORNEY GENERAL

November 14, 2023

The Honorable Elizabeth P. Folk
Newberry County Clerk of Court
Post Office Drawer 10
Newberry, SC 29108

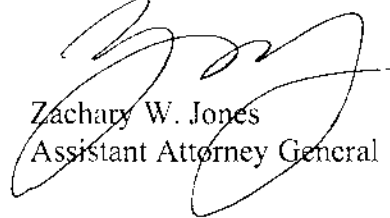
Re: Franklin D. Hayes v. State of South Carolina
2019-CP-36-00334

Dear Ms. Folk,

Enclosed please find the original **Order of Dismissal** signed by the Honorable R. Scott Sprouse, 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.

If you have any questions regarding this matter, please let me know.

Sincerely,


Zachary W. Jones
Assistant Attorney General

ZWJ/zew
Enclosure

cc: Ashley A. McMahan, Esquire

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