STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Phillip Fleming Watts, Jr., #307234,

Applicant,

v.

State of South Carolina,

Respondent.

2012-CP-46-0988

ORDER OF DISMISSAL

This matter comes before the Court by way of an Application for Post-Conviction Relief filed March 19, 2012. The Respondent made its Return on July 5, 2012. An evidentiary hearing into the matter was convened on August 13, 2013, at the Moss Justice Center in York, SC. Bill Hancock, Esquire represented Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. P. John Freeman, Esquire also testified. This Court had before it a copy of the records of the York County Clerk of Court, records from the South Carolina Department of Corrections, the trial transcript and the appellate records.

PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the York County Clerk of Court's orders of commitment. Applicant was indicted by the May 2008 term of the York County Grand Jury for Armed Robbery (2008-GS-46-2083) and Possession of a Firearm during the Commission of a Violent Crime (2008-GS-46-2083A). P. John Freeman, Esquire, represented him. On September 22-24, 2008, Applicant proceeded to a jury trial pursuant to which he

was found guilty of both charges as indicted. The Honorable John C. Few sentenced Applicant to confinement for thirty (30) years for Armed Robbery and five (5) years, consecutive, for the weapons charge.

A notice of appeal was filed and an appeal perfected pursuant to Anders v. California, 386 U.S. 738 (1967). After a thorough review of the entire record, the South Carolina Court of Appeals dismissed Applicant's appeal. State v. Watts, Op. No. 2011-UP-421 (S.C. Ct. App. filed September 20, 2011). The Remittitur was issued on October 13, 2011.

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. "Counsel failed to conduct reasonable investigation critical to defense. This resulted in denial of Due Process."

At the hearing, Applicant proceeded on his claims of ineffective assistance of trial counsel for failing to obtain Applicant's consent before allowing Judge Few to amend the indictment and failing to request a mental evaluation before the trial.

SUMMARY OF TESTIMONY

Applicant testified Counsel did not obtain his consent to amend the indictment for Armed Robbery. The indictment was amended to reflect the crime occurred on January 20, 2008 instead of January 22, 2008. Applicant stated he neither signed nor initialed the amendment. Applicant testified that his alibi defense was for the 20th and not the 22nd as reflected in the original indictment.

Applicant also testified Counsel failed to look into his mental health history. Applicant claimed he had a long history of mental health issues, including on-going treatment at Catawba Mental Health located in York, SC. Applicant claimed he and his family requested Counsel obtain

these records. Applicant also stated the Department of Juvenile Justice records would have shown a history of mental health issues. He further stated he was not taking his prescription medications at the time of the incident. Applicant lastly testified Counsel did not give him the option of having a mental competence evaluation before his trial nor that he allowed Counsel to waive his right to a mental health evaluation.

On cross-examination, Applicant agreed that his alibi defense witness (Applicant's sister) testified at his trial that she had gone to school the next morning after the incident and that Applicant was at home that day. However, Applicant admitted that this witness was completely discredited by the State's rebuttal witness which proved that the York County schools were closed on the day she claimed as it was Martin Luther King, Jr. Day, a national holiday. Thus, Applicant admitted that his alibi defense fell apart at trial. Additionally, after much discussion, Applicant admitted that at least four independent witnesses, including Applicant's own girlfriend, identified him as the perpetrator of the Armed Robbery either by being an eye-witness or by viewing the video of the scene. Three witnesses testified that Applicant was wearing a "Gold Hill" sweatshirt during the robbery and saw Applicant driving his girlfriend's distinctive purple Dodge Durango while fleeing the scene of the robbery. Further, Applicant, while claiming all of the evidence at the trial was false and that he never gave a confession to law enforcement, admitted that his full confession was read into the record at trial.

Counsel testified he met with Applicant several times and that Applicant's defense is that he did not commit crime. Counsel stated he hired a private investigator to examine the scene of the crime, the One-Stop gas station on Highway 5 in York County, SC. He also testified Applicant's mother and sister testified on Applicant's behalf as alibi witnesses.

Counsel testified he did not object to Judge Few's amendment of the indictment because if he had, it would have weakened Applicant's defense. Counsel stated the alibi defense was for January 20 not January 22 and had he objected to Judge Few's amending the indictment, it would have completely discredited the alibi defense. Further, Counsel stated the indictment had no effect on the outcome of Applicant's case.

Additionally, Counsel testified he found no reason to request a mental health evaluation for Applicant. Counsel stated, according to his interactions and meetings with Applicant, he had no concerns about Applicant ability to understand the proceedings and assist in his own defense. Counsel testified he has been practicing law for 22 years and has handled cases where the client has had mental issues. He stated in these cases he would make the solicitor aware of the issues and seek a mental evaluation for his client. However, Counsel testified this was not one of those cases.

On cross-examination, Counsel testified he could have reviewed all of Applicant medical records but he found this to be unnecessary as he had no concerns with Applicant's ability to assist in his own defense. This was the reason Counsel did not raise mental incompetency as a defense.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. The Court also has read the trial transcript, all of which assists the Court in judging their credibility. This Court finds Applicant's testimony concerning Counsel's alleged ineffective assistance not credible while also finding Counsel's testimony credible.

Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant 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, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing* Strickland. 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.

Failure to object to the amendment of the indictment

The Applicant alleges Counsel was ineffective for failing to object to Judge Few amending the Armed Robbery indictment.

Under S.C. Code Ann. § 17- 19-100 (1976), an indictment may be amended at trial only if the amendment does not change the nature of the offense charged. Further, where trial counsel articulates a valid reason for employing certain trial strategy, such conduct should not be deemed ineffective assistance of counsel. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d. 529 (1992).

This Court finds Counsel was not ineffective for failing to object to Judge Few's amendment of the Armed Robbery indictment. As Counsel testified, the indictment was amended to reflect that the Armed Robbery occurred on January 20, 2008 instead of January 22, 2008. Counsel stated this was the date with which the alibi witnesses were concerned. Counsel further testified had he objected to the amendment and the indictment was kept with January 22, 2008 as the date, Applicant's alibi defense would have been completely discredited. As such, Counsel's decision not to object was sound strategy in these circumstances based on the facts of the case. Additionally, the amendment only changed the date and not the nature of the charge. Further, Applicant has failed to prove any resulting prejudice from Counsel's alleged deficiency. Accordingly, this allegation is denied.

Failure to request a mental evaluation

Applicant alleges Counsel was ineffective for not requesting an independent mental health evaluation before trial.

No prejudice can be shown for Counsel's alleged failure to request a mental evaluation where

no medical evidence is presented at the PCR hearing suggesting that Applicant was incompetent to stand trial or to participate in his own defense. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997).

This Court finds Counsel was not ineffective for failing to have Applicant independently evaluated in this case. While Applicant claims he has a long history with mental illness documented by his Department of Juvenile Justice files, he failed to show he was mentally incompetent to stand trial or assist in his own defense. Applicant provided no expert testimony or other competent evidence to prove that he was incompetent at the time of his trial. He only provided his own self-serving testimony that he asked Counsel to obtain his mental health records and that he asked Counsel for a mental evaluation.

Counsel testified Applicant was fully involved in assisting with his own defense. Applicant provided alibi witnesses for Counsel to interview and present at the trial. Counsel also testified he did not recall Applicant ever discussing Applicant's mental health issues with him. Counsel testified he found no reason to ask for an evaluation because Applicant was able to assist in his own defense. Counsel also has experience with clients that have had mental health issues and has experience with having clients evaluated. Counsel lastly testified that based on his interactions with Applicant and his experience, he decided a mental evaluation was not needed in this case.

This Court finds Counsel was effective in his representation of Applicant. Applicant has failed to prove Counsel's actions fell below the reasonableness standard in this case. Further, Applicant has failed to prove any resulting prejudice as he provided no medical evidence that he was incompetent to stand trial or unable assist in his own defense. Accordingly, this allegation is denied.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the 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.

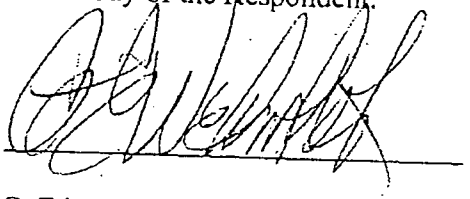
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED!



G. Edward Welmaker
Presiding Circuit Court Judge
Sixteenth Judicial Circuit

9-12, 2013

Richland, South Carolina