STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	
		2009-CP-02-0103
Braheim Hill, #316768,	)	487440 3
	)	
Applicant,	)	
	)	
v.	)	**ORDER OF DISMISSAL**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

This matter comes before the Court by way of an Application for Post-Conviction Relief filed January 26, 2009. The Respondent made its Return on or about May 13, 2009. An evidentiary hearing into the matter was convened on January 29, 2010, at the Aiken County Courthouse. The Applicant was present at the hearing and was represented by Patricia James, Esquire. The Respondent was represented by Mary S. Williams of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Also testifying was David Mauldin, Esquire ("Counsel"). This Court had before it the records of the Aiken County Clerk of Court, the trial transcript, the appellate records, and the Applicant's records from the South Carolina Department of Corrections.

PROCEDURAL HISTORY

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Aiken County. Applicant was indicted at the June 2006 term of the Aiken County Grand Jury for Armed Robbery (2006-GS-02-0883) and Possession of Firearm or Knife During Commission of or

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Attempt to Commit a Violent Crime (2006-GS-02-0884). David Mauldin, Esquire, represented him. Applicant proceeded to a jury trial before the Honorable John C. Few on July 26, 2006. Applicant was found guilty and sentenced to thirty (30) years for Armed Robbery and to a concurrent term of five (5) years for Possession of Firearm or Knife During Commission of or Attempt to Commit a Violent Crime.

A timely Notice of Appeal was filed on Applicant's behalf. Following the submission of an Anders brief, the South Carolina Court of Appeals dismissed the appeal. State v. Hill, Op. No. 2008-UP-452 (S.C. Ct. App. filed Aug. 7, 2008). The remittitur was sent on August 25, 2008.

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

1. Ineffective assistance of counsel.
2. "The trial judge's failure to grant direct verdict, where evidence fails to support elements of the crime of which applicant was convicted."

At hearing, Applicant asserted that Counsel was ineffective in failing to object to fingerprint testimony, allowing him to appear in prison clothing, failing to call witnesses, and advising him not to testify.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief 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 accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80.

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, 80 L.Ed.2d 674, 692 (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, supra). 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

Summary of Trial Testimony

Robby's Convenience Store was robbed on November 28, 2005. A man walked in with a long, camouflage gun while clerk Willie Ray Rutland ("Rutland") was stocking cigarettes. Rutland described the robber as a black male wearing dark pants, a white baggy shirt, a stocking cap, socks, and bedroom slippers. Rutland identified Applicant in court as the perpetrator; Rutland was never shown a photo lineup. A videotape of the robbery was introduced. Approximately $300.00 and a pack of cigarettes were taken from the store.

A long, camouflage gun was found behind the store, in the direction the perpetrator had fled. Applicant's fingerprint was found on the gun. Police officers also testified that Applicant was interviewed upon his arrest. Officers testified that Applicant made a comment that his print would be on a different place on the gun from what the officers indicated. Officers further testified that while Applicant was being escorted from the police station he remarked that they could just put down on paper that he did it.

Fingerprints

Applicant next asserts that Counsel failed to challenge the admission of fingerprint evidence. Counsel testified that he had spoken with the investigator who did the fingerprint analysis. Counsel stated that the fingerprint card that was compared to the fingerprint on the gun was a card from Applicant's prior drug arrest. Counsel stated at trial and at PCR hearing that he had seen Applicant's fingerprint card before because he had represented him previously. Counsel stated that he planned to stipulate to the fingerprint card to avoid mention of Applicant's prior arrest. Even though Applicant was not convicted of the offense he was arrested for, Counsel felt it best to limit the jury's knowledge of prior contact with law enforcement.

Where counsel articulates a reasonable strategy, he will not be deemed ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995). I find that Counsel articulated a reasonable strategy in his decision to stipulate to the authenticity of the fingerprint card. Since Applicant may have testified, Counsel was especially aware of making sure that the jury was not aware of any law enforcement contact. Counsel also took independent steps to ensure the authenticity of the fingerprint card before entering the stipulation. Further, Applicant has failed to demonstrate prejudice in this regard. The only evidence before this court as to the authenticity of the fingerprint comparison card is Counsel's testimony that it was indeed a card containing Applicant's fingerprints. For these reasons, I find that Applicant has failed to carry his burden in this regard.

Clothing

Applicant asserts that he was dressed in prison clothing during his trial. Counsel testified that he was certain that Applicant did not wear prison clothing at trial as he had never allowed a defendant to do so. I find Counsel's testimony to be credible in this regard. Moreover, even if Applicant had been wearing such clothing, Applicant has failed to demonstrate prejudice. also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001) (prejudice not presumed where applicant proceeded to trial in readily identifiable prison clothing).

Failure to Investigate

Applicant further asserts that counsel failed to adequately investigate. Applicant testified that his child's mother and her mother could have provided testimony that would have been helpful to the defense. Applicant stated that he met with Counsel only twice. Counsel testified that he met with Applicant several times, including an initial meeting, at a preliminary hearing, and a meeting to discuss a plea offer. Counsel testified that he had the assistance of an investigator in this case, and

Counsel recalled that his investigator had spoken to Applicant's girlfriend.

I find that counsel's performance was not deficient under these circumstances. Moreover, Applicant has failed to demonstrate prejudice in this regard. See Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) (no prejudice where claim of failure to investigate is supported only by mere speculation as to the result). For these reasons, I find that counsel was not ineffective with regard to her investigation.

Lineup

Applicant further asserts that Counsel should have requested that a lineup be shown to the store clerk, Rutland, prior to trial. Counsel explained that Rutland identified Applicant in court. To this end, Counsel cross-examined Rutland in order to emphasize that Rutland predictably identified the only person at the defense table as the perpetrator. The record further reflects that Counsel argued the issue in his closing argument, noting that the incident occurred months prior, that no lineup had been done, and that Rutland would of course choose any person seated at the defense table. Counsel added that he does not recall in his approximately ten (10) years of experience ever asking for a lineup; such a request could just as likely be inculpatory as exculpatory. I find that Counsel's failure to request a lineup was not unreasonable under professional norms. Counsel further articulated a reasonable approach to the topic in his approach to cross-examination and argument regarding the in-court identification. Further, there has been no showing of prejudice in this regard. It is unknown whether Rutland would have selected Applicant from a lineup or not. For these reasons, I find that Applicant has failed to carry his burden in this regard.

Advice Regarding Defendant's Testimony

Applicant asserts that Counsel dissuaded him from testifying in his own defense. Applicant

asserts that this was error given his lack of criminal record. Counsel testified that he discussed with Applicant both positive and negative aspects of Applicant taking the stand. Counsel confirmed that prior record was not a concern, but Counsel testified that he and Applicant had some concerns about Applicant being subjected to cross-examination. Counsel's recollection was that Applicant was concerned that he would not do well on cross-examination. Counsel testified that while he discusses the "pros and cons" of testifying, he leaves the decision whether to testify up to the defendant.

The trial transcript reflects that the court made inquiry of both Counsel and Applicant regarding Applicant's decision whether to testify. (Tr. pp. 119-123.) A break was observed before Applicant made his decision on the record. During the court's inquiry, Applicant stated that he had discussed his right to testify with Counsel "before today and today." (Tr. p. 121.) The trial court clearly explained to Applicant while his attorney could provide advice, that the choice whether to testify was entirely his own.

I find Counsel's testimony to be credible. I find that Counsel's advice in this regard was within reasonable professional norms. The decision whether to testify is a decision that must be made by the defendant, and a criminal defendant is not required to present evidence. In this case, Counsel explained this, and Counsel provided Applicant with the positive and negative aspects of testifying in his case. Applicant informed the trial court that the decision not to testify was his own, and I find no evidence of any circumstance which should allow Applicant to depart from the truth of the statements made to the trial court. Moreover, Counsel noted concerns with Applicant's performance on cross-examination. This was a reasonable concern. I further find no evidence of prejudice such that the outcome of trial would have been different but for any alleged misadvice not to testify.

Other Allegations

No other allegations were raised at the PCR hearing. Therefore, any additional allegations are deemed waived because no evidence was presented.

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 advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order to secure the appropriate appellate review. His attention is also directed to Rule 243, SCACR,[1] for appropriate procedures after notice has been timely filed.

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 this 24 day of March, 2010.

W. JEFFREY YOUNG
Presiding Judge
Second Judicial Circuit

Sumter, South Carolina.

[1] Formerly Rule 227, SCACR. Rules 224 through 230, SCACR, were renumbered as Rules 240 through 246, SCACR, by order of the South Carolina Supreme Court dated April 29, 2009.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF **AIKEN**
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2009CP0200103

Braheim Hill

South Carolina, State of

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order. (Formal order to follow)
☒ Statement of Judgment by the Court:

Dated at Aiken, South Carolina, this 30th day of March, 2010.

Court Reporter:

PRESIDING JUDGE:

This judgment was entered on the 30th day of March, 2010, and a copy mailed first class this 30th day of March, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

Patricia Thomas James Attorney at Law P.O. Box 1739
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Mary Shannon Williams Attorney General Po Box 11549
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G.S.
Solicitor

ATTORNEY(S) FOR THE DEFENDANT(S)

Liz Godard by Barbara Riggs D/C
Liz Godard - Clerk of Court

SCCA SCRCP Form 4 Revised 06/2008