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PCR

March 7, 2014

Via Regular Mail
Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: *ZACHARY FOWLER v. State*

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondents. The Notice has been filed with the Greenville County Clerk of Court.

These matters are being referred to the Office of Appellate Defense in that we were participating as Court appointed counsel at trial.

Thank you for your attention to this matter.

Yours very truly,

Caroline Horlbeck
Caroline M. Horlbeck, Esq.

Enclosure

cc: Office of the Attorney General
Office of Appellate Defense

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
THE HONORABLE G. Edward Welmaker

CA No. 2012-CP-23-5182

ZACHARY FOWLER,

APPELLANT,

vs.

STATE OF SOUTH CAROLINA

RESPONDENT.

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2014 MAR 7 PM 3 05

NOTICE OF APPEAL

Appellant ZACHARY FOWLER, appeals from the Order of the Honorable G. Edward Welmaker, Circuit Court Judge clocked February 17, 2014.

Respectfully submitted,

Caroline M. Horlbeck

Caroline M. Horlbeck, Esq.
101 Whitsett St
Greenville, SC 29601

Date: March 4, 2014

Other Counsel of Record: Karen Ratigan, Esq.
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211

STATE OF SOUTH CAROLINA	)	**IN THE SUPREME COURT**
	)	
COUNTY OF GREENVILLE	)	
	)	**C.A. No. 2012-CP-23-5182**
ZACHARY FOWLER,	)	
	)	
APPELLANT,	)	
	)	
-vs-	)	**CERTIFICATE OF SERVICE**
	)	
	)	
STATE OF SOUTH CAROLINA	)	
	)	
RESPONDENT.	)	
	)	

This is to certify that I am an employee in the law office of Caroline M. Horlbeck, attorneys for Applicant, and that I have this day caused to be served upon the person(s) named below Applicant's Notice of Appeal by placing copies of same in the United States mail, with adequate postage thereon, addressed as follows:

Ms. Loriene French
S.C. Office of Appellate Defense
1205 Pendleton St., Suite 306
Columbia, SC 29201

Karen Ratigan, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Ashley Foy
Ashley Foy

Greenville, South Carolina

March 7th, 2014

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE) C.A. No. 2012-CP-23-5182
)
Zachary Marquis Fowler,)
S.C.D.C. #323544,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2014 FEB 17 PM 4 40

ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed August 10, 2012. The Respondent made its return on March 26, 2013. An evidentiary hearing into the matter was convened on December 17, 2013 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's trial counsel, Thomas M. Creech, Jr., Esquire. The Court had before it the trial transcript, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, the return, the appellate records, and Applicant's Exhibit 3.[1]

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted

[1] Applicant's Exhibits 1 and 2 were identified but not admitted.

at the January 2007 term of the Greenville County Grand Jury for murder (2007-GS-23-0245), armed robbery and possession of a weapon during the commission of a violent crime (2007-GS-23-0246), assault with intent to kill (AWIK) (2007-GS-23-0247), assault and battery with intent to kill (ABIK) (2007-GS-23-0248), and possession of a pistol under 21 years of age (2007-GS-23-0249). He was represented by Thomas M. Creech, Jr., Esquire.

After the State brought the case to trial, the Applicant was found guilty. On August 15, 2007, the Honorable D. Garrison Hill sentenced the Applicant to concurrent terms of life imprisonment for murder, thirty years for armed robbery, five years for possession of a weapon during commission of a violent crime, ten years for AWIK, twenty years for ABIK, and one year for possession of a pistol under age 21.

A notice of appeal was filed at the South Carolina Court of Appeals. Joseph L. Savitz, III, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. Fowler, Op. No. 2010-UP-372 (S.C. Ct. App. filed July 21, 2010). By order dated October 5, 2011, the South Carolina Supreme Court denied the subsequent petition for writ of certiorari.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel.
   a. Failed to adequately challenge Applicant's seizure under the 4th and 14th Amendments.
2. Ineffective assistance of appellate counsel.
   a. Failed to effectively challenge Applicant's seizure.

In an Amended Petition for Post Conviction Relief filed by counsel on December 16, 2013, the Applicant makes the following allegations:

1. Ineffective assistance of trial counsel:
   a. Advised the Applicant not to testify during the Jackson v. Denno hearing.
   b. Failed to adequately and effectively challenge the voluntariness of the Applicant's statement.
   c. Failed to adequately and effectively challenge the legality of the Applicant's detention.
   d. Failed to adequately and effectively challenge the legality of the Applicant's arrest warrants.
   e. Failed to adequately and effectively challenge the legality of the State's search warrants.
   f. Failed to adequately and effectively challenge the Applicant's indictments.
   g. Failed to incorporate the existence of two .22 live bullets found in victims' automobile into the defense at trial.

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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by 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).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v.

State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "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 v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

The Applicant stated he met with trial counsel several times about the case and they reviewed the discovery materials. The Applicant stated he told trial counsel his version of events and the circumstances surrounding his statements to Officers Conroy, Justice, and Miller (including that Miller made promises in exchange for his statement). The Applicant stated trial counsel said he should not testify at the Jackson v. Denno[2] hearing because it would give the State "a heads up." The Applicant stated he could have testified that he was coerced by Miller's promises and was nervous. The Applicant admitted trial counsel argued to suppress the statements (based on voluntariness) but that he wanted trial counsel to have made a different argument (one that was based upon an illegal detention). The Applicant stated the search warrants were based upon "untruthful" information. The Applicant admitted trial counsel argued the information for the search warrant was given to the magistrate third-hand, but the Applicant stated trial counsel did not argue it violated the statute. The Applicant stated he told trial counsel the arrest warrants were not signed but counsel said there was no significant argument to be made. The Applicant stated trial counsel did not contest that the indictments were not filed within 90 days of his arrest. The Applicant stated trial counsel should have mentioned in closing argument that there were live .22 rounds in the victims' car because it would have helped his

[2] 378 U.S. 368, 84 S. Ct. 1774 (1964).

self-defense argument.

Trial counsel testified he was appointed in this case and filed the usual discovery motions. Trial counsel testified he had multiple meetings with the Applicant. Trial counsel testified he reviewed the State's evidence with the Applicant (including the statements) and discussed the Applicant's version of events. Trial counsel testified the trial strategy was to argue self-defense and voluntary manslaughter. Trial counsel testified the State's version of events was that this was a drug deal gone bad and that he reviewed this theory with the Applicant. Trial counsel testified he would have discussed with the Applicant that he did not want him to testify at the Denno hearing because it would preview their defense for the State. Trial counsel testified that it likely would not have helped for the Applicant to testify in the Denno hearing. Trial counsel testified he challenged whether Valencia Sullivan could give consent to a trailer where she, the Applicant, and Nicki Tisdale were staying. Trial counsel confirmed, however, that the Applicant gave consent for the police to search the trailer without a search warrant and testified the discussed the impact of the consent on the case. Trial counsel testified he did not recall making any motions about the arrest warrants but that it was unlikely a challenge to the warrants would have ended the case. Trial counsel noted the Applicant was indicted almost seven months after he was arrested.

This Court finds the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court further finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not properly handle the Denno hearing. Trial counsel testified he told the Applicant that he did not

want him to testify at the Denno hearing because it would inform the State of the defense they would use at trial. This Court finds both that trial counsel's testimony is credible and that he articulated a valid strategic reason he advised the Applicant not to testify. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel). This Court has reviewed the trial transcript and finds trial counsel presented a detailed argument in favor of suppressing the Applicant's statements. (Trial transcript, pp.44-134). This Court finds the Applicant has failed to articulate why trial counsel would have been more successful if he had instead argued about the voluntariness of detention.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not properly challenge the search warrant. This Court has examined the trial transcript and notes trial counsel presented a comprehensive argument in favor of suppressing evidence obtained pursuant to the search in this case. (Trial transcript, pp.136-56). This Court notes, however, that the Applicant consented to the search while the officers were waiting for the procurement of a search warrant. The Applicant has failed to articulate what else trial counsel should have argued that would have resulted in the suppression of the evidence.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not properly challenge the arrest warrants. Trial counsel testified he did not make any motions regarding the legality of the warrants. Trial counsel testified, however, that it was unlikely such a motion would have changed anything or ended the Applicant's case. This Court agrees. This Court finds that, assuming arguendo there was an error in the arrest warrants, the Applicant has failed to prove his case was prejudiced as a result or that the outcome of his trial would have been different if trial counsel had challenged the warrants. See Johnson v. State, 325 S.C. at 186,

480 S.E.2d at 735.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have challenged that the indictments in his case were issued more than 90 days after his arrest. This Court finds the failure to indict within the 90-day period does not automatically nullify the warrants. See State v. Culbreath, 282 S.C. 38, 40, 316 S.E.2d 681, 681 (1984) ("[T]he failure of the solicitor to act upon a warrant within ninety (90) days . . . does not within itself invalidate a warrant or prevent subsequent prosecution."). Further, this Court finds the Applicant failed to provide evidence of any prejudice that resulted from the delay. See, e.g., State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007) (noting one must prove prejudice in order to prevail on an allegation that one's speedy trial rights were violated).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have mentioned in closing argument that live .22 rounds were found in the victims' car. This Court finds trial counsel did not err in not making this argument to the jury. While the Applicant argues this evidence would have supported his self-defense argument, this Court finds this is entirely speculative, as these bullets could have been in the victims' car well in advance of the shooting. Regardless, the Applicant cannot demonstrate any resulting prejudice because the State presented overwhelming evidence of his guilt.[3] See Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

Accordingly, this Court finds the Applicant has failed to prove the first prong of the

[3] The State presented the following evidence: (1) the victim of the AWIK charge positively identified the Applicant as having shot (unprovoked) into the victims' car, (2) the murder weapon was found in the Applicant's residence after he gave consent to search, (3) an eyewitness to the shooting described a car similar to the Applicant's vehicle, and (4) the Applicant gave incriminating statements to police.

Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and

2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 10 day of Feb, 2014.

G. Edward Welmaker
Presiding Judge
Thirteenth Judicial Circuit

Pickens, South Carolina.

CAROLINE M. HORLBECK
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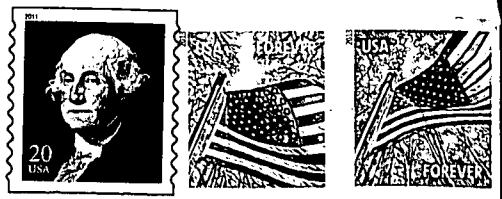
GREENVILLE, SOUTH CAROLINA 29601



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