

IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM ORANGEBURG COUNTY
COURT OF COMMON PLEAS
DIANE S. GOODSTEIN, CIRCUIT COURT JUDGE
2010-CP-38-1105

RECEIVED

MAR 24 2014

S.C. Supreme Court

Anthony Britt,.....Petitioner.

vs

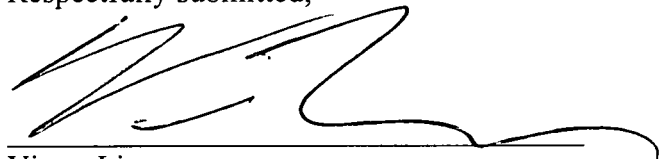
The State of South Carolina,.....Respondent.

NOTICE OF APPEAL

Anthony Britt appeals the Honorable Diane S. Goodstein's March 5, 2014, order denying post-conviction relief to the Petitioner. Undersigned counsel received notice of entry of the order on March 4, 2014. A copy of the order on appeal is attached to this notice.

24, 2014

Respectfully submitted,



Victor Li
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Attorney for the Petitioner.

March 24, 2014

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PROOF OF SERVICE

I, Victor Li, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to the attorney of record, Megan Harrigan, P.O. Box 11549, Columbia, South Carolina 29211-1549. I further certify that all parties required by Rule to be served have been served this 24th day of March, 2014.

Respectfully submitted,



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STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)
))
))
Anthony Britt, #317524,)
))
Applicant,)
))
v.)
))
State of South Carolina,)
))
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

Case No. 2010-CP-38-1105

ORDER OF DISMISSAL

2011 MAR - 5 PM 1:55
FILED FOR FILING
WINNEFA P. STORR
CLERK OF COURT
ORANGEBURG COUNTY

PROCEDURAL HISTORY

This matter comes before the Court by way of an application for post-conviction relief filed August 3, 2010. Respondent made its Return on January 7, 2011, requesting an evidentiary hearing be held. An evidentiary hearing was convened on October 29, 2013 and November 1, 2013, at the Dorchester County Courthouse. Applicant was present at the hearing and was represented by Victor K. Li, Esquire. Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office.

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 Orangeburg County Clerk of Court. Applicant was indicted during the March 2009 term of the Orangeburg County Grand Jury for Burglary in the First Degree (2009-GS-38-0331). C. Bradley Hutto, Esquire, represented him. On August 6, 2009, Applicant appeared before the Honorable Edgar W. Dickson, where he pled guilty as indicted; sentencing was deferred at that time. On August 13, 2009, Judge Dickson sentence Applicant to sixteen years imprisonment. No direct appeal was taken.

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

1. Ineffective assistance of counsel for failing to object to an enhanced sentence;
2. Due process violations; and
3. Trial court lacked subject matter jurisdiction.

The State made its Return on January 7, 2011, requesting an evidentiary hearing be held.

Thereafter, Applicant filed a *pro se* amended application, alleging:

1. Ineffective assistance of counsel for failing to investigate Rule 5 materials before advising Applicant to pled guilty;
2. Ineffective assistance of counsel for failing to protect his Fourth Amendment right against bodily intrusion; and
3. Ineffective assistance of counsel for failure to object and argue against the State's Schmerber¹ motion.

At the evidentiary hearing, Applicant proceeded forward on these three allegations.

TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. Respondent presented testimony from plea counsel C. Bradley Hutto, Esquire (hereafter "Counsel"). This Court also had before it a copy of the Applicant's guilty plea transcript, the records of the Orangeburg County Clerk of Court, and the Applicant's records from the South Carolina Department of Corrections. Additionally, this Court had before it Applicant's Exhibit #1 and Respondent's Exhibits #1-9, all from Counsel's file and introduced without objection.

During the evidentiary hearing, Applicant testified he retained Counsel to represent him, first for a bond hearing and later to represent him on the charges subject to this application. He testified that he met with Counsel three times before his guilty plea, but also discussed the case with him by letter. He testified that he never reviewed any discovery with Counsel and did not have access to a complete copy of his discovery until he filed for post-conviction relief. He

¹Schmerber v. California, 384 U.S. 757 (1966).

testified that he discussed the discovery with Counsel, and that Counsel advised him the evidence was only circumstantial. However, he testified that Counsel told him that his DNA matched the blood found at the victims' residence and he should plead guilty. He testified that the South Carolina Law Enforcement Division (hereafter "SLED") DNA crime scene report from December 10, 2007, which was introduced as Applicant's Exhibit #1, stated that the blood sample from the victims' residence matches an "unidentified man," and therefore Counsel's advice was incorrect. He testified that he was never shown a subsequent SLED DNA report showing that his DNA matched the sample found in the victims' home based on his known DNA sample in the SLED DNA database for convicted felons.² He testified that this report would not have been admissible at trial based on a break in the chain of custody.

He testified that his DNA was taken pursuant to a court order following a Schmerber hearing that took place before Counsel had been retained. He testified that Jillian Ullman of the Orangeburg County Public Defender's Office represented him at the time of the Schmerber hearing. He acknowledged that Ullman argued against the State's Schmerber motion, but that his DNA was taken in violation of his constitutional rights. He testified that his DNA was taken in a hallway of the courthouse without any counsel present. He acknowledged that this DNA sample also matched the blood found in the victims' home, but that since it was taken in violation of his constitutional rights, it would have been inadmissible at trial.

Applicant testified that he did not give Counsel any leads or potential witnesses to aid in his defense. He testified that he did not want to plead guilty, but that Counsel advised him that it was in his best interest to plead since his DNA was a match. He testified that it was his decision to plead guilty and he pled because he did not want to risk receiving a possible life sentence if

² Applicant has prior convictions for: three counts of Burglary in the Second Degree, two counts of Grand Larceny, and Unlawful Carrying of a Pistol.

convicted. He testified that Counsel informed him the mandatory minimum sentence for Burglary in the First Degree was fifteen years imprisonment up to a possible maximum sentence of life without parole. He testified that he told the plea court under oath that he was guilty, but testified at the evidentiary hearing that he is not guilty. He testified that he lied under oath during his guilty plea proceeding based on the advice of Counsel. He testified that Counsel advised him to give a statement to law enforcement in an effort to help retrieve some of the jewelry, weapons, and other items stolen from the victims' residence because it would "look good" to the plea court. He testified that he gave three or four different statements to law enforcement and that he lied in each statement. He testified that Counsel advised him to lie when speaking to law enforcement. He testified that he recalled telling the plea court that he was satisfied with Counsel's representation and testified that Counsel "did the best he could do." Applicant testified that he understood the plea was without any negotiation or recommendation from the State and that he understood he could possibly receive a life sentence as a result of his guilty plea.

Applicant testified that he has a prior record, including three Burglary in the Second Degree convictions. He acknowledged that when he was arrested, he was in possession of one of the stolen weapons with an engraving of one of the victim's name on the handle. However, he testified that this merely proves that he was in possession of stolen property, not burglary. He testified that he was aware the State had fingerprint evidence, but testified that he never reviewed any fingerprint discovery prior to his guilty plea.

Following Applicant's testimony, Counsel testified. He testified that he has been practicing law since 1982 and that approximately fifty-percent of his practice is criminal defense. He testified that Applicant first retained him solely for a bond hearing and after successfully

obtaining bond for Applicant, Applicant retained in full for the pending charges on July 6, 2009. He testified that he met with Applicant between three and five times, as well as in court for appearances. Counsel testified that Applicant was previously represented by Jillian Ullman of the Orangeburg Public Defender's office and that he received a full copy of her file when he took over representation. He testified that Ullman had previously filed all appropriate discovery motions and he received those materials when he took over representation. He testified that Ullman had used the Public Defender's Office Investigator and that he received a copy of the investigator's report when he took over the case. He testified that this is the same private investigator that he personally employs. He testified that the report was not beneficial to Applicant and further implicated him, which he shared with Applicant.

He testified that he thoroughly reviewed all discovery materials with Applicant and told him he would more than likely be convicted at trial. He characterized the State's case as "overwhelming evidence of guilt," including fingerprint evidence, DNA evidence, and Applicant's possession of a stolen weapon with the victim's personal engraving. He testified that he informed Applicant that his DNA matched blood found in the victims' home. Additionally, he testified that Applicant's fingerprints matched multiple fingerprints found on and around the jewelry box where items were taken at the victims' home; this report was introduced as Respondent's Exhibit #7. He testified that he informed Applicant that the case was "circumstantial" because there was no eyewitness who saw him in the home, but unequivocally told Applicant that his DNA matched the blood found at the victims' home and a conviction was likely. He testified that the blood found at the victims' home matched Applicant's DNA sample that was in the SLED DNA Database for convicted felons and that he shared these results with Applicant, which were introduced as Respondent's Exhibit #1. He testified that before he was

retained, the State moved for a known sample of Applicant's DNA pursuant to Schmerber. He testified that Ullman represented Applicant at this hearing and she argued against the State's motion; the transcript of this hearing was introduced as Respondent's Exhibit #5. He testified that Ullman's argument at this hearing was that the DNA was not necessary, as it would be merely cumulative to the SLED DNA Database sample of Applicant's DNA. Counsel testified that based on his discussions with Applicant and Ullman, opposing the State's Schmerber motion was not crucial to Applicant's defense, as Applicant was insistent that he had an alibi and the DNA would exonerate him. In support of this, Respondent introduced an email between Counsel and Ullman as Respondent's Exhibit #3. Counsel testified that based on this information from Applicant, he put the State on notice of an intended alibi defense, introduced as Respondent's Exhibit #8. Counsel testified that the Schmerber sample positively matched the blood found in the victims' home and this report was introduced as Respondent's Exhibit #2.

He testified that after receiving this second report showing Applicant's DNA matched the blood found in the victims' home, he advised Applicant that he would likely be convicted at trial. He testified that he summarized all of the evidence in a letter to Applicant, advising him to plead guilty, which was introduced as Respondent's Exhibit #9. He testified that Applicant asked him to secure a favorable plea deal, and an example of such request was introduced to the Court as Respondent's Exhibit #5. He testified that he entered into plea negotiations with the State and the prosecuting solicitor refused to make a recommendation for the minimum sentence. He testified that he discussed the plea in chambers with the State and plea court and received assurances that Applicant would likely receive a sentence of less than twenty years. He testified that based on this, he advised Applicant to provide any assistance possible to law enforcement in an effort to mitigate the damage and possibly lessen his sentence. He testified that Applicant

gave a statement to law enforcement implicating himself and indicating where some of the stolen materials might be located, introduced as Respondent's Exhibit #3. He testified that he explained to Applicant that the plea was without any negotiations or recommendations and Applicant understood he was facing a sentence of between fifteen years to life imprisonment.

He testified that Applicant had three prior burglary convictions and that there was no meritorious ground on which he could have challenged the enhanced Burglary in the First Degree indictment. He testified that he fully advised Applicant of his constitutional rights and the implications of entering a guilty plea. He testified that it was Applicant's decision to plead guilty, and that he never indicated he wanted a trial. He testified that a trial would not have been in Applicant's best interest. He testified that he was unable to get any witnesses to come forward on Applicant's behalf to support his alibi claims. In response to Applicant's claims that he advised Applicant to lie, Counsel testified that he never advises anyone to be untruthful in any situation and certainly does not advise clients to lie in court.

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 (1985).

Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant 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 the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether an 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, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. 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. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

After careful review based on the standard discussed above, this Court finds that Applicant has failed to carry his burden in this action. Specifically, this Court finds that Counsel's testimony is very credible while Applicant's testimony is not credible. Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel.

*Failure to investigate discovery materials before advising
Applicant to plead guilty*

Applicant has failed carry his burden of establishing that Counsel was ineffective in his representation regarding Applicant's discovery materials. To establish counsel was inadequately prepared, an applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding an applicant not entitled to relief where no evidence presented at post-conviction relief hearing to show how additional preparation would have had any possible effect on the result at trial). Counsel testified once he took over representation of Applicant, he fully reviewed all discovery materials in Applicant's file, including the State's discovery that was supplied in response to former counsel Ullman's motions. He testified that he fully reviewed the discovery with the Applicant and discussed Applicant's version of the facts with him. Counsel testified that advised Applicant of the elements of each charge he was facing, what the State would be required to prove if he proceeded to trial, and the possible sentences Applicant was facing for each charge. This Court finds that Counsel's performance was reasonable and effective.

Additionally, this Court finds that the Applicant has failed to establish any prejudice resulting from Counsel's alleged ineffective assistance of counsel, as the Applicant failed to provide the Court with any evidence of how specifically Counsel was ineffective in this regard or what additional investigation could have been performed. See Harris v. State, 377 S.C. 66, 659 S.E.2d 140 (2008) (Applicant failed to show that he was prejudiced by any lack of preparation by defense counsel in armed robbery case, as required for his ineffective assistance of counsel claim, where defendant did not present any evidence or argument as to how counsel's alleged

lack of preparation prejudiced him or how the outcome of the trial would have been different had counsel spent more time with defendant or given him a copy of the discovery materials). Additionally, this Court finds that there was overwhelming evidence of guilt (including multiple fingerprints, a match between Applicant's DNA and blood found in victims' home, and possession of a stolen weapon with an engraving of victim's name) and therefore, any alleged deficiency does not amount to ineffective assistance of counsel. See Harris, 377 S.C. 66, 659 S.E.2d 140 (Evidence that applicant committed armed robbery was overwhelming, such that any deficiency in counsel's performance arising from his failure to obtain a transcript from defendant's first trial, to use for impeaching witnesses in defendant's second trial on same charges, did not prejudice defendant and did not amount to ineffective assistance of counsel). Therefore, this Court finds that this allegation of ineffective assistance of counsel must be denied and dismissed with prejudice.

*Failure to protect Applicant's Fourth Amendment Rights Against
Bodily Intrusion and Failure to Object and Argue for the Denial of
the State's Schmerber Motion*

Applicant has failed to meet his burden of proof in establishing that Counsel was ineffective in his representation of the Applicant regarding bodily intrusion. Counsel testified that he was retained after the State's Schmerber motion hearing, in which the court allowed the State to obtain a buccal swab from Applicant to compare with blood found in the victims' home. Counsel testified that at the time to the hearing, and when he was retained, Applicant insisted that he had an alibi defense and his DNA would not match the blood sample from the victims' home. The record of Applicant's Schmerber hearing, introduced as Respondent's Exhibit #6, supports Counsel's testimony. This Court finds that Counsel's performance was reasonable and effective.

Additionally, this Court finds that the Applicant has failed to establish any prejudice resulting from Counsel's alleged ineffective assistance of counsel, as there was ample evidence independent of the Schmerber DNA sample, that implicated Applicant, including multiple fingerprint matches and that he was arrested with a personally engraved weapon from the victims' home. Therefore, this Court finds that these allegations of ineffective assistance of counsel must be denied and dismissed with prejudice.

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.

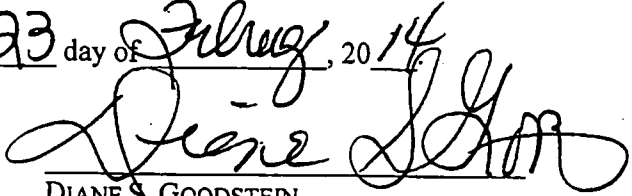
This Court notes that that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right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

IT IS THEREFORE ORDERED:

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

2. The Applicant must be remanded to and remain in the custody of the State

AND IT IS SO ORDERED this 23 day of February, 2014



DIANE S. GOODSTEIN
Presiding Judge
First Judicial Circuit

Sumner, South Carolina