

STATE OF SOUTH CAROLINA)
)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

Case No. 2011-CP-38-~~776~~ 766

Jimmy Taylor,
S.C.D.C. No. 321636,

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

FILED FOR RECORD
WILLIAM B. TINKER
CLERK OF COURT
ORANGEBURG, SC

2013 OCT 10 AM 11:48

This matter comes before this Court by way of an application for post-conviction (PCR) relief filed on July 27, 2011. The Respondent filed its return on January 11, 2012. An evidentiary into this matter was held at the Orangeburg County Courthouse on May ~~15~~²², 2013.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. The Applicant was indicted for three counts of Felony Driving Under the Influence, Resulting in Death (2005-GS-38-2141, 2142, & 2143). Everett Chandler, Esq., represented him. Applicant proceeded to a jury trial before the Honorable Diane S. Goodstein. Applicant was found guilty, and on May 4, 2007, was sentenced to twenty (20) years imprisonment on each offense. The sentences were to be served concurrently.

A notice of appeal was filed on behalf of Applicant. Tara D. Shurling, Esq., perfected the appeal. The Court of Appeals affirmed Applicant's convictions and sentences. State v. Taylor, Op. No. 2009-UP-148 (S.C. Ct. App. filed March 20, 2009). Applicant's Petition for Rehearing

1/12


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was denied on June 29, 2009. The South Carolina Supreme Court denied Applicant's Petition for Writ of Certiorari on September 2, 2010, and the Remittitur was sent on September 22, 2010.


At the PCR hearing, Applicant was represented by W. Scott Palmer, Esq., and the Respondent was represented by Walt Whitmire, Esq., of the Office of the Attorney General. Applicant, trial counsel, and Eric V. Brown, P.E., testified. The Applicant proceeded on the following allegations that he was being held unconstitutionally:

1. Ineffective assistance of counsel:
 - a. "Failure to investigate Applicant's case and States' evidence."
 - b. "Failure to prepare and move for a continuance."
 - c. "Failure to subpoena witnesses to testify."
 - d. "Failure to present an expert accident reconstruction expert."
 - e. "Failure to make a Batson motion." 
 - f. "Failure to make a sufficient opening statement."
 - g. "Failure to move to have Applicant's post-offense blood alcohol test suppressed."
 - h. "Failure to challenge the sufficiency of the indictment."
 - i. "Failure to object to Solicitor Pascoe's improper closing argument."
 - j. "Failure to object to the admissibility of expert testimony."
 - k. "Failure to properly cross-examine State witnesses."
 - l. "Failure to ensure Applicant testified effectively at trial and was not denied due process."

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, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court's records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and exhibits from the prior proceedings, and, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

APPLICABLE LAW

2/12 


In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application 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, 104 S.Ct. 2052, 2064, (1984); Butler, 286 S.C. at 441, 334-S.E.2d at 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668, 104 S.Ct. at 2064. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel’s performance was deficient. Under this prong, the court measures an attorney’s performance by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 386 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.


This Court finds Applicant failed to meet his burden to prove trial counsel was deficient for not conducting a thorough investigation of Applicant’s case. “[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing

3/12 

potential witnesses and making an independent investigation of the facts and circumstances of the case.” Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). Applicant alleged trial counsel was deficient for not investigating relevant emergency dispatch calls made relative in time to the commission of the offense. This Court finds trial counsel’s testimony more credible than Applicant’s testimony. Trial counsel inherited Applicant’s case from John Mobley, Esq., who conducted a thorough investigation into the matter. Trial counsel testified Applicant had Mr. Mobley removed from representation when he declined Mr. Mobley’s advice to enter a guilty plea. Trial counsel had in-depth discussions with Mr. Mobley in preparation for trial. Trial counsel reviewed the State’s evidence and visited the sight of the offense. In meeting with Applicant and his family on numerous occasions prior to trial, trial counsel formulated a viable defense strategy that was subsequently executed at trial. This Court finds that trial counsel conducted a thorough investigation into Applicant’s case. See Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007). This Court finds Applicant failed to produce the alleged emergency dispatch recordings to show what if any evidentiary value they would have had to his case. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998). Therefore, this allegations is denied and dismissed.

B.

This Court finds Applicant has failed to meet his burden to prove trial counsel was deficient for failing to properly make a motion for a continuance. An applicant “[is] not entitled to post-conviction relief where there was no evidence presented at the PCR hearing to show how additional preparation would have had any possible effect on the result of the trial.” Skeen v. State, 325 S.C. 210, 214–15, 481 S.E.2d 129, 132 (1997). This Court finds trial counsel’s testimony more credible than Applicant’s testimony. Trial counsel testified he was adequately

4/12 

prepared to take Applicant's case to trial. Trial counsel testified he underwent representation in Applicant's case in full knowledge that the case was ripe to be called for trial. Trial counsel has a plethora of experience in both prosecuting and defending vehicular offenses. See Smith v. State, 404 S.C. 493, 745 S.E.2d 378 (Ct. App. 2012). Therefore, this allegation is denied and dismissed.

C.

This Court finds Applicant has failed to meet his burden to prove trial counsel was deficient for failing to subpoena various potential defense witnesses. "A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence." Lorenzen v. State, 376 S.C. 521, 530, 657 S.E.2d 771, 777 (2008). This Court finds trial counsel's testimony more credible than Applicant's testimony. Trial counsel testified that Applicant and his wife had presented him with numerous speculative theories. First, Applicant alleged trial ^{counsel} was deficient for failing to subpoena David Page who would have testified that an eyewitness contacted Applicant prior to trial to tell him a superseding act caused the death of the victims. Second, Applicant alleged trial counsel was deficient for failing to subpoena Benjamin Holmes who would have testified Applicant did not appear to be intoxicated while at the hospital after the commission of the offense. Third, Applicant alleged trial counsel was deficient for not presenting a forensic toxicologist at trial. This Court finds because Applicant failed ^{to} present these witnesses necessary to support his allegations, these allegations are speculative and therefore without merit. See Bannister v. State, 333 S.C. 298, 301, 509 S.E.2d 807, 808 (1998).

5/12 ~~20~~

Third, Applicant alleged trial counsel was deficient for not presenting an accident reconstruction expert at trial. Eric Brown, an environmental engineer, testified on behalf of Applicant at the PCR hearing. An applicant must prove how the uncalled witness would have benefited applicant's case. Jackson v. State, 329 S.C. 345, 351, 495 S.E.2d 768, 771 (1998). Upon allowing a proffer, this Court finds Mr. Brown was not qualified as an accident reconstruction expert. See Watson v. Ford Motor Co., 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). This Court finds Mr. Brown speculatively asserted that his general knowledge of physics resulted in a recommendation for a further force and momentum study to disprove the State's evidence of Applicant's culpability. Mr. Brown conceded that he was not qualified to conduct a force and momentum study. This Court agrees with trial counsel that Mr. Brown's testimony would not have been advantageous at trial. This Court finds trial counsel exercised sound judgment in deciding not to present an accident reconstruction expert. Counsel is not deemed deficient when his "decision not to call an expert witness to rebut the state's expert witness was a legitimate trial strategy." Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005). A reputable accident reconstruction expert, Woodrow Poplin, was consulted on Applicant's behalf prior to trial. Trial counsel testified Mr. Poplin analyzed the data crash recording of the vehicle among other items of evidence and was unable to determine the triggering event that caused Applicant's vehicle to disable the victim's vehicle. Trial counsel testified that Mr. Poplin findings would not have aided Applicant's defense at trial.


Trial counsel testified his trial strategy was to argue a superseding causation negated evidence that Applicant disabled the victim's vehicle. Trial counsel testified that an inordinate focus on the triggering event of the initial accident weakened his argument. Trial counsel presented the triggering event as a tire-blowout on Applicant's vehicle because Applicant

directed him to do so despite the State's evidence to the contrary. Furthermore, trial counsel testified the Solicitor's inability to conduct a force and momentum study strengthened his superseding causation argument at trial. This Court finds trial counsel pursued a reasonable trial strategy. See Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). Therefore, these allegations are denied and dismissed.

D.

This Court finds Applicant failed to prove trial counsel was deficient for failing to object to an alleged Batson violation during jury selection. "[A] criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." Palacio v. State, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999). This Court finds trial counsel's testimony credible. Furthermore, trial counsel testified he had no basis for a Batson challenge. This Court finds Applicant failed to present credible evidence that showed Solicitor Pascoe exercised his peremptory strikes in a racially motivated manner. See Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006). Therefore, this allegation is denied and dismissed.

This Court finds Applicant's allegation that trial counsel was deficient for the manner in which he portrayed himself during his opening statement is without merit. "When the PCR court is reviewing a counsel's performance, there is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S.Ct. 2052 (internal quotations omitted). This Court finds trial counsel's testimony credible. Trial counsel testified that he was a "local attorney." Furthermore, trial counsel testified his statements in question were tailored to gain rapport with the Orangeburg County Jury. See Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 64 (2011).


7/12 

Also, this Court finds trial counsel's performance in explaining Applicant's version of the facts and theory of the case reasonable. Therefore, this allegation is denied and dismissed.

This Court finds Applicant failed to prove trial counsel was deficient for failing to object to the admissibility of the blood alcohol test conducted on Applicant after the commission of the offense. "The admission of this irrelevant and prejudicial evidence undermines confidence in the outcome of the trial." Holman v. State, 381 S.C. 491, 493, 674 S.E.2d 171, 172 (2009). This Court finds trial counsel's testimony credible. Trial counsel testified he had no meritorious basis to mount a suppression defense. This Court agrees with trial counsel. (Trial Transcript p.218; p.266; p.274). See State v. Kimbrell, 326 S.C. 344, 481 S.E.2d 456 (Ct. App. 1997). Therefore, this allegation is denied and dismissed.

This Court finds Applicant's allegation that trial counsel was deficient for failing to object to an invalid indictment is without merit. "The primary purposes of an indictment are to put the defendant on notice of what he is called upon to answer, *i.e.*, to apprise him of the elements of the offense and to allow him to decide whether to plead guilty or stand trial, and to enable the circuit court to know what judgment to pronounce if the defendant is convicted." Evans v. State, 363 S.C. 495, 508, 611 S.E.2d 510, 517 (2005). This Court finds trial counsel's testimony credible. Trial Counsel testified there was no basis to challenge the indictments. Furthermore, Applicant was on notice of the charges against him. Trial Counsel testified Applicant was thoroughly involved and cooperated in his defense. See State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005). Therefore, this allegation is denied and dismissed.

This Court finds Applicant failed to prove trial counsel was deficient for not objecting during Solicitor Pascoe's allegedly improper comments made during the State's closing argument. "A solicitor's closing argument must be carefully tailored so as not to appeal to the

8/12 

personal biases of the jury.” Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). “The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom.” Id. at 609–10, 602 S.E.2d at 744. “The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Brown v. State, 383 S.C. 506, 516, 680 S.E.2d 909, 915 (2009). This Court finds trial counsel’s testimony credible. Trial counsel testified he objected to the solicitor’s closing when it was warranted. (Trial Transcript p.480; p.484). Trial counsel further testified none of the solicitor’s comments during his closing argument crossed the line and “infected the trial with unfairness.” This Court agrees with trial counsel. Therefore, this allegation is denied and dismissed.

This Court finds Applicant failed to meet his burden to prove trial counsel was deficient for not objecting when Lt. Dixon testified the collision caused by Applicant resulted in one of the victim’s head going through the windshield. Trial counsel objected. (Trial Transcript p.312). The trial judge ruled the testimony was relevant and did not necessitate an expert study. Therefore, this allegation is denied and dismissed.

D.

This Court finds Applicant failed to prove trial counsel was deficient for failing to properly cross-examine State witnesses. This Court finds trial counsel’s testimony credible. Applicant called into question trial counsel’s cross-examination of the State’s forensic toxicologist and the first responder by opining trial counsel’s cross-examinations were “too short and apologetic.” “Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d

529, 531 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir.1977)). First, Trial counsel testified he limited his cross-examination of Lynne Drawdy, the first responder, in order not to accentuate the testimony or open the door to more harmful testimony. Mrs. Drawdy, testified she detected an odor of alcohol and observed Applicant's slurred speech after the collisions. Trial counsel testified Applicant admitted drinking and that his blood alcohol level tested past the legal inference for intoxication hours after the offense. Trial counsel explained he only cross-examined Mrs. Drawdy regarding her observations as a lay witness. This Court finds trial counsel's tactics here were a product of sound trial strategy. Second, trial counsel testified his strategy in his cross-examination of Brandon Landum, the forensic toxicologist, was to show that any inferences of the effects of alcohol on Applicant were based purely on speculation. This Court again finds trial counsel's performance here valid. Therefore, this allegation is denied and dismissed.

E.

Last, this Court finds Applicant's allegation that he was denied due process because trial counsel failed to ensure Applicant was able to testify "effectively" at trial. A defendant's decision to testify or not must be made with knowledge of the consequences of either choice. Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000). "An on-the-record waiver of a constitutional or statutory right is but one method of determining whether the defendant knowingly and intelligently waived that right." Brown v. State, 317 S.C. 270, 272, 453 S.E.2d 251, 252 (1994). This Court finds trial counsel's testimony more credible than Applicant's testimony. Trial counsel testified he reviewed the assortment of benefits and detriments of testifying with Applicant. Furthermore, the trial judge asked trial counsel if she needed to conduct a colloquy on the matter. (Trial Transcript p.386). Trial counsel asked the trial judge for


colloquy out of an abundance of caution. Thus, the trial judge conducted a thorough colloquy with Applicant regarding his right to testify and his right not to testify. (Trial Transcript pp.387-94). This Court finds that Applicant made a knowing and intelligent decision to testify after being apprised of the possible ramifications from trial counsel and then secondarily from the trial judge. Applicant does not have a constitutional right to ensure that he is a good witness. Therefore, this allegation is denied and dismissed.

Thus, this Court finds Applicant has failed to meet the first prong of Strickland – that trial counsel rendered deficient performance. This Court finds Applicant also failed the second prong of Strickland – that he was prejudiced by trial counsel's performance.

Except as discussed above, this Court finds that the Applicant affirmatively waived the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

CONCLUSION

Based on all the forgoing, 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 for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

11/12 

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 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. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 27th day of September, 2013.



EDGAR W. DICKSON
Presiding Judge
First Judicial Circuit

Orangeburg, South Carolina