STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
Thomas Edward Porter, #318797,	)	2012-CP-42-0911
	)	
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 February 27, 2012. The Respondent made its Return on or about January 30, 2013. An evidentiary hearing into the matter was convened on October 3, 2013, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Hattie D. Boyce, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Robert Hall, Esquire, also testified. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, the plea transcript, and exhibits entered by Applicant.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Applicant was indicted at the November 2008 term of the Spartanburg County Grand Jury for attempted armed robbery and possession of firearm during commission of a violent crime (08-GS-42-7535, count

1 and 2). He was represented by Robert Hall, Esquire. On February 4, 2010, the Applicant pled guilty as indicted to attempted armed robbery. The prosecution dismissed count two for possession of a firearm during commission of a violent crime. Pursuant to a plea agreement, Applicant was released on bond to cooperate with authorities on other matters. Upon information and belief, Applicant failed to abide by the terms of his plea agreement. He was sentenced by the Honorable Roger L. Couch on November 8, 2011, to confinement for a period of fifteen (15) years. The Applicant did not appeal his guilty plea or sentence.

ALLEGATIONS

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

1. Ineffective assistance of counsel, in that;
   a. Counsel "did not have my best interest at hand when he represented me."
   b. Counsel "did not investigate my case or speak with any witness on my behalf."
   c. Counsel "only met with me [three] 3 times and each time told me my only option was to plead to a crime the evidence proves I just couldn't have committed."
   d. "I was promised one thing, lied to by my attorney and not given the lower sentence or time promised."
   e. "Had my [lawyer] fully conducted a reasonable investigation into my case, I wouldn't be in prison with the sentence I now have"

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) (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. 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).

Applicant testified that he was arrested when he and three other people were pulled over in a vehicle following police receiving a tip that the four individuals intended to commit an armed robbery and burglary that night. Applicant testified that he and the others had only planned the robbery, but never had the intent to go through with it or attempted the robbery. Applicant testified that Counsel never told him that planning the commit a crime was not a crime. Applicant also testified that Counsel never discussed the possibility of pleading to a conspiracy charge, but instead, told Applicant that he would be found guilty based upon his statement. Applicant testified that he never had possession of a gun, so he does not believe that there was a crime committed and thought the charge should have been dropped. Applicant testified that the co-defendant that had a gun only received a sentence of five years of probation and others in the car were not charged. Applicant testified that his co-defendant pled guilty to unlawful carrying of a pistol. Applicant also testified that Counsel never informed Applicant that the plea was for any additional charge other than attempted armed robbery. Applicant entered into evidence the following items: Exhibit #1, Applicant's statement; Exhibit #2, co-defendant's statement; Exhibit #3, Applicant's sentencing sheet; and Exhibit #4, co-defendant's sentencing sheet.

Applicant testified that he believed the driver of the car was the confidential informant that provided police with the tip because he was never charged. Applicant testified that Counsel failed to investigate the defense of entrapment because the driver was the informant. Applicant testified that he asked Counsel to investigate that and entered as Exhibit #5, a letter from Applicant to Counsel regarding that issue and Exhibit #6, the incident report. Applicant testified that he did not understand the elements of the charges and Counsel never explained them to Applicant. Applicant testified that he met with Counsel three or four times and never reviewed

discovery materials with the exception of the audio and video of both Applicant and his co-defendant's statements. Applicant testified that the State asked him to come and testify, but he refused to do that. Applicant testified that he does not think a violent or most serious charge is appropriate. Applicant also testified that he did not receive credit for the fifteen or sixteen months' time served.

Counsel testified that he took over the representation of Applicant when he joined the office in June 2008. Counsel testified that the Applicant was already housed in the Department of Corrections at that time. Counsel testified that he was able to meet with the Applicant and review the charges, statements, the issue of attempt and what the jury could find and what Applicant's chances of winning were. Counsel testified that he did discuss with Applicant the fact that attempted armed robbery is a motion serious and violent charge. Counsel testified that the evidence included a surveillance tape of police waiting at the apartment complex that was allegedly going to be robbed and of the police stopping the car as it entered the complex. The police found a .38 pistol in the co-defendant's purse and a shot gun on the driver's side towards the back seat. Counsel also testified that the statements given to police indicated intent. Counsel testified that he did discuss conspiracy with the State, but they would not entertain that as an option.

Counsel testified that it was possible that the driver of the car was the confidential informant, but Applicant would have received that information if he chose to proceed to trial. Counsel testified that when asked by the State to cooperate, the Applicant originally said yes. So, the Applicant pled guilty and the gun charged was dismissed with a delayed sentencing. Counsel testified that he could not find the Applicant to bring him in and Applicant ended up being picked up on a bench warrant after Counsel delayed sentencing for as long as he could.

Counsel testified that the Applicant would have received a much better sentence if he had cooperated. Counsel testified that he had no knowledge of the negotiations or plea of the co-defendant. Counsel testified that at the time of the plea agreement, the Applicant reviewed the agreement and appeared to be excited. Counsel testified that the decision to plead and not proceed to trial was the Applicant's decision.

This Court finds the testimony of Counsel to be more credible that the testimony of the Applicant. The Applicant's allegation that Counsel did not conduct an adequate pre-trial investigation or speak with any witnesses on Applicant's behalf is without merit. Following testimony and review of the transcript, it is clear that Counsel had reviewed the facts and evidence, as well as the options that Applicant faced. The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). 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) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). The Applicant failed to point to any specific matters Counsel failed to discover, or any defenses that could have been pursued had Counsel been more fully prepared. Furthermore, the Applicant failed to show any prejudice that may have resulted from Counsel's alleged inadequate preparation or investigation.

Furthermore, Applicant offered no witnesses that Counsel failed to interview or any testimony that might have been developed at trial. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction

relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). The Applicant failed to meet this burden of proof. Accordingly, these allegations are dismissed.

In Hill v. Lockhart, 474 U.S. 52 (1985), the United States Supreme Court held that the two-part standard adopted in Strickland v. Washington, supra, for evaluating claims of ineffective assistance of counsel applies, as well, to guilty plea challenges based on ineffective assistance of counsel. To meet the Court's "prejudice" requirement, a criminal defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Hill at 59. Not only did the Applicant fail to establish that Counsel offered incorrect advice or made promises that were not kept, the evidence is clear that the Applicant is the one who failed to follow through on promises made. Additionally, the Applicant has failed to establish that he would have proceeded to trial, but for, these alleged deficiencies of Counsel. Therefore, this claim is denied and dismissed.

Summary

This Court finds in regards to the allegation of ineffective assistance of counsel, the Applicant's testimony is not credible. This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in his

representation, and that Counsel's conduct does not fall below the objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that 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 Counsel's performance. This Court concludes the Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier *supra*. Therefore, 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 cautions 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 this 20 **day of** February **, 2013.**

J. Derham Cole
Presiding Judge

2014 FEB 20 PM 1:50

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O Box 3483
Spartanburg, SC 29304-3483

Phone (864) 596-259
Fax (864) 596-2239

M. Hope Blackley
Clerk of Court

2-21-14

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

Thomas Edward Porter
318797
Applicant

7TH JUDICIAL CIRCUIT

CASE # 2012CP42-911

vs

Spee
Respondent

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the Order & Dismissal
In this action dated 2-20, 2014 on 2-21-14

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Lee Mueller
Suzanne White
Hattie Boyce
Thomas Porter

2-21-14
(Date)

(Signature)