STATE OF SOUTH CAROLINA

COUNTY OF UNION

Douglas Hall, #144917,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

C/A NO. 2013-CP-44-0095

**ORDER DENYING
POST-CONVICTION RELIEF**

This matter comes before the Court by way of an Application for Post-Conviction Relief ("PCR"), filed March 22, 2013. The Respondent made its Return on June 26, 2013. An evidentiary hearing into the matter was convened on January 21, 2014, at the Moss Justice Center in York, South Carolina. Leah B. Moody, Esquire, represented the Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, appeared on behalf of the Respondent. At the beginning of the hearing, the Court denied Applicant's motion for a continuance, which was based on the alleged unavailability of witnesses Applicant intended to call during the PCR trial. The denial was based upon the fact that all necessary parties were present for the proceeding, further delay was not in the interests of judicial economy, and any additional witnesses that could be called by Applicant were unlikely to be able to successfully contradict evidence already established through the direct testimony of Applicant at the previous trial.

At the hearing, Applicant testified on his own behalf. Melinda I. Butler, Esquire, Applicant's trial counsel, also testified. The Court had before it a copy of the records of the Union County Clerk of Court, records from the South Carolina Department of Corrections, and the trial transcript.

PROCEDURAL HISTORY

Applicant is presently confined at the South Carolina Department of Corrections pursuant to orders of commitment from the Union County Clerk of Court. Applicant was indicted at the August 2010 term of the Union County Grand Jury for Possession of Crack Cocaine with Intent to Distribute ("PWID") (2010-GS-44-0887). He was represented on this charge by Melinda I. Butler, Esquire. On April 6, 2011, Applicant proceeded to a jury trial, and at the conclusion, he was found guilty of Simple Possession of Crack Cocaine as a lesser included offense. The Honorable John C. Hayes, III sentenced Applicant to confinement for ten (10) years for Possession of Crack Cocaine, third offense. Applicant appealed his conviction and sentence, but the South Carolina Court of Appeals dismissed pursuant to the withdrawal of the appeal by Applicant.

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

1. "Ineffective Assistance of Counsel"
   a. "Counsel failed to conduct proper pre-trial investigation"
   b. "Counsel failed to object to improper prosecutorial misconduct"
   c. "Applicant was denied effective assistance of counsel due to counsel [*sic*] failure to interview and subpoena all witnesses"
   d. "Applicant was entitled to a new trial due to counsel [*sic*] failure to raise that the drawing of the alternate juror was pre-textual"

At the hearing, Applicant proceeded on his claims of ineffective assistance of trial counsel.

SUMMARY OF TESTIMONY

Applicant testified his trial occurred approximately eight months after his preliminary hearing, which was conducted in May of 2010. He stated counsel was appointed to represent him in December 2010 after he had a public defender relieved as counsel. Applicant testified he

met with counsel in December 2010 during a bond reduction hearing. He stated counsel explained the bond reduction process and offered a plea agreement of three to five years on PWID crack cocaine and an accompanying proximity charge, and that trial counsel wanted him to plead guilty, as opposed to defending him vigorously. He stated he was also charged with attempting PWID crack cocaine about one month prior to trial. Applicant also testified that during the time between his bond reduction hearing and trial, he received a letter from counsel concerning a speedy trial motion, but did not get to discuss this motion with counsel before the hearing. At the hearing, the presiding judge gave the State an ultimatum: try the case by April of that year or dismiss it.

Additionally, Applicant testified the only discussion concerning his trial was whether to accept an offer from the State or a dismissal of the charges. He stated he was willing to accept a plea for time served but not a plea for zero to three years. Applicant then testified he wanted counsel to call witnesses on his behalf who were at the scene prior to Applicant's arrest; namely, Sharon Young, Deon Thompson, and Brian Gist. Applicant claimed that these witnesses would have told the jury "what really happened" and that Applicant did not possess crack cocaine. Applicant stated he gave counsel these witnesses' information in March of 2011.

Applicant testified he thought counsel was ineffective for not striking Juror #74, as Juror #74 was similarly situated to a juror who was struck for cause because of his prior criminal record. Applicant stated counsel acknowledged on the record that she did not challenge the juror being placed as an alternate. Applicant also stated the trial court denied the Batson[1] motion and that trial counsel had let the time for challenging Juror #74 lapse.

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1 Batson v. Kentucky, 476 U.S. 79 (1986).

Applicant then testified he was tried for PWID crack cocaine, but was only convicted of possession of crack cocaine, and that he was concerned about the officer's testimony. He claimed counsel did not challenge the officer's testimony and that such testimony was the only evidence the State presented against Applicant. Applicant lastly testified that through the witnesses counsel failed to call, the jury would have seen both sides of the story.

On cross-examination, Applicant admitted that counsel successfully challenged two of the charges and was able to get both the attempted PWID crack cocaine and the accompanying proximity charges dismissed. Applicant also admitted he has had substantial prior experience with crack cocaine and has a prior conviction for conspiracy to commit PWID crack cocaine. Additionally, Applicant admitted that there was a confidential informant ("CI") who testified that he saw Applicant possessing and trying to sell crack cocaine, thus undermining Applicant's claim that the testifying officer was the only evidence the State presented against him at trial. Moreover, Applicant admitted that in his own testimony at trial, he admitted to possessing crack cocaine (an item he referred to as a "crunch and munch") and selling crack cocaine to the CI earlier that same day. Lastly, Applicant admitted law enforcement found a bag containing .3 grams of crack cocaine near the location where Applicant was arrested.

Counsel testified she has been practicing law for five years and was appointed to Applicant's case in November 2010. She stated that, according to her notes, she met with Applicant on November 17, 2010 to discuss the case and review the video in the discovery materials. Counsel testified at that time, Applicant did not provide the names of any witnesses. She stated she called Jerome Beatty, a law enforcement officer who was present during Applicant's arrest, at trial as a witness to testify that he did not see Applicant discard any type of plastic bag containing crack cocaine. Counsel then testified she filed a motion for bond

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reduction on December 9, 2010, and met with Applicant on January 3, 2011, February 9, 2011, and filed a motion for speedy trial on March 11, 2011. Counsel also stated Applicant always wanted a trial, but never indicated he wanted any other witnesses called on his behalf other than Officer Beatty.

Concerning the defense theory of the case, counsel testified the theory was that Applicant did not intend to distribute crack cocaine. She stated the CI wanted to buy some crack cocaine, but Applicant was not going to sell him crack cocaine. Counsel articulated that, in her opinion, this theory was effective until Applicant took the stand in his own defense and admitted that he had possessed a "crunch and munch"[2] when he exited the vehicle driven by the CI during the attempted buy. Counsel then testified that the .3 grams of crack cocaine found at the scene were the drugs Applicant was on trial for and she requested that the Court instruct the jury as such; thus, Applicant was not on trial for possession of the "crunch and munch." Counsel stated Applicant's theory was that he would have disposed of any drugs he possessed while he was in the house prior to his arrest. Counsel expressed that she tried to illustrate that the drugs found might have already been on ground before Applicant was near the scene.

Further, counsel testified that after the jury was seated, one of the jurors gave the judge a doctor's note as to why he was unable to sit on the jury. Counsel stated she made an argument on the record as to why the juror should not be excused from jury duty. Counsel then testified she brought up the Batson challenge again because a Caucasian juror was seated but not an African-American when both of the jurors had prior convictions. Counsel stated this only came to her attention when the juror with the doctor's note was excused; so she brought it to the trial

2 A "crunch and munch" is a marijuana joint laced with crack cocaine.

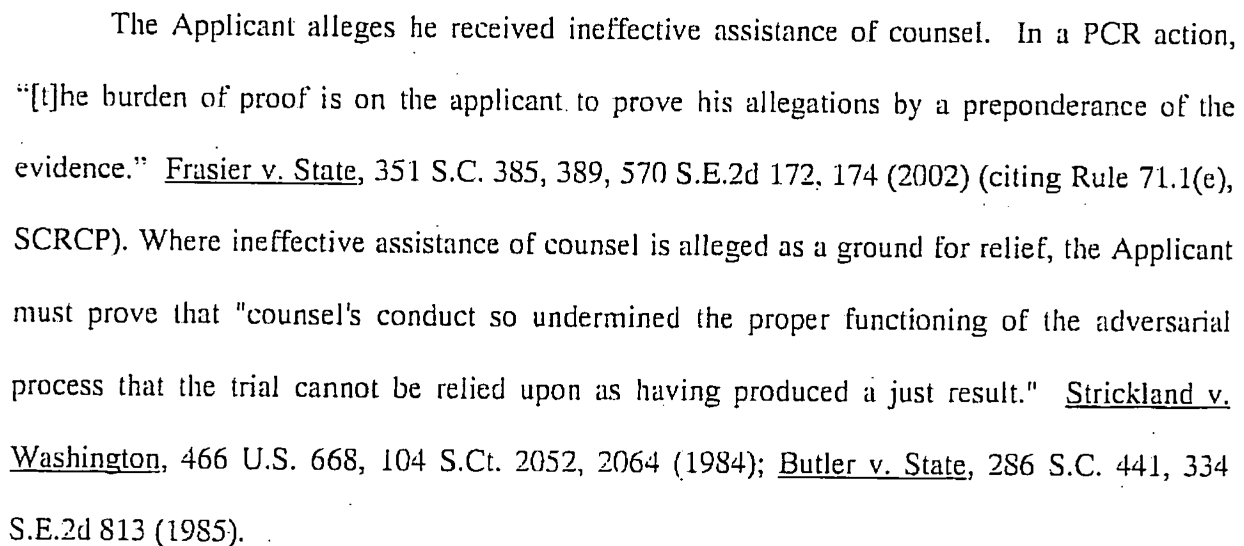
judge's attention only when the issue arose. The Court denied this motion because, in its words, the "proper time to raise [the Batson challenge] has passed."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has had the opportunity to review the record in its entirety and has heard the testimony of the various witnesses at the PCR hearing. The Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. The Court finds the testimony of counsel to be credible. This Court finds the Applicant's testimony concerning ineffectiveness of trial counsel is not credible.

Set forth below are the relevant findings of fact and conclusions of law as required pursuant to 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 (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 of counsel practicing criminal law in this state. 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.

Failure to Interview/Call Witnesses on the Applicant's Behalf

Applicant alleges counsel was ineffective for failing to interview and call witnesses on his behalf at trial.

At the PCR hearing, Applicant testified counsel failed to interview witnesses from the scene of his arrest. Conversely, counsel testified Applicant never asked her or provided her names of witnesses to interview other than Officer Beatty, whom she called as a witness on Applicant's behalf at the 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 Court finds counsel was not ineffective in failing to interview or subpoena witnesses on Applicant's behalf. The Applicant failed to produce any testimony or evidence at the PCR hearing to show what these witnesses would have testified to at trial or how their testimony would have altered the outcome of his trial. Additionally, the Applicant has failed to prove any resulting prejudice from counsel's alleged shortcoming. As a result, this allegation is denied.

Failure to Challenge/Strike Juror

Applicant contends counsel was ineffective for failing to timely strike Juror #74. At the PCR hearing, Applicant testified counsel was ineffective for failing to timely challenge Juror #74 from being seated on the jury as he had a prior criminal record; the same as an African-American juror who was struck from the jury. Counsel testified that it wasn't until one of the jurors was excused from this case due to medical issues that she brought it to the Court's attention that Juror #74 was similarly situated as another juror who was struck during jury selection and the only difference between the two was race.

"[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). At PCR, the Petitioner must provide credible evidence that counsel's failure to strike a juror prejudiced the defense. Magazine v. State, 361 S.C. 610, 606 S.E.2d 761 (2004). Additionally, jurors are presumed to follow the instructions of the trial court. State v. Queen, 264 S.C. 515, 521 216 S.E.2d 182, 185 (1975).

In this case, counsel made a Batson motion during jury selection and the trial judge denied it. Later, when a juror was excused due to medical reasons, counsel challenged the

alternate being seated on the jury as, in her opinion, a similarly situated juror had been struck during the selection process. The trial judge denied this challenge as untimely. This Court finds that Applicant has failed to meet either prong of the Strickland test as to this allegation. Although counsel was arguably ineffective for not challenging Juror #74 during the selection process, Applicant provided no evidence whatsoever that he was prejudiced by the seating of Juror #74. It was not until the medically-excused juror was dismissed from the trial that Juror #74 was even going to be part of the jury. As such, counsel had no initial reason to strike him. Only until the prior juror was excused did counsel bring this challenge to the Court's attention. Nevertheless, Applicant presented no testimony or other evidence showing but for Juror #74 being seated on the jury, the outcome of Applicant's trial would have been different.

Applicant is entitled to a fair and impartial jury, not a perfect one. Applicant provided no evidence that these jurors were anything but fair and impartial. Additionally, all twelve jurors agreed that Applicant was guilty of possessing crack cocaine. As jurors are presumed to follow the law as given by the judge, Applicant has failed to meet his burden of proving resulting prejudice. Accordingly, this allegation is denied.

Overwhelming Evidence

The Court also finds there exists overwhelming evidence of Applicant's guilt in this case. First, the CI testified he bought crack cocaine from Applicant earlier on the day of the incident. (Tr. p. 137 lines 17-21). Second, the CI testified he saw Applicant with a baggie of crack cocaine on his person while Applicant was riding in the car with the CI during the attempted buy. (Tr. p. 143 lines 3-6). Third, Officer Brian Bailey testified that while in pursuit of Applicant, he saw Applicant make a throwing motion with his right hand. (Tr. p. 176 lines 17-24). Fourth, a bag containing .3 grams of crack cocaine was found in the vicinity where Officer Bailey saw

Applicant make the throwing motion. (Tr. p. 178 lines 4-7). Fifth, Applicant admitted that he sold crack cocaine to the CI earlier that same day. (Tr. p. 244 lines 8-13 ("I said oh, man, [Officer Bailey] got me from a buy earlier. When I, when I actually did, [CI] purchased crack from me earlier that day...)). Last, and most importantly, Applicant, through his own testimony, admitted that he possessed crack cocaine when he exited the vehicle being driven by the CI during the attempted buy of crack cocaine.

> **Solicitor: Okay. Okay. So, at the time that you get out of the car, you had some, some amount of crack cocaine in a cigarette form?**
>
> **Applicant: Most definitely.**

(Tr. p. 245 lines 10-13 emphasis added).

Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); See also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001); Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (1991). Clearly through the testimony at trial, Applicant was guilty of possessing crack cocaine. Applicant even admitted that not only had he sold the CI crack cocaine earlier in the day, but that he also possessed crack cocaine in some form when he exited the vehicle during the attempted buy set up by law enforcement. This Court finds Applicant can prove no prejudice from counsel's alleged errors because there is overwhelming evidence of his guilt and no reasonable juror could have come to any other conclusion regarding Applicant's guilt.

CONCLUSION

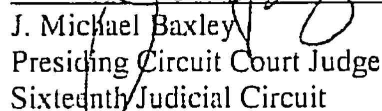
Based on all the foregoing, the Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his PCR application. Therefore, this PCR application must be denied and dismissed, with prejudice.

The Court hereby notifies 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. Applicant's attention is directed to South Carolina Appellate Court Rule 243 for the appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The Application for Post-Conviction Relief is denied and dismissed, with prejudice; and
2. Applicant must remain in the custody of Respondent for completion of his sentence.

IT IS SO ORDERED.



J. Michael Baxley
Presiding Circuit Court Judge
Sixteenth Judicial Circuit

March 6, 2014

Hartsville, South Carolina