STATE OF SOUTH CAROLINA COUNTY OF ORANGEBURG	)	IN THE COURT OF COMMON PLEAS FOR THE FIRST JUDICIAL CIRCUIT
Adrian Darby, #342254, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2012-CP-38-0805 **ORDER OF DISMISSAL**

PROCEDURAL HISTORY

This matter comes before the Court by way of an application for post-conviction relief filed May 30, 2012. Respondent made its Return on November 28, 2012, requesting an evidentiary hearing be held. An evidentiary hearing was convened on October 31, 2013 at the Dorchester County Courthouse. Applicant was present at the hearing and was represented by Glenn Walters, Sr., 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 May 2010 term of the Orangeburg County Grand Jury for Burglary in the First Degree (2010-GS-38-0240) and Assault and Battery of a High and Aggravated Nature (2010-GS-38-0241). Everett K. Chandler, Esquire, represented Applicant on both charges. On August 10-11, 2010, Applicant proceeded to a jury trial before the Honorable R. Ferrell Cothran, Jr., where he was convicted as indicted. Judge Cothran sentenced Applicant to fifteen years imprisonment for Burglary in the First Degree and five years

for Assault and Battery of a High and Aggravated Nature, with the sentences to be served concurrently.

A Notice of Appeal was filed with the South Carolina Court of Appeals. An Order of Dismissal was issued on August 5, 2011, following Applicant's notification to the Court of his desire to withdraw his appeal. The Remittitur was issued on August 23, 2011.

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following allegations of ineffective assistance of counsel:

1. Ineffective assistance of counsel
    a. Defense counsel failed to request a continuance because the Defendant's co-defendant, Quinton Green, would have provided the relevant testimony with regards to the Defendant's innocence.
    b. Defense counsel failed to advise the Defendant properly with regard to the sentencing and penalties.
    c. Defense counsel informed the jury that his client had a gun.
    d. Defendant talked to a member of the jury proclaiming his innocence.
    e. Defense counsel failed to call any witness given to the Defendant's counsel by Defendant."
    f. Defense counsel failed to investigate the prosecution's case.
    g. Defense counsel guaranteed a verdict of not guilty.

TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. Respondent presented testimony from plea counsel Everett K. Chandler, Esquire (hereafter "Counsel"). This Court also had before it a copy of the Applicant's trial transcript, the records of the Orangeburg County Clerk of Court, Applicant's appellate records, and Applicant's records from the South Carolina Department of Corrections.

During the evidentiary hearing, Applicant testified that his mother retained Counsel almost a year prior to trial. He testified that he met with Counsel between four and six times, but

acknowledged that he missed multiple scheduled appointments with Counsel. He testified that he was sent a full, complete packet of discovery by Counsel and "had everything." He testified that he reviewed these discovery materials with Counsel twice, as well as potential witnesses the State would likely call against him at trial. However, he testified that he was surprised that the EMS employee and victims' minor child were called as witnesses. He testified that he provided Counsel with possible defenses, such as that he was invited into the victims' home and that his co-defendant Green was person who assaulted the victim. He elaborated that he was long-time friends with the victims, whom he considered family. He testified that he gave Counsel potential witnesses to investigate, such as Phoenix Smalls, Angela Raysor, and Quinton Green. He testified that at the time of the alleged incident and trial, his best friend was Quinton Green, who he called "QP" (hereafter "Green"). He testified that he needed Green to testify on his behalf at trial to prove that Applicant did not break into the victims' home or intend to do any harm. He testified that Green would have been a beneficial witness and that Green would have taken responsibility for both the assault and burglary. He testified that he told Counsel that Green was a necessary witness and that he gave Counsel as much information as possible. However, he admitted that he did not provide Counsel with an address, phone number, or other contact information for Green, or any other potential witnesses, and does not have any such information now. He acknowledged that the State was not able to find him for trial, which was testified to by State's witnesses Bobby Jones. He testified that neither Green nor any other desired witnesses were present to testify at the evidentiary hearing. He testified that he also believes that Counsel was ineffective for failing to investigate. He testified that the only information that Counsel came from him, and he acknowledged that he did not provide Counsel with any contact

information for these potential witnesses. He testified that Counsel did not know that one of the victims had a prior record before trial.

Applicant further testified that Counsel entered into plea negotiations with the State and that Applicant wanted a plea offer capping his sentence exposure at five years. He testified that he was aware that Burglary in the First Degree carried a mandatory minimum sentence of fifteen years imprisonment up to a possible sentence of life without parole. He testified that it was his decision to turn down any offers from the State and proceed to trial. He testified that part of his decision to do so was because Counsel guaranteed him a verdict of not guilty if he paid Counsel in full. He testified that he did not testify at trial because Counsel advised him it would be beneficial to have the last argument before the jury. He testified that Counsel did review the right to testify with him, as well as the trial court.

He testified that at the trial, Counsel vigorously cross-examined the State's witnesses regarding whether Applicant had been invited into the home and that Counsel was able to elicit from the minor child that Applicant was invited into the home. Applicant testified that Counsel also questioned that State's witnesses as to whether Green was the actual assailant. He testified that he feels Counsel was ineffective for informing the jury that Applicant had a gun during the altercation. Applicant testified that Counsel informed him this was part of his strategy to not hold anything back to gain credibility with the jury. Applicant testified that he now thinks this was ineffective because he "painted a negative picture" to the jury. He did acknowledge that Counsel was able to effectively convey to the jury that the victims sold drugs out of their residence.

Applicant also testified that Counsel was ineffective because Applicant talked to a member of the jury proclaiming his innocence. Applicant testified that he spoke to two women

in the elevator and told them he was "not guilty." However, Applicant's counsel informed this Court that he investigated this claim with his private investigator, including talking to the specific juror Applicant provided, and that as an officer of the court, this allegation was untrue and lacked any merit.

Following Applicant's testimony, Counsel testified. Counsel testified that he has been practicing law since 1997, started his career as an Assistant Solicitor in the Second Judicial Circuit, and has been handling criminal matters since then. He testified that he was retained to represent Applicant on January 6, 2010. He testified that he met with Applicant between six and eight times, as well as discussed the case with Applicant by telephone and letter. He elaborated that Applicant was difficult to contact, as he changed his address and phone number several times. He also testified that Applicant missed number of scheduled appointments with him. He testified that he received discovery materials from the State and provided Applicant with a complete copy of these materials, as well as discussed the materials with Applicant. He testified that he discussed possible defenses with Applicant, and that his theory of the case was that Applicant was invited into the victims' home, then Green rushed in an assaulted the victims. He testified that Applicant informed him that he was very close with the victims and had visited their home numerous times as an invited guest. He testified that Applicant agreed with the theory of the case and planned defense for trial. He testified that he informed Applicant there was a possibility of success at trial, but that he never guaranteed Applicant a verdict of not guilty. Counsel testified that it is his standard practice not to guarantee clients of a particular outcome and that he is absolutely certain he did not promise Applicant an acquittal. He elaborated that his standard retainer agreement, which Applicant signed, specifically states in a "No Guarantees" clause that a particular outcome cannot be assured.

Counsel testified that Applicant did provide him with some names of potential witnesses, but that Applicant did not provide any contact information for any of these people. In particular Counsel testified that Applicant advised him that he wanted Green to testify, but that he provided absolutely no assistance in tracking down Green. He testified that the State was not able to locate Green for trial and that Green did not testify at trial. He testified that Green's absence benefited his theory of the case because in his professional experience, it was highly unlikely that Green would take the stand and be the scapegoat for Applicant's charges. He testified that he saw no possible benefit in having Green present at the trial and explained this to Applicant. He testified that this is why he did not move for a continuance to secure Green's presence at trial. He testified that he was able to contact several of Applicant's potential witnesses, such as Angela Raysor, and prepared subpoenas for trial. Counsel testified that it was a joint decision between himself and Applicant not to call any witnesses on his behalf to preserve the final argument before the jury. He testified that he advised Applicant of his right to testify and the possible benefits and drawbacks of testifying. He testified that Applicant agreed with the decision not to call any witnesses on his behalf to preserve the last argument.

Counsel testified that he vigorously cross-examined the State's witnesses, particularly the victims. He testified that he was able to get the victims' minor child to testify that Applicant was actually invited into the home and that it was Green who assaulted the victim. He also was able to elicit testimony regarding the victims selling drugs out of their residence. He testified that he did inform the jury that his client had a gun during the altercation because he did not want to lose the jury's credibility by portraying Applicant untruthfully as a "boy scout." He testified that his client was not on trial for having or using a gun, and he does not think this impacted Applicant's case negatively. He testified that he does not believe he performed deficiently in regards to any

of Applicant's allegations and that he provided Applicant with a thorough and well-planned defense.

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.

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.

Counsel's alleged failure to request a continuance because co-defendant, Quinton Green would have provided relevant testimony in regards to Applicant's innocence

Applicant alleges that Counsel was ineffective for failing to secure Green's presence at trial and not moving for a continuance to allow Green to testify at trial This Court finds that Applicant has failed to establish any deficiency of Counsel and that this allegation must be denied and dismissed with prejudice. The uncontroverted testimony reveals that Applicant failed to provide any contact information or other assistance in tracking down his self-proclaimed "best friend" Green, who he insisted would admit to committing the assault. Both Counsel and Applicant testified that the State was not able to secure Green's presence at trial. Counsel testified that it was in Applicant's best interest not to have Green present at trial, as he was able to portray Green was the assailant without having Green take the stand and deny involvement. He testified that he told Applicant it was highly unlikely that Green would testify on the stand that he was guilty of the crimes, not Applicant. This Court finds that Counsel's performance was reasonable in effective under professional norms. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland).

Additionally, this Court finds that Applicant cannot prove any resulting prejudice from this alleged deficiency, as Green was not present at the evidentiary hearing to provide testimony. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at the post-conviction relief hearing. 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). 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 post-conviction relief 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). Based on the foregoing, this Court finds that this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to advise Applicant properly regarding to sentencing and penalties

Applicant alleges that Counsel was ineffective for failing to advise him of the possible penalties and sentences he was facing. However, Applicant testified that Counsel advised him of the minimum and maximum sentences for both charges, including a mandatory minimum of fifteen years imprisonment up to a maximum sentence of life imprisonment for Burglary in the First Degree. This Court finds that that Applicant has failed to establish any deficiency of Counsel or prejudice from this alleged deficiency and therefore, this allegation must be denied and dismissed with prejudice.

Counsel informed the jury that Applicant had a gun during the altercation

Applicant alleges that Counsel was ineffective for informing the jury that Applicant had a gun during the altercation. Applicant testified that this was deficient performance because it painted a negative picture of him to the jury, and as a result, prejudiced him. Counsel testified that he made a strategic decision to be honest with the jury and not try to hide anything to gain the jury's credibility and trust. Counsel testified that this included informing the jury that his client had a gun during the altercation. He testified that he does not think this impacted Applicant's case, as Applicant was not on trial for possession of a weapon and his theory of the case was that Applicant had been invited into the victims' home and Green was the assailant. This Court finds that this strategy was valid and prudent based on all testimony presented, and therefore, Counsel's performance was not deficient. See Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011) ("[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'" Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, we must be wary of second-guessing trial counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992)). This Court finds that counsels' performance went well beyond the standard of reasonableness according to professional norms, and therefore Applicant has failed to establish any deficiency regarding this allegation. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

Allegation that Applicant told a member of the jury that he was innocent

Applicant alleges that Counsel was ineffective because Applicant talked to a member of the jury proclaiming his innocence. Applicant testified that he spoke to two women in the elevator and told them he was "not guilty." However, Applicant's counsel informed this Court that he investigated this claim with his private investigator, including talking to the specific juror Applicant provided, and that as an officer of the court, this allegation was untrue and lacked any merit. This Court agrees and finds that this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to call any witnesses as provided by Applicant

Applicant alleges that Counsel was ineffective for failing to call any of the witnesses that he provided to Counsel. However, the uncontested testimony shows that Applicant utterly failed to provide competent information to Counsel regarding potential witnesses. Counsel testified that he was able to locate some witnesses and subpoenaed them for trial. Counsel testified that he discussed the strategy of not calling any witnesses to preserve the last argument with Applicant, and that Applicant agreed with this strategy. This Court finds that this strategy was valid and prudent based on all testimony presented, and therefore, Counsel's performance was not deficient. See Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011) ("[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'" Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they

were made. Strickland, 466 U.S. at 689. Accordingly, we must be wary of second-guessing trial counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992)).

Additionally, as Applicant failed to present any testimony from the purported witnesses at trial, this Court finds that he has failed to establish any resulting prejudice. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at the post-conviction relief hearing. 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). 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 post-conviction relief 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). Based on the foregoing, this Court finds that this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to investigate the prosecution's case

Applicant has failed carry his burden of establishing that Counsel was ineffective for failure to investigate. However, Applicant failed to present any evidence or testimony to this Court as to what possible benefit could have been derived from additional investigation. "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998). Therefore, this allegation must be denied and dismissed with prejudice.

Counsel's alleged guarantee of an acquittal

Applicant alleges that Counsel guaranteed him a verdict of not guilty as along as he paid Counsel in full. However, Counsel's credible testimony was that he never makes any promises or guarantees of a particular outcome to clients and that he is absolutely certain he did not make such a promise in this case. Additionally, Counsel read his standard retainer agreement to the court which specifically contains a "No Guarantees" clause, which he reviewed with Applicant. This Court finds that Counsel never made such a guarantee to Applicant and this this allegation 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), SCRCP, 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 2004.

DIANE S. GOODSTEIN
Presiding Judge
First Judicial Circuit

Sumter, South Carolina

ALAN WILSON
ATTORNEY GENERAL

March 21, 2014

Glenn Walters, Sr., Esquire
Glenn Walters & Associates, PA
Post Office Box 1346
Orangeburg, South Carolina 29116-1346

Re: Adrian Darby, #342254 v. State of South Carolina
2012-CP-38-0805

Dear Mr. Walters:

Enclosed please find a copy of the filed Order of Dismissal signed by the Honorable Diane S. Goodstein in the above mentioned case that our Office received on **March 17, 2014** from the Kershaw County Clerk of Court.

Sincerely,

Megan E. Harrigan

Megan E. Harrigan
Assistant Attorney General

MEH/ko
Enclosure(s)

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG
IN THE COURT OF COMMON PLEAS

ADRIAN DARBY, #342254,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

Glenn Walters, Sr., Esquire
Glenn Walters & Associates, PA
Post Office Box 1346
Orangeburg, South Carolina 29116-1346

This 21st day of March, 2014.

Megan E. Harrigan

MEGAN E. HARRIGAN
ATTORNEY FOR RESPONDENT

SWORN to before me this 21st day of March, 2014.

Judy-ae Carey

Notary Public for South Carolina.
My Commission Expires: 5/11/2014