STATE OF SOUTH CAROLINA
In The Supreme Court

ORIGINAL

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Presiding Judge

12-CP-42-2779

HAZELL STOUDEMIRE, IIII, #349731,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Hazell Stoudemire III, #349731, appeals the Order of Dismissal denying his Application for Post-Conviction Relief in this case. The Order of Dismissal was imposed by The Honorable J. Derham Cole on April 7th, 2014, and received by counsel on April 9th, 2014.

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This 9th day of April, 2014.

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HAZELL STOUDEMIRE, III, # 349731

Petitioner,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Petitioner's Notice of Appeal in the above-entitled case has been served upon opposing counsel, Suzanne H. White, Assistant Attorney General, P.O. Box 11549, Columbia, SC 29211-11549, by mailing in an envelope properly addressed with postage prepaid on this 14 day of April, 2014.

Grace Gilchrist Knie
Attorney and Counselor at Law

SWORN TO BEFORE me this 14 day
of April, 2014.

Melody B. Halbrook (L.S.)
Notary Public for South Carolina
My Commission Expires: 09/04/17

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
Hazell Stoudemire III, #349731,	)	2012-CP-42-2779
	)	
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 July 2, 2012. The Respondent made its Return on or about July 17, 2012. An evidentiary hearing into the matter was convened on October 4, 2013, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Grace G. Knie, 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. Timothy M. Ray, 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 Applicant's exhibits.

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 March 2011 term of the Spartanburg County Grand Jury for murder (2011-GS-42-1427) and possession of a weapon during a violent crime (2011-GS-42-1427(A)). The Applicant

was then indicted at the January 2012 term of the Spartanburg County Grand Jury for attempted armed robbery (2012-GS-42-0352). Applicant was represented by Timothy M. Ray, Esquire. On February 14, 2012, the Applicant pled guilty to possession of a weapon during a violent crime, attempted armed robbery, and the lesser included offense of accessory to felony murder. The Applicant was sentenced by the Honorable Roger L. Couch to confinement for twenty (20) years for attempted armed robbery (2012-GS-42-0352), provided that upon the service of fifteen (15) years the balance will be suspended with probation for five (5) years, to be served concurrently with fifteen (15) years' confinement for accessory to felony murder (2011-GS-42-1427) and fifteen (15) years' confinement for possession of a weapon during a violent crime (2011-GS-42-1427(A)). The Applicant did not appeal his conviction or sentence.

ALLEGATIONS

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

1. Direct appeal issues;[1] and
   a. "I wasn't identified as the shooter."
   b. "I never pointed & presented a firearm during the commission of the crime that was committed."
   c. Conflicting witness statements.
   d. "The two weapons used during the commission of the crime were not mine, they were registered to Charvus Nesbitt."
   e. "In the crime scene report in my motion of discovery it cleary [sic] states when detectives exicuted [sic] a search warrant on Charvus Nesbitt's residense [sic] they recovered gun cases with serial numbers matching the ones used during the commision [sic] of the crime that were registared [sic] to Charvus Nesbitt."
   f. Evidence showing Applicant's innocence.
2. Ineffective assistance of counsel.

[1] [Hereinafter "first allegations"].

a. "My attorney failed to provide me with a copy of my motion of discovery until after my negotiative plea bargain."

At the hearing, the Applicant orally amended his application to include a claim of involuntary guilty plea.

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, in his first allegations, 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 introduced the following exhibits in support of his claims: #1, the statement of witness BJ Rookard; #2, Kamuka Scott's statement; #3, Raymond Phillips' statement; #4, Marilyn Phillips' statement; #5, Starr Burgess' first statement; #6, Starr Burgess' second statement; #7, photo lineup; #8, photo lineup; #9, photo lineup with Nesbitt circled by Starr Burgess; #10, photo lineup with a random person circled; #11, voluntary statement of Tim Ferguson; #12, SLED toxicology report indicating the victim had marijuana in his system; #13, SLED trace evidence report for gunshot residue; #14, investigative report indicating eight shots were fired with .45 caliber ammunition; #15, supplemental investigative report indicating a .45 caliber Ruger was found, but no fingerprints were found; #16, supplemental investigative report regarding the victim's wounds; #17, SLED report dated December 9, 2010.

Applicant testified that he turned himself into police on December 10, 2010, following a shooting on December 7, 2010. Applicant testified that he went with Chavous Nesbitt, Teddy Byers, and a fourth person to the victim's home. Applicant testified that he had never met the victim, but had been told that they were going to rob the victim. Applicant testified that when he

saw a gun, he ran and jumped out of the window of the house, but he had no idea who was actually shooting. However, Applicant testified that he believed the victim had fired first. Applicant testified that he was not contesting his guilt. Applicant testified that his family retained Counsel to represent him after he turned himself in. Applicant testified that Counsel never reviewed discovery materials with him and only discussed the witness statements. Applicant testified that Counsel never explained that none of the witnesses were able to identify the assailants or that there was gunshot residue on the victim's hands. Applicant did testify that Counsel explained to him that Starr Burgess, one of the witnesses, had removed a gun from the scene. Applicant testified that he only received discovery materials fourteen months following his plea.

Counsel testified that by the time he was retained in the case, Applicant already turned himself in to police and confessed to his involvement in the shooting. Counsel testified that he received all discovery materials from the State and shared them with the Applicant. Counsel testified that because of the SLED testing, he received some reports at different times, but the Applicant had all of the discovery materials prior to the plea. Counsel testified that he reviewed all of the statements with the Applicant and discussed the possibility of who might cooperate with the State.

Counsel testified the evidence included a statement by a child witness (Exhibit #1), which included the description of one of the assailants which appeared to be similar to applicant's appearance. Counsel testified that this was a concern. However, Counsel testified that the gun that was dropped from the window as Applicant left the house was tested and showed that the Applicant had not been the shooter. Counsel testified that although a report indicated gunshot residue on the victim's hands, the Applicant never saw the victim with a gun. Counsel also

testified that the fact that there were drugs at the house or in the victim's system was not helpful in terms of a defense. Counsel testified that the State was interested in the Applicant cooperating because he turned himself in and appeared to be less culpable than the others. Counsel testified that the report indicating blood found in several parts of the home was not helpful for the defense because there was never any allegation that anyone else was ever shot. Counsel testified that even with any possible issues with the investigative work or inconsistencies in witnesses' statements, there was too much to risk for the Applicant to proceed to trial. Further, Counsel testified that because the Applicant turned himself into police, it would have been difficult to present a defense at trial.

This Court finds the testimony of Counsel to be more credible that the testimony of the Applicant. The Applicant's first allegations that Counsel did not conduct an adequate pre-trial investigation are without merit. Following testimony and review of the transcript, it is clear that Counsel reviewed the facts and evidence with Applicant, 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, although he presented many exhibits, failed to point to any specific matters Counsel failed to discover, or any meritorious defenses that could have been pursued had Counsel discussed matters further with Applicant. This Court finds that Counsel reviewed all

discovery materials with the Applicant in assessing the case and discussed any possible flaws in the State's case. Accordingly, this allegation is dismissed.

Involuntary Guilty Plea

The Applicant also alleges that he did not plead guilty freely and voluntarily. To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

This Court finds that the transcript reflects that the pleas were knowingly and voluntarily entered with a full understanding of the charges and consequences of the plea to each charge. Boykin, supra; Dover, supra. Further, because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. U.S., 519 F.2d 317 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795

(1993).

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.

Applicant testified that he knew what charges he was pleading to and was not promised a particular sentence by Counsel. Counsel testified that he reviewed all of the charges and possible sentences Applicant could receive with Applicant and had no concerns that Applicant was unaware of what he was doing at the plea. Counsel testified that even after hearing Applicant's testimony during this proceeding, he still felt confident that the Applicant pled guilty freely and voluntarily.

Again, this Court finds that Counsel's testimony regarding this issue is credible. And that Applicant has failed to meet his burden of proof as to this claim. The Applicant has failed to offer any evidence or testimony which would cause this Court to consider questioning the voluntariness of Applicant's plea. Not only did the Applicant fail to establish that Counsel had failed to fully review discovery materials with Applicant or fully investigate the matter, but 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 allegations of ineffective assistance of counsel and involuntary guilty plea, Counsel's testimony is more credible than Applicant's testimony. 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 7 **day of** April **, 2014.**

J. Derham Cole
Presiding Judge

 Stoudemire v. State 12-2979

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ORIGINAL

VIA U.S. POSTAL SERVICE
April 14, 2014

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

RE: The State vs. Hazell Stoudemire, III, # 349731, ;

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

(1) Original Proof of Service upon opposing counsel.
(2) Order of Dismissal.

If I can be of any further assistance please feel free to call me.

Sincerely,

Grace Gilchrist Knie

✓ Enclosures: as stated

Greenville P&DC 296

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TO: The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
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