THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

RECEIVED
APR 30 2014
S.C. Supreme Court

Case No. 2010-CP-20-453

Darryl T. Cook Appellant,

v.

The State of South Carolina, Respondent.

NOTICE OF APPEAL

Darryl T. Cook appeals the order of the Honorable Clifton Newman dated April 4, 2014. Appellant received written notice of entry of this order on April 17, 2014.

April 30, 2014

Glenn E. Bowens
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Attorney for Appellant

Other Counsel of Record:
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PROOF OF SERVICE

I certify that I have served the Notice of Appeal on The State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on April 30, 2014, addressed to his attorney of record, Suzanne H. White, Esq., Post Office Box 11549 Columbia, South Carolina 29211.

April 30, 2014

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Attorney for Appellant

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S.C. Supreme Court

DEFENSE OF INDIGENT ACT
FORM NO.4

IN THE COURT OF COMMON PLEAS

STATE OF SOUTH CAROLINA)
)
COUNTY OF FAIRFIELD)
)
Case No. 2010-CP-20-453)
)
DARRYL T. COOK)
Plaintiff)
)
vs)
)
STATE OF SOUTH CAROLINA)
Defendant

ORDER OF APPOINTMENT OF LEGAL COUNSEL OF INDIGENT PLAINTIFF

Post Conviction Relief

The plaintiff contends that he is indigent and in need of services of an attorney as contemplated by law for representation in a PCR. THEREFORE, Glenn E. Bowens Attorney-at-Law is appointed as counsel for the Plaintiff.

This 26 day of October, 20 11

At 1:45 (~~AM~~ - p.m.)

BROOKS P GOLDSMITH
ADMINISTRATIVE JUDGE
SIXTH JUDICIAL CIRCUIT

Attorney: Glenn E. Bowens
P.O. Box 424
Winnsboro, SC 29180

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SIXTH JUDICIAL CIRCUIT
COUNTY OF FAIRFIELD	)	
	)	
Darryl T. Cook, #267867	)	2010-CP-20-0453
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 November 8, 2010. Respondent made its Return on or about July 15, 2011. Applicant filed an amended application on July 15, 2013. An evidentiary hearing into the matter was convened on August 7, 2013, at the Lancaster County Courthouse. Applicant was present at the hearing and was represented by Glenn Bowens, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. His mother, father, grandmother, and Hughley Grattic also testified on his behalf. The deposition of Charles Walker was introduced by Applicant in support of his claims. Jack B. Swerling, Esquire, ("Counsel") testified on behalf of the State.

This Court also had before it a copy of the records of the Fairfield County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Appellate Court records, the trial transcript, the transcript of the deposition of Charles Walker, along with memoranda and exhibits provided by both Applicant and Respondent.

PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Fairfield County Clerk of Court's orders of commitment. The Fairfield County Grand Jury indicted Applicant at the January 2006 term of General Sessions for murder (2002-GS-20-0546, amended), armed robbery (2002-GS-20-0082, amended), and grand larceny - more than $1,000 but less than $5,000 (2002-GS-20-0132, amended). Jack B. Swerling, Esquire, represented Applicant. On October 23, 2007, Applicant was convicted of these charges by a jury. The Honorable Kenneth G. Goode sentenced Applicant to confinement for forty-five (45) years for murder, twenty-five (25) years for armed robbery, and five (5) years for grand larceny, all running concurrently.

A timely Notice of Appeal and subsequent Anders brief were filed on Applicant's behalf. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Cook, Op No. 2010-UP-0023 (filed January 25, 2010). The Remittitur was returned on February 10, 2010.

ALLEGATIONS

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

1) Ineffective assistance of Counsel, in that;
   a) Counsel refused to subpoena witnesses on Applicant's behalf,
   b) Counsel refused to ask questions the way Applicant wanted;
   c) Counsel did not object to comments and instructions given by the trial judge to the jury when they came indicating they were deadlocked,

d) Counsel did not object to sending the jury back to deliberate after the jury indicated they were deadlocked a second time,
e) Counsel did not assert as a defense that Mr. McGuirt's death, which occurred over a year after the shooting, was due to the negligent medical care he received.

2) Insufficient evidence to support the murder, in that;
   a) Trial judge allowed evidence that did not pertain to the actual crime to be used as evidence to gain a conviction,
3) Exclusion of relevant evidence, in that;
   a) Presiding trial judge refused to let certain statements that could have been extremely credible on Applicant's behalf for a new trial.

At the beginning of the hearing, Applicant indicated his desire to specifically abandon claim 1(e), regarding Counsel's failure to assert negligent medical care as a cause of the victim's death. Additionally, Applicant informed the Court that he would proceed on claims 1(a), (c), and (d). Therefore, this Court finds that Applicant voluntarily abandoned all other claims.

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 his or her 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

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, 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. Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, 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 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).

Failure to subpoena witnesses on Applicant's behalf

Applicant alleged that Counsel was ineffective for failing to subpoena Hughley Grattic on Applicant's behalf at trial. This Court finds Counsel's testimony credible as to this claim.

Applicant testified that he and Counsel discussed calling Grattic. Counsel indicated his concern with calling Grattic and the fact that Grattic's statement appeared to contradict what all of the other officers stated. Counsel informed Applicant that he was concerned Grattic would

testify to something different than what his statement indicated.

Mr. Grattic testified that he was the Chief of the Ridgeway Police Department in November 2001 when the armed robbery and shooting occurred. He was one of the first to respond to the scene following the 911 call from the victim's daughter. Grattic testified that he spoke with the victim prior to EMS arriving on the scene. Grattic testified that the victim did not identify Applicant by name at the scene. However, Grattic testified that the victim indicated that he knew the person who shot him, but could not recall the person's name. Grattic testified that the Fairfield County Sheriff's Office then responded and SLED took over the investigation. Grattic testified that he never spoke with Counsel in regards to testifying at the trial, but would have been willing to testify if subpoenaed.

Counsel testified that contrary to Mr. Grattic's testimony, Counsel spoke with Grattic prior to the first trial and a couple of times in May 2006. Counsel testified that the information he received from Grattic was contradictory and Grattic appeared to be hostile when they spoke. Counsel testified that Grattic indicated that he was close to the victim. Counsel also testified that Grattic informed him that the workers at the service station knew the guy that had come in and gotten a soda earlier that afternoon as indicated by the victim. Counsel testified that he had the incident reports completed by Grattic, as well as the notes from the Solicitor's interview with Grattic. Counsel believed that Grattic might have been confusing his notes with Officer Guinyard's investigative notes for his testimony at the hearing because they contradicted his typed notes. Counsel testified that there was a previously provided handwritten acknowledgement by Grattic and Officer Bowman that the victim's truck was gone at the time they arrived on scene, but had previously been at the service station as late as 5:50 pm. Counsel made the strategic decision to not call Grattic as a witness because he believed that Grattic's

testimony might do more harm than good. Counsel testified that he discussed the decision and his concerns with Applicant and Applicant acknowledged his agreement with that decision by signature on a note dated May 15, 2006. Counsel testified that nothing changed in regards to Grattic's testimony prior to the trial in 2007.

This Court finds that Applicant failed to meet his burden of proof as to this claim. 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). 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). Although Applicant provided Grattic's testimony, this Court does not find that the testimony would have been helpful to Applicant's case at trial. The testimony appeared to be cumulative to the testimony presented at trial in regards to the victim failing to specifically name Applicant as the shooter.

Furthermore, this Court finds that the strategic reasons offered by Counsel for not calling Grattic as a witness were reasonable. "Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective." Underwood at 562; Legare v. State, 333 S.C. 275, 281, 509 S.E.2d 472, 475 (1998). This Court also does not find that Applicant established any prejudice suffered from Counsel's failure to subpoena Mr. Grattic. Therefore, this claim is denied and dismissed.

Failure to object to comments and instructions given by trial judge to deadlocked jury and Failure to object to sending jury back to deliberate after the jury indicated they were deadlocked a second time

Applicant alleged that the trial judge made coercive comments and provided coercive instructions to the jury when the jury came back twice indicating that they were deadlocked. Applicant alleged that Counsel failed to object to the comments or instructions, as well as failed to object to the jury being sent back to deliberate after indicating they were deadlocked a second time.

Applicant testified that the jury came back twice to indicate they were deadlocked. Applicant testified that the first time the jury indicated they were deadlocked the judge informed them that they had the right to go back and continue to deliberate. Applicant estimated that this was around six or seven o'clock at night. Applicant then testified that the jury came back an hour and a half later, which is the time that the judge made the alleged coercive statements. Applicant testified that the judge told the jury that there had been two mistrials in this case and he did not want a third, they would stay all night if they had to for a verdict, and the checks were already cut. Applicant testified that he did not express his concerns to Counsel about the statements at the time because Applicant was not aware that Counsel could object to the comments made in front of the jury by the trial judge. However, Applicant acknowledged that he was aware that Counsel objected to portions of the jury charge and also moved for a mistrial because of the charge as well.

Applicant's mother, Jerlean Miller Cook, testified that Applicant worked for the victim in his service station after school when was younger. Jerlean testified that the victim accused Applicant of stealing money from the station, which Jerlean paid back. She acknowledged that there was a videotaped recording of the meeting between her and the victim when she paid the

money back. However, Jerlean testified that Applicant never admitted taking the money and continued to work at the service station. Jerlean testified that she recalled the jury deliberating for approximately an hour and then returning with questions regarding the timeline and identity. Jerlean testified that the jury then came back and informed the court that they were deadlocked. At that time, Jerlean testified that the trial judge made statements to the jury indicating that there had already been one mistrial and this jury "needed to get it right." Jerlean testified that the jury returned to deliberate and returned to the courtroom a second time indicating they were still deadlocked. Jerlean testified that the judge then sent the jury back to deliberate and returned with a verdict in approximately 30-40 minutes. Jerlean testified that neither the Solicitor nor Counsel objected to the statements of the judge or the return to deliberations either time. She did acknowledge that Counsel objected many times during the trial and requested a mistrial once during the trial. Jerlean testified that she does not recall contacting Counsel about this issue, but was concerned.

Applicant's father, Darryl Cook, also testified. Mr. Cook testified that he knew the victim because Applicant used to work for the victim. Mr. Cook testified that the jury deliberated, then returned to the courtroom and indicated that they were deadlocked seven to five. Mr. Cook testified that the second time the jury returned to the courtroom was for the two questions. Mr. Cook then testified that the jury returned to the courtroom for a third time and were told by the trial judge that the "check was already cut," "they did not want another mistrial," and "they would stay all night if they needed to." Mr. Cook testified that the jury returned with a verdict with twenty minutes of those statements being made and returning to deliberate. Mr. Cook testified that neither the Solicitor, nor Counsel, objected either time the jury indicated they were deadlocked.

Majorie Cook, Applicant's grandmother, also testified on his behalf. Ms. Cook testified that she knew the victim and believed that the victim knew Applicant. Ms. Cook testified that the jury returned to the courtroom three times: the first time with the two questions; the second time with the information that they were deadlocked seven to five; and the third time indicating they were deadlocked again. Ms. Cook testified that the trial judge informed the jury that, "if they had to stay out all night, they would to come back with a verdict." Ms. Cook testified that it was not long until the jury returned with a verdict following that comment by the judge.

This Court notes that Charles Walker, one of the jurors, was subpoenaed to appear for the hearing, but failed to appear. This Court provided for an additional 60 days to obtain a deposition of Mr. Walker. Mr. Walker, again under subpoena, failed to appear for the first scheduled deposition; however, he did appear at a second deposition when this Court provided additional time to Applicant to obtain his testimony. This Court finds that Walker's testimony regarding his recollection of the alleged coercive comments by the trial judge is not credible. Walker testified that his first mention of feeling coerced into a verdict came as a result of ". . . working at Walmart, from [Walker] talking to [Applicant's] father coming in there quite a few times, that's where that came from." (Depo. Tr. p. 11, lines 10-12). Walker testified that he recalled the jury returning to the courtroom with questions and then returning once to indicate they were deadlocked. (Depo. Tr. p. 12-3). Walker testified that he did not recall that the jury went out to deliberate a third time. (Depo. Tr. p. 15). Walker acknowledged that he voted to convict Applicant "after [looking] at the evidence that was presented to [the jury]." (Depo. Tr. p. 9, lines 9-11). This Court notes that Walker affirmed that he voted to find Applicant guilty when polled by the trial court. (Tr. 2nd part p. 329-330). This Court does find Walker's testimony regarding the jury only coming back twice and acknowledging his guilty verdict to be credible.

The testimony given at the PCR hearing by Applicant's mother, father, and grandmother, is suspect because of their vested interest in seeing Applicant released from jail. This Court finds that the testimony of each lacks credibility. This Court notes that the allegation was not presented in Applicant's initial PCR application filed in 2010, but rather, was added as an amendment a month prior to the hearing in 2013. Additionally, these alleged statements made by the trial judge were never discussed with Counsel at the time of or following the trial. Although Applicant provided the testimony of Mr. Walker, a juror in the case and non-family member of Applicant, this Court cannot find his testimony credible. As Mr. Walker indicates, he was contacted by Applicant's father regarding testifying in this matter. Mr. Walker also testified that he had become friends with Applicant's family over the years since the trial. Walker indicated much of his affidavit was based on his memory of the trial six years prior, conversations with Applicant's father, and information heard through the community over the years.

Counsel testified that he keeps detailed notes of every trial and the notes indicate that an Allen charge was given at 5:30 pm. However, Counsel testified that he has no independent recollection of the jury being deadlocked or the Allen charge. Counsel did testify that he recalled the jury returning to the courtroom with questions, as reflected in the transcript. Counsel testified that had the Allen charge been coercive or had the trial judge made the alleged improper comments to the jury, he would have immediately objected as he had throughout the trial at the appropriate times. Counsel was adamant that the judge did not make any of the comments suggested by Applicant or his family in front of the jury. Counsel also testified that he had tried a number of cases in front of Judge Goode and Counsel has never heard any Goode make comments similar to those alleged to any jury.

Counsel also testified that he would not have allowed the judge to send the jury back to deliberate for a third time without raising a strenuous objection. Counsel testified that neither Applicant, nor anyone in his family, raised any concerns about the jury deliberations or anything said by the judge at the time of trial or appeal. In fact, Counsel testified that the first appearance of this claim regarding a deadlocked jury or improper coercive comments was in the amended application filed July 2013, immediately prior to the hearing and several years after the initial application was filed.

This Court finds Counsel's testimony to be most credible based upon the testimony presented, as well as Counsel's expansive career and experience in criminal defense. This Court finds that it is clear that Counsel had thoroughly prepared for this trial. The record is clear that Counsel was questioning statements and rulings by the trial judge throughout almost seven days of trial. As the transcript reflects, the trial began on October 15, 2007, and continued until the end of October 18, 2007, then resumed on the morning of October 22, 2007 until the end of October 23, 2007. Counsel questioned the jury charge and even moved for a mistrial based upon his concern with the corrective jury instruction provided by the trial judge. (Tr. 2nd part p. 317-9; p. 321; p. 322-3).

The record also reflects that following the verdict and sentencing, the judge stated, ". . . to the jury, you had a horrifically difficult task facing . . . Your resolve is apparent and the difficulty that you demonstrated that you had in deciding what to do, and on behalf of the State of South Carolina, I thank you, each and every one, very much. This will conclude your jury service for this term and for the next three years, and I thank all very much. ***The Clerk has a huge check for each one of you.***" (Tr. 2nd part p. 349-50) (emphasis added). In as much as the judge made any comments which could have been interpreted by the family or others present in

the courtroom as questionable, this Court notes that the judge referenced the checks for the jurors following the verdict and sentencing.

This Court cannot conclude, without great speculation, that the trial judge made any improper comments to the jury during their deliberation or improperly sent the jury to deliberate a third time. It is more likely than not that Applicant and his family, after more than six years following the trial, recalled the situation differently from the reality of what occurred. The combination of Counsel's experience and credibility, the record indicating Counsel's various motions and numerous objections during the trial, and the fact that this issue was never discussed with Counsel by Applicant or his family following the trial leads this Court to find Applicant has failed to meet his burden of proof of establishing that Counsel was deficient in his representation as to this matter, or that Applicant suffered any prejudice as a result of the alleged deficiencies. This claim is denied and dismissed.

Summary

This Court finds in regards to the allegation of ineffective assistance of counsel, Counsel's testimony is most credible. This Court further finds Counsel adequately conferred with 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 Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of Applicant.

This Court also finds Applicant has failed to prove the second prong of Strickland – that

he was prejudiced by Counsel's performance. This Court concludes 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 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 an 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 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 4th **day of** April **, 2014.**

Clifton Newman
Presiding Judge