

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
Mykel Rasheed Watkins, #340783,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2011-CP-42-2630

ORDER OF DISMISSAL

This matter comes before the Court by way of an Application for Post-Conviction Relief filed June 15, 2011, and amendment filed August 2, 2012. The Respondent made its Return on or about July 13, 2012. An evidentiary hearing into the matter was convened on November 15, 2013, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Joseph E. Hill, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, J. Patricia Anderson, Esquire, 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 trial transcript and Applicant's appellate records.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. The Applicant was indicted at the October 2007 term of the Spartanburg County Grand Jury for armed robbery (07-GS-42-5083). He was represented by J. Patricia Anderson, Esquire. On May 17, 2010, the

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Applicant proceeded to trial, where he was found guilty of the charge by a jury. He was sentenced by the Honorable J. Derham Cole to confinement for a period of twenty-one years.

A timely notice of appeal was filed with the South Carolina Court of Appeals. An Anders brief was filed on Applicant's behalf. State v. Watkins, Op. No. 12-UP-268 (filed May 2, 2012). The Remittitur was returned on May 21, 2012.

ALLEGATIONS

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

1. Ineffective assistance of counsel;
2. Improperly brought before the Grand Jury; and
3. Denial of due process equal protection.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v.

Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

Counsel testified that she was appointed to represent Applicant in this matter. Counsel testified that the Applicant was out on bond prior to trial, so she had him review the path that he had taken on that night. Counsel reviewed the videotape evidence and felt that the masked robber appeared to be shorter than Applicant and right handed. Counsel testified that the co-defendant was not wearing a mask in the tape. Counsel acknowledged that the Applicant was identified by the victim, but it was not very reliable and there were no fingerprints to link Applicant. Counsel testified that the Applicant informed her of potential alibi witnesses and she tried very hard to find them, but none of the witnesses were located. Counsel testified that she

called the numbers Applicant provided her with and visited several locations, but could not find the witnesses. Counsel testified that the Applicant took the stand in his defense, but the State presented the co-defendant, co-defendant's Aunt, and the victim. Counsel testified that their defense theory was that it was not logical that the Applicant and his co-defendant would have participated in a robbery together because they belonged to different groups and neighborhood gangs. Counsel testified that she also visited the store, but could not get inside photos because the store had been closed. Counsel testified that she did not interview the police prior to the trial because she assumed they would be at trial and she had their incident reports. Counsel also testified that she did not get an expert to deal with the height of the person in the video. However, Counsel testified that she tried to point out the Applicant's neck tattoos and the fact that you could not see any tattoos on the masked person in still photos taken from the video. Counsel acknowledged that she did not make an objection or motion for mistrial when the State referenced the absence of the alibi witnesses during their cross of Applicant and closing. The only other witness that Counsel testified might have been able to be called was the other victim from the robbery, the store janitor, but Counsel could not find him.

This Court finds the testimony of Counsel to be credible. Following testimony and review of the transcript, it is clear that Counsel had reviewed the facts and evidence, as well as the options that Applicant faced and any possible defenses. 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

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trial). The Applicant failed to demonstrate that if Counsel been more fully prepared or completed additional investigation into the alibi, gang affiliations, or relationships between witnesses, the outcome of the trial would have been changed. The Applicant failed to show any prejudice that may have resulted from Counsel's alleged deficiency. Accordingly, this allegation is dismissed.

This Court finds that Counsel noted that her strategy was to call into question the credibility of the State's witnesses and their alleged relationships with the Applicant. This Court finds that Counsel did all she could do to further that strategy, but ultimately, the decision came down to who the jury believed. Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). The Applicant has not shown that Counsel was deficient in her choice of tactics used to support Applicant's defense.

In regards to the alibi witnesses, it is clear based upon the number of continuances requested to have the witnesses appear, that the alleged witnesses still refuse to appear to testify on Applicant's behalf. In order to show prejudice from the alleged failure to call a witness, the Applicant must provide competent evidence of the testimony the alleged alibi witness would provide. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992). The Applicant failed to present any testimony at the PCR hearing from an alibi witness or present evidence of that testimony in some other fashion that would demonstrate that Counsel was ineffective as to failing to call alibi witnesses. Additionally, in regards to expert testimony, this Court finds that

it easily could have gone both ways and could have left room for speculation. There is no evidence that an expert could have been located to testify as to the differences in height of the perpetrator and Applicant, or that the testimony would have affected the outcome of the trial. This Court finds no deficient behavior on Counsel's behalf. Therefore, these claims are denied and dismissed.

Improperly Brought Before Grand Jury & Denial of Due Process/Equal Protection

The Applicant also raised the above allegations in his application and amendment. However, the Applicant did not pursue either allegation at the hearing. Therefore, this Court finds that the Applicant voluntarily waived these allegations and they are dismissed.

Summary

This Court finds in regards to the allegation of ineffective assistance of counsel, Counsel's testimony is credible. This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in her 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 her 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), SCRCR, 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 5 day of MARCH, 2014.


Robin B. Stilwell
Presiding Judge

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