

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Buddy Arizona Harris,)
 S.C.D.C. #191201,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2012-CP-23-6446

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 SC Court of Appeals
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ORDER OF DISMISSAL

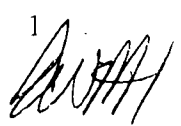
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This matter comes before the Court by way of an application for post-conviction relief (PCR) filed October 9, 2012. The Respondent made its return on May 2, 2013. An evidentiary hearing into the matter was convened on February 19, 2014 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by David R. Harrison, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's trial counsel, Randall L. Chambers, Esquire. The Court had before it the trial transcript, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, the return, and the appellate records.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the April 2011 term of the Greenville County Grand Jury for two counts each of breaking and entering a motor vehicle (2010-GS-23-2140, -2141) and petit larceny (2010-GS-23-4203, -4204).

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He was represented by Randall L. Chambers, Esquire.

After the State brought the case to trial, the Applicant was found guilty. On May 18, 2011, the Honorable C. Victor Pyle, Jr. sentenced the Applicant to consecutive terms of five years for one count of breaking and entering a motor vehicle¹ and five years suspended on service of three years and five years probation on the second count of breaking and entering a motor vehicle.² Judge Pyle levied concurrent sentences of thirty days for each count of petit larceny.

A notice of appeal was filed at the South Carolina Court of Appeals. Elizabeth A. Franklin-Best, Esquire, perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. Harris, Op. No. 2012-UP-474 (S.C. Ct. App. filed August 1, 2012).

ALLEGATIONS

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

1. Ineffective assistance of trial counsel.
 - a. Counsel did not adequately prepare the case.
 - b. Counsel failed to object to the sentence.

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.

¹ 2010-GS-23-2140.

² 2010-GS-23-2141.

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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).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 117-13, 386 S.E.2d 624, 625 (1989). “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 v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

The Applicant stated he only had two meetings with trial counsel before the trial – once to make a payment and once to discuss the case three days before trial. The Applicant stated they did not discuss his version of events. The Applicant stated his co-defendant’s NCIC report was not in the discovery materials. The Applicant stated he gave trial counsel the names of two witnesses (Daniel Harris and Greg Thompson) who could testify that he was at Jack In The Box that day and not at the crime scene. The Applicant stated trial counsel did not interview these witnesses, but that they were present at trial. The Applicant stated these witnesses were not

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called at trial because trial counsel said "I got this." The Applicant stated he asked trial counsel about videotapes from Jack In The Box but trial counsel stated this evidence would not make a difference. The Applicant stated he wanted to testify but trial counsel said his prior record could be held against him. The Applicant stated trial counsel should have objected to his illegal sentence.

Trial counsel testified he could not recall the number of meetings he had with the Applicant but was confident they met more than twice and that he would also see the Applicant when he was bond carded in to court. Trial counsel testified he filed discovery motions, received those materials, reviewed them with the Applicant, and gave him a copy of the materials. Trial counsel confirmed he did not receive the co-defendant's NCIC report in the discovery materials but stated he did not know if the co-defendant had any prior convictions. Trial counsel testified he impeached the co-defendant on cross-examination with the charges related to this case. Trial counsel testified he did not recall whether the Applicant gave him the names of any witnesses but that he would have tracked down any potential witnesses and spoken to them. Trial counsel testified he would have called witnesses at trial if their testimony had any value. Trial counsel testified the Applicant may have mentioned a possible recording from Jack In The Box but that he did not follow up on this because it was not a big issue and the Jack In The Box was located so close to the crime scene. Trial counsel testified he discussed the Applicant's prior convictions with him and that they would be used for impeachment. Trial counsel testified he told the Applicant his prior record was bad enough (and contained similar crimes as the ones he was charged with) that it would prejudice him but stated he would have had the Applicant testify at trial if he felt strongly about it. Trial counsel testified the Applicant's sentence may not have been fair, but it was a legal sentence.

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This Court finds the Applicant failed to meet his burden of proving trial counsel failed to properly prepare and investigate the case. Trial counsel testified he had several meetings with the Applicant and that they reviewed the State's evidence. Trial counsel testified he provided the Applicant a copy of the discovery materials. Trial counsel testified he would have investigated any potential witnesses in the case. This Court finds trial counsel's testimony is credible. This Court finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation. This Court finds the Applicant failed to articulate what more trial counsel should have done in their meetings and trial preparation for the case. See Jackson v. State, 329 S.C. 345, 349-50, 495 S.E.2d 768, 770 (1998) (finding applicant failed to prove prejudice from counsel's failure to investigate criminal backgrounds of victims and witnesses when he failed to substantiate at the PCR hearing that the victims and witnesses had criminal records).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have called two witnesses at trial to testify he was at Jack In The Box that morning. Trial counsel testified he would have investigated any witnesses the Applicant provided and would have called witnesses at trial if they had value. This Court finds trial counsel's testimony is credible. Regardless, as these alleged witnesses did not testify at the evidentiary hearing, any discussion regarding what they would have testified about at trial is purely speculative. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme Court "has repeatedly held a PCR 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.") (emphasis in original).

This Court finds the Applicant failed to meet his burden of proving trial counsel should

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have investigated whether videotape from Jack In The Box could have been useful to his defense. Trial counsel testified there was little value in such evidence, as the Jack In The Box was located very close to the crime scene. This Court notes trial counsel did question the co-defendant about the Applicant's presence at the Jack In The Box. (Trial transcript, pp.68-69). Regardless, as the Applicant failed to present any video recordings at the PCR hearing, this Court cannot speculate as to its potential impact at a trial. See, e.g., Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (holding that, since the contents of challenged documents were not presented at the PCR hearing, the Applicant could not demonstrate how the failure of counsel to obtain these documents prejudiced the defense).

This Court finds the Applicant failed to meet his burden of proving trial counsel erred in not presenting a defense case at trial. The Applicant stated he wanted to testify but trial counsel said his prior record could be used against him. Trial counsel confirmed they discussed the right to testify and that he told the Applicant both that his prior record of similar crimes would be prejudicial and he would lose the ability to give the final closing argument. This Court finds trial counsel's testimony is credible. This Court notes the trial judge thoroughly questioned the Applicant about whether or not he wanted to testify, and the Applicant said he would not. (Trial transcript, pp.86-88). This Court finds the Applicant's decision not to testify was informed and voluntary. See Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000) (holding a defendant's decision to testify or not must be made with knowledge of the consequences of either choice). This Court further finds that, in light of the Applicant's prior record and that he would lose the final closing argument, trial counsel made a strategic decision not to present a defense case. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding

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where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to his sentence. This Court finds the sentence imposed by the trial judge in this case was, in fact, a legal and appropriate sentence. See, e.g., State v. Wickenhauser, 309 S.C. 377, 382, 423 S.E.2d 344, 347 (1992) (noting the maximum sentence for DUI, fourth offense is five years and finding a sentence of four years suspended on the service of eighteen months and five years probation does not exceed the maximum sentence because "any actual period of incarceration under this sentence will not exceed the maximum statutory limit"). As such, there was no basis upon which trial counsel could have argued it was illegal.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial 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 trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

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CONCLUSION

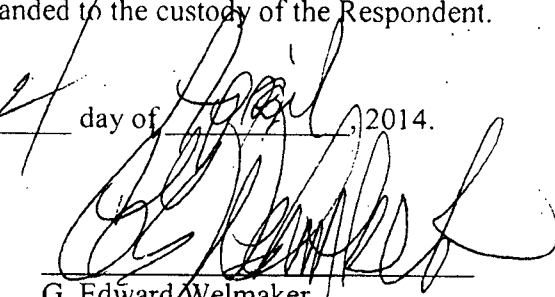
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

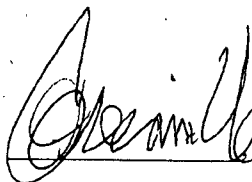
IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 27 day of April, 2014.



G. Edward Welmaker
Presiding Judge
Thirteenth Judicial Circuit



South Carolina.

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

JUDGMENT IN A CIVIL CASE

CASE NO: 2012CP2306446

FILED
GREENVILLE SC SC
PAUL B. WICKENSIMER
2012 APR - 9 P 3: 00

Buddy A Harris vs. South Carolina State Of

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**
SCRC (Vol. Nonsuit); Rule 43(k), SCRC (Settled); Other: _____
 Rule 12(b), SCRC; Rule 41(a),
- ACTION STRICKEN (CHECK REASON):**
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other: _____
 Rule 40(j) SCRC; Bankruptcy;
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded;
 Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court;

Dated at Greenville, South Carolina, this _____.

Court Reporter: _____

PRESIDING JUDGE - G Edward Welmaker

This judgment was entered on the _____, and a copy mailed first class this _____, to attorneys of record or to parties (when appearing pro se) as follows:

Caroline M.W. Horlbeck 101 Whitsett Street
Greenville, SC 29601

Karen Christine Ratigan PO Box 11549 Columbia,
SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court