

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF CALHOUN)

Michael Smith, 311064
 Plaintiff

FILED

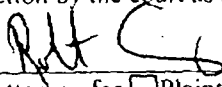
CASE NO.
2010-CP-09-0088

2011 SEP 26 P 2:57

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

State Of South Carolina
 Defendant.

KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY
ST. MATTHEWS, SC

| | |
|--|---|
| Plaintiff's Attorney: Nicole Singletary, Bar No. Address: 4511 Main Street Columbia SC 29203 phone: fax: e-mail: other: | Defendant's Attorney: Robert Comey, Bar No. Address: Post Office Box 11549 Columbia SC 29211-1549 phone: (803) 734-3737 fax: (803) 734-4113 e-mail: other: |
| <input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input checked="" type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III) | |
| SECTION I: Hearing Information | |
| Nature of Motion: Estimated Time Needed: Court Reporter Needed: <input type="checkbox"/> YES / <input type="checkbox"/> NO | |
| SECTION II: Motion/Order Type | |
| <input type="checkbox"/> Written motion attached <input checked="" type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. | |
|  Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant | September 8, 2011 Date submitted |
| SECTION III: Motion Fee | |
| <input type="checkbox"/> PAID - AMOUNT: <input checked="" type="checkbox"/> EXEMPT: <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support (check reason) <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input checked="" type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRCP) <input type="checkbox"/> Proposed order submitted at request of the court: or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: <input type="checkbox"/> Other: | |
| JUDGE'S SECTION | |
| <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: | _____ JUDGE CODE: _____ Date: _____ |
| CLERK'S VERIFICATION | |
| Date Filed: _____ | |
| Collected by: _____ | |
| <input type="checkbox"/> MOTION FEE COLLECTED: _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: _____ | |

STATE OF SOUTH CAROLINA

FILED

COUNTY OF CALHOUN

2011 SEP 25 P 2:57

) IN THE COURT OF COMMON PLEAS

2010-CP-09-0088

Michael Smith, #311064,

Applicant,

KENNETH WASTY
CLERK OF COURT
CALHOUN COUNTY
ST. MATHEWS, SC

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 April 19, 2010. The Respondent made its Return July 27, 2010. An evidentiary hearing into the matter was convened on June 6, 2011, at the Dorchester County Courthouse. The Applicant was present at the hearing and was represented by Nicole Singletary, Esquire. The Respondent was represented by Mary S. Williams of the South Carolina Attorney General's Office.

At the hearing, the Applicant began by making a motion for a continuance, which this Court respectfully denied. Upon the commencement of the hearing, the Applicant testified on his own behalf. Also testifying was Charlie Johnson, Jr., Esquire. This Court had before it the records of the Calhoun County Clerk of Court, the guilty plea transcript, and the Applicant's records from the South Carolina Department of Corrections.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Calhoun County Clerk of Court. The Applicant

was indicted for Murder (2004-GS-09-0145). Applicant was represented by Charlie Jay Johnson, Jr., Esquire. Applicant proceeded to a jury trial before the Honorable Deadra Jefferson. Applicant was found guilty and on September 1, 2005, he was sentenced to forty-five (45) years imprisonment.

A notice of appeal was filed and an Anders brief filed. The appeal was dismissed. State v. Smith, Op. No. 2009-UP-415 (S.C. Ct. App. filed September 3, 2009). The Remittitur was sent on September 21, 2009.

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

1. "Constitutional violations."
 - a. "Ineffective assistance of counsel."
 - b. "Transfer of jurisdiction."

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.

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, supra). 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).

Ineffective Assistance of Trial Counsel

Applicant alleges that trial counsel was ineffective because Counsel didn't adequately prepare a defense strategy, didn't object to statements by the Solicitor that "improperly called [Applicant's] character into question", didn't object to the testimony of

an EMS worker named Becky Springer who Applicant believed the State improperly communicated with prior to the start of the trial and Counsel improperly advised Applicant to take the witness stand in his defense. On cross-examination, Applicant admitted that the trial court did advise him of his Constitutional right not to testify and even had a brief colloquy with Applicant about that right on the record. Further, Applicant testified at the PCR hearing that trial Counsel had brought out the testimony of EMS worker Becky Springer on cross-examination as being unreliable due to a potential improper communication between the State and her. Applicant also admitted that the Court had given the explicit instruction to the jury that statements made during closing arguments made by the lawyers, such as the "improper character evidence" Applicant alleges, are not evidence in the case for the jury to consider as such.

Upon taking the stand at the PCR hearing, Mr. Johnson ("counsel") stated that he tried to meet with Applicant roughly every two months during his nearly two years of representing Applicant, during which he reviewed the discovery with him and discussed potential trial strategy. Counsel stated that he also hired a private investigator with whom he and Applicant met with three times together reviewing various evidence in the case each time. Counsel stated that based on the evidence in the case, there was no doubt that Applicant was present at the scene of the crime, but because there was proof of only one shooter and no eye witnesses testifying, his trial strategy was to show that a co-defendant, not Applicant, was the one who pulled the trigger in the murder. According to his testimony, this was a strategy that he and Applicant had discussed in depth and had both agreed upon as the best course of action at trial. Counsel further

stated that he had advised Applicant to take the witness stand in his defense because, not only did Applicant have no prior criminal record, but Applicant was adamant he was not the shooter. Counsel believed that the smartest tactic to prove Applicant's innocence was to have Applicant take the stand and simply testify truthfully to the jury. Additionally, counsel articulated that he was unable to subpoena Applicant's half-brother, Mr. Rivers, to testify on Applicant's behalf as Applicant requested because Mr. Rivers was a co-defendant in the case and had refused to testify absent a subpoena. On cross-examination, trial counsel stated that he also objected to the admissibility of photos of the crime scene and victim, and in fact had several of the photos suppressed from being introduced by the State during the course of the trial. On cross-examination, counsel said that he almost always took part in a jury charge conference with the judge prior to the charge being given and that, based on the charges agreed upon, he saw nothing to object to as the charges were very straight forward and correct.

Based on the testimony presented at the PCR hearing, this Court finds that the Applicant has failed to meet his burden in proving counsel's performance fell below the objective standard of reasonableness based on professional norms as required under Strickland v. Washington. Counsel thoroughly investigated the case, interviewed and investigated potential witnesses, hired an investigator and met with Applicant several times to discuss the charges Applicant was facing, all relevant discovery and potential defenses to be used at trial. Additionally, Counsel presented a logical and strong trial strategy that was discussed and prepared with Applicant prior to proceeding to trial. Where counsel articulates a valid reason for employing certain trial strategy, such conduct should not be

deemed ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995). Defense counsel is not ineffective for making valid trial strategy decisions. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). Therefore, Applicant has failed to prove by a preponderance of the evidence that counsel's performance fell below the objective standard of reasonableness required of criminal defense attorneys based on professional norms.

Further, Applicant has failed to prove that there is a reasonable probability that the result at trial would have been different had trial counsel done what the applicant alleges he should or should not have done. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). This Court finds the allegation of ineffective assistance of trial counsel to be without merit. Therefore, this Court finds that the application must be denied and dismissed with prejudice.

Other Allegations

No other allegations were raised at the PCR hearing. Therefore, any additional allegations are deemed waived because no evidence was presented.

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 advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order to secure the appropriate appellate review. His

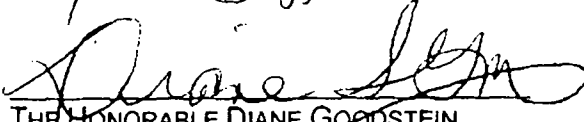
attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

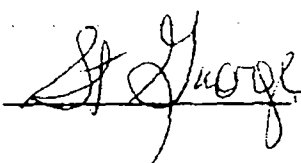
1. That the Application for Post-Conviction Relief must be DENIED AND DISMISSED WITH PREJUDICE; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this

14 day of Sept, 2011



THE HONORABLE DIANE GOODSTEIN
Presiding Judge
First Judicial Circuit

 South Carolina.



ALAN WILSON
ATTORNEY GENERAL

September 23, 2011

REGISTERED MAIL
CLERK OF COURT
CALHOUN COUNTY
ST. MATTHEWS, S.C.

2011 SEP 26 P 2:57

FILED

The Honorable Kenneth Hasty
Clerk of Court, Calhoun County
Post Office Drawer 709
902 F.R. Huff Drive
St. Matthews SC 29135

Re: Michael Smith, 311064 v. State of South Carolina
2010-CP-09-0088

Dear Mr. Hasty:

Enclosed please find the original **Order of Dismissal**, in the above-captioned case, signed by the Honorable Diane S. Goodstein, for filing in your office. Please forward a **time stamped copy** back to our office for filing.

Sincerely,

Robert D. Corney
Assistant Attorney General

RDC/lm
Enclosure(s)