

SUPREME COURT OF SOUTH CAROLINA

APPEAL FROM HORRY COUNTY
In The Court of Common Pleas

Honorable Benjamin H. Culbertson
Common Pleas Judge of the Fifteenth Judicial Circuit

Case No.: 2012-CP-26-6621

Arnold L. Ward, #109169,

Petitioner,

v.

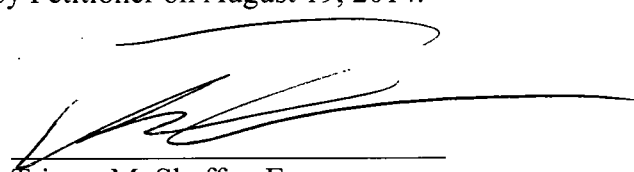
State of South Carolina,

Respondent.

NOTICE OF APPEAL

Petitioner appeals the Order of Dismissal, dated August 1, 2014 of the Honorable Benjamin H. Culbertson, filed August 13, 2014 and received by Petitioner on August 19, 2014.

August 21, 2014


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AUG 25 2014

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Arnold L. Ward, #109169,)

Case No. 2012-CP-26-6621

Applicant,)

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

HORRY COUNTY
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MELANIE JOHNS-WARD
CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief filed August 12, 2012. Respondent made a timely Return on or about December 17, 2012. The Court convened an evidentiary hearing into the matter on June 19, 2014, at the Horry County Courthouse. Applicant was present at the hearing and represented by Tristan M. Shaffer, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, William Thomas Floyd, Esquire, also testified. The Court had before it a copy of the trial transcript, the records of the Horry County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the return. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In January 2007, the Horry County Grand Jury indicted Applicant for attempted first degree burglary (2007-GS-26-418).

William Thomas Floyd, Esquire ("trial counsel"), represented Applicant. On April 13, 2010, Applicant proceeded to trial before the Honorable Steven H. John and a jury. On April 14, 2010, the jury found Applicant guilty as indicted. Judge John sentenced Applicant to fifteen (15) years imprisonment.

Applicant filed a timely notice of appeal, and Wanda H. Carter, Esquire, of the Office of Appellate Defense, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on February 29, 2012. State v. Ward, Op. No. 2012-UP-123 (S.C. Ct. App. filed February 29, 2012). The Court of Appeals returned the remittitur to the circuit court on March 16, 2012.

II. ALLEGATIONS

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

1. "Excessive sentencing"
2. "Subject Matter Jurisdiction"
3. "Ineffective assistance of counsel"
4. "Ineffective assistance of counsel"

At the evidentiary hearing, Applicant proceeded on only the allegations of ineffective assistance of trial counsel for failure to object to Judge John's charge to the jury regarding the elements of first degree burglary.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary 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).

A. Summary of Testimony

Applicant testified he did have a prior criminal record for housebreaking. However, he testified at the time of his arrest he was self-employed as a contractor and had a substantial income. Applicant testified he never understood the terms of the initial plea offer and decided to decline it. However, he admitted he would not have taken a plea because he wanted to go to trial. Applicant testified he met with trial counsel a couple of times before trial. He stated he did not discuss much trial strategy with trial counsel because there was not much of a case to fight. Applicant then testified to his version of events the night of his arrest and admitted he relayed this information to trial counsel. He recalled trial counsel attempting to keep his three (3) prior housebreaking charges from being presented to the jury.

Trial counsel testified he has been a public defender since 1991. He testified he met with Applicant at least three (3) times. During these meetings, they discussed the State's evidence and Applicant's version of events. Trial counsel recalled discussing pleas, but Applicant never intended to plea. Trial counsel testified his trial strategy was to attempt to negate the intent element of the crime. In that regard, he called as witnesses Applicant's business associate and wife to corroborate Applicant's version of events.

Trial counsel testified he explained to Applicant how damaging his prior record would be if presented to the jury. He recalled explaining to Applicant the fact his three (3) prior housebreaking convictions were used to enhance this charge. Trial counsel also candidly admitted he believed the State also had indicted Applicant for attempted first degree burglary because the incident occurred at night. He testified the State never moved to amend the

indictment to include the nighttime element. Trial counsel recalled he did not object to Judge John charging the jury as to the nighttime element because he did not realize that was not alleged in the indictment. Trial counsel also testified he argued to exclude the prior housebreaking convictions because they were more than ten (10) years old and because Applicant pled to all of them on the same day.

B. Ineffective Assistance of Trial Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "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." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance

was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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." Id. at 117-18, 386 S.E.2d at 625.

The Court finds Applicant failed to meet his burden of proving trial counsel ineffective. The Court finds trial counsel's testimony credible and Applicant's not credible. The Court further finds trial counsel adequately conferred with Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

The Court finds Applicant's allegation trial counsel was ineffective for failure to object to Judge John's charge to the jury regarding the elements of first degree burglary is without merit. Applicant alleges trial counsel should have objected to Judge John charging the jury that the State may prove attempted first degree burglary¹ by proving Applicant attempted to enter the victim's house at night. (Trial Tr. 258:2-7). Applicant argues the inclusion of this charge enlarged the scope of the indictment and allowed the jury to convict Applicant of a crime for which he was not indicted.² However, the State did present evidence Applicant had two prior

¹ S.C. Code Ann. § 16-11-311(A) provides in pertinent part:

"A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and either [...] (2) the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; or (3) the entering or remaining occurs in the nighttime."

² The indictment specifically charges that Applicant "did in Horry County on or about October 31, 2006, willfully and unlawfully attempt to enter the dwelling of Shane Holley, [...] without consent and with the intent to commit a crime therein, and the defendant had two or more prior convictions of burglary and/or housebreaking, in violation of the Common Law and Section 16-11-311[.]"

[Handwritten signature]

convictions for housebreaking. (Trial Tr. 124:10-12). Therefore, the Court finds the evidence presented at trial supports a conviction for the indicted offense.

The Court further finds this case is distinguishable from Bailey v. State, 392 S.C. 422, 709 S.E. 671 (2011). There, the defendant was indicted for homicide by child abuse and the indictment specifically indicated the defendant physically abused the victim. Bailey, 392 S.C. at 429 n.4, 709 S.E.2d at 674 n.4. The trial judge gave a supplemental jury instruction that allowed the jury to convict the defendant of homicide by child abuse for neglecting the victim. Id. at 430, 709 S.E.2d at 675. The South Carolina Supreme Court held this supplemental jury instruction allowed the jury to convict the defendant of a crime alternative to the one alleged in the indictment. Id. at 436, 709 S.E.2d at 678. However, the supplemental instruction came after the jury informed the trial judge it did not find evidence the defendant physically abused the victim. Id. at 429, 709 S.E.2d at 675.

In Applicant's case, there is no evidence the jury based its verdict on the fact the crime occurred at night. Unlike the jury in Bailey, Applicant's jury did not indicate they found no evidence Applicant had two prior housebreaking convictions. Such a finding would have been unreasonable in light of the certainty of the two prior convictions entered into evidence. Therefore, this is not a situation where "the indictment facially charges a complete offense and the State presents evidence which convicts under a different theory than that alleged." Bailey, 392 S.C. at 433, 709 S.E.2d at 677 (quoting Thomason v. State, 892 S.W.2d 8 (Tex. Crim. App. 1994)). Rather, the State presented evidence directly supporting the alleged theory. Accordingly, the Court finds there is no material variance between the State's evidence and the allegations in the indictment. Because there was no material variance, Judge John's charge did

not allow the jury to convict Applicant for an unindicted crime and trial counsel was not ineffective in failing to object to the charge.³

C. 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, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes 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.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt 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, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf.

³ The Court also notes trial counsel's strategy was to attempt to exclude the prior convictions. Had he been successful in this attempt, there is a reasonable probability the State would have attempted to proceed on the theory the crime occurred in the night time. Because trial counsel was well aware the crime occurred in the night time, he would have had no grounds to object to an amendment to the indictment to include the nighttime element. See State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005) ("The indictment is a notice document."). Accordingly, even if trial counsel was deficient for failing to realize the indictment did not contain the nighttime element, Applicant cannot show he was prejudiced by this oversight.

Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 1ST day of August, 2014.



THE HONORABLE BENJAMIN H. CULBERTSON
Resident Judge
Fifteenth Judicial Circuit

Georgetown, South Carolina

D CR

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AUG 25 2014

S.C. SUPREME COURT
AUGUST 21, 2014

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Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: Arnold L. Ward #109169 v. State of South Carolina
Case No.: 2012-CP-26-6621

Dear Clerk of Court:

Enclosed please find an original and one copy of a Notice of Appeal in the above referenced matter. If you would, please file the Notice of Appeal and return a clocked copy to me in the envelope provided.

Please be advised that I have been court appointed to represent Mr. Ward in this matter.

Thank you for your assistance in this matter. If you have any questions or concerns, please feel free to contact my office.

With kind regards,



Tristan M. Shaffer

TMS/dke

cc: Joshua L. Thomas, Esquire
Horry County Clerk of Court
Kimberly McCall
Arnold Ward

DEPT

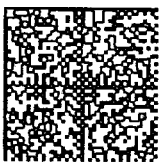
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COURT

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