

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Thomas A. Smart, #299433,)

Case No. 2013-CP-26-225

Applicant,)

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

HORRY COUNTY
AUG 13 PM 2:20
MELANIE HUBBINS-WARD
CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief filed April 4, 2013. Respondent made a timely Return on or about October 24, 2013. The Court convened an evidentiary hearing into the matter on June 18, 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 B. von Herrmann, 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 currently incarcerated in the South Carolina Department of Corrections pursuant to orders of commitment from the Horry County Clerk of Court. In January 2010, the Horry County Grand Jury indicted Applicant for throwing bodily fluids on a correctional facility

employee or local law enforcement officer (2010-GS-26-0682), threatening a public official (2010-GS-26-0684), and resisting arrest (2010-GS-26-0685). William B. Von Herrmann, Esquire (“trial counsel”), represented Applicant.

On July 19, 2010, Applicant proceeded to trial before The Honorable William H. Seals, Jr. and a jury. On July 20, 2010, the jury found Applicant guilty as indicted. Judge Seals sentenced Applicant to consecutive terms of ten (10) years imprisonment for throwing bodily fluids, three (3) years imprisonment for threatening a public official, and six (6) months imprisonment resisting arrest.

Applicant filed a timely notice of appeal, and Tristan M. Shaffer, Esquire, then of the Office of Appellate Defense, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant’s conviction. State v. Smart, Op. No. 2012-UP-371, 2012 WL 10844371 (S.C. Ct. App. filed June 20, 2012). Applicant petitioned the South Carolina Supreme Court for review of the Court of Appeals’ decision, but later voluntarily withdrew his appeal. By order dated February 22, 2013, the Supreme Court dismissed the appeal. The Supreme Court returned the remittitur to the circuit court on February 26, 2013.

II. ALLEGATIONS

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

1. “Ineffective assistance of counsel”
 - a. “My attorney told me I couldn’t be legally charged with throwing of bodily fluid because the officer that was in question was a police officer and not a correctional officer.”
 - b. “I was charged with the throwing of bodily fluid on a correctional officer. My attorney told me not to plead guilty because the officer in question was not a correctional officer but a police officer. Also because it was said that I spit on the

Officer. That's what I was accused of. My attorney said spitting does not constitute throwing. Therefore I'm not guilty of throwing anything. That the judge would have to throw out the charge. Transcript – pg 60-line #11 – pg 70-line #13.”

- c. “My attorney also had his wife whom is an attorney help him prepare my defense. He stated that she was an attorney also and that she agreed that I should not have been charged with throwing of bodily fluids on a correctional officer because the said officer was in fact a police officer. Also my attorney stated that I should have been charged with assault on a police officer instead. I later found out that his wife worked for the prosecutors office. He was giving knowledge of my defense to the prosecutor. That's a conflict of interest. It's illegal for my lawyer to discuss my case with anyone but me. The prosecution knew my whole defense because my attorney Bert Von Hermen told his wife my defense and she works for the prosecutions office.”
- d. “Before trial I told my lawyer about the night I received the charges in which I'm incarcerated on. I told him I believed I was drugged. Alost ha when I woke up in jail that all my money was gone. He never told the jury my thoughts or opinions on what happened the night I was arrested. He told me to plea the 5th Amendment. Not to testify. He stated let him handle my trial. The jury should have heard my whole story.”
- e. “I believe I was convicted over a definition of the word throw. The court and myself picked 12 jurors to judge wheather or not I was guilty of throwing bodily fluids. The 12 jurors were competent and knows what the word throw means. Because my attorney didn't object to the use of a dictionary I was found guilty of the throwing of bodily fluids on a correctional officer. The prosecution stated that any forward motion was throwing (Not true.) But because the definition that the prosecutor found in a dictionary said any forward motion is throwing I was found guilty. The jury should have been aloud to use their own interpretation of throwing. The jury didn't find me guilty. A dictionary did. My lawyer should have objected to the use of a dictionary.”

At the evidentiary hearing, the Applicant proceeded on the following allegations:

1. Violation of due process because there is no evidence Applicant actually threw bodily fluids.
2. Ineffective assistance of counsel for failing to object to the solicitor's use

- of a dictionary during closing arguments.
3. Ineffective assistance of counsel for advising Applicant to proceed to trial under a theory that spitting does not constitute throwing.
 4. Ineffective assistance of counsel for discussing defects in the indictment with his wife, an assistant solicitor.
 5. Conflict of interest when trial counsel allowed his wife to assist with the preparation of Applicant's case.

Respondent consented to Applicant amending his application to include the above grounds for relief with the exception of the conflict of interest allegation. The Court overruled Respondent's objection and allowed Applicant to proceed on this ground. Because Applicant's post-conviction counsel was also his appellate counsel, Applicant also knowingly and voluntarily waived any claims he may have regarding counsel's performance on appeal.

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 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).

A. Summary of Testimony

Trial counsel testified he is a former deputy solicitor who now practices primarily criminal defense. He testified Applicant was intelligent and familiar with the criminal process. Trial counsel recalled Applicant had an appointed public defender before bonding out and retaining trial counsel. Trial counsel testified he met with Applicant seven (7) or eight (8) times. He recalled filing for discovery from the State and reviewing the State's response with Applicant.

Trial counsel believed the State offered Applicant a plea before Applicant retained him, but the plea was not on the table when Applicant retained him. Trial counsel recalled Applicant did not want to enter a plea that would expose him to more than five (5) years incarceration. He recalled he attempted to negotiate a lower plea offer for Applicant, but the State did not officially make any plea offers during his representation. However, he was confident the State would have allowed Applicant to enter a plea with a sentence of seven (7) or eight (8) years. However, trial counsel testified Applicant stated he would not enter such a plea. He also recalled advising Applicant of the risks of going to trial.

Trial counsel testified he and Applicant discussed every possible scenario Applicant was facing at trial. Trial counsel also testified he discussed his trial strategy with Applicant. Specifically, trial counsel told Applicant he could plead to the failure to stop for a blue light charge or go to trial and admit his guilt to that charge in hopes the jury would reach a compromised verdict. Trial counsel explained his theory of the case was the officers did not handle themselves professionally and there was no video of the resisting or throwing bodily fluids. He also sought to convince the jury Applicant's threat to "sit in a tree stand and shoot" an officer was not sincere. Trial counsel discussed with Applicant these strategies as well as his theory that spitting did not constitute throwing bodily fluids. However, trial counsel was adamant that he never told Applicant the case would be dismissed because spitting did not constitute throwing bodily fluids. Instead, trial counsel testified Applicant made the decision to go to trial with a full understanding this defense may not be successful.

Trial counsel was also adamant he never told Applicant the indictment would be quashed because it incorrectly indicated the victim was a correctional officer. Trial counsel testified he

explained this discrepancy in the indictment to Applicant and told him the State would likely be successful in amending the indictment. Trial counsel admitted he regularly discusses his cases with his wife, then an assistant solicitor, but that he has no knowledge of her ever sharing their discussions with any other solicitors. He also admitted he discussed this case with several other attorneys because of the novelty of the argument regarding spitting. Trial counsel testified he did not tell his wife about the indictment issue in this case. He also testified she had no involvement in the preparation of this case for trial.

Trial counsel articulated he did not object to the solicitor's use of a dictionary in closing arguments because he did not find it objectionable. Rather, he testified an objection to the use of the dictionary would have been overruled and would have brought attention to the solicitor's preferred definition. Trial counsel believed he could address the use of a dictionary to his advantage in his closing by arguing to the jury to use their common sense in deciding if spitting constituted throwing.

Applicant testified he had been drinking at a bar the night of his arrest. Applicant also testified he retained trial counsel because trial counsel said he could get a three (3) year plea offer. He testified he only went to trial counsel's office twice. Applicant testified trial counsel told him to not take a plea offer of seven (7) or eight (8) years because he would get the same sentence if convicted at trial. He testified he believed trial counsel only wanted to take this case to trial because he thought the assistant solicitor did not have a very good trial record. He also testified the assistant solicitor could not have known to amend the indictment unless he was told by trial counsel's wife. Applicant testified trial counsel shared trial strategy and privileged communications with his wife.

B. Due Process

The Court finds Applicant failed to demonstrate his conviction offends the Due Process Clauses¹ of the United States Constitution. Although a conviction may be unconstitutional when it rests upon no evidence at all, Thompson v. City of Louisville, 362 U.S. 199 (1960), the Court finds the question of whether any evidence supports Applicant's conviction is not properly addressed in post-conviction relief.

Initially, the Court notes the issue of the existence and sufficiency of the evidence was raised and ruled upon in Applicant's direct appeal. There, Applicant challenged the trial court's refusal to direct a verdict in his favor, "arguing his act of spitting blood on an arresting officer did not constitute throwing bodily fluids under the statute." Smart, 2012 WL 10844371, at *1. The Court of Appeals affirmed Applicant's conviction and indicated spitting is a prohibited conduct covered by the language of the statute. Id. Applicant contends the due process issue he now raises is distinct from the issue on appeal. However, the argument that spitting does not constitute throwing was raised on appeal in the context of a directed verdict issue. A directed verdict motion asks the court to consider merely "the existence of evidence, not its weight." State v. Wiggins, 330 S.C. 538, 545, 500 S.E.2d 489, 493 (1998). Thus, the existence of any evidence to support Applicant's conviction was directly raised at trial and on appeal. Accordingly, Applicant cannot now attempt to re-litigate that issue in a collateral attack. S.C. Code Ann. § 17-27-20(b) (post-conviction relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction."); see also

¹ See U.S. Const. amend V and U. S. Const. amend XIV, § 1.

Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) (“It is uniformly held that an application for post-conviction relief is not a substitute for an appeal.”).

Furthermore, Applicant cannot make a collateral attack on his conviction based on the sufficiency of the evidence used to convict him. Simmons, 264 S.C. at 423, 215 S.E.2d at 885 (“[T]he Uniform Post-conviction Procedure Act ‘shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.’” (quoting Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973))). In Sullivan v. State, the petitioner was convicted of violating the safe cracking statute. Sullivan, 251 S.C. 53, 54, 159 S.E.2d 918 (1968). He sought *habeas corpus* relief on the grounds “that the compartment broken into was not a safe within the meaning of the statute[.]” Id. at 55, 159 S.E.2d at 918. The Supreme Court held this challenge to the statutory language was “an attack upon the sufficiency of the evidence [and] may not be raised by *habeas corpus*.” Id. (citing Dickson v. State, 247 S.C. 153, 146 S.E.2d 257 (1966); Shelnut v. State, 247 S.C. 41, 145 S.E.2d 420 (1965); Medlock v. Spearman, 185 S.C. 296, 194 S.E. 21 (1937)). Similarly, Applicant now contends his actions the night of his arrest do not meet the statutory definition of throwing bodily fluids on an officer. Because this is a challenge to the sufficiency of the evidence supporting Applicant’s conviction, the Court finds this allegation should be dismissed as an improper ground for collateral relief.

Finally, were the Court to reach the merits of Applicant’s argument, it would agree with the Court of Appeals that spitting is within the ambit of behaviors prohibited by the statute. When faced with an undefined statutory term, a court must interpret the term in accord with its usual and customary meaning. State v. Morgan, 352 S.C. 359, 366, 574 S.E.2d 203, 206 (Ct. App. 2002) (citation omitted). Courts should consider not merely the language of the particular

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clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 569, 703 S.E.2d 197, 200 (2010) (citation omitted). The clear purpose of section 24-13-470² is to discourage conduct that would cause law enforcement and correctional officers to suffer the disgrace of having another's bodily fluid forced upon him, and also to protect law enforcement from potential diseases that may be transmitted through bodily fluids. Applicant's argument that spitting does not constitute throwing is at odds with legislative intent behind the statute. The term "saliva" is specifically listed as one of the prohibited bodily fluids, and saliva is typically thrown via the act of spitting. It would eviscerate the statute to excuse conduct such as Applicant's simply because Applicant neglected to spit into his hand before throwing it upon the officer. Accordingly, this Court declines to adopt Applicant's narrow interpretation that only criminalizes hand-launched bodily fluids.

C. Ineffective Assistance of 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

² "An inmate, a detainee, a person taken into custody, or a person under arrest, who attempts to throw or throws body fluids including, but not limited to, urine, blood, feces, vomit, saliva, or semen on an employee of a state correctional facility or local detention facility, a state or local law enforcement officer, a visitor of a state correctional facility or local detention facility, or any other person authorized to be present in a state correctional facility or local detention facility in an official capacity is guilty of a felony and, upon conviction, must be imprisoned not more than fifteen years. ..." S.C. Code Ann. § 24-13-470(A)

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.

1. Failure to object to the solicitor's use of a dictionary during closing arguments

The Court finds Applicant failed to meet his burden of proving trial counsel was ineffective for not objecting to the solicitor's use of a dictionary during closing arguments. Trial counsel testified he chose not to object because it would call attention to the definition the solicitor read. The Court finds this rationale is a valid reason for not objecting. Cf. Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000) (no ineffective assistance in not requesting

curative instructions because it tends precisely focus the jury on an issues counsel wants to keep out). Furthermore, trial counsel testified he expected more latitude to challenge the solicitor's definition of "throw" in his closing arguments if he did not object to the solicitor's use of the dictionary. Accordingly, the Court finds trial counsel articulated a valid strategy for not objecting. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992))).

Applicant has also not shown how he was prejudiced by the solicitor's use of the dictionary in closing arguments. The Court finds nothing objectionable in allowing the solicitor to read a definition from the dictionary during a closing argument. Furthermore, the trial judge charged the jury on the statutory definition of throwing bodily fluids on a law enforcement officer. (Trial Tr. 224:16-225:5). He also admonished the jury that the solicitor's arguments were not evidence. (Trial Tr. 82:2-12) The trial judge's instructions to the jury allowed them determine on their own whether Applicant's actions met the statutory definition of throwing bodily fluids. See Smith v. State, 375 S.C. 507, 523, 654 S.E.2d 523, 532 (2007) (trial judge's instructions can cure any objectionable material in solicitor's arguments (citing Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998))). Accordingly, Applicant has not shown he was prejudiced by trial counsel's lack of an objection to the solicitor's closing argument.

2. Advice to proceed to trial rather than plea

The Court also finds Applicant failed to show trial counsel was ineffective for advising Applicant to proceed to trial. Regarding this allegation, the Court finds trial counsel's testimony

very credible and Applicant not credible. Applicant alleged trial counsel virtually guaranteed a dismissal of his charges because the indictment was invalid and because spitting does not constitute throwing. In contrast, trial counsel credibly testified he never promised Applicant any specific outcome to his charges. He also testified he had lengthy discussion about the trial strategy and the likelihood of being unsuccessful in challenging the throwing bodily fluids charge. Trial counsel also testified Applicant was unwilling to enter a plea longer than five (5) years, and made the decision to proceed to trial. Applicant was also arraigned before trial and admitted it was his decision to proceed to trial. (Trial Tr. 73:18-77:5). Therefore, the Court finds Applicant knowingly and voluntarily exercised his right to a jury trial with a full understanding of the risks thereof. The Court further finds counsel adequately conferred with Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

D. Trial Counsel's Discussions with His Wife.

The Court finds Applicant failed to demonstrate any constitutional violations resulting from trial counsel's discussion of the case with his wife. Regarding these allegations, the Court finds trial counsel's testimony very credible; correspondingly, the Court finds Applicant's testimony not credible.

Trial counsel was not ineffective for having a discussion about a pending case with his wife. Trial counsel vehemently denied sharing any privileged information with his wife. Rather, he testified he and his wife regularly discuss the cases they are working on. Trial counsel also vehemently denied his wife ever relayed their discussions to other assistant solicitors. He specifically recalled he did not discuss the indictment issue in this case with his wife and she did not actively assist in preparing this case for trial. Applicant has presented no evidence, other

than his own testimony, that trial counsel shared any privileged or sensitive information with his wife, nor that she shared any such discussions with the assistant solicitor prosecuting Applicant's case.

Likewise, Applicant has not demonstrated a conflict of interest was created by trial counsel being married to an assistant solicitor. "An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendants." State v. Gregory, 364 S.C. 150, 152, 612 S.E.2d 449, 450 (2005) (citing Fuller v. State, 347 S.C. 630, 557 S.E.2d 664 (2001)). Contrary to Applicant's contentions, the Court finds trial counsel's wife did not actively participate in the preparation of this case for trial. Accordingly, there were no competing duties here giving rise to a conflict of interest.

Trial counsel testified he discussed the novel issues in this case with several other attorneys as well. Certainly such discussions were calculated to assist trial counsel in carrying out his representation of Applicant. Applicant has not presented, and the record does not contain, any evidence suggesting trial counsel's behavior was directly adverse to Applicant's interests. Accordingly, the Court finds Applicant is not demonstrated the result of his trial would have been different had trial counsel not discussed his case with others, including his wife.

E. 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. 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. The 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

DCK

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August 21, 2014

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

RECEIVED

AUG 25 2014

RE: Thomas A. Smart #299433 v. State of South Carolina
Case No.: 2013-CP-26-225

S.C. SUPREME COURT

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. Smart 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
Thomas A. Smart

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