

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
THE HONORABLE Robin B. Stilwell

CA No. 2013-CP-23-3233

TRAVAUGHN THOMAS,
APPELLANT,
vs.
STATE OF SOUTH CAROLINA
RESPONDENT.

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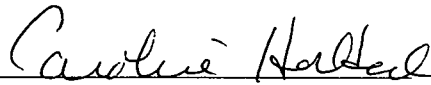
S.C. SUPREME COURT

FILED - CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2014 AUG 29 PM 1 24

NOTICE OF APPEAL

Appellant TRAVAUGHN THOMAS, appeals from the Order of the Honorable Robin B. Stilwell, Circuit Court Judge clocked July 31, 2014.

Respectfully submitted,


Caroline M. Horlbeck, Esq.
101 Whitsett St
Greenville, SC 29601

Date: August 29, 2014

Other Counsel of Record: Karen Ratigan, Esq.
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE SUPREME COURT

Travaughn Thomas,)
)
)
Appellant,)

C.A. No. 2013-CP-23-3233

-vs-)

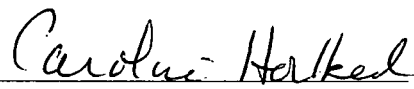
CERTIFICATE OF SERVICE

State of South Carolina,)
)
)
Respondent.)
_____)

This is to certify that I am an employee in the law office of Caroline M. Horlbeck, attorneys for Appellant, and that I have this day caused to be served upon the person(s) named below Appellant's Notice of Appeal by placing copies of same in the United States mail, with adequate postage thereon, addressed as follows:

Ms. Lorie French
S.C. Office of Appellate Defense
P.O. Box 11433
Columbia, SC 29211

Karen Ratigan, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211


Caroline M. Horlbeck

Greenville, South Carolina

August 29, 2014

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
Tra'Vaughn La'Roi Thomas,)
S.C.D.C. No. 342780,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
C.A. No. 2013-CP-23-03233

ORDER OF DISMISSAL

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER
2014 JUL 31 PM 4 49

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed June 10, 2013. The Respondent made its return on December 3, 2013. An evidentiary hearing into the matter was convened on June 17, 2014, at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Caroline Horlbeck, 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, Dorothy A. Manigault, 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 December 2009 term of the Greenville County Grand Jury for Armed Robbery (2009-GS-23-1867). He was represented by Dorothy A. Manigault, Esquire.

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After the State called the case to trial, the Applicant was found guilty. On September 15, 2010, the Honorable C. Victor Pyle, Jr. sentenced the Applicant to confinement for twelve years.

A Notice of Appeal was filed at the South Carolina Court of Appeals. Elizabeth A. Franklin-Best, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed Applicant's conviction and sentence. State v. Thomas, Op. No. 2012-UP-361 (S.C. Ct. App. filed June 13, 2012). The remittitur was sent June 29, 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. “[F]ailure to investigate [sic] and object to the constitutional claims [sic] so it could be presented for review on appeal.”
2. “Violation of Constitutional Right 6th and 14th amend.”

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).

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, 117-18, 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 trial counsel should have objected to Jerry Morehead’s testimony and investigated his statement. The Applicant stated trial counsel should have made a specific objection when the trial judge asked his family and friends to leave the courtroom during Morehead’s testimony. The Applicant stated trial counsel did not object when Juror #11 was not removed. The Applicant stated trial counsel did not object when the State introduced a dubbed copy of the video that did not have audio (though there was audio in the original video). The Applicant stated he wanted to testify at trial, but that both his brother and trial counsel advised him not to do so. The Applicant stated trial counsel did not investigate either that his cousin (Jay Smith) was similar in appearance to him or Morehead’s story about having taken a detour that night.

Trial counsel testified she was retained six or seven months before the trial. Trial counsel testified she filed discovery motions, received those materials, and reviewed them both

independently and with the Applicant. Trial counsel testified the Applicant did not ask her to investigate Morehead's original statement that Jamil Brown was the driver. Trial counsel testified the trial judge asked some of the Applicant's friends and family to leave the courtroom during Morehead's testimony because Morehead stated he had received threats. Trial counsel testified this issue came up during the trial, but there was no basis to object. Trial counsel testified a juror revealed he had the same employer as one of the State's witnesses. Trial counsel testified, however, that the trial judge thoroughly questioned this juror and there was no basis for her to object. Trial counsel testified she reviewed the video evidence but that there was no audio on her copy. Trial counsel testified she contacted the assistant solicitor about obtaining a copy of the video with audio. Trial counsel testified she and the Applicant discussed his right to testify both before and during the trial. Trial counsel testified she told the Applicant the advantages and disadvantages of testifying and that it was his decision. Trial counsel testified the Applicant directed the investigation as they went along and never asked her to investigate Jay Smith or Morehead's detour.

This Court finds the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court further finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in her representation.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to Morehead's testimony and asked him why he mentioned Jamil Brown was the driver in his original statement. Trial counsel testified she vaguely recalled this name and that there were no other mentions of it in the discovery materials. Trial counsel testified Jamil Brown was never developed as a suspect and the Applicant did not ask her to investigate. This Court

notes the record is clear – and the Applicant agrees – that trial counsel impeached Morehead’s testimony with inconsistencies and his prior criminal record. This Court finds it doubtful that asking Morehead about the name Jamil Brown would have had an additional impact upon his credibility or testimony.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected when the trial judge asked the Applicant’s family and neighbors to vacate the courtroom. Prior to Morehead’s testimony, the assistant solicitor asked for the judge to take this action because Morehead said he had been threatened by these individuals. Trial counsel objected, arguing the State had not provided any evidence of threats (such as affidavits). The trial judge asked these individuals to leave the courtroom during Morehead’s testimony. (Trial transcript, pp.74-76; p.79). This Court finds trial counsel did not err in not making a specific objection and arguing whether there was an overriding interest in asking these individuals to leave the courtroom. Contrary to the Applicant’s argument, the courtroom was not closed in this case. See, e.g., State v. Lormor, 172 Wash.2d 85, 93, 257 P.3d 624, 629 (2011) (holding “a ‘closure’ of a courtroom occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave”). Rather, a group of individuals was asked to leave the courtroom during the testimony of one witness.¹ For a partial closure of a courtroom, there must only be a “substantial reason” to do so – which was articulated by the State. See, e.g., United States v. Sherlock, 865 F.2d 1069, 1077 (9th Cir. 1989). As such, there was no error in trial counsel not making an objection that the State failed to show an “overriding interest.”

¹ The trial judge allowed the Applicant’s family and neighbors to return to the courtroom after Morehead’s testimony. (Trial transcript, p.107).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to Juror #11 remaining on the jury. After State's witness Kenneth Spearman testified, Juror #11 sent a note to the trial judge that he and Spearman were employed by the same company. The trial judge questioned Juror #11, who stated this would not interfere with his ability to be fair and impartial. (Trial transcript, pp.120-21). This Court finds the Applicant has failed to articulate a legitimate reason for trial counsel to have objected to Juror #11 continuing to serve on the jury.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to introduction of the video without audio because the original video had audio. The Applicant, however, failed to produce a copy of the video that included audio. Trial counsel testified she asked the assistant solicitor about obtaining a copy with audio. Investigator Michael Jarvis, however, testified he did not recall there being audio when he viewed the video. (Trial transcript, p.64). Without this evidence, this Court cannot speculate as to whether it would have had an impact upon the defense case. 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 did not allow him to testify at trial. Trial counsel testified she advised the Applicant of the advantages and disadvantages of testifying. Trial counsel testified this included telling the Applicant that the victim may be able to recognize his voice if he did testify. Trial counsel testified she told the Applicant it was his decision. This Court finds trial counsel's testimony is credible. This Court notes the trial judge advised the Applicant of his right to testify at trial and that the Applicant

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stated it was his decision not to testify. (Trial transcript, pp.122-25). The Applicant's decision not to testify was both informed and voluntary and the Applicant has failed to demonstrate trial counsel was deficient. 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 finds the Applicant failed to meet his burden of proving trial counsel did not properly investigate his case. While the Applicant argued trial counsel should have investigated the similarities between himself and his cousin, Jay Smith, trial counsel testified the Applicant did not give her this information. In fact, trial counsel testified she asked the Applicant if he knew who committed this crime and he did not provide her with any names. This Court finds trial counsel's testimony is credible. Regardless, as the Applicant failed to present any evidence to support his argument that such an investigation would have been helpful to his case, this argument is speculative. See Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (finding the failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result); Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing he would have had a defense with additional time to prepare for trial). Similarly, as the Applicant failed to present evidence that Morehead's testimony about the detour he took that night was false, this Court cannot speculate as to whether investigation into such would have been helpful to his defense. See id.

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

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that trial 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 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.

CONCLUSION

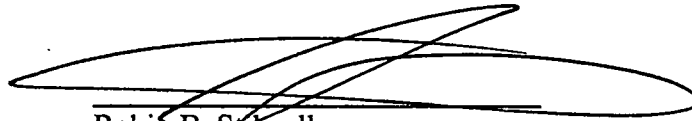
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel’s representation. Therefore, this 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 25 day of JULY, 2014.



Robin B. Stowell
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina.

CAROLINE M. HORLBECK

ATTORNEY AT LAW

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August 29, 2014

Via Regular Mail

Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

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SEP 03 2014

S.C. SUPREME COURT

Re: TRAVAUGHN THOMAS v. State

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondents. The Notice has been filed with the Greenville County Clerk of Court.

These matters are being referred to the Office of Appellate Defense in that we were participating as Court appointed counsel at trial.

Thank you for your attention to this matter.

Yours very truly,

Caroline M. Horlbeck, Esq.

Enclosure

cc: Office of the Attorney General
Office of Appellate Defense

CAROLINE M. HORLBECK

Attorney At Law

101 WHITSETT ST.
GREENVILLE, SOUTH CAROLINA 29601



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