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STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHESTER)
)
 Travis Lamar Bowser, #288475,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 SIXTH JUDICIAL CIRCUIT

2003-CP-12-0032

ORDER OF DISMISSAL

FILED

2010 MAR 17 P 2:12

CLERK OF COURT
 CHESTER CO S.C.

This matter comes before the Court by way of an Application for Post-Conviction Relief filed January 29, 2003, and received by the Respondent on May 4, 2009. The Respondent made its Return on July 14, 2009. An evidentiary hearing into the matter was convened on February 8, 2010, at the Lancaster County Temporary Judicial Center. Ross A. Burton, Esquire, represented the Applicant. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Brian Gibbons, Esquire, also testified. This Court also had before it a copy of the records of the Chester County Clerk of Court and 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 Chester County Clerk of Court. The Applicant was indicted at the June 2002 term of the Chester County Grand Jury for three counts of Armed Robbery (02-GS-12-0375, -0376, and -0409). Brian Gibson, Esquire, represented the Applicant. On October 30,

2002, the Applicant pled guilty as indicted. The Honorable Paul E. Short, Jr. concurrently sentenced the Applicant to confinement for a period of twenty (20) years for each count of Armed Robbery. The Applicant did not appeal his conviction or sentence.

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

1. Ineffective assistance of trial counsel;
2. Improper advice of trial counsel; and
3. Failure to conduct a proper investigation.

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.

At the conclusion of the Applicant's case, PCR Counsel moved for a directed verdict on the basis that Applicant filed his PCR application in 2003 and the State did not respond until 2009, which meant that the transcript was no longer available and therefore, the Applicant was prejudiced. The State responded that although the application was filed in 2003, the State did not receive the application from the Chester County Clerk of Court's office until May 2009 and filed its Return in July 2009. PCR Counsel's Motion for Directed Verdict was denied. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to 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) (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. 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. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203

(1985).

The Applicant testified that he tried to fire Mr. Gibbons at his guilty plea; however, the judge would not allow him to represent himself or give him time to hire another attorney. Applicant testified that he had only met with Counsel three (3) times and wanted to retain an attorney to represent him. Applicant also testified that his family had started the process of retaining an attorney at the time of the guilty plea. On cross-examination, Applicant testified that Counsel was appointed in May 2002 and he pled guilty in October 2002. Applicant further testified that he met with Counsel and discussed mitigation for a reduced sentence, but he did not discuss defenses other than Applicant stating he did not commit two of the three robberies. Applicant also testified that Counsel did not request a continuance so that Applicant and his family could retain an attorney.

Applicant testified that Counsel told him that if Applicant pled to the charges with a range of zero to twenty (0-20) years he would actually receive ten (10) years on the charges. Applicant testified that Counsel also did not tell him that armed robbery was a no parole offense. Applicant also testified that Counsel did not tell him that his exposure was ninety (90) years if sentences were run consecutively. Applicant testified that he told Counsel that he did not commit two of the three alleged armed robberies. The Applicant also testified that counsel did not investigate those two robberies. Applicant testified that Counsel told him that the State would seek the maximum on those two charges if Applicant chose to proceed to trial. Applicant also testified that his parents told him to plead. Applicant testified that he had no prior criminal record.

On cross-examination, Applicant testified that he pled guilty because he knew he was facing three (3) armed robbery charges and he could receive a maximum of thirty (30) years. Applicant also admitted that he knew when he pled he could receive any sentence from zero to twenty (0-20) years.

Applicant testified that he did know that Counsel had worked out a deal with the State regarding his plea.

The Applicant testified that he requested a preliminary hearing, but did not receive one. Applicant also testified that the preliminary hearing was waived without his consent. The Applicant also testified that Counsel did not review discovery materials with him. Applicant testified that he did not believe Counsel did an adequate job representing him. On cross-examination, Applicant testified that he did not know about any video evidence of the crimes

Counsel testified that he was appointed to represent Applicant in May 2002 after a conflict arose in the public defender's office because of a co-defendant of Applicant's. Counsel testified that he met with the Applicant initially at the jail in June 2002 and then met with him in July 2002. He also testified that he met with the Applicant twice during the term of court. Counsel testified that the Applicant never requested that he have a preliminary hearing. On cross-examination, Counsel testified that he could not remember the length of any meetings he had with the Applicant. Counsel also testified that he does not have a direct memory of reviewing the elements of the crimes with Applicant; however, it is his practice to review the elements of the charges with clients. Additionally, Counsel testified that he has notes in his files indicating he discussed information regarding juries and constitutional rights with Applicant.

Counsel testified that he filed a discovery motion and received all discovery materials, including co-defendant statements, witness statements and warrants. He testified that he met with detectives and reviewed the video evidence of the armed robberies. Counsel also testified that he reviewed all discovery materials, with the exception of the video evidence, with Applicant in June 2002. Counsel testified that he also conveyed a plea offer to Applicant at that same meeting, as

Counsel had already met with the State regarding Applicant's case. Counsel testified that the offer at that time was for Applicant to plead to concurrent sentences on all three armed robbery charges or be ready for trial in August 2002. Counsel also testified that at that time, the Applicant agreed to the offer. Counsel testified that he felt it was the best option for Applicant to plead guilty. However, Counsel also testified that it was ultimately the Applicant's decision to plead guilty.

Counsel testified that in October 2002, when Applicant was scheduled to plead guilty, was the first time that the Applicant told Counsel that he was not guilty of two of the three armed robberies. Counsel testified that he was told at that time that Applicant wanted to retain an attorney. Counsel relied on his notes to testify that he met with several of Applicant's family members, who all informed him that they wanted to retain an attorney. Counsel testified that on October 29, 2002, he moved for a continuance before the judge, so that Applicant could retain counsel, but the motion was denied.

On cross-examination, Counsel testified that the only defense to the crimes that he and Applicant discussed was the fact that the Applicant claimed he did not commit two of the three armed robberies. However, Counsel also testified that he was prepared for trial had Applicant chosen to request to proceed to trial instead of plead guilty.

Counsel testified that he did tell Applicant that the State would potentially try him separately for all three (3) armed robberies and that Applicant would face significant time if he were found guilty. Counsel testified that he told Applicant that he had negotiated a cap of twenty (20) years, but would ask the judge for the minimum of ten (10) years. However, Counsel testified that he never told Applicant that he would receive ten (10) years. Counsel also testified that he explained to the Applicant that armed robbery was a crime requiring service of 85% of the sentence.

On cross-examination, Counsel testified that he had hoped that the Applicant would receive a ten (10) year sentence, in particular since Applicant had no criminal record. Counsel also testified that he did advise Applicant that he could be facing life if the State chose to try him separately on each of the three (3) charges. Counsel testified that he approached the case as a mitigation case since Applicant had told Counsel that he wanted to plead in June 2002.

To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). When claims of ineffective assistance of counsel are based on lack of preparation time, an Applicant challenging his conviction must show specific prejudice resulting from counsel's alleged lack of time to prepare. United States v. Cronin, 466 U.S. 648, 104 S.Ct. 2039 (1984); U. S. v. LaRouche, 896 F.2d 815 (4th Cir. 1990). Applicant also alleges that Counsel was ineffective for failing to investigate the allegations. "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." Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998). Applicant presented no evidence or testimony at the PCR hearing as to what he believes Counsel would have discovered had he completed an independent investigation.

This Court finds that the Applicant has failed to establish that Counsel was ineffective with investigating and preparing for this matter. Plea counsel noted that he reviewed discovery materials

with the Applicant, met with and spoke with the Applicant and his family on numerous occasions, spoke with law enforcement officials, and prepared mitigation for the plea once Applicant made the decision to plead guilty. The record clearly indicates that counsel was considerably prepared for this case. Moreover, the Applicant put forth no evidence suggesting what evidence counsel failed to discover or what other defenses counsel could have pursued. Therefore, based on the foregoing, this allegation is denied.

Ineffective Assistance of Appellate Counsel

Applicant provided no testimony or evidence at the hearing to support his claim of ineffective assistance of appellate counsel. Therefore, this Court finds that the Applicant has failed to meet his burden of proof as to this claim and it is denied and dismissed.

Summary

This Court finds in regards to the allegations of ineffective assistance of counsel and failure to investigate, the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court further finds plea counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in his representation, and that counsel's conduct does not fall below the objective standard of reasonableness. Further, this Court also finds that the record in this case fully demonstrates that the Applicant understood the nature of his plea, and that his plea was made freely and voluntarily after being made aware of the potential exposure he faced on all three charges.

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 supra. Therefore, this allegation is denied.

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 and serve a notice of appeal within thirty (30) days from the receipt by counsel 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 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

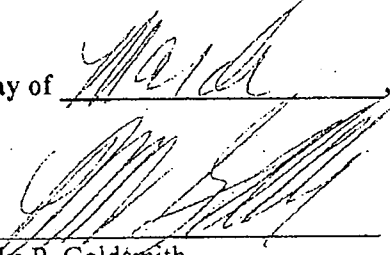
IT IS THEREFORE ORDERED THAT:

1. The post-conviction relief application is **DENIED AND DISMISSED WITH PREJUDICE**;
2. The Court advises the Applicant and his attorney of record that any Notice of Appeal must be filed within thirty (30) days of service of the signed copy. Your attention is directed to South Carolina Appellate

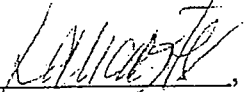
Court Rule 243¹ for appropriate procedures on appeal.

3. The Applicant is remanded to the custody of the Respondent for the completion of his sentence.

AND IT IS SO ORDERED this 9 day of March, 2010.



Brooks P. Goldsmith
Presiding Circuit Court Judge


_____, South Carolina

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¹ Formerly Rule 227, SCACR. Rules 224 through 230, SCACR, were renumbered as Rules 240 through 246, SCACR, by order of the South Carolina Supreme Court dated April 29, 2009.