ORDER GRANTING

POST-CONVICTION RELIEF

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

RECORDED
2014 JUN30 PM 1:1
JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

Russell Earley, # 199848,

Applicant,

v.

State of South Carolina,

Respondent.

2013-CP-43-0037

ORDER GRANTING POST-CONVICTION RELIEF

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DEPUTY CLERK OF COURT
SUMTER COUNTY
SOUTH CAROLINA

This matter came before the Court pursuant to an application for post-conviction relief filed January 7, 2013 by Russell Earley. The State filed a return dated April 9, 2013. An evidentiary hearing was convened at the Sumter County Judicial Center on February 24, 2014. The applicant was present and represented by Tommy A. Thomas, Esquire. The State was represented by Daniel Gourley, Assistant Attorney General.

PROCEDURAL HISTORY

The applicant is presently confined in the South Carolina Department of Corrections pursuant to a conviction in Sumter County. The applicant was indicted in July 2009 for Criminal Solicitation of a Minor. He was represented at trial by Charles T. Brooks, III, Esq. On January 5-6, 2009, the applicant was tried and convicted following a jury trial before the Honorable Benjamin H. Culbertson. Judge Culbertson sentenced the applicant to eight years imprisonment. A notice of appeal was timely filed, but the appeal was dismissed after the applicant notified the Court of Appeals he wanted to withdraw his appeal.

STANDARD OF REVIEW

In a post-conviction relief proceeding, the applicant bears the burden of proving his allegations by a preponderance of the evidence. Caprood v. State, 338 S.C. 103, 109-110, 525 S.E.2d 514, 517 (2000); Rule 71.1(e). 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 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The correct measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, *supra*. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in a case." Caprood, supra, at 109, 525 S.E.2d at 517 (citations omitted). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. 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. When a defendant challenges his conviction after a trial, the proper consideration is whether there is a reasonable probability that, absent the errors, the fact-finder would have had a reasonable doubt respecting guilt. Smith v. State, 375 S.C. 507, 515, 654 S.E.2d 523, 527-28 (2007. (citations omitted). In order to receive relief, an applicant must prove both ineffective assistance and resulting prejudice. See, e.g., Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

ALLEGATIONS

Mr. Earley alleged in his application and at the hearing that he is entitled to post-conviction relief for the following reason(s):

1. Trial counsel did not adequately prepare.

2. Trial counsel failed to review discovery with him.

3. Trial counsel failed to fully discuss the State's plea offer with him.

4. Trial counsel failed to establish a timeline to establish he could not have committed the offense.

5. Trial counsel failed to properly cross-examine the victim as to certain discrepancies between the victim's statement to law enforcement and his trial testimony.

6. Trial counsel failed to adequately advise him of his right to testify and the ramifications of criminal record.

7. Trial counsel failed to object to evidence that the applicant had posted a message on the victim's Facebook page the week prior to trial, and failed to move for a mistrial for a discovery violation committed by the State.

SUMMARY OF RELEVANT FACTS

The applicant was arrested for criminal solicitation of a minor after the victim reported to Walmart security and to law enforcement that the applicant had propositioned him in or just outside a bathroom at the Walmart store in Sumter. Specifically, the victim claimed that when he encountered the applicant, the applicant said, "Hey, do you want a blow job?", and then pointed at the victim's groin area. The sole witnesses to the alleged event were the victim and the applicant. The victim gave a written statement to law enforcement. The applicant was arrested after he left the store.

PCR HEARING

The applicant and trial counsel testified at the hearing. The applicant testified on direct examination that trial counsel met with him a couple of dozen times but that they discussed the case only once. He claims trail counsel told him there was no discovery except for the victim's

statement to law enforcement, which trial counsel showed him. He claims that the statement and the victim's trial testimony were inconsistent as to which bathroom the incident occurred in. That issue will be discussed fully below. Trial counsel seemingly agreed during cross-examination that he did not explore the alleged inconsistency. The applicant repeated his trial testimony that he was using the bathroom in the front of the store and that he observed the victim apparently attempting to open a package. He claims he thought the victim was shoplifting, so he told the victim his shouldn't be stealing. He believes the victim assumed he was going to report the shoplifting to security, so the victim fabricated the solicitation incident so he would not get arrested for shoplifting. The applicant testified trial counsel never explained to him how the case would be defended and that he learned of the trial only two days before. He claims the State offered a plea deal calling for probation but that he did not accept the offer because he would have to be on the sex offender registry and because he was not guilty. He testified he wanted to call the people he went to Walmart with in order to prove he was in the bathroom for a couple of minutes and that the timeline was very short. None of these witnesses were called at trial or at the PCR hearing. He testified that trial counsel's failure to call these witnesses influenced his decision to testify, though he had convictions for bank robberies. He admitted he knew the convictions could be used against him. He claims trial counsel told him video footage of the event was not available.

Trial counsel testified he met with the applicant "too many times to count". He stated the applicant wanted to get the case over with, but a new solicitor had been elected and he did not want to "rock the boat". He found out that solicitors John Meadors and Tyler Brown were assigned to the case, but when he spoke to them, they were not even aware of the case.

Trial counsel further testified that he was aware that the victim's Facebook page had a cartoon of a man with a caption reading "Smoke weed all day" and that the applicant was aware of that. He testified that unbeknownst to him, the applicant had posted a message on the victim's

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Facebook page the week prior to trial saying something to the effect of "See ya". He summarized the solicitor's cross-examination of the applicant about any communication with the victim, and that the applicant denied any communication. However, the solicitor then brought out the Facebook posting and the applicant admitted that communication. Trial counsel testified that the applicant did not tell him about the Facebook posting. He testified that the cross-examination on that issue was devastating because the applicant was caught in a blatant lie and the sole issue in the case was the credibility of the victim and the applicant. He testified that if he had known about it, he would have advised the applicant to either not testify or to not deny communicating with the victim.

Trial counsel testified that he did not call as witnesses the people who went to Walmart with the applicant because they would not have added anything to the facts, as none of these people went to the bathroom with the applicant, and the alleged incident took only seconds. He also said there was no real timeline to establish, because the alleged incident took only seconds. He testified he did not see the need to request surveillance video to see if there was a recording of the applicant pointing at the victim's groin area or otherwise showing an encounter, because the incident took only a short time. Trial counsel testified that he did not realize at trial that the victim's written statement and trial testimony were inconsistent as to whether the incident occurred in the bathroom in the front of the store or the back of the store. He testified that in hindsight, he could have done a better job of exploring that point.

Trial counsel testified that the applicant did not tell him about the Facebook posting

Set forth below are the relevant findings of fact and conclusions of law, as required by S.C. Code Ann. § 17-27-80 (2003):

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In considering the Applicant's case, this court had before it the Applicant's PCR file, including all pleadings filed, the records of the Sumter County Clerk of Court regarding the

conviction, the Applicant's records from the South Carolina Department of Corrections, and the trial transcript. This Court carefully listened to all of the testimony presented at the hearing and weighed the same according to credibility. The court's findings are as follows.

Adequate Preparation

I first conclude that, overall, trial counsel was prepared. He had developed a reasonable strategy centering upon the credibility of the victim and the applicant. There was obviously a problem with the admissibility of the applicant's bank robbery conviction(s), but there was no other reasonable strategy to employ other than making the case a proverbial swearing contest. Relief is denied on this ground.

Review of Discovery

It is apparent there was no discovery to review, except for the victim's statement. Perhaps it would have been advisable to determine whether there was video of the encounter; however, no video was introduced at the hearing and there is no evidence as to what, if anything, any video would have shown. Therefore, the applicant has established no prejudice for trial counsel's failure to obtain video. Relief is denied on this ground.

Failure to Fully Discuss Plea Offer

Relief is denied on this ground. The applicant testified he did not accept an offer calling for probation because he would have been on the sex offender registry and because he was not guilty. The applicant has presented no evidence of ineffective assistance of counsel as to this ground.

Failure to Establish Timeline

There was no real timeline to establish, as the incident took only a few seconds. The applicant did not call at the PCR hearing the individuals he claims accompanied him to Walmart. Therefore, the applicant cannot establish the prejudice prong on the issue as to whether their testimony at trial would have been beneficial to the applicant.

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Failure to Adequately Advise Applicant of Ramifications of his Criminal Record

The transcript reveals that the trial judge fully examined the applicant as to whether he understood his right to testify or not testify. The record shows he understood his rights. The trial transcript establishes the trial judge ruled that the applicant's "2003 bank robbery conviction" would be admissible. The applicant testified at the PCR hearing that he knew his bank robbery convictions could be introduced if he testified at trial. See a more complete discussion below of the introduction of the applicant's nine bank robbery convictions.

Failure to Explore Inconsistencies Between Victim's Written Statement and Direct Testimony

I conclude the applicant is not entitled to relief on this ground. The applicant contends that counsel failed to explore discrepancies in the victim's testimony and pre-trial statements as to which bathroom was the location of the encounter. In his statement to the police given two days after the incident, the victim stated "I went to the bathroom in the back of Walmart." He proceeded to give details of the defendant's actions leading the criminal charge of solicitation of a minor. At trial, the victim's testimony as to the location of the bathroom was less specific, obviously because he was never asked to pinpoint whether the incident occurred in the bathroom at the front of the store or the bathroom at the back of the store. For example, on page 77 of the trial transcript, the victim's testimony reads, "I walked in the store and I went to the front and all I did was go – I walked around, then I went to the bathroom, yes, sir." The Walmart loss prevention officer testified that he was told the encounter took place in the bathroom at the back of the store. In my view, there is no location discrepancy between the victim's trial testimony and his statement to law enforcement. He testified that he walked in the store, went to the front, walked around, and went to the bathroom. This testimony alone does not indicate he went to the bathroom in the front of the store or the back of the store. At best, the testimony is inconclusive on that point. It is unusual, at least in my experience, for a victim to be called as a witness at a PCR hearing; however, the victim could have

been called to testify at the hearing and clarify which bathroom he claims was the location of the encounter.

On the issue of which bathroom was the incident location, the area in which I believe trial counsel's performance may have fallen below accepted norms was in his failure to realize, explore, and argue to the jury that the applicant's version of events had the encounter occurring in the bathroom in the front of the store (see Transcript, page175, lines 11-12). Mr. Early testified, "As we walking out the door I cut off to use the bathroom and then right behind them." This clearly indicates the applicant had the encounter occurring in or around the front bathroom. However, I find the applicant has not established the prejudice prong, as I find that he has not proven that there is a reasonable probability that the outcome of the trial would have been different if this issue had been more fully explored. Pointing out to the jury that the two people involved in the incident testified differently as to where the incident happened would not have, by itself, made it reasonably likely the outcome would have been different. Absent proof that the victim gave conflicting statements as to where the incident occurred, the crucial issue was not **where**, but **whether**, the incident occurred.

Failure to Object to Evidence of Facebook Posting and Failure to Move for Mistrial

The applicant testified in his own defense at trial. On cross-examination, the solicitor asked the applicant if he had had any direct contact with the victim from the day of the incident up to the time of trial, a period of almost four years. The applicant responded that he had had no contact with the victim during that time; however, the solicitor had been provided with information, presumably by the victim, that the applicant had posted a message on the victim's Facebook "wall" the week before trial. The message said "See ya". After the applicant denied he had had any contact with the victim, the solicitor confronted the applicant with the message and the applicant admitted he had posted the message. During closing, the solicitor highlighted this exchange to the jury as one

reason to find the applicant not credible, arguing that the applicant had lied about having any contact with the victim, and that "It's all about credibility, believability."

In State v. Lawton, 382 S.C. 122, 675 S.E. 2d 454 (Ct. App. 2009), the Court of Appeals considered whether a letter written by the defendant to his ex-wife was a "statement" under Rule 5, SCRCrP. Lawton was indicted for burglary and weapons charges after entering his ex-girlfriend's home. Before trial, he wrote his ex-wife a letter in which he stated, "I know that my story is full of lies, but no more than hers, mine just have to be better than hers." The letter was not disclosed to the defense. The defendant testified and the solicitor produced the letter on cross-examination, and the defendant objected based on the State's failure to disclose in violation of Rule 5 (a) (1) (A). The State argued Rule 5 did not apply because the statement was used on cross-examination. The trial judge overruled the objection on that basis. The trial court further stated that the letter involved Lawton's credibility, which the trial court viewed as merely collateral, thereby rendering the letter not "relevant" within the meaning of 5 (a) (1) (A). On appeal, the Court of Appeals held that the letter should have been disclosed to the defense because it was "clearly relevant". The court also ruled that the statement was also material to the preparation of Lawton's defense under Rule 5 (a) (1) (C).

Rule 5 (a) (1) (A) provides in pertinent part that upon request the prosecution shall permit inspection and copying of any relevant written or recorded statements made by the defendant within the possession, custody or control of the prosecution or the existence of which is known to the prosecution. Rule 5 (a) (1) (C) provides that the prosecution, upon request, shall permit the defendant to inspect and copy papers, etc., within the possession of the prosecution "and which are material to the preparation of his defense...."

Trial counsel testified on cross-examination that if he had been provided the Facebook posting, he would have counseled the applicant about not denying its existence or would have

counseled him not to testify. Trial counsel testified that in his opinion, the Facebook posting "played a huge role" in the jury convicting the applicant because credibility of the victim and the applicant was the key to the case.

I first conclude that the Facebook posting was a "statement" made by the defendant, the existence of which was known to the State under Rule 5 (a) (1) (A). Though the posting was not written in the literal sense, it was typed by the defendant and electronically transmitted to the victim. In my view, that is a writing. The statement was also "relevant", as used by the State, for the purpose of attacking the applicant's credibility and for the purpose of establishing the inference that the applicant was trying to intimidate the victim (See cross-examination, Trial Transcript, page 180, lines 5-21; page 181, lines 2-3; page 181, line 23 through page 182, line 2; see also closing argument of solicitor, page 228, lines 15, through page 229, line 9; page 230 ,lines 22-24). Rule 5 (a) (1) (A) speaks in terms of "any relevant written statement" and does not require only the production of statement relevant to the direct issue of guilt. The Lawton court clearly understood this, as it held the State must produce statements relevant to the issue of credibility. Though Lawton's letter in and of itself raised direct issues of credibility, the Facebook posting made by the applicant was ultimately relevant to the issue of credibility.

I also conclude that the posting was a paper or document material to the preparation of the applicant's defense. Trial counsel testified that if he had known about the posting, he would have counseled the applicant to not deny having made the posting or to not testify at all. In my view, there was no practical way for the applicant to avoid testifying, because if he did not testify, the only story the jury would have heard was the victim's relatively uncontradicted testimony. However, the decision of whether to testify must be made with knowledge of all relevant facts and circumstances, including the proper production of all discoverable material. If the posting had been disclosed and the defendant still elected to testify, it is obvious that trial counsel would have

counseled the applicant how to respond to the question of whether he'd had any contact with the victim. Thus, it was material to the preparation of the applicant's defense. See Lawton, 382 S.C. at 127-128.

For the foregoing reasons, I conclude trial counsel's failure to move for a mistrial based on a Rule 5 violation fell below accepted professional norms. That satisfies the first prong of the PCR analysis. The second prong that the applicant must establish is whether there is a reasonable probability that but for counsel's unprofessional errors, the outcome of the trial would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial. As is typically the case, this is a difficult issue. It is undeniable that credibility of the victim and the applicant was central to the jury's resolution of the case and credibility was the focal point of the State's closing argument. Both sides argued credibility to the jury, and the relevant issues boil down to "He said, he said." The State has a heavy burden of proof and the subject crime allegedly occurred out of view of any person other than the victim and the defendant; therefore, their credibility is paramount. The applicant's credibility was substantially undermined when he denied having had contact with the victim since the incident date and he then was immediately compelled to admit he had contacted the victim by Facebook a week before trial. On the other hand, the applicant had been convicted of bank robbery and the trial judge ruled that "the 2003 bank robbery conviction" would be admissible; for some unknown reason, the applicant volunteered on cross-examination that he had been convicted of nine bank robberies. Evidence of being convicted of one bank robbery is damaging enough to one's credibility, but evidence of nine bank robbery convictions is perhaps much more damaging. If the Facebook posting had been disclosed to the defense and had the applicant not been caught saying he'd had no contact when he actually had contact, there would still have been an issue of whether he had been trying to intimidate the victim, an argument which the State still could have pursued.

As noted, the applicant must establish that there is a reasonable probability that the outcome of the trial would have been different if counsel had performed properly. In the context of trial counsel failing to object to the State's use of the Facebook posting and failing to move for a mistrial, the analysis of the second prong must include an analysis of the question of whether the trial judge would have been required to grant a motion for mistrial. See Weinn v. State, 281 S.W. 3d 633 (Tex-App. 2009) (Failure to move for a mistrial is ineffective assistance of trial counsel if a motion for mistrial should have been granted, if made). The court realizes that the decision to grant or deny a motion for a mistrial would be within the trial judge's discretion, and "the granting of a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no other way." State v. Ferguson, 376 S.C. 615, 658 S.E. 2d 101 (2008), quoting State v. Edwards, 373 S.C. 230, 236, 644 S.E. 2d 66, 69 (Ct. App. 2009). Many South Carolina appellate cases involving mistrial motions based upon the State's failure to fully respond to Rule 5 and Brady motions have been addressed in the context of the motion for mistrial having been made, denied, and a curative instruction having been given. In those cases, the appellate courts have held that the curative instruction to disregard certain evidence was sufficient to cure any prejudice. However, the rule has been stated somewhat differently by our Supreme Court in several cases, e.g., "An instruction to disregard incompetent evidence is usually deemed to have cured the error **unless on the facts of the particular case** it is probable that, notwithstanding the instruction, the accused was prejudiced." State v. Bell, 293 S.C. 391, 360 S.E. 2d 706 (1987), citing State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976); State v. Smith, 290 S.C. 393, 350 S.E.2d 923 (1986) (emphasis added).

I conclude that in this particular case, the trial judge would have been compelled, upon proper motion, to grant a mistrial. A curative instruction would not have been sufficient to cure the prejudice resulting from the State's failure to disclose the statement. Again, victim/defendant credibility was the paramount, if not the sole, issue for the jury to determine. Trial counsel's failure

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to move for a mistrial left the applicant's credibility severely damaged with little room for rehabilitation.

As noted above, the applicant's credibility was arguably substantially undermined when he volunteered on cross-examination that he had been convicted of nine bank robberies instead of just one. I conclude this is of no import to the determination of whether the trial judge would have been required to grant a mistrial with regard to the Facebook evidence. Overall, the applicant has established that a mistrial would have to have been granted if trial counsel had objected to the discovery violation and moved for a mistrial.

CONCLUSION

In conclusion, based upon the entire record, this court finds and concludes that the applicant has met his burden of proof under Strickland v. Washington, 466 U.S. 668 (1984), and Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Counsel's attention is directed to Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007), and Rule 59(e), SCRCP, regarding the filing of a Motion to Alter or Amend should counsel believe this Order fails to adequately address all issues raised as required by S.C. Code Ann. § 17-27-80 (2003). This Court further advises that if either party desires to secure appellate review of this order, a notice of appeal must be filed and served **within thirty (30) days** of the service of this order. The applicant and counsel are directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed.

IT IS THEREFORE ORDERED THAT the application for post-conviction relief is granted and the matter is remanded to the Sumter County Court of General Sessions for a new trial.

June 30, 2014

George C. James, Jr., Circuit Judge