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January 5, 2015

RECEIVED

JAN 22 2015

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of South Carolina Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, South Carolina 29201

Re: Terrance Johnson v. State of South Carolina
Case No.: 2011-CP-10-9193

Dear Mr. Shearouse:

Enclosed for filing, please find an original and two copies of Mr. Johnson's Notice of Appeal the denial of his application for Post Conviction Relief. If you find everything in order, please file the original and return the clocked in copies in the enclosed self-addressed envelope.

Please note I was appointed and copy the Office of Appellate Defense who will handle the appeal. Please call if you have any questions.

With kindest regards, I am

Sincerely,



Christopher L. Murphy

CLM/aj

Enclosures

c: Mr. Terrance Johnson

M. Dudek, Esq.
PO Box 11433
Columbia, SC 29211-1433

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Stephanie McDonald; Circuit Court Judge

Case No.: 2011-CP-10-9193

Terrance Johnson Appellant


v.

State of South Carolina Respondent

NOTICE OF APPEAL

Terrance Johnson appeals the order of The Honorable Stephanie McDonald filed December 1, 2014, denying his PCR application. The order was received December 23, 2014. Attached is a copy.

January 5, 2015


CHRISTOPHER L. MURPHY
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Stephanie McDonald; Circuit Court Judge

Case No.: 2011-CP-10-9193

Terrance Johnson.....Appellant
v.
State of South Carolina..... Respondent

PROOF OF SERVICE

I CERTIFY that I have served PROOF OF SERVICE on counsel of record for Respondent by delivering a copy via U.S. Mail First-Class postage prepaid on the 6th day of January, 2015, addressed as follows:

Ashleigh R. Wilson
Assistant Attorney General
PO Box 11549
Columbia, South Carolina 29211
(803) 734-3737
ARWilson@SCAG.gov

Attorney for Respondent

RECEIVED

JAN 22 2015

S.C. SUPREME COURT

April Jennings
APRIL JENNINGS

cc
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STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
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Terrance Johnson, #156066,)
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Applicant,)
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v.)
)
State of South Carolina,)
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)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
2011-CP-10-9193

FILED
2014 DEC -1 AM 9:26
JULIE J. ARABSTRONG
CLERK OF COURT
BY _____

ORDER OF DISMISSAL

Presiding Judge: The Honorable Stephanie P. McDonald
Applicant's Attorney: Christopher L. Murphy, Esquire
Respondent's Attorney: Ashleigh R. Wilson, Esquire
Trial Counsel: Melissa W. Gay, Esquire
Date of Hearing: November 21, 2013
Court Reporter: Sharon Vizer

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed December 13, 2011. The Respondent made its Return on June 19, 2012. An evidentiary hearing on the matter was convened on November 21, 2013, at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Christopher L. Murphy, Esquire. Ashleigh R. Wilson, Esquire, of the South Carolina Office of the Attorney General represented the Respondent.

Also present and testifying was Melissa W. Gay, Esquire. The Court had before it the trial transcript, the Charleston County Clerk of Court records, the Applicant's records from the South Carolina Department of Corrections, the post-conviction relief application, the Respondent's Return, the Applicant's appellate records, and Court's Exhibit 1¹.

¹ Court's Exhibit I was an Affidavit from Fautain Judon dated November 18, 2004.

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PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Charleston County Clerk of Court. The Applicant was indicted at the June 2004 term of the Charleston County Grand Jury for trafficking cocaine 28-100 grams- 2nd offense (2004-GS-10-3796), possession of a weapon during the commission of a violent crime (2004-GS-10-3797), possession of a stolen pistol (2004-GS-10-3795), and unlawful carrying of a gun (2004-GS-10-3794). Applicant was represented by Melissa W. Gay, Esquire.

Applicant proceeded to trial on March 9-10, 2006. He was acquitted of possession of a stolen pistol and convicted of the three remaining charges. The Honorable Deadra L. Jefferson sentenced the Applicant to confinement for life for trafficking cocaine and one year for unlawful carrying of a gun.² The sentences were to run concurrently.

A Notice of Appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. Robert Dudek, Esquire, of the South Carolina Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences. State v. Johnson, Op. No. 2011-UP-411 (S.C. Ct. App. August 29, 2011).

ALLEGATIONS

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

1. Ineffective assistance of counsel.
 - a. Counsel failed to challenge the stop and other claims.

² The Court did not impose a sentence for the possession of a weapon during the commission of a violent crime conviction pursuant to S.C. Code Section 16-23-490(a).

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

1. Ineffective assistance of counsel.
 - a. Counsel failed to challenge the traffic stop.
 - b. Counsel failed to call Fauntain Judon as a witness at Applicant's suppression hearing.
 - c. Counsel failed to properly investigate whether a camera was in the police car.
 - d. Counsel failed to object to the judge going into the jury room.

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. Sec. 17-27-80 (2003).

Summary of the Testimony

The Applicant was present and testified that he was represented at trial by Melissa Gay. Applicant testified he retained Gay to represent him and met with her four times prior to trial. He testified he wanted counsel to argue that the stop by police was a pretextual stop, but he was told by counsel they did not need to argue about the initial stop because the police let him go.

The Applicant testified that he was offered a guilty plea deal, but he told counsel that he did not want to plead guilty. Applicant testified the State offered a plea to fifteen years in the middle of trial. He discussed the plea offer with counsel and rejected it because he felt he did not do anything wrong.

The Applicant testified that counsel also failed to call Funtain Judon as a witness at his suppression hearing. He testified counsel's investigator obtained a statement from Judon. The Applicant testified that Judon's testimony would have shown that the officer was not behind him to see the tag obstruction before the stop.

The Applicant also testified that counsel failed to properly investigate his case. He testified counsel never investigated whether the officer who stopped him had a camera in his car. He testified that a camera should exist and it would show that the officer was not really behind him. Lastly, the Applicant testified the judge was allowed to go to the jury room.

Melissa Gay, Esquire, was also present and testified that she has been practicing criminal law since 1991. She testified that she was retained to represent the Applicant and they met several times prior to his trial. Counsel testified she filed Brady and Rule 5 motions on Applicant's behalf. Counsel testified she reviewed the evidence with the Applicant and they discussed the elements of the Applicant's charges and what the State was required to prove. She testified they also discussed the Applicant's version of the facts and the possible defenses.

Counsel testified that she did not recall the statement of Funtain Judon, but it looks like it was probably taken by her investigator. She testified she knows all the Judons and would have spoken with all of the witnesses. Counsel testified that Judon's statement simply was not relevant to the issues presented at the suppression hearing.

Counsel testified she had ample time to prepare for trial. She testified that the Applicant did not want to plead guilty and wanted to go to trial. Counsel testified she did not recall recommending that Applicant take a plea offer, but that she generally tries to get defendants to take a plea if there is a high risk of conviction.

Counsel testified that she discussed challenging the traffic stop with the Applicant prior to trial. Counsel testified she told the Applicant if they lost the suppression motion, they would have no defense at trial. She testified she argued at trial that the stop and search of Applicant's car was unconstitutional. She testified that she also argued that Applicant's first contact with law enforcement was problematic. Counsel testified that the suppression issue was also raised on appeal.

Counsel testified she reviewed the Applicant's discovery and would have been provided with the video from the police car camera had there been a video. She testified that she would not have gone beyond the scope of what was already given by the police and that there was no evidence that footage from the police car camera was available. Counsel testified that she did not subpoena any specific police car video and that if there had been a video, the solicitor would have turned it over.

Counsel testified that she did not recall the judge going into the jury room, but if she felt that the judge had done something inappropriate with the jury, she would have objected.

Ineffective Assistance of Counsel

Applicant alleges that he received ineffective assistance of counsel. In a PCR action, "the burden of proof is on the applicant to prove his allegation by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For the 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 (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 that "there

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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, 117-118, 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).

This Court finds the Applicant's testimony at the evidentiary hearing was not credible. This Court also finds that counsel's testimony at the evidentiary hearing was credible. Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds that Applicant's attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, 466 U.S. at 668; Butler, 286 S.C. 441, 334 S.E.2d 813. This Court further finds counsel adequately conferred with the Applicant, conducted a proper investigation, and provided thorough representation. This Court finds that counsel's representation did not fall below an objective standard of reasonableness.

The Applicant alleges that counsel was ineffective for failing to challenge the traffic stop which resulted in his arrest. The Court finds this allegation to be without merit. The Court finds that counsel provided credible testimony that she discussed challenging the traffic stop with the Applicant prior to trial. The Court finds and the record reflects that counsel vigorously challenged the traffic stop which resulted in Applicant's arrest during a suppression hearing held at the start of trial. (T. 3:13-95:22). After extensive cross-examination of the State's witnesses, counsel argued to the court during the suppression hearing that the traffic stop was pretextual based on the fact that the Applicant was a black man driving a nice car and that he had not

committed any moving violation warranting the stop. Counsel argued further that the finding of the gun in the Applicant's car was not a separate event from the stop and both the gun and drugs found after the traffic stop should be suppressed as "fruit of the poisonous tree". (T. 75:25-92:13, 94:6-95:22). After the Court denied Applicant's motion to suppress (T. 181:17-190:14), counsel renewed her motion to further insure that the issue was properly preserved for appellate review (T. 190:20-25). This Court finds that Applicant has failed to carry his burden of proving counsel was deficient in failing to challenge the traffic stop. As there was no deficient performance, the Court need not consider any resulting prejudice on this particular issue.

Applicant further alleges that counsel was ineffective in failing to call Fauntain Judon as a witness during his suppression hearing. This Court finds this allegation to be without merit. Counsel provided a strategic basis for her decision not to call Judon as a witness during the Applicant's suppression hearing. Where counsel articulates a valid strategic reason for her action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Counsel stated at the evidentiary hearing that Judon's testimony would not have been relevant to the suppression issue. This Court finds counsel's reasoning for failing to call Judon as a witness during the suppression hearing was valid and that no prejudice resulted from this decision.

This Court also finds and the record reflects that counsel was able to vigorously argue the motion to suppress without calling any additional witnesses. This Court finds it unlikely that the

testimony of Judon (as reflected in the affidavit presented by Applicant) would have assisted the court in ruling on Applicant's motion to suppress. Applicant has failed to carry his burden of proving that counsel was deficient in failing to call Judon as a witness during the Applicant's suppression hearing. This Court also finds that Applicant has failed to show that but for counsel's failure to call Judon as a witness, his motion to suppress would have been granted.

Applicant next alleges that counsel was ineffective in failing to investigate and obtain any available video from the camera in the police car involved in his traffic stop. This Court finds this allegation to be without merit. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 521-22 (2003).

This Court finds that counsel thoroughly investigated Applicant's case. Applicant has failed to show the existence of any video footage from the police car involved in his traffic stop. This Court will not speculate with regard to what an investigation by counsel into police car video would have yielded. This Court finds that Applicant has failed to carry his burden of proving counsel was deficient in failing to investigate whether any video existed from any

camera alleged to be in the police car involved in the traffic stop. This Court also finds that the Applicant has failed to show that counsel's performance in this regard resulted in any prejudice.

The Applicant alleges that counsel failed to object to the judge going into the jury room. This Court finds this allegation to be without merit. This Court finds that the record is devoid of any instance reflecting that the trial judge entered the jury room or in any way inappropriately interacted with the jury. Thus, Applicant has failed to carry his burden of proving counsel ineffective in this regard.

Accordingly, this Court finds that Applicant failed to satisfy 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 her representation of Applicant. This Court also finds that Applicant has failed to satisfy the second prong of Strickland- that he was prejudiced by trial counsel's performance. This Court concludes that Applicant has not met his burden of proving that 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 in this matter and not specifically addressed in this Order, the Court finds that Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant abandoned such allegations. Therefore, they are hereby dismissed.

CONCLUSION

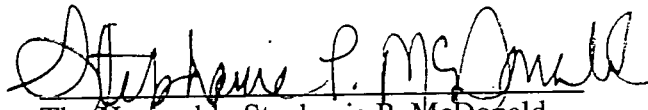
Based on the forgoing, this Court finds and concludes the Applicant has not established any constitutional violation or deprivation either before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

The Court advises 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 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 Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 24th day of November, 20 14


The Honorable Stephanie P. McDonald
Presiding Judge
9th Judicial Circuit

Charleston, South Carolina.

