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RECEIVED

April 16, 2015

APR 21 2015

Via Regular Mail

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

S.C. Supreme Court

Re: ANTWAN D. GRAYSON 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

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
THE HONORABLE Eugene C. Griffith

CA No. 2013-CP-23-4574

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER
2015 APR 16 PM 2 09

ANTWAN D. GRAYSON,

APPELLANT,

vs.

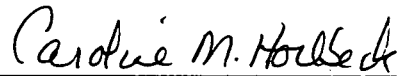
STATE OF SOUTH CAROLINA

RESPONDENT.

NOTICE OF APPEAL

Appellant ANTWAN D. GRAYSON, appeals from the Order of the Honorable Eugene C. Griffith, Circuit Court Judge clocked March 16, 2015.

Respectfully submitted,



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

Date: April 16, 2015

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

Antwan D. Grayson,)
)
)
Appellant,)

C.A. No. 2013-CP-23-4574

-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 Applicant, and that I have this day caused to be served upon the person(s) named below Applicant's Notice of Appeal by placing copies of same in the United States mail, with adequate postage thereon, addressed as follows:

Ms. Lóriene French
S.C. Office of Appellate Defense
PO Box 11433
Columbia, SC 29211

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

RECEIVED

APR 21 2015

S.C. Supreme Court

Caroline M. Horlbeck
Caroline M. Horlbeck

Greenville, South Carolina

April 16, 2015

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Antwan Dominique Grayson,)
 S.C.D.C. No. 329430,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2013-CP-23-4574

FILED-CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL B. WICKENSIMMER
 2015 APR 16 PM 2 53

ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed August 21, 2013. The Respondent made its return on April 8, 2014. An evidentiary hearing was held on December 18, 2014 at the Greenville County Courthouse. The Applicant was present 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 were Alvin Grayson and the Applicant's trial counsel, Randall L. Chambers, 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, the appellate records, and Applicant's Exhibit 1.

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 May 2010 term of the Greenville County Grand Jury for armed robbery (2009-GS-23-4364, count 1), possession of a weapon during commission of a violent crime (2009-GS-23-

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4364, count 2), first-degree criminal sexual conduct (CSC) (2009-GS-23-4365), and kidnapping (2009-GS-23-4366). He was represented by Randall L. Chambers, Esquire.

After the State brought the case to trial, the Applicant was found guilty. On March 30, 2011, the Honorable Robin B. Stilwell sentenced the Applicant to 30 years for armed robbery and 5 years for possession of a weapon during commission of a violent crime. Judge Stilwell also levied a 30 year sentence for first-degree CSC and a 30 year sentence of kidnapping to be consecutive to the 14-year sentence the Applicant was already serving.¹

A notice of appeal was filed at the South Carolina Court of Appeals. Dayne C. Phillips, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal in the form of an Anders² brief. The Court of Appeals dismissed the appeal. State v. Grayson, Op. No. 2013-UP-263 (S.C. Ct. App. filed June 19, 2013). The Remittitur was sent on July 9, 2013.

ALLEGATIONS

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

1. Ineffective assistance of counsel.

In a pro se "Brief in Support of Amendment and Additional Pleading to Prior Post-Conviction-Relief Filed August 21, 2013, Pursuant to Rule 15" filed November 19, 2013, the Applicant makes the following allegations:

1. Ineffective assistance of trial counsel:
 - a. Failed to disclose all favorable Brady materials:
 - i. "[I]f counsel was effective and showed me the photos that the state used on me at trial before hand, I would have took

¹ On May 15, 2009, the Honorable C. Victor Pyle, Jr. revoked the Applicant's probation for second-degree burglary (2008-GS-23-5293) and sentenced him to 14 years imprisonment.

² Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

- the plea for 22 years for everything.”
- ii. “[N]ever heard the police 911 call until trial which my lawyer had.”
 - b. Failed to object to the prosecutor’s direct examination of Wilkie.
 - c. Failed to ask for a continuance.
 - d. Failed to object to the prosecutor’s closing arguments (page 430, line 6 – page 431, line 13).
 - e. Failed “to allow me to plea.”
 - f. Failed to communicate.
 - g. Failed to investigate witnesses (Crystal Davis, Tina Grayson, and Alvin Grayson) to prepare a defense.
 - h. Failed to investigate indictments and move to quash.
 - i. Failed to prepare for trial.

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 he and trial counsel had three meetings prior to trial. The Applicant stated they discussed potential witnesses and his version of events but did not review discovery. The Applicant stated he gave witness names to trial counsel (Alvin Grayson, Tina Grayson, and Crystal Davis) and trial counsel said he had contacted them but did not need them. The Applicant stated Tina Grayson and Crystal Davis would have been character witnesses. The Applicant stated he wanted a continuance but admitted he did not convey this to trial counsel. The Applicant complained there was no Jackson v. Denno hearing. The Applicant stated he did not review photographs and the 911 call until the trial and that he would have pled guilty if he had seen this material beforehand. The Applicant stated trial counsel should have objected to Curtis Wilkie's testimony and questioned him about his testimony that he was not related to the Applicant. The Applicant stated he rejected a 22-year plea offer because he did not know the extent of the State's case. The Applicant acknowledged trial counsel advised him the State had "substantial evidence" but said he did not plead guilty because he was innocent. The Applicant stated he subsequently wanted to plead guilty three months before trial but trial counsel would not let him do so. The Applicant stated he did not feel he could tell the trial judge about this. The Applicant stated trial counsel should have objected during the State's closing argument because the assistant solicitor gave input as to who she thought was lying.

Alvin Grayson stated he is the Applicant's cousin and Curtis Wilkie's father. Grayson

stated the Applicant and Wilkie knew each other well. Grayson admitted he was not present at the incident and could not add anything to the facts of this case.

Trial counsel testified he was appointed in this case and filed discovery motions. Trial counsel testified he received full discovery in this case, which included: two statements from the Applicant, photographs from the ATM camera that showed the victim as the driver but someone identified as the Applicant in a hoodie, and a 911 tape. Trial counsel testified there was no way for the Applicant to listen to the 911 tape, but that the Applicant received a copy of the discovery materials (his assistant always sends it to clients) and they reviewed it several times. Trial counsel testified he and the Applicant discussed his version of events and that the Applicant was adamant he was innocent. Trial counsel testified he did not recall discussing witnesses but that he would not have called character witnesses. Trial counsel testified Grayson's testimony would not have been relevant at trial. Trial counsel testified the State requests a Denno hearing but that he had no problem with the Applicant's statements being admitted because they were consistent. Trial counsel testified he conveyed a 22-year plea offer to the Applicant, who rejected it because he was adamant about his innocence. Trial counsel testified the Applicant never stated he wanted to plead guilty.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not adequately prepare for trial. This Court finds trial counsel reviewed the discovery materials with the Applicant, as well as his version of events. This Court finds the Applicant was provided with a copy of his discovery materials (except for the 911 tape). This Court does not find credible the Applicant's assertion that he did not see the photographs until the day of trial. Regardless, this Court also does not find credible the Applicant's assertion that he would have pled guilty if he had seen the photographs and heard the 911 tape because (1) he was always adamant about his

innocence and (2) by his own admission, trial counsel said the State had substantial evidence against him. This Court finds trial counsel was prepared for the legal and factual issues at the Applicant's trial and the Applicant has failed to meet his burden of proving trial counsel needed additional time in which to investigate or prepare his case.³ See Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding 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).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have contacted witnesses in his case. While the Applicant argued trial counsel should have presented Tina Grayson and Crystal Davis as character witnesses, trial counsel testified he would not have called such at trial. This Court cannot speculate on what these witnesses might have testified about (and any potential impact) because they did not testify at the PCR hearing. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme Court "has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial.") (emphasis in original). As to Alvin Grayson, this Court finds the Applicant has failed to demonstrate either that trial counsel was deficient in failing to subpoena and call Grayson as a witness or that his case was prejudiced as a result. While the Applicant argued Grayson would have been able to testify Wilkie stated falsely that he was not related to the Applicant, this Court finds this would not have

³ This Court finds the Applicant failed to meet his burden of proving trial counsel should have requested a continuance both because he admitted he did not ask trial counsel to make such a motion and because he failed to meet his burden of proving a continuance was necessary. See Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (holding in a PCR proceeding, the applicant bears the burden of proving the allegations in their application).

changed the outcome of the case. Trial counsel thoroughly cross-examined Wilkie and impeached him with inconsistent statements. This Court does not find Grayson's testimony would have added much to the defense case as the jury was already aware of Wilkie's inconsistent testimony. See State v. Pipkin, 359 S.C. 322, 327, 597 S.E.2d 831, 833 (Ct. App. 2004) (noting the jury is "the finder of fact and weigher of credibility").

This Court finds the Applicant failed to meet his burden of proving trial counsel prevented him from pleading guilty. The Applicant and trial counsel both testified counsel conveyed the 22-year plea offer and that the Applicant rejected it because he proclaimed his innocence. The Applicant admitted trial counsel told him the State had substantial evidence against him. The Applicant testified he later wanted to plead guilty but trial counsel would not allow him to do so. This Court does not find this testimony is credible. This Court notes the Applicant admitted he was familiar with the court process. This Court finds the Applicant knew he had the right to address the court, if he so desired, and indicate he wanted to plead guilty. The absence of such in the trial transcript bolsters this Court's finding that the Applicant is not credible. Trial counsel's testimony (that the Applicant never stated he wanted to plead guilty) is, by contrast, extremely credible. This Court finds both that the Applicant (1) made an informed decision to reject the plea offer and proceed to a jury trial and (2) failed to meet his burden of proving trial counsel was deficient.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected during the State's closing argument. The Applicant argued the State's closing argument was improper because she gave input as to who she believed was lying in this case. (Trial transcript, pp.430-31). This Court has examined the language of the assistant solicitor's closing argument and does not find trial counsel deficient for failing to object because the

argument was not objectionable. See State v. Huggins, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997) (finding a solicitor's argument must stay within the record and its reasonable inferences); see also State v. Cooper, 334 S.C. 540, 553, 514 S.E.2d 584, 591 (1999) (noting a solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony).

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 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.


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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 17th day of February, 2015.



Eugene C. Griffith, Jr.
Presiding Judge
Thirteenth Judicial Circuit

Newberry, South Carolina.

CAROLINE M. HORLBECK

Attorney At Law

101 WHITSETT ST.
GREENVILLE, SOUTH CAROLINA 29601



Via Regular Mail

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