

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Roger L. Couch, Circuit Court Judge

RECEIVED

JUN 19 2015

Case No. 2013-CP-42-0051

S.C. Supreme Court

State of South Carolina

Respondent,

v.

Milciades Alcantara,
#339223


Appellant.

Notice of Appeal

Milciades Alcantara appeals the order of the Honorable Roger L. Couch dated May 8, 2015. Appellant received written notice of entry of this order on May 13, 2015.

June 7, 2015

Sincerely,

s/ 
Brandt Rucker
Attorney for Appellant
522 North Church Street
Greenville, South Carolina 29601
(864) 271-9925

cc:
Other Counsel of Record:

Suzanne White
Office of the South Carolina Attorney General
P.O. Box 11549
Columbia, S.C. 29211

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Appellant.


Proof of Service

I certify that I have served the Notice of Appeal, and the Proof of Service on the State of South Carolina by depositing a copy of those documents in the United States Mail, postage prepaid, on June 7, 2015, addressed to its attorney of record, Suzanne White Office of the South Carolina Attorney General, P.O. Box 11549, Columbia, S.C. 29211

June 7, 2015

Sincerely,

s/


Brandt Rucker
Attorney for Appellant
522 North Church Street
Greenville, South Carolina 29601
(864) 271-9925

cc:

Other Counsel of Record:

Suzanne White
Office of the South Carolina Attorney General

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Columbia, S.C. 29211

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 Milciades Alcantara, #339223,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2013-CP-42-0051

ORDER OF DISMISSAL

CLERK OF COURT
 SPARTANBURG COUNTY
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 M. HOPE BLACKLEY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed January 7, 2013. The Respondent made its Return on or about June 6, 2014. An evidentiary hearing into the matter was convened on September 16, 2014, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by J. Brandt Rucker, Esquire. 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. Richard Welchel, Esquire, also testified. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, the Appellate Court records, and the trial transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the June 2009 term of the Spartanburg County Grand Jury for two counts of armed robbery and possession of a weapon during the commission of a violent crime (2009-GS-42-4456, -4459,



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counts 1 and 2), two counts of kidnapping (2009-GS-42-4457, 4460), and criminal sexual conduct – 1st degree (2009-GS-42-4458). The Applicant was represented by Tanya Jones, Esquire, and Richard Whelchel, Esquire. On February 9, 2011, the Applicant proceeded to trial, where he was convicted by a jury. The Honorable J. Derham Cole sentenced Applicant to twenty-five years for criminal sexual conduct, concurrent sentences of ten years for each kidnapping charge, and a consecutive fifteen years for armed robbery.

A timely notice of appeal and Anders brief were filed on Applicant's behalf. Applicant also filed a *pro se* brief in support of his appeal. The South Carolina Court of Appeals dismissed the appeal. State v. Alcantara, Op. No. 2012-UP-108 (filed February 22, 2012). The Remittitur was returned on March 12, 2012.

ALLEGATIONS

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

1. Ineffective assistance of counsel, in that;
 - i. Counsel failed to diligently pursue any negotiated plea deal as requested by Applicant,
 - ii. Counsel failed to move for a change of venue for trial,
 - iii. Counsel did not come to see Applicant regarding the case until two weeks before trial and the visits were short,
 - iv. Counsel failed to effectively cross-examine witnesses at trial,
 - v. Counsel advised Applicant not to testify,
 - vi. Counsel failed to prove defense of innocence by demonstrating a prior association with one of the alleged victims.

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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. This Court found the testimony of Counsel to be more credible than the testimony of Applicant as to all allegations raised.

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), SCRCF). 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

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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. "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).

Applicant testified that he informed Counsel that he was willing to plead guilty to the incident that occurred at the Subway, but not the crimes that occurred at the tanning salon. However, Applicant testified that Counsel did not pursue a negotiated plea deal to that charge. Applicant testified that he did not know at the time of the trial that his charges could be severed, but he believes that would have been to his benefit because the charges involved two separate crimes. Counsel testified that the State was unwilling to allow Applicant to plead guilty solely to the incident at Subway and intended to proceed to trial with both incidents.

Applicant testified that he recalled Counsel advising him that he could face "like a hundred years," but Applicant was never advised of a potential life without parole sentence. Further, Applicant testified that Counsel only visited with him briefly and not until two weeks prior to trial. Applicant testified that he was represented at trial by Counsel and Tanya Jones Esquire, of the Seventh Circuit Public Defender's office. Counsel testified that he did not believe that the cases could be severed based upon the similarities and the close connection in time. Counsel testified that not filing a motion for severance was a strategic decision because you also run the risk of the State filing a notice to seek life without parole if the cases are severed and Applicant is found guilty of the first charges.

This Court finds that the Applicant's allegations that Counsel did not spend enough time with him, failed to pursue a negotiated plea, and should have made a motion for severance are

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without merit. 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). 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 Applicant failed to point to any specific matters Counsel failed to discover, or any defenses that could have been pursued had Counsel been more fully prepared or spent additional time with the Applicant prior to the case being called to trial. This Court notes that Counsel has years of experience representing clients on similar charges and remains updated on case law through research. Counsel reviewed discovery materials with the Applicant, including the video of both the Ultra Tan incident and the Subway. Counsel also discussed with the Applicant the possibility of presenting a defense that the Ultra Tan incident was planned with the victim. This Court finds Counsel's testimony that the State refused to offer a negotiated plea to the Subway charges only very credible.

As to the failure to move to sever the charges, "charges can be joined in the same indictment and tried together where they 1) arise out of a single chain of circumstances; 2) are proved by the same evidence, 3) are of the same general nature; and 4) no real right of the defendant has been prejudiced." State v. Beekman 405 S.C. 225, 229, 746 S.E.2d 483, 486 (2013). The Applicant failed to demonstrate any right that was prejudiced from the joinder of the charges in one trial and failed to show that had Counsel made a motion to sever, that the

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motion would have been grated or that the severance would have affected the outcome of the trial.

Applicant testified that the alleged victim of the criminal sexual conduct – 1st degree and kidnapping at the tanning salon had been involved in a consensual sexual relationship with Applicant. Applicant testified that he had previously been to the tanning salon and met the victim. Applicant testified that he provided Counsel with the names of two witnesses, Gary Bryant and Nick (no last name), who could corroborate the fact that Applicant had been in the tanning salon before. However, Applicant testified that he did not know the two witnesses, but they had seen Applicant at the tanning salon before. Applicant introduced the signed, but not filed proposed witness list as Applicant's Exhibit #1, as evidence that he informed Counsel of the two potential witnesses. Applicant testified that the robbery of the tanning salon was planned with the victim. The victim left the back door open for Applicant and was the one who locked the door instead of running out of the door. Applicant testified that although his semen was found at the tanning salon, there was no physical trauma to the victim, which supported his defense of a consensual relationship. Although Applicant alleged that Counsel was ineffective for failing to effectively cross-examine the victim as to their alleged relationship, Applicant acknowledged that Tanya Jones thoroughly cross-examined the victim as to the fact that she failed to cooperate with the police and refused to provide a correct address.

Counsel testified that there was a video from the tanning salon incident, which showed the Applicant entering the store, but Counsel believed it helped the Applicant's case because it showed the victim's actions or lack of actions. Counsel testified that Ms. Jones was effective in cross-examining the victim and raised the issues regarding the victim's credibility during closing arguments as well. Counsel also testified that the Subway robbery occurred approximately an

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hour and a half after the tanning salon incident. Counsel testified that the Applicant was wearing a mask during the Subway robbery, but was identified by the victims by his clothing, vehicle, and star tattoo on his neck. Counsel testified that he could not recall the names of the two potential witnesses. Counsel acknowledged the signed proposed witness list had two names on it, but could only assume that they might be the names of the men Applicant referenced who were in the County Detention Center.

In regards to the Applicant's allegation that Counsel was deficient in the cross-examination of the State's witnesses, this Court finds that the Applicant has failed to meet his burden of proof. The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995). The Applicant did not proffer any questions Counsel allegedly failed to ask, and did not present any testimony showing the witnesses' answers at trial would have been different. This Court finds that Ms. Jones was effective in her cross-examination of the witness, in particular calling attention to the victim's unwillingness to cooperate. Accordingly, the Applicant has not shown that a different approach to cross-examination would have been beneficial to the defense.

Additionally, prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what a witnesses' testimony



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would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An 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. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). The Applicant failed to present any witness testimony to support his claim that Counsel was ineffective for failing to call the two witnesses on Applicant's behalf. This Court would be required to speculate on what those witnesses might have said.

Further, the Applicant alleged that Counsel failed to prove a defense of innocence based upon the Applicant's prior relationship with the victim. Applicant failed to present any testimony or evidence that would support his claim of a prior relationship and which could have been used at trial.

Applicant testified that Counsel advised him not to testify on his own behalf because Applicant would be forced to answer questions from the State, but that Applicant wanted to testify to explain the consensual relationship between the victim and him and had no prior record. Counsel testified that he discussed the right to testify with the Applicant and advised him of the risks, but it was Applicant's decision not to testify.

In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984).

There is a strong presumption that counsel's conduct falls within the wide range of reasonable

STATE OF SOUTH CAROLINA
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professional assistance and the “defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” *Id.*

This Court finds that the Applicant has failed to meet his burden of proof as to any allegations that Counsel was ineffective in his representation. Therefore, this claim is denied and dismissed.

This Court also finds that although it was raised in his application, the Applicant did not pursue the allegation of Counsel’s failure to make a motion for change of venue at the hearing. Therefore, this Court finds that the Applicant voluntarily abandoned this claim.

Summary

This Court finds in regards to the allegation of ineffective assistance of counsel, Counsel’s testimony was most credible. This Court further finds 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.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that 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 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.

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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 cautions 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:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 8th day of May, 2015.



 Roger L. Couch
 Presiding Judge

CLERK OF COURT
 SPARTANBURG COUNTY
 2015 MAY - 8 PM 4: 00
 M. HOPE BLACKLEY

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June 15, 2015

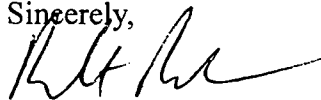
The Honorable Daniel E. Shearouse
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RE: Notice of Appeal and Proofs of Service for Alacantara, Pearson, and Arevalos

Dear Mr. Shearouse:

Please find enclosed the Notices of Appeal, Proofs of Service, and the respective underlying orders for Frederick Pearson, Jose Arevalos, and Milciades Alacantara. These were 608 appointment post conviction relief actions.

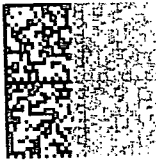
Sincerely,



Brandt Rucker, Esq.

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The Honorable Daniel E. Shearouse
Supreme Court of South Carolina
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