

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

Kristi Lea Harrington, Circuit Court Judge

JEFFREY WAYNE RIEBE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000015

SUPPLEMENTAL APPENDIX

DAVID ALEXANDER
Appellate Defender

ALAN WILSON
Attorney General

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

JOSHUA L. THOMAS
Assistant Attorney General

P. O. Box 11549
Columbia, SC 29211

ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

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PETITIONER'S PROPOSED ORDER GRANTING POST CONVICTION RELIEF1

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Jeffrey Riebe, #177357,)

Case No. 2013-CP-26-5292

Applicant,)

v.)

**ORDER GRANTING
POST CONVICTION RELIEF**

State of South Carolina,)

Respondent.)

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed August 5, 2013. Respondent made a timely Return on or about June 3, 2014. The Court convened an evidentiary hearing into the matter on August 26, 2014, at the Horry County Courthouse. Applicant was present at the hearing and represented by Daniel A. Selwa II, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Brana J. Williams, Esquire, also testified. The Court had before it a copy of the trial transcript, the records of the Horry County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the return, and the exhibits introduced at the hearing. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In October 2008, the Horry

County Grand Jury indicted Applicant for murder (2008-GS-26-1053). Brana J. Williams, Esquire ("trial counsel"), represented Applicant. On May 20, 2011, Applicant appeared before the Honorable Steven H. John for pre-trial motions. On May 24, 2011, Applicant proceeded to trial before Judge John and a jury. On May 31, 2011, the jury found Applicant guilty as indicted. Judge John sentenced Applicant to forty (40) years imprisonment.

Applicant filed a timely notice of appeal. Benjamin J. Tripp, Esquire, and Reid T. Sherard, Esquire, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on June 26, 2013. State v. Riebe, Op. No. 2013-UP-278 (S.C. Ct. App. filed June 26, 2013). The remittitur was returned to the circuit court on July 15, 2013.

II. ALLEGATIONS

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

1. "Ineffective Assistance of counsel for failure to object to expert testimony and court not recognizing as expert."
2. "Ineffective Assistance of counsel for failure to object to closing statement by state"
3. "Ineffective Assistance of counsel for failure to object to trial under one indictment then sentence under another"
4. "Ineffective Assistance of counsel for failure to defects in the indictment."
5. "Ineffective Assistance of counsel for failure to bring up meritorious issue to Appeal court."
6. "Ineffective Assistance of counsel for fail to bring up plain erro issue before the appeals court"

At the evidentiary hearing, Applicant proceeded on only the allegations of ineffective assistance of trial counsel for failing to move to quash the indictment and for failing to object to the solicitor's closing argument.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The 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).

A. Summary of Testimony

Applicant testified his indictment was amended during trial. Applicant averred the state presented evidence during trial that differed from the information in the indictment. Specifically, Applicant alleged the State presented evidence the victim died from strangulation and blunt force trauma, but the indictment only listed strangulation. Applicant believes this is a change in the State's theory of the case. Applicant testified trial counsel never reviewed the elements of murder or the State's evidence with him. He believes trial counsel should have moved for a directed verdict when the state failed to present evidence consistent with the allegations in the indictment.

Applicant further alleged his indictment was not true billed by a legally constituted grand jury. Applicant testified the grand jury was not authorized to meet on the date listed on his indictment. Applicant also testified the trial counsel should have objected to the indictment because the indictment number indicated indicates he was indicted in 2008, but was actually true billed in 2009. He recalled the trial judge amending the indictments at trial to reflect the correct year. Applicant further testified the difference in dates on the front and back of the indictment should have been objected to. Applicant also testified trial counsel should have objected to the solicitor's closing argument that called Applicant guilty and said his experts were lying.

Trial counsel testified she has been practicing law for over twenty (20) years, and has been employed in private practice and as an assistant solicitor. She testified she recalls lodging no objection to the indictment. Trial counsel also testified she recalled the difference in dates on the indictment, but did not think it was prejudicial. She testified she had no questions about whether the grand jury met and considered Applicant's indictment. Trial counsel testified she reviewed the State's evidence with Applicant prior to trial, and was not surprised by the medical evidence the State presented regarding the victim's cause of death. She testified she understood what the State was alleging in the indictments. Trial counsel also recalled the solicitor's closing argument, and testified she would have objected if the solicitor had said anything objectionable. However, she recalled no objectionable material in the closing. She also recalled Judge John instructing the jury it was the judge of the facts and that the attorney's arguments were not evidence.

B. Ineffective Assistance of Trial Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "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." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at

687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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." Id. at 117-18, 386 S.E.2d at 625.

The Court finds Applicant met his burden of showing trial counsel was ineffective as to the deficiencies in the indictment. Applicant's allegations regarding deficiencies in the indictment are meritorious. The Court finds the indictments provided insufficient notice on the State's allegations to the Applicant, then Defendant, and his trial counsel. The Court finds Applicant was without proper notice to formulate a defense to the State's theory of it's case as one of the two possible reasons relied upon to determine cause of death was not present in the notification of the charges against the Applicant. The Court finds had the Applicant been properly notified of all of the alleged conduct and consequences as a result, the Applicant would have presented a competently prepared defense, which may have used this absent allegation in his favor to prove his innocence.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has established specific constitutional violations or deprivations that requires this Court to grant his application. Therefore, this application for post-conviction relief must be granted and remanded for a new trial.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is granted; and
2. The matter shall be remanded for a new trial.

AND IT IS SO ORDERED this _____ day of _____, 2014.

THE HONORABLE KRISTI LEA HARRINGTON
Presiding Judge

_____, South Carolina