THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse, Circuit Court Judge

Case No. 2013-CP-42-2913

State of South Carolina

Respondent,

v.

Joseph Gabriel Cobb,
#183773

Appellant.

Notice of Appeal

Joseph Gabriel Cobb appeals the order of the Honorable R. Scott Sprouse dated August 6, 2014. Appellant received written notice of entry of this order on August 13, 2015.

September 3, 2015

Sincerely,

s/ Brandt Rucker

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

cc:
Other Counsel of Record:

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

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

Case No. 2013-CP-42-2483

State of South Carolina

Respondent,

v.

Joseph Gabriel Cobb, #183773

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 September 3, 2015, addressed to its attorney of record, Justin Hunter Office of the South Carolina Attorney General, P.O. Box 11549, Columbia, S.C. 29211.

September 11, 2015

Sincerely,

s/ _____

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

cc:
Other Counsel of Record:
Justin Hunter
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P.O. Box 11549
Columbia, S.C. 29211

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2013-CP-42-2913

Joseph Gabriel Cobb, #183773,

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

This matter comes before the Court by way of an Application for Post-Conviction Relief filed July 19, 2013, and amendment filed March 17, 2015. The Respondent made its Return and Motion to Dismiss on or about September 5, 2014. An evidentiary hearing into the matter was convened on June 8, 2015, 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 Whelchel, Esquire, ("Counsel") 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 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 August 2007 term of the Spartanburg County Grand Jury for criminal sexual conduct with a minor, second degree (2007-GS-42-3875). The Applicant was represented by Richard H. Pickley

Whelchel, Esquire. On March 10, 2011, the Applicant proceeded to trial and was convicted as indicted. The Honorable J. Derham Cole sentenced Applicant to life without parole.

A timely Notice of Appeal was filed on the Applicant's behalf and an appeal was perfected by Breen Richard Stevens, Esq. Following the submission of a brief pursuant to Anders v. California, 386 U.S. 738 (1967), the South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Cobb, No. 2013-UP-122 (filed March 27, 2013). The Remittitur was issued on April 16, 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 that;
   a. Counsel failed to move for a mental evaluation of the Applicant,
   b. Counsel and prior defense counsel failed to properly investigate,
   c. Counsel failed to discuss the alteration of trial exhibits, failed to prevent such alteration, and failed to move to suppress publication of the video tape based upon the severely diminished sound quality of the video tape,
   d. Counsel failed to inform Applicant of a plea deal until it was too late to accept the deal.

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. Initially, this Court finds Applicant's testimony to be not credible. In contrast, this Court finds Counsel's testimony

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credible. 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) (citing Rule 71.1(e), SCRCP). 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 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

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480 S.E.2d 733, 735 (1997) (citing Strickland).

1. Failure to move for mental evaluation

Applicant alleges trial counsel was ineffective for failing to have Applicant mentally evaluated. This allegation is without merit.

A defendant must be mentally competent to stand trial to assist counsel in his defense. Drope v. Missouri, 420 U.S. 62 (1975). In determining if counsel is ineffective for failing to request a competency hearing, an applicant must show that a reasonable probability exists that he would be found incompetent at the time of this trial or plea. Jeter v. State, 308 S.C.230, 417 S.E.2d 594 (1992). Counsel may reasonably rely on his own perceptions in deciding if a client is competent to stand trial. Id.

After reviewing the record before the Court and thoroughly evaluating the testimony presented at the PCR hearing, this Court finds Applicant failed to meet his burden of proof. This Court finds Applicant failed to present credible evidence that he was not competent to stand trial for the offenses of which he was convicted. Furthermore, trial Counsel did not testify that he had any concerns relating to Applicant's mental state. Accordingly, this issue without merit.

2. Failure to investigate

This Court finds Applicant failed to meet his burden to prove that counsel's performance was either deficient or ineffective for failing to properly investigate. "Criminal 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." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (internal citations omitted). Regardless, the allegation rests entirely on speculation. See Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) ("failure to conduct an independent investigation does not

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constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result.").

At the PCR hearing, Applicant testified Counsel only went over discovery with him immediately prior to the trial. Applicant testified Counsel only met with him three or four times, for no longer than ten to fifteen minutes per meeting. Applicant testified Counsel did not prepare for trial and had no strategy. In contrast, Robert Hall, Applicant's initial defense attorney, testified he believed he did review the discovery materials with Applicant. Additionally, Richard Whelchel (Counsel) testified that when he took over the case, he discussed with Applicant the possibility of Applicant testifying at trial and the possibility he could be impeached with his prior convictions. Counsel also testified he went over the evidence against Applicant with him, including the two statements Applicant gave. Counsel testified he explained to Applicant that just because no DNA was found inside the Victim, it did not mean there was no evidence of rape. Counsel testified the Victim's testimony was enough to convict Applicant.

After weighing the testimony of Applicant and Counsel, this Court finds Applicant has not presented any credible evidence that Counsel was unprepared for trial. At the PCR hearing, Counsel demonstrated a clear understanding of Applicant's case and the evidence against him. Furthermore, this Court finds Applicant's testimony to be not credible with regard to the amount of time he met with Counsel prior to his trial. This Court finds Applicant's unsupported allegations do not merit post-conviction relief in this matter.

3. **Alteration of exhibits and suppression of the videotape**

Applicant alleges Counsel was ineffective for failing to move to suppress evidence that Applicant believes was altered or destroyed. This Court finds this allegation to be without merit.

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At the PCR hearing, Applicant alleged the videotape of his statement was missing eight seconds of the interview. Applicant also alleged various pieces of evidence were incomplete or missing. In contrast, Counsel testified he did not believe there was anything wrong with the videotape of Applicant's statement. Counsel also testified that at Applicant's trial, Counsel did raise to the trial judge that some evidence appeared to have been lost.

This Court finds that based upon Counsel's testimony, Applicant has failed to show any ineffectiveness. Counsel cannot be ineffective for failing to object where he did raise to the trial court that he believed some evidence was missing. Furthermore, this Court finds Counsel credible where he testified he did not believe there was anything wrong with the tape. As such, the allegations are without merit.

4. Failure to inform Applicant of plea deal

Applicant alleges Counsel did not inform him of the State's plea offer until it was too late to accept it. This allegation is without merit.

To be successful on an allegation of an un-conveyed plea offer, Petitioner must prove: (1) trial counsel's failure to communicate the State's initial plea offer constituted deficient performance, and (2) Petitioner was prejudiced by the deficient performance, or there was a reasonable probability that but for this deficient performance, he would have accepted he original plea offer. Davie v. State, 381 S.C. 601, 608, 675 S.E.2d 416, 420 (2009). Generally, failure to convey a plea offer constitutes deficient performance, although the existence of prejudice needs to be evaluated on a case-by-case basis. Id. at 613, 675 S.E.2d at 422. To show prejudice from a failure to convey a plea offer, Applicant must:

> Demonstrate a reasonable probability [he] would have accepted the earlier plea offer had they been afforded effective assistance of counsel. [He] must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the

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> authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.
>
> Missouri v. Frye, ___ U.S. ___, 132 S.Ct. 1399, 1409 (2012).

At the PCR hearing, Applicant testified his first attorney, Robert Hall, came to him with a plea offer for ABHAN, but it was too late for him to accept the offer. In contrast, Hall testified he did not recall the solicitor ever extending any plea offers to Applicant. This Court finds Hall's testimony credible and Applicant's testimony not credible. As such, Applicant has presented no credible evidence that Hall, or Welchel, failed to convey any plea offers. Accordingly, the allegation is without merit.

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:

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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 3 day of August, 2015.

R. SCOTT SPROUSE
Presiding Judge
Seventh Judicial Circuit

Walhalla, South Carolina

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2015 AUG -6 AM 9:40
HENDEE BLACKLEY

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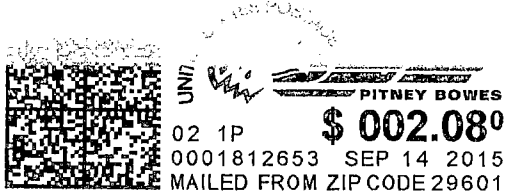

The Honorable Daniel E. Shearouse
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