

STATE OF SOUTH CAROLINA
COUNTY OF WILLIAMSBURG

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

David R. Vice, #314663

2014-CP-45-485

Applicant,

v.

ORDER OF DISMISSAL

State of South Carolina,

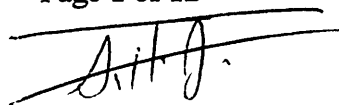
Respondent.

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This matter comes before the Court by way of a post-conviction relief (PCR) application filed on September 17, 2014. Respondent made its return on March 3, 2015. An evidentiary hearing in to the matter was convened on July 15, 2015, at the Sumter County Courthouse. Applicant was present at the hearing and was represented by Ralph Wilson, Sr., Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Williamsburg County Clerk of Court. The Applicant was true bill indicted at the March 2012 term of the Williamsburg County Grand Jury for failure to stop for a blue light, possession with intent to distribute marijuana, and trafficking in cocaine, 28 g. or more, but less than 100 g. (2012-GS-45-0050). Matt Swilley, Esquire represented Applicant. Applicant proceeded to a jury trial and was found guilty as indicted on November 6, 2012. The Honorable Clifton Newman sentenced



Applicant to a ten year term of imprisonment and a \$50,000 fine for trafficking in cocaine (more than 28 g. but less than 100 g.), a three year term of imprisonment for failure to stop for a blue light, and a five year term of imprisonment for possession with intent to distribute marijuana with all sentences running concurrently.

A timely notice of appeal was filed on Applicant's behalf. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. David R. Vice, 204-UP-103 (Ct. App. 2014). The Remittitur was issued on October 28, 2014.

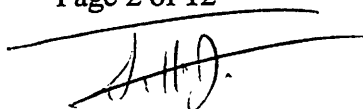
ALLEGATIONS

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

1. Ineffective Assistance of Counsel
 - a. Counsel failed to properly investigate the facts of the case and adequately prepare for trial;
 - b. Counsel failed to properly represented Petitioner during trial; and
 - c. Counsel failed to convey any plea offers from the State to Petitioner and failed to advise Petitioner.
2. Violation of Defendant's 6th and 14th Amendment Constitutional Guarantees.

SUMMARY OF TESTIMONY PRESENTED

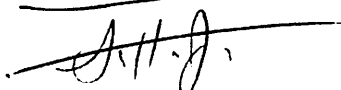
At the evidentiary hearing, Applicant testified on his own behalf. Applicant also presented testimony from Matt Swilley, Esquire. (hereinafter "Trial Counsel"). This Court also had before it a copy of the trial transcript, the Williamsburg County Clerk of Court records, Applicant's South Carolina Department of Correction records, appellate records, the PCR application, and return. During the evidentiary hearing, Applicant introduced various exhibits.

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During the evidentiary hearing, Applicant stated that he is currently housed in Turbeville correctional institution. Applicant stated that he filed his PCR application because he felt his trial attorney was ineffective. Applicant stated that he was originally represented by Shaun Kent. Applicant stated that he hired trial counsel the Friday before the start of trial. Applicant stated Trial Counsel requested a continuance until the following term. However, Judge Newman only gave him a week long continuance. Applicant stated that the continuance was not long enough for Trial Counsel to adequately prepare the case. Applicant stated Trial Counsel received discovery the Monday after the continuance hearing. Applicant stated that they went to his Aunt's house to review the material. Applicant stated that they watched the police officer's dash cam video. Applicant stated the meeting lasted for approximately twenty or thirty minutes.

Applicant stated Trial Counsel told him that they needed to go to trial because the State had nothing on him. Applicant stated that he wanted to go to trial because he was not guilty of the charges. Applicant stated the police attempted to stop him because he was known for driving under a suspended license. Applicant stated the police officer claimed that he drove across the center yellow line. Applicant stated the police officer pulled his car in front of Applicant. Applicant stated that he sped off, a chase ensued, and he was stopped and arrested. Applicant stated that he wanted Trial Counsel to limit the testimony of the officer regarding this issue. Applicant noted that Trial Counsel filed a motion to suppress the evidence, but the motion was denied.

Applicant stated that he never discussed trial strategy with Trial Counsel. Applicant stated that there was no plea offer from the State. Applicant stated that Trial Counsel talked about a ten year plea offer. Applicant stated that he wanted to just go forward with the trial.

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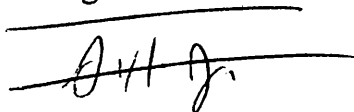
Applicant stated that he would have taken the ten year plea offer had he known that the motion to suppress hearing was denied. Applicant acknowledged that he was present for the hearing, but did not understand what the hearing meant. Applicant stated that he would have worked out something to avoid getting a lot of time.

Applicant stated Trial Counsel didn't locate witnesses or talk to anyone on his behalf because of the one week time period. Applicant stated he only knew the street names and nick names of people who were around the scene. Applicant stated there were about ten people present at the scene. Applicant stated Trial Counsel should have gone by the crime scene, hired an investigator, and examined the video tape.

Applicant stated Trial Counsel should have had an ID hearing because no one knew him. Applicant stated Trial Counsel was ineffective for failing to object to the curative instruction. Applicant acknowledged that Trial Counsel objected to the Officer Hayes stating that Applicant was known to run from law enforcement. However, Applicant claimed Trial Counsel should have objected to the curative instruction given by the trial judge. Applicant stated the Trial Counsel should have objected to the trial judge charging the jury regarding the "strong evidence" language.

Applicant opined that he would have pled guilty to get less time. Applicant stated that he did not feel Trial Counsel had any evidence to support his case. However, Applicant could not name what evidence Trial Counsel should have obtained. Applicant claimed that he is not guilty of the charges and was only found guilty because he received ineffective assistance of counsel.

Following Applicant's testimony, Trial Counsel was called to testify. Trial Counsel stated that Applicant retained him the weekend before his trial was scheduled to begin. Trial

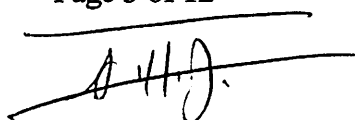
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Counsel stated Shaun Kent was representing Applicant previously. Trial Counsel stated that he advised Applicant that he could not guarantee a continuance in the case, but that he would make the motion. Trial Counsel thought that the court would continue the case until the next term of General Sessions. Trial Counsel was surprised when the trial judge only granted him a one week continuance. Trial Counsel stated that he was not satisfied with a one week continuance and felt the court should have granted him more time to prepare the case for trial.

Trial Counsel stated that he got discovery from the solicitor on the day of the motion's hearing. Trial Counsel stated that he filed a supplemental discovery motion requesting various documents including video tapes, service logs, recordings etc... Trial Counsel could not recall if he ever received the additional discovery. Trial Counsel could not recall whether he renewed his discovery request prior to trial on the record or off the record.

Trial Counsel stated that he drove out to the scene immediately following the continuance hearing. Trial Counsel explained that the police officer claimed Applicant crossed the yellow line. Trial Counsel stated the police officer cut Applicant off, Applicant drove around the officer, and a chase ensued. Trial Counsel stated that the officer claimed Applicant threw various narcotics out of the car window during the chase.

Trial Counsel stated that he explained all the probable cause information to Applicant prior to and after the hearing. Trial Counsel stated Applicant told him that he understood. Trial Counsel stated that he objected to Officer's Hayes testimony concerning Applicant's tendency to run from law enforcement. Trial Counsel stated that he moved for a mistrial and the judge denied his motion. Trial Counsel stated that he did not object to the curative instruction. Trial

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Counsel stated that they discussed the ten year plea offer. Trial Counsel stated that he advised Applicant that the ten years was less time than he would get if convicted at trial.

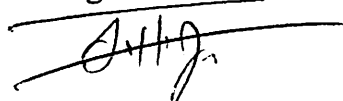
FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. Specifically, this Court finds Trial Counsel's testimony credible and Applicant's testimony not credible. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

INEFFECTIVE ASSISTANCE OF COUNSEL

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

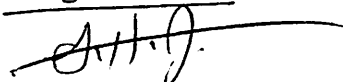
The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. 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.

1. Ineffective assistance of counsel for failing to properly investigate the facts of the case and adequately prepare for trial.

This Court finds Trial counsel was not ineffective for failing to properly investigate the facts of the case and adequately prepare for trial. Initially, this Court notes "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Strickland v. Washington, 466 U.S. 668, 691, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674 (1984). In the instant case, Applicant retained Trial Counsel the weekend before his trial was scheduled for trial. Trial Counsel requested a continuance and was granted seven days to prepare the case. Trial Counsel was substantially hindered in his ability to fully prepare and investigate due to Applicant retaining his services at the ninth hour. Regardless, this Court finds Trial Counsel prepared and conducted a diligent investigation given his limited amount of time. Notably, Trial Counsel viewed and investigated the scene of the crime, obtained and reviewed discovery with Applicant, and prepared the case for trial. Based off of the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of

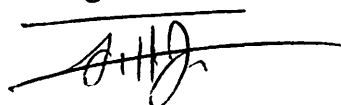
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the Strickland test – that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms.

Furthermore, Applicant has failed to provide this court with any credible evidence in support of his allegation. 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 notes Applicant complained that Trial Counsel failed to investigate into several witnesses and failed to call the various witnesses at trial. Since none of the witnesses testified at the PCR hearing, this Court cannot consider any testimony they might have given at trial to determine whether the failure to call them as witnesses constitute ineffective assistance of counsel. See Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (Holding the Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice).

Applicant further complained the Trial Counsel should have retained an expert witness to review the video tape. Since no expert witness testified at the PCR hearing, this Court cannot consider any testimony he might have given at trial to determine whether the failure to call an expert as a witness constituted ineffective assistance of counsel. See Dempsev v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, as the applicant failed to have an expert testify at the evidentiary hearing, "any finding of prejudice is merely speculative").

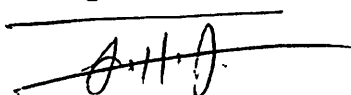
Additionally, Applicant claimed Trial Counsel was ineffective in failing to obtain additional discovery material and other various documents. Since Applicant failed to provide this Court with the documents in question, this Court cannot review them to ascertain whether Trial Counsel's failure to secure them amounts to ineffective assistance of counsel. See Palacio

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v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (holding that, since the contents of challenged documents were not presented at the PCR hearing, the Applicant could not demonstrate how the failure of counsel to obtain these documents prejudiced the defense). Based off of the foregoing, this Court finds Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland – that he was prejudiced by Trial Counsel’s performance.

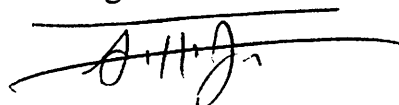
2. Ineffective assistance of counsel for failing to represent him properly at trial.

This Court finds Applicant’s allegation that he received ineffective assistance of counsel for Counsel’s failure to properly represent him at trial is meritless. First, Applicant claims Trial Counsel should have objected to the Trial Court’s curative instruction given after Trial Counsel’s request for a mistrial. At trial, Officer Hayes stated: “Considering knowing that - - if who the suspect was and knowing he was known to run from law enforcement - - -”. Trial Counsel immediately objected to the testimony by the officer, and argued the admission was improper because it was evidence of prior bad acts. (T.80 lines 10-16). The Trial Court then sustained the objection and issued a curative instruction including striking the testimony from the record. (T.86 lines 7-11). Specifically, the Trial Court instructed the jury to “disregard the entire question and response.” (T.86). Applicant now contends that Trial Counsel should have objected to the curative instruction. However, this Court finds the Trial Court’s curative instruction was proper. As a result, this Court finds Applicant has failed to to present sufficient evidence to prove the first prong of the Strickland test – that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present any credible evidence as to how he was prejudiced by Trial Counsel’s failure to

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object to the curative instruction. Based off of the foregoing this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test – that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms.

Applicant further contends Trial Counsel was ineffective for failing to object to the Trial Court using language subsequently prohibited by *State v. Cheeks*, 401 S.C. 322, 737 S.E.2d 480 (2013). Specifically, Applicant referenced the Trial Court’s charge to the jury: “Actual knowledge of the presence of the marijuana is strong evidence of the defendant’s intent to control its disposition or use.” However, the South Carolina Supreme Court has consistently held that Trial Counsel cannot be held ineffective for failing to anticipate changes in case law. See *Gilmore v. State*, 314 S.C. 453, 445 S.E.2d 454 (1994) (attorney is not required to be clairvoyant or anticipate changes in the law which were not in existence at time of trial), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999). Applicant’s trial was conducted in November 2012. *State v. Cheeks* was not decided until January 2013. As a result, Trial Counsel cannot be held ineffective for failing to anticipate changes in the law. This Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test – that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, this Court finds Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland – that he was prejudiced by Plea Counsel’s performance. This Court finds Applicant’s allegation should be denied and dismissed with prejudice.

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3. Ineffective assistance counsel for failing to convey any plea offers from the State to Petitioner and failed to advise Petitioner.

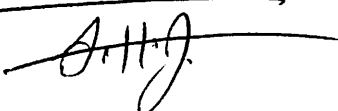
The Applicant seems to complain ineffective assistance on the ground that Trial Counsel failed to convey a plea offer. However, this Court notes Applicant acknowledged that he turned down a ten year plea offer prior to the start of trial. This Court finds credible Trial Counsel's testimony that he relayed the ten year plea offer and discussed the advantages and disadvantages of accepting the offer. This Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test – that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, this Court finds Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland – that he was prejudiced by Plea Counsel's performance. This Court finds Applicant's allegation should be denied and dismissed with prejudice.

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 that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his



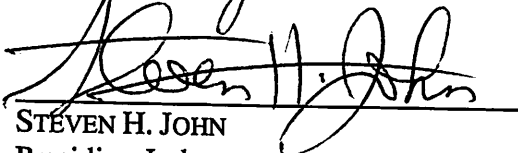
application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

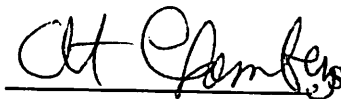
This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant 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 4th day of August, 2015.


STEVEN H. JOHN
Presiding Judge
Third Judicial Circuit


South Carolina

