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MARION C. FAIREY, JR.

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RECEIVED

February 11, 2016

FEB 17 2016

Via U.S. Mail

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

S.C. SUPREME COURT

Re: Joseph Wilson v. State of South Carolina
Case Number 2014-CP-25-001

Dear Mr. Shearouse:

Please find enclosed the original and one copy of the *Notice of Appeal* and the Order appealed from relevant to the above-mentioned Post-Conviction Relief matter, for which I was the Court Appointed counsel. Please file the original and return the clocked-in copy to me in the envelope provided. By copy of this letter, I am today serving the Attorney General and filing same with the Clerk of Court in Hampton County.

Please accept my kindest regards.

Sincerely,


Marion C. Fairey, Jr.

MCFjr/jj

Enclosure(s)

cc: J. Rutledge Johnson
Myllinda Nettles
Loriene French

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Hampton County
In the Court of Common Pleas

Roger L. Couch, Presiding Judge

Case No. 2014-CP-25-0001

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FEB 17 2016

S.C. SUPREME COURT

Joseph Davis, #262813Appellant,

v.

State of South Carolina Respondent

NOTICE OF APPEAL

Joseph Davis appeals the orders of the Hon. Roger L. Couch entered January 29, 2016, denying post conviction relief. Appellant received written notice of the entry of the final order on February 3, 2016.


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February 11, 2016

STATE OF SOUTH CAROLINA)
)
COUNTY OF HAMPTON)

CERTIFICATE OF SERVICE

RECEIVED

RE: Joseph Davis, #262813 v. State of South Carolina
Case No. 2014-CP-25-0001

FEB 17 2016

PERSONALLY APPEARED before me Jill Jones, who being ^{S.C. SUPREME COURT} duly sworn,
deposes and says: that she is employed by The Fairey Law Firm; that she served or
caused to be served via US Mail Delivery postage prepaid the attached **Plaintiff's Notice
of Appeal** in the above-referenced matter to the addresses listed below on February 11,
2016:

J. Rutledge Johnson
Assistant Deputy Attorney General
Post Office Box 11549
Columbia, SC 29211

Supreme Court of South Carolina
Daniel Shearouse, Clerk
Post Office Box 11330
Columbia, SC 29211

Loriene French
South Carolina Commission on Indigent Defense
Post Office Box 11433
Columbia, SC 29211

Jill S. Jones

Jill S. Jones

Sworn to before me this
11 day of February, 2016

[Signature]
Notary Public, State of South Carolina
My Commission Expires: 3/11/2021
My Comm. Exp. 03-11-2021
PUBLIC NOTARY SOUTH CAROLINA

0589), and armed robbery (2008-GS-25-0590). The Applicant was represented by Stephanie Smart-Gittings, Esquire.

The Applicant proceeded to trial and was convicted as indicted. On June 29, 2011, the Applicant was sentenced by the Honorable Perry M. Buckner to confinement for a period of life for murder, twenty-five (25) years for burglary, and thirty (30) years for armed robbery. The sentences are to be served concurrently.

The Applicant filed a timely Notice of Appeal. His appeal was perfected by Benjamin Tripp, Esquire, and Breen Stevens, Esquire, of the South Carolina Office of Appellate Defense. The Applicant's convictions and sentences were affirmed by the Supreme Court. State v. Davis, No. 2013-MO-031 (S.C. Sup. Ct. October 9, 2013). The Remittitur was issued on October 25, 2013.

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

1. Ineffective assistance of counsel and a denial of due process rights.
 - a. Numerous deficiencies.
 - b. Failure to investigate.
 - c. Counsel's inaction denied me a fair 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. Set forth below are the relevant findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

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Ineffective Assistance of Counsel

The Applicant alleges he is entitled to post-conviction relief on the basis that he received ineffective assistance of trial 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). To be entitled to post-conviction relief, the applicant must prove both of the following: (1) his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) the applicant suffered prejudice 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). Under this standard, counsel's deficient performance must have prejudiced the Applicant to the extent that "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).

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 v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

A. Trial counsel's failure to object to a co-defendant's testimony at trial.

Applicant contends Counsel was ineffective for failing to object to a co-defendant's testimony during his trial.

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During the trial, Applicant's co-defendant, Shawn Davis, testified Applicant was his brother. (Tr. p. 312 line 8). The solicitor then asked Mr. Davis what he was doing on the incident date, to which Mr. Davis responded, "The only thing I can say is I got—I got 30 years. I ain't got nothing to say." (Tr. p. 312 lines 11-12). Mr. Davis proceeded to deny the fact the he had given a statement to law enforcement; however, the State introduced his statement into evidence under 613(b), SCRE. This statement fully implicated Applicant in the murder of the Victim with a .22 caliber revolver. (Tr. pp. 316-318).

This Court finds Counsel had an obligation to object to, argue against, or request a limited instruction as to the introduction of the convictions of the co-defendant by the assistant solicitor. However, although Counsel's failure to do so fell below the objective standard of reasonableness required under Strickland, this deficiency was not sufficiently prejudicial in light of the overwhelming evidence of the Applicant's guilt presented at trial.

Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); See also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001); Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (S.C. 1991). In Ford, trial counsel failed to request an alibi instruction and his representation was found deficient as a result. However, the evidence of the applicant's guilt in Ford was overwhelming and this Court held that the applicant failed to prove the second prong of Strickland, which requires that an Applicant show prejudice by the deficient representation.

At trial, the State introduced into evidence Applicant's own voluntary verbal and video confessions fully implicating Applicant as the perpetrator of these crimes. (Tr. pp. 355-356; 377

(video confession)). The State also introduced Shawn Davis's statement to law enforcement into evidence, in where he fully implicated Applicant as the shooter of Victim. Additionally, the State introduced into evidence Mr. Derrick Adkins' statement, another co-defendant. This statement also incriminated Applicant in the shooting death of the victim. (Tr. pp. 326-328). Further, Marquis Bryant, a fourth co-defendant and driver of the vehicle, testified he gave a statement in which he knew the other co-defendants were planning to rob Victim and that Applicant threatened to kill him with a gun if he ever told anyone about the incident. (Tr. p. 308 lines 4-15). As such, this Court finds there is overwhelming evidence of Applicant's guilt in this case which would negate any deficiency of Counsel's failure to object to the co-defendant's statement concerning his conviction. Thus, this allegation is denied.

B. Failure to challenge the Blair hearing and failure to call witnesses on Applicant's behalf during mitigation.

Applicant also presented claims that Counsel was ineffective for failing to call an expert on Applicant's behalf to challenge the pre-trial Blair¹ hearing and for failing to call witnesses on Applicant's behalf during the mitigation stage of Applicant's trial.

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). 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

¹ State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981).

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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).

Applicant failed to produce any witnesses to substantiate either claim at the PCR hearing. As such, Applicant has failed to meet his burden of proving prejudice under Strickland. Thus, these allegations are denied.

C. Additional Grounds Raised by Applicant

Applicant also raised several other issues in support of his Application: (a) the failure of counsel to object to evidence ballistics evidence of a recovered bullet and .22 caliber pistol where the bullet has been lost and unavailable at trial; (b) the failure of counsel to object to the trial court's order hospitalizing the Applicant, who had initially been deemed incompetent to stand trial, for treatment to restore his competency; and (c) the failure to present evidence that the Applicant had been given anti-psychotic medication prior to his interrogation and subsequent confession. These issues are without merit and can be summarily rejected for lack of evidence.

As to the issue regarding the missing bullet, there was no evidence at the PCR hearing regarding what, if any, testing may have been utilized on the missing bullet that might have changed the result of the trial. The SLED Forensics Firearms Specialist who testified at the Applicant's trial was unable link the recovered bullet to a specific firearm, let alone the specific weapon allegedly used by the Applicant. (Tr. 336). He admitted this on direct examination and further admitted on cross-examination that the bullet could have been fired from other weapons. (Tr. 342). Under the circumstances, counsel's failure to object to the introduction of evidence



regarding the bullet that disappeared before trial was neither an error by counsel nor reasonably likely to have changed the result. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Applicant's claim that his trial counsel's failure to object to the trial court's Order, issued pursuant to S.C. Code Anno. §42-23-430, that he be hospitalized and treated so that he could become competent to stand trial, is also without merit. Prior to standing trial, the trial judge ordered the Applicant to undergo a competency evaluation. (Tr. 13). This initial evaluation concluded that the Applicant was not competent to stand trial, but that "the symptoms rendering him incompetent are often remediable, he is likely restorable to competency in the foreseeable future via psychological treatment." (Tr. Ex. 1). The Applicant was then hospitalized and treated in what turned out to be a successful effort to restore his competency as determined by the trial court at a pretrial hearing conducted pursuant to State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981). The Applicant argues that his forced hospitalization and treatment violated his Fifth Amendment right against self-incrimination and that his counsel was ineffective for failing to object to the hospitalization and treatment that eventually restored his competency.

The record reflects that the procedure utilized to evaluate the Applicant's competency for trial and his hospitalization and treatment were in compliance with S.C. Code Anno. §42-23-430. Prior to the commencement of his trial the Applicant was given a proper Blair hearing where he was found to be competent to stand trial. Moreover, the record reveals no deficiency in counsel's performance either at the Blair hearing or regarding the conduct of the Applicant's mental evaluations and treatment. Further, the Applicant has failed to identify any authority that would suggest that he has a Fifth Amendment Right as an accused to refuse treatment that was



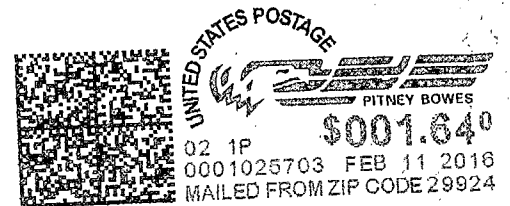
determined to be medically necessary, appropriate under S.C. Code Anno. §42-23-430 and reasonably calculated to allow him to participate in his own defense. The Court finds that the performance of Applicant's trial counsel regarding his competence was constitutionally adequate.

Additionally, the Applicant claims that his trial counsel was deficient in failing to object to the introduction of his videotaped confession on the grounds that he was under the influence of anti-psychotic medication during his interrogation. However, the record reveals that during the Jackson v. Deno hearing in this matter, trial counsel not only introduced evidence that suggested that the Applicant was on anti-psychotic medication during his interrogation, but that she also called a nurse, Pecolia Mungin, who was qualified as an expert witness to testify about this issue at trial. (Tr. 408). The court finds that trial counsel performance was adequate on this issue.

Finally, the Court notes that even if there were some evidence to suggest that his trial counsel's performance were deficient on these issues, the Applicant's Petition must still fail due to the overwhelming evidence of the Applicant's guilt and the attendant lack of prejudice. See, Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); See also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001); Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (S.C. 1991).

After consideration of the arguments and evidence of the Applicant, the Court concludes that these claims have no merit.

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