

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

RECORDED
IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
2019 MAY 18 PM 10:24

William Gregg, #274507,

JAMES W. HART, III
CLERK OF COURT
SUMTER COUNTY, S.C.
Case No. 2008-CP-43-2479

Applicant,

v.

ORDER OF DISMISSAL

State of South Carolina,

Respondent.

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on October 27, 2008. Respondent made its return on May 6, 2009. An evidentiary hearing in to the matter was convened on December 17, 2015, at the Sumter County Courthouse. Applicant was present at the hearing and was represented by John S. Keffer, 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 incarcerated with the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. Applicant was indicted at the October 2007 term of the Sumter County Grand Jury for (1) Murder, (2) Possession of a Firearm During Crime of Violence, and (3) Possession with Intent to Distribute Heroin (2007-GS-43-0796). Christopher Hart, Esquire, represented him. Applicant proceeded to a jury trial before the Honorable R. Ferrell Cothran, Jr., on July 28-30, 2008. Applicant was found guilty of Murder and Possession of a Firearm During Crime of

Violence.¹ Applicant was sentenced to thirty-five (35) years imprisonment for Murder and a concurrent term of five (5) years imprisonment for Possession of a Firearm During Crime of Violence. Applicant did not appeal his conviction and sentence.

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. Failed to investigate case.
2. Denial of due process and fair trial.
3. Prosecutorial misconduct.

This Court notes Applicant failed to present sufficient testimony and arguments in support of his claims of a due process violation and prosecutorial misconduct.

SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. The State presented testimony from Chris Hart, Esquire (hereinafter "Trial Counsel"). This Court also had before it a copy of the trial transcript, the Sumter 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 testified that he was sentenced for murder in 2008. Applicant stated Chris Hart was his trial attorney. Applicant stated he met with Trial Counsel approximately three to five times prior to his trial. Applicant recalled reviewing discovery with Trial Counsel. Applicant recalled discussing various defenses with Trial Counsel.

¹ As a result of a pre-trial motion by the defense, the charge of Possession with Intent to Distribute Heroin was not tried during this trial.

Applicant stated that he felt he received ineffective assistance of counsel because Trial Counsel failed to properly investigate his case. Applicant stated Trial Counsel represented him eighteen months and only saw him about three to five times. Applicant stated that there were various witnesses alleging that he committed this crime. Applicant stated the area was known to be dark. Applicant further stated Trial Counsel failed to investigate the medical evidence in his case.

Applicant stated Kendrick Miller identified him as the shooter. Applicant recalled Trial Counsel requesting a Neil v. Biggers hearing to determine the identification. Applicant stated that he did not know who Kendrick Miller was prior to trial. Applicant stated he did not know how Kendrick Miller could identify him as the shooter when Applicant did not know him.

Applicant stated Trial Counsel should have moved to dismiss the indictment on a double jeopardy grounds. Specifically, Applicant stated he was indicted for murder, possession of a firearm, and possession with intent to distribute heroin. Applicant recalled Trial Counsel made a motion to sever the charges. Applicant stated the appearance of charges were prejudicial. Applicant cited to the Blockburger test. Applicant stated Trial Counsel failed to move to suppress illegally seized evidence. Specifically, Applicant stated the bullet taken from the wall was introduced into evidence.

Following Applicant's testimony, Trial Counsel was called to testify by the State. Trial Counsel stated that he had been practicing law for fourteen years and was retained to represent Applicant. Trial Counsel stated he met with Applicant seven to ten times prior to his trial. Trial Counsel stated he filed Brady and Rule 5 motions. Trial Counsel stated he reviewed the discovery material with Applicant prior to trial. Trial Counsel stated he hired a private investigator to help him investigate the case. Trial Counsel stated the investigator took pictures

of the scene and interviewed Kendrick Miller. Trial Counsel stated Kendrick Miller was not an important witness because he only heard shots and did not see anything take place.

Trial Counsel stated Applicant was very personable and intelligent person. Trial Counsel stated he first met with Applicant and got the true story. Trial Counsel stated Applicant was very concerned about extradition and wanted to challenge his extradition. Trial Counsel stated he discussed Applicant's version of facts. Specifically, Trial Counsel stated Applicant was traveling to New York from time to time. Trial Counsel stated he had a girlfriend that lived in North Carolina and a wife that lived in Sumter, South Carolina. Trial Counsel stated Applicant's wife's brother was Kevin Franklin (victim). Trial Counsel stated Applicant was known to be in the drug trade and his house was burglarized. Trial Counsel stated it was alleged that Victim was the person who burglarized Applicant's house.

Trial Counsel characterized the evidence against Applicant as "overwhelming." Specifically, Trial Counsel stated Darrell Harriott was a key eye witness who positively identified Applicant as the shooter. Trial Counsel stated he continually asked Applicant how Darrell Harriott knew Applicant, but Applicant failed to explain their connection. Trial Counsel stated Darrell Harriott's had a daughter with Applicant's wife. Trial Counsel stated Applicant would drive Darrell Harriott's daughter around in his vehicle and Darrell Harriott was able to identify the vehicle and Applicant. Trial Counsel further stated Darrell Harriott knew Applicant as "bubba," Applicant's nickname.

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(c), SCRCP; 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).

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.

Ineffective assistance of counsel for failing to investigate.

This Court finds Applicant's allegation that he received ineffective assistance of counsel for failing to investigate his case is meritless. "[C]riminal 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." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 521-22 (2003).

In the instant case, Trial Counsel testified he met with Applicant seven to ten times prior to his trial. Trial Counsel stated he filed Brady and Rule 5 motions. Trial Counsel stated he reviewed the discovery material with Applicant prior to trial. Trial Counsel stated he hired a private investigator to help him investigate the case. Trial Counsel stated the investigator took pictures of the scene and interviewed Kendrick Miller. Trial Counsel stated Kendrick Miller was not an important witness because he only heard shots and did not see anything take place. Based on the foregoing, this Court finds Trial Counsel's actions were reasonable in the circumstances and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland).

Additionally, this Court finds Applicant can show no prejudice as he failed to present any evidence or witnesses in support of his argument that Trial Counsel failed to investigate his case.

See Skcen 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). Furthermore, this Court agrees with Trial Counsel's assertion that there was clear evidence of overwhelming guilt. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial). Based off of the foregoing, this Court finds this allegation should be denied and dismissed.

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), SCRPC, 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 13 day of May, 2015.



J. CORDELL MADDOX, JR.
Presiding Judge
Third Judicial Circuit

Anderson, South Carolina