

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Andrew Brent Scott, #192735,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

Case No. 2014-CP-42-0304

ORDER OF DISMISSAL

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SC SUPREME COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief filed January 24, 2014. Respondent made a Return on or about August 20, 2014. The Court convened an evidentiary hearing into the matter on January 13, 2016, at the Spartanburg County Courthouse. Applicant was present at the hearing and represented by Leah B. Moody, Esquire. Alicia A. Olive, 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, Beverly Jones, Esquire, also testified. The Court had before it a copy of the trial transcript, the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the pleadings, 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 Spartanburg County Clerk of Court. In November 2010, the Spartanburg County Grand Jury indicted Applicant for assault and battery - 1st degree (2010-GS-

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42-6835), kidnapping (2010-GS-42-6836), and armed robbery and possession of a weapon during the commission of a violent crime (2010-GS-42-6837, counts 1 and 2) Beverly Jones, Esquire, ("Counsel") represented Applicant. On April 26, 2012, Applicant proceeded to trial before the Honorable Roger L. Couch and a jury. The jury found Applicant guilty as indicted. Judge Couch sentenced Applicant to concurrent sentences of thirty years each for kidnapping, and armed robbery, ten years for assault and battery – 1st degree, and a consecutive term of five years for possession of a weapon.

A timely Notice of Appeal and Anders brief were filed on Applicant's behalf. The South Carolina Court of Appeals dismissed the appeal. State v. Scott, Op. No. 2013-UP-456 (Ct. App. filed Dec. 11, 2013). The Remittitur was returned on December 30, 2013.

II. ALLEGATIONS

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

1. Ineffective assistance of counsel, in that;
 - a. Counsel refused to subpoena the victim's co-worker to address identification issues,
 - b. Counsel failed to properly interview witnesses and investigate the crime scene,
 - c. Counsel failed to make a motion regarding the illegal search and seizure,
 - d. Counsel may have had a conflict as a result of representing the arresting officer's wife in another criminal matter;
2. Illegal search and seizure, in that;
 - a. Applicant has never seen or received an arrest warrant or search warrant for his home;
3. Identification, in that;
 - a. Victim's testimony regarding identification should not have been allowed.

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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.

A. Summary of Testimony

At the outset of the hearing, Applicant asked this Court to relieve Leah Moody as PCR counsel. This Court denied the motion. Applicant's convictions arose out of the robbery of a Money Tree. Applicant testified Beverly Jones was appointed to represent him in October 2011. Applicant testified he was initially represented by Michael Brown. Applicant stated Counsel failed to do a proper investigation, and that she told him she did not have enough time to prepare.

Applicant testified Kip Teal did not have a warrant to enter the house when he arrested Applicant. He stated Teal assaulted him, resulting in a cut on Applicant's face, and that is how Teal obtained Applicant's DNA. Applicant stated the warrant was for the address where he was living. Applicant stated there was no probable cause to arrest him and that he had been at home in his bed all day. Applicant stated he could barely get out of bed to walk and said that Counsel should have gotten his medical records to prove that. Regarding the search, Applicant stated that the authorities did not find anything in the house except for him. He also said that Counsel should have called Regina Jones, who was the supervisor of the store, to testify. Applicant testified that someone had told the victim two weeks prior to the robbery that the store would be robbed and that he was going to do it. Applicant testified he did not communicate to Counsel that

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he wanted Jones to testify on his behalf because that information was not in his discovery, and that he only learned about it because the victim testified about it at trial. Applicant stated that Counsel had a conflict of interest because she represented Kip Teal's wife in a criminal matter.

Applicant stated he also wanted Counsel to call three other witnesses. He admitted he did not give two of those witnesses' names to Counsel. He alleged those two individuals were in the store next door and would have had a video from outside of the store, since there was no video from inside. Applicant also stated that Counsel should have investigated an individual named Earnest Jackson who was alleged the brother of Bridgett Jackson.

Applicant alleged that Counsel should have challenged the "search and seizure" with respect to Verdiana Copeland's home. Applicant testified the police chief "forced and threatened" Copeland into signing a consent form for the authorities to enter her home. He stated that she refused to give them the keys and they told her that if she did not give them the keys, they would have to tear her house up. Applicant presented Verdiana Copeland, who also testified at trial, as a witness at the PCR hearing. Applicant referred to Copeland as both his wife and his girlfriend, but later admitted that they were not married. Copeland also testified they were never married, and stated that at the time of his arrest, he had been staying with her. Copeland testified that on the day Applicant was arrested, she was gone all day attending to her mother in the hospital. She stated she left Scott at her home, in the bed that morning. She stated that about a week before she had taken him to the emergency room with pains in his side. However, Applicant was not admitted, but was given some pain pills. Copeland said the police chief asked for her keys but that she said no because she would be going back home later and would need her keys to get in. She stated that she did not have a problem with the authorities going into her home. She stated

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that she understood they were going in her home to look for Applicant. She said that she spent the night with her sister, who is disabled, and that when she returned to her home, she observed that her back door had been prised open. She stated that she gave consent to the authorities to go in her home in search of Applicant and that she did not feel threatened or coerced to give consent.

Applicant stated he had worked at the store previously. Applicant introduced a copy of an unsigned arrest warrant as an exhibit at the hearing and alleged the warrant was defective because it was unsigned. When questioned by PCR counsel, Applicant stated he was not seeking a new trial.

Counsel testified she has been practicing criminal law for nearly thirty years. Counsel began representing Applicant in November of 2011. She testified Michael Brown had been representing him for a year prior to her appointment. Counsel testified she met with Applicant approximately eight to twelve times prior to his trial. Counsel testified that Applicant was cooperative in helping her with his defense, but that he was focused on certain issues that he thought should be raised. She stated that she discussed these issues with him. Counsel testified she filed the appropriate motions for discovery and that she received complete discovery. She testified she reviewed all discovery material with Applicant. Counsel stated that prior to trial she discussed with Applicant the elements of the charges and what the State was required to prove. She testified that she felt Applicant understood.

Counsel stated that she and Applicant discussed his version of the facts several times. Counsel stated that the State's evidence against Applicant included DNA evidence, the victim's identification of Applicant, Kip Teal's identification of Applicant riding his bicycle, and the

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discovery of the bicycle in front of Copeland's house. Counsel testified that Applicant assisted with her investigation by providing Copeland as a potential witness, by providing information concerning the store including his termination and the policy or lack of policy regarding store keys, and information concerning his medical issue.

Counsel testified the store was a Money Tree that Applicant had previously worked for. She stated that Applicant was terminated from the store and that she looked into his termination. Counsel stated that the victim claimed the assailant came in through the public front. The assailant then was able to go through an inner door that was supposed to stay locked. Counsel stated that during her investigation, the owner could not affirmatively say whether the inner door was locked. She stated she cross-examined the witnesses about this issue at trial.

Counsel testified that she conducted an independent investigation that consisted of going to the store, speaking to potential witnesses, obtaining Applicant's medical records, and pursuing any additional leads that arose from her investigation. Counsel visited the store, went in and around the store, tried to get the maintenance log, and spoke to individuals about the lock policy and the video surveillance system. She testified she spoke with Ian Stowell at length about his willingness to be an identification witness, but that he ultimately testified for the State. Counsel testified Applicant never told her about seeing any specialists regarding his alleged medical condition. She stated he only told her about going to the emergency room at Mary Black. She stated she subpoenaed records but the only thing they had was that he had been there five weeks before the incident for generalized abdominal pain. She also stated that she had a number of conversations with Copeland.

Counsel testified that she had ample time to prepare for trial and felt her investigation

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rush to judgment in the identification of Applicant and that she discussed this with Applicant. She stated that it never appeared to her that Applicant did not understand. She stated that the bigger issue was that he "was not wanting to listen" and had his mind set about things. She stated that when those situations arise in her representation of her clients, she tries to reinforce what her position is. She stated that she listened to what he had to say, especially the facts.

Regarding Applicant's challenge to his arrest warrant, Counsel testified that anomalies or errors in arrest warrants are meaningless and that the indictment controls. Counsel testified that by the time she was appointed, he had already been indicted. Counsel testified that the fact that he had an unsigned copy does not mean it was not signed. She stated that those are copies and that as long as the original bears the signature that is all that matters.

Regarding the DNA issue, Counsel testified that she and Applicant discussed the buccal swab before trial. Counsel testified the assistant solicitor filed a motion for collection of a buccal swab the month before trial, and that a hearing was held on the motion pursuant to Schmerber v. California, 384 U.S. 757, 770-72 (1996). Counsel testified she did not think there was anything objectionable about the motion. As a result of the hearing, the State obtained a court order to take Applicant's buccal swab. Counsel stated that she received a call to go to the jail where Applicant was held because he was refusing to cooperate despite the order. Ultimately the buccal swab was obtained. Counsel testified that she and Applicant discussed what the DNA would be used for. She stated he explained and that he did not accept it but that she explained it.

Counsel stated that she talked to Applicant about his claim that he had been in bed all day. She stated she could not use Copeland as a true alibi witness because she was not at the house all day. Counsel testified that Applicant told her that when the police came to Copeland's

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Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). 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).

The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, the Court measures counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced 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.

Identification

Applicant alleged the victim's testimony regarding identification should not have been allowed. Applicant presented this claim as an allegation of ineffective assistance of Counsel at the PCR hearing. Applicant has failed to produce any evidence in support of this allegation. Counsel testified and the record reflects that Counsel challenged the pre-trial identification of Applicant by requesting a pretrial hearing pursuant to Neil v. Biggers, 409 U.S. 188. In that hearing, Counsel argued that the suggestion by the victim's co-worker prior to the line-up that Applicant was the assailant could have impacted the victim's identification of Applicant. The trial judge allowed the identification to go forward and stated he did not find that the fact a name might have been mentioned to the victim, without any description of that individual or

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photograph, would have in anyway affected her identification of someone who was unnamed and not identified by name at the time of her identification. Applicant again challenged the identification in his direct appeal. The Court of Appeals dismissed his appeal. This Court finds that Counsel adequately raised and challenged the issue of victim's identification of Applicant. This Court further finds Applicant has failed to demonstrate prejudice. The clothing that the victim wore at the time of the robbery, as well as a tablecloth taken from a window display in the store, was collected and tested for DNA evidence. A buccal swab was obtained from Applicant for comparison. The State presented a DNA analyst at trial who testified that Applicant's DNA matched several items of the victim's clothing. Therefore, this Court finds Applicant failed to show that there was a reasonable probability that but for Counsel's alleged error, the result of the trial would have been different.

Accordingly, this Court finds Applicant has failed to demonstrate either deficiency or prejudice with respect to this allegation. Therefore, this allegation is denied and dismissed.

Failure to investigate

Applicant alleges Counsel failed to properly interview witnesses and investigate the crime scene and refused to subpoena the victim's co-worker to address identification issues. This Court finds Applicant has failed to satisfy his burden of proving that Counsel was ineffective in this regard. Failure to conduct an independent investigation is not *per se* ineffective assistance of counsel, especially where an investigation would not have uncovered any helpful information. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998). See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of

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counsel.” (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992))). Here, Counsel testified that she felt her investigation was complete. She stated that she went to the store, observed the layout, talked to the store employees and other potential witnesses, questioned the appropriate people about the store's policies as to the turning over of keys after termination of employment, and attempted to flesh out the issue regarding the lack of a surveillance video. Counsel also stated that she looked into Applicant's medical history, requested his medical records from the hospital where he said he had been treated, and that all she found was that he had been treated five weeks before the robbery for generalized abdominal pain. Though Applicant claimed at the PCR hearing that he had been treated by a specialist, Counsel testified he never mentioned anything to her about a specialist. Counsel also testified that she did not call the victim's co-worker, Regina Jones, to testify because the store employees in general were not helpful and because Regina's testimony in particular would have been harmful. Counsel testified she reviewed all discovery with Applicant. The Court finds trial counsel conducted a proper investigation, fully explored all possible defenses, adequately conferred with Applicant, and was thoroughly competent in her representation. Accordingly, Applicant has failed to demonstrate that Counsel's performance was deficient in this regard.

Further, this Court finds Applicant has failed to demonstrate that any alleged error prejudiced him. Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) (“A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence.” (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995))). Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)

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("Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial.").

Here, Applicant produced no witnesses at the PCR hearing. Applicant's PCR counsel informed the Court that she diligently attempted to contact the witnesses Applicant named, but that she either could not locate those individuals or they did not respond. Because Applicant did not produce these witnesses at the PCR hearing, this Court can only speculate as to what their testimony would have been and whether it would have been helpful or harmful. Likewise, Applicant failed to present any evidence of what information Counsel would have uncovered had she conducted any further investigation. Though Applicant claimed there were medical records that Counsel failed to uncover, he failed to produce any medical records as part of this action. In addition, given the DNA evidence that linked Applicant to the crime, Applicant has failed to show that there is a reasonable probability that but for the alleged deficiency of Counsel, the outcome of Applicant's trial would have been different.

Accordingly, this Court finds Applicant has failed to satisfy his burden of proving either deficiency or prejudice with respect to this allegation. Therefore, this allegation is denied and dismissed.

Failure to make a motion regarding illegal search and seizure

Applicant alleged Counsel was ineffective for failing to make a motion regarding the illegal search and seizure. This Court finds Applicant has failed to satisfy his burden of proving that Counsel was deficient for failing to challenge the search of Copeland's home. Applicant argues that Counsel should have challenged both his arrest and the collection of his DNA.

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Here, Applicant was staying as a guest at Copeland's home. On the day of the robbery, Copeland was away visiting her mother in the hospital. After the robbery occurred, officers asked for Copeland's consent to search for Applicant in her home. Copeland testified that she was not threatened or coerced to consent to the search. Thus, Officers obtained lawful consent to search Copeland's home for Applicant. Applicant testified that no evidence was found or obtained other than himself and blood from his nose. Counsel testified that anomalies or errors in arrest warrants are meaningless and that the indictment controls. Counsel testified that when her representation began, Applicant had already been indicted. Counsel stated the arrest warrants introduced at the hearing were copies and that as long as the original bears the signature that is all that matters. The arrest warrants are part of the record before this Court. This Court finds that the arrest warrants are signed and the warrants bear no facial defects. In addition, this Court finds Applicant has failed to show that the search of Copeland's home was not accomplished pursuant to her lawful consent. Accordingly, Applicant has failed to show Counsel was deficient for failing to challenge his arrest, or that she had any basis for doing so. Furthermore, Applicant has failed to present any evidence that the alleged deficiency had any impact on the outcome of his trial.

In support of his allegation that Counsel should have challenged the collection of his DNA, Applicant contended (contrary to the officer's testimony at trial) that the officer assaulted him and was able to illegally obtain a sample of his blood as a result of the assault. However, the DNA evidence that was presented at trial was obtained through a court-ordered buccal swab. Counsel testified that prior to trial, a hearing was held pursuant to Schmerber v. California, 384 U.S. 757, 770-72 (1996), in which the State moved for and obtained a court order to perform a

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buccal swab to collect Applicant's DNA. Applicant's DNA profile was compared to samples obtained from the clothing that victim wore at the time of the robbery and a tablecloth that was hanging in a window at the store. Counsel testified that she had no basis upon which she could have challenged the collection of Applicant's DNA through the court-ordered buccal swab. See Palacio v. State, 333 S.C. 506, 514, 511 S.E.2d 62, 67 (1999) (no deficiency where "it would have been futile for Attorney to have made such arguments").

This Court finds Applicant failed to show that the collection of his DNA in this manner violated the Fourth Amendment or Schmerber, 384 U.S. 757. See State v. Baccus, 367 S.C. 41, 54-55, 625 S.E.2d 216, 223 (2006) (setting forth requirements for obtaining an order permitting involuntary submission of nontestimonial identification evidence). As a result, Applicant has failed to show any deficiency in Counsel's performance with respect to this allegation. This Court also finds that Applicant has failed to show that any alleged deficient performance prejudiced him. In his Application, Applicant states that the relief he desires is to have his sentence and conviction overturned. At the hearing, when Applicant's PCR counsel asked him if he was seeking a new trial in this case, he stated "no." See Leon v. State, 379 S.C. 448, 451, 666 S.E.2d 260, 262 (Ct. App. 2008) ("[W]hen asked during direct-examination if he would have gone to trial instead of pleading guilty . . . , [his] response was, 'No.' Thus, [petitioner] fails to prove the deficient performance by his attorney prejudiced his case.").

Accordingly, this Court finds Applicant has failed to show either deficiency or prejudice as to this claim. Therefore, this allegation is denied and dismissed.

(1993) ("A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal."). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised these issues at trial or on appeal. In fact, the identification issue was raised at trial, and was the only issue that was addressed in his direct appeal. Applicant did not challenge the search and seizure at trial and his failure to do so has waived this allegation as a ground for relief. Regardless, this Court finds Applicant has failed to produce any evidence in support of these claims. Accordingly, these allegations are without merit and are therefore denied and dismissed.

C. 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, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes 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.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate

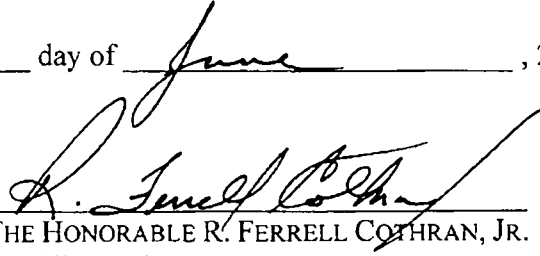
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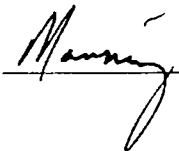
appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRPC, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 17 day of June, 2016.


THE HONORABLE R. FERRELL COTHRAN, JR.
Presiding Judge

 _____, South Carolina

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M. Hope Blackley
Clerk of Court
July 5, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

7TH JUDICIAL CIRCUIT

Andrew Brent Scott
Applicant # 192735

CASE # 2014CPA-304

CERTIFICATE OF SERVICE

VS
Steele
Respondent

I certify that, on this date, I served a copy of the Order of Dismissal
In this action dated 6-17 2016 on 7-5-16

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Orlando Hernandez
Leah Morley
Andrew Scott

7-5-16
(Date)

Carrie Sharp
(Signature)