The Brough Law Firm

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August 10, 2016

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

RECEIVED
AUG 12 2016
S.C. SUPREME COURT

RE: THE STATE VS. Bert Wayne Foster

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

(1) Original Proof of Service upon opposing counsel.
(2) Order of Dismissal.

If I can be of any further assistance, please feel free to call me.

Sincerely,

Christopher D. Brough

Enclosure

cc: South Carolina Office of the Attorney General
Bert Wayne Foster

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Larry B. Hyman, Jr., Circuit Court Judge

RECEIVED
AUG 12 2016
S.C. SUPREME COURT

Case No.: 2013-CP-42-3201

The State, Respondent,

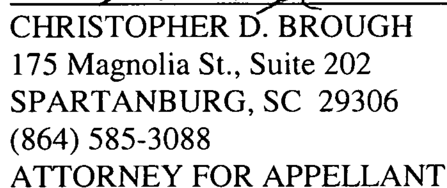
v.

Bert Wayne Foster, Appellant.

NOTICE OF INTENT TO APPEAL

Bert Wayne Foster appeals the denial of his application for Post-Conviction Relief in this case. The Order of Dismissal was imposed by the Honorable Larry B. Hyman, Jr. on July 15, 2016. Appellant received notice of the same on August 10, 2016.

August 10, 2016



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ATTORNEY FOR APPELLANT

Other Counsel of Record:
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
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Case No.: 2013-CP-42-3201

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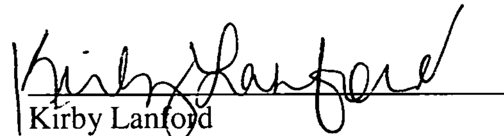
PROOF OF SERVICE

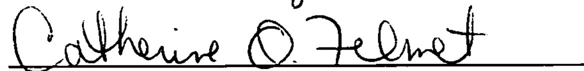
The undersigned hereby certifies that he is a person of such age and discretion as to be competent to serve papers and that a copy of the **Notice of Intent to Appeal**, was served upon the following person(s) on the State, by depositing copies of the same in the United States Mail, with sufficient postage affixed thereto, on August 10, 2016, addressed as follows:

The Honorable Alan Wilson
SC Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, S.C. 29201



Kirby Lanford

SWORN BEFORE ME THIS
10 DAY OF August, 2016.



NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: Aug. 3, 2019
Catherine Q. Felmet

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Bert Wayne Foster, #325398,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

Case No. 2013-CP-42-3201

ORDER OF DISMISSAL

This matter comes before the Court by way of an Application for Post-Conviction Relief filed August 6, 2013. Respondent made a Return on or about August 14, 2014. The Court convened an evidentiary hearing into the matter on November 10, 2015, at the Spartanburg County Courthouse. Applicant was present at the hearing and represented by Christopher Brough, 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, Melinda Butler, 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 application, and the return. 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 February 2010, the Spartanburg County Grand Jury indicted Applicant for two counts of armed robbery (2010-GS-42-1308, and -1309). Melinda Butler, Esquire, represented Applicant. On December 15, 2010,

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HOPE BLACKLEY

Applicant proceeded to trial before the Honorable Roger L. Couch and a jury. The jury found Applicant guilty as indicted on both charges. Judge Couch sentenced Applicant to imprisonment for consecutive terms of 12 years for each count of armed robbery.

Applicant filed a timely notice of appeal. Katherine H. Hudgins, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction. State v. Foster, Op. No. 2012-UP-485 (S.C. Ct. App. filed August 8, 2012). The Remittitur was returned to the circuit court on August 24, 2012.

II. ALLEGATIONS

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

1. Ineffective Assistance of trial counsel, in that;
    a. Trial counsel failed to make proper objections,
    b. Trial counsel failed to investigate,
2. Ineffective Assistance of Appellate Counsel, in that;
    a. Appellate counsel failed to raise all meritorious issues on appeal;
3. After discovered evidence, in that;
    a. Witnesses were offered a deal for testimony and lied about it.

At the evidentiary hearing, Applicant proceeded on only the allegations of ineffective assistance of trial counsel for failure to investigate and for advising Applicant not to testify.

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.

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A. Summary of Testimony

Applicant was charged with two armed robberies that took place on the same night. Applicant testified that he committed one armed robbery, but not the other. He denied involvement with the robbery of the first victim, Freddie Robinson. He stated that he and his co-defendants went to rob the second victim, Rigoberto Sanchez, and on the way, they saw Robinson and his co-defendants decided to rob him. Applicant stated that he was not involved because based on Robinson's appearance, he was not worthy of being robbed. However, Applicant admitted he was in the car when Robinson was robbed. Applicant testified that he and Counsel did not discuss his niece, Cassie Cordoza, testifying until the day of trial because his sister did not show up. Counsel asked him who could testify about where he lived and he told her that Cordoza could.

Melinda Butler ("Counsel") testified that she was retained in December of 2009 and that she met with Applicant at least ten times prior to trial and that those meetings were always longer than an hour. She testified she received full discovery and that she went over discovery with him in three separate visits. She stated at the time she represented Applicant she was able to devote a substantial amount of time to preparing his case. She testified that she discussed with Applicant the elements of the offenses and what the State would be required to prove at trial. She discussed with him his version of the facts and the legal concept of "the hand-of-one is the hand-of-all" and the defense of mere presence. She testified she and Applicant discussed all aspects of the defense, including the identification issues and the fact that Applicant's co-defendants were getting deals in exchange for their testimony. Counsel requested a mere presence instruction at the trial. Both victims and all of Applicant's co-defendants testified against him. Trial counsel cross-examined both victims about their inability to positively identify Applicant as an assailant.

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Counsel also cross-examined Officer Bobbie Duncan regarding a 9-1-1 call in which victim Sanchez reported he had been robbed by four black males, though Applicant is a white male. Counsel testified she called Applicant's niece at trial because Counsel expected his sister to testify, but she did not appear. She testified the State's theory was that Applicant participated in the robberies because he needed rent money. Counsel testified she needed the niece's testimony to show lack of motive because she could testify that Applicant was living with them and did not need money for rent.

Applicant's co-defendants testified that he actively participated in the robberies. The victims testified that the assailants were in a dark-colored Dodge Durango. Applicant testified he was riding around with the co-defendants in a Dodge Durango that night. Furthermore he did not deny that he was involved in the robbery of Sanchez. Counsel characterized the State's case against Applicant as "compelling." She testified it was his decision to go to trial. She testified she thought the most viable defense was mere presence and that the judge did charge the jury on the concept of mere presence. Counsel stated she did not think Applicant should testify at trial because he had a criminal record that the State intended to impeach him with. She testified she discussed with Applicant the risks and benefits of testifying, and it was ultimately his decision not to testify.

B. Ineffective Assistance of Trial Counsel

In this post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove counsel's "conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon

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as having produced a just result." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; 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.

Failure to Investigate

Applicant alleged that Counsel failed to adequately investigate or prepare for trial. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation[.]" Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). This Court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" Strickland, 466 U.S. at 689. This Court finds Applicant has failed to satisfy his burden of proving either deficiency or prejudice as to this allegation.

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H. HOPE BLACKLEY

Here, Counsel reviewed all the evidence in the case. She met with Applicant at least ten times for at least an hour each visit. In these meetings, she reviewed all discovery with Applicant, ad nauseam, and fully discussed any possible defenses with him. Such an investigation was reasonable under the circumstances, particularly where Applicant never denied that he was in the vehicle with the co-defendants during both robberies. See Edwards, 392 S.C. at 457, 710 S.E.2d at 65 (citing Daniels v. State, 676 S.E.2d 13 (Ga. 2009)). To the extent there were inconsistencies with the victims' and co-defendants' testimony at trial, Counsel challenged those witnesses on those inconsistences in cross-examination. See Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam) ("[T]he Confrontation Clause guarantees an opportunity for effective cross examination, not cross examination that is effective in whatever way, and to whatever extent, the defense might wish" (emphasis in original)). She testified the only viable defense was mere presence. Applicant has failed to produce any testimony or evidence of any other available defenses. 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 Counsel conducted a proper investigation, adequately conferred with Applicant, and was thoroughly competent in her representation. Applicant has failed to show any deficiency in Counsel's performance.

This Court further finds Counsel provided competent representation in light of the overwhelming evidence against Applicant, and Applicant has failed to show that but for the alleged error of Counsel, he would not have been convicted. See Harris v. State, 377 S.C. 66, 79, 659 S.E.2d 140, 147 (2008) (holding applicant cannot prove prejudice where there is overwhelming evidence of guilt). Counsel testified the State's case was compelling and this Court likewise finds there was overwhelming evidence of Applicant's guilt. Both victims and all

co-defendants testified against Applicant. Both of the victims testified that the assailants were in a dark-colored Dodge Durango and that one of the assailants had his face covered. Counsel adequately cross-examined both the victims and the co-defendants. Applicant has failed to produce evidence of what information Counsel failed to uncover, or how any such information would have assisted in the defense. See Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) ("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."). Accordingly, this Court finds Applicant has failed to show that but for the alleged error, he would not have been convicted. Applicant has failed to show either deficiency or prejudice with regard to this allegation and it is therefore denied and dismissed.

Advice Not to Testify

Counsel stated she advised Applicant not to testify because she did not think it was in his best interest. She made a pretrial motion to settle the record as to Applicant's prior convictions, and the State indicated it intended to impeach him on a 2007 conviction for third-degree burglary. The trial judge also advised Applicant that if he chose to testify, any convictions he had involving dishonesty or false statements or convictions for crimes which were punishable by imprisonment for more than one year, could be used against him and that the judge would make the determination of the admissibility of that record. Counsel testified the only viable defense was mere presence. The only evidence of mere presence would have been Applicant's testimony; however, Counsel testified she did not believe it was in his best interest to testify. 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 counsel." (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992))). This

Court finds that Applicant has failed to show Counsel's conduct in advising him not to testify was unreasonable under prevailing professional norms. Therefore, Applicant has failed to satisfy his burden of proving deficiency as to this allegation.

This Court also finds Applicant has failed to show that this alleged deficiency prejudiced him. Based on Applicant's testimony at the PCR hearing and in light of the overwhelming evidence against him, this Court is not convinced his testimony would have assisted him in his defense. See Harris, 377 S.C. at 79, 659 S.E.2d at 147 (holding applicant cannot prove prejudice where there is overwhelming evidence of guilt). Applicant only denied that he participated in one of the robberies and did not deny that he was in the vehicle during both. Therefore, this Court finds that Applicant has failed to show there is a reasonable probability that but for Counsel's advice not to testify, he would not have been convicted. Accordingly, this Court finds Applicant has failed to show any deficiency in Counsel's performance or resulting prejudice. Therefore, this allegation is 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.

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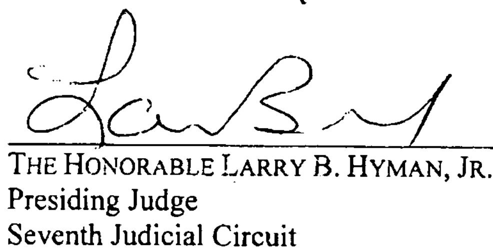
The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, 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 15 day of July, 2016.



THE HONORABLE LARRY B. HYMAN, JR.
Presiding Judge
Seventh Judicial Circuit

Conway, South Carolina

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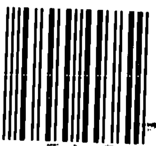

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