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August 31, 2016

RECEIVED

SEP 06 2016

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

S.C. SUPREME COURT

Re: Michael Tompai 355763

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Horry County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,



James K Falk

Thank you for your assistance.

Cc: Caitlin Hastings, Esq.; Michael Tompai 355763.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM HORRY COUNTY

SEP 08 2016

Court of Common Pleas

Honorable Paul M. Burch, Jr, Circuit Judge

S.C. SUPREME COURT

Case No.: 2015-CP-26-3502

Michael Tompai 355763.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Michael Tompai appeals the Honorable Paul M Burch Jr.'s August 11, 2016, Order of Dismissal. Undersigned counsel received notice of entry of the order on August 19, 2016. A copy of the order on appeal is attached hereto.



James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

August 31, 2016

Caitlin Hastings, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Honorable Paul M Burch Jr., Circuit Judge

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SEP 06 2016

Case No.: 2015-CP-26-3502

S.C. SUPREME COURT

Michael Tompai 355763.....PETITIONER

V.

State of South Carolina.....RESPONDENT

PROOF OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Caitlin Hastings, Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this August 31, 2016.



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Applicant filed a timely notice of appeal. Robert M. Pachak, Esquire, of the Office of Appellate Defense perfected the appeal with the filing of an Anders¹ brief. The South Carolina Court of Appeals dismissed Applicant's appeal after review on June 30, 2014. State v. Tompai, Op. No. 2014-UP-276 (S.C. Ct. App. filed June 30, 2014).

II.

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

1. Ineffective assistance of counsel
 - a. "[trial counsel] failing to object to officer testifying"
 - b. "[trial counsel] failing to present character [and alibi] witnesses [sic]"
 - c. "[trial counsel] failing to investigate into my mental health background [sic]"
2. Rule 5/Brady Violation
 - a. "state failed to disclose the video of the armed robbery"
3. 14th Amendment due process violation
 - a. "judge Larry Hyman violated my right to due process when the jury asked for him to clarify reasonable doubt"

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 the witness who testified at the hearing, and to closely pass upon his credibility. This Court finds Counsel's testimony credible, and has not given any weight to the fact that Applicant did not testify. 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

¹ Anders v. California, 386 U.S. 738 (1967).

(2003). Furthermore, this Court finds that Applicant abandoned all allegations except for those specifically addressed below.

A. Summary of Testimony

Trial counsel began by testifying to the basics of his representation of the Applicant, which was through an appointment in the course of his employment with the Public Defender's Office. He testified that he received and reviewed the discovery, and also went over it with the Applicant. Trial counsel was aware before trial that a surveillance video of the crime had been obtained by law enforcement, watched by one officer, but had since gone missing. He testified that he did not know of any way to produce or recreate the video, and that he had an investigator look into the issue without any success. However, trial counsel believed it was to the Applicant's advantage that the video was unavailable. With the video missing, the only evidence tying the Applicant to the crime was the victim's testimony.

During the direct examination of trial counsel, PCR counsel questioned trial counsel on regarding several potential interpretations of evidence and testimony from trial in order to question trial counsel about his motivations. For example, PCR counsel questioned trial counsel if he was concerned about the jury viewing the victim as an expert in eyewitness identification because he testified that his employee training included information on how to behave in a robbery, which included focusing on the assailant. Trial counsel testified that he never considered this to be expert testimony. Similarly, PCR counsel asked why trial counsel did not investigate the victim's testimony that he left the job due to a conflict of interest, and raised the question of whether the victim could have stolen from the store. Trial counsel testified that he did not believe it was a worthwhile investigation.

Trial counsel admitted that he should have objected to testimony from Officer Cusick who viewed the surveillance video, as it effectively served as another eyewitness statement.

When questioned about Officer Ridgeway's testimony that she thought of the Applicant when she heard about the crime, trial counsel admitted that he had not heard her say testify to a mention of a prior armed robbery in connection to the Applicant. Similarly, trial counsel admitted to not hearing the trial judge get caught in a double negative during charges. However, trial counsel did catch a misstatement by the trial judge when he referred to the incorrect standard of evidence. This led to the jury returning to the courtroom to clarify the charge.

On cross examination by the State, trial counsel testified that he met with the Applicant at least three (3) times, and had another note in his file that he tried to get in touch with Applicant. Trial counsel further testified that he asked Applicant for a list of potential witnesses that could benefit his case, but decided not to call any witnesses after reviewing the letters that they had written. The defense theory was simply that the State could not tie the Applicant to the crime. Trial counsel and the Applicant decided together that not presenting a case was the best option. Regarding plea negotiations, trial counsel testified that Applicant was offered a ten (10) year sentence, but turned it down. Trial counsel also testified that he did not believe that Applicant had any need for a mental health or competency evaluation.

B. Ineffective Assistance of 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 trial counsel as a ground for relief, Applicant must prove trial 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." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

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

This Court finds Applicant has failed to show Counsel's performance fell below an objective standard of reasonableness. Counsel's testimony indicated he was extremely familiar with the facts of Applicant's case. This Court finds Counsel met with Applicant an adequate number of times and was familiar with the discovery materials. Counsel indicated he explained Applicant's constitutional rights, and he explained the differences between going to trial and entering a guilty plea, especially in light of the favorable plea that was placed on the record. Counsel indicated he never had trouble communicating with Applicant, and he never had any concern that Applicant did not fully understand their conversations.

Counsel refuted the allegations that Applicant made in his application including, but not limited to, issues regarding Applicant's mental status, character witnesses, the existence of the

surveillance video, and any potential prejudice or confusion that arose out of jury instructions. Though the failure of trial counsel to object to Officer Cusick's testimony regarding the surveillance video could be interpreted as deficient performance as it allowed in some information that may not have otherwise been introduced, this Court does not find that this was ultimately prejudicial. This Court finds that, through the presentation of evidence at the post-conviction relief hearing, Applicant has failed to demonstrate both deficiency by trial counsel, as well as any prejudice caused by trial counsel's actions. Therefore, this allegation is denied and dismissed with prejudice.

C. Discovery Violations

This Court finds Applicant's allegation that the solicitor failed to turn over the surveillance video is without merit. An individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555 (1995). A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.*, 434 S.E.2d at 268. This Court finds Applicant failed to prove that the State violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to disclose exculpatory material that would indicate that Applicant was not guilty of the crimes with which he was charged. In fact, Applicant failed to produce any evidence tending to show that that prosecution withheld information that may have helped him or change the outcome of the case. It was established by the testimony of trial counsel that the prosecutor's office was not at fault in

the disappearance of the surveillance video and, therefore, cannot be viewed as having withheld evidence. Therefore, this allegation is denied and dismissed with prejudice.

D. 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 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), SCRCR, 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.

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IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice;
and
2. The Applicant shall be remanded to the custody of the South Carolina Department of Corrections for service of the remainder of his term of imprisonment.

AND IT IS SO ORDERED this 11th day of August, 2016.



THE HONORABLE PAUL M. BURCH, JR.
Presiding Judge
Fifteenth Judicial Circuit

Pageland, South Carolina



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