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APR 04 2017
S.C. SUPREME COURT

March 31, 2017

Attn: Ashli Thompson
The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: John Wayne Brannon Appeal

Dear Ms. Thompson:

Please find enclosed, per your request:

- Proof of Service of the Notice of Appeal
- Copy of the final Order being appealed

If you have questions or concerns, please do not hesitate to contact me.

Sincerely,

s/ *Brandt Rucker*

Brandt Rucker, Esq.

CC:

Alicia A. Olive, Esq.
S.C. Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

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APR 04 2017
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Circuit Court

The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

Case No. 2013-CP-42-4797

State of South Carolina,

Respondent,

v.

John Wayne Brannon, #209650

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal by depositing a copy of it in the United States Mail, postage prepaid, on March 27, 2017 addressed to:

Alicia A. Olive, Esq.
S.C. Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

March 31, 2017

Allyson Rucker, Esq.
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(864) 271-9925
Attorney(s) for Appellant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
John Wayne Brannon, #209650,	)	Case No. 2013-CP-42-4797
Applicant,	)	
v.	)	**ORDER OF DISMISSAL**
State of South Carolina,	)	
Respondent.	)	

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M. HOPE BLACKLEY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed December 5, 2013. Respondent made a Return on or about August 18, 2014. The Court convened an evidentiary hearing into the matter on June 17, 2016, at the Spartanburg County Courthouse. Applicant was present at the hearing and represented by J. Brandt Rucker, 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, Tanya Jones, Esquire, also testified.[1] 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, Applicant's appellate records, and the pleadings. 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 July 2011, the

[1] With consent of the parties, Counsel, who was then residing outside of the state, testified by telephone at the evidentiary hearing.

SCANNED

Spartanburg County Grand Jury indicted Applicant for attempted murder (2011-GS-42-4694). Tanya Jones, Esquire, represented Applicant. On December 13-15, 2011, Applicant was tried before the Honorable Roger L. Couch and a jury. The jury found Applicant guilty of the lesser-included-offense of assault and battery of a high and aggravated nature. Judge Couch sentenced Applicant to life without parole pursuant to S.C. Code Ann. § 17-25-45.

A timely Notice of Appeal and Anders[2] were filed on Applicant's behalf. Applicant also filed a *pro se* brief. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Brannon, Op. No. 2013-UP-362 (Ct. App. filed October 2, 2013). The Remittitur was returned on November 5, 2013.

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. Counsel failed to properly research and investigate the law and facts pertaining to Applicant's case,
   b. Counsel failed to hire an investigator or expert witness to assist in defense,

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ROPE BLACKLEY

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. As a matter of general impression, this Court finds Applicant's testimony was not credible. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

[2] 386 U.S. 738 (1967).

A. Summary of Testimony

Applicant testified he only met with Counsel two or three times and that she did not discuss the self-defense theory with him. He testified that Counsel advised him not to take the stand because she thought he would incriminate himself. He testified that she advised him that the State could use his prior convictions against him. Applicant also acknowledged that Counsel advised him of his right to testify. Applicant testified that the victim had attacked him with a dagger on four or five occasions. He testified that he hit the victim over the head with a chair.

Counsel testified she has been practicing law since 2006. She testified she had frequent contact with Applicant and met with him at least four times prior to trial and also spoke with him over the phone. Counsel testified she would have filed discovery motions and would have reviewed the discovery material with Applicant. She discussed with him the elements of attempted murder. Counsel further testified she discussed possible defenses with Applicant, in particular, self-defense. Applicant told Counsel that the victim had a dagger, which he took from the victim the night of the incident. Counsel testified she informed Applicant of his right to testify and of the significance of his testimony in the context of the self-defense claim. She also testified that, at the time, she felt it was likely not in his best interest to testify.

Counsel testified that in investigating Applicant's case in preparation for trial, she went over the police reports, went to the crime scene (though the house had been condemned), and spoke to Applicant's mother because Applicant indicated he had given the dagger to her following the incident. Applicant's mother did not know much about the dagger. Counsel testified that she was unable to get the victim to cooperate with her investigation and that she tried to track the victim down but his phone number was disconnected and she was unable to obtain an address for him.

Counsel testified essentially they were going forward on the theory that Applicant was acting in self-defense. Counsel stated her trial strategy was to discredit the victim's recollection of the events by showing—through his inconsistent statements and the medical record—that the victim could not keep his story straight and did not really know what happened that night. Counsel testified she obtained the dagger, but ultimately did not introduce the dagger at trial because she had a bad feeling at the time. She testified the dagger belonged to the victim and she feared that the victim would "go into a story" about it and she did not know what he would say. Counsel said she did not want to ask a question she did not know the answer to. She further testified that the victim was a terrible witness, had a poor demeanor, and was combative.

Counsel testified the State offered to reduce attempted murder and allow Applicant to plead to assault and battery of a high and aggravated nature without an agreed sentence. She testified she presented Applicant with this offer on August 18, 2011, and he rejected it. Applicant acknowledged he rejected this offer.

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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 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 counsel failed to conduct a proper investigation. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014) (citing Strickland, 466 U.S. at 691). "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 this case, Counsel's investigation was reasonable. In preparing Applicant's case for trial, Counsel had frequent contact with Applicant and met with him at least four times prior to trial and spoke with him over the phone several times. Counsel reviewed the discovery material

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with Applicant. She also discussed with him his version of the facts and any possible defenses he may have, including the defense of self-defense. Counsel testified she reviewed the police reports contained in discovery, went to the crime scene (though the house had been condemned), and spoke to Applicant's mother about the dagger Applicant alleged the Victim threatened him with, though Applicant's mother was of little help in that regard. Counsel testified that she was unable to get the victim to cooperate with her investigation and that she tried to track the victim down but his phone number was disconnected and she was unable to obtain an address for him. Counsel contacted or attempted to contact all potential fact witnesses. To the extent there were inconsistences between witness statements contained in discovery and the witness's testimony presented at trial, Counsel brought those inconsistencies to light during her cross-examination of those witnesses. This Court finds Counsel conducted a reasonable and proper investigation, adequately conferred with Applicant, and was thoroughly competent in her representation. Therefore, Applicant has failed so satisfy his burden of proving Counsel failed to conduct a proper investigation.

Likewise, Applicant has failed to show prejudice and this Court can only speculate as to what additional investigation Counsel could have done and what evidence that investigation would have uncovered. See Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (finding no prejudice where applicant "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."). Applicant testified on his own behalf but presented no other witnesses and produced no evidence of what Counsel might have uncovered had he conducted any additional investigation. Therefore, Applicant has failed to demonstrate any alleged deficiency prejudiced him. See Glover v. State, 318 S.C. 496, 499, 458 S.E.2d 538, 540 (1995)

("The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice."). Accordingly, this Court finds Applicant has failed to demonstrate either deficiency or prejudice with respect to this allegation.

Failure to Present an Expert Witness

Applicant also alleged counsel was ineffective for failing to call an expert witness. Counsel stated that Dr. Bradley Davis, the emergency room physician testified the victim was a "poor historian" and that he was a good witness because he was a neutral witness. Dr. Davis testified at trial that the victim was "clinically intoxicated and thus a poor medical historian. He could not describe symptoms." (Tr. p. 83, lines 9-11). The doctor testified that a C.T. scan was performed on the victim because of his inability to accurately describe his symptoms. (Tr. p. 83) He also testified generally that head traumas can be considered deadly. (Tr. p. 85, lines 23-25). Furthermore, the victim himself testified concerning his injuries and the extent of those injuries. (Tr. p. 107-09). Based on these facts, Counsel's decision not to hire or produce an expert witness to challenge Dr. Davis's testimony was reasonable. See Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (holding the Court must evaluate performance by its reasonableness under prevailing professional norms). Further, Counsel also provided a valid strategic reason for not presenting an expert to challenge Dr. Davis. 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))). The doctor's testimony that the victim was intoxicated and was a poor medical historian was consistent with Counsel's trial strategy of discrediting the victim. Therefore, Applicant has failed to demonstrate any deficiency with respect to this allegation.

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In addition, Applicant presented no witness at the evidentiary hearing and offered no testimony or evidence concerning what, if anything, such a witness could have contributed at trial. Therefore, Applicant has also failed to establish prejudice. See 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))); see also Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) ("This Court has repeatedly held a PCR 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 order to establish prejudice from the witness' failure to testify at trial"). Accordingly, this Court finds Applicant has failed to satisfy his burden of proving either deficiency or prejudice with respect to this allegation.

Advice Not to Testify

Applicant presented testimony at the evidentiary hearing that Counsel advised him against testifying in his defense at trial.[3] A defendant's decision to testify or not must be made with knowledge of the consequences of either choice. Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000) (citing State v. Orr, 304 S.C. 185, 403 S.E.2d 623 (1991), overruled in part on other grounds, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)). Counsel has a duty "to inform a client of his Fifth Amendment rights and the consequences of exercise and waiver of those rights." Brown v. State, 340 S.C. 590, 595, 533 S.E.2d 308, 310 (2000).

Applicant testified that Counsel informed him of his right to testify but advised him not

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[3] Though this was not raised as an allegation in Applicant's application and Applicant's PCR counsel did not ask to amend the application to conform to the pleadings, out of an abundance of caution, this Court nevertheless addresses this as if it were presented as an allegation.

to testify because she thought he would incriminate himself. Likewise, Counsel testified that she discussed with Applicant his right to testify and that she advised him against testifying because she did not feel it was in his best interest. Therefore, Counsel gave a valid strategic reason for advising Applicant against testifying. See, e.g., Jackson v. State, 329 S.C. 345, 352, 495 S.E.2d 768, 772 (1998) (finding Counsel's advice not to testify was valid strategy where applicant had prior convictions that could have been used for impeachment). Furthermore, Applicant waived his right to testify on the record at trial, Applicant admitted at the evidentiary hearing he was advised of his right to testify, and Counsel advised Applicant of his right to testify and of the consequences of not testifying—i.e., the impact on the defense of self-defense. Cf. Brown v. State, 340 S.C. 590, 595, 533 S.E.2d 308, 310 (2000) (finding where there was no on-the-record waiver of the applicant's right to testify, counsel's failure to inform him of his Fifth Amendment rights and the consequences of exercise and waiver of those rights falls below an objectives standard of reasonableness). Applicant was advised of his right to testify by the court and by Counsel. Applicant was informed of the risks and advantages of testifying, and Counsel advised him against testifying because of the concern that he would incriminate himself. Ultimately, Applicant chose not to testify. Therefore, Counsel was not deficient for advising Applicant not to testify.

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Applicant also failed to show that there is a reasonable probability that but for Counsel's alleged deficient advice not to testify, there is a reasonable probability the result of trial would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Furthermore, when a defendant's conviction is challenged, 'the question is whether there is a reasonable probability that, absent the errors, the fact finder would

have had a reasonable doubt respecting guilt.'" Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland v. Washington, 466 U.S. at 695).

At trial, the victim testified Applicant had been staying with him for a couple of weeks and that he wanted Applicant to leave but was having problems getting him to leave. (Tr. p. 124; p. 141). He testified that it became "physical . . . a couple of times" but denied ever striking Applicant because he would have been "kind of crazy trying to strike [Applicant]." (Tr. p. 124). The victim also testified that he told Applicant that Applicant was "too big" for him to fight. (Tr. p. 106). He testified that on this occasion, they started arguing and he asked Applicant to leave. (Tr. p. 107). The victim testified that Applicant then left, exiting through the front door. (Tr. p. 107). He walked into the kitchen because he thought Applicant was gone, but moments later, Applicant came back into the house and struck him in the head with a rock that Applicant had taken from the sidewalk outside. (Tr. p. 120; p. 125-26).

At trial, Brendall Mathis testified he met the victim at the hospital while the physician was examining him. (Tr. p. 61). He testified he could see the victim's skull. (Tr. pp. 61-62). He testified that the area outside of the house where the rock appeared to come from was approximately twenty or thirty feet from the living room. (Tr. p. 69).

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At the evidentiary hearing, Applicant provided testimony consistent with what he would have testified to had he chosen to testify at trial. He testified that the victim had threatened him with a "dagger" and that he hit the victim over the head with an aluminum chair. He also testified that in a previous altercation he had disarmed the victim. He testified that on this occasion, he could not get out of the house because the victim was blocking the door.

This Court finds there is no reasonable probability that but for Counsel's advice not to testify, the jury would have had a reasonable doubt respecting Applicant's guilt. Applicant has

failed to establish the necessary prejudice required to grant post-conviction relief. Applicant's allegation that Counsel was deficient for advising him not to testify is based on his contention that had he testified, he would have been able to provide testimony to show that he was acting in self-defense when he struck the victim in the head. A jury instruction is appropriate where evidence is presented as to the following four elements:

> First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. If, however, the defendant was on his own premises he had no duty to retreat before acting in self-defense

State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984).

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COMMON PLEAS

Assuming arguendo that had Applicant testified at trial consistently with the testimony he provided in the evidentiary hearing, a self-defense instruction would not have been warranted because he failed to present evidence as to each of the elements. In addition, this Court finds that Applicant's testimony regarding his version of the facts is incredible and not supported by the evidence. Specifically, this Court finds incredible Applicant's contentions that he was without fault in bringing on the difficulty and that he actually believed he was in imminent danger of losing his life or sustaining serious bodily harm. The victim indicated at trial that Applicant was significantly larger than him, and Applicant even testified that he had previously disarmed the victim by taking the dagger from him. In addition, the victim testified that the place where the rock was removed was twenty to thirty feet from his living room. This Court finds there is no reasonable probability that the jury would have had a reasonable doubt respecting Applicant's

guilt but for Counsel's advice not to testify. Accordingly, Applicant failed to satisfy his burden of proving ineffective assistance of counsel as to this allegation.

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 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 22 day of Feb., 2017.

R. FERRELL COTHRAN, JR.
Presiding Judge
Seventh Judicial Circuit

Manning, South Carolina

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