

4-25-2017
DATED

Michael E. Hyatt #358395
Goodman Corr. Inst
Dorm 3-A-16-B
4556 Broad River Rd
Columbia, S.C.
29210

RECEIVED
APR 27 2017
S.C. SUPREME COURT

In Re: Notice of Appeal from PCR Dismissal
Michael E. Hyatt vs. State of South Carolina 2015-C7-29-1103

Dear Supreme Court, Clerks Office

Find enclosed my Notice of Appeal
that needs to be clock stamped DATED, Filed and a copy
returned to me for my records Please.
Also enclosed is the Order dated 3-28-17

Sincerely Yours

"Awaiting Reply"

Michael E. Hyatt

2
THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

APR 27 2017

S.C. SUPREME COURT

APPEAL FROM LANCASTER COUNTY

Court of Common Pleas

Appellate Case # _____

Civil Action # 2015-CP-29-1103

Michael E. Hyatt, #358395

v.

State of South Carolina

"NOTICE OF APPEAL"

I, Michael E. Hyatt hereby give my Notice of Appeal from the Order of Dismissal for Post Conviction Relief from Court of Common Pleas, Sixth Judicial Circuit on March 28th, 2017 in front of the Honorable W. Jeffrey Young, filed April 5th, 2017

Dated 4-25-2017

S. Michael E. Hyatt
Michael E. Hyatt #358395
Goodman Corr. Inst.
Dorm 3-A-16-B
4556 Broad River Rd
Columbia, S.C.
29210

"PROOF OF SERVICE"

I, Michael E. Hyatt hereby certify that I have properly served the parties listed below, with the Order dated 3-22-17 NOTICE OF APPEAL by placing the same in the United States Postal Mail Service, Postage Prepaid Affixed and forwarded to the addresses below:

Dated 4-25-2017

Michael E Hyatt
Michael E Hyatt #358395
Goodman Corr. Inst
Dorm 3-A 16-B
4556 Broad River Rd.
Columbia, S.C. 29210

The Supreme Court of South Carolina
Daniel E. Shearouse, Clerk of Court
Post office Box 11330
Columbia, S.C. 29211

Jeff Hammond
Clerk of Court
P.O. Box 1809
Lancaster, S.C.
29721-1809

Office of the Attorney General
To: Deshaun H. Mitchell, Asst. Attorney General
Rembert C. Dennis Building
Post office Box 11549
Columbia, S.C.
29211-1549

RECEIVED
APR 27 2017
S.C. SUPREME COURT

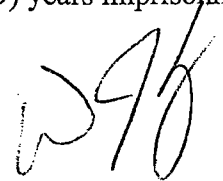
STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF LANCASTER)	SIXTH JUDICIAL CIRCUIT
)	
Michael E. Hyatt, S.C.D.C. No. 358395)	C.A. No. 2015-CP-29-1103
)	
Applicant,)	
)	
v.)	ORDER OF DISMISSAL
)	(with prejudice)
State of South Carolina,)	
)	
Respondent.)	

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on August 6, 2015. Respondent filed its Return on or about March 1, 2016. An evidentiary hearing into the matter was convened on January 9, 2017, at the Lancaster County Courthouse. The Applicant was present and testified in his defense. Steve Garris also testified, as did the Applicant's plea counsel, Mark H. Grier, Jr. The Applicant was represented by Ashlee A. McMahan, Esquire. Respondent was represented by Patrick Schmeckpeper, Esquire, of the South Carolina Attorney General's Office.

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PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Lancaster County Clerk of Court's orders of commitment. Applicant was indicted at the December 2010 term of the Lancaster County Grand Jury for attempted murder (2010-GS-29-1590). Applicant was represented by Mark Grier, Esquire. On January 6, 2014, Applicant proceeded to trial where he was convicted by a jury of the lesser included offense of assault and battery of a high and aggravated nature. The Honorable Brian M. Gibbons sentenced Applicant to nine (9) years imprisonment.



Applicant filed a timely notice of appeal. An appeal was perfected by Susan B. Hackett, Esquire, of the South Carolina Office of Appellate Defense. The South Carolina Court of Appeals affirmed Applicant's conviction on March 1, 2015. State v. Hyatt, Op. No. 2015-UP-326 (S.C. Ct. App. filed July 1, 2015). The Remittitur was returned on July 22, 2015.

Allegations

In his application for post-conviction relief, the Applicant alleges he is being held in custody unlawfully for the following reason:

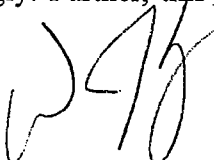
1. "Applicant's sentence and conviction were procured in violation of the sixth and Fourteenth Amendments"
 - a. Ineffective assistance of counsel, in that:
 - i. Trial counsel failed to object to Trial Court's charge of assault and battery
 - ii. Trial counsel failed to object to the solicitor's closing argument

On or about December 29, 2016, the Applicant filed an amended application raising the following issues:

1. Ineffective assistance of counsel
 - a. Mr. Grier failed to call witnesses on behalf of Mr. Hyatt who would have testified that the victim's intent was to in fact injure Mr. Hyatt.
 - b. Mr. Grier did not convey any plea offers from the Solicitor to Mr. Hyatt in violation of Davie v. State, 381 S.C. 601 (2009) & Missouri v. Frye, 132 S.Ct. 1399 (2011).
 - c. Mr. Grier did not cross-examine Officer Lilly on the fact that MR. Hyatt had called the sheriff earlier that day regarding Kamil Nassrah and his threats to Mr. Hyatt.
 - d. Mr. Grier did not sufficiently cross-examine Mr. Nassrah on the differences in his statement to the police and the testimony he gave in court.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject



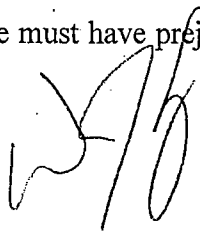
conviction, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and the legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2015), this Court has made the following findings of fact and conclusions of law based upon all of the probative evidence presented.

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(e), SCRPC; 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."

Id. at 117-18, 386 S.E.2d at 625.

Failure to Convey Plea Offer

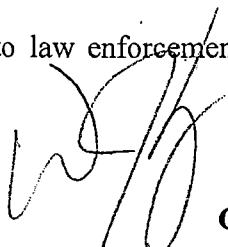
The Applicant testified that he was never informed of any plea offers. He testified that if he had been told of any plea offers, he probably would have pled guilty. The Applicant specifically testified that he was never offered the opportunity to plead to assault and battery of a high and aggravated nature, but that he was not sure he would have taken such an offer.

Counsel testified that the only offer ever made by the solicitor's office in this case was to assault and battery of a high and aggravated nature. Counsel was unable to specifically remember conveying the plea offer to the Applicant. However, he testified credibly that his standard practice is to convey plea offers to his clients. This Court also takes into account that counsel had been practicing for roughly twenty-five years at the time of the Applicant's trial. There is nothing in the record that realistically suggests counsel failed to convey the plea offer to the Applicant.

The Applicant's contrary self-serving testimony is not credible. Particularly compelling to this determination is counsel's credible testimony that the Applicant considered himself the victim throughout the course of the proceedings. In any event, even taking everything he says as true, the Applicant was unable to definitively say that he would have accepted the offer had it been conveyed by counsel. See Hill v. Lockhart, supra. Because he has failed to meet his burden to show deficiency or prejudice, this allegation did denied and dismissed.

Failure to Adequately Impeach the Victim on Cross-Examination

Applicant testified that counsel failed to question or adequately impeach the victim on his statement to law enforcement. He said the victim's prior statement to law enforcement was



different than his testimony at trial. Having reviewed the record, this Court notes that counsel did, in fact, cross-examine the victim on his prior statement to law enforcement. Tr. p. 210-16.¹ Inasmuch as the Applicant disagrees with the extent or method, this Court finds he has failed to meet his burden to show counsel's performance was objectively unreasonable. The Applicant has also failed to meet his burden to show that but for counsel's purported deficiency, the outcome of the proceeding would have been different. This allegation is therefore denied and dismissed.

Failure to Introduce Missing Portions of Video

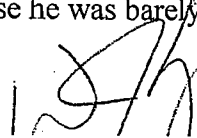
The Applicant testified that the video introduced at trial of the immediate aftermath of the incident was incomplete, and that certain parts were missing. However, the Applicant did not produce the video or any of the alleged missing portions at the evidentiary hearing. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (allegation of ineffective assistance may not be supported by mere speculation as to the result). Lacking either, this Court cannot find the Applicant has met his burden. This allegation is therefore denied and dismissed.

Failure to Call Witnesses

Steve Garris

The Applicant further alleged counsel was ineffective for failing to call witnesses Steve Garris and Terry Bowers. Steve Garris testified at the evidentiary hearing, apparently to present statements he heard from Terry Bowers that were attributed to the victim. Any such statements from Ms. Garris would have clearly been inadmissible at trial. See, Rule 801, SCRE. Moreover, this Court finds counsel was not deficient in failing to call Mr. Garris as a witness because the Applicant failed to provide him with the appropriate contact information in sufficient time to be

¹ The victim explained that he had trouble remembering his statement to law enforcement because he was barely conscious from being struck in the head by the Applicant. Tr. p. 211-12.



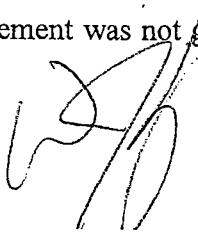
ready for trial. Counsel's credible testimony further indicates that the Applicant requested a speedy trial, further compounding problems with his failure to turn over witness contact information. Given the reasonableness of counsel's failure to call Mr. Garris, as well as the lack of admissible evidence Mr. Garris's testimony would have produced, this Court finds the Applicant has failed to show deficiency or prejudice with respect to this allegation. It is therefore denied and dismissed.

Terry Bowers

Concerning counsel's failure to call Terry Bowers as a witness, the Applicant failed to produce Mr. Bowers at the evidentiary hearing or any admissible evidence as to what he would have said at trial. He has therefore failed to show any prejudice resulting from this purported deficiency. Moorehead, supra. The Applicant's failure to provide contact information in a timely manner, as with Mr. Garris, also precludes a finding of deficiency. Having failed to meet his burden to prove ineffective assistance, this allegation is denied and dismissed.

Failure to Adequately Cross-Examine Law Enforcement

The Applicant further alleges counsel was ineffective for failing to adequately cross-examine law enforcement officers about a prior call concerning the victim. Again, the Applicant has failed to present testimony of the law enforcement officers, or any records of previous calls to police, to support his allegation. The Applicant has not presented any prior statements – inconsistent or otherwise – which would have corroborated his testimony or weakened the state's case. Compare Rutland v. State, 415 S.C. 570, 785 S.E.2d 350 (2016). This Court will not fill in the gaps of the Applicant's burden to prove prejudice with rampant speculation. In any event, counsel testified that he was aware that, in part, because of the victim's stature in the community, law enforcement was not going to be particularly helpful to his client on the witness stand, and



approached them accordingly on cross-examination. See Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). As the Applicant has failed to show deficiency or prejudice, this allegation is 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, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

CONCLUSION

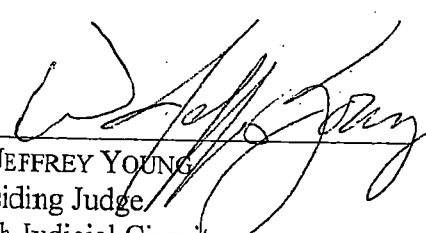
Based on the foregoing, this Court finds that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 28 day of March, 2017.


W. JEFFREY YOUNG
Presiding Judge
Sixth Judicial Circuit

Sumter, South Carolina

Michael E. Hyatt #358395
Goodman Corr. Inst.
Dorm 3-A-16-B
4556 Broad River Rd.
Columbia, S.C.
29210

Legal Mail

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