THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Circuit Court

The Honorable Paul M. Burch, Circuit Court Judge

Case No. 2015-CP-42-0321

State of South Carolina,

Respondent,

v.

David Anthony Tyre, # 00343149,

Appellant.

Notice of Appeal

David Anthony Tyre appeals the order of the Honorable Paul M. Burch, dated November 2, 2016. Appellant received written notice of entry of this order on April 13, 2017.

May 9, 2017

Sincerely,

Brandt Rucker
128 Millport Circle, Suite 200
Greenville, South Carolina 29607
(864) 271-9925
Attorney for Appellant

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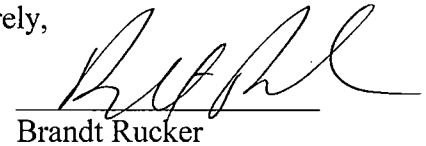
PROOF OF SERVICE

I certify that I have served the Notice of Appeal on The State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on May 9, 2017, addressed to its attorney of record, Alicia A. Olive, Esq., SC Attorney General's Office, Post Office Box 11549, Columbia, South Carolina 29211.

May 9, 2017

Sincerely,



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Attorney for Appellant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	FOR THE SEVENTH JUDICIAL CIRCUIT
	)	
David Anthony Tyre, S.C.D.C. No. 343149,	)	C.A. No. 2015-CP-42-0321
	)	
Applicant,	)	
v.	)	**ORDER OF DISMISSAL**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 25, 2015. Respondent made its return on or about August 14, 2015, and amended return on or about July 22, 2016. An evidentiary hearing was held on September 20, 2016, at the Spartanburg County Courthouse. Applicant was present and represented by J. Brandt Rucker, Esq., and Senior Assistant Deputy Attorney General Johanna C. Valenzuela represented Respondent.

Applicant; Applicant's mother, Hazel Tyre; Applicant's former co-worker, Terrie Laskowski; and Applicant's trial counsel, N. Douglas Brannon, Esquire, and Shawn M. Campbell, Esquire, testified at the hearing. The Court had before it Applicant's trial transcript, the Spartanburg County Clerk of Court records, the South Carolina Department of Corrections records, the PCR application, Applicant's appellate records, and the Amended Return.

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SPARTANBURG COUNTY

PROCEDURAL HISTORY

David Anthony Tyre ("Applicant") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk

of Court. He was indicted at the August 2009 term of the Spartanburg County Grand Jury for homicide by child abuse (2009-GS-42-4508) and infliction of great bodily injury upon a child (2009-GS-42-4509). Doug Brannon and Shawn M. Campbell represented him. Applicant was tried October 11–13, 2010, before the Honorable J. Derham Cole and a jury. The jury found him guilty of both charges as indicted. Judge Cole sentenced him to concurrent terms of life imprisonment for homicide by child abuse and twenty years for infliction of great bodily injury upon a child.

A timely Notice of Appeal was filed on Applicant's behalf. Breen Richard Stevens and Carmen Vaughn Ganjehsani perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences in an unpublished opinion. State v. David Tyre, 2013-UP-286 (Filed June 26, 2013). Applicant filed a petition for writ of certiorari to the South Carolina Supreme Court. The Supreme Court denied Applicant's petition in an order dated July 11, 2014. The Remittitur was returned on July 25, 2014.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility. This 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 (2003).

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Summary of the Testimony

Applicant testified that he retained his counsel Shawn Graham almost immediately because Mr. Graham was already representing him in an unrelated driving under the influence

charge. Applicant stated he hired Doug Brannon closer to the trial date to assist Shawn Graham. According to Applicant, the strategy going in to trial was to challenge how the victim's injuries were inflicted. Applicant stated his counsel were not concerned about his competency to stand trial. Applicant claims that after his bond hearing, when the judge ordered him to be evaluated, he spoke with his counsel about treatment. Applicant admits he went to Spartanburg Regional and began the process of seeing a psychiatric liaison, but says he never met with a psychologist.

Applicant claims he was diagnosed with depression in his early twenties and was seeing "Dr. Wells" for sullenness, moodiness, depression, and inability to deal with anger. Applicant claims he did not receive treatment for a long time as a child because his family did not know about his issues. According to Applicant, he took Zoloft for a while but stopped taking it because it made him dizzy and he had insurance problems. Applicant further claims he was suicidal from the period of 2007 to 2008 and on at least two occasions took initial steps to try and commit suicide.

Applicant argues his counsel's failure to have him evaluated affected the outcome because he "could have gotten some mercy," and he would have pleaded guilty.

On cross-examination, Applicant admitted he intentionally caused the injuries that led to the victim's death. This was opposite to what he testified to under oath before the jury:

Q. Tony, did you intentionally cause any harm to [Victim]?
A. No, sir, I did not.
Q. Did you intentionally shake [Victim] to harm her?
A. No, sir.
Q. Did you shake her with malice?
A. No sir, I was never angry with [Victim] for anything.
Q. Did you shake her because you were frustrated with her?
A. No, sir. There's nothing to be frustrated about.
Q. Did you intentionally cause her head injury?

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A. No, sir. I didn't intentionally mean to do anything to her.

(Trial Tr. p. 393, ll. 8-19.)

When asked how his depression caused him to lie about how he had broken the victim's arm about a week before he killed her, he stated he was scared. When asked why he lied to the doctors providing emergency care to the victim for injuries that eventually led to her death, Applicant stated his depression affected him. On this point, he was impeached with his testimony at trial where he testified under oath that he lied to the doctors because he "was staying with the story that [he] told" because he "was afraid and ashamed of what had happened . . . . Oftentimes when you lie you get locked into it." (Trial Tr. p. 404, ll. 1-5.) When questioned about his work history at the time he committed this crime, Applicant testified that he was employed and doing well enough to win awards for the work he was doing.

Applicant's mother also testified at the hearing. According to Ms. Tyre, her son was on Wellbutrin in high school, but he eventually stopped taking that. She claimed she had observed some changes in her son's behavior, such as him being withdrawn and that he would sometimes be irritable for no reason. His mother also admitted that Applicant did not really discuss his depression with her and there was no discussion about seeing a local psychiatrist.

Applicant's former co-worker testified that she had been friends with Applicant for about three years and she believed he suffered from depression because he could sometimes be withdrawn. She never spoke to his attorney about her observations. On cross-examination, Ms. Leskowski admitted that what she observed in Applicant's behavior did not cause enough concern to cause her to talk to his attorney about it.

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Applicant's trial counsel, Doug Brannon, testified that he met with Applicant a few times prior to trial and then interacted with him often throughout the trial. Mr. Brannon did not know a circuit judge had ordered an evaluation for Applicant. Mr. Brannon explained that he had no concerns with Applicant understanding the charges he was facing, understanding the trial process, and understanding jury selection. Mr. Brannon observed Applicant to take part in his defense by asking questions and answering questions appropriately. According to Mr. Brannon, Applicant always claimed the injuries to the victim were cause accidentally and Applicant's testimony at the PCR hearing was the first time Mr. Brannon was hearing Applicant accept responsibility for causing the victim's death. A plea was not discussed because Applicant had always claimed this was an accident and not intentional.

Applicant's other trial counsel, Shawn Campbell, also testified. Mr. Campbell explained he had met with Applicant and family at least ten times prior to trial. In his interactions with Applicant, Mr. Campbell had never had any concerns about Applicant's mental status to stand trial or his mental status at the time Applicant caused the victim's injuries. Applicant never changed his story to Mr. Campbell that this was an accident. Mr. Campbell stated that he was aware a judge had ordered an evaluation, but he understood that evaluation to be linked to Applicant being released early from bond. He could not remember the result, but he did know he tried to get Applicant evaluated to get him out of jail on bond. Mr. Campbell said he was not concerned about the evaluation hurting or helping the case and was only trying to get Applicant out of jail. He stated he was not concerned because depression did not have a role in what Applicant did; Applicant had always and only claimed that this was an accident. Mr. Campbell

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said that had Applicant admitted he had killed the victim, they may have tried a different defense, but Applicant never said that until the PCR hearing.

Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel due to his trial counsel's alleged failure "to obtain a psychological exam, given a history of mental illness and treatment and no history of violent acts."

In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing SCRCP 71.1(e)). Where the application alleges ineffective assistance of counsel as a ground for relief, 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. at 442, 334 S.E.2d at 814.

First, the applicant must show that counsel's performance "fell below an objective standard of reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have 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 to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

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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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; see Strickland v. Washington, 466 U.S. 668, 688, 692, 104 S. Ct. 2052, 2065, 2067 (1984) ("[T]he defendant must show that counsel's representation fell below an objective standard of reasonableness [and] . . . any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution."); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) ("PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case.").

And "where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006 (citing Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992)). "Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (quoting Strickland, 466 U.S. at 690, 104 S.Ct. 2052). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Id. (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such

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conduct will not be deemed ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)).

This Court will now address the allegation of ineffective assistance of counsel:

Alleged failure to obtain a mental evaluation

"Due process prohibits the conviction of a person who is mentally incompetent." McLaughlin v. State, 352 S.C. 476, 481, 575 S.E.2d 841, 843 (2003) (citing Jeter v. State, 308 S.C. 230, 417 S.E.2d 594, 596 (1992)). A criminal defendant is competent to stand trial if "the accused [has] sufficient capability to consult with his lawyer with a reasonable degree of rational understanding and [has] a rational as well as a factual understanding of the proceeding against him." Jeter, 308 S.C. at 230, 417 S.E.2d at 596. "The purpose of requiring a defendant to be competent is 'to ensure that he has the capacity to understand the proceedings and to assist counsel.'" State v. Kelly, 331 S.C. 132, 148–49, 502 S.E.2d 99, 108 (1998) (citing Godinez v. Moran, 509 U.S. 389, 402, 113 S.Ct. 2680, 2688, 125 L.Ed.2d 321, 329 (1993)); see also, Bell v. Evatt, 72 F.3d 421 (4th Cir.1995), *cert. denied,* 518 U.S. 1009, 116 S.Ct. 2533, 135 L.Ed.2d 1056 (1996) (finding the trial judge only had to ensure the defendant had the capacity to understand, the capacity to assist, and the capacity to communicate with his counsel, not that the defendant was acting in accordance with his capacity).

An applicant challenging his competency must prove this allegation by a preponderance of the evidence. Jeter, 308 S.C. at 230, 417 S.E.2d at 596. An applicant claiming that trial counsel was ineffective in failing to pursue this defense "must produce some evidence of insanity or showing that with the exercise of due diligence, an insanity defense could have been

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developed." Jeter, 308 S.C at 233–34, 417 S.E.2d at 594. The applicant must show that he was "unable to distinguish moral or legal right from wrong and to recognize the particular act charged as morally or legally wrong." Id.

Here, Applicant presented no testimony or evidence of insanity or of his inability to consult with his lawyers with a reasonable degree of rational understanding. The only testimony presented in support of his allegation was that he would occasionally be withdrawn and had struggled with depression. Applicant presented no medical records and no testimony of an expert qualified to determine if Applicant was competent to stand trial or if he was unable to understand his actions at the time he killed the victim. Applicant's counsel both stated they did not have any trouble communicating with him, and a review of Applicant's testimony and presentations to the Court in his trial transcript show that Applicant had the ability to "consult with his lawyer with a reasonable degree of rational understanding." McLaughlin, 352 S.C. at 481, 575 S.E.2d at 843. The trial transcript shows that Applicant testified in his defense to the Court at pre-trial, prior to testifying he engaged in a set of questions with the Court to cover his Fifth Amendment rights, he testified during the trial to the Court and the jury, and he addressed the Court during his sentencing. (Trial Tr. pp. 54-63, pp. 334-336, pp. 336-422, p. 506.) No concerns were raised or noted by the Court in the transcript, and a review of the transcript indicates an engaged, well-spoken Applicant. Applicant's story to the jury remained consistent throughout; he never claimed any mental concerns or inability to control his anger, instead he maintained a consistent storyline that he had been playing with the child and she had slightly bumped her head, and she must have hit her head harder than he first understood. (Trial Tr. p. 371, l. 20 – p. 374, l. 5.)

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Applicant was able to answer questions of the state, the court, and his own attorneys throughout the trial clearly and appropriately. See, id. ("During his trial testimony, [McLaughlin] answered his counsel's questions, and those of the prosecution, clearly and appropriately.").

Applicant has failed to meet his burden of proof on this issue. His trial counsel were not ineffective, and Applicant has not shown any prejudice. This allegation lacks merit and is dismissed.

All Other Allegations

As to any additional allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds Applicant has abandoned any such allegations.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial. Counsel was not deficient in any manner, and Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

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IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and

2. That Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 2nd day of November, 2016.

Paul M. Burch
Presiding Judge
Seventh Judicial Circuit

Greenville, South Carolina.

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