

STATE OF SOUTH CAROLINA)
COUNTY OF DARLINGTON)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTH JUDICIAL CIRCUIT

Dontavious H. Jackson, #343868,)

Case No. 2013-CP-16-177

Applicant,)

v.)

ORDER OF DISMISSAL

State of South Carolina,)

TRUE CERTIFIED COPY,

Respondent.)

Scott B. Suggs
**CLERK OF COURT/RMC
DARLINGTON COUNTY, SC**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed February 22, 2013. Respondent made a timely Return on or about May 29, 2014. The Court convened an evidentiary hearing into the matter on July 27, 2015, at the Darlington County Courthouse. Applicant was present at the hearing and represented by Lance S. Boozer, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsels, Matthew S. Swilley, Esquire, and William E. Grove, Esquire, also testified. The Court had before it a copy of the trial transcript, the records of the Darlington County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, Applicant's direct appeal 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 Darlington County Clerk of Court. In November 2010, the Darlington County Grand Jury indicted Applicant for first-degree burglary (2010-GS-16-1975) and grand larceny (2010-GS-16-1974). Matthew S. Swilley, Esquire, and William E. Grove, Esquire, (collectively, "trial counsel") represented Applicant. On November 29, 2010, Applicant

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proceeded to trial before the Honorable J. Michael Baxley and a jury.¹ On December 1, 2010, the jury found Applicant guilty as indicted. Judge Baxley sentenced Applicant to concurrent terms of twenty-five years for first-degree burglary and five years for grand larceny.

Applicant filed a timely notice of appeal. Tristan M. Shaffer, Esquire, and Susan B. Hackett, Esquire, of the Office of Appellate Defense, represented Applicant on appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on August 1, 2012. State v. Jackson, Op. No. 2012-UP-476 (S.C. Ct. App. filed August 1, 2012). The Court of Appeals issued the remittitur on August 17, 2012.

II. ALLEGATIONS

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

1. "Ineffective Assistance of Counsel"

In an attachment to his application, Applicant raised the following allegations of ineffective assistance of counsel:

1. Failure to move for a continuance to further prepare.
2. Failure to object to a photograph.
3. Failure to object to a cigarette butt.
4. Failure to impeach Dylan Smothers.
5. Failure to make a motion to dismiss.
6. Failure to object to a witness' handling of evidence at trial.
7. Failure to impeach Deputy Pierre.
8. Failure to suppress the cigarette butt.
9. Failure to object to statements at sentencing.
10. Failure to object to chain of custody.
11. Failure to object to Dylan Smothers' testimony.
12. Failure to move for a change of venue.
13. Failure to renew the motion for continuance.
14. Failure to object to Dylan Smothers' testimony.

On or about June 29, 2015, Applicant filed an amendment to his application, adding an

¹ Trial counsel also represented Applicant at an earlier trial of these charges, which resulted in a mistrial.

allegation of ineffective assistance of counsel for failure to object to improper jury instructions.

At the evidentiary hearing, Applicant proceeded on only the following allegations of ineffective assistance of trial counsel:

1. Failure to object to a photograph of a fingerprint.
2. Failure to object to the introduction of a cigarette and related DNA.
3. Failure to impeach the victim with inconsistent statements.
4. Failure to challenge the search warrant that led to the discovery of the stolen items.
5. Failure to impeach the investigating officer with a video of the crime scene.
6. Failure to object to law enforcement statements at sentencing.
7. Failure to object to the jury instructions on reasonable doubt and the role of jurors.

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.

A. 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 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. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

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 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 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, 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.

1. Photograph of a Fingerprint

The Court finds Applicant failed to meet his burden to show trial counsel ineffective in failing to object to a photograph of a fingerprint taken from the crime scene. Applicant testified this photograph was not turned over prior to trial. However, Mr. Swilley testified he was aware of the photograph before trial and discussed it with Applicant. Mr. Grove also testified he reviewed all discovery with Applicant. The Court finds Applicant's testimony on this issue not credible. The Court finds credible and dispositive the testimony of trial counsel. Trial counsel was provided a copy of the photograph in discovery and had no viable objection to its introduction at trial. Accordingly, they were not deficient in failing to object to the photograph. 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”). Likewise, because Applicant failed to articulate a viable objection, he has not shown prejudice from trial counsel not making such an objection.

2. Cigarette DNA

The Court finds Applicant failed to meet his burden of proof to show trial counsel ineffective in failing to object to the introduction of a cigarette and the related DNA results. Applicant first argues the cigarette and DNA results were not disclosed prior to trial. This argument is without merit. Swilley and Grove both testified the cigarette was introduced in Applicant’s first trial, but the State did not have any DNA results at that time. Grove recalled making arguments at the first trial regarding the lack of DNA results. Swilley testified he represented Applicant at a Schmeyer² hearing after the first trial. He also testified he received a copy of the subsequent DNA results and shared them with Applicant. Grove also testified he was aware prior to the second trial that the cigarette and DNA would be introduced.

The Court finds credible trial counsel’s testimony that the cigarette and DNA results were provided prior to trial. Applicant’s testimony he never received any information on these items is not credible. Because trial counsel was provided these items in discovery and had no viable objection to their introduction at trial, they were not deficient in failing to object to the cigarette or DNA results. Palacio, 333 S.C. at 514, 511 S.E.2d at 67. Likewise, because Applicant failed to articulate a viable objection based on non-disclosure, he has not shown prejudice from trial counsel not making such an objection.

Applicant next argues trial counsel should have maintained an objection to the chain of custody on the DNA sample. This argument is likewise without merit. Grove testified he withdrew his chain of custody objection after the analyst reviewed the chain of custody form.

² Schmerber v. California, 384 U.S. 757, 767 (1966).

He testified he could have maintained the objection, but the State would have just called in those witnesses to testify to their role in the chain of custody. The Court agrees with Grove's analysis. Although he could have maintained his objection, professional norms do not require counsel to interpose patently meritless objections. Accordingly, the Court finds trial counsel articulated a valid strategic reason for withdrawing his objection. 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))).

Regardless, Applicant has also not shown prejudice from trial counsel's decision to withdraw the chain of custody objection. The investigator who took the buccal swab from Applicant and transported it to the State Law Enforcement Division testified. The chemist who analyzed the sample testified. This testimony is sufficient to establish the admissibility of the DNA sample. State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (State need only establish chain of custody "as far as practicable." (citations omitted)). Therefore, Applicant has not demonstrated a chain of custody objection would have been successful if raised.

3. Impeachment of the Victim

The Court finds Applicant failed to meet his burden to show trial counsel ineffective in failing to further impeach the victim with his statements. Applicant argues the victim identified the cigarette found at the scene as a Newport, but that the investigating officer never told the victim what brand of cigarette it was. The record reflects trial counsel thoroughly cross-examined the victim on his inconsistent statements about which property was stolen. Swilley testified he attempted to get the victim to admit he bought drugs from Applicant, and the record reflects Swilley engaged in this cross-examination. The Court finds trial counsel's cross-examination of the victim was reasonable under the circumstances, and he was not deficient for

not questioning the victim about the brand of cigarette recovered by the investigator. See Sallie v. N.C., 587 F.2d 636, 640 (4th Cir. 1978) (“Marzullo was not intended to promote judicial second-guessing on questions of strategy as basic as the handling of a witness.”). Furthermore, Applicant has not shown further cross-examination would have changed the result of his trial. Skeen v. State, 325 S.C. 210, 216-17, 481 S.E.2d 129, 133 (1997) (“[O]ne can only speculate whether a ‘better’ cross examination would have helped Skeen.”); Simpson v. Moore, 367 S.C. 587, 598 n.2, 627 S.E.2d 701, 707 n.2 (2006) (“Though hindsight may provide a different view of counsel’s actions, Simpson is not entitled to a new trial for the sole purpose of presenting a ‘fancier’ case.” (citing Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998))).

4. Search Warrant

The Court finds Applicant failed to meet his burden of proof on his allegation trial counsel should have challenged the search warrant that led to the discovery of the stolen items. Swilley testified he challenged the search warrant at the first trial. He recalled the judge denying his motion to suppress because Applicant did not have a privacy interest in the searched property. Swilley testified it would have been futile to make the motion a second time at the second trial. The Court finds Swilley’s testimony credible and agrees with his analysis. Accordingly, the Court finds trial counsel was not deficient in failing to raise a challenge to the search warrant. Palacio, 333 S.C. at 514, 511 S.E.2d at 67.

The Court nevertheless also finds Applicant failed to demonstrate a challenge to the search warrant would have been successful. To successfully claim protection under the Fourth Amendment, Applicant must show he had “a legitimate expectation of privacy in the place searched.” State v. Missouri, 361 S.C. 107, 112, 603 S.E.2d 594, 596 (2004) (citing Rakas v. Illinois, 439 U.S. 128 (1978)). Applicant admitted he did not own the property searched, nor did he reside there. Therefore, he cannot claim his rights under the Fourth Amendment were

violated by the search. State v. Hiott, 276 S.C. 72, 78, 276 S.E.2d 163, 166 (1981) (“The law is well-settled that these rights are personal and one person may not claim the rights of another.” (citing United States v. Payner, 447 U.S. 727 (1980))). Applicant cannot show prejudice from trial counsel’s decision to not challenge the search on Fourth Amendment grounds.

5. Impeachment of the Investigating Officer

The Court finds Applicant failed to meet his burden to show trial counsel ineffective in failing to impeach the investigating officer with inconsistencies in the video of the crime scene.³ Applicant argues Officer Pierre testified he videotaped everything at the scene, but the video does not show the cigarette or the fingerprint. Swilley testified Pierre did not have much involvement in the case, but he did review the incident report and cross-examined Pierre as best he could. The Court finds Swilley’s testimony credible and controlling regarding this allegation. Pierre merely testified at trial that he was the first person on the scene. Swilley cross-examined Pierre on his lack of involvement in the collection of evidence. The Court finds trial counsel’s cross-examination of Pierre was reasonable under the circumstances, and he was not deficient for not questioning Pierre about a videotape of the scene. Sallie, 587 F.2d at 640. Applicant has also failed to demonstrate further cross-examination would have changed the result of his trial. Skeen, 325 S.C. at 216-17, 481 S.E.2d at 133; Simpson v. Moore, 367 S.C. at 598 n.2, 627 S.E.2d at 707 n.2.

6. Sentencing

The Court finds Applicant failed to demonstrate trial counsel was ineffective in failing to object to statements from the Sheriff at sentencing. Applicant testified trial counsel should have objected to the Sheriff telling Judge Baxley about Applicant’s pending charges and juvenile

³ Applicant referenced a video in his testimony, but no video is referenced in the trial transcript. Applicant also presented no such video at the evidentiary hearing. Nevertheless, the Court interprets this allegation as one of failure to adequately cross-examine Officer Pierre.

record. Swilley candidly admitted he did not appreciate the Sheriff's comments, but had no basis to object to them. He recalled Applicant did have other pending charges and a juvenile record. The Court finds trial counsel's assessment correct. See State v. Cantrell, 250 S.C. 376, 379-80, 158 S.E.2d 189, 191 (1967) (sentencing judge entitled to "inquire into any relevant facts in aggravation or mitigation of punishment" so that he "is the possession of the fullest information possible concerning the defendant's life and characteristics" (citations omitted)). Furthermore, the rules of evidence are less stringent at a sentencing proceeding. See Rule 1101(d)(3), SCRCP. Because the information provided by the Sheriff was pertinent to sentencing, trial counsel had no valid objection to the Sheriff's comments. Palacio, 333 S.C. at 514, 511 S.E.2d at 67. Furthermore, Applicant cannot prove prejudice from trial counsel not objecting to the Sheriff's comments because he can provide no proof, beyond his own speculation, that the comments affected his sentence. Trial counsel asked Judge Baxley to consider Applicant's lack of an adult record, his lack of education, and his family background in sentencing. His performance in this regard was reasonable under the circumstances, and no further mitigation would have reasonably changed the outcome of sentencing.

7. Jury Charges

The Court finds Applicant failed to meet his burden to prove trial counsel ineffective in failing to object to Judge Baxley's jury instructions on reasonable doubt and the duty of the jury. Applicant argues trial counsel should have objected to Judge Baxley's charge that a reasonable doubt is a substantial doubt. (Trial Tr. p. 335, lines 7-9). Swilley testified he thinks the charge is problematic, but was not aware of any case law addressing the issue. Grove testified he has discussed this language with Judge Baxley before. He recalled there being no case law forbidding the language in the charge, and that language was consistent with the definitions in the dictionary. The Court finds the testimony of trial counsel candid and reasonable. They have

clearly reviewed and discussed this issue, and determined the language of the charge was not objectionable. The Court agrees with their analysis. See Singletary v. State, 281 S.C. 444, 447, 316 S.E.2d 369, 371 (1984) (“[I]t is not error to equate substantial doubt with reasonable doubt.” (quoting State v. Butler, 277 S.C. 452, 290 S.E.2d 1 (1981))). Trial counsel’s decision to not object to this part of the reasonable doubt instruction was reasonable under prevailing professional norms, and such an objection would not have been successful even if interposed.

Applicant also argues Judge Baxley’s charge that the jury was “acting for the community” and “to reach a verdict that is just and that is fair” is objectionable. (Trial Tr. p. 342, lines 15-17; line 22-p. 343, line 22). However, Applicant’s reliance on State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012), is misplaced. Daniels was decided on October 10, 2012. Applicant’s trial concluded on December 1, 2010. Thus, the law in effect at the time of Applicant’s trial allowed use of the language Applicant challenges here. Trial counsel was not deficient for failing to make an objection to what was, at the time, a proper jury charge. See Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) (citations omitted), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999) (attorney not required to be clairvoyant or prophetic in anticipating changes in law). Swilley testified he did not have any objections to the “acting for the community” charge at the time, and his assessment in December 2010 was correct. Accordingly, trial counsel was not deficient for not raising an objection to this portion of the charge.

Even if the Court were to require trial counsel to be clairvoyant, Applicant failed to demonstrate prejudice from the lack of an objection to the instruction that the jury act for the community. A majority of the Supreme Court held this isolated objectionable language can be harmless if the instructions as a whole are otherwise free from error. Daniels, 401 S.C. at 258, 737 S.E.2d at 477 (citing State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000)). Here, Judge

Baxley gave a thorough and proper charge on reasonable doubt, circumstantial evidence, the presumption of innocence, and the State's burden of proof. Accordingly, the jury instructions as a whole properly conveyed the law to the jury and there is no reasonable likelihood the jury acted in contravention of the law.

A majority of the Supreme Court also held any objectionable language can be harmless if there is substantial circumstantial evidence of guilt. Daniels, 401 S.C. at 260, 737 S.E.2d at 478. Here, the State presented evidence Applicant's fingerprints and DNA were located at the scene of the burglary. The stolen items were found in an abandoned building near Applicant's residence. The State presented substantial circumstantial evidence of Applicant's guilt, and there is no reasonably likely possibility any error in the jury instructions contributed to the jury's verdict. Accordingly, Applicant failed to prove he was prejudiced by trial counsel not lodging a novel objection to Judge Baxley's instructions.

B. 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.

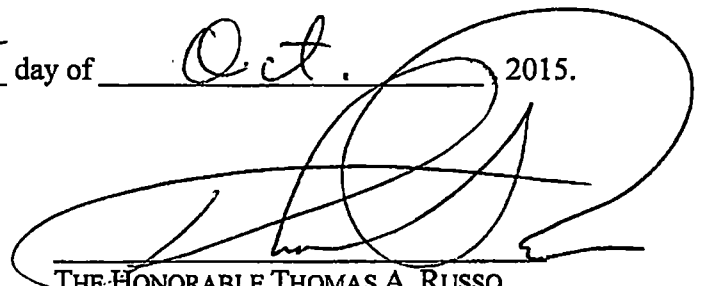
The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate

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 7th day of Oct. 2015.



THE HONORABLE THOMAS A. RUSSO
Presiding Judge

Florence, South Carolina