

The Law Office of Tristan M. Shaffer

Litigation • Injury Law • Criminal Defense

August 7, 2017

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

RECEIVED
AUG 10 2017
S.C. SUPREME COURT

Re: Weber v. State (2013-CP-27-0246)

Dear Ashli Thompson,

Please find the enclosed Notice of Appeal, Certificate of Service, and Order of Dismissal in the above referenced case.

Sincerely,



Tristan M. Shaffer

CC: Jasper County Clerk of Court
Ruston Neeley
Rhonda Foxworth

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

AUG 10 2017

APPEAL FROM JASPER COUNTY
Court of Common Pleas

S.C. SUPREME COURT

J. Cordell Maddox, Jr., Circuit Court Judge

Case No. 2013-CP-27-0246

Tara M. Weber # 347905,

Petitioner,

v.

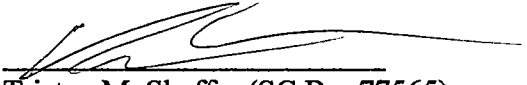
The State of South Carolina,

Respondent.

NOTICE OF APPEAL

Petitioner appeals the order dismissing his post-conviction relief action filed on May 1, 2017. This order was received by Petitioner on July 5, 2017.

August 7, 2017


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Other Counsel of Record:
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Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM JASPER COUNTY
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Case No. 2013-CP-27-0246

Tara M. Weber # 347905,

Petitioner,

v.


The State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that on the date below I served the Notice of Appeal on The State of South Carolina by mailing a copy to the Respondent at the address below.

August 7, 2017



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Other Counsel of Record:
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Attorney for Respondent

RECEIVED

AUG 10 2017

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
COUNTY OF JASPER)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL CIRCUIT

Tara Marie Weber, #347905,)

Case No. 2013-CP-27-0246

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

This Court convened an evidentiary hearing into the matter on July 30, 2014, at the Beaufort County Courthouse. Applicant was present at the hearing and represented by Tristan Shaffer, Esquire. Ashleigh Wilson, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant's trial counsel, Robert Hughes, Esquire (hereinafter "trial counsel") was present and testified. This Court considered the testimony of Applicant and trial counsel, the trial transcript, the records of the Jasper County Clerk of Court regarding the conviction, Applicant's records from the South Carolina Department of Corrections, and the pleadings in this matter. This Court finds as follows:

I. PROCEDURAL HISTORY

Applicant was indicted at the August 2011 term of the Jasper County Grand Jury for voluntary manslaughter (2011-GS-27-0378). Applicant was represented by Robert Hughes, Esquire.

On September 12-14, 2011, the Applicant proceeded to trial and was convicted. The Applicant was sentenced by the Honorable Michael Nettles to confinement for a period of twenty-three years.

Applicant filed a timely Notice of Appeal. Her appeal was perfected by Robert Pachak, Esquire, of the Office of Appellate Defense. The Applicant's convictions and sentences were affirmed by the Court of Appeals. State v. Weber, No. 2013-UP-42 (S.C. Ct. App. January 30, 2013). The Remittitur was issued on February 21, 2013.

II. ALLEGATIONS

Applicant alleged the following grounds in her original application:

1. "Insufficient counsel."
 - a. Attorney mislead me.
2. "False information."
 - a. Witness lied on the stand.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. General

This Court reviewed the record in its entirety, listened to the testimony given, and heard the arguments presented at the evidentiary hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their 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).

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). Where the application alleges ineffective assistance of plea counsel as a ground for relief, Applicant must prove plea counsel's "conduct so undermined the proper functioning of the adversarial process" that the plea proceedings "cannot be relied upon as having produced a just result." Id.

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 first prong, the proper measure of performance is whether plea counsel

provided representation within the range of competence required in criminal cases. Id. The Court strongly presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. 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). 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. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 688.

This Court finds trial counsel’s testimony credible and persuasive. This Court finds Applicant’s testimony lacks credibility. This Court finds Applicant has failed to satisfy his burden of proving the alleged deficiencies. This Court also finds that Applicant has failed to prove she was prejudiced by trial counsel’s actions. This Court dismisses Applicant’s application for the reasons set out below:

B. Ineffective Assistance of Counsel

1. Self-Defense Jury Instruction

Applicant consistently told law enforcement and trial counsel that the incident was an accident. PCR p. 8. App. p. 84. Trial counsel testified Applicant’s account of the incident relied solely on the fact that the stabbing of her husband was an accident. PCR p. 10. Applicant gave three statements to law enforcement. Applicant stated that she retrieved a knife to hurt herself and the decedent attempted to take the knife away from her. App. p. 182. As decedent attempted to take the knife away, Applicant attempted to hand the knife to decedent and the knife went into his shoulder. App p. 183. Applicant had no apparent injuries. App. p. 241. Witnesses heard Applicant say, “If you don’t leave me alone I’m going to stab you.” App. p. 156.

Trial counsel testified it was trial strategy to avoid a self-defense jury instruction. PCR p. 11. He reasoned it would be difficult for a jury to understand two conflicting theories of how the incident took place. PCR p. 11. Trial counsel sought to avoid the conflicting theories of: Applicant killed him on purpose to defend herself and she didn't mean to kill him; it was an accident. This Court agrees and finds trial counsel used reasonable professional judgement and articulated a valid trial strategy for not requesting a self-defense instruction. "Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

This Court also finds self-defense was not applicable in Applicant's case. There was no evidence that supported a self-defense instruction. Self-defense requires a defendant to meet each of four separate elements:

A person is justified in using deadly force in self-defense when:

- (1) The defendant was without fault in bringing on the difficulty;
- (2) The defendant ... actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger;
- (3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief ...; and
- (4) 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.

State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011)

(1). The evidence at trial did not warrant a self-defense jury instruction. Applicant stated she retrieved the knife and, after retrieving it, accidentally stabbed decedent. App. p. 181. "Slater approached an altercation that was already underway with a loaded weapon by his side, and that such activity could be reasonably calculated to bring on the difficulty that arose." State v. Wigington, 375 S.C. 25, 32, 649 S.E.2d 185, 188 (Ct. App. 2007).

(2). Applicant's testimony directly contradicts the subjective belief that she was in danger from decedent. She testified there was no struggle and the incident was an accident. There was no apparent injury to Applicant, nor was an injury asserted or part of Applicant's story. App. p. 241.

(3). A prudent and reasonable person could not have had fear of imminent danger in the situation as described by Applicant. Where she has a knife to inflict self-harm and the stabbing is an accident. Applicant's testimony directly contradicts the objective belief that she was in danger from decedent.

(4). Applicant failed to prove she was prejudiced by alleged deficiency of trial counsel because her statements and the defense theory of the case relied on accident, which runs counter to the theory of self-defense.

This Court finds that Applicant has failed to satisfy her burden to prove that trial counsel erred by failing to ask for a self-defense instruction or that Applicant was prejudiced by the lack of self-defense instruction. Accordingly, Applicant has failed to satisfy her burden to prove ineffective assistance of counsel with regard to this allegation and it is denied and dismissed.

2. Decedent's Toxicology Report

Applicant failed to demonstrate she was prejudiced by trial counsel's failure to introduce the decedent's toxicology report. Trial counsel testified that the decedent's toxicology report did help to prove Applicant's assertion that the incident was an accident. PCR p. 18. Applicant presented no evidence that she was prejudiced by the failure of trial counsel to introduce the decedent's toxicology report.

This Court finds that Applicant has failed to satisfy her burden to prove that trial counsel erred by failing to the decedent's toxicology report or that Applicant was prejudiced by its failure to be introduced. Accordingly, Applicant has failed to satisfy his burden to prove ineffective assistance of counsel with regard to this allegation and it is therefore denied and dismissed.

3. Solicitor's Opening and Closing Statements

The State's opening and closing remarks appropriately utilized decedent's final words, "Tell my children I love them." App. p. 291. Applicant's argument is without merit. "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Smith v. State, 375 S.C. 507, 523, 654 S.E.2d 523, 531-32 (2007). The comments made by the State in this case were the decedent's dying words as testified to by witnesses. App. p. 289. Here, any impropriety in the State's closing argument was not sufficient to warrant the grant of a new trial.

Trial counsel strategically used the same words in the dying declaration, in defense of Applicant's case. App. p. 291. Trial counsel testified his strategy was to point out what the decedent didn't say during his dying declaration. PCR p. 15. Decedent never accused Applicant of perpetrating a crime or expressed ill will toward her, which would have been logical if Applicant had murdered decedent. App. p. 291. Trial counsel testified he wanted the declaration to come in because he thought it strengthened Applicant's version of the incident. PCR. p. 22.

This Court finds that Applicant has failed to satisfy her burden to prove that trial counsel erred by failing to object to the Solicitor's open and closing arguments or that Applicant was prejudiced by the lack of objection. Accordingly, Applicant has failed to satisfy his burden to prove ineffective assistance of counsel with regard to this allegation and it is therefore denied and dismissed.

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, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION


Based on the foregoing, this 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.

This Court notes Applicant must file and serve a notice of appeal within thirty (30) days from 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, his post-conviction relief attorney must serve and file a notice of appeal on Applicant's behalf. Applicant and his attorney are 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.

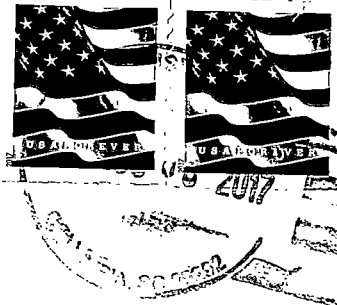
AND IT IS SO ORDERED this 25 day of April, 2017.



J. CORDELL MADDOX JR.
Presiding Judge
14th Judicial Circuit

Anderson, South Carolina

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Supreme Court of South Carolina
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