

AM

J

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

William Andrew Lee, #313779,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2012-CP-42-0097

10-9-13

ORDER OF DISMISSAL

This matter comes before the Court by way of an Application for Post-Conviction Relief filed February 27, 2012, and amendments filed March 13, 2013. The Respondent made its Return on or about February 26, 2013. An evidentiary hearing into the matter was convened on June 27, 2013, at the Spartanburg County Courthouse. The Applicant was present and represented by Kenneth P. Shabel, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

2013 OCT -2
CLERK
COURT

At the hearing, the Applicant testified on his own behalf. S. Frank Adams, Esquire, testified on Respondent's behalf. This Court also had before it a copy of the records of Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, Applicant's appellate records, and the trial transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Applicant was indicted by the Spartanburg County Grand Jury at the May 2008 term for murder (08-GS-42-2433) and attempted armed robbery (08-GS-42-2432). Applicant was represented by S. Frank

Adams, Esquire. On February 3, 2009, the Applicant proceeded to trial, where he was convicted of the charges by a jury. Applicant was sentenced by the Honorable Thomas A. Russo to confinement for thirty-five years for murder and a consecutive term of ten years for attempted armed robbery.

A timely Notice of Appeal was filed and an appeal was perfected. The South Carolina Court of Appeals affirmed the conviction and sentence. State v. Lee, Op. No. 2011-UP-369 (S.C. Ct. App. filed July 14, 2011). The Remittitur was returned on August 2, 2011.

ALLEGATIONS

In the current application and amendments, the Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel, in that;
 - a. Counsel failed to provide adequate assistance,
 - b. Counsel failed to investigate,
 - c. Counsel failed to request a mental evaluation,
 - d. Counsel failed to properly attack indictment,
 - e. Counsel failed to petition the trial court for motion for reconsideration;
2. Ineffective assistance of appellate counsel, in that;
 - a. Counsel failed to file a petition for rehearing.

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). This Court notes that the Applicant indicated to the Court that he was voluntarily withdrawing the allegation that Counsel was ineffective for failing to request a mental evaluation.

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. 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 Rule 71.1(e), SCRPC). 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 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, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

Applicant testified that he saw Counsel only once prior to trial. Applicant testified that

Timothy Ray of the Seventh Circuit Public Defender's Office was originally appointed, but then Counsel was substituted in. Applicant testified that he never received bond once he was arrested.

Applicant testified that he was charged with murder and attempted armed robbery, but his co-defendant, Darrell Ray, was the person that shot the victim. Applicant testified that Ray always admitted being the shooter. Applicant testified that his defense was going to be one of mere presence because although he was at the scene, he did not know that Ray had a gun or was going to rob anyone. Applicant testified that at his trial, his co-defendant testified and said that he had not been offered anything in exchange for his testimony. Applicant introduced his co-defendant's sentencing sheets as Applicant's Exhibit #1. Co-defendant Ray received thirty years for murder and a concurrent sentence of twenty years for attempted armed robbery. Applicant testified that because his co-defendant was sentenced less than ten days after his sentencing, he believes that Counsel should have filed a motion for reconsideration based upon the co-defendant's sentence.

Applicant testified that he did discuss the decision to not testify with Counsel and Counsel advised him to not testify, especially in light of the fact that there had been various inconsistent statements given by Applicant to police. Applicant also testified that Counsel argued that the indictments should be dismissed because of issues with the dates that the grand jury met, but that argument was denied.

Counsel testified that he has been licensed in the state of South Carolina since 1987, handling a combination of criminal law, family law, and real estate cases. Counsel testified that he was appointed in this case based upon a conflict of interest with the co-defendant. Counsel testified that he first met with the Applicant in Turbeville for over an hour and a half, but there was no discovery to review. Counsel testified that he then met with Applicant for over two hours

at the local jail after the Solicitor's office had him transported up to Spartanburg. During that meeting, Counsel testified that he reviewed all discovery materials with the Applicant, including the indictments, witness statements, and his co-defendant's statements. Counsel testified that he also completed legal research in preparation for trial on various issues.

Counsel testified that he believed Applicant had a good defense and good arguments for his defense. However, the Applicant's case was hurt because of the statements of the victim and his co-defendant. Counsel testified that he did discuss with Applicant the possibility of Applicant testifying at trial, but that his record and two inconsistent statements could hurt the case. Counsel testified that he did inquire about whether or not the co-defendant received a deal from the State and did not consider a motion for reconsideration to be an option. Counsel testified that he would have needed a reason for the motion and did not think there was one, but he had discussed with the Applicant the fact that he was filing a notice of appeal.

As it relates to the claim that Counsel failed to investigate, this Court finds that the Applicant failed to meet his burden of proof. To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). When claims of ineffective assistance of counsel are based on lack of preparation time, an Applicant challenging his conviction must show specific prejudice

resulting from counsel's alleged lack of time to prepare. United States v. Cronie, 466 U.S. 648, 104 S.Ct. 2039 (1984); U. S. v. LaRouche, 896 F.2d 815 (4th Cir. 1990).

Although the Applicant claimed that Counsel did not spend enough time with him and failed to investigate the case, he failed to offer any evidence or testimony as to what would have been discovered had there been additional preparation or investigation. It is clear that Counsel reviewed discovery materials with the Applicant and completed research in order to prepare for trial. Therefore, this claim is denied and dismissed.

Applicant has also failed to meet his burden of proof as to the claim that Counsel was ineffective for failing to properly attack the indictments. As the record reflects, Counsel did make a motion to dismiss the indictments prior to the jury being sworn, which was subsequently denied by the trial court. This Court finds that the Applicant failed to offer any evidence that the outcome of his trial would have been any different had additional arguments on that issue been made. Therefore, this claim is denied and dismissed.

As to the claim that Counsel was ineffective for failing to file a motion for reconsideration following the sentencing of Applicant's co-defendant, this Court finds that the Applicant has failed to meet his burden of proof. First, this Court finds that Counsel is not required to file a motion for reconsideration following a trial. However, even if Counsel were deficient for failing to file the motion, the Applicant failed to establish any prejudice. To grant this would require this Court to engage in rank speculation based upon the fact that judges have a myriad of factors that they consider when sentencing. Therefore, this claim is denied and dismissed.

Ineffective Assistance of Appellate Counsel

The Applicant has also claimed that he received ineffective assistance of appellate counsel. A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Applicant testified that he believed that other issues should have also been raised in his appeal by appellate counsel. However, he failed to meet his burden of proof of establishing that there were any issues that could have been raised that were stronger than those raised or that those issues would have affected the outcome of his appeal. Therefore, this claim is denied and dismissed.

Summary

This Court finds that Counsel is an experienced attorney who was prepared for and effectively represented Applicant at his trial. This Court finds Counsel adequately conferred with the Applicant, was thoroughly competent in his representation, and that Counsel's conduct does not fall below the objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in their representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. There is no evidence that the outcome of the proceedings would have changed based upon any of the allegations of deficiency. This Court concludes the Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, this allegation is denied.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the 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.

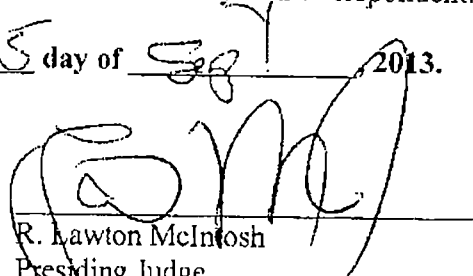
This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the

denial of PCR. Rule 71.1(g), SCRPC, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 25 day of Sept, 2013.



R. Lawton McIntosh
Presiding Judge
Seventh Judicial Circuit

CLERK OF COURT
SEVENTH JUDICIAL CIRCUIT
2013 OCT -2 PM 2:42

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O Box 3483
Spartanburg, SC 29304-3483

Phone (864) 596-2591
Fax (864) 596-2239



M. Hope Blackley
Clerk of Court
Oct. 14, 2013

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

William Blackley
Applicant # 313779

7TH JUDICIAL CIRCUIT

CASE # 2012CP42991

VS
Stee
Respondent

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the Order of Dismissal
In this action dated 9-25, 2013 on 10-14-13

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

William Blackley
Suzanne White
Wm. Lee
Heath Shuler

10-14-13
(Date)

Carrie Gay
(Signature)

STATE OF SOUTH CAROLINA)
 COUNTY OF SPARTANBURG)
 William Andrew Lee, #313779)
 Plaintiff(s),)
 -vs-)
 South Carolina State Of,)
 Defendant(s).)

IN THE COURT OF COMMON PLEAS
 7th JUDICIAL CIRCUIT
 CASE NO.: 2012CP4200991
 APPOINTMENT OF COUNSEL OR GAL
 (Select one.)

ORDER
 AMENDED ORDER

TYPE OF CASE/PROCEEDING: (Check one.)

- | | | |
|--|--|--|
| <input checked="" type="checkbox"/> Post-Conviction Relief (PCR)/habeas case | <input type="checkbox"/> Adoption | <input type="checkbox"/> Juvenile |
| <input type="checkbox"/> SVP case | <input type="checkbox"/> Custody and/or Visitation | <input type="checkbox"/> Abuse and Neglect |
| <input type="checkbox"/> Minor Name Change | <input type="checkbox"/> Other: Post Convict Rel 500 | |

It appears William Andrew Lee, who is a litigant in this case, is entitled to court-appointed counsel or a guardian ad litem.

- It further appears that: (Select only one.)
- counsel/guardian ad litem has not yet been appointed by the court; therefore, an appointment for counsel/guardian ad litem is necessary.
 - counsel or a guardian ad litem was previously appointed by the court but has indicated either a possible conflict of interest, an entitlement to exemption, or other good cause warranting the appointment of new counsel or guardian ad litem based on:
 - counsel was previously appointed by the court but has not indicated that the litigant has retained private counsel and is no longer entitled to appointed counsel.
 - court appointed counsel has obtained, Esquire as substitute counsel pursuant to Rule 608(h)(2); provided, however, only the member who originally received the appointment and who sought substitute counsel shall receive credit.
 - Other: .

Therefore, it is ordered that **Kenneth P. Shabel**, hereby is appointed as (Select one.)

counsel lead counsel (if capital PCR case) guardian ad litem
 for the above-named person. Any counsel or GAL previously appointed is/are hereby relieved.

(If Death Penalty PCR Case) It is further ordered that Esquire, is hereby appointed as second counsel in this capital PCR case.

The clerk of court is directed to forward a copy of this order to all persons entitled to notice

IT IS SO ORDERED
 April 3, 2012

M. Hope Blackley
 Circuit Judge Clerk of Court
Gail Moffitt, Court Clerk

FILED
 CLERK OF COURT
 SPARTANBURG COUNTY
 2012 APR -3 AM 10:05
 M. HOPE BLACKLEY

Plaintiff Attorney:

Kenneth P. Shabel	
C/O Campbell & Shabel, LLC	
104 N. Daniel Morgan Ave. Ste. 201	
Spartanburg, S. C. 29306 (864) 583-0001	

Defendant Attorney:

NOTICE: SC Supreme Court Order of September 29, 2006, requires appointed counsel entitled to payment from the Office of Indigent Defense (OID) to register the case online with OID within fifteen (15) days of this appointment at www.sccid.sc.gov, and further directs that reimbursement vouchers be submitted directly to SCCID and not to the trial judge or clerk of court. See SCCID website for further details.