The Law Office of Tristan M. Shaffer

Litigation • Injury Law • Criminal Defense

December 28, 2017

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

Re: Andre Green #283773 v. State 2014-CP-07-0359

Dear Mr. Shearouse,

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

Sincerely,

Tristan M. Shaffer

CC: Beaufort County Clerk of Court
Ruston Neeley

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2014-CP-07-0359

Andre Green # 283773,

Petitioner,

v.

The State of South Carolina, Respondent.

NOTICE OF APPEAL

Petitioner appeals the order dismissing his post-conviction relief action filed November 21, 2017 and received by Petitioner on November 28, 2017.

December 28, 2017

Tristan M. Shaffer (SC Bar # 77565)
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Other Counsel of Record:
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Attorney for Respondent

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CERTIFICATE 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.

December 28, 2017

Tristan M. Shaffer (SC Bar # 77565)
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STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	)	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
Andre Green, #283773, Applicant, v. State of South Carolina, Respondent.	)	2014-CP-07-0359 **ORDER OF DISMISSAL**

The above-captioned matter is before the court pursuant to a PCR application filed February 17, 2014. This Court convened an evidentiary hearing into this matter on June 5, 2017, at the Beaufort County Courthouse. Applicant was present at the hearing and represented by Tristan Shafer, Esquire. Ruston W. Neely, Esquire, of the South Carolina Attorney General's Office, represented Applicant.

Applicant's trial counsel, Donald Colongeli ("Counsel"), Esquire, and Applicant were present and testified. This Court also had the opportunity to listen to their testimony and rule on their credibility. This Court had before it a copy of the trial transcript, the records of the Beaufort County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the direct appeal records, and the pleadings in this matter.

I. PROCEDURAL HISTORY

Applicant was indicted at the December 2011 term of the Beaufort County Grand Jury for carjacking (2011-GS-07-2111) and kidnapping (2011-GS-07-2109). On April 25, 2012, Applicant proceeded to trial and was found guilty on the carjacking and kidnapping charges and found not guilty on the charges of armed robbery and unlawful carrying of a pistol. Applicant was sentenced by the Honorable J. Derham Cole to confinement for a period of twelve years for

carjacking and thirty years, provided upon the service of twelve years, the balance is suspended to five years' probation for kidnapping. The sentences are to be served concurrently.

Applicant filed a timely notice of appeal. His appeal was perfected by Carmen Ganjehsan (Appellate Counsel), Esquire, of the Office of Appellate Defense. Appellate Counsel submitted a brief pursuant to Anders v. California, 386 U.S. 738 (1967). Applicant's convictions and sentences were affirmed by the Court of Appeals. State v. Green, No. 2014-UP-152 (S.C. Ct. App. April 4, 2014). The remittitur was issued on April 18, 2014.

II. ALLEGATIONS

Applicant alleged the following grounds in his application:

1. Ineffective assistance of counsel.
    a. Counsel was ineffective for not previously reviewing State Exhibit 4, a recorded interview of Petitioner and Sgt. Massey, and allowed a statement concerning Applicant's 'background' to be played.
    b. Counsel was ineffective for allowing the solicitor to admit alleged hearsay phone calls to the victim without objection.
    c. Counsel was ineffective for not objecting to the State playing the CD of the interview of Sgt. Massey.
    d. Counsel was ineffective for failing to properly investigate and prepare an adequate defense.
    e. Counsel was ineffective for failing to object to improper statements made by solicitor in his closing argument.

III. SUMMARY OF FACTS

On June 9, 2011, Dennis Boskey ("the victim") was robbed at gunpoint and forced into the trunk of his own car by two individuals. While the car was stopped, the victim managed to escape from the trunk of the vehicle and run away. Monica Wiser witnessed the victim getting out of trunk of a car and called 911. The victim contacted law enforcement and identified Brandon Parker as one of the assailants. Four days after the incident, the victim picked Applicant out of a photo line-up as the second of his two assailants. The victim told law enforcement

Applicant came to his house with two of his friends. They circled him while his children were playing nearby. And continued asking him questions threatened him and attempted to get him to recant his story. There were also phone calls to the victim saying he needs to drop the charges while threatening his family. At trial, the victim disclaimed the ability to identify Applicant as one of the perpetrators. However, the victim identified Applicant's codefendant and stated there was someone else in the car with the codefendant when he was robbed and kidnapped. Applicant gave a statement to law enforcement admitting he was in the car with Applicant and the codefendant. The victim said there were two people in the car and they robbed him, but would not testify Green was one of the people.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds Applicant's testimony lacked credibility. This Court finds that Applicant has failed to satisfy his burden to prove that Counsel's actions were deficient. Applicant also failed to prove he was prejudiced by Counsel's alleged deficiencies. This Court finds Counsel properly prepared for Applicant's trial. This Court finds Counsel elucidated valid trial strategies in defending Applicant and preparing for trial. This Court finds Counsel rendered adequate assistance and exercised professional judgment in his decisions at trial. This Court further finds This Court dismisses Applicant's application for the reasons set forth below:

A. Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). "When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove 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). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). An applicant must overcome this presumption to receive relief. State v. Cherry, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). "Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made." Id. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove 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. 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.

1. Counsel was ineffective for not previously reviewing State Exhibit 4, a recorded interview of Petitioner and Sgt. Massey, and allowed a statement concerning Applicant's 'background' to be played.

Applicant did not prove he was prejudiced by Counsel's failure to review the redacted recorded interview. Applicant alleges he was prejudiced by Counsel's failure to review the interview because the interviewing officer, Detective Massey (Massey), stated people might be trying to get him because of his background. Tr. 199. Counsel objected and was overruled by the trial judge. Tr. 199-200. The trial judge overruled Counsel's objection and stated he *did not believe* the statement was related to Applicant's criminal history. Tr. 200. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 670. In regards to Massey's statement about Applicant's 'background,' Applicant was not prejudiced by Counsel's failure to review the tape because Counsel objected to the statement and it was found admissible by the trial court. Applicant presented no evidence the trial court's decision would have been different if Counsel made his objection after reviewing the tape. Under Strickland, prejudice requires a reasonable probability the result of the proceeding would be different. Applicant failed to prove how the result of the proceeding would be different if Counsel reviewed the tape before objecting to Massey's statement. Therefore, Applicant's assertion he was prejudiced by Counsel's failure to review the tape is pure speculation. Mere speculation on potential prejudice does not satisfy the applicant's burden of showing prejudice. See State v. Glover, 318 S.C. 496, 498–499, 458 S.E.2d 538, 540. Therefore, Applicant has failed to prove he was prejudiced by Counsel's failure to exclude an admissible statement.

Further, this issue is not appropriate for PCR because Counsel appropriately objected and was overruled. "Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings." Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975). Therefore, this issue was preserved for appeal and is not appropriate for PCR.

Accordingly, this Court finds this issue was preserved for direct appeal and, therefore, is inappropriate for PCR. This Court also finds Applicant failed to prove he was prejudiced by an admissible statement under Strickland. Accordingly, this Court denies and dismisses this allegation.

2. Counsel was ineffective for allowing the solicitor to admit alleged hearsay phone calls to the victim without objection.

Counsel was not deficient for not objecting to the alleged hearsay testimony, the threatening phone calls, because the testimony was not hearsay. Applicant alleges Counsel was deficient because he failed to object to the victim's testimony concerning threatening phone calls he received. Tr. 137-139; 151-154. The victim testified to phone calls he received threatening himself and his family if he testified against Applicant. Tr. 137-139; 151-154. The victim was then approached by Applicant who pressured the victim to drop the charges because Applicant thought the victim was a drug dealer. Tr. 122-123. After receiving those phone calls, the victim went to law enforcement to recant his statement and his identification of Applicant. State Ex. 4. The resulting meeting between the victim and law enforcement was recorded and, subsequently, played for the jury at trial. State Ex. 4. Despite his identification of Applicant via a photo-lineup after the incident, the victim denied being able to identify Applicant at trial as one of the two perpetrators. Tr. 119. The threats were not offered by the State to prove the truth of the matter asserted. The State did not attempt to prove the threats against the victim were real or would be

carried out. The State used the threats against the victim to show the victim's fearful mindset at trial. The State argued this fear was the reason for the victim's partial recantation and refusal to identify Applicant at trial. Tr. 228. Therefore, the victim's testimony was not hearsay because it was not offered to prove the truth of the matter asserted. Accordingly, Counsel was not deficient for failing to object.

This Court finds Applicant failed to prove Counsel was deficient for failing to exclude an admissible statement. This Court also finds Applicant failed to prove the alleged hearsay's exclusion would have created a reasonable probability of changing the outcome of the trial. Accordingly, this Court denies and dismisses this allegation.

3. Counsel was ineffective for not objecting to Investigator Massey's question to Applicant concerning his codefendant's confession.

Applicant failed to prove he was prejudiced by Massey's statement because the statement had miniscule prejudicial value when viewed against the entirety of the evidence against Applicant. Applicant alleges Counsel was ineffective for failing to object to Massey's questioning of Applicant concerning his codefendant. During a bond hearing, Applicant approached Massey and requested to speak with them. Tr. 196. During the following interview, Applicant admitted he was in the car with the victim and his codefendant, Brandon Parker ("Parker"). Tr. 204. However, Applicant claimed he left the vehicle before the robbery took place. Tr. 204. In response to Applicant's claim, Massey asked, "Why would Brandon Parker say [Applicant] was the one with him and the one who done these things, if he hadn't done it? What would be his motive to lie?" Counsel did not object to the question when it was played for the jury. Massey's question was not argued or mentioned by the State while questioning the witness or during the State's closing argument.

In Counsel's post-trial motion for a new trial, Counsel admitted he erred in failing to object to Massey's question. Tr. 334-336. This Court agrees and finds Counsel was deficient in failing to object to Massey's question. Therefore, this Court must examine whether Applicant was prejudiced by Counsel's deficiency to determine whether Counsel's error influenced the trial such that it created a reasonable probability the result of the trial would have been different had the question been cured or excluded.

This Court finds Applicant failed to prove Massey's question was so prejudicial that its exclusion or admission would create a reasonable probability the result of the trial would be different. Applicant confessed to the crime and identified his codefendant during a conversation with the victim. "I just want to clear this problem. Brad put me up to this situation. Brad said you were a drug dealer, I didn't know you were just a regular dude that goes to school and everything. My boys told me you was a good dude, and I'm sorry I did this." State Ex. 5. Applicant's confession and statement inculpating Parker as his codefendant severely minimizes the prejudicial significance of Massey's question. "[T]he admission of improper evidence is harmless where it is merely cumulative to other evidence." State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978). In PCR, the burden is placed on the applicant to prove there is a reasonable probability, but for Counsel's unprofessional errors, the result of the proceeding would have been different. Butler, 286 S.C. at 334 S.E.2d at 818. Here, Applicant has failed to prove Massey's single question, which was cumulative to Applicant's confession, would have created a reasonable probability the result of the proceeding would have changed.

In State v. Brewer, 411 S.C. 407, 768 S.E.2d 659 (2015), reh'g denied (Mar. 5, 2015), the Court expressed concern with questions posed by law enforcement that contain hearsay. "[W]e would like to remind trial courts that the questions police pose during suspect interviews may

contain false accusations, inherently unreliable, unconfirmed or false statements, and inflammatory remarks that constitute legitimate points of inquiry during a police investigation, but that would otherwise be inadmissible in open court." Id, at 408, 768 S.E.2d at 659. In Brewer, the interviewing officer frequently referenced and quoted witnesses and also insisted the defendant prove his innocence. Id, at 401, 406, 768 S.E.2d at 659. Here, the officer asked only one question, which implied hearsay, and the question was not referenced by the State again.

Applicant has failed to prove a reasonable probability that without Massey's mention of Parker's confession the jury would have found Applicant not guilty. Applicant apologized and confessed to the victim after Applicant was charged. He apologized for robbing the victim with Parker. Applicant's confession to the victim was corroborated by the victim's earlier photo line-up identification of Applicant. Applicant also gave a partial corroborating confession to law enforcement. He admitted he was the third person in the car with Parker and the victim the day of the robbery. The victim testified there were two men in the car other than himself. At trial, the victim identified Parker and claimed he could not identify the other man. However, the victim testified both of the other men in the car robbed him at gun point and forced him into the trunk of his own car. This Court finds Applicant failed to prove there is a reasonable probability the jury's decision would have changed if Counsel suppressed Massey's question regarding Parker's alleged confession. Excluding Massey's question, this Court finds the jury had overwhelming evidence, including Applicant's own confessions, admissions, and apology, from which it reasonably found Applicant guilty beyond a reasonable doubt.

This Court also finds the State's evidence against Applicant was overwhelming. See Harris v. State, 377 S.C. 66, 79, 659 S.E.2d 140, 147 (2008) (applicant cannot prove prejudice where there is overwhelming evidence of guilt). As elucidated above, the State had the victim's

eye witness account of the incident, the photo line-up identification of Applicant, and Applicant's apology and confession to the victim. Further, the State had Applicant's recorded admission he was in the car around the time of the robbery.

Therefore, this Court also finds Applicant failed to prove Massey's mention of Parker's confession prejudiced Applicant such that there was a reasonable probability the result of the trial would have been different had it been suppressed. Further, the State had overwhelming evidence of Applicant's guilt. Accordingly, this Court denies and dismisses this allegation.

4. Counsel was ineffective for failing to properly investigate and prepare an adequate defense.

Applicant failed to show how further investigation by Counsel would have benefited Applicant at trial. Applicant did not prove anything of evidentiary value would have been found if Counsel had investigated further. Applicant alleged Counsel could have subpoenaed phone records to prove the threatening calls did not come from Applicant. The State never asserted the phone calls came from Applicant, but instead asserted they came from a number with an Atlanta, Georgia area code. The phone records would not have disproved the State's evidence or exonerated Applicant. Therefore, Applicant's assertion Counsel should have subpoenaed the phone records is without merit because they contained no evidentiary value. Mere speculation as to what would have been discovered during further investigation cannot, by itself, satisfy the applicant's burden of showing prejudice. See State v. Glover, 318 S.C. 496, 498–499, 458 S.E.2d 538, 540. "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998).

Applicant also failed to prove Counsel was deficient in his investigation and preparation for Applicant's trial. "To state the obvious: the trial lawyers, in every case, could have done

something more or something different. So, omissions are inevitable. But, the issue is not what is possible or what is prudent or appropriate, but only what is constitutionally compelled." Chandler v. United States, 218 F.3d 1305, 1313 (11th Cir. 2000). Applicant has failed to prove Counsel's preparation and investigation fell below the professional norms constitutionally required of Counsel.

Accordingly, this Court finds Applicant failed to prove Counsel failed to properly investigate or prepare defense. This Court also finds Applicant failed to prove he was prejudiced by Counsel's lack of investigation such that there was a reasonable probability the result of the trial would have been different. Accordingly, this Court denies and dismisses this allegation.

5. Counsel was ineffective for failing to object to the solicitor's statement regarding the victim's failure to identify Applicant at trial.

This Court finds the solicitor's statement did not vouch for the victim's testimony because the solicitor did not vouch for the victim's veracity. Applicant asserts Counsel was deficient for failing to object to the solicitor's statement which vouched for the victim's veracity. The solicitor argued: "It wasn't a matter of Dennis Boskey not being able to identify Andre Green as the person that did this, but it's simply that he wouldn't, because he's afraid to." Tr. 229, ll. 12-15. "Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony." Gilchrist v. State, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2002).

Here, the solicitor's statement did not vouch for the victim and was reasonably drawn from the facts in the record. After positively identifying Applicant's codefendant, the victim identified Applicant from a photo line-up several days later. In an interview with law

enforcement, Applicant identified himself as the other man in the vehicle. Victim's failure to identify Applicant in court was after he received a threatening visit from Applicant and threatening phone calls from Atlanta. The solicitor argued the threats against Applicant should be taken into account when the jury decided which version of the victim's story to believe. Therefore, this Court finds Counsel was not deficient for failing to object where the objection would have been overruled.

Applicant has also failed to prove a reasonable probability that the solicitor's statement affected the outcome of his trial. The solicitor's statement merely argued the victim's first version of events was the accurate one. The jury heard the evidence of the threats against the victim. The jury heard the victim's first statement and identification of Applicant. They also heard the victim's interview with law enforcement. The jury was given the facts and had the sole responsibility to determine Applicant's guilt or innocence beyond a reasonable doubt. "The issue must be submitted to the jury whenever there is material evidence tending to establish the issue in the mind of a reasonable juror." Parrish v. Allison, 376 S.C. 308, 319, 656 S.E.2d 382, 388 (Ct. App. 2007). Nothing in the solicitor's statement vouched for the victim's credibility. Therefore, this Court finds Applicant failed to prove the solicitor's statement was prejudicial under Strickland.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for not objecting. This Court also finds Applicant failed to prove there is a reasonable probability that but for the solicitor's closing argument; the outcome of the trial would have been different. Accordingly, this Court denies and dismisses this allegation.

VI. CONCLUSION

Based on the foregoing, this Court finds and concludes Applicant, Andre Green, 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 71.1g, 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 13 day of November, 2017.

DIANE S. GOODSTEIN
Presiding Judge
14th Judicial Circuit

Aiken, South Carolina

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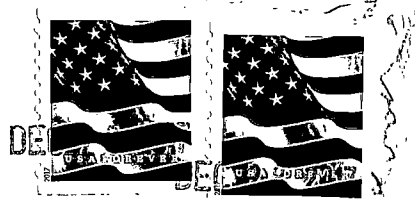

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