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January 25, 2018

RECEIVED

JAN 29 2018

S.C. SUPREME COURT

South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

RE: Terrance J. Goss v. State of South Carolina, Case #2012-CP-04-2834

Dear Sir or Madam:

Please find enclosed the original and one (1) copy of the Appellant's Notice of Appeal and Proof of Service on Kelly Oppenheimer of the Office Attorney General in connection with the above-referenced matter. Please file the original and return a clocked copy to my office in the enclosed self-addressed stamped envelope. Also enclosed is a copy of the Order of Dismissal.

Please contact me if you have any questions.

Sincerely,

Linda Vallar Whisenhunt, LLC



Linda Vallar Whisenhunt

LVW/

Enclosure

cc: Terrance J. Goss

Kelly Oppenheimer, South Carolina Office of Attorney General

Adriane Burk, South Carolina Commission on Indigent Defense

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JAN 29 2018

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Carmen Mullen, Circuit Court Judge

Case No. 2012-CP-04-2834

Terrance J. Goss,
S.C.D.C. No. 340914

Appellant,

v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

Terrance J. Goss appeals the denial of his Post Conviction Relief by the order of the Honorable Carmen Mullen, dated January 10, 2018 and filed January 19, 2018. Appellant received written notice of entry of this order on January 22, 2018.

January 25, 2018



Linda Vallar Whisenhunt
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Attorney for Appellant

Other Counsel of Record:
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South Carolina Office of Attorney General
Post Office Box 11549
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Attorney for Respondent
(803) 734-3970

PROOF OF SERVICE OF A NOTICE OF APPEAL

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JAN 29 2018

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Carmen Mullen, Circuit Court Judge

Case No. 2012-CP-04-2834

Terrance J. Goss,
S.C.D.C. No. 340914

Respondent,

State of South Carolina,

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on January 25, 2018, addressed to its attorney of record, Kelly Oppenheimer, South Carolina Office of Attorney General, Post Office Box 11549, Columbia, South Carolina 29211.

January 25, 2018



Linda Vallar Whisenhunt
Linda Vallar Whisenhunt, LLC
213 South Main Street
Anderson, South Carolina 29624
(864) 225-3125
Attorney for Appellant

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)
Terrance J. Goss, #340914,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON)
TENTH JUDICIAL CIRCUIT)

2012-CP-04-2834

A TRUE COPY
JAN 19 2018
Richard S. Kintley
CLERK OF COURT

ORDER OF DISMISSAL

FILED-CLERK'S OFFICE
ANDERSON SC
2018 JAN 19 AM 10:50
COMMON PLEAS AND
GENERAL SESSIONS

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on August 23, 2012. Respondent submitted its Return on April 11, 2013. An evidentiary hearing was convened on December 1, 2014, at the Anderson County Courthouse. Applicant was present at the hearing and was represented by Linda Whisenhunt, Esquire. Respondent was represented by Assistant Attorney General John W. Whitmire of the South Carolina Attorney General's Office. At the evidentiary hearing, Applicant testified on his own behalf and presented testimony from Mary Jane Goodwin, Esquire (Counsel). After reviewing all the evidence and testimony presented, this Court finds Applicant has failed to establish any constitutional deprivations or other grounds for relief and denies this application for post-conviction relief.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. Applicant was indicted at the June 2009 term of the Court of General Sessions of Anderson County for armed robbery and possession of a weapon during the commission of a violent crime (2009-GS-04-0072) and conspiracy to commit armed robbery (2009-GS-04-070). Mary Jane Goodwin, Esquire, represented Applicant. Applicant proceeded to a jury trial before the Honorable R. Lawton

McIntosh. Applicant was convicted as indicted. On May 17, 2010, Judge McIntosh sentenced Applicant to a fifteen year term of imprisonment for armed robbery and concurrent five-year terms of imprisonment for possession of a weapon during the commission of a violent crime and conspiracy to commit armed robbery.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by LaNelle C. Durant, Esquire, pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Applicant's appeal. State v. Goss, Op. No. 2012-UP-204 (S.C. Ct. App. filed March 28, 2012). The Remittitur was returned to the Circuit Court on April 17, 2012.

II. ALLEGATIONS

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

1. Ineffective Assistance of Trial Counsel
 - a. Failure to object to testimony regarding prior bad acts and to introduction of evidence not provided in discovery
 - b. Failure to investigate
 - c. Failure to present adequate defense, including failing to subpoena defense witnesses or call Applicant to testify
2. Prosecutorial Misconduct
 - a. Knowingly eliciting false testimony
 - b. Using statements regarding other crimes to confuse the jury
3. Violation of Due Process pursuant to Brady
 - a. Failing to turn over witness statement in discovery
4. Abuse of Discretion of the Trial Court
 - a. Error in allowing testimony regarding prior/unrelated crimes

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.

Ineffective Assistance of Counsel

Applicant has asserted several allegations of ineffective assistance of counsel. Each allegation presented at the evidentiary hearing is addressed below. Applicant alleges Counsel failed to object to the detective's testimony regarding prior bad acts and unrelated crimes. Applicant also alleges Counsel failed to conduct a reasonable investigation, which resulted in an inadequate defense, including failing to call favorable witnesses and refusing to allow Applicant to testify.

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 counsel as a ground for relief, the applicant 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." 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 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 presumes 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 Counsel's performance was deficient. Id. Under this prong, the Court measures 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.

In general, this Court finds Counsel was adequately prepared for Applicant's trial and did not fall below the standards of professional norms in any manner. Counsel credibly testified she had enough time to prepare for trial and did not have any reason to request more time. She communicated properly with Applicant and reviewed all discovery materials with him. Finally, Counsel testified she later represented Applicant on another charge, and he did not express any concerns about retaining her again; if he had raised those concerns, she would have brought it to the court's attention. Applicant admitted five months later, he pled guilty to strong arm robbery, with Counsel representing him on that charge as well. Applicant testified he had already planned to pursue a PCR against Counsel on the prior armed robbery charge, and Counsel was aware he was unhappy with her representation in that case. However, Applicant further testified he did not inform Counsel of any concerns at that time regarding her representation on the new charge and also never expressed his concerns to the judge. Applicant acknowledged he told the judge he was satisfied with Counsel's representation in that matter as well. Applicant testified he never asked to be appointed a new attorney for the new charge.

Based on this testimony and the record before the court, this Court finds Counsel's representation was not deficient in any regard.

Failure to Object to Detective's Testimony

Applicant testified at the evidentiary hearing Counsel failed to object to the testimony of prior bad acts by officers of Greenville County, thereby depriving him of having a fair trial. Applicant testified Counsel also allegedly failed to object to testimony from Anderson County detectives about unrelated crimes that occurred on January 20th with Applicant's codefendant. Counsel testified, and the record confirms, she objected repeatedly to the detective's testimony, and her objections resulted in the judge issuing multiple curative instructions and kept harmful information, such as Applicant's gang affiliation, from coming in front of the jury.

This Court finds Applicant has failed to meet his burden of establishing Counsel was ineffective for failing to object to the detective's testimony because Counsel did in fact object, repeatedly, to such testimony. Because there was no deficiency, Applicant was not prejudiced.

Failure to Investigate, Subpoena Favorable Witnesses, and Allow Applicant to Testify

Applicant testified he wanted Counsel to call Sanchez Gilliard as a witness because he believed Gilliard's statement was exculpatory. Counsel testified she did not interview Sanchez Gilliard because he is a convicted felon, and she did not think he was an appropriate witness. Counsel further testified there was confusion over the Gilliard statement, and which robbery it refers to. Counsel testified the gas station had been robbed three times in short succession, and Applicant was charged in the third robbery, along with two other people. Counsel testified Applicant incorrectly believed there were only two people involved in the second robbery when actually that robbery also involved three people. Counsel further testified the Gilliard statement concerned the second robbery, not the third one, but since it was confusing, she felt it was helpful to use in her closing argument.

Additionally, Counsel testified two other individuals mentioned in the Gilliard statement did testify at Applicant's trial, and neither corroborated any account of the statement. Counsel then testified she interviewed several potential witnesses, but she declined to call them as the witnesses' version of events varied wildly from one week to the next leading up to trial. She testified no one specifically said they witnessed Applicant commit the crime; the only connection was the gun used in the robbery and Applicant's letter and audio recording from the jail. Counsel testified to her belief the audio recording was the most significant evidence against Applicant.

Applicant further testified Counsel did not call Applicant to the stand against Applicant's wishes to testify. Applicant testified the State entered into evidence a letter Applicant had written to his codefendant, and the State's witness, one of the detectives on the case, testified as to the meaning of the statements in the letter. Applicant testified he wanted the jury to hear his explanation of the letter. Applicant further testified he informed Counsel he wished to testify, but she told him he should not testify due to his prior criminal history.

Counsel also testified that though the judge did not discuss with Applicant his right to testify, there was a clear understanding between Applicant and Counsel that he did not want to testify. Counsel testified she and Applicant discussed many times about whether he should testify, as Applicant did not want to be labeled as a snitch. Counsel testified Applicant told her he was afraid for the safety of himself and his family, as one of the witnesses was beaten in jail after testifying. Counsel further testified there was not really a way in which Applicant could testify without opening the door to unfavorable testimony.

On cross examination, Applicant testified the Anderson County Sheriff's Department broke the case after discovering some guns in an apartment on the Greenville Tech campus.

Applicant testified, at that time, he gave a statement to the Greenville Tech police, stating he saw a big gun and a small gun in the apartment, but they belonged to other occupants of the apartment, not to him. Applicant testified he and his attorney did not review his statement, and when he asked her if he could testify, she would not let him. Applicant acknowledged he told the judge he did not take the stand because of his prior record and because he feared for his life. Applicant further testified that, other than giving Counsel Sanchez Gilliard's statement, he never told her during the representation he knew who really committed the crime. Applicant then testified Sanchez Gilliard would know who really committed the crime.

Counsel testified she was appointed several months before trial after the initial attorney recused himself due to a conflict of interest at the public defender's office. Counsel testified she read everything in the case file and met with Applicant at least six times at the jail. Counsel also testified Applicant continuously denied any involvement in the robbery, and he never gave any version of events that implied he knew who the culprit was. Only during sentencing did Applicant make it known he may know who is responsible for the robbery.

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case. Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (citing Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). Failure to conduct an independent investigation is not *per se* ineffective assistance of counsel, especially where an investigation would not have uncovered any helpful information. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998).

In this case, Counsel's investigation was reasonable. Counsel thoroughly reviewed all evidence and discovery materials in the case, discussed possible defenses with Applicant, and

pursued leads Applicant provided. Specifically, Counsel reviewed all photos, video, audio from jail, and the Sanchez Gilliard statement. Counsel testified she had plenty of time to review all materials. In addition, Counsel met with Applicant at least six times in jail to review the case.

Counsel also discussed with Applicant her strategy for how to cast reasonable doubt on the culpability of Applicant. Counsel tried and investigated the case to the best of her ability by pursuing the most advantageous trial strategy, which involved deciding not to call Sanchez Gilliard as a witness at trial due to credibility concerns. This Court finds Counsel conducted a reasonable and proper investigation, adequately conferred with Applicant, and was thoroughly competent in her representation.

Likewise, Applicant has failed to show prejudice, and this Court can only speculate as to what additional investigation Counsel could have done and what evidence that investigation would have uncovered. See Jackson v. State, 339, S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (finding no prejudice where applicant “failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial.”). Applicant testified on his own behalf that Counsel should have called Sanchez Gilliard as a witness at trial. However, Counsel had sound justification for not doing so, as the statement was not corroborated by other testimony and came from an unreliable convicted felon. Most importantly, Applicant failed to present any other witnesses, including Gilliard, at the evidentiary hearing and produced no evidence of what Counsel might have uncovered had she conducted any additional investigation, although Applicant admitted a copy of the Gilliard statement into evidence.

Therefore, Applicant has failed to demonstrate any alleged deficiency prejudiced him. See Glover v. State, 318 S.C. 496, 499, 458 S.E.2d 538, 540 (1995) (“The applicant’s mere

speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice."'). Accordingly, this Court finds Applicant has failed to demonstrate either deficiency or prejudice with respect to this allegation. Therefore, Court finds that this allegation must be denied and dismissed with prejudice.

A. Prosecutorial Misconduct/Violation of Due Process

Applicant testified he was denied due process of law because the State did not provide the Sanchez Gilliard statement, which he believed to be exculpatory, in response to his discovery request.

Brady v. Maryland, 373 U.S. 83 (1963), requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. Clark v. State, 315 S.C.385, 388, 434 S.E.2d 266, 268 (1993). Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). "Determining whether evidence withheld by the state is 'material' under Brady turns on whether the cumulative effect of the withheld evidence results in a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." State v. Hill, 368 S.C. 649, 661, 630 S.E.2d 274, 280-81 (2006).

Counsel testified she did not receive the Gilliard statement from the State, but instead obtained it from Applicant. Counsel further testified she did not believe anyone could reasonably have been expected to put that statement in the case file, as it did not even have Applicant's name in it. She testified she did not think it had an obvious logical connection to this case, although she did ultimately use it in her defense. Lastly, Counsel testified she had a good

working relationship with the solicitor, and he had an open file policy, so she never believed he intentionally withheld any discovery from her, including the Gilliard statement. She testified she believed the solicitor never realized the statement's potential connection to this case.

Counsel further testified she received photos, video from the gas station, and an audio recording from jail in discovery from the State. Counsel further testified there was some confusion over exactly which items had been turned over, but she had plenty of time to review all materials before trial began.

This Court finds Applicant has not established the State committed a Brady violation, or any other violation of Applicant's constitutional rights, when it failed to turn over the Gilliard statement in discovery. The Court finds the statement was not material because it was not material of Applicant's guilt or punishment, as it related to a different robbery than the one Applicant was charged with. The Court also notes Counsel did eventually receive the statement and was able to use it to impeach the detective's testimony at trial, so Applicant suffered no prejudice from the State's initial failure to turn the document over to Counsel.

B. Prosecutorial Misconduct

This Court finds Applicant failed to present any testimony, argument, or evidence at the hearing regarding the allegations in his application that the prosecutor knowingly elicited perjured testimony and purposely sought to confuse the jury. Therefore, this Court deems them abandoned, and those allegations are dismissed.

C. Trial Court Error

This Court finds Applicant failed to present any testimony, argument, or evidence at the hearing concerning the allegation in his application that the trial court erred in admitting the detective's testimony. Additionally, the Court finds this allegation is a direct appeal issue and is

procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 420 (1993). Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief, and the allegation is dismissed.

IV. CONCLUSION

Based on all 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 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), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if Applicant wishes to seek appellate review, post-conviction relief 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.

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IT IS THEREFORE ORDERED:

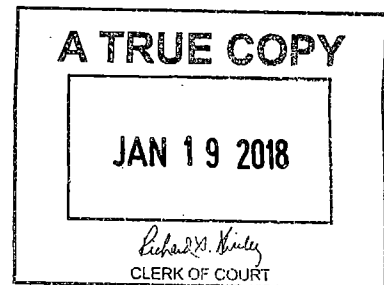
1. The application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 10 day of Jan, 2017.


THE HONORABLE CARMEN MULLEN
Presiding Judge
Tenth Judicial Circuit

Beaufort, South Carolina

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2018 JAN 19 AM 10:50
COMMON PLEAS AND
GENERAL SESSIONS



Linda Vallar Whisenhunt
213 South Main Street
Anderson, SC 29624

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