

IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS
JOCELYN NEWMAN, CIRCUIT COURT JUDGE
2015-CP-40-1658

RECEIVED
FEB 01 2018
S.C. SUPREME COURT

Ricky Bowman,.....Petitioner.

vs

The State of South Carolina,.....Respondent.

NOTICE OF APPEAL

Ricky Bowman appeals the Honorable Jocelyn Newman's January 31, 2018 Order of Dismissal. Undersigned counsel received notice of entry of the order on December 31, 2018. A copy of the order on appeal is attached to this notice.

Respectfully submitted,



Anna R. Browder
Law Office of Anna Browder, LLC
PO Box 7284
Columbia, South Carolina 29202
Telephone: (803) 661-6758
Fax: (803) 403-8752

Attorney for the Petitioner.

February 1, 2018

OTHER COUNSEL OF RECORD:
Jessica Kinard, Esquire
South Carolina Attorney General's Office
Post Office Box 11549
Columbia, SC 29211-1549

IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

RECEIVED
FEB 01 2018
S.C. SUPREME COURT

JOCELYN NEWMAN, CIRCUIT COURT JUDGE

2015-CP-40-1658

Ricky Bowman,.....Petitioner.

vs

The State of South Carolina,.....Respondent.

PROOF OF SERVICE

I, Anna Browder, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to the attorney of record, Jessica Kinard, P.O. Box 11549, Columbia, South Carolina 29211-1549. I further certify that all parties required by Rule to be served have been served this 1st day of February 2018.

Respectfully submitted,



Anna R. Browder, Esquire
Law Office of Anna Browder, LLC
PO Box 7284
Columbia, South Carolina 29202

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Ricky Bowman (SCDC #348625),

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 2015-CP-40-1658

ORDER OF DISMISSAL

FILED
JAN 31 PM 8:28
COURT CLERK
RICHLAND COUNTY

This matter comes before the Court upon Application for Post-Conviction Relief filed by Applicant Ricky Bowman ("Applicant") on March 17, 2015. Respondent filed its return on July 9, 2015. Applicant filed an Amended Application for Post-Conviction Relief on September 21, 2015. On January 30, 2017, an evidentiary hearing was conducted at the Richland County Judicial Center. Applicant was present along with his counsel, Anna Good Browder, Esquire. The State was represented by Jessica Kinard, Esquire.

For the reasons set forth below, the Application for Post-Conviction Relief is DENIED, and this matter is DISMISSED WITH PREJUDICE.

FINDINGS OF FACT

At the April 2010 term of the Richland County Grand Jury, Applicant was indicted for assault and battery of a high and aggravated nature, possession of a weapon during the commission of a violent crime, armed robbery, kidnapping, and burglary in the first degree. Mark Schnee, Esquire ("trial counsel") was appointed to represent him. Applicant was tried by a jury from



November 7 to November 9, 2011. He was convicted of all charges and was sentenced to twenty years' imprisonment.¹

Applicant appealed his conviction to the South Carolina Court of Appeals, which was denied by Order filed April 2, 2014. Rehearing was denied on June 2, 2014. Applicant then filed a Petition for Writ of Certiorari. The South Carolina Supreme Court denied the Petition on January 15, 2015, and issued its Remittitur on February 17, 2015.

Applicant subsequently filed the instant Application for Post-Conviction Relief and Amended Application for Post-Conviction Relief ("PCR"). In those filings, Applicant alleges that he is being unlawfully detained due to ineffective assistance of counsel and due process violations. Specifically, Applicant contends that trial counsel failed to make certain objections, failed to file motions, and failed to discuss evidence with him. He also alleges his due process rights were violated in that the arrest warrants were not based upon probable cause,² that an improper photo lineup identification was done, that evidence was withheld from him, and that he was improperly shackled within the view of the jury.

I. Applicant's Testimony

At the evidentiary hearing on January 30, Applicant testified on his own behalf and expounded on his written allegations. He said that the State extended two plea offers to him – one for seven years' incarceration for a non-violent offense, and another for ten years' incarceration for a violent offense. Applicant testified that he accepted the seven-year offer and signed all required

¹ The Court sentenced Applicant to ten years for assault and battery of a high and aggravated nature, five years for possession of a weapon during the commission of a violent crime, twenty years for armed robbery, twenty years for kidnapping, and twenty years for burglary in the first degree. All sentences were to be served concurrently.

² During the evidentiary hearing, Applicant withdrew this allegation as well as his allegation; that trial counsel was ineffective for failing to move to quash the indictments in his case.



plea paperwork, but before he could enter the plea, trial counsel told him that the offer had been rescinded once the State learned that Applicant's codefendant was willing to testify against him at trial. Applicant now complains that trial counsel was ineffective for failing to request that the court require the State to honor the plea offer.

Applicant also testified that he only met with trial counsel four times while he was in jail. He alleges that during those meetings, he was never shown any written statement made by his codefendant and instead was only told a synopsis of what the codefendant's testimony might be. Additionally, the codefendant testified in pre-trial hearings; the State alluded to the codefendant's testimony in its opening statement; and at least one witness mentioned the codefendant in his own testimony. However, the codefendant never testified during trial. Applicant contends that before the trial began, trial counsel knew that the codefendant had decided not to testify and, therefore, trial counsel was ineffective in failing to object to the State's opening statement and the witness's testimony and in failing to move for a mistrial on the same grounds.

According to Applicant, witness Sean Toran wrote a letter to him while he was in jail, and that letter could have been – and should have been – used to impeach Toran's testimony. Applicant also contends that trial counsel was ineffective for failing to fully inform him of Toran's intended testimony. Applicant testified that if he had known that such testimony was forthcoming, he would have accepted a plea offer instead of having a jury trial.

Applicant contends that after the jury returned its verdict, only eleven of the twelve jurors were polled by the court. Applicant argues that trial counsel should have moved for a mistrial but failed to do so. Finally, Applicant alleges that during the trial, the courtroom was closed to the public. He believes the closure to be a violation of his Sixth and Fourteenth Amendment rights.

II. Testimony of Trial Counsel

Trial counsel also testified during the evidentiary hearing. He explained that after he was retained by Applicant, he met with Applicant "a number of times" and had long, detailed conversations with him. During those meetings, Applicant gave him a list of potential witnesses for his defense. Trial counsel stated that he gave the witnesses' names to a private investigator so that they could be located and interviewed but that the list "didn't pan out" because it lacked sufficient information such as witnesses' full names and addresses.

Trial counsel testified that he had sufficient time to prepare for trial and that Applicant had always wanted a jury trial rather than a plea offer. His trial strategy was to challenge the State's case by showing that the State had no physical evidence against Applicant. He was surprised by the codefendant's decision not to testify and the closure of the courtroom to the public. Trial counsel also testified that he reviewed the letter to Applicant from witness Sean Toran but determined that it wasn't sufficiently specific to be helpful to Applicant's defense. Specifically, trial counsel stated that despite Applicant's contentions, he didn't believe that the Toran letter could be used effectively in the witness's cross-examination.

Trial counsel acknowledged that only eleven of the twelve jurors were polled after the verdict was returned. He had no explanation as to why that occurred or why he didn't notice its occurrence at the time. Finally, trial counsel testified that he was surprised by the trial judge's decision to close the courtroom, but he gave no explanation about why he failed to challenge the closure or the effect of that decision on Applicant.

III. Other Evidence

The Court also reviewed the transcript of Applicant's trial, the letter purportedly mailed to Applicant by witness Sean Toran, a typewritten statement of Sean Toran, and the Affidavit of codefendant Torrell Johnson.

CONCLUSIONS OF LAW

In a PCR action, "[t]he applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence." Rule 71.1(e), SCRPC. Where it is alleged that trial counsel was ineffective, 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, 686 (1984). Additionally, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Id.* at 692. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (citation omitted). "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691.

I. Plea Offer

Applicant's complaint about the State's rescission of a plea offer is without merit. Even assuming Applicant's contention to be true, he has failed to prove that he detrimentally relied on the State's offer.

"A plea agreement is only an 'offer' until the defendant enters a court-approved guilty plea." *Reed v. Becka*, 333 S.C. 676, 688, 511 S.E.2d 396, 402 (Ct. App. 1999). "A defendant accepts the 'offer' by pleading guilty." *Id.* "Thus, until formal acceptance of the plea by the court has occurred, the plea binds no one, not the defendant, the State, or the court." *Id.* (citing *Harden v. State*, 453 So.2d 550 (Fla. Dist. Ct. App. 1984) (until formal acceptance of plea has occurred, plea binds no one, not defendant, prosecutor, or court; formal acceptance of plea occurs when trial court affirmatively states to parties, in open court and for the record, court accepts the plea)).

The exception to this rule is when the accused shows that they have detrimentally relied upon the State's plea offer. *Id.* at 688-89, 511 S.E.2d at 402-03 (citations omitted). "A defendant relies upon a solicitor's plea offer by taking some substantial step or accepting serious risk of an adverse result following acceptance of the plea offer." *Id.* at 689. 511 S.E.2d at 403 (citation omitted). "Reliance may not be shown 'by the mere passage of time.'" *Id.* (citation omitted). "Also, it may not be shown where the defendant stopped preparing his defense, absent a showing of specific prejudice." *Id.* (citation omitted). "Nor may detrimental reliance be shown by the prospect of a longer sentence." *Id.* (citation omitted).

Here, Applicant has shown no prejudice. Rather, it appears that Applicant regrets losing the opportunity to receive a shorter prison sentence. Such regret is not a sufficient basis upon which to grant PCR. Therefore, this allegation is dismissed.

II. Deficiencies in Jury Polling and Closed Courtroom

According to both Applicant and trial counsel, the courtroom was closed to the public during the trial. Additionally, upon the jury's pronouncement that Applicant was guilty, eleven of the twelve jurors were polled. However, Applicant's contention that counsel was ineffective for

failing to move for a new trial on these grounds is unfounded, as Applicant has not shown any resulting prejudice.

"A trial judge polls the jury to ensure the verdict is unanimous." *Green v. State*, 351 S.C. 184, 196, 569 S.E.2d 318, 324 (2002) (citation omitted). However, trial counsel has no affirmative duty to request that a trial jury be polled. *Id.* Further, even when a poll is taken and there is some anomaly in the results, the PCR court cannot speculate as to any conclusions to be drawn from that anomaly. *Id.* Rather, an applicant must successfully argue that the outcome of his trial would have been different if the jury polling procedure had gone differently. *Id.*

Similarly, prejudice must be shown in order to demonstrate that the closure of the trial court to the public resulted in violation to Applicant's constitutional rights. "[T]he right to an open courtroom protects the rights of the public at large, and the press, as well as the rights of the accused." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1910 (2017) (citations omitted). "[W]hen a defendant raises a public-trial violation via an ineffective-assistance-of-counsel claim, *Strickland* prejudice is not shown automatically." *Id.* at 1911. Instead, the burden is on the defendant to show either a reasonable probability of a different outcome in his or her case or ... to show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair." *Id.*

Applicant in this case is unable to show how he was prejudiced by the failure to poll the twelfth juror in his trial or by the closure of the courtroom. Because this court cannot assume that any prejudice occurred, this claim is dismissed.

III. Remaining Allegations

Applicant's remaining allegations must be dismissed as well. Applicant has not only failed to prove that trial counsel's actions were anything other than strategic, but he has also failed to offer evidence of any resulting prejudice.

As the United States Supreme Court has recognized, "Representation [of clients] is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Strickland*, 466 U.S. at 691. "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Here, Applicant complains of trial counsel's failure to call Sean Toran ("Toran") to testify as a witness at trial. According to trial counsel, however, he made a calculated decision not to call Toran as a witness. Specifically, trial counsel stated that he read the letter than Toran had written to Applicant and determined that it was not sufficiently specific to have any impact on this case. Trial counsel also testified that he did not believe, in his professional opinion, that the letter would have been useful in any effective cross-examination.

Applicant also complains of trial counsel's failure to object when Torrell Johnson ("Johnson") testified during pre-trial hearings but did not testify as a witness during trial. Specifically, Applicant contends that trial counsel should have objected to any mention of Johnson during the State's opening statement and in the State's examination of a police investigator, as trial counsel knew before trial began that Johnson would not testify. Trial counsel – who this court finds to be credible – denies this, stating that he was unaware that Johnson would not testify in trial; therefore, he had no reason to lodge such objections. Trial counsel testified that Johnson's

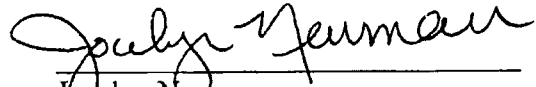
failure to testify during trial was "a curveball" and that, strategically, he knows of no better way to have handled the situation.

Finally, trial counsel explained that his trial strategy was to "poke holes in the State's case" and show that the State had no physical evidence upon which to convict Applicant. According to trial counsel, each of his decisions was made with that strategy in mind. Because this court must accept the valid, calculated, strategic decisions made by trial counsel and because Applicant has failed to demonstrate that any of these decisions was the cause of the trial having an unjust result, Applicant's remaining allegations are dismissed as well.

IT IS THEREFORE ORDERED that the Application for Post-Conviction relief is DENIED and DISMISSED with prejudice.

IT IS FURTHER ORDERED that Applicant Ricky Bowman be REMANDED to the custody of the State of South Carolina.

AND IT IS SO ORDERED.



Jocelyn Newman
Presiding Judge

January 30, 2018
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-40-1658

RICKY SHEROD BOWMAN (SCDC# 348625)

STATE OF SOUTH CAROLINA

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: NEWMAN, J.

Attorney for : Plaintiff Defendant
or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

2015 JAN 31 AM 11:28
RICHLAND COUNTY

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

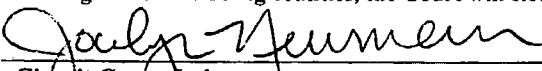
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.


Circuit Court Judge

2757
Judge Code

January 30, 2018
Date

