

Vol. II of II
RECEIVED
FEB 26 2018
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County

Honorable George C. James, Circuit Court Judge

RALPH BEVERLY HAYES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001593

APPENDIX

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

DESHAWN H. MITCHELL
Assistant Attorney General
P.O.Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

INDEX

INDEX i

TRIAL TRANSCRIPT DATED OCTOBER 15-17, 2012.....1

INDICTMENTS AND SENTENCING SHEETS435

APPLICATION FOR POST-CONVICTION RELIEF FILED MAY 28, 2015439

RETURN DATED NOVEMBER 30, 2015449

POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED JUNE 14, 2016454

ORDER OF DISMISSAL FILED AUGUST 3, 2016524

1 Q. And just -- so just to clarify, you were able
2 to attack Mr. White's credibility and point out that
3 he was -- he didn't appear to be entirely sure of
4 what days it happened on?

5 A. I did -- I did my best. Yes. I did bring
6 those points up. Now, obviously it wasn't
7 successful with the jury, but, you know, we did --
8 we did our -- I did my best.

9 We also tried to point out all the
10 opportunities that Mr. White had to call the police.
11 He was in an area of town where he could easily --
12 there were no more businesses, whether it was a
13 Sunday or a plain 'ole weekday. There are gas
14 stations there, there's fast food stations. There
15 were a number of places he could've gone -- a
16 library -- to place a phone call to the police.

17 He used -- I'm trying to look at my notes and
18 see. We were trying to use his transiency to sort
19 of flush out whether or not he expected anything in
20 return for speaking to the police, perhaps payment
21 for transportation, payment for hotels, payment for
22 meals, that kind of thing.

23 He had admitted to, you know, cashing his
24 brother's check, you know, obviously, stealing from
25 his brother, those kinds of things. We were trying

1 to use all of it. I was trying to use whatever I
2 could to try to discredit this man.

3 MR. SCHMECKPEPER: Thank you. I have no
4 further questions of this witness.

5 MR. JOHNSON: Your Honor, I have no questions
6 for cross.

7 THE COURT: All right. Now, any objection to
8 me asking questions?

9 MR. JOHNSON: No, sir.

10 MR. SCHMECKPEPER: No, objection.

11 THE COURT: You said you thought Mr. Adcock
12 would be fine as a juror, even though his father had
13 been charged with CDV?

14 THE WITNESS: Uh-huh.

15 THE COURT: So you didn't move to strike for
16 cause?

17 THE WITNESS: I didn't.

18 THE COURT: All right. But you say that in
19 hindsight you should've moved to strike for cause
20 Ms. Redding because her father was charged with CDV.
21 What's the consistency there, or where is the
22 consistency?

23 THE WITNESS: Perhaps it's better for me to say
24 that I should've moved to strike both of them. But
25 I think what I was -- when I answered that question

1 about Ms. Redding, that scenario hit a little closer
2 to home because you -- you do have a woman
3 disclosing that her father was charged.

4 It seemed like it was longer ago with her. She
5 couldn't even tell us what date her father had been
6 charged, so that left me to wonder, is this
7 something that happened when she was a child? Is
8 this something she witnessed? Is this something
9 she's been traumatized with? Is this someone who's
10 going to identify with this lady and her family?

11 THE COURT: Was there a domestic violence angle
12 in this case?

13 THE WITNESS: There could've been, yes. And we
14 were worried that there was prior CDV implications.
15 We managed to keep that out.

16 THE COURT: So was there evidence that they
17 knew each other?

18 THE WITNESS: Yes. They had been living with
19 each other and there had been prior ---

20 THE COURT: I didn't know that.

21 THE WITNESS: And this is where my client had
22 been convicted of criminal domestic violence
23 involving this same victim.

24 THE COURT: Was that put in evidence?

25 THE WITNESS: No. We kept that out, but we

1 were constantly worried that should that come in or
2 should somebody say the wrong thing and open the
3 door. We just...

-4 THE COURT: Was there any evidence that the
5 victims in the jurors' cases were their mothers?

6 THE WITNESS: I don't believe so, not that was
7 presented -- not when the -- not -- it wasn't
8 presented in the jurors' explanation.

9 THE COURT: Did the judge's question encompass
10 those who had -- who had family members who were
11 victims, as well as people who were charged? I
12 believe it did.

13 THE WITNESS: I believe it did if you'd just
14 let me look.

15 "A complaining witness, a victim, or been
16 accused or charged in any way of a crime of violence
17 against a person."

18 THE COURT: Okay. All right. Any follow-up to
19 that from the State?

20 MR. SCHMECKPEPER: No follow-up, Your Honor.

21 THE COURT: Any questions of the witness on
22 that?

23 MR. JOHNSON: Just one question. Did you ever
24 consider pursuing any further voir dire of those
25 witnesses to try to look into more of those angles

1 that you ---

2 THE WITNESS: I -- I did not and I -- I
3 probably should have.

4 MR. JOHNSON: No further questions, Your Honor.

5 THE COURT: Any -- anything else of this
6 witness?

7 MR. SCHMECKPEPER: No, Your Honor. The State
8 has no -- no further questions and also rests.

9 THE COURT: All right. Thank you, ma'am. So
10 Ms. Johnson is not going to be called?

11 MR. SCHMECKPEPER: No, Your Honor.

12 THE COURT: All right. Thank you. You can
13 step down.

14 THE WITNESS: (Complying.)

15 (Witness excused.)

16 THE COURT: Any reply?

17 MR. JOHNSON: No, sir, Your Honor.

18 THE COURT: All right. So the witness just
19 testified when I asked her about the consistency
20 between her decisions on Adcock and Redding, she
21 said, "Maybe I should've moved to strike Adcock for
22 cause too"; is that right?

23 Okay. What's the -- is that right?

24 MR. JOHNSON: Yes, sir, Your Honor.

25 MR. SCHMECKPEPER: Yes, sir.

1 THE COURT: All right. Any argument?

2 MR. JOHNSON: Judge, I -- I guess going towards
3 the ineffectiveness and prejudice, it appears
4 because of the angle with the -- my client and the
5 victim's relationship of a domestic nature.

6 Furthermore, Judge, with especially
7 Ms. Redding's, "I guess so. I think so." She
8 wasn't as sure as Mr. Adcock that it wouldn't affect
9 her ability to move forward. I think that some voir
10 dire should've been appropriate to kind of look
11 further into whether or not there should be a motion
12 for a strike for cause and then a move to strike.

13 And, Your Honor, as far as the issue with the
14 photograph, which I believe the trial counsel
15 appropriately judged it to and preserved the record
16 for, and it looks like there were actually extensive
17 arguments. They actually took it outside the view
18 of the jury and kind of went back and forth about
19 it. So I think the record would've been
20 appropriately preserved in that issue, could have
21 and should have been pursued on appellate issue.

22 Now, Judge, he -- he went into what he thought
23 should've been objected to with regard to the knife.
24 You commented with regards to my responsibilities as
25 an officer of the court. And I don't know that I

1 can -- I can argue that further. I think that
2 probably was an appropriate argument.

3 THE COURT: I think -- I think that was a
4 proper argument.

5 MR. JOHNSON: Yes, sir.

6 THE COURT: I'll go ahead and rule on that now.

7 MR. JOHNSON: Yes, sir, Your Honor.

8 THE COURT: In the scheme of things when the
9 prosecutor or defense lawyers are arguing, they're
10 permitted to argue to the jury the evidence and
11 logical conclusions. Obviously, I will take it from
12 the transcript that the victim was stabbed; is that
13 right?

14 MR. JOHNSON: Yes, sir, Your Honor.

15 THE COURT: No knife was found?

16 MR. JOHNSON: No, sir, Your Honor.

17 THE COURT: So whoever did it had to take the
18 knife.

19 MR. JOHNSON: Yes, sir.

20 THE COURT: And that's -- that is the absolute
21 truth. If they found no knife and the victim was
22 stabbed, either the victim was taken there and left
23 after the stabbing, or whoever stabbed her there
24 took the knife with them. That's -- that's
25 undeniable.

1 MR. JOHNSON: Yes, sir, Your Honor.

2 THE COURT: So I'll go ahead and rule on that
3 now.

4 How about the other points you'd like to make?

5 MR. JOHNSON: Yes, sir, Your Honor. As far as
6 Mr. White, and I think we kind of got to the -- to
7 the bottom of where he says that he had a
8 conversation with my client on a certain date.

9 My client testified today that he didn't talk
10 to this man. And so the pure enormity of what it is
11 that he says my client says, and I'm paraphrasing,
12 Judge, but basically that "you never killed
13 someone," and that he was leading.

14 And I think that ---

15 THE COURT: What was the context of that?
16 Because I can look at you and say, "You've never
17 killed anybody." That doesn't mean I have.

18 MR. JOHNSON: Yes, sir. And I believe it was
19 not only what he said, but his observation. His
20 observation -- the reason why he says he went up and
21 talked to him was because he looked sad. And he was
22 drinking a beer, I think a Bud Ice, and he said he
23 looked sad. And they begin to have a conversation
24 about why he -- why he should be cheered up. And
25 he's basally like -- all of a sudden he said, "Well,

1 you never killed anyone before."

2 THE COURT: I gotcha. That's the context.

3 MR. JOHNSON: Yes, sir. I apologize.

4 And so when he talked to him and whether or
5 not -- because if he thought it was one day and he
6 apparently gave a statement inconsistent to the
7 Solicitor where she had to correct him.

8 I think whether or not he's telling the truth
9 and whether or not he actually remembers what was
10 said and what took place would've been important. I
11 believe the trial counsel went into the various ways
12 within which she was able to attack his credibility
13 as well, Judge. So we ask you to consider that.

14 And he gave one last argument with regards to
15 the witness being sequestered. And, again, this was
16 Mr. White. Mr. White's hearing of the detective at
17 least for a short period of time, maybe testified as
18 to some of the background facts, that what we see is
19 that his ability to remember might not be as good as
20 he would prefer.

21 And so him being able to hear the lead
22 detective testify about some background facts that
23 he may have not been privy to or may have at that
24 point in time now been privy to it and can now
25 testify to it and kind of fill in some blanks.

1 Believe that may have also been able to be
2 prejudicial to my client. We ask that you consider
3 that, Judge.

4 THE COURT: Okay. Page 128, line 21. You're
5 saying that this question: "Maybe June 9th. Does
6 that sound about right?" You're saying that's a
7 leading question?

8 MR. JOHNSON: Yes, sir.

9 THE COURT: How -- how is -- so you --
10 you're -- I guess that depends on what everybody's
11 view of a leading question is.

12 MR. JOHNSON: Yes, sir, Your Honor. I think
13 when you -- when you tell them the answer that you
14 want them to say and it's not -- I don't -- I think
15 it's a sneaky way more than a way of -- of -- of
16 saying that your name is Patrick, correct?

17 You know, it's not that obvious leading, but
18 when you say -- when he's already answered your
19 question and then when you say, "Maybe June 9th.
20 Does that sound about right?" I think that's
21 leading.

22 THE COURT: Was June 9th a Sunday?

23 MR. JOHNSON: That was -- that was the alleged
24 date. I can't remember if it was Sunday after
25 alleged -- that's the date that he's alleged and

1 previously stated that he talked to my client.

2 THE COURT: Okay. He said he saw a young man
3 crying and drinking a Bud Ice, which you're
4 already -- you've already talked about.

5 MR. JOHNSON: Yes, sir, Your Honor.

6 THE COURT: All right. Okay.

7 MR. JOHNSON: Thank you, Judge.

8 THE COURT: Any -- any other points? I think
9 you made the ones about him being in the courtroom
10 during the pretrial, the closing argument about the
11 knife, the family photo, and two jurors. You've
12 already covered that, correct?

13 MR. JOHNSON: Yes, sir, Your Honor. I believe
14 that completes it.

15 THE COURT: All right. State?

16 MR. SCHMECKPEPER: Your honor, may it please
17 the Court?

18 Concerning the -- I'm just going to try and go
19 in order. Concerning the actual jurors, I think
20 counsel's testimony -- first, counsel testified that
21 she didn't call or she didn't move to strike
22 Mr. Adcock because she thought it was beneficial.

23 And then she also testified that she should've
24 struck Mr. -- or I think Ms. Redding.

25 THE COURT: No, not Ms. Redding. The

1 terminology we've got to get straight, and I know
2 that this may sound nit-picky. She couldn't strike
3 for cause either one. She has to ask the judge to
4 strike them for cause. If she doesn't like them and
5 has a non-Batson volitive reason, she can strike
6 them for any reason.

7 By the time Ms. Redding got there, she was out
8 of strikes. So let's -- let's go from that premise.
9 She can't strike anybody for cause. You can only
10 ask.

11 MR. SCHMECKPEPER: And I apologize, Your Honor.
12 My point would be in hindsight, it's very easy to
13 say, "I should've, you know, made a motion -- made
14 this motion or I should've considered to make this
15 motion."

16 My argument would be that the presumption of
17 counsel aren't reasonably -- it's pretty high. And
18 even assuming counsel in hindsight doesn't agree now
19 that she shouldn't have made this motion, I don't
20 think Applicant's presented any -- any evidence here
21 today that goes towards prejudiced.

22 I don't think there's any indication that this
23 outcome was determinative, especially when
24 considering that both of these jurors when asked
25 told the judge under oath that they could be fair

1 and this would not affect their ability to be
2 impartial jurors.

3 And concerning the next issue, I believe it was
4 that co-counsel moved to have witnesses sequestered
5 too late. I think it's the same problem. I don't
6 think looking at the testimony of the detective, I
7 don't think there's really anything in there that
8 prejudices the Applicant.

9 Otherwise, I think most Applicants for
10 post-conviction relief would have a pretty strong
11 argument that they were the victims of ineffective
12 assistance anytime their attorneys didn't make a
13 motion to sequester witnesses in every single trial.
14 That's not required in every single trial.

15 I don't think there's any case law up there
16 saying any attorney was ineffective for failing to
17 sequester a trial -- or failing to sequester
18 witnesses during a trial. I could be wrong. This
19 is the first time I've heard this allegation today,
20 and I haven't had an opportunity to do any actual
21 research.

22 But I don't think there's any -- there are
23 any -- in any event, I don't think there's been any
24 showing of prejudice in this case that Mr. White's
25 testimony changed as a result of hearing -- and I

1 believe it was just the direct testimony of this
2 detective en camera.

3 Your Honor, I don't think there's been any
4 evidence that his testimony was material --
5 materially different or that there's any obligation
6 on counsel to move to sequester witnesses.

7 Concerning the -- I believe Your -- Your Honor
8 has ruled on the knife issue. Concerning the
9 closing argument, pictures of victims. Your Honor,
10 ineffective -- a claim of ineffective assistance of
11 appellate counsel is very similar to ineffective
12 assistance of counsel. You've got to show deficient
13 performance and prejudice.

14 It's very, very difficult to show deficiency
15 for an appellate counsel, mainly because the
16 appellate courts have ruled over and over again that
17 appellate counsel doesn't have to brief every
18 arguable or even potentially meritorious issue.
19 They have to express and to choose which issues they
20 feel are more appropriate and which issues they feel
21 are more likely to be successful, even if there is a
22 potential for being successful.

23 THE COURT: What did they -- what appellate
24 counsel brief in this case?

25 MR. SCHMECKPEPER: In this case, appellate

1 counsel briefed the issue that the trial court erred
2 in failing to grant directed verdict. There was an
3 unpublished opinion where the Court of Appeals went
4 through each specific issue.

5 I think there was a strong argument on directed
6 verdict, as did the appellate -- appellate counsel.
7 Appellate counsel gets to make that Caldwell,
8 especially considering the fact that on review, a
9 trial judge's decision -- decision to grant or not
10 grant a mistrial is judged by abusive discretion
11 standard.

12 In this case, trial judge heard argument on
13 whether or not to grant a mistrial, declined to do
14 so, and then granted a -- or issued a curative
15 instruction instructing the jury not to consider
16 anything -- or not to consider the photo.

17 The photo, by the way, wasn't all that
18 prejudicial. According to the testimony here today,
19 it was simply a picture of the victim with her
20 family. I don't think it was -- there's any
21 testimony that it was overt -- overtly prejudicial
22 autopsy photo or anything that was calculated toward
23 the passions and prejudices of the jury.

24 I think the only thing we had was a -- I think
25 there was a -- just an enlarged photo of the victim

1 with her family.

2 May I beg the Court's indulgence?

3 THE COURT: What -- what was the evidence of
4 guilt?

5 MR. SCHMECKPEPER: Your Honor, the evidence of
6 guilt in this case, I believe, was almost entirely
7 circumstantial. You had the victim, and the victim
8 was clearly stabbed to death in her house. I think
9 there was a fingerprint of the victim's -- I think
10 the Applicant's fingerprint was found on the toilet
11 near where the victim's body was found.

12 THE COURT: But he lived there?

13 MR. SCHMECKPEPER: But he also lived there,
14 Your Honor.

15 In addition, you have Mr. White's testimony.
16 And Mr. White testified, I think, in part he
17 witnessed the victim -- or he witnessed the
18 Applicant by this labor center area behind -- in
19 sort of the alley drinking a Bud Light. And he
20 approached him and said, "What's wrong? What's
21 wrong?" The Applicant --

22 THE COURT: I've read that. He said he messed
23 and messed up bad.

24 MR. SCHMECKPEPER: And he also said, Your
25 Honor, he also said, "Well, I -- the dope boys got

1 my -- got my girlfriend." And he saw body and left.

2 And then I think later on it came out, you
3 know, I think Mr. White said, "Well, you know,
4 what -- what did you do that's so bad? You know,
5 have you ever smoked up your check?" I think was
6 what the testimony was.

7 And he says, "Well, you ain't never killed
8 nobody." And that was -- that was most of the
9 evidence.

10 I think that was a good bit of the evidence.
11 And I'm sure counsel will correct me if I'm wrong,
12 but there wasn't really anything in the way of
13 direct evidence to convict the Applicant. So I
14 would submit that a directed verdict was -- was at
15 least grantable. I don't think there were -- I
16 don't think a decision to grant directed verdict
17 would've been reversed on appeal.

18 Unfortunately, for the Applicant, the judge
19 grant -- the judge denied the Applicant's motion for
20 directed verdict and that was upheld on appeal. The
21 Court of Appeals found there was substantial
22 circumstantial evidence for a conviction and that
23 the trial judge did not abuse his discretion and
24 this -- and the client he granted a directed
25 verdict.

1 THE COURT: And the Supreme Court ended up
2 denying the cert?

3 MR. SCHMECKPEPER: I believe so, Your Honor. I
4 can double check and make sure.

5 THE COURT: Well, the order dated March 18,
6 2015, is the petition was denied?

7 MR. SCHMECKPEPER: Yes, Your Honor.

8 THE COURT: All right. Did I just totally
9 mishear what the Applicant said about when he said
10 that he saw a bald man, but I had on a hat?

11 MR. SCHMECKPEPER: Your Honor, maybe I misheard
12 that testimony. I thought it was that his testimony
13 was inconsistent internally throughout -- throughout
14 the transcript.

15 THE COURT: All right. Well, I may just listen
16 to that after a while.

17 All right. Anything else?

18 MR. SCHMECKPEPER: Nothing from the State, Your
19 Honor.

20 THE COURT: All right. Any response on that
21 from the Applicant?

22 MR. JOHNSON: No, sir. No, sir, Your Honor.

23 THE COURT: What did your client say from the
24 witness stand about a hat?

25 MR. JOHNSON: I believe he was referring to

1 what Mr. White was saying. I think he was referring
2 to -- he's saying, "One day I -- one day I recall
3 that I had on a hat." I think that's what he
4 intended to say.

5 THE COURT: Oh, he was saying Mr. White was
6 saying inconsistent things?

7 MR. JOHNSON: Correct.

8 THE COURT: All right. Okay. Anything else?

9 MR. JOHNSON: No, sir, Your Honor.

10 THE COURT: Anything from the victims,
11 Mr. Schmeckpeper?

12 MR. SCHMECKPEPER: Yes, Your Honor. If I may
13 beg the Court's indulgence.

14 THE COURT: They're not permitted -- unless you
15 call them, they're not permitted and you have not.
16 They're not permitted to offer any evidence, but
17 they do have the right to speak if they want to.

18 MR. SCHMECKPEPER: Yes, sir. And we just have
19 representatives of the victim. We have Jennie
20 Ashborn, the victim's mother; Barbara Sneed, the
21 victim's sister; Tyronda Alexander, Ms. Sneed's
22 daughter; and Ms. Celia Moss, the victim's sister.

23 THE COURT: Okay. Any of them like to say
24 anything?

25 MS. MOSS: I'm not sure what I'm supposed to

1 say.

2 THE COURT: No, you don't have to. I'm just
3 extending the opportunity to speak if you want to.
4 You don't have to say anything if you don't want to.
5 But if you do, then I'll need your name first.

6 MS. MOSS: Okay. My name is Mossleana Moss.

7 THE COURT: Ma'am?

8 MS. MOSS: Mossleana Moss.

9 THE COURT: All right.

10 MS. MOSS: I'm Jackie's baby sister. And when
11 I say I'm not sure what I'm supposed to say, I know
12 that he did it. I know, but he took somebody away
13 from us till it ain't even been the same. The
14 family ain't been the same. We ain't been the same.
15 And it hurts. And to keep having to relive this,
16 it's a hurtful thing. So, I mean, that's...

17 THE COURT: Thank you, ma'am.

18 MS. ASHMORE: Your Honor, I would like to
19 speak.

20 THE COURT: Your name?

21 MS. ASHMORE: I'm Jackie Alexander's mother.

22 THE COURT: Your name?

23 MS. ASHMORE: My name is Jamie Ashmore.

24 THE COURT: Yes, ma'am.

25 MS. ASHMORE: This man over here took my oldest

1 daughter away from all of us. She got only one son.
2 They took her away from her son, from us all. He
3 took my daughter's life for no reason. He stabbed
4 her 28 times for nothing.

5 I want this man to stay locked up the rest of
6 his life. He don't never need to be free, Your
7 Honor, because he's going to only kill again. He's
8 just that type of person. He has no remorse. He
9 went in and out of my daughter's house the whole
10 time she was laying there dead. How can you do
11 that?

12 THE COURT: Thank you. Your name?

13 MS. SNEED: My name is Barbara Sneed. I'm the
14 one that found my sister.

15 Your Honor, it was an awful sight. It was an
16 awful sight and she don't deserve that. And I ask
17 with everything in me, please don't set him free.
18 He killed my sister.

19 THE COURT: All right. Thank you.

20 Okay. Mr. Hayes, after I review all of this
21 material, I'll be making a decision on whether to
22 grant or deny your application. If I make a
23 decision to grant your application, that does not
24 mean that you go free. That means that you'll be
25 retried. Do you understand that?

1 THE APPLICANT: Yes, sir.

2 THE COURT: If I do make that decision, I will
3 sign an order to that effect and the State will have
4 to the right to appeal.

5 The other alternative I will have will be to
6 sign an order denying your application. If I do
7 that, then you will have a certain time within which
8 to appeal. It's 30 days, but I'm not going to
9 explain to you how you calculate those 30 days. I
10 will leave that up to your attorney to advise you
11 accordingly. Do you understand that?

12 THE APPLICANT: Yes, sir.

13 THE COURT: Do you have any questions?

14 THE APPLICANT: No, I do not.

15 THE COURT: All right. Thank you, sir. All
16 right. Thank you very much.

17 (The proceedings concluded at 5:00 p.m.)

18 - - -

19

20

21

22

23

24

25

1 C E R T I F I C A T E O F R E P O R T E R

2

3 STATE OF SOUTH CAROLINA

4 COUNTY OF GREENVILLE

5

6 I, the undersigned, Lisa Scott, Circuit Court
7 Reporter for the Thirteenth Judicial Circuit of the
8 State of South Carolina, do hereby certify that the
9 foregoing is a true, accurate and complete
10 transcript of record of all the proceedings and the
11 evidence introduced in the trial of the captioned
12 cause, relative to appeal in the Circuit Court for
13 Greenville County, South Carolina, on the 14th day
14 of June, 2016.

15 I do further certify that I am neither of kin,
16 counsel, nor interest to any party hereto.

17

18

September 27, 2017

19

20

/s/Lisa Scott

21

22

Lisa Scott
Circuit Court Reporter

23

24

25

RECEIVED

JUL 26 2017

S.C. SUPREME COURT

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER
2016 AUG 3 PM 2 15

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
Ralph Beverly Hayes,)
S.C.D.C. No. 320369,)
)
Applicant,)
)
)
)
)
v.)
)
State of South Carolina,)
)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
2015-CP-23-3426

ORDER OF DISMISSAL

ENTERED COMPUTER

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on May 28, 2015. Respondent filed its Return on or about November 30, 2015. An evidentiary hearing into the matter was convened on June 14, 2016, at the Greenville County Courthouse. Applicant was present at the hearing and was represented by Brian Johnson, Esquire. Also present was Applicant's trial counsels, Caroline M. Horlbeck, Esquire, and Teal A. Johnson, Esquire. Applicant and Ms. Horlbeck testified. Respondent was represented by Patrick Schmeckpeper, Esquire, of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the October 2011 term of General Sessions for murder (2011-GS-23-7681, count 1) and possession of a weapon during commission of a violent crime (2011-GS-23-7681, count 2). Caroline Horlbeck, Esquire and Teal Johnson, Esquire represented the Applicant.

After the State called the case to trial, the Applicant was found guilty. On October 17,

2012, the Honorable G. Edward Welmaker sentenced the Applicant to concurrent terms of life imprisonment for murder and 5 years for possession of a weapon during commission of a violent crime.

A notice of appeal was filed at the South Carolina Court of Appeals. Susan B. Hackett, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. Hayes, Op. No. 2014-UP-385 (S.C. Ct. App. filed November 5, 2014). The South Carolina Supreme Court denied the Applicant's subsequent petition for writ of certiorari on March 18, 2015. The Remittitur was sent on March 20, 2015.

Allegations

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

1. Denial of Sixth and Fourteenth Amendment.

At the evidentiary hearing, Applicant proceeded on the following issues:

1. Ineffective assistance of trial counsel:
 - a. Failure to move to strike Jurors Adcock and Redding for cause;
 - b. Failure to object to the State's closing argument;
 - c. Failure to sequester witness;
 - d. Failure to object to leading;
2. Ineffective assistance of appellate counsel;
 - a. Failure to raise issue on appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject

convictions, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and the legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2015), this Court makes the following findings of fact and conclusions of law based upon all of the probative evidence presented.

Ineffective Assistance of Trial Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler at 442, 334 S.E.2d at 814.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, Applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel's 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." 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 v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

Failure to Move to Strike Jurors Adcock and Redding for Cause

This Court finds Applicant has failed to meet his burden with respect to his allegation that trial counsel was ineffective for failing to strike jurors Adcock and Redding for cause. Juror Adcock was seated at a time during jury selection when the applicant had used nine of his ten strikes. Juror Redding was seated after the applicant had used all ten of his strikes. Even though Ms. Horlbeck testified that she probably should have moved to strike Ms. Redding for cause, if such a motion had been made, it would likely not have been granted. The same goes for Mr. Adcock. Both jurors stated that their fathers had been charged with criminal domestic violence. The trial judge properly asked follow-up questions, and both jurors stated they could be fair. There was no basis to strike either of them for cause, so counsel was not deficient for failing to so move. Though counsel may, in hindsight, have a different view of her actions, Applicant is not entitled to a new trial for the sole purpose of presenting a "fancier" case. See Simpson v. Moore, 367 S.C. 587, 598 n. 2, 627 S.E.2d 701, 707 n.2 (2006). Further, even if both counsels were deficient with respect to this allegation, there is no evidence of prejudice because both jurors said they could be fair. Applicant has failed to present any evidence otherwise, as is his burden. See Butler, supra. Accordingly, this allegation is denied and dismissed.

Failure to Object to State's Closing Argument



Applicant also alleged counsel was ineffective in failing to object to an improper comment on the fact from the solicitor's closing argument. A solicitor has the right to state his version of the testimony and to comment on the weight to be given such testimony. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990). The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). During the state's closing argument, the solicitor said "[n]o, there was no knife found because it's not there because he took it with him." This was not improper argument, as it was appropriate for the solicitor to argue inferences to be derived from the evidence. There was no knife found at the scene, so there is a logical (and perhaps inescapable) inference that whoever committed the crime took the murder weapon away from the scene. As Applicant has failed to meet his burden with respect to this allegation, it is denied and dismissed.

Failure to Sequester Witness

Applicant also alleged counsel was ineffective for failing to move to sequester witness White during *in camera* testimony of Detective Miller regarding the lineup and the identification made by witness White. Perhaps this was deficient performance in a general sense, as the very reason for sequestration is to make sure witnesses do not base their own testimony on the testimony of others. However, there is nothing in the record to establish whether White was paying close attention during the proffer or that he heard something from Detective Miller that changed his own testimony. White was very thoroughly cross-examined during his *in camera* testimony and in front of the jury. Applicant has failed to meet his burden to show prejudice.

Failure to Object to Leading

Applicant alleged counsel was ineffective in failing to object to a purported leading question asked of witness White as to the date he encountered Applicant. The solicitor was questioning White about the date in June that he encountered the applicant and asked "so this was in June?" White responded "Yes", and the solicitor asked "Maybe June 9th, does that sound about right?", and White responded "Yes". While perhaps leading, this was not prejudicial at all because the totality of White's testimony establishes his version of events as occurring shortly after the murder. If the objection to leading had been made, and the trial judge sustained the objection, there would have been no difference in White's overall testimony.

Ineffective Assistance of Appellate Counsel

Applicant also alleges appellate counsel was ineffective for failing to include a ground based on the solicitor showing the jury a photo.

A criminal defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, the Applicant must show that appellate counsel's performance was (1) deficient; and (2) that there was prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999).

To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. Id., citing Evitts, 469 U.S. 387, 105 S.Ct. 830 (1999). Appellate counsel is not required to raise every nonfrivolous issue that is presented by the record,¹ but instead has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983).

¹ Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990).

"For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy...." Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 754, 103 S.Ct. 3308 (1983)); see also Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985) (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).

When a claim of ineffective assistance of appellate 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 has failed to meet his burden with respect to each of his allegations.

Applicant has failed to meet his burden. Trial counsel objected to the photograph, the trial judge sustained the objection, and promptly instructed the jury not to consider the photo in their deliberations. The granting of a motion for a mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. State v. Inman, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011). The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. *Id.* No such abuse of discretion occurred here. This Court agrees with the trial judge that the showing of the photo, while objectionable, was not a basis for a mistrial. In this Court's view, the appellate court would not have reversed the conviction even if it had been raised on appeal.



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

[Signature follows]

Handwritten signature or initials, possibly "B/S", written in black ink.

CONCLUSION

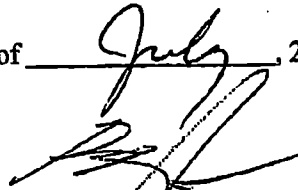
Based on the foregoing, this Court finds that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED

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

AND IT IS SO ORDERED this 22 day of July, 2016.



 GEORGE C. JAMES, JR.
 Presiding Judge
 Thirteenth Judicial Circuit

_____, South Carolina

