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RECEIVED

JAN 22 2015

January 15, 2015

S.C. Supreme Court

VIA US MAIL

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

RECEIVED

JAN 21 2015

S.C. SUPREME COURT

**RE: PRC Notice of Appeal
Desaussure, 2013-CP-10-5614
Turner, 2013-CP-10-4151**

Dear Sir/Madam,

Please find the enclosed original and one (1) copy of the Notice of Appeal and Proof of Service regarding the above referenced cases. Please keep the original and return the second filed copy using the self-addressed stamped envelope. Should you have any questions please do not hesitate to contact the office.

Thank you for your assistance.

With best regards, I am,

Tiffany Barba, CP
Paralegal for Bush Law Group

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable G. Thomas Cooper

2013-CP-10-5614

Alonda B. Desaussure, #142994

State of South Carolina

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JAN 21 2015

S.C. SUPREME COURT

RECEIVED

JAN 22 2015

S.C. Supreme Court


Petitioner

Respondent

NOTICE OF APPEAL

Petitioner, Alonda B. Desaussure, appeals the Honorable G. Thomas Cooper's December 11, 2014, ORDER OF DISMISSAL, of Petitioner's application for Post-Conviction Relief. Undersigned counsel received notice of the entry of the order on January 5, 2015. A copy of the order on appeal is attached to this notice.

Respectfully submitted



James K Falk
Bush Law Group
3 Broad Street, Suite 450
Charleston, SC 29401
Attorney for Applicant

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JAN 22 2015

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Honorable G. Thomas Cooper

S.C. Supreme Court

2013-CP-10-5614

Alonda B. Desaussure, #142994

Petitioner

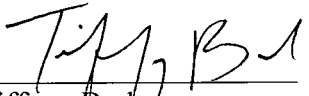
State of South Carolina

Respondent

PROOF OF SERVICE

I, Tiffany Barba, 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 its attorney of record, Ashleigh R. Wilson, P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 15th day of January, 2015.

Respectfully Submitted,



Tiffany Barba
Bush Law Group
3 Broad Street, Suite 450
Charleston, SC 29401

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 Alonda B. Desaussure, #142994,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 2013-CP-10-5614

ORDER OF DISMISSAL

BY
 JULIE S. HARRIS, CLERK
 CLERK OF COURT
 2014 DEC 15 PM 4: 54

Presiding Judge:	The Honorable G. Thomas Cooper
Applicant's Attorney:	James Falk, Esquire
Respondent's Attorney:	Ashleigh R. Wilson, Esquire
Trial Counsel:	Aaron Mayer, Esquire
Date of Hearing:	September 11, 2014
Court Reporter:	Joyce Rueger

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed September 24, 2013. The Respondent made its Return. An evidentiary hearing on the matter was convened on September 11, 2014 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by James Falk, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

Also present and testifying were Dr. Lori Van Wallendael, Mary Ford, Esquire, Ashley Pennington, Esquire, and Aaron Mayer, Esquire. The Court had before it the trial transcript, the Charleston County Clerk of Court records, the Applicant's records from the South Carolina

Department of Corrections, the Applicant's application, the Respondent's Return, and exhibits submitted by the Applicant at the evidentiary hearing¹.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Charleston County Clerk of Court. The Applicant was indicted at the April 2011 term of the Charleston County Grand Jury for assault and battery-first degree (2011-GS-10-2048) and armed robbery (2011-GS-10-2047). He was represented by Aaron Mayer, Esquire.

On July 8-10, 2013, the Applicant proceeded to trial and was found guilty as indicted. The Honorable Stephanie McDonald sentenced the Applicant to ten (10) years for assault and battery and life without parole for armed robbery. The sentences are to be served concurrently. The Applicant did not appeal his convictions or sentences.

ALLEGATIONS

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

1. Ineffective assistance of counsel.
2. Insufficient evidence.
3. Denied equal protection by counsel and the judge.

At the hearing, Applicant proceeded solely on the allegation of ineffective assistance of counsel for counsel's failure to request funding for and obtain an eyewitness identification expert to testify at trial. This Court finds the Applicant has failed to present any evidence or testimony

¹ Over the State's objection, the following were admitted into evidence: Applicant's Exhibit 1- State v. Loyal Petition to Authorize Funds for Independent DNA Review, Applicant's Exhibit 2-State v. Loyal Motion to Reconsider Order Requiring Payment of State's Costs, and Applicant's Exhibit 3- State v. Loyal Order to Pay State's Costs.

A handwritten signature in black ink, followed by the number "2". The signature appears to be "S. C. 2".

regarding any other claims raised in his application, therefore, this Court deems abandoned any other claims raised by the Applicant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. Sec. 17-27-80 (2003).

Summary of the Testimony

Dr. Lori Van Wallendael was present and called to testify for the Applicant. Dr. Wallendael testified she is an associate professor and chair of psychology at the University of North Carolina- Charlotte. She testified she has previously been qualified as a forensic psychology expert.

Dr. Wallendael testified she reviewed police reports, witness statements, and the portion of the trial transcript related to the eyewitness identifications in the Applicant's case. She testified she had some concerns with regard to the identification of the Applicant prior to trial. Dr. Wallendael testified she had concerns about the uncontrolled circumstances of the initial show-up where the Applicant was first identified. Dr. Wallendael testified that show-ups are normally conducted under circumstances that are inherently suggestive. She testified she was surprised the police failed to undertake any additional identification procedures after the initial identification of the Applicant.



Dr. Wallendael testified the Applicant's cases also involved cross-racial identification which is a factor that decreases the accuracy of an identification. She testified the impact of cross-racial identification is minimized by the amount of time an eyewitness has to view a suspect. She testified the weapon focus effect was also potentially at play in the identification of the Applicant. Dr. Wallendael testified when a weapon is visible one's attention is drawn to the weapon and their ability to make an identification later is decreased. She testified Stephen Silcott, who initially identified the Applicant, stated he saw the Applicant with a knife.

Dr. Wallendael also testified the length of the initial exposure before identification is a factor present in the Applicant's case. She testified the more time one has to study a person, the more likely they are to recall a person accurately. She also testified seeing a perpetrator more than once in a short period of time could increase the accuracy of an eyewitness' identification.

Dr. Wallendael testified she is aware that eyewitness identification and false convictions are connected, but she is not saying the identifications in this case are false. She also testified jurors are persuaded by both eyewitnesses and eyewitness confidence.

Dr. Wallendael testified that had she been consulted by defense counsel she would have suggested counsel focus on examining the police officers who first encountered the Applicant. She testified she would have explained to the jury at trial how our memories work, the weapons effect, cross-racial identification, and best practice procedures for identifications. Dr. Wallendael testified whether an identification is accurate or not is beyond the point of her opinion and a question for the jury.

Dr. Wallendael also testified there were other factors present which would increase the accuracy of the eyewitness identifications in this case. She testified distinguishing features that make the suspect unique or stand out increase the accuracy of an identification. She testified the



sooner an identification is made the more likely it is accurate. Dr. Wallendael also testified that a well-lit area is better for an accurate identification than a busy street which could be distracting. Dr. Wallendael concluded there were points in favor of a possible accurate identification in the Applicant's case, along with red flags which gave her concern.

Mary Ford, Esquire, was present and called to testify for the Applicant. Ford testified she is a public defender who was appointed to represent the Applicant in January 2011 and relieved as his counsel in March 2013. She testified she felt an identification expert was necessary in the Applicant's case and discussed it with the Applicant. Ford testified she was prepared for trial and prior to being relieved had retained Dr. Bryan Cutler, an eyewitness identification expert. Ford testified she started talking to Dr. Cutler one month prior to trial. She testified one month was sufficient time for Dr. Cutler to provide his expert opinion on the identification. Lastly, Ford testified she planned to present an eyewitness identification expert at the Applicant's trial, but the eyewitness identifications in the Applicant's case lacked enough credibility that she could have easily attacked the eyewitness identification on her own at trial without hiring an expert witness.

Ashley Pennington, Esquire, was also present and called by the Applicant to testify. Pennington testified he is the 9th circuit head public defender. He testified he has been a public defender for 34 years and is familiar with criminal cases in Charleston County. Pennington testified he is aware of cases where retained counsel requested funding from the State after their clients had been declared indigent. Pennington testified this is not a frequent occurrence, but he has seen it done before.

Aaron Mayer, Esquire, was present and testified he was retained to represent the Applicant prior to trial. Counsel testified the Applicant had previously been represented by a



public defender. He testified he was initially contacted by a friend of the Applicant who explained the Applicant's case had been called for trial and the day the trial was to start the Applicant was displeased with his public defender.

Counsel testified he filed an entry of appearance on the Applicant's behalf in late March 2013. Counsel testified he met with the Applicant multiple times prior to trial. He testified he filed Brady and Rule 5 motions on the Applicant's behalf. He testified he had ample time to review the Applicant's discovery. Counsel testified he discussed with the Applicant the elements of the charges he was facing and what the State was required to prove to convict him. He testified they also discussed possible defenses and the Applicant's version of the facts.

Counsel testified when he initially spoke with the Applicant he discussed the importance of having an eyewitness identification expert witness at trial. Counsel testified he told the Applicant from the beginning that his public defender had already obtained an expert witness and if he wanted a free expert witness he should continue being represented by his public defender. Counsel testified he advised the Applicant that in addition to his attorney's fee, the Applicant would be responsible for any additional costs incurred during his representation of the Applicant. He testified the Applicant understood that if an expert witness was hired for trial, the Applicant would have to pay for it. Counsel testified the Applicant never gave him any indication that he did not have the means to pay for the expert witness.

Counsel testified he learned after he was retained that the Applicant was unable to pay for an eyewitness identification expert. Counsel testified the Applicant's case called for an eyewitness identification expert. He testified he had not had any success in the past obtaining money from Indigent Defense for cases on which he was retained as counsel. Counsel testified

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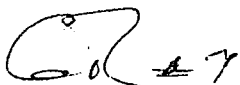
he told the Applicant he should come up with the funds to hire an expert or they would proceed to trial without an expert.

Counsel testified the Applicant was ultimately unable to come up with the money to hire an eyewitness expert, so he prepared to proceed to trial without an expert. Counsel testified he researched the reliability of eyewitness identification testimony. He testified he learned about the factors which often make eyewitness identifications unreliable and made a strategic decision to proceed to trial without an eyewitness identification expert witness. Counsel testified he moved to preclude in-court identification of the Applicant at trial and asked the Court to charge the jury on identification. Counsel testified he also recalled arguing to the jury the fact that the victim never identified the Applicant prior to trial and the possibility that cross-racial identification affected the accuracy of the eyewitness identifications.

Ineffective Assistance of Counsel

The Petitioner alleges counsel was ineffective for failing to obtain an eyewitness identification expert to testify for the defense at trial. This Court finds this allegation is without merit and the Applicant has failed to carry his burden of proving counsel was ineffective in this regard. 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, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The



Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Harrington v. Richter, 131 S. Ct. 770, 788, 178 L. Ed. 2d 624 (2011) (citing Strickland, 466 U.S., at 690, 104 S.Ct. 2052.) "Surmounting Strickland's high bar is never an easy task." Harrington v. Richter, 131 S. Ct. 770, 788, 178 L. Ed. 2d 624 (2011).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id.

This Court finds trial counsel was not deficient for failing to call an eyewitness identification expert at trial. This Court finds counsel articulated a valid strategic basis for his decision to proceed to trial without the aid of an eyewitness identification expert to testify for the defense.

Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of



counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

Counsel provided credible testimony that after researching the reliability of eyewitness identification and the factors which tended to make identifications less reliable, he made a strategic decision to challenge the State's eyewitness identification testimony at trial without the use of an expert witness. This Court finds counsel's trial strategy was valid. This Court will not second guess counsel's decision to attack the accuracy of the eyewitness identification evidence at trial on his own simply because an alternative method to challenge the evidence existed.

This Court finds further counsel adequately cross-examined the State's witnesses, objected, and attacked the accuracy of the identification evidence without the support of an expert witness. The South Carolina Supreme Court has held counsel's failure to procure an expert witness does not render their representation deficient when counsel vigorously cross-examined the State's witnesses and attacked the accuracy of the evidence. Lorenzen v. State, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008). See also Frasier v. State, 306 S.C. 158, 160-61, 410 S.E.2d 572, 573 (1991) (holding counsel was not deficient for failing to procure an expert witness to challenge the DNA evidence presented at trial when trial counsel vigorously cross-examined the State's DNA experts and attacked the accuracy of the evidence).



This Court finds and the record reflects counsel vigorously challenged the eyewitness identifications of the Applicant at trial without the use of an expert witness. At the start of trial, trial counsel moved to preclude any in-court identifications by any State witness who had not identified the Applicant prior to trial on the basis that such identifications would be inherently suggestive. (Tr. 54:19-55:8). Counsel also argued that there were several factors present in the Applicant's case which would make an in-court identification prejudicial including the lapse of time since the incident, any emotion or stress the eyewitness was under, and the brief view of the incident by the eyewitness. (Tr. 95:24-96:22).

The record reflects trial counsel cross-examined Daniel Cobiella (the victim) regarding factors affecting the accuracy of the victim's in-court identification of the Applicant. Counsel elicited testimony from the victim about the following: his poor vision at the time of the assault and robbery (Tr. 129:21-130:6), his vague description of the clothing of the assailant (Tr. 130:18-25), the fact that he never saw a weapon (Tr. 131:2-3), the fact that he never mentioned a white plastic bag in his description of the assailant's bike (Tr. 132:3-12), and the fact that he was never asked to identify the Applicant prior to trial (Tr. 133:24-134:2). Trial counsel also cross-examined Stephen Silcott, who identified the Applicant shortly after the incident, on the affect the Applicant's distinguishing features and change of clothing had on his identification of the Applicant. (Tr. 209:5-18, 210:12-14).

The record reflects further counsel challenged the State's eyewitness identification evidence in both opening and closing statement. In his opening statement, counsel highlighted to the jury the shortcomings of the State's eyewitness identification evidence. (Tr. 79:5-80:14). In closing statement, counsel reiterated the shortcomings of the evidence and told the jury that Silcott's identification of the Applicant was cross-racial which may have affected the accuracy of




the identification. (Tr. 322:25-323:20). Counsel also asked the trial court to take judicial notice of articles that discussed problems with eyewitness testimony. (Tr. 242:24-245:25). This Court finds counsel vigorously attacked the credibility of the eyewitness identifications of the Applicant at trial, therefore, his performance cannot be found to be deficient.

The Applicant claims counsel was ineffective for failing to request funding from the Office of Indigent Defense to hire an expert witness to testify at trial after he learned the Applicant could not afford to pay for an expert. While retained counsel could have chosen to request funding, this Court finds counsel was not deficient for simply employing an alternative means of challenging the State's eyewitness identification evidence². This Court finds counsel for the Applicant effectively balanced his limited resources with effective trial tactics and adequate cross-examination of the State's witnesses. This Court finds counsel's performance was reasonable under professional norms.

This Court also finds the Applicant has failed to carry his burden of proving prejudice resulted from counsel's failure to request funds to hire an eyewitness identification expert. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland v. Washington, 466 U.S. 668, 694 (1984). 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 693. It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test,

² This Court also notes that assistant public defender Mary Ford (who represented the Applicant prior to Mr. Mayer was retained) testified that based on the facts of the case and the circumstances of the eyewitness identifications she could have effectively challenged the identification at trial without an expert.



and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Id.

This Court finds the Applicant has failed to show that there is a reasonable probability that the result of the Applicant's trial would have been different had counsel obtained funds for and called an eyewitness identification expert at trial. At the evidentiary hearing, the Applicant presented the testimony of eyewitness identification expert Dr. Lori Van Wallendael. Dr. Wallendael testified there were factors and circumstances present in the Applicant's case which tended to *decrease* the accuracy of the eyewitness identifications of the Applicant. However, she also testified that there were factors and circumstances present in the Applicant's case which tended to *increase* the accuracy of the eyewitness identifications of the Applicant. This Court finds the nature of the expert testimony presented does not suggest a reasonable probability the testimony would have affected the outcome of the Applicant's trial since the testimony including conclusions that were favorable to both the Applicant and the State.

This Court finds the Applicant also could not have been prejudiced by counsel's failure to obtain an eyewitness identification expert since the jury was given an identification jury instruction which highlighted potential factors which affect the accuracy of eyewitness identification evidence. The record reflects the jury was instructed as follows:

"Identification testimony is an expression of belief or impression by a witness. You must determine the accuracy of the identification of the defendant. You must consider the believability of any identification witness in the same way as you would consider the believability of any other witness. You may consider whether the witness had an adequate opportunity to observe the offender at the time of the offense or afterward. This will be affected by things such as how long or short a time was available, how far or close the witness was, the lighting conditions, and whether the witness had a chance to see or know the person in the past." (Tr. 343:4-16).

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This Court finds the identification jury instruction highlighted to the jury several factors mentioned by Dr. Wallendael which could have affected the accuracy of the eyewitness identification evidence presented by the State.

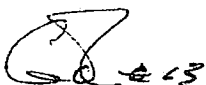
This Court finds further the Applicant was not prejudiced by counsel's failure to request funds from the Office of Indigent Defense to hire an expert witness. This Court finds the Applicant has failed to present any testimony or evidence to show that a request for funding by retained counsel from the Office of Indigent Defense would have been granted. This Court will not speculate on whether or not the Applicant's case would have fallen into the category of rare cases where retained counsel successfully obtains funding from the Office of Indigent Defense. This Court finds the Applicant has failed to carry his burden of proving that but for counsel's failure to request funds to obtain an eyewitness identification expert the outcome of his proceeding would have been different. This Court finds Applicant's attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, 466 U.S. at 668; Butler, 286 S.C. 441, 334 S.E.2d 813.

All Other Allegations

As to any and all allegations that were raised in the application and not specifically addressed in this Order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations. Therefore, they are hereby denied and dismissed.

CONCLUSION

Based on all the forgoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing



proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 11 day of DECEMBER, 2024



The Honorable G. Thomas Cooper
Presiding Judge
9th Judicial Circuit

COLUMBIA, South Carolina.



Bush Law Group, P.C.
3 Broad Street, Suite 450
Charleston, SC 29401

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