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S.C. SUPREME COURT

November 29, 2016

Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Re: Romeo Brown vs. State of South Carolina
C/A No: 2015-CP-38-0364

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Brown in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-708-6767.

Sincerely,

Jonathan D. Waller

Cc: J. Clayton Mitchell, South Carolina Office of Attorney General

Enclosures

STATE OF SOUTH CAROLINA
In The Supreme Court

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DEC 01 2016
S.C. SUPREME COURT

APPEAL FROM ORANGEBURG COUNTY
Benjamin H. Culbertson, Circuit Court Judge

2015-CP-38-0364

Romeo Brown, #185544,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Romeo Brown, #185544, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed November 7, 2016 issued by the Honorable Benjamin H. Culbertson, Presiding Judge, First Judicial Circuit.

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ATTORNEY FOR PETITIONER

This 29 day of November, 2016.

Other Counsel of Record:
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STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM ORANGEBURG COUNTY
Benjamin H. Culbertson, Circuit Court Judge

2015-CP-38-0364

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, J. Clayton Mitchell, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 29th day of November, 2016, to his office located at P.O. Box 11549, Columbia, SC 29211.

Kelly Giese

STATE OF SOUTH CAROLINA COUNTY OF ORANGEBURG	IN THE COURT OF COMMON PLEAS FIRST JUDICIAL CIRCUIT
Romeo Brown, #185544, Applicant, v. State of South Carolina, Respondent.	2015-CP-38-0364 **ORDER OF DISMISSAL**

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed March 16, 2015. Respondent filed a Return on October 1, 2015, requesting an evidentiary hearing be convened. Jonathan D. Waller was appointed by the Orangeburg Clerk of Court. An evidentiary hearing was held on May 17, 2016, at the Dorchester County Courthouse. Applicant was represented by Counsel Waller. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent.

At the PCR hearing, Applicant testified on his own behalf. Also testifying was Applicant's trial counsel Byron E. Gipson, Esquire. This Court had before it the Orangeburg County Clerk of Court records, Applicant's South Carolina Department of Corrections records, appellate records, the PCR application, the Return, and the transcript.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Orangeburg County. Applicant was indicted at the March 2011 term of the Court of General Sessions for Orangeburg County for murder (2011-GS-38-0012) and at the April 2012 term for possession of firearm by a person convicted of a violent crime (2012-GS-38-0792). Applicant was represented by Counsel Gipson. On May 22,

2012, Applicant proceeded to trial before the Honorable Diane Schafer Goodstein. The jury found Applicant guilty as indicted. Judge Goodstein sentenced Applicant to life for murder and five (5) years' imprisonment on the possession of a firearm by a person convicted of a violent crime charge, to be served concurrently.

Applicant filed a timely notice of appeal. Kathrine H. Hudgins, Esquire, of the Office of Appellate Defense represented Applicant on appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on January 21, 2015. State v. Brown, Op. No. 2015-UP-040 (S.C. Ct. App. filed Jan. 21, 2015). The remittitur was sent down on March 9, 2015.

In this action, Applicant alleges that he is being held in custody unlawfully for the following reasons:

I. Ineffective assistance of trial counsel in:
   a. Failing to proper advise Applicant on whether to testify or not;
   b. Failing to investigate the DNA collected at the scene;
   c. Failing to object during Patricia Eikhoff's testimony;
   d. Failing to object and bring to the court's attention sleeping jurors; and
   e. Failing to object to Applicant's shackles allegedly being visible to the jury.

II. APPLICABLE LAW

In a post-conviction relief action, Applicant bears the burden of proving the allegations in the 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, 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, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. 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. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use 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, courts measure an attorney'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.

III. 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 has reviewed the Clerk of Court records regarding the subject convictions, the transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

Failing to proper advise Applicant on whether to testify

Applicant argues Counsel was ineffective in advising him to testify. Applicant makes this allegation because he was thoroughly impeached by the solicitor. On cross examination, Applicant stated unequivocally that he did not know the victim. (Trial Tr. p. 737). Outside the presence of the jury, the solicitor argued that Applicant had opened the door to allow him to

question Applicant on a prior incident with the victim. (Trial Tr. p. 737). Judge Goodstein allowed this line of questioning.[1] Applicant then was questioned about the prior incident and whether he struck the victim with a hand gun at the same incident location a few months prior. (Trial Tr. p. 742). Applicant denied the prior altercation. (Trial Tr. p. 742-43). On reply, the State presented witness Randy Ryant, owner of the property where the prior incident and the murder took place. Ryant explained that while Applicant knew the victim, they did not socialize. (Trial Tr. p. 792). Notably, this issued was raised on Applicant's direct appeal in the form of whether Judge Goodstein erred in allowing the State to impeach Applicant with evidence of the prior altercation.

Applicant testified that he told Counsel he did not wish to testify and that a defense investigator also told him not to take the stand. Counsel testified he reviewed the prior incident with Applicant and how he would argue that the incident was not admissible. Counsel recalled that he objected during and attempted to assuage the situation by asking Applicant to explain that "knowing" someone meant more than a casual acquaintance, essentially arguing that Applicant had a different definition of "know" that most. (Trial Tr. p. 739-41). Counsel testified that he discussed this situation with Applicant in preparing him to take the stand.

This Court finds Applicant failed to meet his burden in proving Counsel was ineffective. Counsel advised Applicant of the risks of taking the stand and how the solicitor may be able to impeach him. By stating on the stand that he did not know the victim when he had been in a similar altercation with him just months prior, Applicant allowed the solicitor to introduce strong evidence that he was not a credible witness. Applicant's testimony that he did not wish to testify is not credible. Judge Goodstein questioned Applicant on whether he understood his right to

[1] Judge Goodstein had previously ruled that the prior altercation would not be admissible.

remain silent and asked him whether would testify just prior to him taking the stand. (Trial Tr. p. 504-05).

In any event, this is a case of overwhelming evidence. Numerous people who attended the gathering at Ryant's property witnessed the shooting and identified Applicant as the assailant. These witnesses knew Applicant by name and face. Applicant cannot show that the result of the trial would have been different had Counsel failed to properly advise him of the risks of testifying in his defense.

Failing to investigate the DNA collected at the scene

Next, Applicant alleges Counsel was ineffective in failing to investigate and test the DNA collected at the incident location. Applicant testified that he was not aware of any DNA being tested. Counsel testified that he believed the investigation done in this case was sloppy and supported this conclusion with the fact that the DNA was not tested. Counsel testified that he did not have any independent testing done because there was a risk that it would come back positive. "Criminal 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) (internal citations omitted).

This Court finds Applicant failed to meet his burden in proving Counsel was ineffective in not further investigating the DNA collected. This Court finds Counsel's testimony credible and persuasive on the issue. It was reasonable for Counsel not to have the DNA tested himself. See Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992) (Where counsel articulates valid reasons for employing a certain strategy, counsel's choices of tactics will not be deemed ineffective assistance.). Just as Counsel testified, if the results come back positive, then there is

the risk that the solicitor would be able to somehow present those results to the jury. Further, Counsel was able to support his theme of the case by showing that the investigation was sloppy in noting that DNA was collected but never tested.

Applicant has also failed to present any evidence to show how having the DNA tested could have benefited Applicant. See Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) ("failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result."). The allegation rests entirely on speculation. Applicant is, therefore, unable to show any prejudice. This allegation is denied and dismissed with prejudice

Failing to object and bring to the court's attention sleeping jurors

Applicant alleges Counsel was ineffective in failing to object and bring to the court's attention that jurors had fallen asleep during the trial. Applicant testified that an elderly lady and another juror fell asleep during the trial. He testified that he told Counsel this when it happened. Counsel testified that, to his recollection, no jurors fell asleep but that it was possible. Counsel explained that if he had seen a juror sleeping he would have approached Judge Goodstein to ensure that the jurors were alert. The defendant bores the burden to show that a juror was actually asleep. See State v. Smith, 338 S.C. 66, 71, 525 S.E.2d 263, 266 (Ct. App. 1999) (analyzing the issue of a sleeping jury through a juror misconduct analysis and holding that a judge can dismiss a juror and replace the juror if the judge determines that the juror has been sleeping).

Here, this Court finds Applicant's testimony not credible. Applicant has failed to meet his burden in proving that multiple jurors were asleep at various points in the trial. There is no mention of this in the trial transcript. It is noteworthy that no court room participants noticed any

jurors sleeping. Even if jurors were sleeping, Applicant cannot be found to have been prejudiced because there is overwhelming evidence of his guilt.

Failing to object during Patricia Eikhoff's testimony

Next, Applicant alleges Counsel was ineffective in failing to object to the nonresponsive answers given by Investigator Patricia Eikhoff who was called to testify in the defense's case. Applicant argues that Eikhoff's testimony was not responsive at certain points and believes that Counsel should have objected to her nonresponsive answers and asked for curative instruction. When being questioned on specifics regarding the weapon used, Counsel objected to Eikhoff's answer as unresponsive. (Trial Tr. p. 553). Judge Goodstein agreed and instructed her to answer the questions asked. (Trial Tr. p. 553). Later in her testimony, Judge Goodstein interjects *sua sponte* and asks the jury to return to their deliberation room and then proceeded to chastise Eikhoff for refusing to directly answer Counsel's questions.

> THE COURT: Detective Eikhoff, I'm going to ask you to do this for me. I'm going to ask you to listen very carefully to the question that you are being asked. I'm going to ask you to answer that question. If it is a yes or no answer, I'm going to ask you to answer it yes or no. You may explain your answer. I don't want you to go into a non-responsive dialogue, but if you need to explain your answer I want you to do that. The reason that I have sent the jury out is because it's clear that Mr. Gipson is not going to abandon his question because you're not answering it, he's just simply going to come back around to the question, and you know, we have a jury here and I must be mindful of their times as well as everyone else's.

(Trial Tr. p. 566). On cross examination, the solicitor attempted to rehabilitate Eikhoff by asking her to explain that she was no longer an employee of the Orangeburg County Sheriff's Office and had been dealing health issues. (Trial Tr. p. 581-83).

At the hearing, Counsel explained that he called Eikhoff, the lead investigator on the case, to testify as a defense witness in an attempt to show that the investigation was sloppy and to point out that the State chose not to call her to testify. Counsel exploited Eikhoff's memory of

the case. (Trial Tr. p. 558). Counsel also questioned Eikhoff on why the DNA was not analyzed when it would seemingly just require sending the samples to SLED for testing. (Trial Tr. p. 557-59). Counsel noted that nonresponsive answers from Eikhoff would likely help Applicant's case and bring into question the credibility of the State's case.

This Court finds Counsel's handling of Eikhoff to be particularly damaging to her credibility. Applicant has not shown that Counsel was ineffective in any regard. Counsel clearly had a strategy in calling Eikhoff and allowing her to repeatedly give nonresponsive answer to his questions. Eikhoff's answers even forced Judge Goodstein to intervene, outside the presence of the jury, directing her to answer Counsel's pointed questions. Further, this Court finds there was no need for a curative instruction. This allegation is denied and dismissed.

Failing to object to Applicant's shackles allegedly being visible to the jury

Finally, Applicant alleges Counsel was ineffective in failing to object to Applicant's shackles allegedly being visible to the jury. The Court has examined the trial record and notes that the solicitor brought it to Judge Goodstein's attention that some of the jurors may have seen Applicant walk into the courtroom in an unnatural way because he was wearing leg shackles. (Trial Tr. p. 177-78). The solicitor was concerned, not that the shackles were visible, but that Counsel would use this to support his argument that Applicant could not have physically committed the crime. (Trial Tr. p. 177). At the hearing, Applicant testified that there was a clicking sound when he was walking into the courtroom and that the jurors may have noticed his unnatural gait. Counsel explained that Judge Goodstein wanted Applicant shackled but that the shackles were not visible because they were underneath his pants. Counsel was confident that the jurors never saw the restraints.

Applicant relies on Deck v. Missouri, 544 U.S. 622 (2005) in support of his allegation. Deck held that a criminal defendant has a right to remain free of physical restraints that are visible to the jury absent a trial court determination that they are justified by a state interest specific to a particular trial. This Court finds Applicant's testimony not credible on the issue. Applicant's testimony is self-serving and unsupported by any evidence before the Court. Applicant has failed to present any probative evidence that his shackles were ever visible to the jury. Even if Applicant was seen by the jurors with his movement restricted by the shackles, this worked to his advantage to support the argument that Applicant could not have physically fought the victim nor committed the crime. This Court finds Applicant failed to meet his burden.

Applicant has also failed to show how he was prejudiced in any manner. In Humbert v. State, 345 S.C. 332 (2001), the Supreme Court faced the issue of whether the PCR court erred in finding no prejudice where the applicant was wearing a jail uniform and shackles during his trial. The court held that there was not a reasonable probability that the outcome of the trial would have been different had he not been dressed in a jail uniform. Humbert v. State, 345 S.C. at 338. See Byers v. Basinger, 610 F.3d 980, 989 n.6 (7th Cir. 2010) (finding that even if a defendant proceeds to a jury trial while wearing ankle restraints, he must still prove his appearance affected the outcome of his trial); Whitman v. Bartow, 434 F.3d 968, 971-72 (7th Cir. 2006) (finding any error in having the defendant proceed to a jury trial while wearing a prison jumpsuit was harmless because the State presented overwhelming evidence of the defendant's guilt); see also Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt). Applicant has failed to prove any prejudice. This allegation is denied and dismissed.

All Other Allegations

As to any and all allegations that were raised 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.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate counsels' performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR 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.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 27 day of October, 2016.

BENJAMIN H. CULBERTSON
Presiding Judge

Conway, South Carolina

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