FALK LAW FIRM, LLC.

James K. Falk

(843) 606-6007
(843) 972-9005 Fax Admitted to practice: KY(1984) S.C. (2010) jfalklaw@gmail.com

July 30, 2018

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

Re: Malcolm Brabham 359777 v State, 2016-CP-10-4888

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Beaufort County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,

James K Falk

Thank you for your assistance.

Cc:
DeShawn H Mitchell, Esq.
Malcolm Brabham 359777.

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Honorable R. Lawton McIntosh, Circuit Judge

Case No.: 2016-CP-07-1092

Malcolm Brabham 359777.....PETITIONER

V.

State of South Carolina.....RESPONDENT

CERTIFICATE OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, DeShawn H Mitchell Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this July 30, 2018.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

RECEIVED
AUG 02 2018
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Honorable R. Lawton McIntosh, Circuit Judge

Case No.: 2016-CP-07-01092

Malcolm Brabham 35977.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Michael Bellamy appeals the Honorable R. Lawton McIntosh's June 13, 2018 Order of Dismissal. Undersigned counsel received notice of entry of the order on July 23, 2018. A copy of the order on appeal is attached hereto.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

July 30, 2018

DeShawn H. Mitchell, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	)	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
Malcolm Brabham, #359777, Applicant,	)	2016-CP-07-1092
v.	)	**ORDER OF DISMISSAL**
State of South Carolina, Respondent.	)	

This matter comes before the Court by way of an application for post-conviction relief filed on May 6, 2016 by Malcolm Brabham (Applicant). Respondent made its Return on or about August 3, 2017. An evidentiary hearing into the matter was convened on January 29, 2018, at the Beaufort County Courthouse in Beaufort, South Carolina. Applicant was present and represented by James K. Falk, Esquire. Respondent was represented by DeShawn H. Mitchell, Esquire of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Applicant's trial counsel Trasi Campbell, Esquire also testified. This Court had before it a copy of the records of the Beaufort County Clerk of Court regarding the Applicant's convictions, the transcript from Applicant's trial, the PCR application, Respondent's Return, Applicant's records from the Department of Corrections and Applicant's appellate records. After reviewing the record and everything presented, this Court finds Applicant has failed to establish any constitutional deprivations entitling him to post-conviction relief and denies this application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. In September 2013, the Beaufort County Grand Jury indicted Applicant for attempted murder (2013-GS-07-1230) and

possession of a weapon during a violent crime (2013-GS-07-1231). Chief Public Defender Trasi Campbell, Esquire, represented Applicant. Assistant Solicitors Mary Jordan Lempesis, Esquire, and Mary Concannon, Esquire, prosecuted the case. On April 21-23, 2014, Applicant proceeded to trial before the Honorable Roger M. Young. The jury found Applicant guilty as indicted. Judge Young sentenced Applicant to imprisonment for concurrent terms of twenty years for attempted murder and five years for possession of a weapon during a violent crime.

Applicant filed a timely notice of appeal. Susan B. Hackett, Esquire, of the Office of Appellate Defense, perfected the appeal by submitting an Anders brief. The South Carolina Court of Appeals dismissed Applicant's appeal on October 21, 2015. State v. Brabham, Op. No. 2015-UP-498 (S.C. Ct. App. filed October 21, 2015). The remittitur was returned to the circuit court on November 6, 2015.

ALLEGATIONS

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

1. "Ineffective Assistance of Counsel"
    a. "Trial counsel failed to communicate a favorable written ten year plea offer made to Applicant by the State."

Applicant filed an Amendment to his Application on January 29, 2018 alleging the following reasons:

1. Trial Counsel failed to object to hearsay statements regarding conversations that the State's witness had with the victim.
    a. Record on Appeal p. 132, l. 7 (Testimony of Corporal Seronka on Re-Direct)
    b. Record on Appeal p. 136, l. 6 (Testimony of Corporal Seronka on Re-Direct)
2. Trial Counsel failed to object when the State sought to elicit negative testimony regarding the Defendant's character. Record on Appeal p. 232 l. 17-20 (Testimony of Reah Gonsalves on Direct).
3. Trial Counsel failed to request a jury charge on alibi even though she argued that defense in her closing argument. (Record on Appeal p. 333 l. 9-17)

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTARY HEARING

Applicant's Testimony

Applicant testified he was charged with the crimes he was found guilty of in July of 2013 and the first time he saw Trial Counsel was in September of that year. Applicant testified Trial Counsel presented him a plea offer for ten years for assault and battery of a high and aggravated nature. He testified Trial Counsel explained his charges and told him not to take the plea because the offer was a sign of weakness in the State's case. Applicant then testified he could not get in touch with Trial Counsel after their meeting but months later Trial Counsel told him he should now take the ten year plea offer because the State's case was a slam dunk. Applicant testified there was a second ten year plea offer for assault and battery 1st degree that was never relayed to him that he only found out about after he was found guilty. Additionally, Applicant testified had Trial Counsel presented him with the ten year plea offer for assault and battery 1st as opposed to the plea offer for assault and battery of a high and aggravated nature he would have accepted it as it was a non-violent plea offer versus a violent plea which would have resulted in him serving less time in prison.

On cross-examination, Applicant testified he met with Trial Counsel three times and there was one plea offer presented to him for ten years. Applicant testified when asked if he rejected the plea offer that Trial Counsel told him they were not taking the offer. Applicant testified the only time he went over discovery was in his cell in jail. He testified he did not give Trial Counsel a list of people he wanted her to contact. Applicant testified Trial Counsel did not think it was a good decision to have him testify at trial.

Trial Counsel's Testimony

Trial Counsel was handed a plea offer sheet for assault and battery 1st degree by

Applicant's PCR counsel and testified that the plea offer sheet did come from the State. Trial Counsel then testified her email correspondence with the Solicitor in charge of the case confirmed that the State had sent a plea offer of assault and battery 1st for ten years but that it was done in error as the offer was originally and remained a plea offer for ten years for assault and battery of a high and aggravated nature. Trial Counsel testified she did not object to hearsay testimony from one of the State's witnesses as the same testimony had come in prior to that witness testifying. Trial Counsel also testified the reason she did not object to Applicant's girlfriend's testimony about him not being a trustworthy person was because the girlfriend did not testify according to what was expected and she changed her version of the facts. However, Trial Counsel testified she believed she challenged the girlfriend's testimony at trial and part of her strategy was to discredit her. Trial Counsel testified she did not request an alibi charge because Applicant did not have an alibi. She testified she tried to argue somethings related to an alibi defense in closing but did not have any alibi testimony.

On cross-examination, Trial Counsel testified the facts of the case were that the victim who was Applicant's girlfriend's brother, was shot in the chest down a dark dirt road and he crawled to a house on that road where 911 was called. Trial Counsel testified she met with Applicant at the detention center and court. She then testified she received a plea offer of ten years for assault and battery of a high and aggravated nature which Applicant rejected. Trial Counsel then testified that if there had been a true offer of ten years for assault and battery 1st degree she would have communicated that to Applicant. However, Trial Counsel testified she had an email from the Solicitor regarding the plea offer of assault and battery 1st for ten years but that the offer was done in error as the offer was originally and remained a plea offer for ten years for assault and battery of a high and aggravated nature. Trial Counsel testified she had

practiced law for some time and had seen inconsistencies or mistakes in plea offers from Solicitors before. Trial Counsel testified she did not object during Applicant's girlfriend's direct examination because she was able to exploit her testimony on cross examination.

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 at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and can weigh their testimony and credibility accordingly. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017).

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). 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. at 443, 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 that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, the court measures an attorney's

performance by its "reasonableness under professional norms." Id. (quoting Strickland v. Washington, 466 at 688). 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 (1985).

After careful review of the entire record, including the testimony presented at the evidentiary hearings, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action regarding any of his allegations of ineffective assistance of counsel. These credibility findings have been applied to the Court's findings and conclusions set forth below. Additionally, prior to testimony being taken, Applicant proceeded on only the following grounds for relief.

Failure to communicate plea offer

Applicant alleged Trial Counsel failed to communicate a favorable written ten year plea offer. Applicant testified Trial Counsel had a plea offer for ten years for assault and battery of a high and aggravated nature. Applicant also testified there was a second ten year plea offer for assault and battery 1st degree that was never relayed to him that he only found out about after he was found guilty at trial. Trial Counsel testified she received a plea offer of ten years for assault and battery of a high and aggravated nature which Applicant rejected. Trial Counsel also testified she had an email from the Solicitor regarding a plea offer of assault and battery 1st for ten years but that the offer was done in error as the offer was originally and remained a plea offer for ten years for assault and battery of a high and aggravated nature. Trial Counsel testified she had

practiced law for some time and had seen inconsistencies or mistakes in plea offers from Solicitors before. This Court finds Applicant's allegation that Trial Counsel failed to communicate a favorable written ten year plea offer is denied as the evidence established from the testimony that Trial Counsel did communicate the State's actual plea offer. Moreover, this Court finds the alleged plea offer of ten years on a non-violent assault and battery 1st was mistakenly put in writing but was corrected by the Solicitor in communications to Trial Counsel. Further, Applicant admitted that the correct plea offer was communicated to him and he rejected it. Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in her representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. Accordingly, this allegation is denied and dismissed.

Failure to request an alibi charge

Applicant alleged Trial Counsel failed to request an alibi charge. "[S]ince an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all." State v. Robbins, 275 S.C. 373, 377, 271 S.E.2d 319, 321 (1980). Further, an alibi which makes it only *less likely* the accused is the guilty party is no alibi. See Walker v. State, 397 S.C. 226, 723 S.E.2d 610 (Ct. App. 2012) "To establish an alibi defense and thus be entitled to an instruction of alibi, a defendant must present some evidence that he was at another place at the time of the crime and could not therefore have committed the crime." State v. Diamond, 280 S.C.

296, 297, 312 S.E.2d 550 (1984), quoting State v. Robbins, 275 S.C. 273, 271 S.E.2d 319 (1980). "A simple denial of one's presence at the scene does not constitute an alibi." Id. Trial Counsel testified she did not request an alibi charge because Applicant did not have an alibi. She testified she tried to argue somethings related to an alibi defense in closing but did not have any alibi testimony. This Court finds there was insufficient evidence presented at trial to warrant such a request or charge on alibi and had one been requested it would have been denied. Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in her representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. Applicant has failed to show the outcome of his trial would have been different had Trial counsel requested an alibi charge. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. This allegation is denied and dismissed.

Failure to object to hearsay testimony

Applicant alleged Trial Counsel failed to object to hearsay testimony regarding conversations the State's witness had with the victim. Applicant argued that the testimony elicited from the State's Witness Corporal Seronka was hearsay. (ROA p. 132, 1-11, 136, 1- 8). As to this allegation that the hearsay testimony was improperly allowed with regard to the victim's identification of Applicant, this Court finds Applicant is correct that the testimony constitutes improper hearsay. However, this Court finds the victim testified to the exact testimony offered by Corporal Seronka prior to Corporal Seronka actually testifying. (ROA p. 153-154). Therefore, there was substantial evidence in the record prior to the admission of this

evidence and counsel was not ineffective for failing to object. Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in her representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. Applicant has failed to show the outcome of his trial would have been different had Trial counsel objected to hearsay testimony regarding conversations that the State's witness had with the victim. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. This allegation is denied and dismissed.

CONCLUSION

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

This Court notifies Applicant that he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCP. Reefer to Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

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

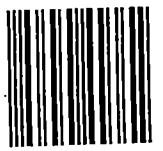
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 10 day of Nov, 2018.

R. LAWTON MCINTOSH
Presiding Judge
Fourteenth Judicial Circuit

Aiken, South Carolina

1000



29211

U.S. POSTAGE
PAID
CHARLESTON, SC
29401
JUL 30, 18
AMOUNT
$1.63
R2305K141335-16

FALK LAW FIRM
PO Box 1058
Charleston, SC 29402

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