

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No.: 2015CP0200218

RECEIVED

NOV 01 2018

S.C. SUPREME COURT

State of South Carolina,

Respondent,

v.

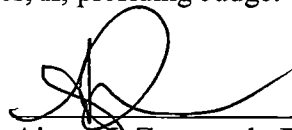
William R. Pearson, #336210,

Appellant.

NOTICE OF APPEAL

William R. Pearson, #336210, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed February 13, 2018, and received by counsel on February 13, 2018, and the Order Denying Rule 59(E) Motion filed and received by counsel on October 8, 2018, issued by the Honorable J. Mark Hayes, II, presiding Judge.

October 30, 2018



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THE STATE OF SOUTH CAROLINA
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APPEAL FROM AIKEN COUNTY
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William R. Pearson, #336210,


Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Julie Coleman by depositing a copy of it in the United States Mail, postage prepaid, on ~~October 30~~^{November 1}, 2018, addressed to her office at:

PO Box 11549
Columbia, SC 29211

~~October 30~~^{November 1}, 2018



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STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)
William R. Pearson, #336210,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

2015-CP-02-00218

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**S.C. SUPREME COURT
ORDER OF DISMISSAL**

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on January 23, 2015. Respondent submitted its return on February 19, 2015. An evidentiary hearing into the matter was convened on September 18, 2017, at the Aiken County Courthouse. Applicant was present at the hearing and was represented by Aimee Zmroczek, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

At the evidentiary hearing, Applicant testified on his own behalf. Respondent presented testimony from Barry Thompson, Esquire ("Trial Counsel"). This Court had before it the records of the Aiken County Clerk of Court regarding the subject convictions, Applicant's records for the Department of Corrections, appellate records, the trial transcript, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. Applicant was true bill indicted at the October 2012 term of the Aiken County Grand Jury for first degree burglary (2012-GS-02-01518). Barry Thompson, Esquire represented

Applicant. Applicant proceeded to a jury trial and was found guilty on October 16, 2012. The Honorable Doyet A. Early, III sentenced Applicant to a fifteen year term of imprisonment.

A timely Notice of Appeal was filed on Applicant's behalf and an Anders v. California, 4386 U.S. 738 (1967) brief was submitted. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Pearson, 2014-UP-404 (Ct. App. 2014). The Remittitur was issued on December 12, 2014.

II. ALLEGATIONS

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

1. Ineffective Assistance of Counsel
 - a. Failing to investigate, interview, and call witnesses.
 - b. Failing to use the taped phone conversations of co-defendant with Petitioner and various other individuals.
 - c. Trial Counsel was ineffective for failing to move for a continuance to allow additional times to subpoena various witnesses.
 - d. Failure to object to prosecutors improper remarks.
 - e. Failing to object to the "hand of one hand of all"

III. SUMMARY OF RELEVANT TESTIMONY PRESENTED

Applicant's testimony

Applicant testified that he was arrested for this charge on May 28, 2012. He stated he met with Trial Counsel only twice before the trial. He stated that, right before the trial, Trial Counsel told him of a plea offer from the State to serve 85 percent of a twelve year sentence, and Trial Counsel advised him to take the plea. Applicant stated he rejected the plea offer, and he wanted Trial Counsel to put up witnesses on his behalf. He stated he had seven people who would testify for him, and five of them had written statements. Applicant stated his co-defendant, his son William James Pearson, wanted to rent the house where the crime occurred, so he drove the car there to look at it with him. He stated he told Trial Counsel that his son took the stuff out of the

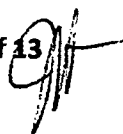
house while Applicant was checking out the back yard. He stated he heard a noise while he was in the yard, and his son came out of the house with a microwave. Applicant testified that he did not go in the house, but after his son loaded up the car with stolen goods, he drove the car away with his son and the stolen goods inside.

Applicant testified his son testified against him at trial and was given a deal on his sentence for cooperating. Applicant testified he never saw any discovery materials in his case. He stated his defense at trial was that he was merely present at the scene of the crime and did not participate in it. Applicant stated that he testified at trial and told the jury his side of the story. He stated he does not want a new trial, but he only wants to accept the original plea deal.

Trial Counsel's testimony

Trial Counsel testified that he was appointed to represent Applicant in this case, and he met with him regularly—at least once a month—before his trial. He stated he had a reasonable relationship with Applicant, and Applicant understood the charges against him and had been convicted before, so he was familiar with the process. He testified that Applicant was eligible for LWOP, but he received a fifteen year sentence after he was convicted.

Trial Counsel stated the evidence against Applicant consisted of his son and co-defendant's testimony, and if the jury believed the son, he believed the evidence against Applicant was overwhelming. He stated the police officer who testified at trial actually saw the broken window on the house, as well as Applicant's car full of stolen items while Applicant and his son were in the car. He stated he did not believe the State's case rested heavily on the son's testimony, but it mostly relied on the broken window of the house combined with the cut on Applicant's hand, Applicant's vehicle full of stuff, and the police officer who got there as Applicant pulled up in the car full of stolen stuff.



Trial Counsel testified his trial strategy was to convince the jury that Applicant did not commit the crime but was only an accessory after the fact, but Applicant's biggest problem is that, even if the son worked alone in taking the goods from the house and loading them into the car, Applicant got into the car and drove away, which made him guilty of the crime as an accomplice. He stated the best they could do at trial was a conviction for accessory after the fact, which would have been a violation of Applicant's probation. He stated the State's plea offer before the trial was for a sentence that Applicant would have gotten if he were convicted of accessory after the fact.

Trial Counsel testified that he hired an investigator who met with all the potential witnesses, including Jimmy Sikes and David Rogier, who both had the best testimony. He stated Sikes testified at trial as a rebuttal witness to show the jury that Applicant's co-defendant son was lying. Trial Counsel testified Rogier did not come to the trial, even though they had subpoenaed him. He stated he had ample time to prepare for trial, and there was no reason to request a continuance before the trial. He stated he could have requested a continuance in order to get Rogier as a witness, but he did not choose to do so because Applicant would have been in the same situation even with Rogier's testimony. Trial Counsel stated there was no reason to object to the "hand of one is the hand of all" jury charge. He stated he requested a mere presence jury instruction, and the trial judge charged the jury on mere presence.

Trial Counsel testified that he did not challenge the probable cause for the police officer's stop of Applicant because Applicant was not stopped; Applicant drove into his own backyard and got out of the car in front of the police officer. Trial Counsel testified that he choose not to ask to have the blood on the broken window of the robbed house tested for DNA because he was afraid the results would show the blood belonged to Applicant, which would hurt his case. He



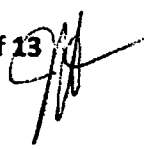
further stated he did not want to have them test the DNA because the risk was stronger than the possibility of proving his guilty, and it would have taken away any leverage he had for negotiations with the State.

IV. APPLICABLE LAW

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged 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 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption 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. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty pleas, the Applicant must



show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart , 474 U.S. 52, 106 S.Ct. 366 (1985).

V. 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 further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds Counsel's testimony to be credible and persuasive. These credibility findings have been applied to the Court's findings and conclusions set forth below.

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant has asserted several allegations of ineffective assistance of counsel. This Court finds these claims to be meritless and they should be denied and dismissed with prejudice. After considering the testimony and judging their credibility on the witness stand and reviewing the materials presented to the court, this Court finds Applicant has failed to meet his burden of proof. Applicant raises some probing issues, including but not limited to the manner of cross-examination, failure to challenge the search, the failure to properly address the broken glass and Applicant's injury, and counsel's failure to object to certain arguments. Trial counsel's position is that his decisions were attributable to trial strategy. Even if his decisions were not reasonable, the burden of establishing prejudice has not been satisfied given the evidence that is uncontested.



Additionally, Applicant does not necessarily desire a new trial, he desires a new sentence given his age. Accordingly, post-conviction relief is denied. Each individual allegation is addressed below.

Failure to investigate, interview, and call witnesses

Applicant's allegation that Trial Counsel was ineffective for failing to investigate is meritless. "[C]riminal 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." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 521-22 (2003).

Trial Counsel credibly testified that he fully investigated Applicant's case and hired an investigator to meet with all potential witnesses. Trial Counsel clearly made strategic choices in choosing which witnesses to call, and had Jimmy Sikes testify as a rebuttal witness to impeach the credibility of the co-defendant's testimony. Trial Counsel credibly testified that he subpoenaed David Rogier to testify at trial, but he did not show up to the trial, and even if he had asked to continue the case to get Rogier's testimony, he would have been in the same position with the same evidence against him. This Court finds Trial Counsel's strategic decisions were reasonable in this situation and presented testimony of one of the best witnesses he had available.



Applicant has not presented any specific evidence that Trial Counsel failed to investigate that would have affected the outcome of his trial. Accordingly, this allegation is denied and dismissed with prejudice.

Failure to use the taped phone conversations of co-defendant

Applicant alleges Trial Counsel was ineffective for failing to use the taped jail phone call conversations of his co-defendant son to impeach his credibility. This allegation is meritless. First, it was not unreasonable of Trial Counsel not to use any recordings of phone calls that impeached the co-defendant's credibility because Trial Counsel used other strategic methods to do so. Trial Counsel thoroughly cross-examined James Pearson on his criminal record and his history of lying. ROA 74 – 79. Furthermore, Trial Counsel did directly ask James Pearson on cross-examination about his phone conversation with his father about how he was going to tell law enforcement the truth about how it was his fault and not Applicant's, and the witness agreed that he had that conversation. ROA 77, line 19 – ROA 78, line 17. Trial Counsel further put up a rebuttal witness, Jimmy Sikes, to show the jury that James Pearson was lying. Based on these factors in the record, this Court finds Trial Counsel was not deficient for failing to play the actual phone call conversation tape.

Secondly, Applicant failed to present actual, specific recordings that Trial Counsel should have used to change the outcome of the trial. Accordingly, this Court cannot speculate as to the contents of those recorded conversations and the effect they would have had on the trial. The South Carolina Supreme Court has repeatedly held a PCR applicant must produce the favorable evidence in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from failure to produce this evidence at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Applicant's mere speculation of what the evidence would have shown

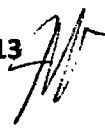
cannot, by itself, satisfy the applicant's burden of showing prejudice. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Because Applicant did not introduce the actual recordings to show how Trial Counsel should have properly used the evidence at trial, he has not proven prejudice. Accordingly, because Applicant has failed to prove deficiency or prejudice, this allegation is denied and dismissed with prejudice.

Failure to move for a continuance to allow additional times to subpoena various witnesses

Applicant alleges Trial Counsel was ineffective for failing to move for a continuance to allow time to get David Rogier to testify as a witness at trial. This allegation is meritless. Trial Counsel credibly testified there was no reason to request a continuance and he had ample time to prepare for trial.

As the trial transcript and the testimony at the evidentiary hearing show, Trial Counsel subpoenaed an additional rebuttal witness to testify at trial, David Rogier. On the day of trial, Rogier did not appear, and the trial court issued a bench warrant. ROA 31 – 32. Rogier never testified at trial. Applicant now asserts Trial Counsel should have moved for a continuance to get him there to testify. The Court notes Rogier was subpoenaed to appear at the trial, and he did not appear on his own accord. It is likely that Rogier would not have appeared on another date even if Trial Counsel had gotten a continuance.

This Court finds Trial Counsel was not deficient for failing to continue the case for this witness. As Trial Counsel testified, even if Rogier had testified, the evidence against Applicant would be the same, and it would not change the fact that Applicant admitted to being at the scene of the crime and participating in the robbery by driving the car away full of stolen goods. This Court finds Trial Counsel articulated a valid trial strategy in choosing not to request a continuance. 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).

Notably, Applicant did not present the testimony of Rogier or any other favorable witnesses at the evidentiary hearing, so this Court cannot speculate as to the contents of his testimony or the effect it would have had on the jury. See Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998); Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (finding a PCR applicant must produce witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence in order to prove prejudice to support a claim that trial counsel was ineffective for failing to interview or call potential witnesses).

The record shows Trial Counsel called Jimmy Sikes as a rebuttal witness at trial to testify for the same reasons he planned to call Rogier—to impeach the co-defendant's credibility and show the jury he was lying. Because Trial Counsel did call a rebuttal witness for this purpose and impeached the co-defendant with history of lying and his confessions to Jimmy Sikes and David Rogier, this Court finds no prejudice from any failure to call Rogier as a witness. Accordingly, because Applicant has failed to prove deficiency or prejudice, this allegation is denied and dismissed with prejudice.

Failure to object to prosecutor's improper remarks

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to object to improper remarks by the prosecutor is meritless. Applicant has failed to meet his burden of proving that Trial Counsel was deficient for failing to object to any specific remark by the prosecutor. Furthermore, even if his decisions were not reasonable, the burden of establishing prejudice has not been satisfied given the evidence that is uncontested. Accordingly, since

Applicant has failed to prove either prong of the Strickland test, this allegation is denied and dismissed with prejudice.

Failing to object to the "hand of one hand of all" |

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to object to the "hand of one, hand of all" jury charge is meritless. Under the "hand of one is the hand of all" theory of accomplice liability, one who joins with another to accomplish an illegal purpose is criminally liable for everything done by the principal actor to the execution of the common design and purpose. State v. Thompson, 374 S.C. 257, 261–62, 647 S.E.2d 702, 704–05 (Ct.App.2007). However, mere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt. Id. "Under an accomplice liability theory, 'a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.'" State v. Gibson, 390 S.C. 347, 354, 701 S.E.2d 766, 770 (Ct. App. 2010) (citing State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct.App.2002); State v. Langley, 334 S.C. 643, 648–49, 515 S.E.2d 98, 101 (1999)). "In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, but rather can prove the same by circumstantial evidence and the conduct of the parties." Id.

In this case, both at trial and at the evidentiary hearing, Applicant testified and admitted to being at the scene of the crime and to driving the car away when his son finished loading it up with stolen goods. Although Applicant insisted that his son stole everything out of the house, he did not contest the evidence that he drove away from the scene of the crime. The evidence also showed that Applicant helped unload the stolen goods when they got back to his house. Trial

Counsel credibly testified that there was no reason to object to the jury charge or the State's use of this accomplice liability theory. The record clearly shows evidence to support the allegation that Applicant participated in the crime, and even if he did not actually enter the house and remove stolen goods. Trial Counsel requested a mere presence charge, and the charge was given. This Court finds the "hand of one is the hand of all" theory was appropriate under the facts of the case and according to the evidence presented, even in Applicant's own testimony.

This Court finds Trial Counsel was not deficient for failing to object to the theory of accomplice liability, and there is no prejudice because any objection to the jury charges would have been overruled. Accordingly, Applicant has failed to prove either prong of the Strickland test, and this allegation is denied and dismissed with prejudice.

VI. CONCLUSION

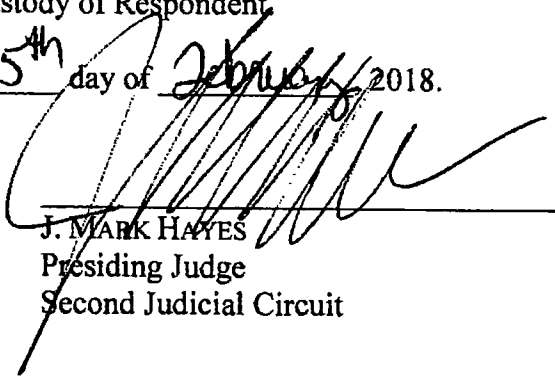
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel 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 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 5th day of February, 2018.



J. MARK HAYES
Presiding Judge
Second Judicial Circuit

Aiken, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)
William R. Pearson, #336210,)
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v.)
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IN THE COURT OF COMMON PLEAS
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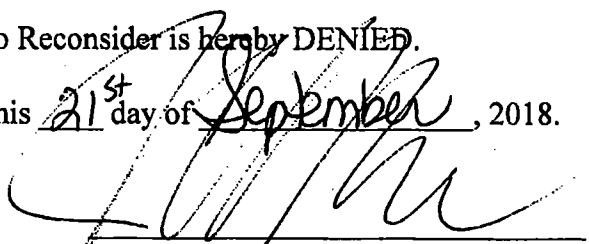
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**ORDER DENYING APPLICANT'S
MOTION TO RECONSIDER**

This matter comes before the Court on an application for post-conviction relief filed on January 23, 2015. Respondent made its return on February 19, 2015. An evidentiary hearing was convened on September 18, 2017 at the Aiken County Courthouse. Applicant was present at the hearing and was represented by Aimee Zmroczek, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman. This Court issued an Order of Dismissal filed February 13, 2018, denying the application for post-conviction relief. Applicant filed a Motion to Reconsider pursuant to Rule 59(e), SCRPC on February 21, 2018. Respondent filed a Return to the motion on May 21, 2018. After due deliberation and review of the case and motion of counsel, this Court finds that there is nothing new warranting reconsideration, and Applicant's Motion to Reconsider is denied.

THEREFORE, Applicant's Motion to Reconsider is hereby DENIED.

AND IT IS SO ORDERED this 21st day of September, 2018.



J. MARK HAYES, II
Presiding Judge
Second Judicial Circuit

Aiken, South Carolina