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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

R. Ferrell Cothran, Circuit Court Judge

Case No. 2012-CP-15-0918

Elijah C. Brown, #340901,

Petitioner,

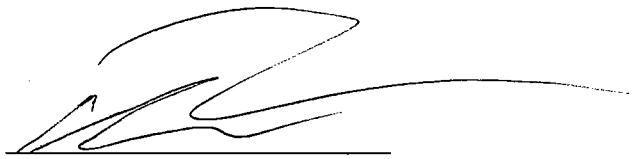
v.

The State of South Carolina, Respondent.

NOTICE OF APPEAL

Petitioner appeals the order dismissing his post-conviction relief action filed December 31, 2018 and received by Petitioner on January 3, 2019.

February 4, 2019



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Attorney for Respondent

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CERTIFICATE OF SERVICE

I certify that on the date below I served the Notice of Appeal on The State of South Carolina by mailing a copy to the Respondent at the address below.

February 4, 2019

Tristan M. Shaffer (SC Bar # 77565)
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Other Counsel of Record:
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Attorney for Respondent

The Law Office of Tristan M. Shaffer

Litigation • Injury Law • Criminal Defense

February 4, 2019

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

Re: Elijah Brown v. State 2012-CP-15-0918

Dear Mr. Shearouse,

Please find the enclosed Notice of Appeal, Certificate of Service, and Order of Dismissal in the above referenced case.

Sincerely,

Tristan M. Shaffer

CC:Colleton County Clerk of Court
Christian Saville

STATE OF SOUTH CAROLINA COUNTY OF COLLETON	)	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
	)	2012-CP-15-0918
Elijah C. Brown, #340901, Applicant, v. State of South Carolina, Respondent.	)	**ORDER OF DISMISSAL**

This Court convened an evidentiary hearing into this matter on February 19, 2014, at the Beaufort County Courthouse. Applicant was present at the hearing and represented by Tristan M. Shaffer, Esquire. Ashleigh R. Wilson, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Applicant's trial counsel, L. Scott Harvin (Counsel), Esquire was present and testified. Applicant was also present and testified. This Court had before it a copy of the trial transcript, the records of the Colleton County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the appellate record, the pleadings in this matter, and the supplemental affidavits submitted by the State. This Court finds as follows:

I. PROCEDURAL HISTORY

Applicant was indicted at the June 2009 term of the Colleton County Grand Jury for possession of a weapon during the commission of a violent crime (2009-GS-15-0288), assault

and battery with intent to kill (2009-GS-15-0289), and two counts of armed robbery (2009-GS-15-0290, -0291). Applicant was represented by Counsel at trial.

Applicant proceeded to trial and was found not guilty of assault and battery with intent to kill, not guilty of the lesser included offense of assault and battery of a high and aggravated nature, and not guilty of one count of armed robbery. Applicant was found guilty of one count of armed robbery, one count of the lesser included offense of strong-arm robbery, and guilty of possession of a weapon during commission of a violent crime. He was sentenced by the Honorable D. Craig Brown to confinement for a period of 15 years on the armed robbery, 10 years suspended upon the service of 5 years and 3 years' probation for strong-arm robbery, and five years for possession of a weapon during commission of a violent crime. The sentences were ordered to be served concurrently. Applicant filed a timely notice of appeal.

Applicant's appeal was perfected by Elizabeth A. Franklin-Best, Esquire. The Court of Appeals affirmed the conviction on February 8, 2012. No. 2012-UP-071.

Applicant filed a PCR application on July 30, 2013. An evidentiary hearing was held on February 19, 2014. The morning of the hearing, Applicant noticed the State that it would pursue the allegation trial counsel failed to object when a juror was not present during a portion of the jury instruction given at trial. At the evidentiary hearing, Applicant noted the transcript reflected a juror leaving the courtroom before the judge's jury instruction and then re-entering the courtroom mid-jury instruction by the trial court.

After the conclusion of the evidentiary hearing, The State made a motion to reopen the record of the PCR case. On March 31, 2014, a hearing was held on the State's motion to reopen the record. On April 14, 2014, the Honorable James R. Barber, III, granted the State's motion to

reopen the record. On August 6, 2018, the Honorable R. Ferrell Cothran held the supplemental evidentiary hearing. Applicant was present at the hearing and represented by Tristan M. Shaffer, Esquire. Christian Saville, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the evidentiary hearing, Respondent introduced affidavits from Amanda Haseldon, the assistant solicitor at the trial and Rebecca Hill, the court reporter at the trial, over Applicant's objection. This Court has reviewed these affidavits. This Court finds as follows:

II. ALLEGATIONS

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

1. Ineffective assistance of counsel
    a. Failure to effectively cross-examine witnesses
    b. Failure to argue the lack of common plan or scheme
2. Due Process
    a. Failure to object to juror's absence during portion of jury instruction
    b. Juror was the mother of a friend of Applicant's codefendant

III. INEFFECTIVE ASSISTANCE OF COUNSEL

This Court finds that Applicant has failed to satisfy his burden to prove that Counsel were deficient or that he was prejudiced by Counsel's alleged deficiencies. 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, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984). The proper measure of performance is whether Counsels provided representation within the range of competence required in criminal cases. Id.

In evaluating allegations of ineffective assistance of counsel, the court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, Counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

This Court finds Applicant's testimony lacked credibility and Counsel's testimony was credible. This Court finds that Applicant has failed to satisfy his burden to prove that Counsel was deficient. Applicant also failed to prove he was prejudiced by the alleged deficiencies. For the reasons below, Applicant has failed to satisfy his burden to prove ineffective assistance of counsel with regard to this allegation and it is therefore denied and dismissed:

A. Failure to effectively cross-examine witnesses

Applicant alleged that Counsel failed to attack the credibility and statements of Kelvin Mitchell and Jermaine Van Dyke. Cross-examination is a matter of trial strategy, and as such, this Court must presume that Counsel "rendered adequate assistance and made all significant

decisions in the exercise of reasonable professional judgment." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 690). In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland v. Washington, 466 U.S. 668, 689. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and the "[applicant] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. "Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Gilchrist v. State, 350 S.C. 221, 226–27, 565 S.E.2d 281, 284 (2002).

Applicant acknowledged that Counsel cross-examined State's witnesses. This Court finds Counsel adequately cross-examined all State's witnesses and pointed out inconsistencies in their testimony. Applicant has failed to produce any evidence regarding what information Counsel could have uncovered had he cross-examined the witnesses more extensively, or how it would have changed the outcome of his trial. Therefore, Applicant has failed to produce any evidence to substantiate his claim that there would have been a different outcome if counsel had been "more vigorous" in his cross-examination of the witnesses. As a result, this Court, this Court "can only speculate whether a 'better' cross examination would have helped [Applicant]." Skeen v. State, 325 S.C. 210, 216-17, 481 S.E.2d 129, 133 (1997).

Accordingly, this Court finds Applicant has failed to satisfy his burden of proving either prong of Strickland with regard to this allegation, and it is therefore denied and dismissed.

B. Failure to argue the lack of common plan or scheme

The only evidence presented on this allegation was Counsel's testimony. Counsel testified this argument was not supported by the facts. Applicant alleges Counsel should have argued there was not enough time to formulate a scheme or plan. However, the letter that Applicant wrote to his mother delineating the plans of the group to 'hit a lick' and rob the victims. Tr. p. 204. Counsel believed this was a weak argument and chose not to utilize it.

A decision on how to argue matter of trial strategy, and as such, this Court must presume that Counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler, 286 S.C. at 442, 334 S.E.2d at 814. In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland v. Washington, 466 U.S. 668, 689. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and the "[applicant] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. "Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Gilchrist v. State, 350 S.C. 221, 226–27, 565 S.E.2d 281, 284 (2002).

Applicant failed to prove his burden that there was a reasonable probability that if Counsel had argued differently there was a reasonable probability the result of the proceeding would have been different.

Here, Counsel articulated a valid reason for not employing the argument that there was not time to form a scheme or plan between codefendants. Accordingly, this Court finds

Applicant has failed to satisfy his burden of proving either prong of Strickland with regard to this allegation, and it is therefore denied and dismissed.

IV. DUE PROCESS

The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application. Butler, 286 S.C. at 111, 334 S.E.2d at 813.

Both the United States Constitution and South Carolina Constitution guarantee a criminal defendant's right to a trial "by an impartial jury." U.S. Const. amend. VI; S.C. Const. art. I, § 14. The Sixth Amendment of the United States Constitution guarantees a criminal defendant the right to a trial by an impartial jury, to notice of the charges against him, to confront any witnesses against him, and to the assistance of counsel for his defense. U.S. Const. amend. VI. Further, "the right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038 (1973). (the Due Process Clause of the Fourteenth Amendment affords criminal defendants a meaningful opportunity to present a complete defense).

The constitution entitles a criminal defendant to a fair trial, not a perfect one. United States v. Hasting, 461 U.S. 499, 508-09, 103 S.Ct. 1974 (1983) (given "the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and the Constitution does not guarantee such a trial."). State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999). While a criminal defendant has a constitutional right to a trial by a competent

and impartial jury; he does not have a constitutional right to a trial by any particular jury. Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007).

These constitutional guarantees do not guarantee that a prospective juror will be free of all preconceived notions relating to guilt or innocence. See Beck v. Washington, 369 U.S. 541, 82 S.Ct. 955 (1962) (holding that "it is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court"). Rather, it is the requirement that a jury's verdict "be based upon the evidence developed at the trial" that goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by a fair and impartial jury. Turner v. Louisiana, 379 U.S. 466, 472, 85 S.Ct. 546, 549 (1965). Thus, to fully safeguard this protection to a trial by an impartial jury, it is required that the jury render its verdict free from outside influences of whatever kind and nature." State v. Bryant, 354 S.C. 390, 395, 581 S.E.2d 157, 160 (2003).

This Court finds Applicant had a proper jury and a fair trial. This Court also finds that all jurors were present and accounted for the entirety of the trial judge's instruction on the law. Therefore, this Court denies and dismisses this allegation for the reasons set out below:

C. Temporary absence of jury panel member

The court reporter's revised transcript and the affidavits of the court reporter and prosecuting solicitor prove each member of the jury was present for the entirety of the trial judge's jury instruction. At the evidentiary hearing, Applicant showed that the trial transcript reflected a juror leaving the courtroom during a break and coming back two pages later, mid-jury instruction by the trial court. Applicant alleges this juror's lack of presence for a portion of the trial judge's instruction on the law violates his constitutional right to a competent twelve-

member jury. Counsel testified a juror left because she was crying and after she left the judge was talking to the courtroom for about five minutes. Applicant's father, Elijah Brown Sr., testified that the lawyers and judge were in a huddle when the absent juror returned. He also testified the judge was not speaking when the juror returned.

The State was advised of this allegation the morning of the evidentiary hearing. After the conclusion of the evidentiary hearing, the State made a motion to reopen the record. The State obtained an affidavit from the prosecuting solicitor, Amanda Haseldon, who testified she did not recall a juror being missing during the juror instruction and was confident that was not the case. The State also asked Rebecca Hill, the court reporter of the trial, to review the tapes and ascertain whether the parenthetical stating the juror re-entered during the trial judge's jury instruction was accurate. The court reporter reviewed the tapes and wrote an affidavit testifying there was a technical error. She testified the header containing the parenthetical in question was incorrectly moved to the wrong page, which made it appear as if the juror came back in the middle of the jury instruction. She testified she recalled the event in question and nothing was spoken on the record while the juror was out. She further testified the trial judge waited until the juror was returned to the panel to resume his jury instruction. This Court finds this testimony persuasive and credible. Therefore, this allegation was based on a technical error of the transcript and is denied and dismissed.

D. Juror was the mother of codefendant's friend

Applicant's allegation a juror was the mother of a person who gave his codefendant a ride the day of the event is mere speculation and irrelevant. The juror was never called to testify at the PCR hearing. Applicant stated he believed the juror was the mother of a friend of the

codefendant. Applicant testified he called a few people and found out the juror was the mother of a friend of his codefendant's. This is pure speculation and hearsay. No proof or testimony was offered. Furthermore, there is no proof that Applicant was prejudiced by this potential relationship. Without the juror's testimony as to her knowledge and mindset this Court cannot find prejudice. Neither this Court nor the Applicant knows whether this juror knew Applicant, his codefendant, or any testifying parties. The only record this Court has before it is that the juror did not stand up when asked if she had a relationship or prior knowledge of the applicable parties. The alleged daughter of the juror did not testify and was not involved in the case.

Mere speculation is not sufficient evidence on which to support a PCR allegation. "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, 629 S.E.2d 353, 357 (2006). See Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (holding PCR applicant was not entitled to relief where he failed to show how counsel's lack of preparation prejudiced him); See also Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (holding, where applicant alleged counsel was ineffective for failing to call certain witnesses, applicant's "mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice.") Applicant has presented mere speculation as to the relationship between a juror and a friend of his codefendant. Applicant's prejudice is also purely speculation as to that juror's knowledge of associated parties. This Court finds Applicant has failed to satisfy his burden to prove his due process right to a fair and impartial jury was impaired. Therefore, this Court denies and dismisses this allegation.

V. CONCLUSION

Based on the foregoing, this Court finds and concludes 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 Applicant must file and serve a notice of appeal within thirty (30) days from 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, his post-conviction relief attorney must serve and file a notice of appeal on Applicant's behalf. Applicant and his attorney are directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

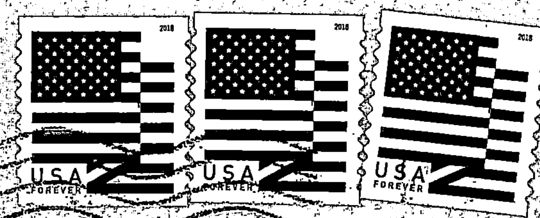
1. The above captioned application is **dismissed with prejudice**, and
2. Applicant shall remain in the custody of the South Carolina Department of Corrections.

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

R. FERRELL COTHRAN, JR.
Presiding Judge
Fourteenth Judicial Circuit

Manning, South Carolina

4036



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