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February 6, 2019

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

Re.: Al M. Green v. State
2016-CP-29-1099

Dear Mr. Shearouse:

Please find enclosed the original and one copy of the Notice of Appeal and Proof of Service on the above referenced case. Please file the original and mail the stamped copies back to me in the also enclosed self-addressed stamped envelope. I have also enclosed a copy of the Order Denying PCR that is being appealed. Please note that I have asked Appellate Defense to handle this appeal from here forward. Thank you and please contact me with any additional questions or concerns.

Sincerely Yours,

Nathan Sheldon
The Law Office of Nathan J. Sheldon

RECEIVED
FEB 11 2019
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECORDED

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

FEB 11 2019

S.C. SUPREME COURT

Brooks P. Goldsmith, Circuit Court Judge

Case No. 2016-CP-29-1099

State of South Carolina,

Respondent,

v.

Al Martinez Green,

Appellant.

NOTICE OF APPEAL

Al Martinez Green appeals the order of the Honorable Brooks P. Goldsmith dated August 29, 2018 denying his request for post-conviction relief. Appellant received written notice of entry of this order on February 1, 2019.

February 6, 2019



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LANCASTER COUNTY
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Brooks P. Goldsmith, Circuit Court Judge

Case No. 2016-CP-29-1099

State of South Carolina,

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PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Samuel L. Key with the Attorney General's Office by depositing a copy of it in the United States Mail, postage prepaid, on February 6, 2019 mailed to Post Office Box 11549, Columbia, South Carolina 29211-1549.

February 6, 2019



Nathan Sheldon
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803-909-9343
Attorney for Appellant

RECEIVED
FEB 11 2019
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
 COUNTY OF LANCASTER)
)
)
 Al Martinez Green, #359254,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 SIXTH JUDICIAL CIRCUIT

2016-CP-29-1099

ORDER OF DISMISSAL

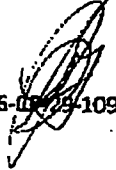
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 CLERK OF COURT
 LANCASTER, SC

This matter comes before the Court by way of an application for post-conviction relief filed on September 16, 2016, by Al Martinez Green (Applicant). Respondent made its Return on or about November 23, 2016. An evidentiary hearing into the matter was convened on July 18, 2018, at the Lancaster County Courthouse in Lancaster, South Carolina. Applicant was present at the hearing and represented by Nathan J. Sheldon, 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 Amy S. Raney, Esquire, Esquire also testified. This Court had before it a copy of the records of the Lancaster 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 Lancaster County Clerk of Court. Applicant was indicted by the

2016-CP-29-1099


July 2012 term of the Lancaster County Grand Jury for murder (2012-GS-29-0636). Amy Raney, Esquire, represented Applicant. On March 10-14, 2014, Applicant proceeded to trial before the Honorable R. Knox McMahon and a jury and was convicted as indicted. Judge McMahon sentenced Applicant to imprisonment for life without parole.

A timely Notice of Appeal was filed on Applicant's behalf. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence in an unpublished opinion. State v. Green, Op. No. 2016-UP-205 (S.C. Ct. App., filed May 11, 2016). The Remittitur was issued on May 27, 2016.

FACTUAL HISTORY

In January 2012, Jenika Jones (the murder victim) lived in a Lancaster County trailer park with her three minor children, ages four, two and one. Tr. pp. 216; 218-19; 221-26; 264-65. On the night of January 19, 2012, officers with the Lancaster County Sheriff's Office, responding to a dispatch for a home invasion at Jenika's residence, found her dead from a single gunshot wound to the head. Her minor children were also still in the house. Applicant along with several co-defendants were ultimately arrested and charged with Ms. Jones' death.

ALLEGATIONS

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

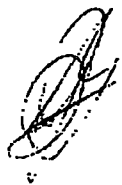
1. Ineffective assistance of counsel
 - a. "I was denied the right to effective assistance of "defense counsel" guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provision of the South Carolina Constitution. See Strickland v. Washington, 466 U.S. 668 (1984).
 - b. Defense counsel failed to object to the jury instruction concerning the "hand of one, hand of all theory."

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTARY HEARING



Applicant's Testimony

Applicant testified he was serving a life sentence in prison and his direct appeal had been denied by the South Carolina Court of Appeals. He testified the crime he was convicted of happened in 2012 and he went to trial for it in 2014 with his co-defendant. Applicant testified he was originally represented by Mark Grier, Esquire, but that he had Mr. Grier relieved because he did not think Mr. Grier was representing him properly. He testified after Mr. Grier was relieved, Trial Counsel took over his representation. Applicant testified Trial Counsel came to see him to let him know the State had extended a plea offer for thirty years for voluntary manslaughter which he turned down. He testified he wanted Trial Counsel to investigate his case and get alibi witnesses' statements for him. Applicant testified Trial Counsel attempted to locate witnesses to get statements but was unsuccessful in doing so. He testified Pete Skidmore was the investigator in his case and Mr. Skidmore met with him to discuss potential witnesses. Applicant testified Trial Counsel did not review the discovery in the case with him but provided it to him. He testified he wanted Trial Counsel to push for a continuance of his case until his alibi witnesses could be located. Applicant testified the victim was shot in her house while her three children were there. He testified he had lived in a residence where one of the three children had lived as well and he wanted Trial Counsel to call the child because they would have recognized him had he been present during the crime. Applicant testified he also got a statement the child made in his discovery. He testified Trial Counsel did not call the child to testify because the strategy potentially could have backfired. Applicant testified there was no direct evidence of him committing the crime other than his co-defendant testifying. He testified there was DNA evidence that was tested and came back unknown in his case that should have been objected to by Trial Counsel.

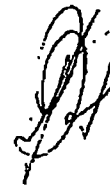


On cross-examination, Applicant testified he met with Trial Counsel four or five times during her representation. He testified Trial Counsel went over the discovery in the case with him which included the child's statement. Applicant testified Trial Counsel wanted him to plead guilty but he rejected the plea offer because he wanted a trial. He testified Trial Counsel told him they had zero chance of winning at trial. Applicant testified he decided against testifying at his trial. He testified the competency of the child he wanted to testify at trial was an issue. Applicant testified he could not remember if Trial Counsel talked to him about the DNA evidence.

Trial Counsel's Testimony

Trial Counsel testified that the victim in the case had three small children who were present in the home when she was murdered. She testified the oldest of the children, a four year old, made a statement to the police about who shot his mother. Trial Counsel testified during pre-trial proceedings she attempted to show the child's statement was an excited utterance. She testified the trial judge ruled that if they could establish the statement was an excited utterance it could potentially come in but a proper foundation would have to be laid. Trial Counsel testified there was also an issue of competency in regards to the four year old potentially testifying. She testified she explained to Applicant that if the child did testify as a witness it would be hard to question the child vigorously if she needed to. Trial Counsel testified she also explained to Applicant that the statement by the four year old was not that favorable to him and since he had lived with the child for a period of time, the child could possibly get on the stand and not remember or implicate him. She testified she had discussions with Applicant and their private investigator about not calling the child as a witness. Trial Counsel testified ultimately the child's statements were not introduced.

Trial Counsel testified that Applicant was only willing to plead guilty if the State offered



a plea of five years or less. She testified Applicant wanted to go to trial and he told her if he lost he would just appeal. Trial Counsel testified there were several alibi witnesses who Applicant wanted her to locate and talk to but none of them turned out to be good alibi witnesses. She testified Applicant named his mother, brother and a man named Gary as his alibi witnesses. Trial Counsel testified she met with his mother who told her Applicant left her house that night and she went to bed early. She testified Applicant's brother told her he was having sex in his room and could not place Applicant at the house. Trial Counsel testified she tried to track down Gary with the help of her investigator but found out Gary did not actually exist. She testified she thought the DNA evidence used at trial was helpful to Applicant as it did not implicate Applicant. Trial Counsel testified one of Applicant's co-defendant's testimony at trial was extremely compelling and she believed his testimony was what helped convict Applicant given the case was heavy circumstantial evidence case. Trial Counsel testified Applicant could not say with certainty what the four year old would say if he testified at trial concerning identification of the shooter.

On cross-examination, Trial Counsel testified she had practiced law in South Carolina for ten years and had practiced criminal law exclusively since 2008. She testified she was appointed to represent Applicant. Trial Counsel testified the evidence to be presented at trial was that the day before the murder took place, Applicant and his co-defendants talked about doing a robbery. She testified the facts presented were that one of Applicant's co-defendants was the shooter and another was the driver with Applicant agreeing to participate. Trial Counsel further testified the evidence that was going to be presented at trial was that Applicant intended to do a robbery but his co-defendant shot the victim. She testified she met with Applicant ten times while he was in prison with the meetings averaging around two hours in length. Trial Counsel testified she



discussed with Applicant the charges he was facing, the possible sentences, his constitutional rights and the State's burden of proof. She testified she did a thorough investigation as she had an order from the court approving funds to hire a private investigator.

Trial Counsel testified it was strategy not to call the four year old as it was unclear what a young child could potentially say on the stand. She testified the DNA evidence did not hurt Applicant in that it did not come back as a match to him. Trial Counsel testified she discussed with Applicant about him testifying but he told her he would be too nervous to testify. She testified it never appeared to her that Applicant had any issues comprehending their conversations. Trial Counsel testified Applicant rejected the plea offer from the State.

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. These credibility findings have been applied to the Court's findings and conclusions set forth below. 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.

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. This Court finds as follows on the following grounds presented by Applicant at the evidentiary hearing:

Ineffective Assistance of Counsel

Failure to Investigate/Failure to call alibi witnesses

Applicant alleges Trial Counsel was ineffective for failing to investigate his case. To show ineffective assistance in this regard, Applicant must present evidence to show what counsel could have discovered had he more fully investigated. Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 772 (1998) ("Respondent failed to present any evidence of what counsel could have



discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial.”). 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)). Applicant has failed to show what beneficial information could have been discovered had Trial Counsel done more investigation. Even so, Trial Counsel testified credibly that she reviewed all of the discovery with Applicant and obtained a private investigator to investigate Applicant’s case. This court finds Trial Counsel and the private investigator met with Applicant a number of times to discuss his case and any potential leads. This Court finds Trial Counsel’s investigation was beyond reasonable. Therefore, Applicant has failed to meet his burden to prove Trial Counsel was ineffective. This allegation is denied and dismissed with prejudice.

Further, Applicant alleges Trial Counsel was ineffective for failing to call alibi witnesses at trial. Applicant testified he wanted Trial Counsel to investigate his case and get alibi witnesses’ statements for him. Applicant testified Trial Counsel attempted to locate witnesses to get statements but was unsuccessful in doing so. Trial Counsel testified there were several alibi witnesses who Applicant wanted her to locate and talk to but none of them turned out to be good alibi witnesses. She testified Applicant named his mother, brother and a man named Gary as his alibi witnesses. Trial Counsel testified she met with his mother who told her Applicant left her house that night and she went to bed early. She testified Applicant’s brother told her he was having sex in his room and could not place Applicant at the house. Trial Counsel testified she tried to track down Gary with the help of her investigator but found out Gary did not actually exist. This court finds Trial Counsel was not ineffective for not calling Applicant’s alibi witness



at trial. This court finds Trial Counsel tracked these witnesses down, talked to them and determined they could offer no actual alibi defense to Applicant. This Court finds Trial Counsel's actions were more than reasonable in locating and deciding not to call the witnesses Applicant provided. 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. The allegation is denied and dismissed.

Failure to Call a Witness

Applicant alleges Trial Counsel was ineffective for failing to call the four year old child of the victim as a witness. Applicant testified the victim was shot in her house while her three children were there. He testified he had lived in a residence where one of the three children had lived as well and he wanted Trial Counsel to call the child because the child would have recognized him had he been present during the crime. He testified Trial Counsel did not call the child to testify because the strategy potentially could have backfired. Trial Counsel testified the oldest of the children, a four year old, made a statement to the police about who shot his mother. Trial Counsel testified during pre-trial proceedings she attempted to show the child's statement was an excited utterance. She testified the trial judge ruled that if they could establish the statement was an excited utterance it could potentially come in but a proper foundation would have to be presented. Trial Counsel testified there was also an issue of competency in regard to the four year old potentially testifying. She testified she explained to Applicant that if the child



did testify as a witness it would be hard to question the child vigorously. Trial Counsel testified she also explained to Applicant that the statement by the four year old was not that favorable to him and since he had lived with the child for a period of time, the child could possibly get on the stand and not remember him or implicate him. She testified she had discussions with Applicant and their private investigator about not calling the child as a witness. Trial Counsel testified ultimately the child's statements were not introduced.

This court finds Trial Counsel was not ineffective for not calling the four year old as a witness as this decision was a strategic one. Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Here, Trial Counsel explained the pros and cons of calling the child as a witness to the Applicant. Ultimately, Trial Counsel choose not to pursue this strategy considering the negative consequences of the child testifying. 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. The allegation is denied and dismissed.

Failure to object to DNA evidence

Applicant alleges Trial Counsel was ineffective for failing to object to the introduction of DNA evidence at trial. Applicant testified there was no direct evidence of him committing the crime other than his co-defendant testifying. He testified there was DNA evidence that was tested and came back unknown in his case that should have been objected to by Trial Counsel. Trial Counsel testified she thought the DNA evidence used at trial was helpful to Applicant as it did not implicate Applicant. She testified the DNA evidence did not hurt Applicant in that it did not come back as a match to him. This court finds Trial Counsel was not ineffective regarding this allegation. This court finds based on the evidence presented at the evidentiary hearing and a review of the record that no information presented to the jury concerning DNA evidence contained a match to Applicant’s actual DNA. This court cannot think of any reason for Trial Counsel to object to the DNA evidence considering it did not harm Applicant in his case. 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. The allegation is denied and dismissed.

CONCLUSION

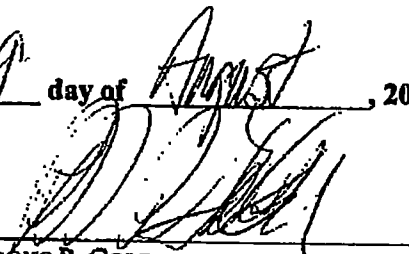
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) 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 PCR. Rule 71.1(g), SCRCR provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

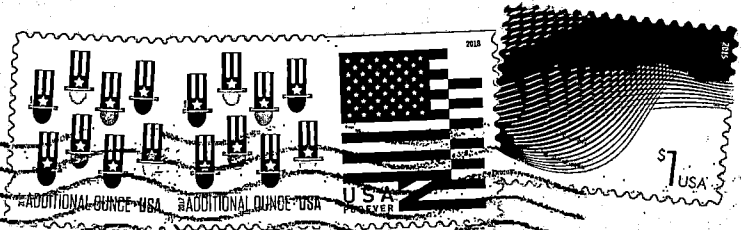
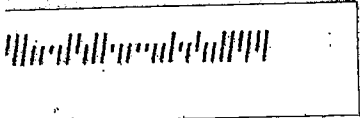
1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 29 day of August, 2018.



BROOKS P. GOLDSMITH
Presiding Judge
Sixth Judicial Circuit

_____, South Carolina



Charlotte P&DC NC 282
WED 06 FEB 2019 PM

aldon

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