WALLER
LAW GROUP

April 26, 2019

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

Re: Jeffrey Thomas Brown vs. State of South Carolina
C/A No: 2015-CP-21-0904

Dear Mr. Shearouse:

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

I was appointed to represent Mr. Brown in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-520-7278.

Sincerely,

Jonathan D. Waller

Cc: Lindsey A. McCallister, South Carolina Office of Attorney General

Enclosures

Waller Law Group
1116 Blanding Street, Suite 2B
Columbia, SC 29201

803-520-7278
www.wallerlawgroup.com
jonathan@wallergroupsc.com

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
George M. McFaddin, Jr., Circuit Court Judge

2015-CP-21-0904

Jeffrey T Brown, # 338329,

Appellant,

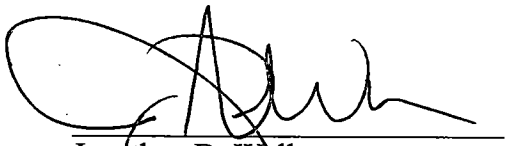
v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Jeffrey T Brown, # 338329, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed April 22, 2019, issued by the Honorable George M. McFaddin, Jr., Presiding Judge, Twelfth Judicial Circuit.



Jonathan D. Waller
Waller Law Group
SC Bar No.: 76290
1116 Blanding Street
Suite 2B
Columbia, SC 29201
803-520-7278 (phone)
jonathan@wallergroupsc.com
ATTORNEY FOR PETITIONER

April 26, 2019

Other Counsel of Record:
Lindsey A. McCallister, Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3319

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
George M. McFaddin, Jr., Circuit Court Judge

2015-CP-21-0904

Jeffrey T Brown, # 338329,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

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

Lyndsay Murray

April 26, 2019

STATE OF SOUTH CAROLINA COUNTY OF FLORENCE	IN THE COURT OF COMMON PLEAS FOR THE TWELFTH JUDICIAL CIRCUIT
Jeffrey Thomas Brown, #338329, Applicant, v. State of South Carolina, Respondent.	C.A. No. 2015-CP-21-0904 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Jeffrey Thomas Brown (Applicant) on March 27, 2015, and amended February 1, 2018. Respondent made its Return and Motion for a More Definite Statement on September 7, 2016. An evidentiary hearing into the matter was convened on April 6, 2018, at the Florence County Courthouse before the undersigned. Jonathan D. Waller, Esquire, represented Applicant. Lindsey A. McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. Applicant's original counsel at trial, Daniel Jordan, Esquire, also testified, along with William "Jay" Jordan (Jay Jordan), Esquire, who represented Applicant's codefendant. This Court had before it a copy of the records of the Florence County Clerk of Court and the South Carolina Department of Corrections, the PCR application, Respondent's Return, the trial transcript, and Applicant's appellate records.

PROCEDURAL HISTORY

Applicant is incarcerated in the South Carolina Department of Corrections pursuant to the Florence County Clerk of Court's orders of commitment. Applicant was indicted at the March 2013 term of the Florence County Grand Jury for one count of attempted armed robbery (2013-GS-21-0320).[1] Applicant was represented by Daniel T. Jordan (Counsel), Esquire. At a jury trial before the Honorable D. Craig Brown on September 19, 2013, Applicant was convicted of one count of attempted armed robbery. Judge Brown sentenced him to fifteen years' imprisonment.

Applicant filed a timely notice of appeal. The appeal was perfected by Wanda H. Carter, Esquire, of the South Carolina Commission on Indigent Defense - Appellate Defense Division pursuant to Anders v California, 378 U.S. 738, 87 S. Ct. 1396 (1967). The South Carolina Court of Appeals affirmed Applicant's conviction on February 4, 2105. State v. Brown, Op. No. 2015-UP-062 (S.C. Ct. App. 2015). The remittitur was returned to the circuit court on February 20, 2015.

ALLEGATIONS

In his original application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel:
    a. "Strickland v. Washington."
2. "Motion for Reconsideration"

Through counsel, Applicant amended his application on February 1, 2018, alleging further claims of ineffective assistance of counsel. Specifically, Applicant alleges:

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[1] Applicant was also indicted on three counts of breaking and entering a motor vehicle and one count of second-degree burglary. Those charges were ultimately dismissed.

1. Counsel was ineffective for failing to disclose a potential conflict of interest, based on a familial relationship, with counsel for Applicant's cooperating codefendant;
2. Counsel was ineffective for failing to properly prepare for Applicant's trial, specifically by not visiting Applicant for the five months prior to trial, while Applicant was incarcerated in the Department of Corrections;
3. Counsel was ineffective for failure to object to impermissible hearsay testimony during the direct examination of Ron Douglas;
4. Counsel was ineffective for failure to object to impermissible comments on Applicant's right to remain silent during the direct examination of Ron Douglas;
5. Counsel was ineffective for failure to file applicable post-trial motions.

At the call of the case, counsel for Applicant clarified the conflict of interest allegation was based on a professional relationship, not a familial relationship. Additionally, counsel for Applicant stated Applicant was going forward only on the claims contained in the amended application. Therefore, this Court finds Applicant has abandoned all other allegations to the extent the allegations in the original application can be construed as separate issues from those contained in the amendment. Those allegations are waived and are hereby denied and dismissed with prejudice.

SUMMARY OF FACTS ADDUCED AT TRIAL

Around 4:45 a.m. on the morning of October 31, 2012, a man entered the Kangaroo Express gas station in Johnsonville, armed with a knife. Tr. pp. 41-43. One of the clerks on duty, Teresa Swanson (Swanson), testified the man demanded she put money into the plastic bag he was carrying. Tr. pp. 43-44. Both Swanson and a second clerk, Michael Christian (Christian), recognized the man as a customer Christian had waited on about an hour earlier. Tr. pp. 48, 59. Swanson hit the store's panic button and grabbed a club from under the counter, causing the man to flee. Tr. p. 45. Swanson and Christian followed the man outside and watched him get into the passenger's side of a white pickup truck, which then drove off. Tr. pp. 47, 61-62.

Swanson identified Applicant on the surveillance video from inside the store, and the investigating officer testified she provided law enforcement with Applicant's name. Tr. pp. 48, 68. Swanson and Christian also identified Applicant as the attempted armed robber at trial. Tr. pp. 46, 61. Swanson testified she noticed Applicant in the store again two days after the attempted robbery, and she alerted law enforcement. Tr. pp. 49-50. When law enforcement placed Applicant under arrest, he had a pocketknife in his pocket. Tr. pp. 69-70.

Applicant's codefendant, his stepbrother, Matthew Venters (Venters), also testified for the State and identified Applicant as the robber. Tr. pp. 81-82. Venters admitted to being the getaway driver of the white pickup truck and testified he knew Applicant was planning to rob the Kangaroo when he dropped Applicant off there. Tr. pp. 80-82.

SUMMARY OF TESTIMONY AT EVIDENTIARY HEARING

Applicant testified he was arrested for the attempted armed robbery, and Counsel was appointed to represent him. Applicant testified he did not speak with Counsel while he was in the detention center, and then he was sent to Turbeville Correctional Institution for ten months on a YOA violation. Applicant testified he was notified of Counsel's appointment while at Turbeville, but Counsel never came to visit him. According to Applicant, he only met with Counsel on the day of trial, and they did not exchange any letters or phone calls. Applicant testified he thought he was at court because the State had made a plea offer of a cap of ten years, which he rejected.

Applicant testified he "went in blind" to trial and did not know what his defense would be. Applicant further testified he wanted Counsel to call alibi witness and for the surveillance videos

to be suppressed. Applicant testified he asked about the video being suppressed because of the date and time stamp, but the first time he actually saw the video was during trial.

Finally, Applicant testified he was not aware his codefendant was represented by another attorney in Counsel's firm, and he was never asked to waive any potential conflicts. Applicant also testified Counsel did not file any post-trial motions on his behalf.

Jay Jordan, who represented Venters, the codefendant, testified for the State and explained the relationship between himself and Counsel. According to Jay Jordan, Counsel had been practicing with him for about a year at the time of this case. Both Jay Jordan and Counsel had contracts with Florence County's Public Defender's Office, and both also had a private practice as well. Jay Jordan testified neither he nor the firm paid any money to Counsel for this case, all money came from Florence County, and he and Counsel received separate W2s – one from Florence County and one from the private practice. Jay Jordan testified he did not exert any supervisory capacity over Counsel on this case, the firm did not keep public defender files in the office, and all cases were kept separate. Finally, Jay Jordan testified they did not discuss these cases with each other.

Counsel testified he met with Applicant multiple times at court appearances and went to Turbeville to speak with him. Counsel testified Applicant was brought back to Florence a week before trial, and they met to go over the evidence, possible defenses, and to discuss the State's plea offer. Counsel further testified he informed Applicant his case would be on the trial roster, but Counsel only found out it was being called for trial the day before. Counsel testified he immediately went to see Applicant, and he was allowed to bring the surveillance video to show

Applicant as well. Counsel testified Applicant was aware of the existence of the surveillance videos and that the clerks would identify him when he decided he wanted to go to trial. Counsel testified he and Applicant discussed the possibility of suppressing the videos, but the State laid the proper foundation for their admission during trial. Counsel also testified Applicant provided the names of potential witnesses, and the Public Defender's Office investigator, Thomas McKenzie, tracked those people down, but ultimately none of them could offer helpful testimony. Counsel testified he moved for a continuance in order to continue to look for witnesses, but the motion was denied. According to Counsel, Applicant did not give him the names of any potential witnesses until the day before trial, even though they had met several times previously, and Applicant had an opportunity to do so earlier.

Counsel further testified to the strategy behind some of his decisions at trial. Counsel testified Applicant's theory was he was being "railroaded" because he had been in trouble before, and his stepbrother pointed the finger at him to get a deal. Counsel testified he did not object to the officer's testimony the store clerk informed him of Applicant's name because the clerk had already referred to Applicant by his given name during her own testimony. Counsel also explained he did not object to the officer's testimony regarding Applicant's decision not to give a statement because part of the defense theory was that law enforcement jumped to conclusions about Applicant's guilt, and he felt the testimony helped Applicant's argument.

Finally, Counsel testified he did not discuss his relationship with Jay Jordan with Applicant because he did not believe a conflict existed. Counsel testified he was not even aware Jay Jordan was the codefendant's attorney until the morning of trial, and they never had any conversations

about the two cases. Counsel also testified he and Jay Jordan created a "firewall" around their respective cases and had a policy not to go into the other person's files.

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 PCR hearing. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

Applicant alleges he received ineffective assistance of counsel. 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, Applicant must prove "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 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 plea counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove 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, 466 U.S. at 688 (1984)). 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." Id. at 117-18, 386 S.E.2d at 625.

Further, the standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 668.

1. Potential conflict of interest

Applicant alleges Counsel had a conflict of interest because he had a private practice arrangement with the attorney who represented Applicant's testifying codefendant. Applicant argues Counsel had an incentive to keep Jay Jordan happy in order to continue their private practice agreement. This Court disagrees.

"An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007). The South Carolina Supreme Court has further stated that a conflict of interest occurs when "a defense attorney places himself in a situation inherently conducive to divided loyalties." Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008). Until a defendant shows his counsel actively represented conflicting interests, he has not established the constitutional predicate for a claim of ineffective assistance of counsel. Langford v. State, 310 S.C. 357, 359, 426 S.E.2d 793,

795 (1993) (citing Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)). "The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." State v. Gregory, 364 S.C. 150, 152-53, 612 S.E.2d 449, 450 (2005).

Counsel testified he did not believe his practice arrangement constituted a conflict of interest, and both Counsel and Jay Jordan testified they did not discuss these cases with each other. Further, although they practiced in the same firm together, Jay Jordan had no supervisory capacity over Counsel on this case, and each were paid for these cases via their separate contracts with Florence County, not with funds from the private practice. Further, the Court finds Applicant was unable to articulate any prejudice which resulted from this alleged conflict of interest. Therefore, this Court finds in this instance, there was no possible harm to Applicant, and there was no collusion or sharing of information between Counsel and Jay Jordan which could have prejudiced Applicant. Accordingly, this allegation is denied and dismissed.

2. Deficient investigation and trial preparation

Applicant alleges Counsel rendered deficient investigation and trial preparation. Specifically, Applicant alleges Counsel failed to interview potential witnesses, and failed to contest the State's introduction of the Kangaroo surveillance video. For the reasons stated below, the Court disagrees.

"[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) (reversed on other grounds by Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014)). 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), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). To establish counsel failed to adequately prepare for trial, Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. See Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (finding trial counsel not ineffective for failing to timely request discovery because the contents of the documents were not presented at the PCR hearing); Moorehead, 329 S.C. at 334, 496 S.E.2d at 417 (holding trial counsel's failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result); Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing applicant would have had a defense with additional time to prepare for trial); Skeen v. State, 325 S.C. 210, 217, 481 S.E.2d 129, 133 (1997) (finding applicant was not entitled to relief where no evidence was presented at the PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

Here, Applicant has not presented any evidence, witnesses, or defense theory he was unable to present at trial due to Counsel's alleged deficiency. See, e.g., Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) ("This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. . . ."). Counsel testified Applicant gave him the names of potential witnesses the day before trial. This Court finds Applicant had

ample opportunity to provide Counsel with these witnesses well in advance of trial, and Applicant failed to do so. Nevertheless, Counsel testified the investigator was able to speak with all of them, but none proved helpful to Applicant's defense. Further, Counsel testified he played the surveillance video for Applicant, and the State was able to lay a proper foundation for its admission at trial. Counsel also testified Applicant was aware the store clerks would identify him.

Therefore, this Court finds Counsel was not deficient as he undertook a reasonable investigation based on the available evidence, the defense theory of the case, and the late notice regarding potential witnesses. The Court also finds Applicant has failed to meet his burden of proof regarding prejudice because he did not present the testimony of any witnesses at the evidentiary hearing to establish an alibi or other viable defense. Because Applicant has failed to meet his burden of proof as to either deficiency or prejudice, Counsel was not ineffective, and this allegation shall be denied and dismissed.

3. Missed objections at trial

In this case, Applicant alleges Counsel missed objections at trial which prejudiced Applicant. For the reasons stated below, this Court disagrees.

"Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Strickland, 466 U.S. at 690. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). 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, 466 U.S. at 688-689. "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).

Counsel testified he did not believe the testimony regarding the store clerk giving Applicant's name to law enforcement was objectionable because she identified him by name earlier in the trial. Further, he testified he felt the officer's testimony regarding Applicant's decision not to give a statement was helpful to Applicant's theory of the case because it showed law enforcement jumped to conclusions about Applicant's guilt.

The Court finds Counsel's reasoning sound, and will not, in hindsight, second guess Counsel's tactic not to object. See Stone v. State, 419 S.C. 370, 383, 798 S.E.2d 561, 568 (2017) ("Trial counsel is repeatedly required during any trial. . . to make split-second decisions on many subjects, including whether to object to testimony. There are a variety of reasons counsel may soundly choose not to make such an objection, including the reality that not all evidence offered by the State is harmful to the defendant."). The Court also finds Applicant was not prejudiced because neither of the instances he now alleges were deficient caused harmful testimony to be admitted. This allegation is therefore denied and dismissed.

4. Post-trial motions

Applicant further alleges Counsel was ineffective for failing to make any post-trial motions. However, Applicant did not present any testimony as to this issue during the hearing, and he has failed to establish how he was prejudiced by this alleged failure. Further, Counsel filed a timely notice of appeal, and an appeal was perfected on Applicant's behalf. Therefore, this Court finds Counsel was not deficient, nor was Applicant prejudiced by the lack of post-trial motions. Because this Court finds Counsel was not ineffective, the allegation shall be denied and dismissed.

CONCLUSION

Based on all 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. Counsel was not deficient in any manner, nor was Applicant prejudiced by his representation. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED.

GEORGE M. MCFADDIN, JR
Presiding Circuit Court Judge
Twelfth Judicial Circuit

April 16, 2019

FILED
2019 APR 22 AM 10:41
DORIS FOULOS O'HARA
CCCP & GS
FLORENCE COUNTY, SC

CERTIFIED: A TRUE COPY
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.