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JUL 22 2019

S.C. SUPREME COURT

July 16, 2019

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

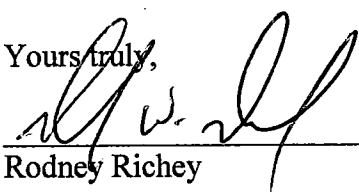
RE: Terry Cooper vs. The State of South Carolina
Case No: 2018-CP-42-0868

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and an affidavit of service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Please clock and file the copies and return them to me. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,



Rodney Richey

RWR/
Enclosures
cc: Johnny James, Esquire

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
HONORABLE THOMAS A. RUSSO
2018-CP-42-0868

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JUL 22 2019
S.C. SUPREME COURT

TERRY COOPER, SCDC# 319549

APPELLANT,

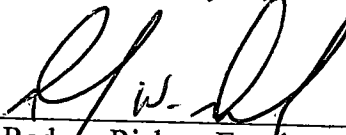
vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Terry Cooper appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Thomas A. Russo, Circuit Judge on March 12, 2019 an Order issued on June 26, 2019 and filed on July 12, 2019. The Appellant received notice of the judgment on July 15, 2019.


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Other Counsel of Record:
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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
HONORABLE THOMAS A. RUSSO
2018-CP-42-0868

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S.C. SUPREME COURT

TERRY COOPER, SCDC# 319549

APPELLANT,

vs.

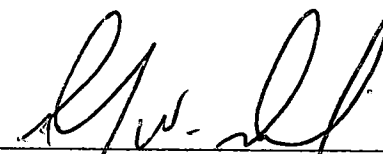
STATE OF SOUTH CAROLINA,

RESPONDENT.

AFFIDAVIT OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on July 16, 2019, addressed to their attorney of record, Johnny James, Esquire Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: July 16, 2019



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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

) IN THE COURT OF COMMON PLEAS
) FOR THE SEVENTH JUDICIAL CIRCUIT
)

Terry Cooper,
S.C.D.C. No. 118061,

) Case No.: 2018-CP-42-00868
)

Applicant,

) **ORDER OF DISMISSAL**
)

v.

State of South Carolina,

Respondent.

This matter comes before the Court by way of an application for post-conviction relief filed by Terry Cooper ("Applicant") on March 12, 2018. Respondent made its return on or about August 1, 2018. The Court convened an evidentiary hearing into the matter on Thursday, March 7, 2019, at the Spartanburg County Judicial Center in Spartanburg, South Carolina. Applicant was present at the hearing and represented by Rodney W. Richey, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Michael D. Morin, Esq. ("Counsel"), and Solicitor Barry J. Barnette also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's direct appeal records (including the complete trial transcript), and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to order of commitment of the Spartanburg County Clerk of Court. Applicant was indicted at the April

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2015 term of the Spartanburg County Grand Jury for bank robbery (2015-GS-42-03353).

Michael D. Morin, Esq. represented Applicant, and Barry J. Barnette, Esq., Solicitor for the Seventh Judicial Circuit, prosecuted the case. On March 14, 2016, Applicant proceeded to trial before the Honorable J. Derham Cole and a jury. The jury found Applicant guilty as indicted on March 15, 2016. Judge Cole sentenced Applicant to imprisonment for a term of 28 years.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Taylor D. Gilliam, Esq. filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967), which offered the following issue:

Whether the trial judge erred in admitting Appellant's statement to law enforcement where the State could not prove by a preponderance of the evidence that Appellant's statement was knowingly, intelligently, and voluntarily made since evidence suggested Appellant was under the influence of intoxicating medications?

The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. State v. Cooper, Op. No. 2017-UP-390 (S.C. Ct. App. filed Oct. 18, 2017). The Remittitur was issued on December 21, 2017.

Present Application

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

1. "Ineffective Assistance of Counsel"
 - a. "Trial counsel fail to file motion to have Applicant mentally evaluated whenever he was well aware that his client was a mentally ill defendant."
2. "Prosecutorial Misconduct"
 - a. "Prosecutor Barry Barnette fail[ed] to produce information that was requested and applicant['s] counsel fail to filed motion to compel any and all evidence that the prosecutor [held] back."
3. "Trial judge committed error of law"
 - a. "Trial judge erred in admitting applicant['s] statement to law enforcement where the State could not prove by a preponderance of evidence that

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applicant['s] statement was knowingly intelligently and voluntarily made since evidence suggested applicant was under the influence of intoxicating medications.”

Applicant requests relief as follows:

- “reversal of [his] conviction and dismissal of indictment and also [to] replace [a] watch that S.C.D.C. took.”

At the evidentiary hearing, Applicant proceeded forward only on the above allegations of ineffective assistance of counsel and prosecutorial misconduct.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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.” Butler, 286 S.C. 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

“[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Butler, 286 S.C. at

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442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). “Judicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). “[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

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, 386 S.E.2d at 625 (citing Strickland, 466 U.S. 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 (citing Strickland, 466 U.S. at 694).

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. Strickland, 466 U.S. at 696. 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.

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if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id. at 696-97.

1. Failure to Subject Applicant to Mental Evaluation

The Court finds no merit in Applicant's contention that Counsel was ineffective for failing to have him professionally evaluated for his mental health issues. "Due process of law prohibits the conviction of a person who is mentally incompetent." Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 595 (1992). An accused is competent to stand trial if he or she has sufficient capability to consult with his or her lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings against him. Id., 308 S.C. at 232, 417 S.E.2d at 596. "The focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the *ability* to understand the proceedings." Garren v. State, 423 S.C. 1, 14, 813 S.E.2d 704, 711 (2018) (quoting Godinez v. Moran, 509 U.S. 389 (1993)).

As to the deficiency prong under Strickland, an attorney may reasonably rely upon his or her own perceptions of a defendant in determining whether or not their client should be mentally evaluated. Jeter, 308 S.C. at 233, 417 S.E.2d at 596. When establishing Strickland prejudice in the context of counsel's failure to request a mental competency evaluation, the applicant need only show a reasonable probability that he was incompetent at the time of the original proceeding. Garren, 423 S.C. at 12, 813 S.E.2d at 710 (citing Ramirez v. State, 419 S.C. 181, 217, 795 S.E.2d 841, 845 (2017)). As is the case with any other allegation that a defense attorney failed to adequately investigate some matter, an applicant must present some proof of identifiable mental health issues which undermine his or her competency; mere speculation and conjecture by the applicant is insufficient to establish prejudice. Id., 423 S.C. at 13-14, 813 S.E.2d at 711.

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An applicant alleging incompetence *in fact* must show by a preponderance of the evidence that he was incompetent at the time of his original proceedings. Id., 423 S.C. at 16, 813 S.E.2d 704, 713; Hall v. Catoe, 360 S.C. 353, 358, 601 S.E.2d 335, 338 (2004). If an applicant claims he was rendered incompetent due to medication, he or she must show that his or her mental faculties were so impaired by drugs during the original proceedings that he or she was incapable of full understanding of the proceedings. Garren, 423 S.C. at 15, 813 S.E.2d at 712 (quoting United States v. Truglio, 493 F.2d 574, 578 (4th Cir. 1974)). "A PCR court must consider 'objective data' about the nature and effect of the medication the defendant had taken and evaluate whether such medication 'had the capability to produce a sufficient effect on his mental faculties to render him incompetent[.]'" Id. (quoting United States v. Damon, 191 F.3d 561, 565 (4th Cir. 1999)).

At trial, Applicant testified *in camera* during a Jackson v. Denno hearing regarding the conditions of his interrogation. (R. 49-76). Applicant testified that he told law enforcement he was "up under mental health observation and everything." (R. 52, ll. 2-7). Applicant recalled taking Remeron,¹ Seroquel, and Neurontin. (R. 52, ll. 5-11). Applicant explained the medications were for depression, nerves, and anxiety. (R. 52, ll. 12-17). On cross-examination during the Denno hearing, Applicant asserted that at the time of his arrest he was on his way to "mental health on Dewey Avenue" to pick up a prescription. (R. 59-60). Applicant conceded law enforcement retrieved insulin for him, but denied being provided his mental health medications. (R. 60, ll. 9-21). Pressed by the State, Applicant listed his prescribed medications in full, including the three previously mentioned, insulin, aspirin, and unidentified blood pressure medication he couldn't name "because I'm on so much medication." (R. 60-62). Applicant

¹ The trial transcript reflects Applicant's pronunciation of the drug as "Ramrod," but the Court is aware of no such medication. The Court infers from Applicant's claim of depression that he is referring to Remeron, which is an antidepressant.

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explained he had been on mental health medication since he was eight years old, that he had previously attempted suicide by running out in front of a tractor-trailer, and that if provided a gun he would "blow my own brains out right here." (R. 62, ll. 15-25). Pressed on his prior convictions, Applicant testified he could remember them, then explained that without his medication he would "act a certain way." (R. 63-64). After a lunch break prompted by Applicant's complaint of a headache, the State further inquired as to Applicant's medications during prior crimes and proceedings. (R. 67-73). Applicant ultimately conceded that law enforcement got all of his medications. (R. 73-76). Applicant concluded his testimony and the trial court promptly found his statement to law enforcement was freely and voluntarily made. (§. 77, ll. 6-12).

At the evidentiary hearing, Applicant testified he and Counsel discussed his case, but never discussed the possibility of a mental health evaluation. Applicant asserted he suffered from mental health problems at the time and that he was diagnosed with major depression. Applicant admitted that he never told Counsel about his mental health issues, but testified he told law enforcement at the time of his arrest. Applicant noted he was diabetic, and that his confession to law enforcement was influenced by the medications he was taking at the time. Applicant claimed he was taking Remeron and Seroquel, but never told Counsel about the medications. Applicant recalled struggling with mental health issues since he was eight years old. Applicant opined that, had the jury known of his issues, the trial could have turned out differently. However, on cross-examination, Applicant could not articulate what sort of mental health evaluation he needed, and admitted that his condition probably had no impact on his memory.

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Counsel testified he became aware Applicant was on medications and that, as a result, he obtained from Spartanburg Mental Health some twenty-six pages of records. Counsel recalled the records revealed no memory issues or hallucinations, and were generally not helpful. Counsel testified that Applicant was able to talk to him and assist at trial, and gave no indication of any confusion during the course of his representation. Counsel testified that he perceived no memory issues in Applicant, and perceived nothing in Applicant's conduct to prompt further investigation into Applicant's mental health. Counsel confirmed that he and Applicant never really discussed his mental health.

The Court finds Applicant has failed to meet his burden of proof as to this allegation. First, Applicant presents *no* objective evidence in support of his claimed mental health issues, or that the medications he was prescribed were such that they could have rendered him incompetent at the time of trial. Second, there is no sign of any insanity defense, as Applicant does not assert he was unable to control himself, but rather that he is innocent. Third, Counsel's credible testimony demonstrates that he reasonably relied upon his own perceptions of Applicant and perceived no reason to investigate Applicant's competence to stand trial. To the extent Counsel did have a reason to investigate Applicant's mental health, he did so by obtaining records from Spartanburg Mental Health, which he found to be unhelpful. Fourth, Applicant never shared with Counsel his concerns regarding his own mental health. Fifth, as appears to have been indicated by Applicant during the Denno hearing, the medications he was prescribed served to make him more lucid, not less. Sixth, the trial record, alongside this Applicant's conduct at the evidentiary hearing, show a lucid, cogent individual who was well aware of his surroundings, understood the proceedings, and was amply capable of assisting in them. Altogether, this Court can find absolutely no basis to even speculate as to Applicant's competence—he is and was

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clearly competent—or any reason for Counsel to have investigated the subject further.

Accordingly, Applicant's request for relief upon this ground is DENIED.

B. Brady Violation

The Court finds Applicant's allegation that the State failed to disclose evidence in its possession in violation of Brady v. Maryland, 373 U.S. 83 (1963), such that he should be granted a new trial is without merit because the evidence in question was not favorable to Applicant. "Brady requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment." Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 268 (1993). "A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment." Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). The mandate of Brady extends to evidence "that is not in the actual possession of the prosecution but known by others acting on the government's behalf in the particular case, including the police." State v. Kennerly, 331 S.C. 442, 452-53, 503 S.E.2d 214, 220 (Ct. App. 1998) (citing Kyles v. Whitley, 514 U.S. 419 (1995)). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Clark, 315 S.C. at 388, 434 S.E.2d at 268 (citing United States v. Bagley, 473 U.S. 667 (1985)).

At the evidentiary hearing, Applicant asserted that although Kim Cash was originally identified as the victim in the bank robbery, and that she gave a statement, he never got any such statement in his discovery. Applicant acknowledged that Cash did not testify at his trial

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Counsel testified that he had an opportunity to review Cash's statement to law enforcement prior to the evidentiary hearing and concluded that it was not helpful to Applicant. If anything, Counsel opined, the statement provided the State a basis to additionally charge Applicant with armed robbery.

Solicitor Barnette testified that he did not receive Cash's statement from law enforcement until just prior to the evidentiary hearing. In the statement, Cash recalled the events of the robbery and the demands made by the perpetrator, including his threat: "I got a gun hurry up give it all to me." Solicitor Barnette testified that there was nothing exculpatory in Cash's statement and that he found nothing exculpatory in his review of the file.

The Court finds Applicant's Brady claim is without merit. Applicant cannot meet the first requirement of proving a Brady claim: that the evidence was favorable to him. To the contrary, the statement was entirely inculpatory and could have resulted in an additional charge for armed robbery had it been in the possession of the prosecution prior to trial. In that regard, it is likely to Applicant's benefit that Counsel did not recognize and press the issue of Cash's missing statement. The Court additionally notes Cash did not testify at trial, such that it had no use for impeachment purposes. Accordingly, Applicant's demand for relief under Brady is **DENIED.**

[Conclusion and signature on following page]

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III. CONCLUSION

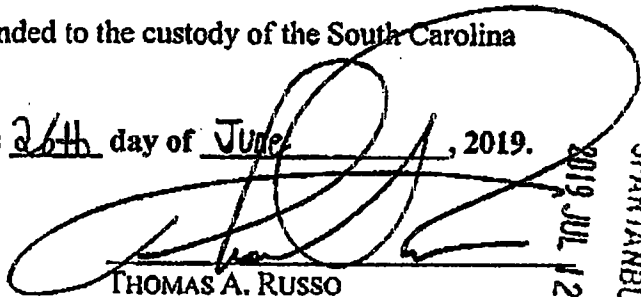
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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, 409 S.E.2d 395 (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:

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 26th day of June, 2019.



THOMAS A. RUSSO
Presiding Judge
Seventh Judicial Circuit

for [Signature], South Carolina

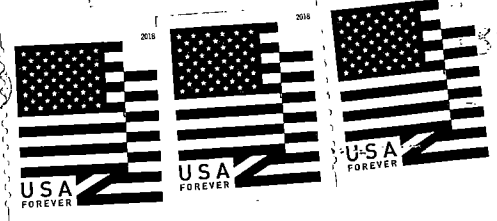
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S.C. SUPREME COURT



The Honorable Daniel E. Shearouse
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