

ELIZABETH FRANKLIN-*Best*

APPELLATE AND FEDERAL CRIMINAL LAW

February 5, 2020

South Carolina Supreme Court
Attn: Clerk of Court
1231 Gervais St.
Columbia, SC 29201

To Whom It May Concern,

Please see the enclosed Notice on Appeal on the order of dismissal for the case involving Anthony Allan Jones, II. Also included is a Certificate of Service.

Sincerely,

LaDonna Beeker

LaDonna Beeker
Paralegal
Elizabeth Franklin-Best, P.C.
803-445-1333

RECEIVED

FEB 07 2020

S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

FEB 07 2020

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Case No. 2017-CP-10-1880

ANTHONY ALLAN JONES, IIPetitioner,

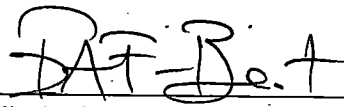
vs.

STATE OF SOUTH CAROLINA.....Respondent.

NOTICE OF APPEAL

Anthony Allan Jones, II appeals the order of dismissal of the Honorable Robert E. Hood dated January 29, 2020. Petitioner received written notice of entry of this order on February 5, 2020.

February 5, 2020.


Elizabeth Franklin-Best
Elizabeth Franklin-Best, P.C.
2725 Devine Street
Columbia, South Carolina 29205
(803) 331-3421
elizabeth@franklinbestlaw.com

Other Counsel of Record:
Benjamin Limbaugh
Assistant Attorney General
1000 Assembly Street
Columbia, SC 29201

RECEIVED

FEB 07 2020

S.C. SUPREME COURT

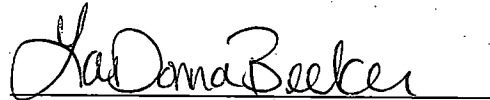
STATE OF SOUTH CAROLINA)
)
SUPREME COURT)
)
Anthony Allan Jones, II)
)
Petitioner,)
)
vs.)
)
State of South Carolina)
)
Respondent.)

CERTIFICATE OF SERVICE

Case No. 2017-CP-10-1880

I hereby certify that a copy of the Notice of Appeal on the order of dismissal was mailed, prepaid postage on this date, 5th of February 2020, to the Benjamin Limbaugh, Assistant Attorney General, 1000 Assembly St., Columbia, SC 29201.

February 5, 2020



LaDonna Beeker

Paralegal

Elizabeth Franklin-Best, P.C.

CC
AG
AT
BS
SOL

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
)
ANTHONY ALLAN JONES, II,)
S.C.D.C. No. 370783)
Applicant,)
)
v.)
)
STATE OF SOUTH CAROLINA,)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2017-CP-10-1880

ORDER OF DISMISSAL

FILED
2020 JAN 31 PM 2:20
JULIE J. ARMSTRONG
CLERK OF COURT

Anthony Allan Jones, II (“Applicant”) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court and Dorchester County Clerk of Court. During its October 2015 term, the Charleston County Grand Jury indicted Applicant for armed robbery. (2015-GS-10-5385). During its October 2015 term of court, the Dorchester County Grand Jury also indicted Applicant for first-degree burglary (2015-GS-18-1420). David Aylor, Esquire, represented Applicant on both charges.

On December 12, 2016, Applicant appeared in the Charleston County Court of General Sessions before the Honorable Deadra Jefferson, circuit court judge, and pled guilty as indicted to both offenses.¹ At this hearing, Applicant, who has his GED and was eighteen years old at the time of the plea, indicated he wanted to plead guilty to both offenses, was indeed guilty of both offenses, was satisfied with Mr. Aylor’s representation of him, understood the mandatory minimum and maximum sentences he could receive for each offense, had not been threatened or promised anything to induce his plea, and waived all of his constitutional rights to plead guilty. (Tr. 4-20). Pursuant to negotiations with the First Circuit Solicitor’s office, Judge Jefferson

¹ Applicant waived venue to plead to both charges in Charleston County. (Tr. 4-5, 7).

sentenced Applicant to fifteen years' imprisonment for first-degree burglary. Judge Jefferson sentenced Applicant to ten year's imprisonment of armed robbery. Judge Jefferson ordered both of these mandatory minimum sentences to be served concurrently. Applicant did not pursue any of his appellate rights following his guilty plea.

II.

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

1. Ineffective assistance of plea counsel, specifically: "Investigation is on-going, but it appears plea counsel did not undertake any investigation into the circumstances of Applicant's youth to mitigate Applicant's sentence, nor did he engage in any other meaningful plea negotiations on Applicant's behalf in violation of his right to the effective assistance of counsel. Lafler v. Cooper, 132 S.Ct, 1376 (2012), Missouri v. Frye, 132 S. Ct. 1399 (2012), Strickland v. Washington, 46 U.S. 668 (1984)."
2. "The automatic waiver provision of S.C. Code Ann. § 63-19-20 is unconstitutional" and "Applicant's sentence violates his right to be free from cruel and unusual punishment," specifically, Applicant was automatically treated as an adult pursuant to S.C. Code Ann. §63-19-20 which provides, in pertinent part: "'Child' or 'juvenile' does not mean a person 16 years of age or older who is charged with a Class A, B, C, or D felony ... or a felony which provides for a maximum term of imprisonment of 15 years or more." Applicant was 16 years old at the time of his crime. This statutory provision is unconstitutional because it does not allow discretion in the sentencing options for a defendant who was a juvenile at the time of the crime in violation of Applicant's right to due process. See Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 132 S. Ct. 2455 (2012); Aiken v. Byars, 410 S.C. 534, 765 S.E,2d 572 (2014). Applicant's sentence is also cruel and unusual in violation of the Federal Constitution, Amendment 8. Applicant's sentence violates the South Carolina Constitution, Article I, §§3, 15."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses presented, which allowed the Court to scrutinize the credibility presented. Set forth below are the

relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Applicant has alleged numerous instances of ineffective assistance of counsel against plea counsel, David Aylor. Each allegation is addressed fully below.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (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 [it] cannot be relied [upon] as having produced a just result.” Strickland, 466 U.S. at 686; Butler, 286 S.C. at 442.

Strickland does not guarantee perfect representation, only a “reasonably competent attorney.” 466 U. S. at 687 (quoting McMann v. Richardson, 397 U. S. 759, 770 (1970)); Representation is constitutionally ineffective only if it “so undermined the proper functioning of the adversarial process” that the defendant was denied a fair trial. Strickland, 466 U.S. at 686. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities. Id.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. at 687. First, an applicant must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624,

625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler, 286, 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. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118. 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.

Although courts may not indulge "post hoc rationalization" for counsel's decision making that contradicts the available evidence of counsel's actions, Wiggins v. Smith, 539 U.S. 510, 526-527, 123 S.Ct. 2527, 2537-2538 (2003), neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (per curiam). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. Strickland, 466 U.S. at 688; Harrington v. Richter, 562 U.S. 86, 131 S.Ct. 770 (2011).

With respect to prejudice, an applicant must demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”

Strickland, 466 U.S. at 694. It is not enough “to show that the errors had some conceivable effect on the outcome of the proceeding.” Id. at 693. Counsel’s errors must be “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Id. at 687; Harrington, 562 U.S. 86.

“Surmounting Strickland’s high bar is never an easy task.” Padilla v. Kentucky, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and the Strickland standard must be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U.S. at 689–690. Even under de novo review, the standard for judging counsel’s representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings knew of materials outside the record and interacted with the client, with opposing counsel, and with the judge. It is “all too tempting” to “second-guess counsel’s assistance after conviction or adverse sentence.” Id. at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney’s representation amounted to incompetence under “prevailing professional norms,” not whether it deviated from best practices or most common custom. Strickland, 466 U.S at 690.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel’s performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Wong v. Belmontes, 558 U. S. 15 (2009); Strickland, 466 U.S. at 693. Instead, Strickland asks whether it is “reasonably likely” the

result would have been different. Id. at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." Id. at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id. at 693; Harrington, 562 U.S. 86.

Based on this standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel as to any of his various allegations. Applicant's allegation is addressed fully below:

Failure to investigate the circumstances of Applicant's youth to mitigate Applicant's sentence or engage in meaningful plea negotiations

Applicant alleges counsel was deficient for failing to investigate Applicant's youth to help in mitigating Applicant's sentence or engage in plea negotiations with the State.

The plea transcript is dispositive as to this issue. Counsel stated during the guilty plea that the Applicant was very young and asked if the Court to sentence Applicant to the minimum sentence. P. 23. The plea court specifically noted Applicant's youth multiple times and clearly took his age into consideration. P. 24-25. Applicant cannot satisfy either requirement of the Strickland test. It is clear from the record that Applicant received the **mandatory minimum** sentences for both offenses. Therefore, his assertions his counsel was ineffective for failing to present mitigation evidence is wholly without merit. This Court finds that Applicant has failed to meet his burden and this allegation is dismissed.

The automatic waiver provision of S.C. Code Ann. § 63-19-20 is unconstitutional and Applicant's sentence violates his right to be free from cruel and unusual punishment

The claims for relief allowed are limited by statute. Issues that could have been raised at trial or on direct appeal are not allowed. S.C. Code Ann. § 17-27-20(b). Therefore, PCR is not a substitute for an appeal and an issue that could have been raised at applicant's trial or on appeal is not cognizable in an application for PCR. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). Trial court error, therefore, is not a cognizable claim for PCR. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001); Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997); Ashley v. State, 260, S.C. 436, 196 S.E.2d 501 (1973). However, if applicant's trial counsel failed to object to the error or properly preserve it for appeal, then a proper claim is that counsel was ineffective for failing to object or properly preserve the issues. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993). This allegation is dismissed as not being a cognizable claim in a post-conviction relief proceeding. Any allegation that the waiver provision was unconstitutional or that Applicant's sentence was unconstitutional could and should have been raised either in a direct appeal or through the Federal Habeas procedures. Even if this Court interprets the allegation as a claim of ineffective assistance of counsel for failing to object or raise the issue, the allegation is still without merit. At the time of Applicant's plea, and to date, South Carolina's automatic waiver provision and Applicant's mandatory minimum sentence are considered constitutional. It is a long-standing rule that an attorney is not required to be clairvoyant and anticipate or discover changes in the law which were not in existence at the time of trial. Harden v. State, 360 S.C. 405, 409, 602 S.E.2d 48, 50 (2004) (citing Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994)). Typically the rule arises in PCR matters where an applicant alleges defense counsel was ineffective for failing to present *at all* an argument or law not recognized or in effect until after trial. See, e.g. Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992) (counsel not deficient

in failing to argue battered spouse syndrome six years before its recognition in State v. Hill²); Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) (counsel not deficient in failing to object to “reach the truth” jury instruction five years before its prohibition in State v. Daniels³); Winkler v. State, 418 S.C. 643, 653-54, 795 S.E.2d 686, 692 (2016) (counsel not deficient in failing to object to trial court’s refusal to answer jury question about what would happen if they failed to reach a unanimous sentencing verdict, where no precedent existed at the time of trial to support such an objection). Clearly, if counsel is not deficient for possessing clairvoyance when a law does in fact change, he is certainly not deficient for failing to challenge something that has to this date still not changed in favor of Applicant’s position. Therefore, this Court finds that Applicant has failed to meet his burden in showing any deficiency on the part of counsel and this allegation is 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, 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), SCRPC 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.

² State v. Hill, 387 S.C. 398, 339 S.E.2d 121 (1986).

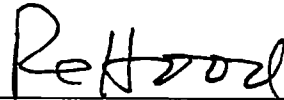
³ State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012).

Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

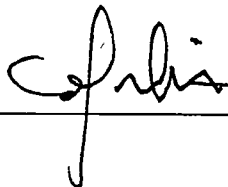
IT IS THEREFORE ORDERED:

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 29 day of Jan, 2020.



ROBERT E. HOOD
Presiding Judge
Ninth Judicial Circuit



_____, South Carolina



State of South Carolina
The Circuit Court of the Fifth Judicial Circuit

Robert E. Hood
Chief Administrative Judge - Civil

Post Office Box 192
Columbia, SC 29202-0192
Phone: (803) 576-1770
Fax: (803) 576-1772

January 29, 2020

Charleston County Clerk of Court
Attn: Julie Armstrong
100 Broad Street, Suite 106
Charleston, SC 29401-2258

RE: Anthony Allan Jones, II v. State of South Carolina
Case No.: 2017-CP-10-1880

Dear Ms. Armstrong:

Please find enclosed herewith the original *Order of Dismissal* which has been signed by Judge Hood in the above entitled matter. This is to respectfully request that it be filed accordingly.

Thank you for your time and we greatly appreciate your assistance. If you need anything further, please do not hesitate to contact our office.

Sincerely,

Jeanne-Marie S. Bolin
Administrative Assistant to
Judge Robert E. Hood

RECEIVED

FEB 07 2020

S.C. SUPREME COURT

/jsb

Enclosure

ELIZABETH FRANKLIN *Best*

APPELLATE AND FEDERAL CRIMINAL LAW

2725 DEVINE STREET
COLUMBIA, SOUTH CAROLINA 29205

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

