STATE OF SOUTH CAROLINA COUNTY OF COLLETON	)	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
Sincere Owens, #342813, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2015-CP-15-0662 **ORDER OF DISMISSAL**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Colleton County Clerk of Court. In June 2009, the Colleton County Grand Jury indicted Applicant for murder (2009-GS-15-0305) and possession of a weapon during a violent crime (2009-GS-15-0306). The charges resulted from an April 2009 incident in which Applicant drove to Victim's home and fatally shot him in the left buttock, causing him to bleed to death. Tr. p. 105, ll. 12-23. David S. Matthews, Esquire, of the Fourteenth Circuit Public Defender's Office, represented Applicant at trial. Deputy Solicitor Sean P. Thornton prosecuted the case. On September 13, 2010, Applicant proceeded to a jury trial before the Honorable D. Craig Brown. The jury found Applicant not guilty of murder, but guilty of the lesser-included offense of voluntary manslaughter and guilty of possession of a weapon during a violent crime. On September 15, 2010, Judge Brown sentenced Applicant to imprisonment for twenty-seven years voluntary manslaughter and five years for possession of a weapon during a violent crime, to be served consecutively. Applicant filed a motion to reconsider the sentence. A hearing on the motion was first convened on May 29, 2012, before Judge Brown, who found it appropriate to recuse himself from the matter. A subsequent hearing was held on November 13, 2012, before the Honorable Perry M. Buckner, III. At the November 2012 hearing, David L. Michel, Esquire,

represented Applicant. Judge Buckner found no legal reason to disturb the discretion of the trial judge and respectfully denied the motion for reconsideration.

Applicant filed a timely notice of appeal. Appellate Defender Kathrine H. Hudgins perfected the appeal pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Applicant's appeal and granted counsel's motion to be relieved on November 5, 2014. State v. Owens, Op. No. 2014-UP-374 (Ct. App. 2014). The remittitur was returned to the circuit court on November 21, 2014.

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

1. Ineffective assistance of counsel
    a. "Not taking pictures to sufficiently illustrate the house and crime scene."
    b. "Failed to properly cross-examine witnesses."
    c. "Failed to investigate."
    d. "Not introducing victim's rap sheet."
    e. "Failed to call witnesses or present evidence to support the charge of self-defense."
    f. "Trial Counsel gave erroneous advice in advising Applicant not to testify for the sole purpose of having the last argument."
    g. "Failed to ask for a continuance or a mistrial because he didn't have time to interview Anita Rowe."
    h. "Not objecting to voluntary manslaughter charge being given to jury."
    i. "Not consulting with Applicant on important decisions and to keep Applicant informed of important developments in the case of prosecution."
    j. "Trial Counsel should have requested a 'stand your ground' grand jury instruction."

Summary of Testimony

Applicant testified that he did not have a criminal record. Applicant testified that he discussed testifying with counsel and that he did not have a criminal record that could be used to impeach him. Applicant testified that counsel did not discuss Stand Your Ground or a possible immunity hearing with Applicant. Applicant testified that he was not aware what an immunity

hearing was. Applicant testified that counsel did review with him the possibilities of self-defense and accident being presented. Applicant testified that counsel advised him not to testify so that they could have last argument. Applicant testified that a witness he wanted to testify would have testified that the incident was an accident. Applicant testified that he would have testified that he did not mean to shoot the victim, but that he was actually aiming at the ground in an attempt to scare him. Applicant testified that he did not ask counsel to request a voluntary manslaughter charge be presented to the jury. Applicant testified that they did not present a case for self-defense. Applicant testified that he does not think that counsel did any investigation in this case. Applicant testified that he did not get proper advice on the law of self-defense. On cross-examination, Applicant testified that counsel discussed testifying, trial strategy, and the evidence with him.

Counsel testified that he did not believe that the facts of the case supported a charge on accident. Counsel testified that the most probably outcome from the facts presented during the trial would have been a conviction for voluntary manslaughter. Counsel testified that he did not see facts supporting proper provocation. Counsel testified that he did not object to the charge of voluntary manslaughter because there were facts presented during the trial that could support that charge. Counsel testified that pursuing self-defense was not viable because the victim was ultimately shot in the buttock, indicating that he was turned away from Applicant at the time of the shooting. Counsel testified that he might should have requested an involuntary manslaughter charge, but was not sure if the judge would grant the request. Counsel testified that he did not request an immunity hearing and that he was unaware of many people requesting them at the time. Counsel testified that he likely should have requested the hearing and that he does it almost every time now. Counsel testified that he asked for a charge on the duty to retreat.

Findings of Facts 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 trial counsel, William Brunson. 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. 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

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. See generally Id.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. 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 690). 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, 386 S.E.2d at 625. 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.

Although courts may not indulge "post hoc rationalization" for counsel's decision making that contradicts the available evidence of counsel's actions, Wiggins, 539 U.S. at 526–527, 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. Id. at 688; Harrington v. Richter, 562 U.S. 86 (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." Id. 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 so 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 Properly Cross-Examine Witnesses

Applicant alleges that trial counsel was deficient for failing to properly cross-examine State's witnesses. There was little testimony elicited at the evidentiary hearing concerning this allegation, however, counsel felt that he thoroughly cross-examined the witnesses. The trial transcript also indicates that counsel did indeed cross-examine the witnesses. Applicant has failed to show how additional cross-examine was necessary or how it would have affected the outcome of the proceeding. Therefore, this Court finds that Applicant has failed to show how he was prejudiced by the alleged deficiency. This Court finds that counsel was not ineffective in regards to this allegation and it is therefore dismissed.

Failure to Investigate

Counsel has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. Strickland v. Washington, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Thus, "[a] criminal defense attorney has the duty to conduct a

reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). Moreover, counsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006). "[C]ounsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions...." Strickland, 466 U.S. at 691, 104 S.Ct. 2052. "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690, 104 S.Ct. 2052. Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 633–34 (Ct. App. 2014).

Counsel testified at the evidentiary hearing that he conducted thorough research in this case and was prepared for trial. Counsel and Applicant both testified that they reviewed the discovery in the case in preparation for the trial. Applicant's testimony at the evidentiary hearing did not provide insight into any relevant matter in which he would have liked counsel to investigate. Therefore, this Court finds that counsel properly investigated the facts of this case and was prepared for trial. This Court finds that counsel was not deficient and Applicant has failed to meet his burden in regards to this allegation.

Failure to Call Witness

To qualify as an alibi, a witness's testimony must account for the defendant's whereabouts during the time of the crime such that it would have been physically impossible for the defendant to commit the crime. Walker v. State, 397 S.C. 226, 237, 723 S.E.2d 610, 616 (Ct. App. 2012). In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise

introduce the witnesses' testimony in a manner consistent with the rules of evidence. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). The applicant's mere speculation about what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice. Id.

Applicant alleges that counsel was deficient for failing to call a witness that would testify in support of a claim of self-defense. Applicant testified that a witness to the incident would have testified that Applicant was acting in self-defense. Applicant failed to the produce the witness at the evidentiary hearing and therefore did not elicit the favorable testimony to be considered by this Court. Applicant has the burden to produce the witness and without the testimony of the witness this Court is asked to consider mere speculation. Therefore, this Court finds that counsel was not deficient for failing to call this witness and Applicant has failed to meet his burden.

Advising Applicant not to Testify to Have Last Argument

"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)). "Accordingly, when 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)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such

conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467,.470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). "[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Examples of such decisions include 'which jurors to accept or strike, which witnesses should be called on the defendant's behalf, what evidence should be introduced, whether to object to the admission of evidence, [and] whether and how a witness should be cross-examined.' What motions to file and 'whether to put on evidence so as to preserve the final word in closing argument' are also strategic and tactical decisions to be made by trial counsel." Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) (internal citations omitted). Trial counsel's strategy is reviewed under "an objective standard of reasonableness." Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004).

Counsel testified that he advised Applicant that it would be in his best interest to not testify so that they could have the last argument to the jury. Counsel testified that he felt that having the last argument to the jury was important and that it was part of his strategy. This Court finds that counsel has articulated a valid trial strategy for wanting to have the last argument to the jury. This Court notes that the decision whether or not to put forth evidence so as to preserve final word in closing argument is a tactical decision to be made by counsel. This Court finds that Applicant has failed to meet his burden and that counsel was not ineffective in regards to this allegation.

Failure to Object to Voluntary Manslaughter Charge

Applicant alleges that counsel was deficient for failing to object to the voluntary manslaughter charge that was requested. Applicant testified that he did not ask counsel to request a voluntary manslaughter charge and did not want the charge given to the jury. Counsel testified

that the most probable outcome of the trial was that Applicant was going to be convicted of voluntary manslaughter. Counsel testified that he did not object to the manslaughter charge being given. It is within the Court's discretion as to what to charge the jury, as long as there is evidence in the record to support the charge. Counsel also felt that charging lesser included offenses was helpful to his client and would be beneficial overall. Counsel also testified that he did not request a charge on involuntary manslaughter because he did not believe there was evidence enough for the judge to grant the request. Therefore, this Court finds that Applicant has failed to meet his burden and that counsel was not deficient in failing to object to jury being charged on voluntary manslaughter. This allegation is dismissed.

Failure to Discuss Case with Applicant

Applicant alleges that counsel was deficient for failing to discuss the case with him and keep him up to date on any developments. Applicant testified that counsel discussed with him his right to testify and the strategy behind him not testifying. Applicant testified that counsel discussed the potential for self-defense or accident as possible defenses in this case. Counsel testified that he discussed Applicant's right to testify with him and the strategy behind him not testifying at trial. Counsel testified that he discussed his trial strategy with Applicant and kept him in the loop as to how he was going to represent him. Counsel testified that he reviewed and discussed all of the evidence in the case with Applicant prior to trial. This Court finds that Applicant has failed to meet his burden and that Counsel was not deficient as to this allegation. Therefore, this Court dismisses this allegation.

Failure to Request "Stand Your Ground" Hearing

Applicant alleges that counsel was deficient for failing to request a Stand Your Ground hearing prior to trial to determine if Applicant was immune or if self-defense was a viable

defense. Applicant testified that counsel did not discuss with him stand your ground or anything concerning potential immunity. Applicant testified that counsel did discuss with him the potential for putting forth self-defense. Applicant testified that they did not present any evidence to support self-defense at trial. Counsel testified that self-defense was not a viable defense because the victim was shot in the buttock. Counsel testified that there was also no contemporaneous provocation to support a claim of self-defense. Counsel testified that he did not request an immunity hearing and that they were not common practice at this time. Counsel testified that he requests immunity hearings all the time now and is not sure he was aware of them at the time. Counsel testified that he requested a charge on the duty to retreat. This Court finds that counsel had sufficient reason to not request a hearing in this case. This Court finds that Applicant has failed to meet his burden and that counsel was not deficient as it relates to this allegation. Therefore, this Court dismisses this allegation.

CONCLUSION

Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient, nor was Applicant prejudiced by Counsel's representation. Therefore, this PCR application 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 be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 6 day of October, 2019.

WILLIAM H. SEALS JR.
Presiding Judge
Fourteenth Judicial Circuit

ALAN WILSON
ATTORNEY GENERAL

October 8, 2019

The Honorable Patricia C. Grant
Colleton County Clerk of Court
Post Office Box 620
Walterboro, SC 29488-0028

Re: **Sincere Owens, #342813 v. State of South Carolina**
2015-CP-15-0662

Dear Ms. Grant:

Enclosed please find the original Order of Dismissal signed by the Honorable William H. Seals, in the above-captioned case, for filing in your office.

In addition, please forward proof of service and a time stamped copy back to our office for our file.

Sincerely,

Sara E. Gunton
Assistant Attorney General

SEG/jaj

Cc: Jared S. Newman, Esquire (without enclosure)