NOTICE OF APPEAL FROM A PCR DENIAL BY THE COURT OF COMMON PLEAS

THE STATE OF SOUTH CAROLINA
In Supreme Court of SC

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

George M. McFaddin, Circuit Court Judge

Case # 2018-CP-43-0806

The State, Respondent,

v.

Jamison D. Holmes Appellant.

NOTICE OF APPEAL

Jamison D. Holmes, appeals the decision of the Court, signed on March 6, 2019 and written copy received by counsel on June 18, 2020, where Mr. Holmes was denied his request for Post Conviction Relief. Mr. Holmes was represented at the hearing by Timothy L. Griffith, Attorney at Law who files this notice on behalf of the Appellant. The order herein attached and a copy of which is also forwarded to the SCCID Appellate Division.

Dated 6/24/2020

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STATE OF SOUTH CAROLINA COUNTY OF SUMTER	)	IN THE COURT OF COMMON PLEAS FOR THE THIRD JUDICIAL CIRCUIT
Jamison D. Holmes, #216587, Applicant, v. State of South Carolina, Respondent.	)	2018-CP-43-00806 **ORDER OF DISMISSAL**

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. Applicant was indicted at the December 2016 term of the Sumter County Grand Jury for two counts of attempted murder, unlawful carrying of a pistol, and possession of a weapon during the commission of a violent crime (2016-GS-43-1237). The charges stem from an incident on July 17, 2016, when Applicant got into an altercation with a female in the parking lot of Studio 378, a private club in Sumter County. After the fight, Applicant attempted to go inside the club, but he was denied access by the security guards at the door. Applicant then returned to his vehicle, pull what witnesses believed to be a gun from his glove box, went back to the door of the club, and shot the security guards. The victim was wearing a bullet proof vest. The guards returned fire on Applicant as he got in his car and drove away from the scene, ultimately crashing his car into a building and he was taken to the hospital. Tr. 7-11.

William H. Brunson, Esquire, represented Applicant on the charges. Assistant Solicitor John P. Meadors, Esquire, prosecuted the case. On July 21, 2017, Applicant pled guilty as indicted to both counts of attempted murder before the Honorable R. Ferrell Cothran, Jr. The weapons charges were dismissed in exchange for his guilty plea. Judge Cothran sentenced Applicant to

imprisonment for eighteen years for both charges, to run concurrently. Applicant did not appeal his guilty plea or his sentence.

II.

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

1. Ineffective Assistance of Counsel
    a. "Misinformed by counsel of rights and evidence"
2. Bias Sentencing
    a. Sentenced on possibility instead of actuality

Attached to and incorporated herein are the records of the Barnwell County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the plea transcript, and the current application for relief. Respondent reserves the right to amend this Return upon receipt of relevant information.

SUMMARY OF TESTIMONY PRESENTED

Applicant

Applicant testified that his attorney told him about the plea, but that he was incorrect in his advice. Applicant testified that if the advice had been correct, he would have wanted to proceed to trial. Applicant testified that he would not have plead guilty if he knew more information. Applicant testified that he met with counsel five times prior to pleading. Applicant testified that counsel reviewed the discovery with him. Applicant testified that counsel did not review defense strategies with him, basically felt this was not a case that would be good for a trial. Applicant testified that he remembered his plea hearing, but needed to be refreshed on what all he said at the hearing. Applicant was refreshed on the plea colloquy and agreeing to the facts as they were presented. Applicant testified that he remembered speaking at the end of his plea

hearing and taking responsibility for what happened, though he does not remember the events. Applicant testified that he was sworn in before his plea hearing.

Counsel

Counsel testified that Applicant was found in his car, which he had crashed into a building. Counsel testified that the Applicant had been shot several times. Counsel testified that he received the report concerning which weapons were used during the crime, but that one part was missing early on in the investigation. Counsel testified that early in the investigation it as still unclear if both shots were fired from Applicant's gun. Counsel testified that the weapon Applicant used was a .38 caliber and that the report indicated that the fragments were from a .38 caliber or a .357 caliber handgun. Counsel testified that the .38 and the .357 were interchangeable rounds and that Applicant did have a .38 caliber handgun. Counsel testified that he hired a private investigator. Counsel testified that the private investigator provided him with leads of people who were at the same party as Applicant prior to the incident and that he followed up on all of these leads. Counsel testified that the plea was made knowingly and voluntarily and that the plea offer accepted was the only one offered. Counsel testified that three weapons were fired at the scene, two of which were .40 calibers and one was a .38 caliber. Counsel testified that the report showed that the bullet fragments were consistent with a .357 or a .38 caliber weapon. Counsel testified that he reviewed and explained the results of the ballistic report with Applicant, which is when Applicant decided to plead guilty. Counsel testified that Applicant was the only person in possession of a gun of that caliber at the scene of the crime.

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, Michael Nelson and Melisa Gay. 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:

Misinformed by counsel of rights and evidence

This court finds that Applicant has failed to show deficiency on the part of plea counsel concerning this allegation. Applicant contends that counsel misinformed applicant of his rights and of the evidence against him. This Court does not find Applicant's testimony credible in regards to this allegation and finds counsel's testimony to be credible Counsel testified that he met with Applicant and explained to the process. Counsel also testified that he had in-depth conversations with Applicant concerning the evidence, specifically, the initial issue of the ballistics report. It appears from Counsel's testimony that Applicant was engaged throughout the process and understood his conversations with counsel regarding his case and the evidence against him. Therefore, this court dismisses this allegation.

Sentenced on possibility instead of actuality

This court dismissed this allegation on the record at the evidentiary hearing, however, the court feels it necessary to elaborate its reasoning in this order. Applicant's allegation of biased sentencing by the plea judge raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Applicant could have raised this issue on appeal. His failure to do so has waived this allegation as a ground for relief. Therefore, this Court summarily 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 May, 2019.

GEORGE M. MCFADDIN, JR
Chief Administrative Judge
Third Judicial Circuit