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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No.: 2014-CP-19-00085

State of South Carolina,

Respondent,

v.

Fredrick Dale Harvey, Jr.,

Appellant.

NOTICE OF APPEAL

Frederick Dale Harvey, Jr., #, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed June 3, 2020, and received by counsel on June 9, 2020 issued by the Honorable J. Derham Cole, presiding Judge.

July 7, 2020

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MEMORANDUM

To: Edgefield County Clerk of Court

From: Sue Pardue, Administrative Assistant

Subject: PCR Order – Frederick Dale Harvey, Jr., Applicant

Date: May 26, 2020

Enclosed please find one (1) signed order for filing in your office. Please file and send copies to all affected parties and/or counsel pursuant to rule 77(d) SCRCP.

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF EDGEFIELD)	
Frederick Dale **HARVEY**, Jr.,)	
Applicant,)	**ORDER**
v.)	Denying Application for Relief
The **STATE** of South Carolina,)	Civil Action No.: **2014-CP-19-00085**
Respondent.)	

This matter came before the Court on application for post-conviction filed March 19, 2014, pursuant to S. C. Code Ann. Section 17-27-10, *et seq.* An evidentiary hearing into the matter was convened on February 21, 2018. Applicant was present and represented by Aimee J. Zmroczek, Esq. Respondent was represented by Assistant Attorney General Susannah R. Cole.

PROCEDURAL HISTORY

Applicant is now confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Edgefield County Clerk of Court. Applicant was indicted at the September 2012 term of the Edgefield County Grand Jury for Murder (2012-GS-19-540). William Gregory Seigler was court-appointed to represent Applicant. On August 14, 2013, pursuant to a negotiated plea agreement, Applicant pled guilty to voluntary manslaughter pursuant to *North Carolina v. Alford*.[1] The State was represented by Assistant Circuit Solicitor H. Franklin Young, III. Circuit Judge Thomas A. Russo sentenced Applicant to a twenty-five year term of imprisonment.

Applicant filed a timely appeal. (Appellate Case No. 2013-001805). The South Carolina Court of Appeals filed an order of dismissal on November 8, 2013, and the remittitur was sent to the Edgefield County Clerk of Court on November 26, 2013.

ALLEGATIONS IN SUPPORT OF RELIEF

Applicant claims he is being held in custody unlawfully for the following reasons: "Ineffective Assistance of Counsel".

[1] *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

a. "Failure to do the necessary pre-trial investigations that would have provided counsel with information and data to prepare an effective defense for the applicant."
b. "Counsel failed to go over any Rule 5, SCRCrimP, or Brady material with applicant."
c. "Counsel failed to talk to any witnesses."

At the evidentiary hearing held in this matter, Applicant amended his application with consent of the State to include an additional claim of "prosecutorial misconduct".

GUILTY PLEA

The transcript of Applicant's guilty plea reflects that the State agreed to allow the applicant to plead guilty to the reduced charge of Voluntary Manslaughter with a recommended cap of twenty-five years imprisonment. Upon acceptance of his plea by the Court, the State would dismiss the accompanying firearm charge. Applicant was advised of the sentencing range and the classification as a violent and most serious crime. The judge explained the proceedings under Alford and its effect on his sentencing. He informed Applicant of his right to have a jury trial and the consequences of his waiving that right. Applicant confirmed he wished to plead guilty. The solicitor presented the following factual basis for the plea:

> MR. YOUNG: Your Honor, at approximately 1:30 in the morning on August 19th of 2012, Sergeant Gary Hitt was dispatched by a call — based upon a call from Stevie T's, which is a — it's a place that's open for rental for other people to use located near Bettis Academy junction here in Edgefield County in the Trenton area. Stevie T's is — it's made somewhat like a — you've seen old Quonset huts. In part, it's made somewhat like that. It's very nice inside. It has a couple bars, a lot of open window space, you can see right inside it, a large dance floor area and a DJ.
>
> A number of people from Amicks, I believe one of them had a birthday party of some kind underway. A lot of people were invited and one of them was a Mr. Marshall Butler. Law enforcement arrived to find Mr. Marshall Butler lying on the floor, I'll show you a picture of where he was found, with his feet pointed toward the front about five feet from one of the bars in the back. He was bleeding from the head. He had apparently suffered a gunshot wound or two. And there were two shell casings from a .22 caliber found right near him. They immediately began investigating.
>
> Of course, EMS was called. Mr. Butler was dead within a matter of minutes of being shot. Probably by the time Deputy Hitt arrived, he was probably either completely deceased or in the process of taking his last breaths.

Law enforcement's investigation, Your Honor, centered on who saw what. They identified a person who was wearing basically all white and a fedora hat in the company of a person by the name of New York, who was a female known to a number of people there. They were able to, in the process of listening to the witnesses, figure out that there was a Chevrolet vehicle involved. Captain Chris Wash made efforts to try to locate this vehicle. They did find this vehicle down at Aiken County, were able to go to that location and met with the person named New York and this man.

They interviewed New York. New York indicated that she had been there. Yes, she'd been there, and this man, Butler, had been harassing her all night and wouldn't leave her alone and saw the victim actually take a swing at and strike her boyfriend, Mr. — the defendant in this case, and strike him and knock him down and then she heard some shots and they ran. And that was her initial statement.

That didn't check out with the rest of the facts. Everyone else seemed to indicate that the person in all white, at that time, who was in the company of her, was the person who did the shooting and had fired a couple shots at least.

Ultimately, Your Honor, we were able to determine — law enforcement was able to determine, through their investigation, that he was, in fact, the person in all white. He ditched the clothing and they also ditched the gun and the clip. They were unable to locate the gun and the clip.

Ms. Miller is the name of the person associated with New York. Ms. Miller is the person who ultimately came clean later about what happened indicating that indeed there had been a harassing, that the defendant in this case was angry because of the harassing by Mr. Butler. At some point, she became, I think, aware that he had taken a swing at him, had struck him and then he pulled out a pistol and shot twice.

More details turned — more details turned from specific witnesses, all of whom, when they were shown a lineup, identified him as the shooter. When these more specific witnesses were identified, they actually said, yes, actually Ms. Miller had come to him, he knew both Mr. Butler and I guess he knew her, and she — he was asked to intercede on behalf of Ms. Miller to try to stop the harassment. She didn't want anything to do with Mr. Butler that night who was very, very intoxicated. And she said that — he told this particular victim that his — her boyfriend had a gun and he needed to be leaving her alone. So he said that he was going to intercede and he tried to do so with Mr. Butler. He went over to Mr. Butler and told him to F off.

Obviously, this wasn't working. Mr. Butler was extremely intoxicated. And, in fact, Your Honor, the toxicology reports verified ocular fluid was 3-0. It was two something, very high.

This man says, yes, he actually saw the swinging effort, the punch that was delivered by Mr. Butler first. He said, Mr. Butler was so — just so intoxicated, he said, there was nothing behind the punch.

This man stepped back, pulled out a .22 caliber pistol and fired it twice. The first shot struck Mr. Butler, it's believed to be, right here in this area of his head. It turned him around and exposed the other side of his head, the back side of his head. He got a second round in the back of the

head underneath the back of the ear.

Both of these were considered to be fatal. The first shot was so close, there was stippling two and a quarter inches around the actual bullet entry for the facial entry. He was immediately incapacitated and fell to the ground and bled out right there on the scene.

The victim {sic} basically said that at the time of the shooting, there was no more than two to three feet distance between himself and what he saw happen in front of him.

Applicant confirmed that the facts as recited by the solicitor would have been presented to a jury and would have likely resulted in a conviction. The judge accepted the plea as knowing and voluntarily made. After hearing from the Applicant and his family and the victim's family, Applicant was sentenced to a term of twenty-five years imprisonment.

SEIGLER DEPOSITION TESTIMONY

William Gregory Seigler, elected as a family court judge subsequent to this plea stated that he had reviewed the relevant files in preparation for the evidentiary hearing but had a limited personal recollection of the matter. However, counsel did recall meeting with Applicant "many times" at the jail during his pre-trial incarceration before the entry of his guilty plea. Counsel filed discovery motions with the State and upon receipt of discovery reviewed those items "numerous times" and discussed it with Applicant. Counsel recalled the only available defenses were self-defense or defense of others. Counsel recalled the State's recommendation of the twenty-five year cap and, although he did not recall the specific as the time of his testimony, he stated that he "would not have signed the plea sheet or had [Harvey] sign it if [he] had any concerns about his ability to understand or comprehend the situation."

Counsel said he would have advised Applicant of his right to trial and would have tried the case if Applicant had elected to do so. Counsel said he drafted an order asking for funds to hire an investigator, but Applicant elected to plead before the order was signed. Counsel also attempted to speak to Applicant's fiancé, a potential co-defendant, but her attorney would not allow it. Counsel said he would have performed a conflicts check to determine if he had ever represented the victim.

THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant amended his application to include a claim

of "prosecutorial misconduct".

Applicant testified he was arrested on August 19, 2002, for a charge of Murder and Possession of a Weapon During the Commission of a Violent Crime. Greg Seigler was court-appointed to represent him and secured a bond which the applicant was unable to post. Applicant met with counsel three or four times while he was incarcerated. Although he saw some discovery documents, he did not recall seeing some evidence. Applicant relayed his version of events the night of the shooting. Applicant said he saw the victim talking to a man with a gun. Applicant said the victim assaulted his girlfriend, then hit him in the jaw. Applicant said he "went down and came up and [he] fired a shot." Applicant claims he discussed his defenses with counsel but was told there was no self-defense in South Carolina. Applicant said counsel told him the family of the victim wanted him to get a life sentence and the best option for Applicant would be to plea. Applicant said counsel advised him he would likely get ten to fifteen years' imprisonment if he pled. Applicant said counsel told him the family did not want the State to recommend a cap of fifteen years, so he could receive anything from two to thirty years. Applicant said counsel told him the State would agree to a cap of twenty-five years, but if Applicant went to trial he would receive a life sentence. Applicant asked counsel to talk to more witnesses, but counsel did not do so. Applicant acknowledged he disposed of the weapon after he fled the scene.

Former solicitor Frank Young testified the State's case involved four witnesses who saw the exchange between Applicant and the victim. According to one witness, the victim approached Applicant's girlfriend and put his arms around her. Applicant confronted the victim, who hit Applicant in the face. A witness tried to intervene but saw Applicant pull out his gun and shoot the victim twice in the head. Young said one bullet hit the victim in the face, and then the second bullet hit the victim in the back of the head. Young said Applicant's girlfriend initially lied to police but later admitted Applicant was the man who shot the victim. The girlfriend also told police the two fled the scene and threw the gun off of a bridge and changed clothes to dispose of the evidence.

Young said he told counsel about the elevated blood alcohol level of the victim – that the ocular fluid indicated a level of 3.0. The State was prepared to present a witness who would say the victim was extremely intoxicated and there was no real impact when he hit the Applicant. Young said discovery would be provided to the defense as it became

available. Young said he had the blood alcohol level report in his hand and showed it to plea counsel. Young recalled making a copy of the report for plea counsel.

On cross-examination, Young said it was practice for a file to be created in the solicitor's office containing all documentation from the sheriff's office as well as reports from SLED, and then copies of the file would be made and turned over to the defense. Young said he relied on an investigator for his information about the State's case, such as the witnesses identifying Applicant from the lineup. Young did not recall hearing the audio of the 911 call, nor did he see an incident report from first responders.

PCR counsel asked Young if he had seen a copy of the blood alcohol report. Young had a copy of the report in his paperwork he possessed on the stand. PCR counsel asked for a break in the proceedings to determine how Young obtained a copy of the blood alcohol report when the report had not been turned over to PCR counsel pursuant to a discovery order. After the break resumed, Young explained that he recently obtained a copy of the report from the original investigator on the case in preparation for the PCR hearing.

Because PCR counsel clearly did not have all the State's documentation available during the evidentiary hearing, this Court agreed to retain jurisdiction over the matter to allow time for the parties to ensure PCR counsel and Applicant received copies of all documentation available from the solicitor's office, the sheriff's department, and SLED. The parties agreed any further testimony of Young could be provided to this Court by deposition.

HENRY FRANKLIN YOUNG, III DEPOSITION TESTIMONY

At his deposition, Young explained that the investigator for the solicitor's office would work with the law enforcement agencies involved to put the file together. The investigator would copy the file for the defense. At the time of the plea, the investigator would try to upload copies of the file to the Eleventh Circuit's database, but there were connectivity problems with the main office and not all documents could be uploaded. Young said the offices were small and when counsel would review the solicitor's file, he could make copies of any documentation needed. Young said all the documentation should have been in the solicitor's file. Again, Young specifically recalled showing plea counsel a copy of the blood alcohol report. Young did not recall hearing an audio recording of the girlfriend's statement to police. Young said at the plea colloquy, he

would have relied on information relayed to him from the investigators on the case.

Young recalled the agreement, though not written down, would be that the State would recommend a cap of twenty-five years imprisonment as to the charge of Voluntary Manslaughter and dismiss the accompanying Possession of a Firearm During the Commission charge. Young said that before the plea, he confirmed that the shell casings found on the floor were from .22 caliber bullets. Young did not know if the bullet fragments removed from the victim were ever tested, however. Young said the fact that the victim was the initial aggressor in some of the altercations that night played into Young's decision to offer a plea to the reduced charge of Voluntary Manslaughter.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety, including the transcript of the guilty plea hearing, the Edgefield County Clerk of Court records, Applicant's South Carolina Department of Corrections records, the deposition testimony of two witnesses, and the application. The Court further had the opportunity to observe the witnesses presented at the evidentiary hearing, closely pass upon their credibility, and weigh their testimony accordingly. Pursuant to S.C. Code Ann. Section17-27-80, the Court makes the following findings of fact and conclusions of law based upon all of the probative evidence presented.

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant alleges plea counsel was ineffective in failing to investigate his case prior to the plea, failure to review discovery materials with Applicant, and failure to interview potential witnesses. This Court finds Applicant has not met his burden to show he is entitled to relief. 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 the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 668. An 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).

Courts use a two-pronged test in evaluating allegations of ineffective assistance

of counsel. First, the applicant must prove counsel's performance was deficient. Id. at 117, 386 S.E.2d at 625. Courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 688). Second, any 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. With respect to guilty pleas, the applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

First Applicant alleges counsel was ineffective for failure to investigate the case. "[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), overruled on other grounds by Walker v. State, 407 S.C. 400, 756 S.E.2d 744 (2014). Counsel testified he reviewed the discovery materials with Applicant several times and discussed the possibility of self-defense and defense of others if the case went to trial. Counsel also prepared to ask for funding to hire an investigator for Applicant's case, but Applicant elected to plead before the funding order was signed. At the plea hearing, Applicant acknowledged he wanted to waive his right to present a defense in a jury trial. Applicant has not shown what further investigation counsel should have conducted, or how that investigation would have changed his decision to plead and instead go to trial.

Similarly, Applicant alleges counsel did not review discovery with him, but in his deposition, counsel did recall reviewing the material "several times" with Applicant. Applicant also testified he reviewed documentation in paper form, but he did not recall hearing any audio of the 911 call or the interview with his girlfriend. The solicitor testified he turned over everything in the solicitor's file to counsel. Counsel would have known multiple witnesses identified Applicant as the man who shot the victim after the victim struck Applicant. Even assuming counsel did not review the audio discovery with Applicant, Applicant has not shown Counsel was deficient for his failure to do so, nor has he shown how his review of the audio would have changed his mind about pleading guilty to voluntary manslaughter.

Lastly, Applicant alleges counsel was ineffective for failing to interview potential witnesses. As counsel testified, Applicant elected to plead before counsel obtained funding for an investigator. Counsel did attempt to interview Applicant's girlfriend, but her attorney would not allow it. In his testimony at the hearing, Applicant did not clarify who counsel should have interviewed prior to the plea. Moreover, Applicant produced no witnesses or evidence at his PCR proceedings to support his assertions and to show prejudice. Thus, Applicant failed to show counsel's actions or inactions resulted in prejudice. *See* Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (noting the courts have "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"); Glover v. State, 318 S.C. 496, 499, 458 S.E.2d 538, 540 (1995) (holding a PCR applicant's mere speculation as to what the witnesses' testimony would have been cannot, by itself, satisfy the burden of showing prejudice).

In short, "there is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). In his claim of ineffective assistance of counsel, Applicant has not overcome that presumption.

PROSECUTORIAL MISCONDUCT

At the time of the hearing, Applicant amended his application to include a claim of prosecutorial misconduct. Although Applicant was not specific, it appears his claim relates to a discovery violation from the State's failure to disclose evidence to the defense before the guilty plea.

An individual asserting an allegation of misconduct pursuant to Brady v. Maryland, 373 U.S. 83, 87 (1963), a defendant must demonstrate the evidence was: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. Kyles v. Whitley, 514 U.S. 419 (1995). Favorable evidence includes both exculpatory evidence and evidence which may be used for impeachment. United States v. Bagley, 473 U.S. 667, 676 (1985).

Here, the Applicant has not shown any evidence was suppressed by the State

prior to the plea. Despite the difficulties PCR counsel faced in obtaining all the discovery materials that would have been turned over to Applicant before his plea, there is no indication the State withheld evidence from plea counsel. Counsel testified he would have filed all the appropriate discovery motions and he recalled reviewing the discovery "several times" with Applicant. Young testified he made copies of and turned over all documentation he received to the defense, or he relayed to the defense important information from witnesses. With respect to the victim's blood alcohol report, Young specifically remembered showing the report to counsel. Further, the record from the plea hearing indicates the solicitor told the plea court about the victim's extreme intoxication: "the toxicology reports verified ocular fluid was 3-0. It was two something, very high." Applicant did not halt the proceedings or express any surprise at the solicitor's comments. From all indications in the record, Applicant and plea counsel were aware of the victim's blood alcohol content.

This Court finds Applicant has failed to meet his burden of proving his claim of actual prosecutorial misconduct. *See Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (holding an applicant bears the burden of proving the claims in his application). Therefore, this allegation is denied and dismissed with prejudice.

ALL OTHER ALLEGATIONS

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the applicant has abandoned any such allegations.

CONCLUSION

Based on the foregoing, the Court finds and concludes applicant has not established any constitutional violations or deprivations that would require this Court to grant any relief requested in his application. Applicant failed to demonstrate his guilty plea was involuntary or that counsel's performance was unreasonable or deficient under prevailing professional norms. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

APPEAL OF THIS COURT'S DECISION

Applicant is advised that he must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment in order 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 if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

The applicant's request for **POST-CONVICTION RELIEF** should be and **IS** therefore **DENIED** and his **APPLICATION** is **DISMISSED** with **PREJUDICE**.

IT IS SO ORDERED!

J. DERHAM COLE, Presiding Judge
The Eleventh Judicial Circuit Court

MAY 22, 2020

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