THE STATE OF SOUTH CAROLINA

In The Supreme Court

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OCT 20 2020

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Honorable Michael G. Nettles, Circuit Judge

Case No.: 2017-CP-10-1725

Levell Grant 357137.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Levell Grant appeals the Honorable Michael G Nettles' September 28, 2020 Order of Dismissal. Undersigned counsel received notice of entry of the order on October 15, 2020. A copy of the order on appeal is attached hereto.

James K. Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

October 16, 2020

Benjamin Limbaugh, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

Clerk of Court- Charleston CP
100 Broad Street
Charleston, SC 29401

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CERTIFICATE OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Benjamin Limbaugh Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549 and the Charleston County Clerk of Court. I further certify that all parties required by Rule to be served have been served this October 16, 2020.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
LEVELL GRANT S.C.D.C. No. 357137 Applicant,	)	Case No. 2017-CP-10-1725
v.	)	**ORDER OF DISMISSAL**
STATE OF SOUTH CAROLINA, Respondent.	)	

This matter came before the court by hearing dated July 25, 2019 in Charleston County upon Applicant's request for Post-Conviction Relief (PCR). The Applicant, Levell Grant, made several arguments in support of his claims of ineffective assistance of trial counsel. Those arguments and the Court's findings on each are discussed below.

PROCEDURAL HISTORY

Levell Grant ("Applicant") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of Charleston County Clerk of Court. During its August 2015 term of court, the Charleston County Grand Jury indicted Applicant for armed robbery (2015-GS-10-4138) and first-degree assault and battery (2015-GS-10-4139). While out on bond for the February 19, 2015 incident, Applicant was involved in another armed robbery on September 12, 2012. Following this incident, during its April 2016 term of court, the Charleston County Grand Jury indicted Applicant for armed robbery (2016-GS-10-2190) and possession of a weapon during the commission of a violent crime (2016-GS-10-2191). Benjamin Lewis, Esquire, of the Charleston County Public Defender's Office, represented Applicant on all charges. Assistant Solicitor David Osborne prosecuted the cases. On May 11, 20176, Applicant appeared in the Charleston County Court of General Sessions before the Honorable Deadra L. Jefferson, circuit court judge, and pled guilty as indicted to all four offenses pursuant to a negotiated plea agreement

with the State for a sentence between twenty to twenty-five years imprisonment.). The court advised Applicant he had ten days to file a notice of appeal following sentencing. (Plea Tr. 17-18). The court accepted Applicant's plea and deferred sentencing. (Plea Tr. 18).

On May 17, 2016, all parties reconvened before the plea court for sentencing. The court sentenced Applicant to twenty-three years for each count of armed robbery, to ten years for first-degree assault and battery, and to five years for possession of a weapon during the commission of a violent crime, with all sentences to be served concurrently. Applicant did not challenge his pleas or sentences on direct appeal.

CURRENT APPLICATION

In his *pro se* application for post-conviction relief, Applicant alleges he is being held in custody unlawfully due to "ineffective assistance of counsel, motion to reconsider sentence imposed, prosecutorial misconduct, see att. with more grounds for relief." However, there was no attachment to his filed application received by Respondent. Applicant failed to set forth with any specificity any of the underlying facts giving rise to these allegations.

Applicant filed an amended application on May 17, 2019. Applicant alleged the following grounds:

1. As a result of trial counsel ineffective assistance and failure to prepare for trial Respondent's guilty plea was involuntary because Respondent did not want to go to trial with his trial counsel.
2. Trial counsel failed to adequate investigate the case
3. Trial counsel had information that one of his alleged victims gave a statement in which he said that he know Applicant did not have a weapon and that victim did not want to go forward. Trial counsel did not provide such information to the

State. Applicant is informed and believes that had trial counsel provided such information to the State, the State would have been less likely to pursue that charge

4. Trial counsel was aware that there was no factual basis for one of the armed robbery charges
5. Trial counsel provided ineffective assistance of counsel for failing to object to an email from the solicitor's office to the sentencing judge informing the Judge that the victim was a suspect in an open murder investigation
6. Trial counsel provided ineffective assistance of counsel for failing to object during sentencing to the presence in the courtroom of several members of Charleston City Police Department and the Charleston County Sheriff's. These members of law enforcement were not involved in the investigation of the offenses to which Applicant was pleading and their presence of these officers was intimidating to the Applicant and created a coercive atmosphere.
7. At the evidentiary hearing the Applicant will allege that the solicitor committed misconduct by persuading a witness to change his prior statement in exchange for a dismissal and expungement of the witnesses pending drug charges.

SUMMARY OF FACTS

On February 19, 2015, Applicant and the victim made arrangements to meet in North Charleston for the victim to purchase Xanax for Applicant. (Plea Tr. 13). When Applicant arrived at the designated location, Applicant lured him into an area between two buildings, where another man was waiting in the bushes. (Plea Tr. 13-14). Applicant then places the victim in a chokehold and places a gun to his back. (Plea Tr. 14). The victim eventually lost consciousness, and when he

woke up, discovered his cell phone and currency had been taken. (Plea Tr. 14). Law enforcement was able to track the phone to Applicant, who made incriminating statements that he took marijuana from the victim. (Plea Tr. 14). Applicant was arrested and released on bond.

While out on bond for the February 19, 2015 incident, Applicant was involved in another armed robbery on September 12, 2012. During this incident, Applicant entered a storage facility in North Charleston armed with a rifle and robbed a female employee of her personal belongings and money from the business. (Plea Tr. 14-15). Surveillance footage captured the encounter and clearly implicated Applicant as the perpetrator.

Applicant appeared in the Charleston County Court of General Sessions before the Honorable Deadra L. Jefferson, circuit court judge, and pled guilty as indicted to all four offenses pursuant to a negotiated plea agreement with the State for a sentence between twenty to twenty-five years imprisonment. At this hearing, Applicant informed the court he had never been treated for abuse of alcohol, drugs, or mental illness and understood what he was doing. (Plea Tr. 9). Applicant told the court he understood the maximum and minimum sentences he could receive for each offense and that he should assume he would serve the entire sentence day for day. (Plea Tr. 10-12). Applicant agreed with the State's recitation of the facts and stated he was pleading guilty because he was guilty. (Plea Tr. 14-15). Applicant told the court he wished to waive all of his constitutional rights and plead guilty. (Plea Tr. 15-16). He stated he was satisfied with his attorney's representation of him, that counsel had answered all of his questions and done everything he had expected and requested, and he had no complaints about his service. (Plea Tr. 16-17). Applicant affirmed he was pleading guilty voluntarily and had not been coerced or threatened to induce his plea. (Plea Tr. 17). The court advised Applicant he had ten days to file a notice of appeal following sentencing. (Plea Tr. 17-18). The court accepted Applicant's plea and

deferred sentencing. (Plea Tr. 18).

SUMMARY OF TESTIMONY AT EVIDENTIARY HEARING

Applicant testified that counsel was not prepared to go to trial and forced him to plead guilty. Applicant testified that counsel did not investigate the facts of the case. Applicant testified that one of the witnesses would have stated Applicant did not have a weapon at the time of the incident. Applicant testified that counsel should have objected to an email from the solicitor's office to the Judge's office. Applicant testified counsel did not object to the police officers observing the plea. Applicant further testified that the solicitor committed misconduct by dropping a codefendant's charge in exchange for testimony.

Counsel testified that he represented Applicant throughout the proceedings. Counsel testified that Applicant was originally charged with two counts of armed robbery, two separate incidents. Counsel testified that Cody Hood would not have made a great witness and that the other case was the robbery of an illegal gambling casino on video. Counsel testified that Applicant was on the trial docket for the Cody Hood case. Counsel testified that he thoroughly investigated both cases and hard a large file for Applicant. Counsel testified that he believed that the State was trying the weaker of the two cases first, then proceeding to the stronger case to subject him to LWOP. Counsel testified that he developed a strategy to preclude LWOP and that Applicant was on board with the plan. Counsel testified that he talked to the Solicitor's Office about a negotiated sentence and was able to get that plea deal. Counsel testified that the solicitor was very clear both on and off the record that the State wanted to pursue LWOP. Counsel testified that he relied on the Court not being swayed by people in attendance in a public forum and didn't believe he had a basis to object to their presence during a plea. Counsel testified that the email to the Court was not ex parte and was referring to an old case in which Applicant was a suspect. Counsel testified he did not

believe the Judge would punish Applicant for uncharged bad acts. Counsel testified that Cody said Applicant represented that he had a weapon, but that he did not believe there was a weapon. Counsel testified that he may have been able to get the case down to strong-arm robbery. Counsel testified that the other armed robbery case had high quality video and there was little room for a defense. Counsel testified that Applicant originally wanted to plead straight up and brought up that the victims in both cases were also doing bad things. Counsel testified that he re-interviewed Cody later and he changed his story to say that Applicant was armed. Counsel testified that he believes that Cody had charges pending at the time, those charges were dismissed and expunged. Counsel testified that the State has cooperating witnesses all the time where they drop charges and are given immunity. Counsel did not believe Cody was exceptionally worried about the charges and felt that it was a weak bias argument.

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).

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 S.C. at 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. Each allegation is addressed fully below:

Failure to properly prepare or investigate

Applicant alleges counsel was ineffective for failing to prepare for trial or investigate his case, thus rendering his plea involuntary.

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).

As stated above, Counsel testified that he thoroughly investigate both cases and reviewed the video evidence. Counsel performed a number of interviews with the victim and reviewed all of the discovery with Applicant. Applicant has failed to provide any evidence as to what counsel has failed to investigate in his case that would have reasonably resulted in a different result.

Based on these reasons, this Court finds plea counsel was not ineffective on this ground and this allegation is denied and dismissed with prejudice.

Failure to Provide Victim statement to the State or challenge armed robbery basis

Applicant alleges counsel was ineffective for failing to provide the victim's statement that he did not wish to press charges to the State and for failing to challenge if there was a factual basis for the armed robbery charge. Counsel testified that this was in fact not the case. Counsel testified that the victim did wish to press charges and did not state what Applicant believes he stated. Counsel further testified that the victim initially stated that he was not sure whether or not

Applicant had a weapon, but by his second statement he was sure that Applicant did have a weapon. Therefore, Applicant has failed to meet his burden in proving any deficiency on the part of counsel or any prejudice resulting from the alleged deficiency. This Court dismisses these allegations with prejudice.

Failure to object to email from Solicitor to Judge

Applicant alleges counsel was ineffective for failing to object to an email from the Solicitor to the Judge stating that the victim was the subject of an open murder investigation. Counsel testified that there was no basis upon which to object to the email. Counsel testified that the email was not ex-parte and that he was copied on the email. Counsel testified that he did not feel there was any purpose in objecting to the email. Therefore, Applicant has failed to meet his burden in proving any deficiency on the part of counsel or any prejudice resulting from the alleged deficiency. This Court dismisses this allegation with prejudice.

Failure to object to the presence of law enforcement in the courtroom

Applicant alleges counsel was ineffective for failing to object to the presence of law enforcement in the courtroom as it was influential on the sentencing judge and made him feel coerced to plead guilty. Counsel testified that he did not feel that he had any grounds to object to the presence of law enforcement in the a public court proceeding. Counsel further testified that he did not recall there being an overwhelming police presence in the courtroom and that it was not more than a few officers. Counsel testified that he did not feel that there was any need to object and that he trusted the Court would be able to do its job and consider the case before it. Therefore, Applicant has failed to meet his burden in proving any deficiency on the part of counsel or any prejudice resulting from the alleged deficiency. This Court dismisses this allegation with prejudice.

Solicitor dismissed and expunged charges of witness in exchange for testimony

Applicant alleges the Solicitor improperly dismissed the charges of the victim in exchange for his testimony. Counsel testified that he believes that the charges arose well before the time of the incident and that they were not explicitly dismissed in return for testimony. Counsel testified that he did not feel that the witness was that concerned with the charges and was going to testify regardless of the status of any other cases. Counsel testified that deals for testimony happen all the time and there was no significant basis upon which to object. Applicant has failed to meet his burden in proving any misconduct on the part of the Solicitor and has failed to prove any prejudice resulting from the alleged misconduct. Therefore, this Court dismisses this allegation with prejudice.

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:

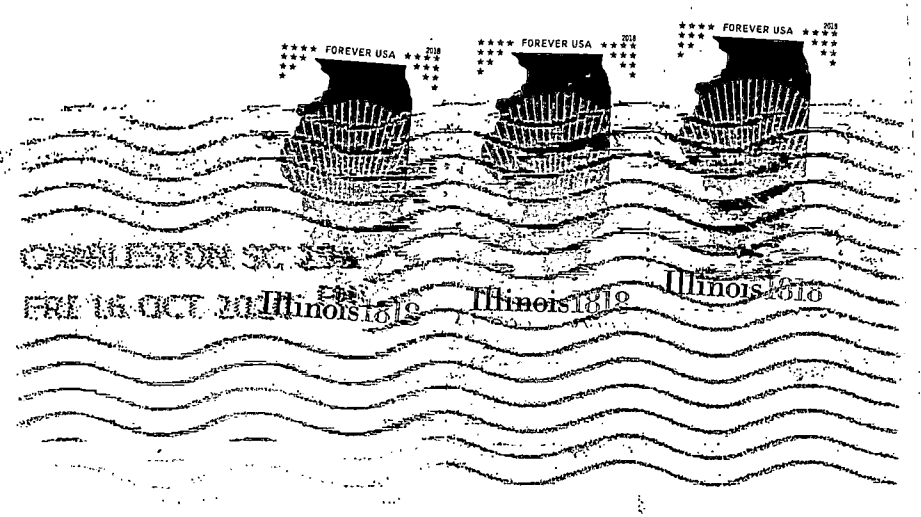
1. The application for post-conviction relief be denied and dismissed with prejudice; and

2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 28 day of Sept, 2020.

MICHAEL G. NETTLES
Presiding Judge

Florence, South Carolina



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