

ATTACHMENT (3)

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

Eugene Thomas,
S.C.D.C. No. 222351,

Applicant,

vs.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2015-CP-23-2998

ORDER

ENTERED COMPUTER

2016 NOV 4 PM 2 54
CLERK OF COURT
S.C.
PATRICK SCHMECKPEPER

Applicant filed this post-conviction relief application on May, 2015. The matter was heard October 24, 2016. Applicant was represented by Brian P. Johnson, Esq. The State was represented by Patrick Schmeckpeper, Esq.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the May 2010 term of General Sessions for third-degree burglary (2009-GS-23-9349), armed robbery (2009-GS-23-9350, count 1), and possession of a weapon during commission of a violent crime (2009-GS-23-93580, count 2). Scott D. Robinson, Esquire represented the Applicant.

After the State called the case to trial, the Applicant was found guilty. On September 11, 2012, the Honorable Markley Dennis, Jr. sentenced the Applicant to concurrent terms of 5 years for third-degree burglary, life imprisonment without parole for armed robbery, and 5 years for possession of a weapon during commission of a violent crime.

Handwritten signature

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Dudek, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. *State v. Thomas*, Op. No. 2014-UP-360 (S.C. Ct. App. filed October 15, 2014). The Remittitur was sent on November 3, 2014.

In his application for post-conviction relief, Applicant alleges nine grounds for relief. At his hearing, these were compressed to four. Each will be addressed separately herein below.

First, Applicant alleges trial counsel was ineffective for failing to present his defense of alibi at trial. The first time Applicant's case was called for court, the testimony is that trial counsel had not complied with Rule 5(e)(1), South Carolina Rules of Criminal Procedure, which trial counsel acknowledged. At the first call, trial counsel had available two alibi witnesses and the State indicated it would waive notice if only one testified. This proposal was refused and the case continued.

At the second call of Applicant's case, trial counsel had alibi witnesses available and notice was not an issue. At his post-conviction relief hearing, Applicant called two witnesses, Demeco Romero Thomason and Yvonne Dee McBee. Both testified that Applicant was with them during the day of the robbery from early until around 3:00 a.m. the following day. However, trial counsel, with Applicant's approval, utilized acceptable trial strategy to not present a defense to preserve his right to make the final closing argument. Trial counsel testified he advised Applicant as to the pros and cons of preserving final argument and Applicant agreed with trial counsel's strategy to not call witnesses. The record reflects Applicant's satisfaction with this strategy (Trial Record p. 283, l. 20 through p. 284, l. 3).

John H.

Where trial counsel articulates a valid reason for employing a certain strategy, such choice will not be deemed ineffective assistance of counsel. *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). In the instant case, the trial strategy exercised by trial counsel was well within the trial strategy which a reasonable competent attorney would have exercised under the same or similar circumstances.

Second, Applicant alleges trial counsel did not properly advise him that if he were convicted of armed robbery or attempted armed robbery, Applicant would be subject to a mandatory sentence of life without parole. The testimony at the hearing convinces the court that Applicant was well aware of his potential life without parole sentence. He received two notices that stated that the State would seek a life without parole sentence. One listed only armed robbery as a qualifying offense. The second listed both armed robbery and attempted armed robbery. Applicant acknowledged to the trial judge that he knew he would (not could) receive a sentence of life without parole (Trial Record p. 9, ll. 4-8).

As to this second allegation, Applicant testified that that trial counsel was ineffective for not "investigating" and "researching" whether or not Applicant's 1981 conviction for murder in Florida was a qualifying conviction. As to the latter point there can be no argument that murder is a qualifier for life without parole regardless of the state of conviction. See S.C. Code Ann. § 17-25-45 (1976 as amended).

Section 17-25-45 has no time parameters as to a time outside of which a qualifying conviction is too remote. In spite of this, trial counsel made a vigorous effort to get the trial judge to make a finding that the Florida conviction was too remote to be used as a qualifier (Trial Record p. 348, l. 10 through p. 349, l. 5).

Applicant argues that had trial counsel done proper research, he would have discovered the 1981 conviction was a qualifier. This is a convoluted argument that seems to have no logic. Applicant was repeatedly advised he was facing life without parole if convicted of armed robbery. Applicant seems to claim that if he was absolutely sure he was facing life without parole he would not have gone to trial. The record is clear that he was, in fact, absolutely sure that, if convicted of either armed robbery or attempted armed robbery, he was facing life without parole.

Third, Applicant alleges trial counsel should have moved to suppress the gun that was ultimately entered into evidence. This is based on a search and the ultimate seizure of the gun when applicant was being arrested on a warrant at a motel. Applicant argues at the time the bag, the dice game, and gun were found inside another bag, he was handcuffed and there was no necessity for a search of the room without law enforcement obtaining a search warrant. The testimony of one of the officers on the scene was that the bag containing the items was within Applicant's arms-reach while he was dressing. (See Trial Record p. 261, ll. 1-11). A search does not violate the Fourth Amendment to the Constitution of the United States when it is incident to an arrest and confined to the immediate vicinity of the arrest. *State v. Brown*, 289 S.C. 581, 347 S.E.2d 882 (1986); *Shipley v. California*, 395 U.S. 818, 89 S. Ct. 2053, 23 L. Ed. 732 (1969); *Stoner v. California*, 376 U.S. 483, 84 S. Ct. 889, 11 L. Ed. 2d 856 (1964). Trial counsel did object to admission of the gun on the grounds of relevance. This objection was overruled (See Trial Record p. 266, ll. 13-19).

Fourth, Applicant argues that the State in its opening and closing talked about "facts and items not put into evidence." Since the Applicant did not call the Court's attention to the specifics of this argument, the Court must find this claim without merit. Additionally, the trial

7/2/84

judge made it clear to the jury that counsels' "remarks" were not evidence. (Trial Record p. 299, ll. 6-8).

Where ineffective assistance of counsel is alleged 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 on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. *See Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by "its reasonableness under prevailing professional norms." *Cherry v. State*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065). 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

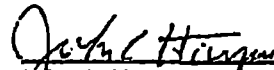
Je. H. H. 5

Wherefore, I find Applicant has not proved by a preponderance of the evidence that trial counsel was ineffective on any of the grounds presented by Applicant at the post-conviction relief hearing. Therefore, Applicant's application for Post-Conviction Relief is denied and dismissed with prejudice.

This Court hereby advises Applicant that he must file and serve a Petition for Writ of Certiorari within thirty (30) days of the service of this Order to secure appellate review. See Rules 203 and 243, South Carolina Appellate Court Rules (SCACR). The Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the Petition.

IT IS SO ORDERED.

October 27th, 2016
Greenville, South Carolina



John C. Hayes, III #6
Presiding Judge