THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Honorable Brooks Goldsmith, Circuit Judge

Case No.: 2017-CP-07-0963

Travis Polite 362894.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Travis Polite appeals the Honorable Brooks Goldsmith's February 13, 2021 Order of Dismissal. Undersigned counsel received notice of entry of the order on February 26, 2021. A copy of the order on appeal is attached hereto.

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

March 1, 2021

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

Clerk of Court- Beaufort CP
PO Box 1128
Beaufort, SC 29901

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	)	IN THE COURT OF COMMON PLEAS THE FOURTEENTH JUDICIAL CIRCUIT
Travis Polite, #362894, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2017-CP-07-0963 **Order of Dismissal**

2021 FEB 24 PM 3:18

BEAUFORT COUNTY, S.C.

I. FACT SUMMARY

The facts supporting the underlying charges are as follows: On September 6, 2012, the victim and a friend attempted to purchase marijuana at a mobile home park. Other people arrived subsequently at the residence. Applicant was also present with Brandon Tucker, who were orchestrating the drug deal. When one individual, by the name of Jessica Power, hesitated before handing over the money, Tucker pushed her to the floor and Applicant grabbed her arm. After she eventually gave Tucker the money, she testified that she witnessed Applicant look out the window of the home and then exchange "words" with Tucker. Applicant then demanded a gun from Tucker and ran outside where gunshots were fired. Witnesses across the street testified they heard shots, as well as dark-colored car racing out of the mobile home park. One woman proceeded to call 911. Later, another witness was able identify Applicant in a photo lineup as the man who shot the victim. Applicant was arrested and afterwards gave two conflicting statements. First, he denied any involvement but later admitted that he was there at the time of murder and knew about the plan to rob the victim; however, he claimed he did not shoot the victim. He was subsequently charged murder, armed robbery, and kidnapping.

II. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. In December 2012, the Beaufort County Grand Jury indicted Applicant for murder (2012-GS-07-2233), armed robbery (2012-GS-07-2234), and kidnapping (2012-GS-07-2377). Gene G. Hood, Esquire, and Lauren Carroway, Esquire, represented Applicant. Assistant Solicitors Sean Thornton, Esquire, and Hunter Swanson, Esquire, prosecuted the case. On January 20-22, 2015, Applicant proceeded to trial before the Honorable Brooks P. Goldsmith. The jury found Applicant guilty as indicted for murder and armed robbery. The jury found Applicant not guilty for kidnapping. Judge Goldsmith sentenced Applicant to imprisonment for concurrent terms of thirty-nine years for murder and twenty years for armed robbery.

Applicant filed a timely notice of appeal. Laura Ruth Baer, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on November 16, 2016. State v. Polite, Op. No. 2016-UP-480 (S.C. Ct. App. filed November 16, 2016). The remittitur was returned to the circuit court on December 2, 2016.

II. CURRENT APPLICATION

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, in violation of Applicant's Sixth and Fourteenth Amendment rights."
    a. "Due Process Violations, contrary to Applicant's Fifth and Fourteenth Amendment rights."
    b. "...Counsel failed to fully impeach witness Antonio Brewer's false and misleading testimony concerning Applicant's participation in the crime (as the shooter) or as a minor participant..."

#2

c. "The detrimental circumstances here lies with counsel's performance being deficient by failing to effectively impeach Brewer concerning his alleged identity of who actually shot the victim when Brewer "could not ever remember exactly how Applicant came to be at his residence. Had counsel effectively cross-examined Brewer, based on the prior inconsistencies, then absolutely, "the outcome of the proceeding could have been different."
d. "Where counsel "failed to object" contemporaneously under South Carolina Court rules, to such a erroneous jury instruction. Without "those facts" in which a jury could rely on in determining guilt, to be squarely placed within the indictment."
e. "...Counsel was ineffective for failing to adequately investigate the case from the onset, "which would have proved his innocence...Counsel should have had independent forensic testing done in order to determine "how exactly could a driver sitting in the driver's seat be straight-forwardly shot in the chest from the driver's side window." These issues bring about plausibility in the State's theory of the case. And counsel was ineffective for his failure to place the State's case to any meaningful adversarial testing..."

Applicant amended his application on August 22, 2019 to include the allegation that counsel was ineffective for failing to move for a mistrial when a witness mentioned being familiar with Applicant's street name.

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.

#4

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

#5

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 impeach Antonio Brewer's testimony

Applicant alleges trial counsel was ineffective for failing to fully impeach witness Antonio Brewer's false and misleading testimony concerning Applicant's participation in the crime (as the shooter) or as a minor participant. However, trial counsel properly cross-examine the witness, bringing out his inconsistent statements and overall weak nature of his testimony.

#6

"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).

Applicant testified at the hearing that he was concerned that Brewer's statements kept changing over time. Applicant testified that Brewer's first statement was that he didn't have

#7

anything to do with it, then it changed to him saying it was Applicant after the police kept threatening him. Applicant testified that Brewer did not identify him until a month after the shooting. Applicant testified that he wanted trial counsel to question Brewer more about his varying statements. Applicant admitted on cross-examination that trial counsel was able to get in the record that Brewer was being inconsistent with law enforcement. Most importantly, Applicant could not think of anything else he wished trial counsel could have gotten out of Brewer on cross-examination in relation to his inconsistent statements. PCR Tr. 16, l. 17. Unfortunately, Applicant's trial counsel is now deceased and was clearly unavailable to testify at the evidentiary hearing. However, this Court has reviewed the Record on Appeal and the trial transcript contained within. The trial transcript is dispositive, along with Applicant's admission on the issue, that trial counsel was not deficient in his cross-examination of Brewer nor has Applicant proven any resulting prejudice. The trial transcript reveals that trial counsel performed a thorough cross-examination of the witness, presenting the jury with a complete picture of the inconsistent statements he provided throughout the life of the case. Trial counsel's cross-examination on the issue is extensive and covered in various degrees across nearly forty pages of the trial transcript. Therefore, this Court finds that Applicant has wholly failed to meet his burden in proving deficiency on the part of trial counsel or any resulting prejudice, thus, this issue is dismissed with prejudice.

Failure to object to the indictment

Applicant alleges trial counsel was ineffective for failing to object to the sufficiency of the indictment. However, there was no valid reason for trial counsel to object to the indictment and therefore was not defective for failing to do so.

Challenges to the sufficiency of an indictment must be made before the jury is sworn.

#8

S.C. Code Ann. § 17-19-90 (2003). The sufficiency of the indictment is determined by whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon, and (2) whether it apprises defendant of elements of offense that is intended to be charged. State v. Gentry, 363 S.C. 93, 101-02, 610 S.E.2d 494, 499 (2005) *citing* State v. Wilkes, 353 S.C. 462, 465, 578 S.E.2d 717, 719 (2003).

An indictment that cites the applicable general criminal statute is sufficient to fulfill the required notice and jurisdictional functions, where the body of the indictment indicates the particular crime of which the defendant is accused. *See* Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998). When defendant timely objects to the sufficiency of the indictment, before the jury is sworn, a ruling that an indictment is not sufficient will result in the quashing of the indictment unless the defendant waives presentment to the grand jury and pleads guilty. State v. Means, 367 S.C. 374, 626 S.E.2d 348 (2006), *overruled on other grounds by* Gentry, 363 S.C. 93, 610 S.E.2d 494.

At the evidentiary hearing, there was very little testimony elicited on this issue. Applicant testified he took issue with the indictment because he was being charged as the principal shooter in the indictment, but he was also charged under the theory of the hand of one is the hand of all. Applicant testified that he was not really indicted as an accomplice, but the jury was charged under a theory of accomplice liability. Applicant did not testify what measures he wished trial counsel took to challenge the indictment or how he was actually prejudiced by any alleged failure. The original indictment was clearly sufficient as a notice document and there were no other issues raised by Applicant at the hearing. Therefore, this Court finds that Applicant has wholly failed to establish any deficiency on the part of trial counsel, nor any prejudice resulting

#9

from the alleged deficiency. This allegation is dismissed with prejudice.

Failure to present independent forensic expert

Applicant alleges trial counsel was ineffective for failing to have independent forensic testing done to determine how a driver sitting in the driver's seat could be shot straight forward in the chest from the driver's side window. However, Applicant presented no expert testimony at the evidentiary hearing or any other evidence in support of this claim.

Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at the post-conviction relief hearing. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). In order to show prejudice from the failure to contact an allegedly favorable witness, a PCR applicant must present the testimony of that witness at the PCR hearing. Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). The applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993).

An 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 from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Bannister also concluded that State's failure to object to applicant's testimony regarding what witness would say does not relieve applicant's burden of actually producing the witness at the PCR hearing. This also applies to expert witnesses. Furthermore, counsel's failure to call an expert witness at trial to rebut the State's expert testimony will not necessarily rise to the level of deficient performance where he undertakes a vigorous cross-examination of the State's witness. Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991).

#10

At the evidentiary hearing, Applicant simply recounted his vague recollection of the testimony of Brewer at his trial. Applicant testified that he did not understand how the victim could be shot straight in the chest; the testimony was that he came up, the victim rolled the window down, he's facing forward, and Applicant shot him in the side. Importantly, Applicant's testimony exhibits a fundamental misunderstanding of the evidence presented in his case. The evidence presented through the forensic expert was that the shot entered the victim from the left rear of his torso, up toward the chest area. This describes the exact situation the Applicant describes and also matches with the testimony of Brewer at trial. Applicant's general confusion is also not enough to support a finding of deficiency nor prejudice. Therefore, this Court finds that Applicant has wholly failed to meet his burden and this allegation is dismissed with prejudice.

Failure to move for a mistrial when a witness expressed familiarity with Applicant's street name

Applicant alleges trial counsel was ineffective for failing to preserve an objection or move for a mistrial when a law enforcement officer testified he was aware of Applicant's street name and Applicant was prejudiced as a result. However, Applicant has wholly failed to meet his burden in proving both deficiency and prejudice resulting from the officer's testimony.

"The decision to grant or deny a mistrial is within the sound discretion of the trial court. The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." *State v. Wilson*, 389 S.C. 579, 585, 698 S.E.2d 862, 865 (Ct. App. 2010) (citation and internal quotation marks omitted). "A mistrial should only be granted when absolutely necessary, and a defendant must show both error and prejudice in order to be entitled to a mistrial." *Id.* at 585-86, 698 S.E.2d at 865. "Insubstantial errors that do not impact

#11

the result of the case do not warrant a mistrial when guilt is conclusively proven by competent evidence." *Id.* at 586, 698 S.E.2d at 865 (citation and internal quotation marks omitted).

The trial court's curative instruction to the jury concerning the street name cured any potential prejudice to Applicant. After trial counsel objected and the objection was sustained, the trial court instructed the jury: "I order the last statement of the witness stricken in the record, and ladies and gentleman, you are to disregard that last statement of the witness." The trial court's curative instruction properly informed the jury that they are not to consider the testimony concerning Applicant's street name. Applicant can show no deficiency by counsel in failing to move for a mistrial where counsel got the result he wanted by objecting and getting a curative instruction. Further, Applicant has failed to show the trial court would have granted the mistrial motion where a mistrial was not absolutely necessary. Applicant has also failed to show how counsel was deficient for failing to object to the curative instruction or any resulting prejudice. This Court finds that Applicant has failed to meet his burden in showing counsel was deficient for failing to move for a mistrial, failing to object to the curative instruction, and showing any resulting prejudice from the alleged deficiencies. Therefore, this Court dismisses this allegation with prejudice.

Conclusion

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel 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 (1991), Applicant has

#12

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, post-conviction relief 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 is denied and dismissed with prejudice; and

2. Applicant shall be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 13 day of February, 2021.

BROOKS P. GOLDSMITH
Presiding Judge
Fourteenth Judicial Circuit

_____, South Carolina

ALAN WILSON
ATTORNEY GENERAL

February 22, 2021

The Honorable Jerri Ann Roseneau
Beaufort County Clerk of Court
Post Office Box 1128
Beaufort, South Carolina 29901-1128

Re: **Travis Polite, #362894 v. State of South Carolina**
2017-CP-07-0963

Dear Ms. Roseneau:

Enclosed please find the original **Order of Dismissal** signed by the Honorable Brooks P. Goldsmith, 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,

Benjamin H. Limbaugh
Assistant Attorney General

BHL/kw

cc: James K. Falk, Esquire