

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

The Honorable R. Kirk Griffin, Circuit Court Judge

Case No. 2014-CP-36-00141

Bennie D. Mitchell, #278318, Petitioner,

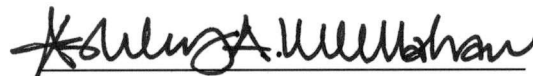
v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Applicant, Bennie D. Mitchell, appeals the order of the Honorable R. Kirk Griffin, filed February 18, 2022, and received by the undersigned on March 4, 2022.

March 4th, 2022



ASHLEY A. MCMAHAN, ESQUIRE

MCMAHAN LAW, LLC

PO Box 50536

Columbia, SC 29250

803-219-1110

ashley@macvance.com

SC Bar No. 71676

ATTORNEY FOR APPLICANT

Opposing Counsel:
Michael J. Neubauer, Asst, Attorney General
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

RECEIVED

MAR 07 2022

S.C. SUPREME COURT

Grand Jury indicted Applicant for Burglary, First Degree (2009-GS-24-0037) and Possession of Burglary tools (2009-GS-24-0039). Matthias Chaplin, Esquire, represented Applicant, and Assistant Solicitor Austin McDaniel of the Eighth Circuit Solicitor's Office prosecuted the case. On April 19, 2010, Applicant proceeded to trial before the Honorable D. Garrison Hill and a jury. At the conclusion of Applicant's trial, the jury found Applicant guilty as indicted. Judge Hill sentenced Applicant to imprisonment for concurrent terms of twenty years for Burglary, First Degree, and five years for Possession of Burglary Tools.

Applicant filed a timely notice of appeal and a direct appeal was perfected by LaNelle Durant. The South Carolina Court of Appeals affirmed Applicant's convictions by written Order, dated July 25, 2012. *State v. Mitchell*, Op. No. 5009 (S.C. Ct. App. Filed July 25, 2012). Applicant petitioned the Supreme Court of South Carolina for a writ of certiorari, which was denied by order dated March 6, 2014. The Remittitur was issued on March 10, 2014.

II. FACTS

On October 28, 2009, at approximately 1:00am, Mr. Stephen Potts came into his house and noticed somebody had attempted to enter his house through the window beside his back door. Tr. p. 85, l. 8-12. Mr. Potts entered the house and realized somebody had entered his house without his permission. Tr. p. 85, l. 13-22. Mr. Potts checked a deer camera which he placed on top of his refrigerator and saw an image of somebody inside his kitchen while he was not home. Tr. p. 85, l. 20- p. 86, l. 3. The following morning, Mr. Potts called the police, and showed police officers the photo from his camera. Tr. p. 86, l. 16-18. The intruder was ultimately identified by the Newberry Police Department as Applicant. Tr. p. 156, l. 1- p. 157, l. 12. Mr. Potts informed Police that Applicant had taken approximately \$100 in quarters, and four to five cans of beer from Mr. Potts house on the night of October 27, 2021. Tr. p. 105, l. 22- p. 106, l. 15.

III. PRESENT APPLICATION

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

1. "Ineffective Assistance of Counsel"
 - a. "Counsel failed to object and motion for the State to move the alleged victim's girlfriend away from the State's table."
 - b. "Counsel bolstered a witness for the State, during cross examination of Lt. McClurkin, by greeted Lt. McClurkin and stating he was a good officer."
2. "Ineffective Assistance of Appellate Counsel"
 - a. "Appellate Counsel has a constitutional duty to make sure the State does not misstate the facts argued in their brief."

Applicant requests relief as follows: "New Trial—Appeal issues/ a new appeal and any other relief I may be entitled to upon all issues and the court deems just and fair."

On October 6, 2021, Applicant through Counsel, filed an amended application for post-conviction relief alleging Applicant is being held unlawfully for the following reasons:

1. "The Applicant request that he be permitted to amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the court of the hearing that have not been specifically addressed in the Application. See Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006)."

At the evidentiary hearing, Applicant proceeded forward on the following allegations:

1. "Ineffective Assistance of Counsel"
 - a. "Counsel failed to object and motion for the State to move the alleged victim's girlfriend away from the State's table."
 - b. "Counsel bolstered a witness for the State, during cross examination of Lt. McClurkin, by greeted Lt. McClurkin and stating he was a good officer."
 - c. "Counsel failed to inform Applicant of a plea offer from the State prior to Applicant's trial."

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, and weighed the testimony accordingly. Further, this Court


J

has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his 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, 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 v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, Applicant must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Applicant must so prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRPC. 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 the 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). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than



through sheer neglect.” *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109-10 (2011). “[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” *Yarborough*, 540 U.S. at 6; *see also* *Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) (“[C]ounsel’s performance need not be optimal to be reasonable.”). 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 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. “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.’” *Harrington*, 562 U.S. at 111-12 (quoting *Strickland*, 466 U.S. at 697). “The likelihood of a different result must be substantial, not just conceivable.” *Id.* at 112. “The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury.” *United States v. Basham*, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting *Elmore v. Ozmint*, 661 F.3d 783, 858 (4th Cir. 2011)).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is

easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

1. Failure to object to Mr. Potts' girlfriend sitting at the State's table during trial

Applicant's allegation of ineffective assistance of counsel due to Counsel's failure to object to Mr. Potts' girlfriend Nancy Polifrone sitting at the State's table during the trial is without merit.

The "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney, and will very seldom constitute objectively deficient representation." *United States v. Nguyen*, 379 F. App'x 177, 181 (3d Cir. 2010). In regards to witnesses being seated at counsel table during any phase of a trial, the South Carolina Supreme Court has held "...The conduct of a trial is left largely to the discretion of the presiding judge and this court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way." *State v. Lee*, 255 S.C. 309, 313-14, 178 S.E.2d 652, 654 (1971) (overruled on other grounds by *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009)).

At Applicant's evidentiary hearing, Applicant testified Judge Hall asked who was sitting at the State's table in front of the jury. Applicant testified Assistant Solicitor McDaniels introduced Mr. Potts and his girlfriend to the jury, and indicated Mr. Potts girlfriend was present for emotional support. Applicant testified he told Counsel he did not want Mr. Potts' girlfriend to be at the State's table because she was holding onto Mr. Potts throughout the trial and acting as if they were on a date. Applicant testified he asked Counsel about having her removed, and Counsel told Applicant he could not have her removed or sequestered because she was not a witness in this case.

At the evidentiary hearing, Counsel testified he does not recall Mr. Potts' girlfriend sitting at the State's table, nor does he recall Applicant bringing it to his attention. Counsel further testified he made every objection that Applicant wanted him to make, and if Applicant had addressed this

J

issue with Counsel, Counsel would have raised this issue during the trial. Counsel testified he does not remember Mr. Potts' girlfriend crying, hanging on to Mr. Potts, or making a scene. Counsel testified that if he had noticed this, he would have addressed this issue with the court.

At the evidentiary hearing, Assistant Solicitor McDaniels testified he introduced Mr. Potts and his girlfriend during jury selection. Assistant Solicitor McDaniels further testified Mr. Potts and his girlfriend would not have sat at the State's table during the course of the trial. Assistant Solicitor McDaniels indicated Mr. Potts and his girlfriend would have been sitting in the gallery with the victim's advocate, and Judge Hill would not have allowed Mr. Potts or his girlfriend to sit at the State's table during the trial. Assistant Solicitor McDaniels testified he does not remember Mr. Potts' girlfriend being emotionally distraught or crying during the course of the trial.

Applicant has failed to establish how Counsel was ineffective in this matter. Both Counsel and Assistant Solicitor McDaniels have credibly testified that Mr. Potts and his girlfriend were introduced during jury selection but were not allowed to sit at the State's table during the course of the trial. Further, Counsel and Assistant Solicitor McDaniels testified that they cannot recall Mr. Potts' girlfriend being emotional during the course of the trial. Counsel testified he would have objected to Mr. Potts and his girlfriend's presence at the State's table during the trial, and if Mr. Potts' girlfriend was being overly emotional during the trial he would have brought it to the Court's attention. Though Applicant asserts Mr. Potts and his girlfriend were sitting at the State's table during the trial, and that Mr. Potts' girlfriend was being emotional during the trial, Applicant has failed to present any credible evidence to support this assertion. Therefore, this Court finds Counsel was not ineffective for failing to object to the presence of Mr. Potts and his girlfriend during the trial, and this allegation is denied and dismissed with prejudice.

2. Bolstering the Credibility of State's Witness Lt. McClurkin

U

Applicant's allegation of ineffective assistance of counsel due to Counsel allegedly bolstering the testimony of Lt. McClurkin by referring to him as a "good officer" is without merit. Generally, the prohibition against bolstering is for the purpose of preventing a witness from testifying whether another witness is telling the truth and to maintain "the assessment of witness credibility ... within the exclusive province of the jury." *State v. Taylor*, 404 S.C. 506, 514–15, 745 S.E.2d 124, 128 (Ct. App. 2013) (citing *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012)).

At Applicant's evidentiary hearing, Applicant testified that Counsel greeted Lt. McClurkin by stating "good evening, Mr. McClurkin, you're a good officer, aren't you?" Applicant asserts he was shocked when Counsel greeted Lt. McClurkin in this manner, and claims Counsel said he was being sarcastic. Applicant testified Counsel also greeted a second witness in this manner. Applicant testified this greeting is significant because Lt. McClurkin was the only witness to identify Applicant, and Counsel's greeting bolstered Lt. McClurkin's identification and testimony because it made him look like a good person.

At Applicant's evidentiary hearing, Counsel testified he does not recall greeting Lt. McClurkin in this manner, and that this greeting does not appear in the transcript. Counsel testified he spent most of Applicant's trial trying to convince the jury that Lt. McClurkin was not a good witness. Counsel testified he attacked the identification of Applicant multiple times, including through pre-trial motions, using expert witnesses to challenge the footage obtained from Mr. Potts' camera. In regards to Applicant's claim that Counsel was trying to bolster the credibility of Lt. McClurkin's testimony and identification, Counsel stated "We spent a lot of time and money attacking the identification of Applicant, I don't know why I would then stand up there and say 'you're a great officer.'"

During cross-examination, Counsel testified he does not see the supposedly bolstering comments in the transcript, and he does not recall ever referring to Lt. McClurkin as a good officer. Counsel further testified that his cross-examination was focused on suggesting Lt. McClurkin could not say beyond a reasonable doubt that Applicant was the one photographed inside Mr. Potts' house.

Assistant Solicitor McDaniel testified that he does not recall Counsel referring to Lt. McClurkin as a good officer and does not believe it happened based on Counsel's cross-examination. Assistant Solicitor McDaniel further testified he has reviewed the transcript and he could not locate the alleged bolstering comments in the transcript of Applicant's trial.

Applicant has failed to establish any evidence to support his assertion that Counsel was ineffective for improperly bolstering the testimony of Lt. McClurkin. In a PCR action, Applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. at 442, 334 S.E.2d at 814. Applicant's assertion that Counsel referred to Lt. McClurkin as a "good officer" is not supported through the record. Though Applicant claims Counsel made these comments, and improperly bolstered Lt. McClurkin's testimony, the record does not show Counsel made any such comments. In the transcript of Applicant's trial, Counsel's first comments to Lt. McClurkin on cross examination are "Officer McClurkin, do you have any training in the use of infrared illumination?" Tr. p. 167, l. 1-3. Counsel proceeds to question Lt. McClurkin regarding his identification of Applicant, without referring to him as a good officer. Additionally, both Counsel and Assistant Solicitor McDaniel credibly testified that the supposed bolstering comments do not appear in the record, and neither individual recalls Counsel making the alleged comments. Therefore, this Court finds Applicant has failed to show how Counsel was ineffective, and this allegation is denied and dismissed.

3. Failure to Inform Applicant of Plea Offer

Applicant's allegation of ineffective assistance of counsel due to Counsel failing to inform Applicant of all plea offers is without merit. "[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Missouri v. Frye*, 566 U.S. 134, 145 (2012). Further, ineffective assistance is given "[w]hen defense counsel allow the [plea] offer to expire without advising the defendant or allowing him to consider [the plea]." *Id.* at 145.

When determining prejudice for failure to convey a plea, a case-by-case determination is made "assessing whether but for counsel's deficient performance a defendant would have accepted the State's proposed plea bargain and that he would have benefited from the offer." *Bell v. State*, 410 S.C.436, 443, 765 S.E.2d 4, 7 (2014). Prejudice is found if applicant "would have taken the plea offer had [he] been afforded effective assistance of counsel", if "the plea would have been entered without prosecution canceling it or the trial court refusing to accept it", and "the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Collins v. State*, 422 S.C. 250, 262, 810 S.E.2d 871, 877 (2018) (quoting *Frye*, 566 U.S. 147) (quotations omitted). Presumed prejudice is reserved to limited situations. *Bell*, 410 S.C. at 443, 765 S.E.2d at 7.

At his evidentiary hearing, Applicant testified Counsel did not relay a plea offer for fifteen years prior to Applicant's trial. Applicant testified he spoke with Counsel and Counsel convinced Applicant that a valid defense of mistaken identity, and third party guilt, would create reasonable doubt for the jury. Applicant testified he told Counsel that he was the one who was pictured inside Mr. Potts house. Applicant testified that if he knew that Counsel would not do all of the things he promised Applicant, that Applicant would have accepted a plea offer instead of proceeding to trial

and facing a possible life sentence. Applicant testified he was told to not accept a plea offer because the State did not have enough evidence to convict him. Applicant testified he asked Counsel about accepting a plea offer after pre-trial motions were heard, and Counsel told Applicant it was too late, and they had good issues for an appeal.

Counsel testified he spent copious hours on weekends and after work meeting with Applicant, in an attempt to develop a defense in Applicant's case. Counsel testified Applicant never said he wanted to plead guilty and accept the fifteen-year plea offer. Counsel testified Applicant took the photo from Mr. Potts' camera and asked different prison guards and prisoners if they thought it looked like Applicant. Counsel testified Applicant's position was that he wanted a jury trial, and he wanted to make the State prove that Applicant was the individual pictured inside Mr. Potts' house. Counsel testified a fifteen-year plea offer was presented to him, and he told Applicant about this offer. Counsel testified that Applicant told Counsel that he did not want to plead guilty. Counsel testified he never attempted to talk Applicant out of accepting a plea offer, but he told Applicant that it may be better to try this case due to possible issues with the picture from Mr. Potts' house. Counsel testified that during his representation of Applicant he does not believe they ever considered taking a plea offer and were always focused on challenging the State's evidence at trial.

Applicant has failed to demonstrate how Counsel was ineffective for conveying a fifteen-year plea offer. Applicant admitted that he was aware of the fifteen-year plea offer prior to his plea, however Applicant asserts that Counsel talked him out of accepting a plea offer by convincing Applicant that they had a high chance of success at trial. Counsel testified he spoke with Applicant at length regarding his case, and conveyed all plea offers to Applicant. Counsel testified at no point did Applicant say he wanted to plead guilty instead of proceeding to trial. Counsel testified

Applicant's focus was on making the State prove that Applicant was the individual pictured inside Mr. Potts' house. Though Applicant now claims he would have plead guilty instead of going to trial if not for Counsel's performance, this Court finds Counsel was not deficient in his representation of Applicant, and Applicant cannot demonstrate how he was prejudiced by Counsel's performance. Therefore this allegations is denied and dismissed with prejudice.

III. CONCLUSION

Based on all the foregoing, this Court finds and concludes that 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.

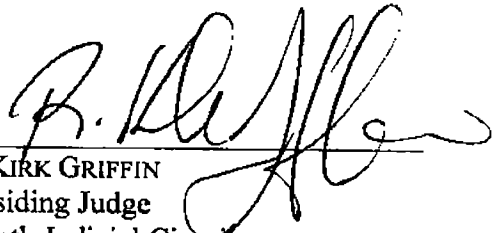
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 16th day of February, 2022.

RECEIVED
MAR 07 2022
S.C. SUPREME COURT


R. KIRK GRIFFIN
Presiding Judge
Eighth Judicial Circuit

Sumter, South Carolina

RECEIVED

MAR 07 2022

S.C. SUPREME COURT