STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	C.A. No. 2011-CP-23-1682
COUNTY OF GREENVILLE)	
)	
Cedric Cassare Patton,)	
S.C.D.C. No. 304790,)	
)	
Applicant,)	
)	**ORDER OF DISMISSAL**
v.)	**GRANTING WHITE V. STATE**
)	**BELATED APPEAL**
State of South Carolina,)	
)	
Respondent.)	
)	

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed March 9, 2011. The Respondent made its return on July 8, 2011. An evidentiary hearing into the matter was convened on April 18, 2013 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Elizabeth P. Wiygul, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. The Court had before it the trial transcript, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, and the return.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Greenville County Grand Jury indicted the Applicant at the March 2010 term of General Sessions for armed robbery (2009-GS-23-6614, count 1) and possession of a weapon during the commission of a violent

crime (2009-GS-23-6614, count 2). Daniel J. Farnsworth, Esquire represented the Applicant.

After the State brought the case to trial, the Applicant was found guilty. On July 13, 2010, the Honorable C. Victor Pyle, Jr. sentenced the Applicant to concurrent terms of twenty-five (25) years for armed robbery and five (5) years for possession of a weapon during the commission of a violent crime. The Applicant did not file an appeal.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel:
   a. Failure to object.
   b. Failure to call alibi and other witnesses.
2. "Judge was bias."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe the witness who testified at the hearing, and to closely pass upon his credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he

must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of 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).

The Applicant stated he had three meetings with trial counsel at the jail and one meeting at the courthouse. The Applicant stated that, in these meetings, they discussed getting ready for trial and that they would argue alibi as a defense. The Applicant stated he only reviewed some of the discovery materials. The Applicant stated he did not have a preliminary hearing. The Applicant stated he gave trial counsel the names of two alibi witnesses and that trial counsel said one would be helpful and the other would not. The Applicant admitted the one witness did testify at his trial and offer an alibi. The Applicant stated trial counsel should have objected to vouching comments by the State. The Applicant stated trial counsel should have made a more specific motion for directed verdict and then renewed that motion at the end of the case.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have spent more time reviewing his case prior to trial. The Applicant stated trial counsel only had three meetings with him at the jail and that he never had a chance to review all of the discovery materials in his case. This Court finds the Applicant's testimony is not credible.

Regardless, this Court notes "[t]he brevity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation." Smith v. State, Op. No. 4938 at *4 (S.C. Ct. App. filed Feb. 8, 2012) (citing Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008)). This Court also notes the Applicant has failed to articulate what more trial counsel should have done in order to prepare his case for trial. See Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (finding the failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result); Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing he would have had a defense with additional time to prepare for trial).

This Court finds the Applicant failed to meet his burden of proving he was prejudiced by the lack of a preliminary hearing. The Applicant, however, failed to articulate why a preliminary hearing would have been crucial in his case. Regardless, this Court notes a defendant does not have a constitutional right to a preliminary hearing. See State v. Keenan, 278 S.C. 361, 365, 296 S.E.2d 676, 678 (1982).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have subpoenaed an additional alibi witness, Andre Smith, Sr. This Court notes Andre Smith, Jr. testified at trial that the Applicant was asleep at his house on the night of the armed robbery. While the Applicant argues his alibi defense would have been stronger with the additional witness providing the same testimony, this Court finds this argument is not persuasive. Regardless, as this alleged witness did not testify at the evidentiary hearing, any discussion regarding what he would have testified about at trial is purely speculative. See Bannister v.

State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme Court "has 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 from the witness' failure to testify at trial.") (emphasis in original).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to vouching comments. The Applicant alleges the assistant solicitor vouched for State witnesses during closing argument. (Trial transcript, p.136, line 18 – p.137, line 8). This Court finds an objection was not warranted, however, because the solicitor's comments did not constitute vouching. See Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) ("A prosecutor improperly vouches for a witness' credibility and places the government's prestige behind a witness by making explicit personal assurances, or indicating that information not presented to the jury supports the testimony.").

This Court finds the Applicant failed to meet his burden of proving trial counsel should have made a more specific motion for directed verdict. The State presented strong evidence of the Applicant's guilt in the form of two eyewitnesses/co-defendants' testimony. A more specifically worded motion for directed verdict would not have led to a different result. See, e.g., State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000) (finding if there is any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury). Further, the Applicant cannot demonstrate he was prejudiced by the lack of a motion for directed verdict at the close of the defense case because the trial judge can grant a directed verdict on its own motion. Rule 19(a), SCRCrimP.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

Belated appeal

This Court finds the Applicant's allegation that he was denied a direct appeal is meritorious. Trial counsel must ensure that a criminal defendant is made fully aware of his appeal rights. White v. State, 263 S.C. 110, 118, 208 S.E.2d 35, 39 (1974). In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure required by Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). Id. Where the post-conviction relief judge determines that the applicant did not freely and voluntarily waive their appellate rights, the applicant may petition the South Carolina Supreme Court for review of direct appeal issues pursuant to White v. State. See Rule 243(i)(1), SCACR; Davis v. State, 288 S.C. 290, 291, n.1, 342 S.E.2d 60, 60, n.1 (1986) ("Even where the post-conviction relief judge makes this finding, he may not grant relief on this basis. Instead, the applicant must petition this Court for a White v. State review.").

At the outset of the hearing, counsel for the Respondent consented to a belated appeal. Counsel noted trial counsel was suffering from a serious medical condition (and thus could not

testify). Counsel stated that, out of an abundance of caution, the Applicant should receive a belated appeal from his trial. The Court concludes the Applicant is entitled to a belated review of his conviction. The Applicant's lack of a direct appeal can be remedied by a petition for belated review pursuant to White v. State.

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, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

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

2. Within thirty (30) days of service of this Order, counsel for the

Applicant must file a Notice of Appeal to secure the appropriate review of the Applicant's convictions. Counsel and the Applicant are directed to Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986) and Rule 243(i), SCACR for the appropriate procedure for securing belated appellate review; and

3. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 30 day of April, 2013.

G. Edward Welmaker
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina.