

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Honorable Robert H. Bonds, Circuit Judge

Case No.: 2018-CP-07-00158

Austin McQuarters 364854.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Scott Welch appeals the Honorable Robert Bonds' April 20, 2022 Order of Dismissal. Undersigned counsel received notice of entry of the order on April 27, 2022. A copy of the order on appeal is attached hereto.



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

May 9, 2022

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

Beaufort Clerk of Court
PO Drawer 1128
Beaufort, SC 29901

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

Austin McQuarters, #364854,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL CIRCUIT

Case No. 2018-CP-07-00158

ORDER OF DISMISSAL

2021 APR 27 AM 11:56
JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

This matter comes before the Court by way of an application of post-conviction relief filed by Austin McQuarters (Applicant) on January 29, 2018. The State (Respondent) made its Return and Partial Motion to Dismiss on May 1, 2018. An evidentiary hearing convened on March 10, 2021, at the Beaufort County Courthouse before the Honorable Robert J. Bonds, circuit court judge.

Applicant was present at the hearing and was represented by James K. Falk, Esquire. Assistant Attorney General Lauren Mims of South Carolina Attorney General's Office represented the State. Applicant testified on his own behalf and presented testimony from trial counsel Arie Bax.

This Court had before it a copy of the Beaufort County Clerk of Court's records regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the post-conviction relief application, Respondent's return, the trial transcript and appellate records. After a review of the record and all evidence presented, for the reasons set forth below, this Court finds Applicant has failed to meet his requisite burden of proof. Therefore, Applicant's application for relief is denied and dismissed with prejudice.

I. 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 January 2014, the Beaufort County Grand Jury indicted Applicant for armed robbery (2013-GS-07-1844) and assault and battery, first degree (2013-GS-07-1845). Arie Bax, Esquire, and James Bell, Esquire, represented Applicant. Assistant Solicitors Mary Jordan Lempesis and Brian Holland prosecuted the case. Applicant proceeded to trial on February 17, 2015 in front of the Honorable William P. Keesley. After three days of trial, the jury indicated that they were unable to come to a unanimous decision. Accordingly, Judge Keesley declared a mistrial. On July 21, 2015, Applicant proceeded to trial again before the Honorable Thomas W. Cooper, Jr. The jury found Applicant guilty as indicted. On July 22, 2015, Judge Cooper sentenced Applicant to imprisonment for twenty-five years for armed robbery and ten years for assault and battery, first-degree, to be served concurrently.

Hearing on Motion to Vacate Conviction and New Trial

On July 28, 2015, Applicant filed a motion to vacate conviction and order new trial based on newly discovered evidence of a statement from Christi (Randi) Ross, a manager at the movie theater where the crime occurred. Her statement revealed that she had a conversation with Colton Delaplane, where he admitted to knowing that the robbery would occur. A hearing on the motion convened on August 12, 2015. The Honorable Thomas W. Cooper, Jr denied the motion to vacate conviction and order new trial. Judge Cooper ruled that trial counsel failed to prove the after-evidence would probably change the result if a new trial were granted, and the evidence was immaterial to the issues of Appellant's guilt or innocence. Specifically, Judge Cooper noted that the information given in the statement was cumulative to another State Witness, Jacklyn Perez, who identified Applicant as the culprit. Additionally, he noted that the statement did not absolve

Applicant of any culpability, and Colton Delaplane did not match the victim's description of the attacker. However, Judge Cooper lowered Applicant's sentence for armed robbery to twenty years, based solely on his age at the time of the attack, and not the new evidence presented.

Direct Appeal

Applicant filed a timely notice of appeal. Kathrine H. Hudgins, Esquire, of the Office of Appellate Defense perfected the appeal. The sole issue on appeal was whether the trial court properly denied Applicant's motion for a new trial based on after-discovered evidence. The South Carolina Court of Appeals affirmed Applicant's conviction in an unpublished opinion filed August 2, 2017. *State v. McQuarters*, Op. No. 2017-UP-320 (Ct. App. 2017). The remittitur was returned to the circuit court on August 18, 2017.

II. FACTS GIVING RISE TO CHARGES

On October 20, 2013, John Snodgrass, the general manager of Northridge Cinemas on Hilton Head Island was robbed and assaulted as he left the theater for the night. Snodgrass, the last employee at the theater, left sometime between 10:30 p.m. and 11:00 p.m. with a bank deposit bag containing approximately \$4,500. As he walked toward his car, he noticed a separate vehicle with a female driver and a man crouched down next to its driver's door. The man approached Snodgrass and asked him questions regarding movie times, borrowing his cell phone, and a final query about the time. As Snodgrass looked down at his watch, Applicant attacked him with a hard object, knocking Snodgrass unconscious after several blows. When he awoke, he discovered the bank bag and its contents had been stolen. (Tr.Vol.III.p.167, line 2–p.177, line 14).

III. ALLEGATIONS

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
 - a. "Violation of the 4th, 6th, and 14th Amendments of the United States Constitution."
2. "Illegal search and seizure of evidence."
3. "Violation of the Confrontation Clause."

At the evidentiary hearing, counsel for Applicant stated that the sole issue for consideration was that counsel was ineffective for failing to interview Christ "Randi" Ross as a potential witness.

IV. SUMMARY OF FACTS ADDUCED AT THE EVIDENTIARY HEARING

Applicant called trial counsel, Arie Bax. Counsel testified that he has been practicing law for eighteen years, and a large portion of that has been criminal. Counsel further testified that he was appointed to Applicant's case as a public defender at the Fourteenth Circuit Public Defender's Office. When asked what was the overall theory of defense was for Applicant's case, Counsel testified that he wanted to represent to the jury that the suspect in the crime was not Applicant. Moreover, Counsel testified that in addition to proving that his Applicant was not the attacker in the crime, he wanted to diminish the credibility of the State's witnesses – Colton Delaplane and Jacklyn Perez-- as much as possible, as they were either not charged with the crime or cooperated with the State. Counsel testified that the State provided a list of potential witnesses, full discovery including investigative reports and identifying information of individuals who the Beaufort County Sheriff's Office had spoken with. When asked what informed his decision to call or contact potential witnesses, counsel testified that there were several things that determined whether to contact witnesses. First, he evaluated whether or not they would be helpful to Applicant's case. Secondly, he weighed that against his office's ability to investigate the witness. He testified that while he was an attorney at the Fourteenth Circuit Public Defender office, there were only two

investigators that were available to interview witnesses. With that in mind, Counsel testified that only sent his investigators to interview witnesses that he felt would be useful to Applicant's defense.

Furthermore, Counsel contended that when he found out about Christi Randi Ross in discovery, she had no information regarding the robbery, and had no intention on speaking with the police. Counsel testified that he concluded that if Christi Ross did not want to speak with investigators and police from the Beaufort County Sheriff's Office that she would not want to speak with an investigator from his office. Therefore, he did not speak with her in preparation for Applicant's trial.

Trial Counsel subsequently testified that he was sent an e-mail on the Friday following Applicant's trial, which contained a statement from Christi Randi Ross, detailing information regarding one of the State's witnesses, Colton Delaplane's, involvement in the robbery. Trial Counsel testified that as soon as he was able, he filed a motion to vacate Applicant's conviction and for a new trial based on after-discovered evidence. When asked whether or not this would be useful evidence, trial counsel contended that this evidence would have been helpful to put the credibility of Colton Delaplane further into question. However, trial counsel agreed that there was substantial evidence that was introduced that would lowered the credibility of Colton Delaplane despite the newly discovered evidence. When asked whether or not the evidence would have cleared Applicant of culpability, trial counsel stated that the victim identified a large, African American male with curly hair. He continued to say that Mr. Delaphane was a white male with a small build, so it would not change anything regarding Applicant's culpability. Counsel agreed that during the hearing on Applicant's motion for a new trial, that Judge Cooper determined that trial counsel did his due diligence regarding handling the new evidence from Christi Randi Ross.

Lastly, trial counsel testified that although he could've found out this information before trial, it would not have been reasonable because this specific information was not apparent before the trial

Furthermore, Applicant testified briefly on his behalf. He testified that he did not know Christi Randi Ross. He also stated that the only person who knew who worked at the movie theater was Colton Delaplane, whom he met while attending the same high school.

V. STANDARD OF REVIEW

An applicant may seek PCR upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right, and raises

a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

The reviewing court applies the two-part test outlined in *Strickland v. Washington* to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Id.* at 687–88; *accord. Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

The applicant has the burden of establishing both deficiency and prejudice in order to be entitled to relief. *Hughes v. State*, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); Rule 71.1(e), SCRCR. To prove deficient performance, the applicant must establish that, in light of all the circumstances, the acts or omissions complained of "were outside the wide range of competence" demanded of attorneys in criminal cases. *Strickland*, 466 U.S. at 688. To prove prejudice, the applicant must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Id.* Significantly, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 696.

VI. FINDING OF FACT AND CONCLUSIONS OF LAW

This Court has heard the testimony and evidence presented at the evidentiary hearing, observed the witnesses, passed upon their credibility, and weighed their testimony accordingly. After the testimony presented and considering the legal arguments by counsels, as well as the record in this action incorporated by way of the State's return, this Court proceeds to the claim raised the evidentiary hearing and find that it is without merit.

Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings of facts and conclusions of law based upon all of the probative evidence presented.

Failure to Investigate Facts of the Case

Applicant asserts that Counsel was ineffective by failing to investigate and interview Christi Ross. At the hearing, Applicant focused on counsel's failure to interview Christi Ross before trial, who was a manager at the movie theater where the crime occurred. This allegation is without merit.

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.*

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Id.* "Counsel's actions are usually based, quite

properly, on informed strategic choices made by the defendant and on information supplied by the defendant.” *Id.* “In particular, what investigation decisions are reasonable depends critically on such information.” *Id.*

In order to prevail upon a claim that counsel did not investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. *Harris v. State*, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing *Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. *Id.* (citing *Davis v. State*, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); *Skeen v. State*, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. *Id.*, 377 S.C. at 75, 659 S.E.2d at 145 (citing *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

This Court finds Applicant failed to meet his burden of proving that Counsel’s preparation or investigation was deficient. Counsel demonstrated through his testimony a thorough command of the facts and circumstances of Applicant’s charges, and credibly testified to fully reviewing and investigating the evidence against Applicant that was reasonable. The information brought forward by Christi Ross would not have been available to Applicant at trial, as Ms. Ross did not initially speak with law enforcement due to fear of retaliation and for her safety. Counsel credibly testified that because of her unwillingness to speak with law enforcement, it would have been unreasonable to investigate her any further as a witness. Moreover, it was only after Applicant was convicted that Ms. Ross came forward with new information regarding Colton Delaplane, who had not been charged in the crime. Additionally, when Counsel received the new evidence, he filed a motion for

a new trial and vacation of conviction on Applicant's behalf. At that hearing, Judge Cooper denoted that there was no lack of due diligence in counsel's representation regarding the evidence, because Ms. Ross was not presented as a witness that would have exculpatory information regarding his client. Furthermore, Applicant testified that he did not know Christi Ross, so he could not have informed trial counsel about her existence to help with his defense. Accordingly, Applicant has failed to meet his burden of proving deficient representation.

Moreover, Applicant has failed to show prejudice in that the discoverable matters would have changed the outcome of his trial. Counsel credibly testified that Ms. Ross' statement was cumulative and would have only been helpful in diminishing the credibility of one of the State's witnesses, and would not have changed or cast doubt on Applicant's role in the crime, as he was a closer match to the victim's description of the attacker than Colton Delaplane was. Furthermore, he was identified as the attacker by co-defendant Jacklyn Perez. Therefore, this Court finds that Applicant has failed to produce any evidence that Ms. Ross' statement would have changed the outcome of his trial.

Applicant has produced no probative evidence towards meeting his burden as to either prong of *Strickland*, and accordingly his demand for relief by way of this allegation is **DENIED**.

VII. CONCLUSION

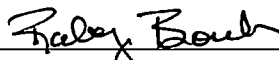
Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. This Court finds Counsel was not deficient in any manner, nor was Applicant prejudiced by Counsel's representation. Therefore, this Court denies relief on all allegations and dismisses this PCR action with prejudice.

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 pursuant to Rule 203, SCACR. Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). Rule 71.1(g), SCRCR, 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 Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 20 day of April, 2022.



THE HONORABLE ROBERT BONDS
Presiding Judge
Fourteenth Judicial Circuit

Walkerboro, South Carolina

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S.C. SUPREME COURT