

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

Jun 06 2022

S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2015-CP-40-03331

Steven Bosnell Gillian, #282336,

Appellant,

v.

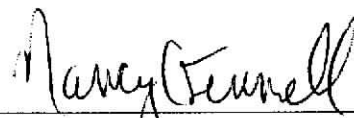
State of South Carolina,

Respondent,

NOTICE OF APPEAL

Steven Bosnell Gillian appeals the Order of the Honorable Grace Gilchrist Knie dated April 25, 2022, a copy of which is attached. Appellant received written notice of entry of this Order on May 10, 2022.

June 3, 2022



Nancy C. Fennell
SC Bar No. 69729
Post Office Box 2176
Irmo, South Carolina 29063
(803) 553-1772
Attorney for Appellant

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTH JUDICIAL CIRCUIT
 COUNTY OF RICHLAND)
)
 Steven Bosnell Gillian,) Case No.: 2015-CP-40-03331
 S.C.D.C. No. 282336,)
)
 Applicant,)
) **ORDER OF DISMISSAL**
 v.)
)
 State of South Carolina,)
)
 Respondent.)

RICHLAND COUNTY
 FILED
 2022 APR 29 PM 3:42
 DEANETTE W. HARRIS
 C.C.R. 615, § 50.

This matter is before this Court by way of an application for post-conviction relief (PCR). A hearing was held at 9:00 a.m. on March 28, 2022 before this Court at the Richland County Courthouse. Applicant was physically present and represented by Nancy C. Fennell, Esquire. The State was represented by Senior Assistant Attorney General David Spencer. Keisha Reed was the Court Reporter.

Applicant filed his PCR application on June 4, 2015. Respondent filed a return and motion to dismiss on July 21, 2017. Subsequently, a mental health evaluation was ordered by the Honorable Clifton Newman, and the Department of Mental Health deemed Applicant incompetent by evaluation dated January 16, 2019 (subsequent to the trial and plea hearings in 2002). This Court has reviewed the evaluation.

Pursuant to Council v. Catoe, 359 S.C. 120, 597 S.E.2d 782 (2004), the proper course is not to delay the PCR proceedings. However, if at a later date, Applicant regains competency and discovers his incompetency prevented his ability to assist counsel on a fact-based claim of ineffective assistance of counsel at the original PCR hearing, under Council, Applicant is not precluded from raising that claim in a subsequent proceeding.

At the hearing, the State raised its motion to dismiss this matter under the statute of limitations. In defense of the State's motion, Applicant presented testimony from Dr. Donna S. Maddox. Following Dr. Maddox's testimony, the State withdrew its motion to dismiss.

Proceeding with the evidentiary hearing, this Court heard testimony from Applicant's trial counsel, Sheila R. Mims, Esquire, and Applicant's appellate counsel, Robert M. Dudek, Esquire. This Court also reviewed the exhibits introduced at the hearing. Further, this Court reviewed the Applicant's original PCR application and amended applications dated June 4, 2015; April 1, 2019; October 21, 2019; and March 21, 2022 as well as the State's Return and Motion to Dismiss, filed July 24, 2017. Further, this Court had the trial transcript dated February 25-28, 2002, and March 1, 2002, as well as the Clerk of Court's records regarding the subject convictions, the appellate records, and records from the Department of Corrections.

PROCEDURAL HISTORY

Applicant is currently confined in the custody of the South Carolina Department of Corrections. Applicant was indicted at the February 2001 term of the Richland County grand jury for Murder (2001-GS-40-01201). Applicant was represented by Sheila R. Mims, Esquire. Applicant was found guilty as charged on March 1, 2002 following trial before the Honorable Marc H. Westbrook. Judge Westbrook sentenced Applicant to life imprisonment. Applicant subsequently pled guilty to second degree burglary on July 24, 2002.

Applicant appealed and was represented by Robert M. Dudek, Esquire. The Court of Appeals affirmed the conviction and sentence on June 28, 2004. State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004). By opinion filed June 11, 2007, the Supreme Court affirmed as modified the Court of Appeals' opinion following grant of the petition for writ of certiorari.

State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007). The remittitur was issued on June 27, 2007.

FACTS FROM TRIAL

The conviction stems from the murder of Jason Ward, Applicant's close friend. Ward's body was found behind the Boozer Shopping Plaza. Testimony from multiple witnesses at a party established Applicant and Ward were engaged in an altercation and then left the party together in the early hours on January 28.

The first two witnesses for the prosecution testified to hearing gun shots between the hours of 6 a.m. and 7 a.m. in the vicinity of Boozer Plaza on January 28, 2001. Tr. p. 126; pp. 129-30. Officer Ron Felder was dispatched at 6:59 a.m. in response to a report of shots fired. Tr. pp. 134-35. Although he did not find anything initially in response, law enforcement responded to a store employee's 911 call after the employee found the deceased behind Boozer plaza that morning. Tr. pp. 147-53. Ward suffered one bullet to the neck and four bullets to the head. Tr. pp. 205-06. Four projectiles were recovered from the autopsy. Tr. p. 206; pp. 235-36. No casings were recovered, which is consistent with a revolver. Tr. pp. 226-27.

Richie Cunliffe testified he was friends with Applicant at the time. He went with Applicant and two other individuals to a party at Parker Valek's house, then later another party Blaine Reedy's residence. When police arrived at Reedy's, Applicant and Cunliffe went to Michael Glenn's house where Glenn had a party of mostly high school-aged guests. Tr. pp. 292-98. Cunliffe was the first of several witnesses testifying to a series of incidents during the Glenn party. Applicant arrived at the party, but left. Cunliffe separately left the party and returned to find Jeremiah Page in the kitchen with a bleeding lip, but apologizing to Alston Lee and Kiah Stone. Applicant arrived back looking for Lee and Stone. He hit Cunliffe and others,

and yelled at Lee and Stone when they appeared. In turn, he started beating Page. Once again, he turned his attention to Lee, and hit Lee. At that point, Ward intervened, rhetorically asking Applicant why he was hitting "these kids." However, Cunliffe did not see what happened after because Applicant head-butted Cunliffe in the nose and Cunliffe went upstairs. Tr. pp. 302-10.

Michael Glenn generally confirmed much of Cunliffe's testimony about the party. He explained Page became boisterous, so Stone and Lee kicked him out of the house. After Page cooled down, he was let back in the house. That was when Applicant returned to the party and pushed and slapped Stone and Lee for how they treated Page. He also head-butted Cunliffe. When Ward told Applicant to stop picking on the kids, Applicant told Ward to shut up and started following Ward. Ward took his shirt off and quickly pinned Applicant, who he let up only after Applicant agreed to calm down. However, Applicant wanted to go back to his house to keep fighting while Ward ultimately asked Applicant to just take him home. Tr. pp. 325-46. Before he left, Applicant said they would read about it in the paper tomorrow. Tr. p. 346.

Matthew Dickerson corroborated these events during his testimony, including Applicant's parting comments about reading the newspaper tomorrow. Tr. pp. 360-69. Alston Lee provided similar testimony. Tr. pp. 382-93. Rachel Armstrong, also present at the party, provided additional information. She testified that she went outside to talk to Applicant after the altercation with Ward and Applicant told her he was going to trick Ward into going back to his house. Armstrong warned Ward not to go with Applicant. But they left together – Armstrong watched them leave together through the window. Tr. pp. 406-11.

A significant amount of testimony was presented concerning the burglary of a residence in Irmo: during the burglary the gun the prosecution contended was used to murder Ward was stolen out of a safe. Co-defendants in the burglary testified against Applicant. Jessie Boot, the

first of the codefendant's to testify, explained Applicant masterminded the burglary and sent his accomplices to the house with keys, the combination to a safe, and a map of the residence while he waited at a gas station. Page opened the safe and removed the weapon and other items inside. Page removed the surveillance tape. Tr. pp. 479-91. Page gave Applicant the gun found in the safe, but Applicant was enraged with the lack of loot, and he returned with some of the codefendants to reenter the residence. They stole numerous items from the house. Tr. pp. 491-96.

Brandon Cannon was another codefendant, who provided a similar account of the burglary. Tr. pp. 528-37. David Grice also testified as to the burglary and confirmed Page gave the stolen gun to Applicant. Tr. pp. 553-560. Page testified. He was both a participant in the burglary and a central figure in the confrontation that developed at the Glenn residence. He was involved in going to Wal-Mart to have copies of the keys used to enter the residence. Tr. pp. 589-90. He described the revolver he took out of the safe in detail. Tr. pp. 595-97. He testified about how Applicant tried to convince someone to buy him bullets. Tr. p. 609.

Page admitted to the jury he behaved boorishly and testified Stone and Lee ejected him out of the house; but Page apologized and allowed back inside. Applicant returned, head-butted Cunliffe, punched Stone and Lee. Applicant then began punching and kicking Page. After Applicant's entanglement with Ward, Page heard Applicant say "I am going to kill you, M.F." Page left because he thought Applicant meant him. From behind a tree, Page saw Ward and Applicant leave together, and he heard them leave in Applicant's car. Tr. pp. 614-22. Page testified Applicant previously said if he ever killed anyone, he would unload the whole gun on the body. Tr. p. 624.

Dustin Johnson, yet another participant in the burglary, did not see the gun, but Applicant told him about it afterwards. Tr. pp. 750-52. Johnson used a fake driver's license to purchase the bullets Applicant sought. They purchased them at Wal-Mart and the transaction was seen on the store's surveillance footage. Johnson identified himself in the video and Applicant in the background in the video. Tr. pp. 754-770. Andre Robinson testified Applicant asked Robinson to buy bullets, but Robinson declined. Tr. pp. 801-02.

The gun-owner's first husband described the gun he purchased for her in the early 1990's as a five-shot revolver. It was a .38 Taurus with a dark hand grip. Tr. pp. 656-58. The pathologist testified to a single entrance wound in the neck, and four more entrance wounds in the back of the head, close together, which was consistent with Ward not moving while he was shot the last four times. Tr. pp. 676-680.

Applicant's cousin, Richard Tyler Gillian, testified Applicant came in his bedroom on January 28, at 9:15 or 9:30 a.m. Applicant told Tyler he beat up Page and Cunliffe at a party, then he killed someone behind a jewelry store he previously burglarized. Applicant said he might see it in the paper. Tr. pp. 816-20. The owner of Dems, a jewelry store in Boozer Plaza, confirmed on July 4, 2000, someone broke into his store overnight and stole thirty-four watches. Tr. pp. 836-44.

Clint Gillian, Applicant's brother, testified Applicant came into his bedroom at 8:30 a.m. and told Clint "someone got offed" and admitted Ward was the victim. Applicant told Clint he got in a scuffle with Ward, then shot him. Applicant told Clint that Applicant was going to jail. Applicant told Clint to watch the news. Tr. pp. 898-901.

DISCUSSION

This Court has had the opportunity to review the record in its entirety and has heard the

testimony at the post-conviction relief hearing. This Court further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. 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).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In a post-conviction relief action, an applicant carries the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, an applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989); Padilla v. Kentucky, 559 U.S. 356, 371 (2010) ("Surmounting Strickland's high bar is never an easy task.").

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). 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.

In the present case, Applicant alleges both trial counsel and appellate counsel provided ineffective assistance of counsel. This Court will first address each allegation of ineffective assistance of trial counsel:

Ineffective assistance of trial counsel

In his pleadings, Applicant alleged trial counsel failed to have Applicant properly evaluated. This issue was not raised at the PCR hearing. Further, this Court would note that evidence and testimony was presented that Applicant was able to assist his counsel and that prior to trial he was evaluated and found competent to stand trial. This Court notes that a Blair hearing (State v. Blair, 275 S.C. 529 S.E.2d 536 (1981)) was held on the day of trial to confirm Applicant's competency to stand trial.

Another allegation, failure to cross-examine one of the state's witnesses, was also not raised at the PCR hearing and is waived.

Richie Cunliffe's testimony:

Richie Cunliffe, a witness for the State testified Applicant, Cunliffe, and others went to a party at Parker Valek's house Saturday night (the murder occurred in the early morning on Sunday). From there, Cunliffe and Applicant would go to another party, leave when police arrived, and finally went to a party at Michael Glenn's house where an altercation that was the triggering event for the murder would occur. Applicant alleges counsel should have objected to the following testimony from State's witness, Richie Cunliffe, about the party at Valek's:

Q: And y'all stayed there for awhile. Why did you leave?

A: Parker asked me to get Steve, and like there was a bunch of Chapin kids there, too.

* * *

A: He didn't know Steve. There was also a bunch of Chapin kids there that had arrived like at the same time just about. He asked me if we could all go ahead and just help him out and leave. He was also worried about the police coming and stuff.

Q: And did y'all leave?

A: Yes, we did.

Tr. p. 295, lines 5-17.

“‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Rule 801, SCRE. “Evidence is not hearsay unless it is an out of court statement offered to prove the truth of the matter asserted.” State v. Thompson, 352 S.C. 552, 558, 575 S.E.2d 77, 81 (Ct. App. 2003). “A ‘statement’ is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.” Rule 801(a), SCRE; see State v. Johnson, 324 S.C. 38, 42, 476 S.E.2d 681, 683 (1996) (finding “the statement [‘you got a gun?’] was not even an assertion, but was a question asked to appellant” and concluding it was not offered to prove the truth of the matter asserted).

Trial counsel explained on the night before the murder, Applicant and others were hopping around from high school party to high school party. She agreed that a jury would expect Steve Valek was concerned about losing control of his high school party and about police coming to break up the party rather than a belief that the police would come to the party because of Applicant. Thus the reference to law enforcement was not prejudicial and not worthy of objection. Further, trial counsel agreed that the testimony was not for the truth of the matter asserted and therefore not hearsay. The testimony concerned a request from a declarant, which is

not hearsay, and an explanation of why Applicant and Cunliffe left the party provides context. Trial counsel agreed the testimony was not objectionable.

This Court agrees with trial counsel's assessment and finds she exercised reasonable professional judgment. This Court finds the testimony was proper and did not constitute hearsay. Further, this Court finds that the testimony was not prejudicial and Applicant was not prejudiced by any alleged deficiency.

Michael Glenn's testimony

An altercation at Michael Glenn's house between Applicant and the victim, Jason Ward, preceded the murder. Ward, Applicant's close friend, intervened after Applicant assaulted several teenagers. Glenn explained Ward got the better of Applicant and "pinned him down, told him to calm down." Tr. p. 344. Lee took Applicant outside to calm down while Ward paced around inside before going outside to speak with Applicant. Tr. pp. 344-45.

The following testimony is the focus of Applicant's claims:

A: . . . Jason was saying, "Steve, just take me home. Take me home." Steve was saying, "Why don't we go to my house where we can fight fair, and I won't get in trouble."

Q: Ultimately, what happens?

A: Jason wouldn't leave with him at first. Steve is saying, "I thought you were my boy. Why can't you leave with me?" Jason was saying, "I was your boy yesterday, I maybe tomorrow; but I'm not right now."

Eventually he keeps telling Jason over and over, "Come to my house, and we can fight fair where I won't get in trouble." So eventually Jason just grabs his shirt off the island and says, "All right, Steve, whatever. Just take me home."

Tr. p. 345, line 20 – p. 346, line 14. Glenn further testified Applicant yelled, “You will see this in the newspaper tomorrow.” Glenn confirmed Applicant was the last person he saw with Ward. Tr. p. 346, lines 15-22.

“‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Rule 801, SCRE. “Evidence is not hearsay unless it is an out of court statement offered to prove the truth of the matter asserted.” State v. Thompson, 352 S.C. 552, 558, 575 S.E.2d 77, 81 (Ct. App. 2003). “A ‘statement’ is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.” Rule 801(a), SCRE; see State v. Johnson, 324 S.C. 38, 42, 476 S.E.2d 681, 683 (1996) (finding “the statement [‘you got a gun?’] was not even an assertion, but was a question asked to appellant” and concluding it was not offered to prove the truth of the matter asserted).

Counsel did not find this testimony objectionable. This Court agrees. First, requests to go to Applicant’s house and Ward’s request for Applicant to just take him home are not statements and therefore, not hearsay. Further, Applicant’s statements are not hearsay. Additionally, Applicant’s statement that the people at the party would read about it in the newspaper is admissible and probative of Applicant’s state of mind.

This Court finds Counsel exercised reasonable professional judgment in declining to object and her performance did not fall below professional norms in this regard. Further, this Court finds Applicant was not prejudiced by any deficiency of counsel and denies this allegation.

Ronnie Muller’s testimony

The State’s theory of the case, and evidence presented, showed the murder weapon, a five-chamber .38 caliber revolver, was stolen from a safe during a burglary of the residence

where Ronnie Muller, his brother, and his brother's wife resided. Muller testified he recalled his sister-in-law owned a ".38 caliber revolver." He was aware that the revolver was kept in a safe in her walk-in-closet, and knew, because she showed him, that the revolver had five chambers, rather than the common six chambers. Tr. p. 475, line 12-24.

The challenged testimony occurred when the prosecutor inquired, "Among other items missing was that firearm missing from the safe of your sister-in-law?" Tr. p. 476, lines 6-7. Muller answered, "That's what I was told, yes, sir." Tr. p. 476, line 8. Applicant alleges trial counsel was ineffective for failing to object on the basis of hearsay.

Counsel agreed tying the gun stolen from the burglary to Applicant was important evidence that incriminated Applicant. However, Counsel agreed with the State abundant evidence was presented from several other witnesses establishing the revolver was stolen from the safe during the burglary and Applicant took possession of the revolver. Counsel agreed that while the fact Applicant was linked to the weapon was important, the testimony was not important because the State established Applicant's possession of the weapon through other witnesses. Therefore, the testimony did not warrant objection. Tr. pp. 489-91 (Jessie Boot testifies he opened the safe and a gun was inside. Page picked up the gun); p. 494 (Page gave Applicant the gun); p. 532 (Brandon Cannon testifies Page handed Applicant a gun after the burglary); p. 556 (David Grice testifies Page gave Applicant the gun after the burglary); pp. 595-99; (Jeremiah Page testifies when the safe was opened, a revolver he describes as a Taurus .38 special made in Brazil with only five rounds was inside. He picked up the gun and later gave to Applicant); p. 752 (Dustin Johnson explained he did not see a gun during the burglary, but confirmed afterwards Applicant said he had a gun).

This Court finds Counsel's professional judgment is reasonable. This Court agrees abundant testimony establishes the revolver was stolen from the safe. That the revolver was stored in the safe was information within Muller's own personal knowledge. Counsel explained she does not object to all evidence that might be objectionable because numerous objections might irritate the jury or leave the impression the defense was trying to hide something. Further, this Court finds Applicant failed to prove prejudice from Muller's statement because the same evidence was established by other witnesses. Accordingly, this allegation is denied.

Jeremiah Page – leading questions

Applicant alleges counsel was ineffective for not objecting to leading questions during Jeremiah Page's direct examination, referencing pages 625-27 of the transcript. Counsel explained that generally, she does not object to leading questions. In this instance, her co-counsel, Beattie Butler, would be responsible for raising any necessary objections. However, this Court, reviewing the passages discussed at the hearing, fails to see testimony upon which an objection based on leading was necessary. Further, the prosecution would be allowed to rephrase and would likely be able to elicit the same evidence. This Court finds Applicant failed to meet his burden of overcoming the presumption that counsel exercised reasonable judgment by not imposing an objection to leading questions. This Court believes an objection was not critical to the defense and believes from the face of the record it is apparent trial counsel engaged in reasonable trial strategy in declining to impose numerous leading objections. This Court is firmly convinced the information elicited would eventually be elicited if the prosecution was required to alternatively ask non-leading questions. See also Rule 611, SCRE (allowing leading questions as needed to develop testimony). Regardless, this Court finds that Applicant failed to establish prejudice from the alleged deficiency and denies this allegation.

Alston Lee's testimony

Alston Lee was at the Glenn party when the altercation between Applicant and Ward occurred. Applicant was at the party, but left the party and later returned with Ward. Lee was one of two individuals who escorted Jeremiah Page out of the house during the party when Page became belligerent. This occurred before Applicant returned to the party. Page apologized and was allowed back in the house by the time Applicant and Ward arrived. Applicant began assaulting Lee and other individuals at the party in retaliation from Page being told to leave. However, upon learning Page's behavior caused him to be removed, Applicant then started beating on Page. Ward intervened which led to the conflict between Applicant and Ward.

Applicant alleges counsel should have objected to the following testimony elicited from Lee, "Steve had left to go get Jason, I presume, and the incident happened while he was gone and Jeremiah was there by himself." Tr. p. 382, lines 5-9. Counsel testified there was no controversy as to why Applicant left the party and nothing of note occurred before Applicant left the party, so there was not a practical reason to object. This Court agrees, to the extent the testimony is objectionable, it was not important why Applicant left the party. Counsel's performance in this regard was not ineffective assistance of counsel and Applicant failed to meet his burden of proof as to both prongs of Strickland.

Ineffective assistance of appellate counsel

Applicant alleges his appellate counsel was ineffective for failing to raise an issue on appeal that the trial court erred in finding Applicant competent to stand trial without Applicant being evaluated by a neuropsychologist. Trial counsel made this objection at the conclusion of the Blair hearing at the onset of trial. Tr. p. 66, lines 17-23. Appellate counsel explained his process of preparing a brief, which is meticulous. As part of his process, he lists all potential

issues he might raise. He then chooses the strongest issues with merit, and eliminates the ones he believes provides little likelihood for success. In the present case, appellate counsel raised three issues, and for two of those issues, the Supreme Court found trial court error, but deemed the errors harmless in affirming the conviction and sentence.

Appellate counsel appointed to represent an indigent defendant in his appeal from a criminal conviction does not have a constitutional duty to raise every non-frivolous issue requested by the defendant. Jones v. Barnes, 463 U.S. 745 (1983); United States v. Mason, 774 F.3d 824, 828-29 (4th Cir. 2014) (“Effective assistance of appellate counsel does not require the presentation of all issues on appeal that may have merit.” (citation and internal quotation marks omitted)). Appellate counsel’s representation will not be deemed ineffective if he makes an informed decision based on reasonable professional judgment not to pursue a particular issue on appeal. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985). “We likewise **presume** that appellate counsel decided which issues were most likely to afford relief on appeal.” Mason, 774 F.3d at 828 (emphasis added, citation and internal quotation marks omitted).

“[I]t is still possible to bring a [claim of ineffective assistance of counsel] based on counsel’s failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent.” Smith v. Robbins, 528 U.S. 259 (2000) (favorably quoting the following observation in Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986): “Generally, only when ignored issues are **clearly stronger** than those presented will the presumption of effective assistance of counsel be overcome” (emphasis added)).

Furthermore, under the two part test of Strickland v. Washington, 466 U.S. 668 (1984), an applicant must show not only that counsel’s performance was deficient, but that this deficiency prejudiced his defense.

In the present case, this Court finds that appellate counsel, the chief appellate defender for Appellate Defense, made an informed decision in deciding which issues to raise and not raise on appeal. This Court also believes that the substantive issue contemplated was not clearly stronger than the other three issues raised on appeal. Finally, this Court finds Applicant failed to meet his burden of proving prejudice. The trial court determined based on the evidence presented to him that Applicant was competent to stand trial, which included the report of Dr. Wadman, an expert in forensic psychiatry. The trial court noted the finding of competency was based on numerous records. The written report was submitted on September 28, 2001, and orally supplemented by testimony at the Blair hearing. Based on the record, it does not appear to be a reasonable probability that a reviewing court would find the trial court abused its discretion. State v. Burgess, 356 S.C. 572, 590 S.E.2d 42 (Ct. App. 2003) (finding that the defendant failed to establish the trial court abused its discretion in declining to order the defendant be evaluated for mental competency). Further, at the PCR hearing, trial counsel confirmed Applicant was able to assist her in his defense. Moreover, any concerns about Applicant's competency to stand trial were alleviated when at the conclusion of trial and during sentencing, Applicant advised the trial court his grandfather could provide an alibi. Trial counsel noted she had a medical excuse for the grandfather, while the prosecutor noted the prosecution had a statement from the grandparents inconsistent with an alibi. Tr. pp. 1061-63. Applicant continued to discuss evidence and documents he believed helped his defense or he considered to be insufficient to establish his guilt. Tr. pp. 1068-77. This display of awareness would communicate to any appellate court Applicant's actual competence to stand trial, and would defeat the issue if raised on appeal. Accordingly, this Court denies the claim of ineffective assistance of appellate counsel.

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 notes that 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), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant 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 is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 25th day of April, 2022.



GRACE GILCHRIST KNIE
Presiding Judge
Fifth Judicial Circuit

Spokane, South Carolina

