

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 17th day of July, 2019.

Omar Smith, No. 1069073, Petitioner,
against Record No. 181478

Harold W. Clarke, Director of the
Virginia Department of Corrections, Respondent.

Upon a Petition for a Writ of Habeas Corpus

Upon consideration of the petition for a writ of habeas corpus filed November 14, 2018, the rule to show cause, the respondent's motion to dismiss, and petitioner's reply, the Court is of the opinion that the motion should be granted.

Petitioner was convicted, pursuant to his pleas of guilty, in the Circuit Court of Hanover County of robbery and abduction for pecuniary benefit, and was sentenced, in accordance with the terms of his written plea agreement, to sixty years' imprisonment with thirty-eight years and ten months suspended. Petitioner did not appeal, and he now challenges the legality of his confinement pursuant to these convictions.

In claim (1), petitioner contends he was denied the effective assistance of counsel when counsel failed to adequately advise him of the elements of the offenses for which he was convicted. Petitioner states his indictments set forth only the standard elements of each charge, and counsel failed to move for a bill of particulars, despite petitioner's request that he do so. Petitioner contends a bill of particulars would have shown the Commonwealth was proceeding under a theory that petitioner was guilty as a principal in the second degree. Without a bill of particulars, petitioner did not understand the nature of each offense and the elements needed for a conviction. Petitioner denies discussing with counsel the elements of the offenses, and avers he should not be bound by his representations to the contrary during his plea colloquy because he falsely answered questions asked of him based on counsel's misadvice.

The Court rejects claim (1). The record, including the trial transcript, demonstrates the trial court engaged in a thorough plea colloquy with petitioner prior to accepting his guilty pleas. During that colloquy, petitioner affirmed he was satisfied with the services of his attorney, he

had discussed with his attorney the charges against him, including the necessary elements of proof, and he understood what the Commonwealth was required to prove in order to obtain a conviction. Petitioner also affirmed he decided for himself to enter his pleas of guilty and that he was in fact guilty. Petitioner has failed to offer a valid reason why he should not be bound by his representation at trial that his counsel's performance was adequate and that his guilty pleas were voluntary and there is no evidence identified by petitioner that would support the contrary conclusion that the pleas were involuntary. *Anderson v. Warden*, 222 Va. 511, 516 (1981).

In claim (2), petitioner contends he was denied the effective assistance of counsel during his preliminary hearing when his attorney failed to move to exclude the victim. Petitioner states that during the preliminary hearing the victim identified two co-defendants and Sydnee Brown as having been present during the offense, but did not identify petitioner. Petitioner alleges the prosecutor then moved to permit the victim to remain in the courtroom during Brown's testimony. Petitioner contends the prosecutor did so hoping "a positive identification of" petitioner would encourage the victim to change his testimony and identify petitioner as one of the perpetrators. Petitioner does not claim the victim did, in fact, change his testimony after the preliminary hearing, but instead alleges counsel advised petitioner that if the case were to go to trial it was likely the victim would change his testimony and identify petitioner.

The Court rejects claim (2) because petitioner failed to offer a valid reason why he should not be bound by his representation at trial that his counsel's performance was adequate. *Id.*

In claim (3), petitioner contends he was denied the effective assistance of counsel when counsel failed to file a motion to suppress the identification of him made by Brown. Petitioner claims the identification was unduly suggestive and that it was irrelevant because it did not tend to establish his guilt.

The Court rejects claim (3) because petitioner failed to offer a valid reason why he should not be bound by his representation at trial that his counsel's performance was adequate. *Id.*

In claim (4), petitioner contends he was denied the effective assistance of counsel when counsel failed to file a motion to sever his trial from that of his co-defendants. He claims that, had he proceeded to trial, he would have been prejudiced by the joinder of the trials, and counsel's failure to file a severance motion influenced petitioner's decision to plead guilty.

The Court rejects claim (4) because petitioner failed to offer a valid reason why he should not be bound by his representation at trial that his counsel's performance was adequate and that his guilty pleas were voluntary and there is no evidence identified by petitioner that would support the contrary conclusion that the pleas were involuntary. *Id.*

In a portion of claim (5), petitioner contends he was denied the effective assistance of counsel when counsel failed to investigate petitioner's phone records which, petitioner alleges, would have disclosed certain calls were not forwarded to petitioner's phone as alleged by the Commonwealth.

The Court rejects this portion of claim (5) because petitioner failed to offer a valid reason why he should not be bound by his representation at trial that his counsel's performance was adequate. *Id.*

In another portion of claim (5), petitioner contends he was denied the effective assistance of counsel when counsel failed to locate an alibi witness and lied to Petitioner about his efforts to locate the witness. Petitioner alleges he informed counsel of two alibi witnesses, one of whom was Jason Limehouse, and that counsel represented he was unable to locate either witness. Petitioner further alleges that, after entry of his guilty plea when reviewing a copy of his case file, petitioner discovered counsel attempted to locate only Limehouse. As support for this contention, petitioner attaches a portion of his case file containing the printed results for a computer-assisted search related to Limehouse.

The Court holds this portion of claim (5) fails to satisfy the "prejudice" prong of the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Petitioner fails to identify the second potential alibi witness or to proffer the testimony he expected that witness to give. *See Muhammad v. Warden*, 274 Va. 3, 19 (2013) (rejecting claim that counsel was ineffective for not securing the assistance of an expert witness because petitioner failed to identify an expert counsel might have consulted or proffer what information an expert would have provided). Thus, petitioner has failed to demonstrate that there is a reasonable probability that, but for counsel's alleged errors, he would have pleaded not guilty, would have proceeded to trial, and the outcome of the proceedings would have been different. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

In another portion of claim (5), petitioner contends he was denied the effective assistance of counsel when counsel failed to locate Limehouse. Petitioner contends counsel's search for Limehouse uncovered a number of potential addresses and counsel failed adequately to investigate each address or to seek petitioner's guidance in determining the most current address. Petitioner further contends that, had counsel shown him the search results, petitioner could have identified Limehouse's home address. Petitioner alleges Limehouse would have testified petitioner was with him when the robbery and abduction occurred.

The Court holds this portion of claim (5) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. There is no evidence in the record to support petitioner's conclusory allegation that counsel failed to conduct an adequate search for Limehouse. In addition, counsel was not required to provide petitioner with the results of his search, and counsel reasonably could have presumed that, had petitioner known where Limehouse lived, petitioner would have shared that information with counsel prior to counsel's search for Limehouse. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged errors, he would have pleaded not guilty, would have proceeded to trial, and the outcome of the proceedings would have been different. *Hill*, 474 U.S. at 59.

Accordingly, the petition is dismissed and the rule is discharged.

A Copy,

Teste:

Douglas B. Robelen, Clerk

By:



Deputy Clerk

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the
City of Richmond on Thursday the 10th day of October, 2019.*

Omar Smith, No. 1069073,

Petitioner,

against Record No. 181478

Harold W. Clarke, Director of the
Virginia Department of Corrections,

Respondent.

Upon a Petition for Rehearing

On consideration of the petition of the petitioner to set aside the judgment
rendered herein on July 17, 2019 and grant a rehearing thereof, the prayer of the said petition is
denied.

A Copy,

Teste:

Douglas B. Robelen, Clerk

By:



Deputy Clerk

APPENDIX B