

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
THE HONORABLE G. Edward Welmaker

CA No. 2011-CP-23-5180

MARLON J. CURRY,

APPELLANT,

vs.

STATE OF SOUTH CAROLINA

RESPONDENT.

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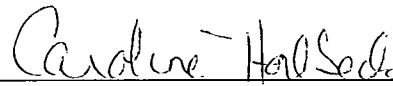
S.C. SUPREME COURT

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CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENS

NOTICE OF APPEAL

Appellant MARLON J. CURRY, appeals from the Order of the Honorable G. Edward Welmaker, Circuit Court Judge clocked May 3, 2013.

Respectfully submitted,



Caroline M. Horlbeck, Esq.
101 Whitsett St
Greenville, SC 29601

Date: May 23, 2013

Other Counsel of Record: Karen Ratigan, Esq.
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211

STATE OF SOUTH CAROLINA)
)
COUNTY OF UNION)

IN THE SUPREME COURT

Marlon J. Curry,)
)
)
Appellant,)

C.A. No. 2011-CP-23-5180

-vs-)

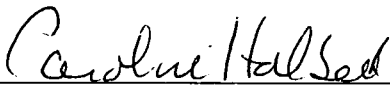
CERTIFICATE OF SERVICE

State of South Carolina,)
)
)
Respondent.)
_____)

This is to certify that I am an employee in the law office of Caroline M. Horlbeck, attorneys for Appellant, and that I have this day caused to be served upon the person(s) named below Appellant's Notice of Appeal by placing copies of same in the United States mail, with adequate postage thereon, addressed as follows:

Ms. Lorie French
S.C. Office of Appellate Defense
P.O. Box 11433
Columbia, SC 29211

Karen Ratigan, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211



Caroline M. Horlbeck

Greenville, South Carolina

May 23, 2013

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF GREENVILLE

CASE NO: 2011CP2305180

IN THE COURT OF COMMON PLEAS

Marlon J Curry vs. South Carolina State Of

FILED IN THE COURT OF COMMON PLEAS GREENVILLE COUNTY SOUTH CAROLINA MAY 3 PM 4:41

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**
 - Rule 12(b), SCRPC: Rule 41(a).
 - SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled): Other: _____
- ACTION STRICKEN (CHECK REASON):**
 - Rule 40(j) SCRPC: Bankruptcy:
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award:
 - Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 - Affirmed: Reversed: Remanded:
 - Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order: Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this 3rd day of May, 2013.

Court Reporter:

PRESIDING JUDGE - G Edward Welmaker

This judgment was entered on the 3rd day of May, 2013, and a copy mailed first class this 3rd day of May, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Caroline M.W. Horlbeck 101 Whitsett Street
Greenville, SC 29601

Karen Christine Ratigan PO Box 11549 Columbia,
SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
C.A. No. 2011-CP-23-5180

Marlon Jamark Curry,
S.C.D.C. No. 339456,

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

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This matter comes before the Court by way of an application for post-conviction relief (PCR) filed August 3, 2011. The Respondent made its return on December 30, 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 Caroline Horlbeck, 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. Also testifying was the Applicant's plea counsel, Christopher T. Posey, Esquire. The Court had before it the transcript of the guilty plea hearing, 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 Applicant waived presentment to the Greenville County Grand Jury on the charges of possession with intent to distribute (PWID) marijuana (2010-GS-23-1043), distribution of cocaine base (2010-GS-23-

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[Handwritten Signature]

1426), and distribution of cocaine base within one half mile of a school (2010-GS-23-1427). He was represented by Christopher T. Posey, Esquire.

On August 2, 2010, the Applicant pled guilty. The Honorable Edward W. Miller sentenced the Applicant to concurrent terms of ten (10) years suspended on the service of five (5) years and three (3) years probation for PWID marijuana, second offense, five (5) years for distribution of cocaine base, second offense, and five (5) years for distribution of cocaine base within one half mile of a school. The Applicant did not 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. "Counsel not present during sentencing phase."
 - b. "Counsel not present at guilty plea."

At the PCR hearing, the Applicant proceeded upon allegations that plea counsel was ineffective in advising the Applicant about time-served credit and the length of sentence he would serve.

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 each witness who testified at the hearing, and to closely pass upon their 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).

² *ANTB 2*

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). When there has been a guilty plea, the applicant must prove that counsel’s representation was below the standard of reasonableness and that, but for counsel’s unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

The Applicant stated he only had meeting with plea counsel and that they “vaguely” reviewed the discovery materials. The Applicant stated plea counsel told him that he would receive credit for the time he served for a probation violation (240 days). The Applicant stated he pled guilty in order to have received this credit. The Applicant stated, however, that he only received credit for the 30 days he served in the detention center. The Applicant stated plea counsel told him that he was pleading guilty to a non-violent sentence ^{and ew} ~~that~~ that, after the 240 days was applied to his sentence, he would only serve eighteen months. The Applicant stated plea counsel led him to believe, therefore, that he would only serve 50% of his sentence and he was actually serving 85% of that sentence. The Applicant stated, however, that he knew he was pleading guilty in exchange for a plea recommendation of 8-12 years (and that he only received a

five year sentence).

Plea counsel testified he filed discovery motions and reviewed the discovery materials with the Applicant. Plea counsel testified the Applicant was transported from the jail to the courthouse that day to "see his intentions." Plea counsel testified there was a plea offer for 10-12 years that was reduced to 8-12 years that day. Plea counsel testified he and the Applicant reviewed: the plea offer, the maximum sentences for second offenses, and that the charges would be third offenses if the case went to trial. Plea counsel testified the Applicant understood their conversation. Plea counsel testified he did not recall a conversation with the Applicant about potential credit for time-served. Plea counsel testified that, in this circumstance, his general practice would have been to advise his client that he was not legally entitled to this credit. Plea counsel testified his general practice would have been to advise the Applicant that, while the charge was non-violent, it would be treated as an 85% sentence. Plea counsel testified he would not have told the Applicant he would serve 50% of the sentence.

Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds the Applicant's testimony is not credible, while also finding plea counsel's testimony is credible. This Court further finds plea counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

The Applicant admitted to the plea judge that he was guilty. (Plea transcript, p.14). The Applicant also told the plea judge he understood the trial rights he was waiving in pleading guilty, was satisfied with counsel, and had not been coerced. (Plea transcript, pp.12-14).

This Court finds the Applicant failed to meet his burden of proving plea counsel did not spend enough time reviewing his case. 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 further notes the Applicant has failed to articulate what more plea counsel should have done in order to investigate and prepare his case. 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).

This Court finds the Applicant failed to meet his burden of proving plea counsel incorrectly advised that he would receive 240 days of credit if he pled guilty. The Applicant testified he had been incarcerated for a probation violation and only spent 30 days in the county jail. This Court notes the Applicant has failed to demonstrate that he was entitled to more than those 30 days of credit. See S.C. Code Ann. § 24-13-40 (2007). While the Applicant testified plea counsel told him he would receive this credit and that he only pled guilty based on this assumption, this Court finds the Applicant’s testimony is not credible.

This Court finds the Applicant failed to meet his burden of proving plea counsel incorrectly advised him about the length of sentence he would serve. The Applicant stated plea counsel told him that he would only serve 50% of his sentence and that, if he had known he would actually serve 85% of his sentence, he would have gone to trial. Plea counsel testified he would never have told the Applicant he would serve 50% of his sentence and that his standard practice would have been to advise that 85% of this sentence would have to be served. This Court finds plea counsel’s testimony is credible and the Applicant’s testimony is not credible. Law enforcement used a confidential informant and documented funds when it recorded two drug transactions involving the Applicant. The informant later identified the Applicant from a

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photographic lineup. (Plea transcript, pp.29-30). This Court finds it highly unlikely that, given the strong evidence against him, the Applicant chose to plead guilty because he believed he would only serve 50% of his sentence. See Geter v. State, 305 S.C: 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that plea 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 plea counsel’s performance. This Court notes the Applicant pled guilty in exchange for an 8-12 year sentence recommendation and plea counsel successfully argued for a reduction down to an active five year sentence. (Plea transcript, pp.32-33).

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.

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

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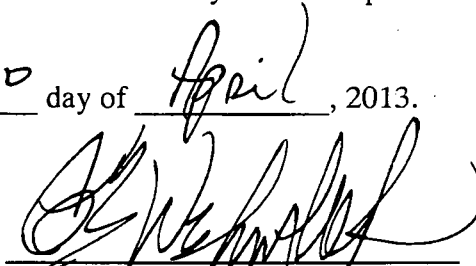
established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

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; and
2. 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.

CAROLINE M. HORLBECK

ATTORNEY AT LAW

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(864) 315-9919
Fax(864) 232-4756

May 23, 2013

Via Regular Mail

Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

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S.C. SUPREME COURT

Re: MARLON J. CURRY v. State

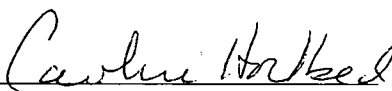
Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondents. The Notice has been filed with the Greenville County Clerk of Court.

These matters are being referred to the Office of Appellate Defense in that we were participating as Court appointed counsel at trial.

Thank you for your attention to this matter.

Yours very truly,


Caroline M. Horlbeck, Esq.

Enclosure

cc: Office of the Attorney General
Office of Appellate Defense

CAROLINE M. HORLBECK

Attorney At Law

101 WHITSETT ST.
GREENVILLE, SOUTH CAROLINA 29601

Via Regular Mail

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