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Admitted in Georgia and South Carolina

May 17, 2013

RECEIVED

MAY 22 2013

S.C. SUPREME COURT

Daniel E. Shearouse, Clerk
Supreme Court for the State of South Carolina
P.O. Box 11330
Columbia, SC 29211

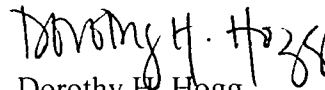
RE: *Notice of Appeal for Freddie L. Howard v. State of South Carolina*
Our File No. 1016/210

Dear Mr. Shearouse:

Enclosed please find an original and one copy of each of the Notice of Appeal and Proof of Service for filing in the captioned case. Once the originals have been filed, please return the date-stamped copies to me in the envelope provided for your convenience.

Thank you for your assistance.

Very truly yours,



Dorothy H. Hogg
For the Firm

DHH/
Enclosures

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

Honorable R. Lawton McIntosh, Circuit Court Judge

Case No.: 2012-CP-19-068

RECEIVED

MAY 22 2013

S.C. SUPREME COURT

Freddie L. Howard, #190795,Petitioner,

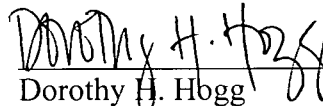
v.

State of South Carolina,Respondent.

NOTICE OF APPEAL

The Petitioner Freddie L. Howard, #190795, appeals the Honorable R. Lawton McIntosh's May 6, 2013, order denying post-conviction relief to the Respondent. Undersigned counsel received notice of entry of the order on May 7, 2013. A copy of the order on appeal is attached to this notice.

Respectfully submitted,



Dorothy H. Hogg
S.C. Bar No. 71710
Attorney for Applicant

May 17, 2013

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Augusta, GA 30903
(706) 724-0171

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

Honorable R. Lawton McIntosh, Circuit Court Judge

Case No.: 2012-CP-19-068

Freddie L. Howard, #190795,Petitioner,

v.

State of South Carolina,Respondent.

PROOF OF SERVICE

I, Dorothy H. Hogg, certify that I have today served the within notice of appeal by depositing a copy of it in the United States Mail, postage prepaid, addressed to:

South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

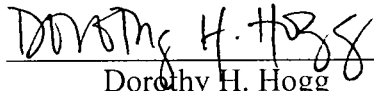
South Carolina Commission on Indigent Defense
P.O. Box 11433
Columbia, SC 29211-1433

Office of the Attorney General
Attn: J. Walter Whitmire
P.O. Box 11549
Columbia, SC 29211-1549

Freddie L. Howard
Dorm # GA 22A
Ridgeland Correctional Institution
P.O. Box 2039
Ridgeland, SC 29936

Aiken County Court of Common Pleas
P.O. Box 583
Aiken, SC 29802

Dated: May 17, 2013



Dorothy H. Hogg
S.C. Bar No. 71710
Attorney for Applicant

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EDGEFIELD COUNTY
CLERK OF COURT
SHIRLEY S. NEVIN

STATE OF SOUTH CAROLINA)
COUNTY OF EDGEFIELD) 2013 MAY -5) AM 9:13)
THE COURT OF COMMON PLEAS)
ELEVENTH JUDICIAL CIRCUIT)

Freddie L. Howard,
S.C.D.C. No. 190795

Applicant,

v.

State of South Carolina,

Respondent.

Case No. 2012-CP-19-068

ORDER OF DISMISSAL

This matter comes before the Court by way an Application for Post-Conviction Relief filed March 19, 2012. The Respondent made its Return and Partial Motion to Dismiss on May 30, 2012. An evidentiary hearing into the matter was convened on February 1, 2013, at the Lexington County Courthouse. Applicant was present at the hearing and was represented by Dorothy Hogg, Esquire. The Respondent was represented by Walt Whitmire, Esquire, of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Applicant's plea counsel, W. Greg Seigler, Esquire, was at present at the hearing and testified as well. This Court also had before it a copy of the transcript of the proceedings against the Applicant, the records of the Edgefield County Clerk of Court, and Applicant's records from the South Carolina Department of Corrections.

I. PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Edgefield County Clerk of Court. The Applicant was indicted at the March 2008, term of the Edgefield County Grand Jury for burglary, first degree

(2008-GS-19-068) and kidnapping (2008-GS-19-069). Applicant was represented by W. Greg Seigler, Esquire. On June 18, 2008, the Applicant pled guilty to a lesser offense of burglary, second degree. The kidnapping charge was nolle prossed. Applicant was sentenced by the Honorable J. Cordell Maddox, Jr. to confinement for a period of fourteen years for burglary, second degree. Applicant did not appeal his conviction or sentence.

Applicant alleged plea counsel was ineffective for failing to advise him regarding an appeal. Except for the Applicant's allegations directed at his plea counsel's failure to inform Applicant of his right to appeal, this Court finds that this Application for Post-Conviction Relief should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160 (2003). S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offense(s) he challenges in this Application on June 18, 2008. The Applicant was therefore required to file his application before June 18, 2009. This Application was filed on March 19, 2012, well beyond the expiration of the statutory filing period.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (2003) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the

pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, this Court grants Respondent's motion for summary judgment.

II. SUMMARY OF TESTIMONY

At the PCR hearing, Applicant testified he entered a guilty plea pursuant to a negotiated agreement. Applicant stated that he only met with plea counsel twice before pleading guilty. Applicant stated that plea counsel never advised him of his right to appeal. Applicant stated that plea counsel never met with him after the guilty plea hearing nor advised him regarding an appeal subsequent to the guilty plea hearing.

Applicant testified that he attempted to contact plea counsel twelve days after he pled guilty before Judge Maddox. Applicant stated that he was unable to contact plea counsel until months after the guilty plea hearing. Applicant testified that he would have wanted to appeal his guilty plea.

At the PCR hearing, plea counsel testified. Plea counsel is currently the Tri-County public defender for the Eleventh Circuit. Plea counsel recalled Applicant's case and plea negotiations with the solicitor. Plea counsel discussed these negotiations with Applicant. Plea counsel obtained a favorable negotiated guilty plea for Applicant. As a result of plea negotiations, Applicant accepted the solicitor's offer to nolle prosequere the kidnapping charge along allowing Applicant to plead guilty to the lesser offense of burglary, second degree.

Plea counsel testified that as a matter of practice, he discusses the right to appeal when advising a client on the consequences of entering a guilty plea. Plea counsel stated that there were no notations in Applicant's file evidencing discussing an appeal. However, plea counsel testified that he always advises his clients of their rights to appeal. Plea counsel stated that

Applicant never contacted him subsequent to the guilty plea hearing to request that he file an appeal. Plea counsel testified that if asked, he would have filed an appeal on Applicant's behalf. Plea counsel testified that Applicant lacked a meritorious basis to appeal.

III. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 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.

The decision of the South Carolina Supreme Court, in White v. State, 263 S.C. 110, 108

S.E.2d 35 (1974), holds that even though the post-conviction relief court finds that the Applicant had never voluntarily and intelligently abandoned his appeal, the court has no jurisdiction to grant a belated appeal. However, where an accused establishes in a post-conviction relief hearing that he was unconstitutionally deprived of his statutory right to a direct appeal, the South Carolina Supreme Court, upon an appeal of the post-conviction relief decision, will review the trial record and pass upon all issues properly raised and argued as if the direct appeal has been perfected.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, the exhibits introduced into evidence at the hearing, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

This Court finds Applicant failed prove that counsel was ineffective for allegedly failing to advise Applicant of his right to appeal. This Court finds plea counsel's testimony more credible than Applicant's testimony. This Court finds plea counsel is an experienced criminal defense attorney that exercises sufficient procures regarding filing appeals for his clients.

Roe v. Flores-Ortega mandates that counsel has a constitutionally-imposed duty to consult with a defendant about an appeal when there is reason to think either (1) that a rational defendant would want an appeal, or (2) that this particular defendant reasonably demonstrated to

counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029 (2000). Absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. Turner v. State, 380 S.C. 223, 670 S.E.2d 373 (2008).

First, This Court agrees with plea counsel's testimony that Applicant lacked a meritorious basis for appeal. The Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently. Boykin v. Alabama, 395 U.S. 238 (1969); Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (1999). Boykin requires that a defendant be made aware of the right to a jury trial, the privilege against self-incrimination, and the right to confront one's accusers. Additionally, the South Carolina Supreme Court requires that a defendant entering a guilty plea be made aware of the nature and crucial elements of the offense, the maximum and any minimum penalty, and the nature of the constitutional rights being waived. Pittman, 337 S.C. at 599, 524 S.E.2d at 624; Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991); State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980). The knowing and voluntary waiver of the constitutional rights "may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both." Pittman, 337 S.C. at 599, 524 S.E.2d at 625 (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "Although the trial court is not required to direct a defendant's attention to each right and obtain a separate waiver, the record should indicate the defendant was fully aware of the consequences of his guilty plea." Id. Additionally, possible errors by trial counsel may be cured by proper advice given by the plea court. Knox v. State, 340 S.C. 81, 530 S.E.2d 887 (2000), Wolfe v. State, 326 S.C. 158, 164-65, 485 S.E.2d 367, 370 (1997) (also finding "wishful thinking" does not equal misapprehension as to a possible sentence); James v. State, 377 S.C. 81, 659 S.E.2d 148, (2008) (A defendant need not admit guilt

in order to enter a valid guilty plea; instead, a guilty plea need only represent a voluntary and intelligent choice among alternative courses of action open to the defendant).

This Court finds Applicant failed to provide any justification of why a criminal defendant in his position would have desired an appeal necessitated under the first prong of Roe v. Flores Ortega. The sentencing Judge apprised Applicant of the maximum possible sentence within the terms of the negotiated guilty plea. (Plea Transcript 3, ln. 1-11). The sentencing Judge apprised Applicant of his waiver of constitutional rights. (Plea Transcript 4, ln. 22-Tr. 5, ln. 4.) Last, Applicant freely and voluntarily entered the guilty plea. (Plea Transcript 4, ln 5-13). Additionally, This Court finds plea counsel is an experienced criminal defense attorney. This Court finds that plea counsel provided competent and effective assistance of counsel in his representation of Applicant.

Second, this Court finds Applicant failed to prove that he communicated a desire to appeal to plea counsel. Applicant failed to produce any evidence showing that he communicated a desire to appeal to plea counsel. Furthermore, this Court finds plea counsel's testimony compelling that he would have filed an appeal if asked.

All Other Claims

Except as discussed above, this Court finds that the Applicant affirmatively waived the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's

failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

CONCLUSION

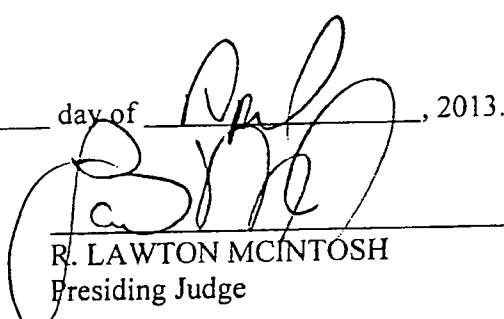
Based on all the forgoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

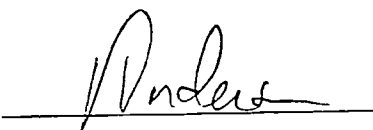
This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRPC; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 4 day of April, 2013.


R. LAWTON MCINTOSH
Presiding Judge


_____, South Carolina

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