

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM HORRY COUNTY

Court of Common Pleas

Honorable H. Steven DeBerry, IV

Case No.: 2020-CP-26-0648

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S.C. SUPREME COURT

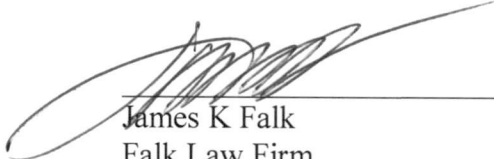
James L Arthur 301001.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner James L Arthur 301001 appeals the Honorable H. Steven DeBerry's October 10, 2022 Order of Dismissal. Undersigned counsel received notice of entry of the order on October 17, 2022. A copy of the order on appeal is attached hereto.



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October 17, 2022

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STATE OF SOUTH CAROLINA)
 COUNTY OF HORRY)
)
)
 James L. Arthur, #301001,)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No.: 2020-CP-26-0648

ORDER OF DISMISSAL

RECEIVED
OCT 21 2022
 S.C. SUPREME COURT

This matter comes before this Court by way of Applicant's post-conviction relief application filed January 27, 2020. Respondent made its return on July 28, 2020, requesting an evidentiary hearing be convened. An evidentiary hearing was held on June 2, 2022, at the Horry County Courthouse. James K. Falk, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto, Esquire, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Counsel Kenneth Massey also testified. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. Findings of fact and conclusions of law are set forth below.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Horry County Clerk of Court. During its June 2016 term, the Horry County Grand Jury indicted Applicant for trafficking cocaine base more than ten grams, less than twenty-eight grams (2016-GS-26-02574), possession of schedule 1 - V drug (2016-GS-26-02575), unlawful possession of a pistol (2016-GS-26-02576), unlawful carrying of a pistol (2016-GS-26-02577). Applicant was represented by Kenneth B. Massey, Esquire. Assistant

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 HORRY COUNTY, SC

MSD

Solicitors Mary-Ellen Walter and C. Leigh Andrew of the Fifteenth Circuit Solicitor's Office prosecuted the case. On November 6-7, 2017, Applicant proceeded to trial before the Honorable Steven H. John, circuit court judge, and a jury. Applicant failed to appear and was tried *in absentia*. Applicant was found guilty as charged. Judge John sentenced Applicant to a total of twenty-five years' imprisonment.

Applicant filed a timely notice of appeal on December 19, 2017, that was perfected by Kathrine H. Hudgins, Esquire, through filing a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967) and a motion to be relieved as counsel. The South Carolina Court of Appeals dismissed Applicant's appeal and granted the motion to be relieved by unpublished opinion. *State v. Arthur*, 2019-UP-364 (S.C. Ct. App. Nov. 13, 2019). The remittitur was issued on December 3, 2019.

Summary of Relevant Facts

On May 12, 2016, an officer was on patrol, running license plates. (Tr. 43). The officer passed Applicant's car, ran the license plate, and the plate came back as suspended. (Tr. 43). The officer stopped Applicant's car, approached Applicant, and smelled marijuana coming from the car. (Tr. 43-44). Applicant was ultimately forced to step out of the car, was given his *Miranda* warnings, and thereafter told the Officer the marijuana was in the passenger seat when asked. (Tr. 44). The Officer went to the passenger seat and found a black bag containing a scale, a mason jar, plastic baggies containing 13.4 grams of crack cocaine, ammunition, and a pistol. (Tr. 44). Applicant was previously convicted of third-degree burglary, rendering his possession of the pistol unlawful. (Tr. 45).

Current Action Before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully

because of ineffective assistance of counsel in that:

1. Defense counsel was ineffective because:
 - a. "no objections to the black bag."
 - b. "no objections to the marijuana."
 - c. "no chain of custody to the black bag – no objections."
 - d. "no chain of custody to marijuana – no objections."
 - e. "no chain of custody on off white back substance – no objection."
 - f. "evidence submitted in evidence with no chain of custody and no objection."
 - g. "no objections to items in the back bag or green bag and no chain of custody."
 - i. "Also no foundation to the chain of custody."
 - h. "There was no chain of custody due to officer findings and collecting the blue-white pills."
 - i. "there was no chain of custody on the collecting of the evidence and there was no body camera to verify a complete chain of custody"
 - j. "Counsel did not object to State's Exhibit #3"
 - k. "No chain of custody was established at the crime scene during the collecting of the evidence."
 - l. "Counsel made no objections to the tainted evidence and State's exhibits 4 and 5."
 - m. "Counsel made no objections to police officer omissions that the body-cam just disappeared."
 - n. "Counsel made no objections to Police Officer Cox not knowing the name of the Highway patrol officer that assisted him."
 - o. "Judicial error when the Judge allowed in exhibit 6. . . Conviction over defense attorney objections."
 - p. "there was no chain of custody established when officer James Hafner turned over 2 white pills/14 blue pills that he released to Officer Cox whom did not establish a chain of custody."
 - q. "Counsel did not object to the omission of police officer Hafner said that he did not recall the highway patrolman's officer name, and asked did he have a body cam that night, Hafner said yes, but it was purged off the system."
 - r. "Defense Counsel made no objections to the omissions of the Clerk Donna Bell."
 - s. "Even after the clerk stated that no evidence of the body cams was turned in defense counsel still failed to object."
 - t. "Defense counsel made no objections to the drug analysis conducted by Courtney Johnson."
 - u. "Defense Counsel made no objections to State's exhibit number 7 when it was admitted into evidence even though the fact is [the officer] stated she did not test all of the drugs defense counsel failed to object to its being admitted into evidence."
 - v. "The Court lacked subject matter jurisdiction to charge defendant with a third offense without presentment by the Grand Jury."

At the PCR hearing, Applicant proceeded forward on the following allegations:

1. Ineffective Assistance of Counsel:
 - a. For promising Applicant drug court or a dismissal of the charges if he

- cooperated with the State.
- b. Failure to convey a seven-year plea offer.
- c. Failure to review discovery.
- d. Failure to communicate effectively with Applicant.
- e. Failure to ensure Applicant was present for his trial.

All other allegations raised in his initial application and amendments are deemed waived and abandoned and, accordingly, will not be addressed in this order.

Summary of the Testimony

Applicant Testimony

Applicant stated that Counsel represented him on his criminal charges. He stated he retained Counsel and he made bond. He stated Counsel went to him and stated he would handle the case and could guarantee him drug court because it would be good for him, and he did not want Applicant to come back to him with another refraction in the future. He stated that a few weeks later Counsel came to him after speaking to the prosecutor, who stated that he could get the charge dismissed if he cooperated with the police. He stated that he received a seven-year written plea offer that he received in his motion for discovery. He stated Counsel never showed him the offer. He stated if Counsel showed him the offer, he would have taken it and would not have gone to trial. He stated he received this after going to Broad River Correctional Institution after he was sentenced. He stated that he and Counsel did not prepare for trial and that Counsel did not talk to him about anything.

On cross-examination, Applicant stated that he met with Counsel four or five times after they initially met when he was in jail. He stated they did not talk about the evidence against him. He stated they only talked about drug court and potentially dropping the charges. He stated he did not appear at his trial because he was scared. He stated he knew he was scheduled for trial on the trial date. He stated he thought the case would be continued if he did not show up. He stated

Counsel did not discuss the plea offer with him. He stated that he did not discuss potential defenses, the plea, or the trial beyond the date it was set for. He stated that he knew about the evidence the State had against him. Specifically, he stated that he knew what drugs the police found in the car that he was driving.

On re-direct, Applicant stated that he did not receive a call the day of trial from Counsel. He stated he received a call from Counsel about a month before trial, stating that the trial was on the docket. He stated he found out about the trial when someone saw him on the news.

Counsel Testimony

Counsel testified that he was retained to represent Applicant and that he met with Applicant five or six times at the jail and then again at court when Applicant was on the October and August rosters. He stated that Applicant was proceeding to trial if he did not sign the paperwork. He stated that Applicant was interested in whether he would be eligible for drug court. Counsel testified that Applicant was a drug dealer, not drug user, and was not a candidate for drug court as a result. He stated that he procured a seven-year plea offer, but Applicant requested it be dropped to five years. He stated Applicant knew about the deal but did not want to do the time. He stated that on the day of trial, he and his staff called Applicant to no avail. He stated that a week later Applicant's girlfriend came to him and asked what they could do. Counsel testified that he told them to file a notice of appeal and a post-conviction relief application. Counsel stated he provided Applicant with a copy of the discovery. He stated that Applicant failed to appear for court multiple times, including at trial. He stated that Applicant only wanted a probation-only sentence and was unwilling to serve active time. He stated he told Applicant that if he appeared at a court hearing, he thought he would be able to get the negotiated plea back on the table.

On cross-examination, Counsel testified that he did not recall who the police officer involved in the case was. He stated that he informed Applicant of the seven-year plea offer during his June office meeting with Applicant. He stated he told Applicant that he received a good offer but did not want to do the time. He stated that Applicant knew about the offer for a year and a half. He stated he tried to contact Applicant several times when he failed to appear at his court hearing.

Applicant Rebuttal

Applicant testified that he never discussed the plea with Counsel. He stated that Counsel told him he could guarantee him drug court. He stated he did not know he could receive probation and that he never discussed this option with Counsel. He stated he never discussed the seven-year plea offer with Counsel. Applicant stated he requested Counsel obtain a five-year offer because he thought that was obtainable. He denied that the five-year request was related to the seven-year offer.

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. Before this Court are the Horry County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the trial transcript, direct appeal records, and this PCR action's records. 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 conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. See also Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed

in virtually “countless” ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel’s deficient performance must have prejudiced the applicant so 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. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters “only in the rarest case” because “[t]he likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Seven-Year Plea Offer

Applicant’s claim of ineffective assistance of counsel for failure to convey a fifteen-year plea offer is without merit. Applicant alleges ineffective assistance of counsel because Counsel failed to present a favorable plea to Applicant before the offer expired. “[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.” *Missouri v. Frye*, 566 U.S. 134, 145 (2012). Further, ineffective assistance is given “[w]hen defense counsel allow the [plea] offer to expire without advising the defendant or allowing him to consider [the plea].” *Id.* at 145.

When determining prejudice for failure to convey a plea, a case-by-case determination is made "assessing whether but for counsel's deficient performance a defendant would have accepted the State's proposed plea bargain and that he would have benefited from the offer." *Bell v. State*, 410 S.C.436, 443, 765 S.E.2d 4, 7 (2014). Prejudice is found if applicant "would have taken the plea offer had [he] been afforded effective assistance of counsel", if "the plea would have been entered without prosecution canceling it or the trial court refusing to accept it", and "the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Collins v. State*, 422 S.C. 250, 262, 810 S.E.2d 871, 877 (2018) (quoting *Frye*, 566 U.S. 147) (quotations omitted). Presumed prejudice is reserved to limited situations. *Bell*, 410 S.C. at 443, 765 S.E.2d at 7.

Counsel credibly testified that the seven-year plea offer was communicated to Applicant, who asked for a five-year sentence instead. Counsel exhibited this written counteroffer by Applicant while on the witness stand. He also credibly testified that Applicant was aware of the offer for a year and a half but rejected it because he did not want to serve any time. Counsel was not deficient because he informed Applicant of the offer. No prejudice is shown because the only reason why the offer was not accepted was because of Applicant's own rejection of said offer. Accordingly, relief is denied on this ground.

Drug Court/Dropped Charges

Applicant alleged that Counsel promised him he could get the charges dropped or get him drug court. Counsel credibly testified that Applicant was not a candidate for drug court because he was a drug dealer, not an addict or user. Counsel also credibly testified that the best offer he was made was a seven-year offer, but that Applicant was unwilling to take any offer that required he serve active time. Thus, this Court finds Applicant's assertions that these were

plausible offers for him or that Counsel portrayed them as plausible options incredible. Thus, relief is denied on this ground.

Failure to Communicate

Applicant alleges that Counsel was ineffective for failure to maintain regular contact with him. “[B]revity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation.” *Smith v. State*, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (2012). Applicant must show evidence indicating “how additional preparation or communication would have resulted in a different outcome.” *Id. See Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (where application failed to show ineffective assistance of counsel based on lack of preparation by neglecting to show evidence of what counsel failed to discover or what defenses counsel could have pursued had he more fully prepared for the case); *Skeen v. State*, 325 S.C. 210, 214-15, 481 S.E.2d 129, 132 (1997) (where applicant failed to show ineffective assistance of counsel when he did not present evidence showing how additional preparation would have impacted the trial).

Counsel credibly testified that he met multiple times with Applicant, where they discussed the plea offer and the discovery. Applicant has failed to show how Counsel was deficient on this ground or what prejudice occurred. In fact, this Court finds that Applicant was primarily responsible for failing to communicate effectively with Counsel, as evidenced by his refusal to show up at court or answer Counsel’s phone calls the day of trial. Thus, relief is denied on this ground.

Failure to Review Discovery

Applicant claims Counsel was ineffective for failure to inform him of what evidence or discovery existed in this case. However, Counsel credibly testified that he provided Applicant

with a copy of all discovery materials. Applicant substantiated this in part by stating that he was aware of what drugs were found in his car. This Court finds Applicant's allegation that he did not know the evidence against him incredible. Thus, relief is denied on this ground.

Failure to Ensure Applicant was Present at Trial

Applicant claims Counsel was ineffective for failure to ensure Applicant was present at his trial. Although the Sixth Amendment of the Constitution guarantees the right of an accused to be present at every stage of his trial, this right may be waived. *State v. Bell*, 293 S.C. 391, 401, 360 S.E.2d 706, 711 (1987); *Ellis v. State*, 267 S.C. 257, 260, 227 S.E.2d 304, 305 (1976). Rule 16 of the South Carolina Rules of Criminal Procedure provides:

[A] person indicted for misdemeanors and/or felonies may voluntarily waive his right to be present and may be tried in his absence upon a finding by the court that such person has received notice of his right to be present and a warning was given that the trial would proceed in his absence upon a failure to attend the court.

Rule 16, SCRCrimP.

A waiver of such an important right is permitted only in limited circumstances. *City of Aiken v. Koontz*, 368 S.C. 542, 547, 629 S.E.2d 686, 689 (2006). Therefore, before a defendant may be tried *in absentia*, the trial court must determine a defendant voluntarily waived his right to be present at trial, making findings of fact on the record that the defendant (1) received notice of his right to be present and (2) was warned that the trial would proceed in his absence. *Id.*

Applicant, by his own admission, understood his trial was taking place on the trial date and chose not to appear, stating that he was afraid of going to trial. Additionally, at the trial, testimony was elicited that Applicant was issued a subpoena to appear on the trial date. (Tr. 30). A bondsman testified that Applicant dropped from calling once a week to not calling in the couple of months prior to trial and has not notified her of any address changes. (Tr. 32-34). Counsel stated at trial that he attempted to contact Applicant at the courthouse, to no avail. (Tr. 34). Counsel credibly testified to the same at the PCR hearing. Thus, this Court finds Applicant was properly notified of the trial and

elected not to appear, waiving this right. Thus, relief is denied on this ground.

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 PCR application must be denied and dismissed with prejudice.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty days of receipt by counsel of the judgment entry's written notice to secure appropriate appellate review. See Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has the right to appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

IT IS THEREFORE ORDERED:

1. The PCR application be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 10th day of October, 2022.


H. STEVEN DEBERRY, IV
Presiding Judge
Fifteenth Judicial Circuit

Florence, South Carolina.