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IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT
SOUTH CAROLINA SUPREME COURT

STATE OF SOUTH CAROLINA)
COUNTY OF CHEROKEE)

Anthony Boyd Tate, #355103,)
Applicant,)

v.)

State of South Carolina,)
Respondent.)

Case No.: 2018-CP-11-0101

ORDER OF DISMISSAL

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2022 DEC 22 A 11:33
BRANDY W. MCBEE

This matter comes before this Court by way of Applicant's post-conviction relief application filed on February 6, 2018, amended on March 12, 2021. Respondent made its return on March 2, 2020, and amended on March 17, 2021, requesting an evidentiary hearing be convened. An evidentiary hearing was held on October 20, 2022, at the Spartanburg County Courthouse. Rodney Richey, Esquire, represented Applicant. Assistant Attorney General Chelsey Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Counsel Scott Robinson 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 of the Cherokee County Clerk of Court. During its March 2014 term, the Cherokee County Grand Jury indicted Applicant for distribution of crack cocaine, third offense (2014-GS-11-0275) and distribution of crack cocaine within one-half mile of school/park (2014-GS-11-0276). During its October 2014 term, the Cherokee County Grand Jury indicted

Applicant for distribution of crack cocaine, third offense (2014-GS-11-2054). During its June 2015 term, the Cherokee County Grand Jury indicted Applicant for distribution of marijuana, third offense (2015-GS-11-0598). Scott D. Robinson, Esquire represented Applicant. Solicitor Barry Barnette prosecuted the case. On June 17, 2015, Applicant appeared before the Honorable R. Keith Kelly and pled guilty as charged. Judge Kelly sentenced Applicant to fourteen years' imprisonment for the distribution of crack cocaine and marijuana charges and ten years' imprisonment for distribution of crack cocaine within one-half mile of school/park, along with credit for time served of nine months GPS home detention, sentences running concurrently. Applicant did not appeal his conviction or sentence.

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. "Newly Discovered Evidence"
 - a. "based on a change of sentencing law."
2. "Ineffective Assistance of Counsel based off Newly Discovered Evidence"
 - a. "Failure to communicate with client: Erroneous Legal Advice"

In an amendment dated March 12, 2021, Applicant alleged:

1. "The Applicant ple[d] guilty to Distribution of Crack 3rd offense two counts, distribution of marijuana and distribution of crack with one-half mile of school/park."
2. "Applicant alleges that his counsel did not advise him that he would have to serve 85% of his sentence. He was advised that his convictions were non-85%."
3. "In early 2018, the Department of Corrections notified the Applicant that he had to serve 85% [] of his sentence."
4. "The Applicant filed this application upon receiving the information."
5. "Thus, Applicant believes that his counsel was ineffective for not advising him that he would have to serve 85% of his sentence."
6. "If Applicant had known he would have to serve 85% he would have proceed[ed] to trial."

Respondent made a return and motion to dismiss on March 2, 2020. The Honorable J. Mark Hayes, II requested a hearing on the motion to dismiss be convened. A hearing was held on



February 16, 2021, with the Honorable J. Derham Cole presiding. Judge Cole granted Applicant thirty-five days to file an amended PCR application and denied Respondent's motion to dismiss with leave granted to Respondent to refile the motion after review of Applicant's amended PCR application. Respondent received the amended PCR application on March 12, 2021. The State's motion to dismiss was denied and a full evidentiary hearing ordered by Judge Cole through Form 4, filed on May 18, 2022.

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

1. Involuntary plea for because Applicant pled believing that he only had to serve sixty-five percent of the sentence to become parole eligible.
2. Ineffective assistance of counsel for failure reduce Applicant's charges from a third offense to second offense charge.

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 testified that Counsel was ineffective. Specifically, he testified that Counsel told him he should only have to serve sixty-five percent of his sentence to be parole eligible. He stated he did not discover he would have to serve eighty-five percent until he was in SCDC custody. He testified he would not have pled if he thought he had to serve eighty-five percent of the sentence. Additionally, he testified that he thought he should have been charged with a second offense, not a third or subsequent offense charge.

Counsel Testimony

Counsel testified that he did not tell Applicant he would only have to serve sixty-five percent of the sentence. Instead, he testified that in his general practice he does not tell clients how much of the sentence they will have to serve to become parole eligible. Counsel testified



that Applicant had two prior convictions, rendering the third offense charge appropriate. He stated that if the charge was inappropriate, he would have brought it up to the prosecutor immediately.

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 Cherokee County Clerk of Court Records, Applicant's South Carolina Department of Corrections 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



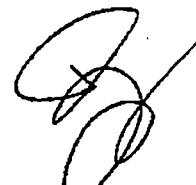
evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. See also Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness 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



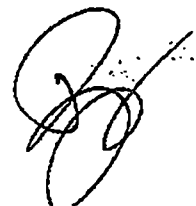
examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Parole Eligibility

Applicant alleges plea counsel was ineffective for misadvising him that he would be eligible for parole upon completion of sixty-five percent of his sentence. For a plea to be valid, the applicant must have been aware of the nature and crucial elements of the offense the maximum and minimum penalties, and the rights he is waiving by accepting the plea. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Roddy v. State*, 339 S.C. 29, 528 S.E.2d 418 (2000). A plea is not knowing or voluntary if a defendant "lacks knowledge of material evidence in the prosecution's possession." *Gibson v. State*, 334 S.C. 515, 523, 514 S.E.2d 320, 324 (1999).

A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both." *Roddy*, 339 S.C. at 34, 528 S.E.2d at 421 (citing *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing." *Dalton*, 376 S.C. at 138, 654 S.E.2d at 874 (quoting *Harres v. Leeke*, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984)). Further, "guilty pleas, freely and voluntarily entered, act as a waiver of all non-jurisdictional defects and defenses, including claims of a violation of a constitutional right prior to the plea." *Whetsell v. State*, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981).

"It is well settled that parole eligibility is a collateral consequence of sentencing, and that



trial counsel need not advise a client of his parole eligibility or ineligibility in order to render effective assistance." *Jackson v. State*, 349 S.C. 62, 64, 562 S.E.2d 475, 476-77 (2002) (citations omitted). "When considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether information conveyed by the plea judge cured any possible error made by counsel." *Burnett v. State*, 352 S.C. 589, 592, 576 S.E.2d 144, 145 (2003) (citing *Moorehead v. State*, 329 S.C. 329, 496 S.E.2d 415 (1998)).

Counsel credibly testified that he does not inform clients about how much time they will spend incarcerated before becoming eligible for parole and credibly denied telling Applicant he would only have to serve sixty-five percent of the sentence. Further, Applicant failed to provide sufficient evidence beyond his word alone to support this allegation. Accordingly, this Court finds counsel properly advised Applicant regarding parole eligibility. Thus, relief is denied on this ground.

Reduction in Charges

Applicant claims Counsel was ineffective for failure to seek a second offense charge, alleging he only had one prior drug charge. Counsel credibly testified that Applicant had two prior drug charges, rendering the third offense charge appropriate. Thus, this claim is without merit and this Court denies relief as a result.

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 the Applicant that he must file and serve a notice of appeal within .



