

Richard Warder
Attorney At Law

June 18, 2013

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

RECEIVED

JUN 24 2013

S.C. SUPREME COURT

Re: Walter Brannon vs. State of South Carolina

Dear Court:

Enclosed please find a Notice of Intent to Appeal and Certificate of Mailing in reference to the above captioned case.

Thank you for your cooperation in this matter.

Sincerely,

Richard H. Warder

RHW/rls



Enclosures

Walter Brannon
Karen C. Ratigan, South Carolina Attorney General Office

proveninnocent@netscape.net



15 Primrose Street
Post Office Box 26133
Greenville, SC 29616
271-9955 Office
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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
COMMON PLEAS COURT

G. EDWARD WELMAKER, CIRCUIT COURT JUDGE
2011-CP-23-08067

WALTER BRANNON SCDC 343944.....Applicant,

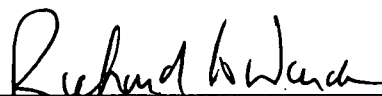
v.

STATE OF SOUTH CAROLINA.....Respondent.

NOTICE OF INTENT TO APPEAL

Walter Brannon, SCDC 343944, appeals the Order of Honorable
G. Edward Welmaker, dated May 20, 2013.

Respectfully Submitted



Richard H. Warder
Attorney At Law
15 Primrose Street
P.O. Box 26133
Greenville, South Carolina

June 18, 2013

Other counsel of record:

Karen C. Ratigan
South Carolina Attorney General Office
P.O. Box 11549
Columbia, South Carolina 29211-1549

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

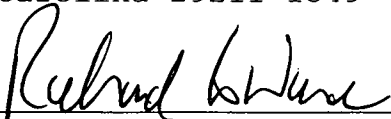
Case Number: 2011-CP-02067

WALTER BRANNON SCDC343944)
)
APPLICANT,)
-vs-)
STATE OF SOUTH CAROLINA)
RESPONDENT)

CERTIFICATE OF MAILING

This is to certify that the undersigned attorney Richard H. Warder, attorney for the APPLICANT did cause a Notice of Intent to Appeal to be served upon the Respondent, by mailing a copy of the same in an envelope addressed as shown below and depositing same in the United States Mail, proper postage affixed thereto, on the ^{18th} day of June, 2013.

Karen C. Ratigan
South Carolina Attorney General Office
P.O. Box 11549
Columbia, South Carolina 29211-1549



RICHARD H. WARDER
POST OFFICE BOX 26133
GREENVILLE, S.C. 29616
ATTORNEY FOR APPELLANT

SWORN to before me this
^{18th} day of June, 2013



NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 10-31-13

RECEIVED
JUN 24 2013
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2011CP2308067

2013 JUN -4 PM 4:11
FILED - CLERK OF COURT
GREENVILLE SC
PAUL B. WICKENSIMER

Walter J Brannan vs. South Carolina State Of

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 4th day of June, 2013.

Court Reporter: _____

PRESIDING JUDGE - G Edward Welmaker

This judgment was entered on the 4th day of June, 2013, and a copy mailed first class this 4th day of June, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Richard Warder, 15 Primrose St. 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

RICHARD WARDER

JUN 10 2013

RECEIVED

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Walter Jonathan Brannan,)
 S.C.D.C. No. 343944,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2011-CP-23-8067

ORDER OF DISMISSAL

FILED
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 PAUL L. WILSON
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This matter comes before the Court by way of an application for post-conviction relief (PCR) filed December 5, 2011. The Respondent made its return on March 22, 2012. 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 Richard H. Warder, 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, R. Mills Ariail, Jr., Esquire. The Court had before it the transcripts of the guilty plea and sentencing hearings, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application and subsequent Amendment, 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 for trafficking cocaine (2009-GS-23-2001,

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count 1), possession of a weapon during commission of a violent crime (2009-GS-23-2001, count 2), possession with intent to distribute (PWID) marijuana (2009-GS-23-2002), and trafficking cocaine base (crack cocaine) (2009-GS-23-8658). He was represented by R. Mills Ariail, Jr., Esquire.

On October 14, 2009, the Applicant pled guilty before the Honorable Edward W. Miller. The sentence was deferred. On December 7, 2010, Judge Miller sentenced the Applicant to concurrent terms of twelve (12) years for trafficking cocaine, five (5) years for possession of a weapon during commission of a violent crime, five (5) years for PWID marijuana, and ten (10) years for trafficking cocaine base (crack cocaine). 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. Failed to "object to sentence after judge gave ruling tã h [sic] based upon his unsupports [sic] speculation that the defendant had done same crime before."
 - b. Failed to "advise Defendant he should appeal."

In a pro se document filed by counsel on April 1, 2013 and captioned "Amendment to PCR Application," the Applicant makes the following allegations:

1. Ineffective assistance of counsel:
 - a. Failed to subject the State's case to meaningful adversarial testing.
 - b. Failed to inform the Applicant of available defenses.
 - c. Failed to challenge the initial traffic stop for a lack of probable cause.
 - d. Failed to conscientiously discharge his professional responsibilities.
 - e. Failed to articulate trial strategy or challenge the sufficient of the indictment.
 - f. Failed to advise of the collateral consequences of the guilty plea.
 - g. Failed to advise he could withdraw his guilty plea.



- h. Failed to file a notice of appeal.
 - i. Failed to challenge the arrest or search and seizure of objects from the vehicle.
 - j. Failed to advise of the waiver of presentment.
2. Involuntary guilty plea:
- a. Counsel failed to ascertain whether the Applicant understood the issues involved in the case.
 - b. Counsel failed to properly consult the Applicant or keep him informed of the status of the case and plea negotiations.
 - c. Counsel failed to keep the Applicant advised of available defenses.
 - d. Counsel dictated how the case would proceed and did not offer alternative options.
3. Malicious prosecution:
- a. "At sentencing, the prosecutor informed the judge that I had refused to cooperate with the state and that because of this the state would make no sentence recommendation in this case which was in direct conflict with the negotiated terms under which I agreed to plead guilty. The prosecution's conduct was malicious and unethical and intended to influence the judge into a more harsh sentence. Furthermore the request by the prosecution for me to commit perjury is not only unethical, it is a criminal act, conspiracy to commit perjury."

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).

Ineffective Assistance of Counsel/Involuntary Guilty Plea

The Applicant alleges his guilty plea was involuntary and that 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).

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000) (citing Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)).

The Applicant stated he had seven or eight meetings with plea counsel and numerous phone calls about the case. The Applicant stated they reviewed the allegations, evidence, and his version of events. The Applicant stated plea counsel did not review possible defenses or challenge the initial traffic stop (and subsequent arrest, search, and seizure). The Applicant stated plea counsel told him there was a seven year plea recommendation. The Applicant stated plea counsel told him it was in his best interest to plead guilty and that he could receive a twenty-

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five year sentence if they went to trial. The Applicant stated plea counsel should have objected when the plea judge stated (during the sentencing hearing) that it was clear the Applicant had engaged in this behavior before. The Applicant stated plea counsel never advised him of his appellate rights.

Plea counsel testified he was retained in this case and filed discovery motions. Plea counsel testified he received the discovery materials, reviewed them with the Applicant, and provided him with a copy. Plea counsel testified they also reviewed the Applicant's version of events. Plea counsel testified he had seven or eight meetings with the Applicant and numerous phone calls with both the Applicant and his mother. Plea counsel testified there was no valid basis to challenge the traffic stop and noted the Applicant admitted the drugs were his at the scene. Plea counsel testified he recommended the Applicant consider pleading guilty. Plea counsel testified there was not a seven year sentence recommendation. Plea counsel testified he told the Applicant the guilty plea would be entered without a recommendation and what the sentence ranges were for the charges. Plea counsel testified he did not object to the plea judge's comment because it was at the sentencing hearing and he had already provided his mitigation argument. Plea counsel testified he did not think he should have objected because it may have created a bigger problem for the Applicant. Plea counsel testified he advised the Applicant about his appellate rights but that the Applicant did not ask him to file an appeal.

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.

A handwritten signature in black ink, appearing to be the initials 'MMS' with a long horizontal stroke extending to the right.

The Applicant admitted to the plea judge both that he was guilty and that the facts recited by the solicitor were true. (Plea transcript, p.8; p.15). The Applicant also told the plea judge that he understood the trial rights he was waiving in pleading guilty and was satisfied with counsel. (Plea transcript, pp.7-9). Plea counsel informed the plea judge the Applicant had claimed possession of the drugs from the beginning and the Applicant stated "I screwed up big time." (Sentencing transcript, p.7; p.14). This Court finds the Applicant entered a knowing and voluntary guilty plea. See Boykin v. Alabama, 395 U.S. at 243-44, 89 S. Ct. at 1712.

This Court finds the Applicant failed to meet his burden of proving plea counsel did not properly review or discuss his case. Both the Applicant and plea counsel testified they had seven or eight meetings and numerous phone calls about the case. Both the Applicant and plea counsel testified they reviewed the evidence and the Applicant's version of events. While the Applicant argues plea counsel should have challenged the initial traffic stop in this case, plea counsel testified there was no valid basis to make this challenge. The Applicant has failed to present a legal argument that plea counsel should have made in this regard. See, e.g., Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing he would have had a defense with additional time to prepare for trial). Based on the strength of the State's case, plea counsel instead advised the Applicant to plead guilty to these charges. Plea counsel effectively negotiated a guilty plea to a substantial two-level reduction of the trafficking statute – from a charge that carries a twenty-five year mandatory minimum to a charge that carries a seven-year mandatory minimum. (Sentencing transcript, pp.6-7). This Court finds the Applicant has failed to demonstrate plea counsel did not properly review his case or represent his interests. See Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

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This Court finds the Applicant failed to meet his burden of proving plea counsel misadvised him about a plea recommendation. While the Applicant stated plea counsel told him the State made a seven year plea offer, plea counsel testified the only offer from the State was to reduce the weight of the drugs. Plea counsel testified there was no recommendation as to sentence and that he explained this to the Applicant. This Court finds plea counsel's testimony is credible. The State noted at the plea hearing there was no recommendation in this case and the Applicant did not dispute this. (Plea transcript, p.15). The Applicant did not mention in either the guilty plea or sentencing hearing that he was pleading guilty pursuant to a seven year recommendation. The Applicant has failed to provide any evidence to corroborate his claim and the issue must be denied.

This Court finds the Applicant failed to meet his burden of proving plea counsel should have objected to the plea judge's comment. At the end of the sentencing hearing, the plea judge stated "here's my concern, you don't ride up and down the highway with 233, I think that's right, 233 grams of cocaine, 25 and a half grams of crack, 216 grams of marijuana unless you've done it before. Nobody is going to trust you with that kind of money, that kind of drugs unless they know who you are." (Sentencing transcript, p.16). Plea counsel testified he did not object because this was at the end of the hearing and after he had made his mitigation argument. Plea counsel testified he believed that objecting would not have benefitted the Applicant. This Court finds plea counsel's testimony is credible and his conduct reasonable. The Applicant has failed to demonstrate that plea counsel was deficient in not objecting or that he was prejudiced as a result. See Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814.

This Court finds the Applicant failed to meet his burden of proving plea counsel did not inform him of his appellate rights. Plea counsel testified he discussed the right to appeal with the

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Applicant but said he did not think an appeal would be successful. Plea counsel testified the Applicant never asked him to file an appeal but that he would have done so if requested. This Court finds plea counsel's testimony is credible and that the Applicant never asked plea counsel to file a notice of appeal. This Court also notes that, even assuming arguendo plea counsel did not advise the Applicant of the right to appeal his guilty plea, this would not have been error. See Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S. Ct. 1029, 1036 (2000).

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 concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. This Court also concludes the Applicant has failed to meet his burden of proving his guilty plea was not knowing and voluntary. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

Malicious Prosecution

The Applicant stated plea counsel should have objected when the assistant solicitor asked for a harsher sentence during the sentencing hearing. The Applicant argues the assistant solicitor committed misconduct and that she was acting maliciously.

This Court finds the Applicant failed to meet his burden of proving malicious prosecution or prosecutorial misconduct. See Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989) (finding the burden is on the defendant to prove actual vindictiveness). At the sentencing

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hearing, the assistant solicitor stated sentencing was deferred in order to proceed with the co-defendant's charges. (Sentencing transcript, pp.6-7). The assistant solicitor stated the Applicant said "he is not going to cooperate, that he is going to claim it all" but that he received substantial assistance because the level of offense was reduced. (Sentencing transcript, p.7). Based upon the record, this Court finds the Applicant has failed to demonstrate actual vindictiveness or misconduct. See id. This Court further finds the Applicant cannot demonstrate he was prejudiced by the assistant solicitor's comments, as plea counsel immediately corrected these statements and explained the Applicant had taken responsibility for the drugs from the beginning. (Sentencing transcript, p.7).

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 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. Furthermore, the Applicant's guilty plea was entered knowingly and voluntarily within the mandates of Boykin. 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

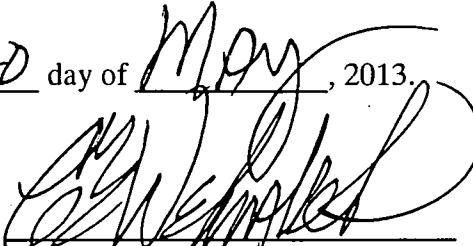
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(30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice 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.

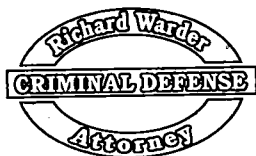
AND IT IS SO ORDERED this 20 day of May, 2013.



G. Edward Welmaker
Presiding Judge
Thirteenth Judicial Circuit

, South Carolina.

Post Office Box 26133 • Greenville, SC 29616



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



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