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June 26, 2013

Via Regular Mail

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

Re: CHAVIS L. COX 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,

RECEIVED

JUL 01 2013

S.C. SUPREME COURT

Caroline M. Horlbeck, Esq.

Enclosure

cc: Office of the Attorney General
Office of Appellate Defense

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-23-6134

2013 JUN 21 PM 1:21
FILED-CLERK OF COURT
GREENVILLE CO. S.C.
DAVID B. WIGFERS/STAFF

CHAVIS L. COX,

APPELLANT,

vs.

STATE OF SOUTH CAROLINA

RESPONDENT.

NOTICE OF APPEAL

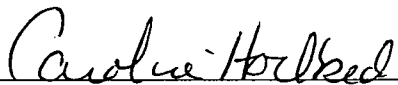
Appellant CHAVIS L. COX, appeals from the Order of the Honorable G. Edward Welmaker, Circuit Court Judge clocked June 4, 2013

RECEIVED

JUL 01 2013

S.C. SUPREME COURT

Respectfully submitted,



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

Date: June 19, 2013

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

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE SUPREME COURT

Chavis L. Cox,)
)
Appellant,)

C.A. No. 2011-CP-23-6134

-vs-)

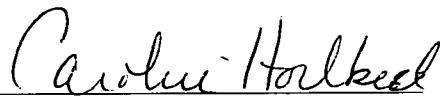
CERTIFICATE OF SERVICE

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

This is to certify that I am an employee in the law office of Caroline M. Horlbeck, attorneys for Applicant, and that I have this day caused to be served upon the person(s) named below Applicant'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

June 27, 2013

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Chavis Laranzo Cox,)
 S.C.D.C. No. 327335,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2011-CP-23-6134

ORDER OF DISMISSAL

2013 APR 10 PM 4:10
 CLERK OF COURT
 GREENVILLE COUNTY

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed September 14, 2011. The Respondent made its return on December 30, 2011. An evidentiary hearing into the matter was convened on April 16, 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 were assistant solicitor Julie Anders, Esquire and the Applicant's plea counsel, Scott D. Robinson, 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 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 was indicted by the Greenville County Grand Jury at the April 2010 term of General Sessions for murder

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(2010-GS-23-2433, count 1) and possession of a weapon during the commission of a violent crime (2010-GS-23-2433, count 2). Scott D. Robinson, Esquire represented the Applicant.

On November 4, 2010, the Applicant pled guilty to murder.¹ The Honorable D. Garrison Hill sentenced the Applicant to forty years imprisonment. 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. Did not explain "in depth the full meaning of trial. In which petitioner did not fully understand the meaning of a trial. Petitioner told counsel that he had not wanted trial, due to the knowledge he obtained and meaning of trial. Petitioner thought trial was only to prove innocence or guilt, however, petitioner wanted to prove that the elements of the crime were manslaughter and not murder. If not had been for counsel's ineffectiveness, petitioner would have went to trial."
 - b. Advised "to plea without disclosure of Rule 5. Counsel was ineffective for allowing solicitor to solicit a plea agreement on the defendant relinquishing petitioner's right to discovery in petitioner's criminal case."
 - c. Rendered "erroneous advice thus making plea involuntary. Counsel told petitioner to falsely answer the questions of the judge "Pretrial Inquiry" so that he wouldn't (illegible) a life sentence. Counsel advised petitioner that the questions were just court formality. If not been for counsel's ineffectiveness, Petitioner would have went to trial."
 - d. Advised "petitioner to plea after petitioner elucidated that it wasn't intentional. Petitioner told counsel that he went to scare victim not kill him. Counsel was ineffective for coercing him to plea murder. If had not been for counsel's ineffectiveness, petitioner would have went to trial."
 - e. Did not file a notice of appeal.
 - f. Did not object to indictment.
 - g. Did not object to sentencing.
2. Insufficient Indictment.
 - a. Indictment "fails to state the elements of Murder pursuant to 17-

¹ The indictment for possession of a weapon during the commission of a violent crime was subsequently not prossed.

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- 19-30. Also indictment fails to allege time and place of death.”
3. Prosecutorial Misconduct.
 - a. “Prosecutor threaten and forced petitioner to plea, thus making petitioner’s plea involuntary.”
 - b. “The Solicitor stated, ‘I can assure you of that, if you do not accept today’s offer and go in there today then you will be placed on the docket for trial and I will recommend as well as make sure that you spend the rest of your natural life in prison.’ Petitioner claims that because of Prosecutors threat and unprofessionalism it forced him to plea involuntarily.”

In an “Amended Petition for Post Conviction Relief” filed December 14, 2012, counsel for the Applicant made the following allegations:

1. Ineffective assistance of counsel:
 - a. Advised the Applicant to plead guilty without the disclosure of Rule 5.
 - b. Allowed the Solicitor to solicit a plea agreement and relinquishing the Applicant’s right to discovery.
 - c. Failed to ensure the Applicant had received the indictments.
 - d. Misadvised the Applicant about how to answer the plea judge’s questions.
 - e. Failed to adequately meet with the Applicant and prepare the case.
 - f. Failed to “explain in depth [the] meaning of [a] trial.”
 - g. Coerced the Applicant into pleading guilty.

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

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 had two previous attorneys before he retained plea counsel. The Applicant stated they did not discuss the evidence in his case and only partially reviewed his version of events. The Applicant stated he did not receive discovery materials until after he pled guilty. The Applicant stated he had three meetings with plea counsel but that they mainly discussed entering a guilty plea. The Applicant stated plea counsel told him there were no defenses in this case, but that he now believed he could have argued self-defense or that he was guilty of voluntary manslaughter. The Applicant stated he asked for a certain plea agreement and plea counsel told him the State would not agree. The Applicant stated plea counsel set up a meeting with the assistant solicitor and that the solicitor said she would put this case on the trial docket and ensure he received a life sentence. The Applicant stated he felt threatened and it forced him to plead guilty. The Applicant stated he answered several of the plea judge’s questions falsely because plea counsel told him to do so. The Applicant stated he did not discuss

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appellate rights with plea counsel and did not ask counsel to file an appeal.

Plea counsel confirmed he was retained in this case. Plea counsel testified the first attorney filed discovery motions, so he had full discovery when he took the case. Plea counsel testified he reviewed the discovery materials with both the Applicant and his investigator. Plea counsel testified they specifically reviewed the Applicant's audiotaped statement, that the murder weapon was found in his vehicle, and that gunshot residue was found on his clothing. Plea counsel testified he reviewed possible defenses with the Applicant but that there was no valid defense in this case. Plea counsel testified he explained this to the Applicant. Plea counsel testified the only plea offer from the State was for: the Applicant to plead guilty to murder, the weapons charge to be dismissed, and no specific offer of sentence. Plea counsel testified the Applicant wanted to be sure the Applicant understood this, so he set up a meeting with the Applicant, the assistant solicitor, and himself. Plea counsel testified this was an informal conversation and the assistant solicitor never said anything threatening (such as that she would ensure he received a life sentence at trial). Plea counsel testified he did not tell the Applicant to lie on either the plea judge's preliminary plea checklist or at the plea hearing itself. Plea counsel testified there were no appealable issues from the guilty plea hearing.

The assistant solicitor who prosecuted this case, Julie Anders, testified the only plea offer she made was to dismiss the weapons charge and have the Applicant plead guilty to murder without a sentence recommendation. Anders testified plea counsel told her the Applicant wanted a plea offer of thirty years, and she refused. Anders testified plea counsel mentioned the idea of the two of them speaking to the Applicant. Anders testified she took notes after this meeting that reflected she told the Applicant she would not recommend thirty years and that he had the right to trial but she would request a life sentence if he was found guilty. Anders testified she did not

A handwritten signature in black ink, appearing to be "E. Anders", is located at the bottom right of the page.

tell the Applicant he would receive a life sentence. Anders testified she was not heavy-handed or forceful during this discussion.

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 both that he was guilty and that the facts recited by the solicitor were true. (Plea transcript, p.4; p.11). The Applicant also told the plea judge that he understood the trial rights he was waiving in pleading guilty, was satisfied with counsel, and had not been coerced in any way. (Plea transcript, p.4; pp.6-8; pp.11-12).

This Court finds the Applicant failed to meet his burden of proving plea counsel did not properly meet with him and investigate and review his case. Plea counsel testified he had discovery materials in this case and reviewed them with the Applicant. Plea counsel specifically testified they reviewed the most damaging evidence and the Applicant's version of events. This Court finds plea counsel's testimony is credible. This Court finds the discovery materials were reviewed with the Applicant, which would have included copies of his indictments. This Court has reviewed the indictments. The indictments in this case were true-billed and clearly sufficient to put the Applicant on notice of the charges he was facing. See State v. Gentry, 363 S.C. 93, 103, 610 S.E.2d 494, 500 (2005); State v. Tumbleston, 376 S.C. 90, 95-96, 654 S.E.2d 849, 852 (Ct. App. 2007).

This Court finds the Applicant failed to meet his burden of proving plea counsel did not adequately investigate a defense in this case. The Applicant argued: the killing was

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unintentional, the State had insufficient evidence to prove murder, and he could have successfully argued either self-defense or mitigation to manslaughter. Plea counsel testified he reviewed the State's evidence with the Applicant several times – along with trial strategy and possible defenses. Trial counsel testified there were no potential defenses in this case and the State had overwhelming evidence of the Applicant's guilt. This Court finds plea counsel's testimony is credible. To establish counsel failed to adequately prepare for trial, applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. 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); 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). This Court finds the Applicant has failed to present any evidence to support his argument that plea counsel should have developed a self-defense argument. This Court notes the Applicant's own statements at the PCR hearing affirm the absence of any factual basis for a defense in this case. For example, the Applicant stated the victim was so obese that he was slow and struggled to get out of his chair such that – even if the victim was armed with a weapon, he would have had difficulty reaching for such because of his size. This Court finds the Applicant has failed to meet his burden of proof. See Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

This Court finds the Applicant failed to meet his burden of proving plea counsel should not have arranged a meeting with the assistant solicitor. The Applicant testified he felt threatened after he had a meeting with plea counsel and the assistant solicitor. Plea counsel and

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the assistant solicitor testified counsel set up this meeting so that the assistant solicitor could confirm the only plea offer she would make was to dismiss the weapons charge and not make a sentence recommendation. Plea counsel and the assistant solicitor testified there were no threats made. This Court finds the Applicant's testimony is not credible and the testimony from plea counsel and the assistant solicitor is credible. This Court finds the Applicant has failed to present any credible evidence or testimony that – as a result of plea counsel's decision to schedule this meeting – he felt pressured into pleading guilty. While the assistant solicitor may have told the Applicant she would pursue a life sentence if he were convicted at trial, this Court finds this was not a threat intended to coerce a guilty plea. Rather, this Court finds the assistant solicitor was merely being candid with the Applicant about both the nature of the plea offer and her intention to ask for the maximum sentence if he were convicted after a jury trial. Cf. Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (finding that, before a defendant can enter a guilty plea, he “must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived”). Plea counsel was not ineffective in arranging this meeting between the parties.

This Court finds the Applicant failed to meet his burden of proving plea counsel told him to falsely answer the plea judge's questions. Plea counsel testified he did not tell the Applicant to lie in answering the questions in either the preliminary plea checklist or at the guilty plea hearing. This Court finds plea counsel's testimony is credible. The plea judge in this case provided a guilty plea checklist to counsel prior to the hearing, the checklist was completed, and both plea counsel and the Applicant signed it. The plea judge thoroughly questioned the Applicant about his decision to plead guilty and the consequences of such during the guilty plea hearing. The Applicant has failed to present any evidence that his answers were not truthful.

Rather, the Applicant appeared very remorseful at the guilty plea hearing in apologizing to the victim's family and seeking both the family's forgiveness and the plea judge's mercy. (Plea transcript, pp.12-14). 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 advise him of the right to appeal. Plea counsel has a constitutionally imposed duty to consult with the defendant about an appeal only when there is reason to think either: (1) that a rational defendant would want to appeal or (2) that this defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S. Ct. 1029, 1036 (2000). In order to make this determination, "courts must take into account all the information counsel knew or should have known." Id. (citing Strickland, 466 U.S. at 690, 104 S. Ct. at 2066). Although not determinative, a highly relevant factor will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because a plea may indicate the defendant seeks an end to judicial proceedings. Id. There being nothing in the record to indicate that the Applicant reasonably demonstrated to plea counsel that he was interested in appealing, this Court finds the allegation is totally without merit and must be dismissed.

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. 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 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 22 day of May, 2013.



G. Edward Welmaker
Presiding Judge
Thirteenth Judicial Circuit


_____, South Carolina.

