THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

Appeal from Charleston County
Honorable Michael G. Nettles, Circuit Court Judge

Case No. 2018-CP-10-4505

ANTONIO SIMMONS, # 279418 . . . . . Appellant,

v.

THE STATE . . . . . Respondent.

NOTICE OF APPEAL

Antonio Simmons, # 279418, appeals the order granting in part and denying in part his Post-Conviction Relief application. The PCR action was heard by the Honorable Michael G. Nettles on July 23, 2019, and the Order was filed on October 1, 2019. The Notice is filed pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) as order in the April 10, 2023, order granting belated PCR Appeal (2019-CP-10-6370) of the Honorable Diane Schafer Goodstein.

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AG
AT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
Antonio Simmons,	)	Case No.: 2018-CP-10-4505
S.C.D.C. No. 279418,	)	
	)	
Applicant,	)	
	)	**ORDER GRANTING RELIEF IN PART AND**
v.	)	**DISMISSAL IN PART**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

FILED
2019 OCT -1 AM 10:00
JULIE J. ARMSTRONG
CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief filed by Antonio Simmons ("Applicant") on September 18, 2018. Respondent made its return on or about January 10, 2019. The Court convened an evidentiary hearing into the matter on July 23, 2019, at the Charleston County Courthouse. Applicant was present at the hearing and represented by Christopher Murphy, Equire. Jacob Isenberg, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, John Apicella, Esquire ("Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original plea transcript, the records of the Horry County Clerk of Court regarding the subject convictions, and the pleadings. After a thorough review of the evidence and testimony in the record, the Court finds as follows Applicant's sentence shall be vacated and he shall be granted a new sentencing hearing. However, the Court also finds all other claims brought by Applicant shall be dismissed with prejudice.

I. PROCEDURAL HISTORY

Applicant is presently confined pursuant to orders of the Charleston County Clerk of Court. In December 2014, the Charleston County Grand Jury indicted Applicant for five counts of Armed Robbery (2014-GS-10-07111/2014-GS-10-07123/2014-GS-1007142/2014-GS-10-07145/2014-GS-10-07147).

Michael Apicella, Esquire represented Applicant. Assistant Solicitor David Osborne, Esquire prosecuted the case. On March 20, 2018, Applicant pleaded guilty as indicted to all charges before the Honorable R. Markley Dennis. Judge Dennis sentenced Applicant to a negotiated 28 years suspended on the service of 18 years on indictment 2014-GS-10-01711 and the other indictments were dismissed as part of the plea. Applicant did not appeal his conviction or sentence.

II. CURRENT ALLEGATIONS

In his post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:

1. Due Process Violations
2. Prosecutorial Misconduct
3. Ineffective Assistance of Counsel
4. Violation of Equal Protection Law

Applicant requests relief as follows:

- Vacate plea follow by a new trial.

At the evidentiary hearing, Applicant proceeded forward on ineffective assistance of counsel based upon the following: 1) Failure to investigate; 2) Failure to review discovery; and 3) Failure to communicate; and 4) Failure to pursue a double jeopardy claim. Applicant also proceeded forward with a claim that he is serving an illegal sentence. Applicant requested to be resentenced to remedy the illegal sentence.

III. 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 has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his 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, Applicant must prove that "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.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove that counsel's performance was deficient. Strickland, 466 U.S. at 686; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id.

(citing Strickland, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Cullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington v. Richter, 562 U.S. 86, 109-10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough at 6; see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced 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 prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." United States v. Basham, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting Elmore v. Ozmint, 661 F.3d 783, 858 (4th Cir. 2011)).

In the context of a guilty plea, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he/she would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985). Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, the PCR applicant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. See Blackledge v. Allison, 431 U.S. 63, 73-74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is

subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). Statements made during a guilty plea should be considered conclusively, unless an Applicant presents valid reasons why he or she should be allowed to depart from the truth of his statements. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Crawford v. United States, 519 F.2d 347, 350 (4th Cir. 1975)).

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.

1. Failure to Investigate Double Jeopardy Defense

Applicant contends Counsel failed to investigate material grand jury transcripts. In reviewing a claim that defense counsel failed to properly investigate a defense to a crime, a court's principle concern is whether the investigation "was itself reasonable." Taylor v. State, 404 S.C. 350, 364, 745 S.E.2d 97, 104 (2013).

Here, Counsel credibly testified Applicant guaranteed a favorable grand jury transcript was available for their review. Specifically, Counsel credibly recalled Applicant claiming this transcript was the key getting current charges dismissed. Further, Counsel credibly recalled Applicant expressing personal belief this piece of evidence would get his charges thrown out for double jeopardy. However, Counsel credibly testified he advised Applicant the alleged circumstances did not amount to a claim of double jeopardy.

Additionally, Counsel credibly testified Applicant told him investigate relevant records in Horry County. Counsel further credibly recalled Applicant claiming to have several charges dismissed in Horry County. Thereafter, Counsel credibly testified he had an investigator check in Horry County to see if there were any relevant records available. However, Counsel credibly testified his investigator could not find anything related to Applicant.

Accordingly, this Court finds Counsel delivered credibly testimony on this issue. It appears Counsel followed through with investigating relevant evidence in Horry County even though he was suspicious anything existed. The investigator delivered news that confirmed Counsel's suspicions. Therefore, this Court finds Counsel conducted a reasonable investigation into relevant records at the request of Applicant. This Court further finds Applicant has failed to prove Counsel was deficient based upon a failure to investigate.

Applicant contends grand jury transcripts exist which would have led to a dismissal of his charges based upon double jeopardy. To establish counsel failed to adequately investigate a defense, applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) (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).

Here, Counsel credibly testified there was no transcript available from previous grand jury proceedings based upon charges against Applicant. Further, Counsel credibly testified transcripts are not customarily recorded for grand jury proceedings. On the other hand, Applicant testified his grand jury transcript exists. Applicant further testified this transcript was wrongly withheld from him. However, Applicant did not specify the charges dismissed. Applicant also did not

specify the month or year these charges were dismissed. As a result, this Court finds no credible testimony or evidence in the record corroborates a relevant grand jury transcript exists. Therefore, this Court finds Applicant is merely providing insufficient speculation to support his claim. This Court further finds he has failed to overcome the burden to prove a failure to investigate prejudiced his double jeopardy defense.

Additionally, Applicant contends double jeopardy attaches after a grand jury dismisses an indictment. The submission of an indictment by the government attorney to the grand jury, and the examination of witnesses before them, do not amount to the institution of a prosecution. Post v. United States, 161 U.S. 583 (1896). Moreover, the double jeopardy clause protects against second prosecution for same offense, after conviction or acquittal, and multiple punishment for same offense Jivers v. State, 304 S.C. 556, 406 S.E.2d 154 (1991).

Here, Applicant testified the transcript would be from a grand jury proceeding dismissing previous indictments. He further testified this is sufficient for double jeopardy. However, grand jury indictment are not considered prosecution. The double jeopardy clause provides protection where there has already been previous prosecution. Therefore, this Court finds a grand jury dismissal on any charges would not be sufficient to satisfy the previous prosecution requirement of double jeopardy. Accordingly, this Court finds Applicant did not suffer prejudice in failing to acquire a grand jury transcript for the purposes of arguing double jeopardy.

2. Failure to Communicate

Applicant contends Counsel deficiently failed to communicate the availability of material evidence throughout his representation.

Here, Counsel credibly testified he met with Applicant about seventy time about this case. Furthermore, Counsel credibly testified they discussed the transcript issue numerous times.

Finally, Counsel credibly testified he advised Applicant the transcript from a grand jury did not exist. Contrarily, Applicant testified a transcript existed from the grand jury who dismissed his charges. Applicant testified Counsel failed to meet with him about the status of collecting this transcript. Applicant further testified he believed he was supposed to get the relevant transcript. However, Applicant testified the state withheld it.

Accordingly, this Court finds Counsel delivered credible testimony on this issue. It appears Counsel entertained the issue in several meetings, but always responded with accurate legal advice. Therefore, this Court finds Counsel reasonably communicated with Applicant about grand jury transcripts. This Court further finds Applicant has failed to overcome the burden to prove Counsel was deficient based upon a failure to communicate.

Applicant contends he was not able to notify Counsel about material evidence that would have resulted in his charges being dismissed. Mere speculation as to what might have happened had defense counsel independently investigated is not sufficient for prejudice, where the record indicates an investigation would have resulted differently. Kibler v. State, 267 S.C. 250, 256, 227 S.E.2d 199, 202 (1976) (finding applicant suffered no prejudice where he could not corroborate an investigation would have produced evidence he did not possess necessary intent to commit the crime).

Here, Applicant reiterated the material evidence was this grand jury transcript. Further, Applicant testified this transcript was violating his due process based upon double jeopardy. Finally, Applicant testified the Assistant Solicitor withheld the transcripts in an effort to get him to plead guilty. On the other hand, Counsel credibly testified grand jury proceedings are not traditionally recorded with a transcript. Further, Counsel credibly testified a previous failure to indict was not, by itself, material evidence.

Accordingly, the issue is whether this alleged grand jury transcript can be considered material evidence. Applicant has not provided any context about the basis for these alleged grand jury proceedings. Applicant has not provided any evidence about the basis for this alleged dismissal. Therefore, no credible evidence in the record corroborates this alleged transcript would contain material evidence. Accordingly, this Court finds the record indicates an investigation into the alleged grand jury transcript would not have produced material evidence sufficient for dismissal.

Additionally, the South Carolina Supreme Court has found deficient counsel does not prejudice an applicant where the basis for their decision to avoid trial was a favorable plea. Goins v. State, 397 S.C. 568, 575, 726 S.E.2d 1, 4 (2012). (finding no prejudice where evidence showed Applicant accepted the plea after State offered to dismiss certain charges).

Here, Counsel credibly testified the Assistant Solicitor was ready to go to trial any of the ten armed robbery charges. Thereafter, Counsel credibly recalled the Assistant Solicitor intended to prosecute Applicant as many times as it took to get life without parole. Counsel credibly testified he notified Applicant of the Assistant Solicitor's LWOP intention. Counsel credibly testified the Assistant Solicitor offered a range of twenty to twenty five years. Subsequently, Counsel credibly testified Applicant said he would accept a negotiated range contingent upon lowering the minimum to seventeen years. Counsel credibly testified the Assistant Solicitor agreed to seventeen years contingent upon raising the potential maximum to twenty eight years. Finally, Counsel credibly testified all parties agreed to a negotiated range of seventeen to twenty eight years on five armed robbery charges. Counsel also credibly testified the agreement further stipulated the other fifteen charges would be dismissed.

Accordingly, this Court finds Counsel has provided credibly testimony on the issue. The testimony indicates Applicant pled with the motivation to avoid LWOP exposure. Further it indicates Applicant pled with the motivation to potentially receive the lower end of a negotiated range. Finally, it indicates Applicant pled with the motivation to have fifteen other charges dismissed. Therefore, this Court finds Applicant has failed to overcome the burden to prove he pled in reliance upon any deficient behavior by Counsel.

3. Failure to Conduct Mental Evaluation

Applicant contends Counsel deficiently failed to have him evaluated for legal incompetency based upon mental health issues.

At the plea hearing, Counsel notified the court of mental health concerns. (Tr. 33-4). He made the court aware Applicant had a longstanding illness of schizophrenia. (Tr. 34). Counsel also indicated he hired had two mental health experts evaluate Applicant. (Tr. 34). Counsel further stated Applicant was fine when he took his medication. (Tr. 34).

Here, Counsel credibly testified he suspected Applicant had mental health issues during their first meeting. Thereafter, Counsel credibly testified he pulled previous documents on Applicant which indicated mental health issues. Counsel credibly testified he had a mental health evaluation conducted where Applicant was found to be incompetent. Counsel credibly recalled improvements after medical experts gave Applicant appropriate medication. Subsequently, Counsel credibly testified Applicant was found to be competent in October 2017. The plea hearing was not until March 20, 2018. Accordingly, this Court finds Counsel took reasonable steps in evaluating competency. This Court further finds Applicant has failed to overcome the burden to prove Counsel was deficient in having him mentally evaluated.

Applicant contends he was legally incompetent to voluntarily enter into a negotiated sentence. The test for competency to stand trial or continue trial is whether the defendant has the sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as a factual, understanding of the proceedings against him. McLaughlin v. State, 352 S.C. 476, 481, 575 S.E.2d 841, 843 (2003). The defendant bears the burden of proving his incompetence to stand trial by a preponderance of the evidence. Id.

Here, Counsel credibly recalled Applicant became competent after he was put on the proper medication. This is consistent with his mitigation statements at the plea hearing. (Tr. 34). Further, this is consistent with one expert's evaluation which was submitted to the plea court. (Tr. 34).

On the other hand, Applicant testified he was incompetent on the day of the plea hearing. However, this is not consistent with the record. An expert originally found Applicant to be legally incompetent on April 28, 2017. (Tr. 12). Thereafter, the same expert found Applicant to be legally competent on October 16, 2017. (Tr. 12). Further, Applicant was found to be criminally responsible in a report compiled on November 3, 2017. All three of these evaluations were submitted to the plea court on March 20, 2018. Accordingly, this Court finds Applicant has provided insufficient evidence to conclude he would have successfully been found incompetent when the negotiated sentence was entered. Therefore, this Court finds Applicant has failed to overcome the burden to prove he was prejudiced by not being evaluated for competency before entering a negotiated sentence.

IV. ILLEGAL SENTENCE

Applicant contends the plea court imposed an illegal sentence. A person who commits robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon,

or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, is guilty of a felony and, upon conviction, must be imprisoned for a mandatory minimum term of not less than ten years or more than thirty years, *no part of which may be suspended* or probation granted. A person convicted under this subsection is not eligible for parole until the person has served at least seven years of the sentence S.C. Code Ann. § 16-11-330 (a) (emphasis added). The issue regarding whether an applicant is serving an illegal sentence is a question of law. Bordeaux v. State, 410 S.C. 495, 765 S.E.2d 143 (2014). Post-conviction relief may be tailored to remedy the precise prejudice resulting from constitutional violations. Boan v. State, 388 S.C. 272, 277, 695 S.E.2d 850, 852 (2010).

At the plea hearing, Applicant entered into a negotiated sentencing range of seventeen to twenty eight years based upon the charge of armed robbery. (Tr. 35). However, Applicant was sentenced to thirty years suspended upon the service of eighteen. (Tr. 37). As a matter of law, Applicant's sentence for armed robbery cannot be suspended. Accordingly, this Court finds Applicant is serving an illegal sentence. This Court finds the appropriate remedy is to vacate the sentence and afford Applicant a new sentencing hearing.

V. CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has established the sole constitutional violation in that he is serving an illegal sentence. Therefore, this application for post-conviction relief must be granted in-part and denied in-part.

This Court notifies both parties they must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the 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 a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Applicant's sentence be vacated; Applicant be remanded to Charleston County Detention Center; and Applicant be re-sentenced.
2. That the other claims in this Application for Post-Conviction Relief must be denied and dismissed with prejudice.

AND IT IS SO ORDERED this 19 **day of** Sept, **2019.**

MICHAEL G. NETTLES
Presiding Judge
Ninth Judicial Circuit

Florence, South Carolina