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THE STATE OF SOUTH CAROLINA

JUL -9 2013

In The Supreme Court

S.C. Supreme Court

APPEAL FROM AIKEN COUNTY

Court of Common Pleas

Honorable James R. Barber, III, Circuit Court Judge

Case No. 2010-CP-02-01256

Travis McKie, #296831.....Petitioner

v.

State of South Carolina.....Respondent

NOTICE OF INTENT TO APPEAL

PETITION FOR REVIEW PURSUANT TO *AUSTIN V. STATE*

Travis McKie appeals the Honorable James R. Barber's August 29, 2011, order denying post-conviction relief to the Petitioner pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395. Undersigned counsel received notice of entry of the Consent Order Filing Belated Notice of Appeal on June 17, 2013. A copy of the order is attached to this notice.

Respectfully submitted,



Jason M. Price
319 Hampton Ave., NW
Aiken, SC 29801
Attorney for the Applicant

**COPY
ORIGINAL FILED**

JUL 03 2013
WJ
**AIKEN COUNTY
CLERK OF COURT**

July 3, 2013

Other counsel of record:

David Spencer

Post Office Box 11549

Columbia, SC 29211-1149

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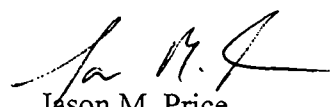
v.

State of South Carolina.....Respondent

PROOF OF SERVICE

I, Jason M. Price, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to the attorney of record, David Spencer, Post Office Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this 9th day of July, 2013.

Respectfully submitted,



Jason M. Price
319 Hampton Ave., NW
Aiken, SC 29801
Attorney for the Applicant

STATE OF SOUTH CAROLINA)

COUNTY OF AIKEN)

TRAVIS LEE McKIE (#296831))

VS.)

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
OF THE SECOND JUDICIAL CIRCUIT

Docket No.: ~~2012-CP-02-01881~~

2010.CP.02.01256

CONSENT ORDER FILING
BELATED NOTICE OF APPEAL

RECEIVED

JUL -9 2013

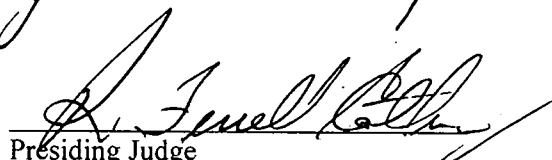
S.C. Supreme Court

The Applicant, Travis Lee McKie, filed an application for Post Conviction Relief, alleging ineffective assistance of counsel against his previous appointed counsel, Joan E. Smith. The Applicant alleges that Ms. Smith failed to file a timely Notice of Appeal after the Applicant verbally requested Ms. Smith to file an appeal from the trial court's Final Order in his previous Post Conviction Relief case (2010-CP-02-01256).

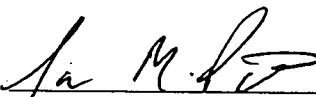
Ms. Smith has written an affidavit, which supports the Applicant's allegations and supports the Applicant's desire to file a belated Notice of Appeal from the Final Order that was entered on August 29, 2011.

Based on the consent of the State, this Court finds that the Applicant shall be entitled to Post Conviction Relief from the actions of his previous appointed counsel, Ms. Smith. **THEREFORE**, the Applicant is entitled to file a belated Notice of Appeal from the Final Order in 2010-CP-02-01256.

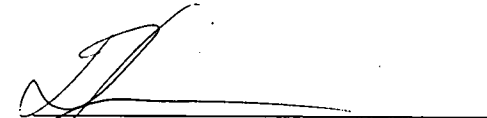
IT IS SO ORDERED this 11 day of June, 2013, at Besthopeville, SC South Carolina.

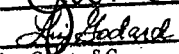
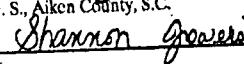

Presiding Judge
Second Judicial Circuit

I SO MOVE:


Jason M. Price
Attorney for Applicant

I SO CONSENT:


David Spencer
Assistant Deputy Attorney General

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
I, Liz Godard, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this 17 day of June 2013

C.C.C.P. & G. S., Aiken County, S.C.

Deputy Clerk

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT

2010-CP-02-1256

Travis McKie, # 296831

Applicant,

v.

State of South Carolina,

Respondent.

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
I, the undersigned, Clerk of Court of Common Pleas and General
Sessions for Aiken County, South Carolina do hereby certify
that the foregoing constitutes a true and correct copy of the
original documents which have been filed in my office this

AUG 27 2011
ORDER OF DISMISSAL

L. H. Hester
CLERK, S.C.A. Aiken County, S.C.
Dorothy G. Gantt
Deputy Clerk

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed May 27, 2010. The Respondent made its Return on November 17, 2010. An evidentiary hearing into the matter was convened on Thursday, July 14, 2011, at the Aiken County Courthouse. The Applicant was present at the hearing and was represented by Joan E. Smith, Esquire. The Respondent was represented by Robert D. Corney of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Also testifying was Applicant's trial counsel, Michael Routzong, Esquire ("counsel"). This Court also had before it a copy of the transcript of the proceedings against the Applicant, the records of the Aiken County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. The Applicant was indicted for two counts of Assault and Battery with Intent to Kill ("ABWIK") (2007-GS-02-1253 & 1254). Applicant was represented by Michael

8/27/11
L. H. Hester
CLERK, S.C.A.
Dorothy G. Gantt
Deputy Clerk

Routzong, Esquire. On June 15, 2009, the Applicant pled guilty before the Honorable Doyet A. Early, III. Applicant was sentenced to fifteen (15) years on one ABWIK and twenty (20) years suspended to five (5) years probation to run consecutive. Applicant did not appeal his conviction and sentence.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.¹

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 at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel

¹ Applicant fails to set forth specific grounds in his application. The application says "see attachment," but no attachment states any facts in support of his allegation.

rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the 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.

With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roseoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). A defendant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). A guilty plea is a solemn, judicial admission of the truth of the charges against the defendant. Statements made during the

plea should be considered conclusive unless the defendant presents reasons why he should be allowed to depart from the truth of those statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

Ineffective Assistance of Counsel

At the hearing, Applicant alleged counsel provided ineffective assistance of counsel in failing to investigate Applicant's innocence. More specifically, Applicant alleges that the victim of the shooting, Stephen Pope ("Pope"), would have testified at trial that Applicant was not the person that shot him.

At the PCR hearing, Applicant testified that he did not shoot the victims in this case and had counsel investigated the case, he would have learned of Applicant's innocence. Applicant stated he spoke with counsel several times during the preparation of his case during which he asked counsel to interview Pope, but that counsel never did so. Applicant went on to state that he never admitted his guilt to the plea judge during his plea hearing, but that he entered this plea because he "was trapped" and felt like he could not win at trial. Finally, Applicant stated he was in fact present at the scene of this shooting when it occurred, but that he was not the shooter.

Pope was also present and testified at the PCR hearing. Pope began his testimony by stating the he was the victim of this shooting, but didn't see who shot him during the incident. He stated he couldn't say for sure that Applicant was in fact the person who pulled the trigger and went on to say he did not know Applicant prior to this incident and knew of no reason why Applicant would want to shoot him. Pope said that he never identified Applicant as the shooter for police, but that he had cooperated during the investigation and was listed on the State's witness list in preparation for trial. Pope stated he was released from subpoena after being

advised Applicant was going to enter a guilty plea, but at no time did he ever tell the solicitor's office or police that he did not believe Applicant was the shooter.

Counsel testified that although he never interviewed Pope as requested by Applicant, he knew Applicant was in fact the shooter in this case as Applicant admitted to counsel he had shot the victims. Counsel went on to state that he discussed Applicant's version of the facts with him, during which Applicant stated that he did shoot the victims after they had pulled a gun first. Counsel testified that once Applicant decided to accept the fifteen year cap sentence, Applicant decided to cooperate with law enforcement in attempting to find the gun he had hidden after the shooting in an attempt to get a more lenient sentence, but the gun was never recovered. Counsel finished by stating that it was ultimately Applicant's decision to plead guilty to these charges and that, had Applicant insisted on proceeding to trial, he would have gone to trial with him.

Based on the facts and evidence presented at the hearing, this court finds counsel's testimony to be credible and Applicant's testimony to not be credible. Counsel advised Applicant of all relevant issues regarding the charges he was facing, including his constitutional rights, the facts giving rise to the charges, and the potential sentences he was facing, as well as sufficiently investigated the facts leading to these charges. The testimony offered by the victim was vague and not sufficient to begin to prove that Applicant was not the shooter in this case. Further, counsel's failure to interview Pope in no way affected his representation of Applicant, as Pope offered no testimony at the PCR hearing to show Applicant was not the shooter and Applicant had admitted his guilt to counsel early on in his representation. Counsel gave Applicant all the information and advice to make an intelligent and voluntary decision on whether to enter this plea, and therefore his guilty plea was entered knowingly and voluntarily

after being fully and adequately advised by competent counsel acting within the range of competence demanded of attorneys in criminal cases.

As discussed above, the Applicant has failed to carry his burden in this action. Therefore, this Court finds that the application must be denied and dismissed in its entirety.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

Except as discussed above, this Court finds that the Applicant failed to raise all additional allegations raised in his application at the hearing and has, thereby, waived them. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BML, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issue at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

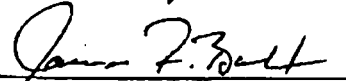
This Court advises Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a 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 Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 17 day of August, 2011.



James R. Barber, III
Presiding Judge
Second Judicial Circuit

Columbia, South Carolina.