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PCR

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July 12, 2013

Daniel E. Shearouse, Clerk
Supreme Court for the State of South Carolina
P.O. Box 11330
Columbia, SC 29211

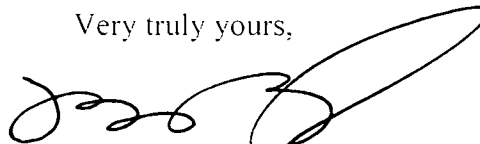
RE: *Notice of Appeal for Claude W. Cordell v. State of South Carolina*
Our File No. N-154-BBM

Dear Mr. Shearouse:

Enclosed please find an original and one copy of the Notice of Appeal and Proof of Service for filing in the captioned case. Once the originals have been filed, if you would kindly send me a file-stamped copy using the enclosed self-addressed stamped envelope, I would greatly appreciate it.

If you have any questions or need any additional information, please do not hesitate to call me at 803-649-6200, ext. 33.

Very truly yours,



Blair Ballard Massey

BBM/

Enclosures

cc: J. Walter Whitmire
Edgefield County Court of Common Pleas
South Carolina Commission on Indigent Defense
Claude W. Cordell

RECEIVED

JUL 16 2013

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

Honorable Frank R. Addy, Jr., Circuit Court Judge

Case No.: 2011-CP-19-289

Claude W. Cordell,Petitioner,

v.

State of South Carolina,Respondent.

NOTICE OF APPEAL

The Petitioner, Claude W. Cordell, appeals the Honorable Frank R. Addy, Jr.'s Order, filed June 25, 2013, denying post-conviction relief to the Petitioner. Undersigned counsel received notice of entry of the Order on June 27, 2013. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,

This 12th day of July, 2013.



Blair Ballard Massey
S.C. Bar No. 74693
Attorney for Applicant

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RECEIVED

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PROOF OF SERVICE

I, Blair Ballard Massey, certify that I have today served the within notice of appeal by depositing a copy of it in the United States Mail, postage prepaid, addressed to:

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

South Carolina Commission on Indigent Defense
P.O. Box 11433
Columbia, SC 29211-1433

Office of the Attorney General
Attn: J. Walter Whitmire
P.O. Box 11549
Columbia, SC 29211-1549

Claude W. Cordell
Aiken County Detention Center
435 Wire Road
Aiken, SC 29801

Edgefield County Court of
Common Pleas
P.O. Box 34
Edgefield, SC 29824

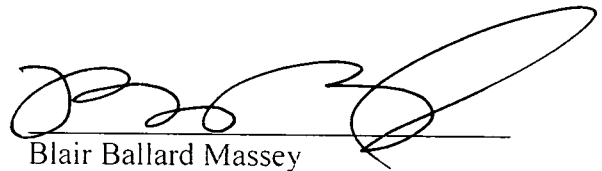
Claude W. Cordell
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c/o Wilda Dew
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Claude W. Cordell
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Claude W. Cordell
772 Oak Ridge Club Road
Windsor, SC 29856

Dated: July 12, 2013

A handwritten signature in black ink, appearing to read "Blair Ballard Massey", written over a horizontal line.

Blair Ballard Massey
S.C. Bar No. 74693
Attorney for Applicant

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EDGEFIELD COUNTY
CLERK OF COURT
SHELLEY E. NEWBY

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

COUNTY OF EDGEFIELD

2013 JUN 25 AM 9:34

Case No: 2011-CP-19-289

Claude W. Cordell,

#302005

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

This matter comes before the Court pursuant to an Application for Post-Conviction Relief (PCR) filed September 14, 2011. Respondent made its Return on April 5, 2012. An evidentiary hearing was scheduled in this matter for April 15, 2013 at the Lexington County Courthouse; however, plea counsel arrived without his file pertaining to Applicant, which he was required to produce pursuant to the subpoena issued by the State. Counsel for Applicant requested that the evidentiary hearing be continued to allow plea counsel to produce his file pertaining to Applicant for inspection and review prior to the hearing. The Court continued the hearing to April 16, 2013 to allow plea counsel time to procure the file. The evidentiary hearing in this matter was reconvened on April 16, 2013 at which time plea counsel informed the Court that he was unable to locate his file on the Applicant. Applicant was present at the hearing and was represented by Blair B. Massey, Esquire. Respondent was represented by Walt Whitmire, Esquire, of the South Carolina Attorney General's Office.

At the PCR hearing, Applicant testified on his own behalf. James M. Ervin, ("plea counsel") Esquire, testified. This Court also had before it the records of the Edgefield County

Clerk of Court, the transcript of the proceedings against the Applicant, and the Applicant's records from the South Carolina Department of Corrections.

I. PROCEDURAL HISTORY

The Applicant was indicted at the May 2010 term of the Edgefield County Grand Jury for Manufacturing Methamphetamines (2010-GS-19-131). Applicant was represented by James M. Ervin, Esquire. On October 5, 2010, the Applicant pled guilty as charged. The Honorable William P. Keesley sentenced the Applicant to confinement for a period of fifteen years, suspended upon time served with five years probation. Applicant did not appeal his conviction or 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

- (a) failure to prepare Applicant's case;
- (b) failure to investigate the State's evidence;
- (c) failure to advise on the consequences of pleading guilty;
- (d) failure to file an appeal;
- (e) failure to meaningfully review evidence with the Applicant;
- (f) failure to advise Applicant of sentencing classification.

2. Involuntary Guilty Plea

- (a) coerced into pleading guilty due to prosecutorial misconduct.

II. SUMMARY OF TESTIMONY

At the PCR hearing, Applicant alleged plea counsel was ineffective for failing to investigate and prepare Applicant's case. Applicant testified plea counsel never reviewed Applicant's version of the facts, discovery, or the elements of the offense charged with him. Applicant stated he did not meet with plea counsel until the day of the guilty plea hearing and only met with him for a short time prior to his plea. Applicant stated evidence of the manufacturing charge was illegally obtained pursuant to a defective search warrant and unlawful



consent search of his home. Applicant stated his wife was coerced into allowing a search of his home. Applicant stated that plea counsel never discussed with him the possibility of a motion to suppress to exclude any such evidence obtained illegally. Applicant stated plea counsel was deficient for not further investigating the State's evidence prior to the guilty plea hearing.

Applicant testified plea counsel was ineffective for failing to advise him the offense was classified as violent. Applicant testified he unknowingly entered a guilty plea to a violent offense. Applicant testified he was unaware of the probation revocation consequences.

Applicant alleged counsel failed to file notice of appeal on his behalf. Applicant stated he pled guilty because he desired getting out of prison and receiving a probationary sentence. Applicant stated plea counsel promised him he would file an appeal once he pled guilty and was released from detention. Applicant testified that but for plea counsel's statement, he would not have pled guilty and would have insisted on going to trial. Applicant stated he posted bail after the arrest and was returned to custody just prior to the guilty plea hearing. Applicant stated he wrote to plea counsel twice requesting he file a notice of appeal.

Applicant alleged his guilty plea was entered involuntarily because of prosecutorial misconduct. Applicant stated the solicitor forced him to accept the guilty plea by leveraging additional jail time. Applicant stated the solicitor told him he would not have the opportunity to enter a guilty plea and receive a probationary sentence for three to six months if Applicant refused to accept the solicitor's offer.

Plea counsel testified. Plea counsel was appointed to Applicant's case in the Summer of 2010. Plea counsel met with Applicant's wife several times prior to the guilty plea hearing. During the course of representation, Applicant never disclosed he was serving an auxiliary probationary sentence in a different county to plea counsel. Plea counsel filed for discovery and



reviewed it briefly with Applicant on the morning of the guilty plea. Plea counsel stated he advised Applicant the State's evidence to prove manufacturing was weak. Plea counsel stated the State's evidence consisted of pictures of a fuel container, matches, among other household products tenuously connected to manufacturing methamphetamine. Plea counsel advised Applicant that they had a strong case to take to trial. Plea counsel advised Applicant he would pursue a suppression defense if Applicant desired a jury trial. Plea counsel advised Applicant his inculpatory statement would not have constituted overwhelming evidence of guilt at trial. Plea counsel stated Applicant had no interest in challenging the State's evidence at trial; to the contrary, Applicant explicitly desired to plead guilty and receive a probationary sentence in order to leave county detention.

Plea counsel stated he reviewed the benefits and detriments of pleading guilty when he advised Applicant to pursue a jury trial. Plea counsel stated Applicant freely and voluntarily accepted the solicitor's offer that included a recommended probationary sentence. Plea counsel stated he advised Applicant of his post-conviction options. Although Applicant expressed an interest in a motion to reconsider sentencing, plea counsel did not receive written notice from Applicant until three weeks after the guilty plea hearing. Plea counsel stated he believed Applicant was satisfied with his guilty plea because he obtained his desired result.

III. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their 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, 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, (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668, 104 S.Ct. at 2064. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, supra. 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 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. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

IV. 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 reviewed the Clerk of Court records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the



application for post-conviction relief, the transcripts and documents from the prior proceedings, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

A.

This Court finds Applicant has failed to meet his burden to prove plea counsel was ineffective for not properly preparing Applicant's case. This Court finds plea counsel's testimony credible and Applicant's testimony not credible. The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). "When claims of ineffective assistance of counsel are based on lack of preparation time, an Applicant challenging his conviction must show specific prejudice resulting from counsel's alleged lack of time to prepare." United States v. Cronin, 466 U.S. 648 (1984); U. S. v. LaRouche, 896 F.2d 815 (4th Cir. 1990). Plea counsel obtained and reviewed discovery with Applicant. Applicant was out on bond, with the exception of the week(s) preceeding the guilty plea hearing, while the charges were pending. Applicant failed to show initiative to meet with plea counsel during the course of representation. Therefore, this Court finds this allegation is denied and dismissed.

B.

This Court finds Applicant has failed to meet his burden to prove plea counsel was ineffective for failing to investigate Applicant's case. "Without a doubt, [a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (citing Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir.1986) (internal citations omitted). This Court finds plea counsel's testimony was more credible than Applicant's testimony. "An Applicant who enters a plea on



the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for trial counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001). Here, plea counsel provided sound advice regarding the strength of the State's case. Applicant alleges plea counsel was deficient for not advising Applicant of his option to pursue a suppression hearing. This Court finds Applicant failed to present evidence to show plea counsel would have been more convincing in advising Applicant not to plead guilty had plea counsel conducted further investigation prior to the guilty plea hearing. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) ("The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice."). Therefore, this allegation is denied and dismissed.

C.

This Court finds Applicant failed to meet his burden to prove plea counsel was ineffective for failing to advise him on the consequences of pleading guilty. This Court finds plea counsel's testimony credible and Applicant's testimony not credible. Applicant was properly advised at the guilty plea hearing. "In 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 any possible error by counsel was cured by the information conveyed at the plea hearing." Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d (1997). The guilty plea hearing judge advised Applicant the offense was classified as violent and provided Applicant the opportunity to discuss the matter further with plea counsel. (Guilty Plea Tr. 10, line 18—Tr. 11, line 14). Applicant also initialed the classification on his sentencing sheet.

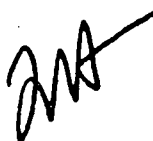
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Applicant also alleged plea counsel was ineffective for failing to advise him the guilty plea would cause his probation to be revoked from a prior conviction in a different county. "The imposition of a sentence may have a number of collateral consequences, however, and a plea of guilty is not rendered involuntary in a constitutional sense if the defendant is not informed of the collateral consequences." Williams v. State, 378 S.C. 511, 514, 662 S.E.2d 615, 617 (Ct. App. 2008) (citing Brown v. State, 306 S.C. 381, 382-83, 412 S.E.2d 399, 400 (1991)). Furthermore, plea counsel testified Applicant never notified him of extra-jurisdictional probationary status. Plea counsel did not independently discover the issue despite diligent investigation. See Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993) ("[The Court] ha[s] never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial."). Therefore, these allegations are denied and dismissed.

D.

This Court finds Applicant failed to meet his burden to prove plea counsel was ineffective for failing to file a notice of appeal. This Court finds plea counsel's testimony credible and Applicant's testimony not credible. "[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S.Ct. 1029 (2000). Plea counsel received a desired probationary sentence as a result of the guilty plea. Applicant failed to produce evidence that he notified plea counsel of his desire to appeal within ten days of the pronouncement. Therefore, this allegation is denied and dismissed.

E.



This Court finds Applicant failed to prove plea counsel was ineffective for failing to challenge prosecutorial misconduct. This Court finds Applicant's testimony is simply not credible in this regard. It is applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). Applicant was not entitled to a guilty plea offer let alone a renewed or subsequent guilty plea offer by the State. Therefore, this allegation is denied and dismissed.

All Other Claims

Except as discussed above, this Court finds that the Applicant affirmatively waived the remaining allegations set forth in his application at the hearing. 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. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues 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.

V. CONCLUSION

Based on all the forgoing, 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 for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. *See* Rule

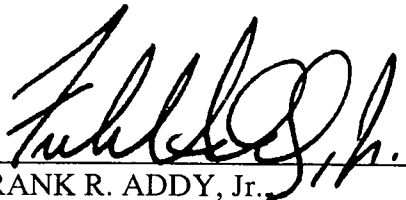


203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent

IT IS SO ORDERED this 14th day of June, 2013.


FRANK R. ADDY, Jr.
Presiding Judge
Eleventh Judicial Circuit

Greenwood, South Carolina

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