

STATE OF SOUTH CAROLINA
In The Supreme Court

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OCT 20 2023

S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable G.D. Morgan, Jr., Circuit Court Judge

Case No. 2022-CP-07-00507

Levy L. Brown,Petitioner,

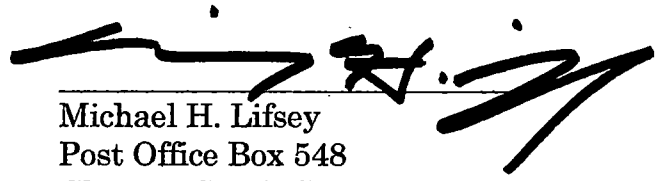
v.

State of South Carolina,Respondent.

NOTICE OF APPEAL

Petitioner, Levy L. Brown, appeals the order of the Honorable G. D. Morgan, Jr., dated October 2, 2023, and filed October 5, 2023. Petitioner received written notice of entry of this order on October 12, 2023.

10/18, 2023



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STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)
Levy L. Brown, SCDC #367857)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH
JUDICIAL CIRCUIT
Case No. 2022-CP-07-00507

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ORDER OF DISMISSAL

S.C. SUPREME COURT

2023 OCT -5 PM 12:35
JERRI ANN ROSENEAU
BEAUFORT COUNTY CLERK
S.C.

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by Levy L. Brown (Applicant) on March 25, 2022. An evidentiary hearing convened before the Honorable G.D. Morgan, Jr. Applicant was present and represented by Michael H. Lifsey, Esquire. Assistant Attorney General Lauren T. Mims represented Respondent. At the hearing, Applicant testified on his behalf. Respondent called as a witness plea counsel Melissa L. Duque. Following a thorough review of the records before the Court and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant did not meet his burden of proof. Thus, this Court denies relief and dismisses this application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections serving an aggregate sixteen-year sentence. In December 2020, the Beaufort County Grand Jury indicted Applicant for manufacturing, distribution, etc., of cocaine base, first offense (2020-GS-07-717); trafficking in cocaine, ten to 28 grams (2020-GS-07-719); trafficking methamphetamine or cocaine base, 28 to 100 grams (2020-GS-07-721); manufacturing/distribution of Schedule I, II, III, Flunitrazepam, or controlled substance analogue (2020-GS-07-713); possession of a weapon during a violent crime (2020-GS-07-720); and pointing and presenting a firearm (2020-GS-7-681).

On July 29, 2021, Applicant pled guilty before the Honorable Carmen Mullen to possession with intent to distribute (PWID) marijuana on the manufacture of schedule I, II, II, flunitrazepam, or controlled substance charge; and as indicted on the remaining charges. Melissa L. Duque, Esquire represented Applicant, and Assistant Solicitor Jared Shedd represented the State. At the plea, the State recommended an aggregate sixteen-year sentence. Pursuant to the State's recommendation, Judge Mullen sentenced Applicant to concurrent sentences of sixteen years for trafficking 28 to 100 grams of methamphetamine; fifteen years for manufacturing / distribution of cocaine base; ten years' for trafficking ten to 28 grams of cocaine; five years for PWID marijuana; and five years for each of the weapon charges. Applicant did not appeal.

CURRENT APPLICATION

On March 25, 2022, Applicant timely commenced this PCR application. On October 31, 2022, Applicant filed an amended application alleging:

Ineffective assistance of counsel/involuntary guilty plea:

- a. Counsel did not meet with Applicant a sufficient number of times, fully explain the strengths and weaknesses of the State's case, or explain the elements of the charges.
- b. Counsel "informed Applicant that he was pleading to a cap of 16-years and that she would ask for less than 16 years. Despite so advising Applicant, plea counsel did not ask for less than 16 years but merely acquiesced to the State's request for a 16-year sentence."
- c. Prior to his plea, counsel previously represented Applicant on an unrelated trial for which Applicant received a 16-year sentence. Counsel filed an appeal and informed Applicant that he had potentially meritorious arguments on appeal. Despite this, plea counsel advised Applicant to enter a plea to these charges without advising him that the plea on these charges would effectively render his appeal moot. Pleas counsel also did not advise applicant that he should seek advice from independent counsel before entering his plea.

- d. Based on plea counsel's ineffective advice as described above, Applicant believed that he had no choice but to answer the Judge's questions during the plea colloquy in such a manner as would result in the Judge accepting the plea. Had plea counsel given effective representation in this regard, Applicant would not have entered a guilty plea and would have insisted on a jury trial.¹

At the hearing, Applicant proceeded on the allegations set forth in his amended application.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before this Court are the Beaufort County Clerk of Court records of the underlying conviction, Applicant's records from the South Carolina Department of Corrections; the plea transcript; and the records from this current application. This Court has had the opportunity to review the records in their entirety, and listen to the testimony at the PCR 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. After a careful review based on the Strickland standard set forth below, this Court finds Applicant has failed to carry his burden of proof. Below are this Court's findings of facts and conclusions of law as required by section 17-27-80 of the South Carolina Code (2017).

Ineffective Assistance of Counsel

In a PCR action, an applicant bears the burden of proving the allegations. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). An applicant alleging ineffective assistance of counsel must prove "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 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813. "The test for effective assistance of counsel is whether the representation was within the range of competence

¹ This Court construes this as a claim that his plea was involuntary due to ineffective assistance of counsel.

demanded of attorneys in criminal cases.” Watson v. State, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. at 441, 334 S.E.2d at 813. An applicant must overcome this presumption to received relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

To establish ineffective assistance of counsel, a PCR applicant must prove (1) counsel’s performance fell below an objective standard of reasonableness and (2) the applicant sustained prejudice as a result of counsel’s deficient performance. Strickland, 466 U.S. at 687–88; Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625. “A PCR applicant 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 applicant would not have pled guilty and would have insisted on going to trial.” Dalton v. State, 376 S.C. 130, 136, 654 S.E.2d 870, 873 (Ct. App. 2007). To prove prejudice following a guilty plea, the applicant “must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” Hill v. Lockhart, 474 U.S. 52, 59 (1985).

Failure to meet a sufficient times / adequately advise

Applicant first alleges plea counsel was ineffective for failing to meet an adequate number of times, fully explain the strengths and weaknesses of the State’s case, or explain the elements of the charge. This Court finds Applicant has not met his burden of proof in this regard.

At the PCR hearing, Applicant testified he met with plea counsel once—the day of the plea. However, Applicant testified he had met with counsel on other occasions to discuss unrelated charges. He averred that had he spent more time with counsel, he would have proceeded to trial. Applicant testified he was rushed at the time of the plea, and he primarily pled to help his

co-defendant, whom he relayed was innocent. Applicant averred counsel should have investigated more. He explained several people were in and out of the hotel room, which was not in his name.

Plea counsel testified she was appointed October 2020 and met with Applicant over ten times and had her investigator meet with Applicant. Plea counsel summarized she initially met with Applicant shortly after she took over previous counsel's cases, which included Applicant's case. She recalled visiting Applicant to explain the charges and sentence each charge carried.

Plea counsel testified she received discovery and burned them into a disk for Applicant. She testified she went over the nature of charges and sentencing, as well as consequences of pleading guilty, the possibility of going to trial, and the recommended sentence. Counsel stated she would have challenged the legality of the search warrant and moved to suppress the drugs if Applicant proceeded to trial. Plea counsel testified Applicant did not wish to appeal his guilty plea and never expressed his interest in proceeding to trial.

This Court finds the foregoing testimony by counsel credible. This Court likewise finds not credible Applicant's assertion that he only met with counsel once—on the day of the plea. This Court further notes Applicant's representation to the plea judge that he was completely satisfied with plea counsel and that counsel had answered all his questions. (Plea 5); see Dalton v. State, 376 S.C. 130, 137–38, 654 S.E.2d 870, 874 (Ct. App. 2007) ("[S]tatements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements."). Based on counsel's foregoing credible testimony, this Court finds counsel met with Applicant an adequate number of times and adequately advised him on the charges he faced. This Court finds counsel's advice was reasonable within prevailing professional norms and not deficient.

Moreover, this Court finds Applicant failed to identify precisely what plea counsel did not

explain or disclose to him from materials provided in discovery or what, if anything, could have been achieved had counsel spent more time with him. See Smith v. State, 404 S.C. 493, 500–501, 745 S.E.2d 378, 382 (Ct. App. 2012) (noting an applicant must present evidence to show how additional time spent in consultation regarding discovery would have resulted in a different outcome); see also Moody v. Polk, 408 F.3d 141, 148 (4th Cir. 2005) (“[T]here is no established minimum number of meetings between counsel and client prior to trial necessary to prepare an attorney to provide effective assistance of counsel.”). Accordingly, Applicant has failed to show deficiency or prejudice, and this claim is **DENIED**.

Failure to further negotiate plea offer

Applicant next contends counsel was ineffective for informing Applicant that he was pleading to a cap of sixteen years and that she would ask for less time, but failing to request less time at the plea hearing. This Court finds Applicant has not proved this claim.

At the PCR hearing, Applicant testified counsel told him he was pleading to a cap of sixteen years, and he would not receive more time than he was already serving for a different conviction (sixteen years). He testified, “But I figured that she would at least try to negotiate the, the cap.” Applicant stated he anticipated a shorter sentence. He explained he thought his plea would help an “innocent” co-defendant who was in the “wrong place at wrong time.” Applicant averred he would have proceeded to a jury trial had he known counsel would not negotiate the sentence. On cross-examination, he acknowledged that he understood this was an open plea.

Plea counsel testified the Solicitor’s Office made it clear there would be “no plea deals for anyone, no reducing it to anything, and the recommendation that you get, was gonna be your recommendation should you decide to plea or should you decide to go to trial.” Plea counsel testified she told Applicant the recommendation would be the same whether he went to trial or

pled guilty, and she advised him he had a right to trial. She stated she informed Applicant of the State's recommendation and explained the plea was not negotiable. Counsel denied telling Applicant that the sentencing range would be zero to sixteen years. However, she stated the judge had relayed to her that if Applicant pled guilty, he would not receive a sentence greater than what he already had on the other charge. Counsel testified Applicant wanted to accept responsibility for the drugs and confess on the record, although she advised him against it. Counsel maintained she would have been prepared for trial.

This Court finds the foregoing testimony by counsel credible, including testimony that she relayed to Applicant that the recommendation from the State would be the same whether he pled guilty or proceeded to trial. Ultimately, counsel could not compel the State to offer a better deal. Based on counsel's foregoing testimony, this Court finds counsel's negotiation of and advice regarding this plea was reasonable within prevailing professional norms and thus not deficient. This Court likewise finds Applicant has not shown prejudice. Specifically, Applicant testified at the PCR hearing that he ultimately pled guilty because he believed it would help co-defendants. This is consistent with his statement at the plea hearing, wherein he told the court, "I had co-defendants that got charged, too, and they had nothing to do with it. They weren't aware of what I had going on. I take credit for all the drug charges." (Tr. 6-7). In light of the foregoing, this Court finds not credible Applicant's testimony that he would not have pled had he known counsel would not negotiate a shorter sentence. Accordingly, Applicant did not meet his burden of proving prejudice, and this claim is **DENIED**.

Failure to advise accepting plea would render appeal moot.

Applicant contends counsel was ineffective for failure to advise him that accepting the recommended sentence for the drug charges would render his appeal moot on the trial charges of

armed robbery. Applicant likewise contends counsel was ineffective for not advising him to seek advice from another lawyer. This Court finds this allegation lacks merit.

At the evidentiary hearing, Applicant explained he had previously been convicted of armed robbery and was sentenced to sixteen years. He stated he believed that if he pled guilty, he would not receive more time than he already had. Applicant averred his direct appeal for the armed robbery charge was moot now that he had received a sixteen-year sentence for the guilty plea. Applicant also testified he did not realize he had received sixteen years along with an additional sixteen-year sentence until he got back to his cell and reviewed his paperwork.

Plea counsel testified that Applicant is serving a sixteen-year sentence for the drug charges. She stated she did not discuss the effect of the sentence on the pending appeal for an unrelated charge. However, counsel explained Applicant wanted to write a statement and plead guilty on the drug charges, that he ultimately made a statement confessing guilt at the plea. She reiterated she was prepared to proceed with trial.

This Court finds counsel's foregoing testimony credible, and counsel's advice and preparation of this case was reasonable within prevailing professional norms and thus not deficient. Initially, Applicant's direct appeal for an unrelated charge was not pertinent to his drug charges. The sentence he is serving for armed robbery is unrelated to his drug charges and has no legal effect on his pending direct appeal. Additionally, this Court finds it is not within the prevailing professional norms for criminal attorneys to advise clients to seek a second opinion; thus, counsel's failure to do so was not deficient. This Court likewise finds it is not reasonably likely Applicant would have obtained significantly different advice had he consulted with a different attorney because counsels' advice here was reasonably within prevailing professional norm. Finally, as noted, this Court finds Applicant ultimately pled because he believed it would assist a

co-defendant. Overall, Applicant did not prove deficiency or prejudice, and this claim is **DENIED.**

Involuntary Plea

Applicant contends that based on plea counsel's ineffective advice, he believed that he had no choice but to answer the judge's questions during the plea colloquy in such a manner as would result in the judge accepting the plea. He avers that had counsel given effective representation, Applicant would not have entered a guilty plea and would have insisted on a jury trial. This Court finds Applicant failed to meet his burden of proof.

In a PCR action, an applicant bears the burden of proving the allegations. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). "To be knowing and voluntary, a plea must be entered with an awareness of its consequences." Holland v. State, 322 S.C. 111, 113, 470 S.E.2d 378, 379 (1996). "To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." Dalton v. State, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Ct. App. 2007).

At the PCR hearing, Applicant explained at the time of his guilty plea, he was dealing with his father's passing and answered questions to get through and leave court. He testified he "was just agreeing, going through the motions." Applicant recalled stating at the plea hearing that no one had pressured or threatened him to enter guilty plea.

Initially, as discussed, this Court finds counsel's representation and advice was reasonable within prevailing professional norms and not deficient. This Court likewise finds Applicant ultimately pled guilty because he thought it would help a co-defendant if he accepted responsibility for the drugs.

Further, this Court finds Applicant failed to show his plea was involuntary. This Court finds credible counsel's testimony that she informed Applicant about his constitutional rights and consequences of pleading guilty. This Court finds not credible Applicant's testimony that he answered plea questions untruthfully because of counsel's ineffective representation. Further, the plea transcript itself supports a finding that Applicant was fully aware of the consequences of his plea, and thus pled guilty knowingly, voluntarily, freely, and intelligently. Specifically, Applicant told the plea court that he understood he was waiving his constitutional rights to a jury trial, and no one had promised him anything or threatened or forced him to plead guilty. (Plea 4-6). Likewise, Applicant relayed that he understood the sentences he faced. (Plea 5). Cf. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (“[S]tatements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements.”). This case presents a classic case of buyer's remorse. Ultimately, the evidence and testimony before this Court establishes Applicant discussed with counsel the consequences of taking the plea and pled guilty because he wanted to assist his co-defendant, who Applicant testified was innocent and at the wrong place at the wrong time. Based on the foregoing, this Court finds Applicant understood the consequences of pleading guilty and has failed to prove his plea was involuntary.

Conclusion

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. Thus, this application is denied and dismissed with prejudice.

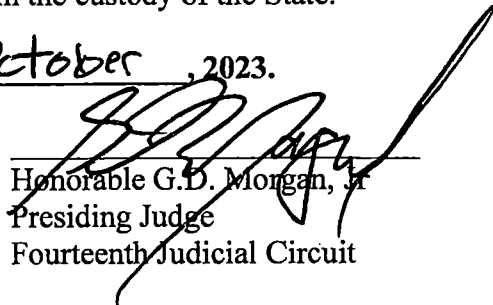
Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty days of receipt by counsel of written notice of entry of judgment. See Rule 203,

SCACR. Applicant has the right to an appellate counsel's assistance in seeking review of the denial of PCR. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on applicant's behalf. Rule 71.1(g), SCRCR. Attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for PCR is denied and dismissed with prejudice; and
2. Applicant must be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED THIS 2nd day of October, 2023.



Honorable G.D. Morgan, Jr.
Presiding Judge
Fourteenth Judicial Circuit

Beaufort, South Carolina