

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Nov 20 2023

S.C. SUPREME COURT

Appeal from Charleston County
Court of Common Pleas

Honorable Clifton Newman, Circuit Court Judge

Case No.: 2018-CP-10-03968

MONTRE DESEAN BROWN, # 347523 Appellant,

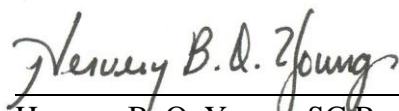
v.

THE STATE Respondent.

NOTICE OF APPEAL

Montre Desean Brown, #347523, appeals the order dated October 10, 2023, of the Honorable Clifton Newman denying his Post-Conviction Relief application. Appellant received written notice of entry of this order on October 24, 2023.

November 20, 2023



Herverly B. O. Young, SC Bar # 7013
SC Commission on Indigent Defense
Post Office Box 11433
Columbia, South Carolina 29211
(803) 734-1343
Attorney for Appellant

Other Counsel of Record:

Danielle Dixon
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-3737
Attorney for Respondent

Att
GS
Sol
AG

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Montre Desean Brown, #347523,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No.: 2018-CP-10-03968

ORDER OF DISMISSAL

2023 OCT 18 AM 10:58
FILED
CLERK OF COURT

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by Montre Desean Brown (Applicant) on August 10, 2018. On March 22, 2021, a virtual evidentiary hearing convened before the Honorable Clifton Newman. Applicant was present and represented by James K. Falk. Assistant Attorney General Benjamin Limbaugh represented Respondent. At the hearing, Applicant testified and called as a witness plea counsel Lauren Williams. Following a thorough review of the transcript 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 active eighteen-year sentence. In April 2015, the Charleston County Grand Jury indicted him for murder (2015-GS-10-02263) and possession of a weapon during the commission of a violent crime (2015-GS-10-02264). These charges arose from the fatal shooting of Kenneth Robinson at a gas station on January 9, 2015; Applicant was captured on a surveillance video holding a gun.

On August 25, 2017, Applicant appeared before the Honorable Markley Dennis and pled guilty to the lesser-included offense of voluntary manslaughter and the weapon charge. Lauren

Williams, Esquire, represented Applicant, and Assistant Solicitor Burns Malone Wetmore represented the State. Judge Dennis sentenced Applicant concurrently to twenty-eight years for voluntary manslaughter, suspended upon the service of eighteen years; and five years for the weapon charge. Applicant filed a notice of appeal that was dismissed due to Applicant's failure to timely serve the State. The remittitur was sent November 27, 2017.

CURRENT APPLICATION

On August 10, 2018, Applicant timely filed the current PCR application alleging he is being held in custody unlawfully because:

1. Ineffective Assistance of Counsel
 - a. "My lawyer misrepresented on me several aspects"
2. "Reconsideration"
 - a. "I believe I was oversentenced [sic] due to the facts in my case"
3. "Due process rights were violated"
 - a. "My attorney provided me with paperwork for an appeal and told to take that act instead of PCR."

The State filed a return requesting an evidentiary hearing.

On November, 7, 2020, Applicant amended his application to allege plea counsel was ineffective for:

1. Advising Applicant he would be eligible for LWOP if he proceeded to trial; and
2. Failing to conduct an adequate review of his criminal record.

At the PCR hearing, Applicant proceeded on the allegations in the amended application. Applicant also clarified he was proceeding on the ground that counsel was ineffective for not preparing a self-defense claim. (Tr. 6-7).

FINDINGS OF FACT & CONCLUSION OF LAW

This Court has had the opportunity to review the records before it, including the Charleston County Clerk of Court records from the underlying convictions; Applicant's records from the

South Carolina Department of Corrections; records from Applicant's direct appeal; the plea transcript; and the records of this PCR action. 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. 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 fact and conclusions of law as required by section 17-27-80 of the South Carolina Code (2017).

Advise regarding potential sentence

Applicant first contends counsel was ineffective for advising him that he already had one strike on his record because of an August 2011 conviction. He avers that although that prior indictment (2010-GS-18-1452) charged him with murder, he pled guilty to the reduced charge of first-degree assault and battery. Applicant asserts he intended to argue at trial that the shooting of Kenneth Robinson was justified because Applicant was acting in self-defense, and he was prepared to call two witnesses that would have testified Robinson went to Applicant's house the night before the shooting and threatened him with a gun. He contends he accepted the plea because he thought a conviction for any serious or most serious offense would automatically result in a life without parole sentence. Applicant contends that had he known he did not have any strikes, he would have proceeded to trial and argued self-defense or a lesser-included offense. This Court finds Applicant failed to prove counsel was ineffective in this regard.

At the PCR hearing, Applicant testified he had a murder charge on his record that was not supposed to be there. He explained he had previously pled guilty in August 2011 to first-degree assault and battery, and he received a YOA sentence not to exceed five years. Applicant averred his record indicated it was a murder charge, although it was supposed to be an attempted murder charge. He clarified he had never been convicted of murder or attempted murder. Applicant stated

counsel sent an email to the Clerk of Court to attempt to clear up his record, but she told him "that it couldn't be stricken and fixed on [his] record as how it was being read." (PCR 20). Applicant reiterated he did not want to go in front of a jury with a prior murder charge on his record.

Applicant stated he knew he faced a life sentence for the underlying murder charge, but he believed the prior charge would increase his chance of being found guilty. He averred counsel advised him the jury would have access to his record if he testified, and he believed the prior murder charge would increase his chances of receiving a life sentence. Applicant stated he would have proceeded to trial if the prior murder charge was not on his record, and counsel's advice that the jury would see his prior charge was the reason he pled guilty. He testified counsel told him he would be subject to cross-examination for the prior murder charge if he testified, and he and his mother agreed he should not take a risk with the prior charges on his record.

Plea counsel recalled Applicant had a prior assault and battery conviction on his record, which is not a violent offense in South Carolina. She stated Applicant was on parole for his YOA offense when he was arrested for this murder charge. When asked whether she told Applicant he should not testify because he had a murder conviction, she replied, "No, he doesn't have a murder conviction so I never told him that." Rather, she stated she advised him that if he took the stand, he could be impeached with prior convictions under certain circumstance according to the Rules of Evidence, and if he were convicted, "a judge could take his prior record, including absconding on parole, into a sentencing decision." (PCR 31). She reiterated she did not advise him or discuss with him a non-existent murder charge.

Counsel stated that if Applicant testified, then his prior convictions could come in. She explained, "[T]he facts underlying those, it was a shooting, there was [an] innocent bystander shot, that would not come in. It would just be the fact that he was in fact convicted." However, she was

concerned that a judge may sentence Applicant more harshly following a trial due to his prior conviction and the fact he had absconded from parole.¹ She clarified she never discussed what his sentence might be after trial other than he would face thirty years to life if convicted of murder.

Counsel testified the State would not give a sentencing recommendation or a cap, although she and Applicant wanted a cap. She stated Applicant decided to plead guilty anyway, and she told him, "I don't think you'll get two years and I don't think you'll bet 30, but it's always up to the judge." She stated she explained to Applicant the constitutional rights he would waive and had him sign a form regarding those rights a few days before the plea.

After counsel testified, Applicant stated he agreed with her testimony about her advice regarding his charge and his record, except that he recalled "that murder charge being brought up and that throwing a wrench in [his] plans." He stated he ultimately backed out of trial because of his prior convictions. (PCR 37-38).

This Court finds counsel's foregoing testimony credible. This Court further finds counsel's advice regarding the sentence Applicant faced was reasonable within prevailing professional norms. Specifically, counsel properly advised Applicant of the sentencing range, that the judge would likely consider the fact he previously absconded from parole in its sentencing decision, and that his prior conviction may be admissible if he decided to testify. This Court further finds that counsel did an excellent job representing Applicant, thoroughly investigated his case, had an accurate understanding of the law and legal procedure, and discussed this with Applicant. Ultimately, it was Applicant's decision to plead guilty. This Court finds counsel's excellent representation led to a reduced sentence for Applicant in this otherwise tragic crime. Based on the foregoing, Applicant did not prove counsel's advice was deficient. Likewise, he did not prove

¹ Counsel testified Applicant had absconded from parole and his YOA was revoked while she represented him.

resulting prejudice, and this claim is denied.

Investigation of prior record

Applicant next contends counsel was ineffective for not adequately reviewing his prior criminal record. Specifically, he avers he was prepared to go to trial and plead self-defense, but counsel advised him that if he testified, he would be subject to cross-examination by the State regarding his prior murder conviction. He asserts this advice was incorrect because (1) he did not have a prior murder conviction and (2) such questioning would have been improper under Rule 404(b), SCRE. This Court finds Applicant did not prove counsel was ineffective in this regard.

This Court finds credible counsel's testimony that she did not advise Applicant about a prior murder conviction because he did not have a prior murder conviction, and she advised Applicant that if he testified, his prior convictions could come in under the rules of evidence. This Court further finds the foregoing advice is reasonable under prevailing professional norms. Notably, counsel had a duty to advise Applicant about the risk of testifying—that his prior convictions could come in under the Rules of Evidence. See Rule 609(a)(1) (providing evidence that an accused has been convicted of a crime punishable by imprisonment in excess of one year shall be admitted if the court determine that the probative value the evidence outweighs its prejudicial effect); Rule 609(b) ("Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines . . . that the probative value of the conviction . . . substantially outweighs its prejudicial effect.")² This is in fact what counsel did; thus, Applicant did not prove her advice

² Applicant's reliance on Rule 404(b) is misplaced. Although Rule 404(b) prohibits the admission of prior crimes "to prove the character of a person in order to show action in conformity therewith," Rule 609 allows for the introduction of prior crimes for impeachment purposes.

was deficient in this regard. Likewise, this Court notes that at the plea hearing, the plea court relayed that Applicant had a prior *assault and battery* conviction—which Applicant agreed with. This Court finds Applicant did not prove deficiency or prejudice, and this claim is denied.

Self-defense

Finally, Applicant contends counsel was ineffective for not adequately investigating self-defense. Applicant did not prove this claim.

At the PCR hearing, Applicant stated counsel advised him that he did not have grounds for a self-defense. He averred he had a right to be where he was and to protect himself, although he believed he was wrong for having a firearm that day. Applicant explained he was at a gas station when he saw the victim approach the store; he testified the victim had brandished a gun and threatened to kill Applicant the night before. Applicant averred,

It had to be fate. Either he was following me or it had to be fate that he popped up there that day, because I walked in the store to pay for gas and when I looked back towards the door he was walking in. I ran to the back of the store and when I came out he had his hand and he was reaching. They found the gun on him and everything and I overreacted. And I know my role.

(PCR 13-14). He agreed counsel reviewed discovery with him, including a video from the gas station.

Counsel testified that had they proceeded to trial, self-defense would have been their strategy. She averred she may have been able to present self-defense without Applicant's testimony based on testimony from other witnesses, but she clarified it would be Applicant's decision about whether to testify. (PCR 30-34). Counsel stated she sent an investigator to gather witnesses, and she interviewed four or five witnesses who could testify about prior threats from the victim, although they "may not have presented as the best witnesses." (PCR 33-34).

Counsel testified she spoke to a potential witness named Gilliard and anticipated that she would have testified they were all afraid of the victim and the victim had threatened Applicant prior to the shooting. She explained Gilliard had called the police previously when the victim was at her house, and there was an incident report to that effect. Counsel averred she would have called Gillard, her daughter, and possibly her husband as witnesses had they proceeded to trial. She reiterated that had she tried the case, she would have attempted to do so without Applicant taking the stand "unless he really, really wanted to." (PCR 31). Counsel stated she had investigated, discussed this strategy with Applicant, and was prepared to present self-defense at trial. (PCR 32-33). Ultimately, she stated the State made a plea offer, she presented it to Applicant, and he accepted it. She stated it was Applicant's decision to plead guilty.

This Court finds counsel's foregoing testimony credible. This Court further finds counsel's investigation of self-defense was reasonable within prevailing professional norms and not deficient. Specifically, counsel credibly testified she sent an investigator to gather witnesses; spoke to witnesses; had several witnesses to support self-defense; and discussed this with Applicant. Applicant has not shown what more counsel should have done to investigate and thus did not prove deficiency. This Court further finds that counsel did an excellent job representing Applicant, thoroughly investigated his case, had an accurate understanding of the law and legal procedure, and discussed this with Applicant. Ultimately, counsel did not present self-defense because Applicant chose to plead guilty, and this Court finds Applicant knowingly, voluntarily, and intelligently pled guilty with a full understanding of the potential sentence he faced and the constitutional rights he was waiving. Applicant did not prove deficiency or prejudice, and this claim is denied.

CONCLUSION


Based on the foregoing, this Court concludes Applicant has not established any constitutional violations 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 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 shall be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED this 10th day of October, 2023.



CLIFTON NEWMAN
Presiding Judge
Fourteenth Judicial Circuit

Columbia, South Carolina



ALAN WILSON
ATTORNEY GENERAL

October 16, 2023

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401

Re: Montre Desean Brown, #347523 v. State of South Carolina
Case No.: 2018-CP-10-03968

Dear Ms. Armstrong:

Enclosed please find the original Order of Dismissal signed by the Honorable Clifton Newman, in the above-captioned case, for filing in your office. Please forward a time-stamped copy back to our office for our file.

Sincerely,

Danielle Dixon
Assistant Attorney General

DD/vh

cc: Peyre Thomas Lumpkin, Esquire
Hervey B.O. Young, Esquire

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

Montre Desean Brown, #347523,

Applicant,

v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Order of Dismissal has been served upon the applicant by mailing one copy in the United States mail, postage prepaid, addressed to:

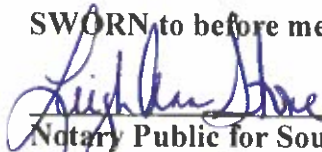
**Hervery B.O. Young, Esquire
S.C. Commission on Indigent Defense
Post Office Box 11433
Columbia, South Carolina 29211-1433**

This 23rd day of October, 2023.



Vickie Hall, Legal Assistant
for Respondent

SWORN to before me this 23rd day of October, 2023.



Notary Public for South Carolina.

My Commission Expires: May 16, 2029