

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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AUG - 9 2013

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

S.C. Supreme Court

J. Mark Hayes II, Circuit Court Judge

Case No. 2012CP421292

STATE OF
SOUTH CAROLINA,

Respondent,

v.

JOEY SHAWN WEIR,
#283049,

Appellant.

NOTICE OF APPEAL

Joey Shawn Weir, #283049, appeals the Order of the Honorable J. Mark Hayes II dated July 26, 2013. Appellant received a notice of entry of this order on August 5, 2013 from the Spartanburg County Court of Common Pleas. The Court denied and dismissed the Appellant's application for post conviction relief.

August 6, 2013



A Business Law Firm, LLC
Thomas A. Belenchia, SC Bar: 2371
Post Office Box 3421
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PCR Counsel for Appellant

Other Counsel of Record:
Alan Wilson, Attorney General
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Post Office Box 11549
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CERTIFICATE OF SERVICE

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Respondent,

v.

JOEY SHAWN WEIR,
#283049,

Appellant.


CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Appellant's Notice of Appeal was served upon the following addressees by depositing a copy thereof into the U.S. Mail in a postage prepaid envelope:

- a. Suzanne H. White, Assistant Attorney General
Office of the Attorney General for the State of South Carolina
Post Office Box 11549
Columbia, SC 29211-1549
- b. Daniel E. Shearouse, Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

- c. Hope Blackley, Clerk of Court
County Courthouse
2nd Floor, Suite 500
180 Magnolia Street
Spartanburg, SC 29306
- d. Judge J. Mark Hayes II
180 Magnolia Street
Spartanburg, SC 29306
- e. Division of Appellate Defense
Attn: Sharon A. Graham
P.O. Box 11433
Columbia, SC 29211-1433

This the 6th day of August 2013.


T. Camden Shealy

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STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 Joey Shawn Weir, #283049,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2012-CP-42-1292

ORDER OF DISMISSAL

This matter comes before the Court by way of an Application for Post-Conviction Relief filed March 20, 2012. The Respondent made its Return on or about January 30, 2013. An evidentiary hearing into the matter was convened on April 2, 2013, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Thomas A. Belenchia, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. James A. Check, Esquire, testified on behalf of Respondent. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, and the plea transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Applicant was indicted at the November 2011 term of the Spartanburg County Grand Jury for one count of petit larceny (11-GS-42-4253), and one count of malicious injury to real property, fixtures or improvements to obtain non-ferrous metals (11-GS-42-4254). The Applicant waived presentation.

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to the Grand Jury on the following offenses: receiving stolen goods valued between \$2000 and \$10,000 (11-GS-42-6870); malicious injury to real property, fixtures or improvements to obtain non-ferrous metals, damages more than \$2000 and less than \$10,000 (11-GS-42-6941, -42, -44, -45, -46); and injury to real property, fixtures or improvements to obtain nonferrous metals, damage of more than \$10,000 (11-GS-42-6943). He was represented by James Cheek, Esquire. On January 6, 2012, the Applicant pled guilty to all charges as indicted. He was sentenced by the Honorable R. Lawson McIntosh to time served for petit larceny (11-GS-42-4254), a concurrent period of five (5) years, suspended to (5) years of probation for receiving stolen goods (11-GS-42-6870), a concurrent period of five (5) years for all counts of injury to real property to obtain nonferrous metals, damage of \$2,000-\$10,000 (11-GS-42-6941, -42, -44, -45, -46), (11-GS-42-4253), and a consecutive period of ten (10) years for injury to real property to obtain nonferrous metals damages of \$10,000 or more (11-GS-42-6943). The Applicant did not appeal his guilty plea or sentence.

ALLEGATIONS

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

1. Ineffective assistance of counsel, in that counsel:
 - a. "failed to object/withdraw applicant's guilty plea when trial bench sentenced applicant to a consecutive ten (10) year sentence on indictment 11-GS-42-6943"
 - b. "failed to request the trial bench for a concurrent sentencing"
 - c. "failed to conduct a full and proper investigation into the matters"
 - d. "allowed applicant to serve two difference sentences on offenses committed within a twenty-four hour period which represent not only a continuous course of conduct, but also, one offense being all offense was so closely

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- connected as one single course. [*sic*] (crime spree)”
2. Involuntary guilty plea, in that;
 - a. “whether applicant’s plea of guilt to indictment number 11-GS-42-6943 voluntarily, knowingly, and intelligently made [*sic*]”
 3. Trial court abused its discretion, in that;
 - a. “sentencing applicant to a consecutive ten (10) years under South Carolina Code of Law, section. §. 16-11-0523 (B) (C) (2) [*sic*]”
 - b. “failing to run indictment number 2011-GS-42-6943, concurrent with all other indictments, pursuant to South Carolina Code of Law, section. §§. 17-25-50 and 24-21-640 [*sic*]”

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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003)

Ineffective Assistance of Counsel

In a PCR action, “[t]he burden of proof is on the applicant to prove his allegation by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). 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 v. State, 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

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

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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland). 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. Hill v. Lockhart, 471 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

Applicant testified that Counsel was ineffective for failing to ask the court for concurrent sentencing. Applicant testified that he received a consecutive sentence of ten years on one indictment, but thinks he should have only received five years. Applicant testified that he never received a copy of his discovery materials. Applicant also testified that he believed that three of his charges should have been considered as one offense because of a continuous court of conduct, rather than three separate offenses. Further, Applicant testified that Counsel was ineffective because Counsel also represented another co-defendant.

Counsel testified that he did represent two of the co-defendants who pled guilty at the same time. Counsel testified that because of the Applicant's two prior property charges, he was

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subject to the enhancement of the charges to a third and subsequent, which has a maximum sentence of ten years. Counsel acknowledged that he failed to ask the court for concurrent sentencing. Counsel also acknowledged that he did not ask the State or court to consider the charges as a continuous course of conduct, in particular because those were only three of nine indictments that Applicant was pleading guilty to. Counsel testified that he spoke with the Applicant several times, reviewed the case with him and advised him of his chances of probation and the requirements of restitution. Counsel also testified that the Applicant waived his restitution hearing and agreed to the amount of \$58,860. Counsel testified that the Applicant did not want a trial, but wanted to put off his plea until a visiting judge was in town.

This Court finds the testimony of Counsel to be more credible than the testimony of the Applicant. The Applicant appeared to be most concerned about the consecutive sentences he received, which are entirely within the court's discretion. Further, the sentences received by the Applicant are within the parameters established by the legislature. Although the Applicant recommended concurrent sentencing, this Court cannot find that Counsel was deficient for failing to object to a sentence which was well within the trial court's discretion.

This Court finds no deficiency on Counsel's behalf and finds that the Applicant failed to demonstrate any prejudice that may have resulted from Counsel's alleged deficiencies. 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. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985). This Court finds that the Applicant has failed to meet his burden of proof. Accordingly, this allegation is dismissed.

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Involuntary Guilty Plea

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). Therefore, statements 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. Crawford v. U.S., 519 F.2d 317 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for 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); Richardson v. State, 310 S.C. 360, 26 S.E.2d 795 (1993).

Applicant testified that he had a reading disability in school and only finished through the tenth grade, never graduating from high school. He testified that he was in learning disability classes at Dorman and read at a seventh or eighth grade level. Applicant alleged that he did not understand the plea proceedings and was confused.

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This Court finds that the record is clear that the Applicant appeared to understand fully the plea proceedings. Based upon Counsel's testimony, the Applicant's prior record, and the plea transcript, this Court finds that the Applicant, although unhappy with the sentence received, freely and voluntarily entered a plea of guilty to all of these charges. Therefore, this claim is denied and dismissed.

Abuse of Discretion

Although raised in the application, the Applicant did not pursue this allegation at the hearing. Therefore, this Court finds that the Applicant voluntarily abandoned this claim.

Summary

This Court finds in regards to the allegations of ineffective assistance of counsel, Counsel's testimony is more credible than the Applicant's testimony. This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in his representation, and that Counsel's conduct does not fall below objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes the Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, this allegation is denied.

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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.

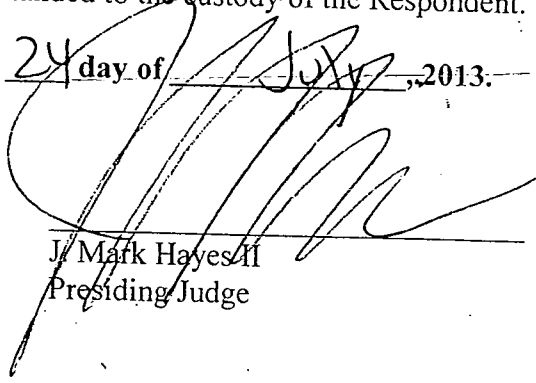
This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a 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 appeal.

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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.

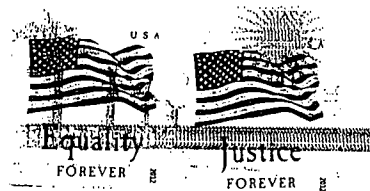
AND IT IS SO ORDERED this 24 day of July, 2013.


J. Mark Hayes II
Presiding Judge

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