

The Bax Law Firm, PA

August 1, 2013

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RECEIVED

AUG 06 2013

S.C. SUPREME COURT

RE: Oscar Gramling v. State of South Carolina
2011-CP-32-1293

Dear Mr. Shearouse:

Enclosed for filing is a copy of the Notice of Intent to Appeal filed on behalf of Oscar Gramling in the above captioned case. Also enclosed are the following:

- (1) Proof of service of the notice of appeal on the respondent.
- (2) A copy of the order which is to be challenged on appeal.
- (3) This appeal is being filed with the Supreme Court because it is an appeal from a PCR case.

Please let me know if you have any questions.

Sincerely yours,



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ATTORNEY FOR APPELLANT

cc: Karen Ratigan
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Columbia, SC 29211
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ATTORNEY FOR RESPONDENT

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
COURT OF COMMON PLEAS
EDGAR W. DICKSON, Circuit Court Judge

Case No. 2011-CP-32-1293

Oscar Gramling, #341691,
Appellant,

vs.

State of South Carolina,
Respondent,

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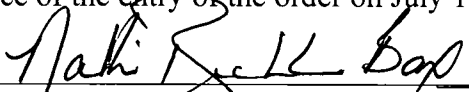
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S.C. SUPREME COURT

NOTICE OF INTENT TO APPEAL

Oscar Gramling, by and through counsel, hereby appeals the Order of Dismissal of the Honorable Edgar W. Dickson, dated July 2, 2013, and filed July 9, 2013 a copy of which is attached hereto. Counsel received written notice of the entry of the order on July 10, 2013.

August 1, 2013



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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
COURT OF COMMON PLEAS
EDGAR W. DICKSON, Circuit Court Judge

Case No. 2011-CP-32-1293

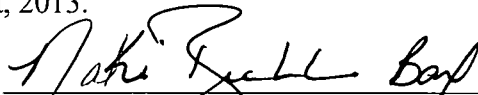
Oscar Gramling, #341691,
Appellant,

vs.

State of South Carolina,
Respondent,


CERTIFICATE OF SERVICE

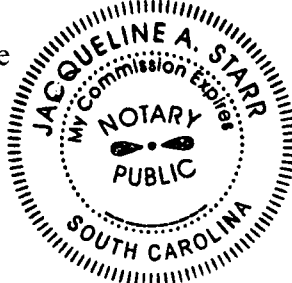
The undersigned attorney hereby certifies that a true copy of the Notice of Intent to Appeal in the above referenced case has been deposited in the United States Mail, postage prepaid on August 1, 2013 addressed to Karen Ratigan, SC Attorney General's Office, P.O. Box 11549, Columbia, SC 29211, Clerk of Court, Lexington County, 205 East Main Street, Lexington, South Carolina 29072, this 1st day of August, 2013.



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ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 1st day of August, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 6-16-2019



(4)

ORIGINAL

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)
)
 Oscar A. Gramling, III,)
 S.C.D.C. No. 341691,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS FILED

2011-CP-32-1293

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CLERK OF COURT LEXINGTON, SC

ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed March 31, 2011. The Respondent made its return on December 16, 2011. An evidentiary hearing was convened on November 14, 2012 at the Lexington County Courthouse. The Applicant was present and represented by Arie D. Bax, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's plea counsel, Victor Li, Esquire. The Court had before it the transcript of the partial trial and guilty plea hearing, the Lexington County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, and the return.¹

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Lexington County Clerk of Court. The Applicant was indicted at

¹ At the end of the hearing, this Court held the record open to allow counsel for the Applicant to speak with Alexandra M. Benevento, Esquire about whether she had any information to contribute on the issues raised in this case. Counsel subsequently informed the Court and opposing counsel that Benevento did not have anything of probative value to add in this case and that the record could be closed.

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the August 2009 term of the Lexington County Grand Jury for second-degree criminal sexual conduct (CSC) with a minor (2009-GS-32-2003) and contributing to the delinquency of a minor (2009-GS-32-2005). He was represented by Victor Li, Esquire.

The State brought the case to trial on July 12, 2010. After the State finished its direct examination of the victim, the Applicant chose to plead guilty. On July 13, 2010, the Honorable William P. Keesley sentenced the Applicant to concurrent terms of eight years for second-degree CSC with a minor and three years for contributing to the delinquency of a minor. The Applicant did not appeal.

ALLEGATIONS

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

1. Ineffective assistance of counsel:
 - a. Misrepresented the terms and conditions of the plea offer.
 - b. Misrepresented the potential maximum term of incarceration under this plea and misrepresented what could be expected in terms of sentence.
2. Involuntary guilty plea:
 - a. Involuntary guilty plea due to counsel being ineffective for failing to be prepared for trial and demonstrating such directly to the Applicant.

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).

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Ineffective Assistance of Counsel/Involuntary Guilty Plea


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The Applicant alleges his guilty plea was involuntary and that he received ineffective assistance of counsel. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). When there has been a guilty plea, the applicant must prove that counsel’s representation was below the standard of reasonableness and that, but for counsel’s unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

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, 243-44, 89 S. Ct. 1709, 1712 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000) (citing Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)).

The Applicant stated he had charges in both Lexington and Richland Counties for incidents with the same victim. The Applicant stated he had weekly meetings with plea counsel

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and they reviewed the Richland County discovery but not the Lexington County discovery. The Applicant stated plea counsel gave him a copy of the Lexington County discovery but that he learned about some of the Lexington evidence for the first time during the trial. The Applicant stated he and plea counsel discussed possible defenses and witnesses (Jamie Banks, a coworker, and the Richland County Detention Center psychologist) but that he did not know if these witnesses had been subpoenaed. The Applicant stated he told plea counsel his version of what happened and also gave him information about the victim and her potential credibility issues. The Applicant stated the victim told him that she would not testify against him and that the victim contacted plea counsel. The Applicant stated the victim testified at trial – at first – that nothing happened between them but then she changed her story. The Applicant stated there was a plea offer during the trial and that plea counsel said he would “walk out that day” if he pled guilty. The Applicant stated he believed that meant he would not be sentenced that day and would not receive a prison sentence. The Applicant stated he decided to plead guilty because he believed he would avoid prison time and because plea counsel seemed nervous. The Applicant stated they had discussed the maximum sentence that was possible if he went to trial but that plea counsel did not discuss the sentence ranges of the charges on the day he pled guilty.

Plea counsel testified he filed discovery motions for both the Richland County and Lexington County charges. Plea counsel testified he had several meetings with the Applicant. Plea counsel testified he received discovery materials from both counties and reviewed them with the Applicant. Plea counsel testified they discussed the Applicant’s version of events and that the Applicant was very upfront about the details behind the charges. Plea counsel testified he explained the sentence ranges on the charges and a prior offer for the Applicant to plead guilty to the lesser offense of assault and battery of a high and aggravated nature. Plea counsel

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testified the Applicant rejected the plea deal because he said the victim would not testify against him. Plea counsel testified the victim contacted him before the trial but they did not discuss her testimony. Plea counsel testified the victim took the stand at trial and initially denied any improper contact with the Applicant. Plea counsel testified, however, the victim then changed her story and offered detailed testimony about their relationship – including several details the Applicant had not provided him. Plea counsel testified the victim’s testimony made him nervous because she appeared very truthful. Plea counsel testified that, during the break after the victim’s direct examination, he spoke to the assistant solicitor. Plea counsel testified the State offered to not pros an enticement charge and not make a sentence recommendation. Plea counsel testified he discussed the offer with the Applicant and said the only chance he had to obtain a good sentence was to plead guilty to avoid a “trial tax.” Plea counsel testified he thought the Applicant would have received a worse sentence if he pled guilty after the victim was cross-examined. Plea counsel testified he never told the Applicant he would go home if he pled guilty.

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LEXINGTON, NC

A.

This Court finds the Applicant failed to meet his burden of proving plea counsel did not properly prepare for the victim’s testimony prior to trial and he was prejudiced as a result. This Court finds plea counsel’s representation may have fallen below the reasonable professional standard. Plea counsel testified the victim did not testify in a manner that he had expected (and as the Applicant had assured him would occur). Consequently, plea counsel was left visibly perturbed by the victim’s testimony at trial. This Court finds plea counsel could have been better prepared for the victim’s testimony and avoided the reaction her testimony prompted.

Regardless, this Court finds the Applicant failed to satisfy his burden of proving he suffered any resulting prejudice. See Roscoe v. State, 345 S.C. at 20, 546 S.E.2d at 419. Plea

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counsel testified his reaction to the victim's testimony was due to the fact that she appeared very credible and he was left with the impression the Applicant would be found guilty. This Court finds the Applicant's decision to plead guilty was voluntary and not solely the result of plea counsel's reaction to the victim's testimony. Rather, it was the result of a sound and carefully-considered legal strategy and advice given the strength of the State's case. See Hill v. Lockhart, 474 U.S. at 58-59; 106 S. Ct. at 370; see also Huggler v. State, 360 S.C. 627, 633, 602 S.E.2d 753, 756 (2004) ("Counsel's strategy will be reviewed under an objective standard of reasonableness.") (internal citation omitted).


Accordingly, this Court finds the Applicant has failed to prove both prongs of the Strickland test – that plea counsel was deficient and he was prejudiced as a result.

B.

Regarding the Applicant's remaining claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds the Applicant's testimony is not credible, while also finding plea counsel's testimony is credible. This Court further finds plea counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

The Applicant admitted to the plea judge that he was guilty. (Transcript, p.215). The Applicant also told the plea judge that he understood the trial rights he was waiving in pleading guilty, was satisfied with counsel, and had not been coerced in any way. (Transcript, pp.211-12; pp.215-16; pp.216-17). This Court finds the Applicant entered a knowing and voluntary guilty plea. See Boykin v. Alabama, 395 U.S. at 243-44, 89 S. Ct. at 1712.


This Court finds the Applicant failed to meet his burden of proving plea counsel did not adequately review the discovery materials and evidence related to his Lexington County charges.

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Plea counsel testified he filed discovery motions for both the Lexington County and Richland County charges and that he reviewed these materials with the Applicant. This Court finds plea counsel's testimony is more credible. This Court notes both the Applicant and plea counsel testified they had numerous meetings about the charges and finds it is improbable that plea counsel never reviewed the Lexington County discovery materials with the Applicant. Further, this Court notes the Applicant has failed to demonstrate how his case was prejudiced by any alleged deficiency in plea counsel's review of the discovery materials. See Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989) (holding that in order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

This Court finds the Applicant failed to meet his burden of proving plea counsel was ineffective in failing to subpoena several witnesses. As these alleged witnesses did not testify at the evidentiary hearing, any discussion regarding what they would have testified about at trial is purely speculative. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme Court "has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial.") (emphasis in original); see also Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, as the applicant failed to have an expert testify at the evidentiary hearing, "any finding of prejudice is merely speculative").

This Court finds the Applicant failed to meet his burden of proving plea counsel did not explain the sentence ranges for the offenses. Plea counsel testified he told the Applicant the minimum and maximum sentences he was facing on the charges. Plea counsel specifically

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testified he told the Applicant of the sentencing ranges again when they were discussing the plea offer because it was made without a sentence recommendation. This Court finds plea counsel's testimony is credible. This Court further notes that, even assuming arguendo plea counsel did not review this information, any error was cured by the judge's explanation of the sentence ranges during the guilty plea hearing. (Transcript, p.217; p.221). See Holden v. State, 393 S.C. 565, 575, 713 S.E.2d 611, 616 (2011); Burnett v. State, 352 S.C. 589, 593-94, 576 S.E.2d 144, 246 (2003).

This Court finds the Applicant failed to meet his burden of proving plea counsel misadvised that he would not receive a jail sentence if he pled guilty. Plea counsel testified that, after the victim's direct examination at trial, he spoke to the State about a plea offer and the State agreed to dismiss an enticement charge and not comment on sentencing. Plea counsel testified he explained this to the Applicant. Plea counsel testified he never told the Applicant he would not receive a jail sentence. This Court finds – especially in light of the Applicant's decision to plead guilty mid-trial – plea counsel's testimony is credible. This Court finds the allegation is refuted by the transcript. See Stalk v. State, 375 S.C. 289, 300, 652 S.E.2d 402, 407 (Ct. App. 2007). Plea counsel told the plea judge the agreement was to “plea guilty based on the State's silence as to sentencing” and the State added “we have agreed to dismiss a companion enticing a child – an enrolled child from school charge.” (Transcript, p.216, lines 10-17). The plea judge asked the Applicant whether “other than what's on the record . . . has anyone promised you anything or offered any hope of reward to get you to plead guilty” and the Applicant replied “[n]o, sir.” (Transcript, p.216, lines 18-22).

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under

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prevailing professional norms. The Applicant failed to present specific and compelling evidence that plea 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 plea counsel’s performance.

C.

This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. This Court also concludes the Applicant has failed to meet his burden of proving his guilty plea was not knowing and voluntary. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner and the Applicant was not prejudiced by counsel’s representation. Furthermore, the Applicant’s guilty plea was entered knowingly and voluntarily within the mandates of Boykin. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty

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(30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 2nd day of July, 2013.



Edgar W. Dickson
Presiding Judge

Orangeburg, South Carolina.

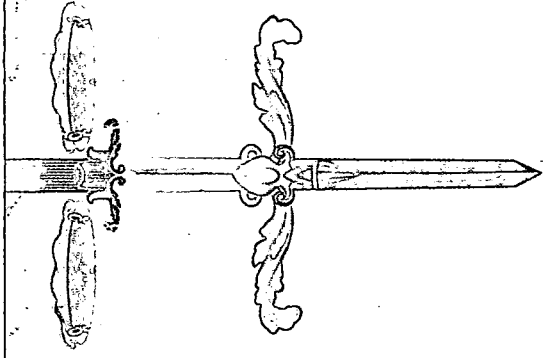
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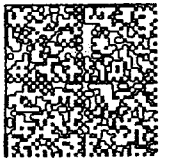
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