

STATE OF SOUTH CAROLINA
In The Supreme Court

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AUG 23 2013

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

S.C. Supreme Court

Judge Edgar Dickson, Circuit Court Judge

Indictment Number: 2012-CP-09-0137

Michael T. McKnight # 305121.....Petitioner

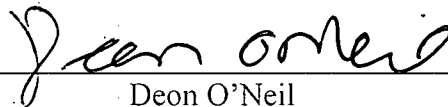
v.

State of South CarolinaRespondant

NOTICE OF APPEAL

The Petitioner appeals the Honorable Edgar Dickson June 27, 2013 order denying Petitioners PCR application. Undersigned counsel received notice of entry of the order on August 19, 2013. A copy of the order on appeal is attached to this notice.

August 23, 2013



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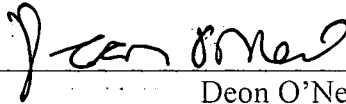
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v.

State of South CarolinaRespondant

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 served upon opposing counsel by mail this date to his office at P O Box 11549 Columbia sc 29211



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STATE OF SOUTH CAROLINA) FILED IN THE COURT OF COMMON PLEAS
COUNTY OF CALHOUN) FOR THE FIRST JUDICIAL CIRCUIT

Michael T. McKnight, #305121,) 2013 JUL 10 P 12:15 Case No. 2012-CP-09-0137

Applicant,) KENNETH HASTY
) CLERK OF COURT
) CALHOUN COUNTY
) S.C.

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

This matter comes before the Court by way of an application for post-conviction relief filed July 9, 2012. The Respondent made its Return on February 21, 2013. An evidentiary hearing into the matter was convened on May 20, 2013, at the Orangeburg County Courthouse. The Applicant was present at the hearing and was represented by Earnest D. O'Neil, Esquire. The Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Calhoun County Clerk of Court. The Applicant was indicted at the April 2007 term of the Calhoun County Grand Jury for Possession with Intent to Distribute Cocaine (2007-GS-09-0042). Applicant pled guilty before the Honorable Diane S. Goodstein. Judge Goodstein sentenced Applicant to ten years imprisonment suspended upon the service of six months imprisonment followed by three years of probation. The sentence was to be served concurrently to Applicant's YOA parole for a previous 2004 charge and a six month sentence for a charge of Manufacture, Distribution, etc. of Cocaine Base-1st (2007-GS-09-040). The Applicant did not appeal his conviction or sentence.

An arrest warrant was issued for the Applicant on December 15, 2010 for violating conditions of his probation by using marijuana on two separate occasions, failing to attend ordered treatment, possessing a dangerous weapon, failing to work, and failing to pay fees. Martin R. Banks, Esquire, represented him at the violation hearing. On January 24, 2011, the Honorable Edgar W. Dickson partially revoked the Applicant's probation, requiring him to serve six months of his original sentence. Judge Dickson also instructed Applicant that any new convictions would be viewed as a new violation of probation.

A probation citation was issued on July 26, 2011 following Applicant's subsequent conviction for Assault and Battery – Second Degree (2011-GS-09-0041). Applicant was represented by Martin R. Banks, Esquire, for both the probation violation and the Assault and Battery charge. Judge Dickson ordered that Applicant continue with his probation and complete anger management counseling with CASA or Calhoun County Mental Health. Upon completion of his GED and anger management counseling, Judge Dickson would consider the case for termination.

A third and final probation citation was issued on September 23, 2011 for cutting off his GPS tracking device,¹ failing to refrain from drug use, absconding from his address, failing to pay supervision fees and additional convictions in Magistrate's Court. Martin R. Banks, Esquire, represented him for his probation revocation hearing. The Honorable R. Ferrell Cothran, Jr., revoked Applicant's suspended sentence and sentenced him to serve the remaining five years of his sentence.

¹ Applicant was ordered to wear a GPS tracking device as a condition of a prior charge for Lewd Act, Committing or Attempting Lewd Act Upon Child under 16 (2004-GS-09-0139).

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following allegations:

1. "Violation of applicant's Constitutional right to Due Process."
 - a. "Applicant's right to Due Process as allowed in the State and federal Constitution was altered by the unconstitutional applications of State statutes."
2. "Violation of Applicant's Constitutional right against ex-posto (sic) facto application of law."
 - a. "Applicant's right to have an Ex-Posto (sic) Facto statute applied against him was Constitutionally violated by the unconstitutional implication of the probation hearing's ordered regarding future GPS monitoring as it applies to the Applicant."

In his application, Applicant only challenges the propriety of his third probation revocation in front of the Honorable Judge R. Ferrell Cothran, Jr.

SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. The State presented testimony from plea counsel, Martin R. Banks, Esquire (Counsel). This Court also had before it a copy of Applicant's guilty plea transcript, the records of the Dorchester County Clerk of Court, and Applicant's records from the South Carolina Department of Corrections.

During the evidentiary hearing, Applicant testified his parole was violated in 2011 for cutting of his GPS tracking device and fleeing to Philadelphia. Applicant testified counsel was ineffective for failing to object to him being subject to the GPS tracking device. Applicant further testified he was convicted for lewd act on a minor in 2004 and received a YOA sentence and was subject to electronic monitoring for thirty days. Applicant testified he was released in 2006 and was never advised of any GPS tracking requirements. Applicant testified he was convicted for Possession With Intent to Distribute Cocaine in 2007 and violated his Parole.

Applicant testified he was sentenced to ten years suspended upon the service of 3 years imprisonment. Applicant testified he was not advised of the GPS tracking device until 2009. Applicant testified that in November 2011 he violated his parole for cutting off his GPS tracking device and fleeing to Philadelphia.

Following Applicant's testimony, Counsel was called to testify by the State. Counsel testified he represented Applicant in his 2004 conviction for lewd act with a minor. Counsel testified that in 2004 he did not advise Applicant that he would be required to wear a GPS tracking device. Counsel testified he represented Applicant in his 2007 PWID Cocaine conviction and he did not advise Applicant that he would be required to wear a GPS tracking device. Counsel testified that the law requiring Applicant to wear a GPS tracking device was not in effect at the time of Applicant's guilty plea. Counsel testified he would have no way of knowing that Applicant would be required to wear a GPS tracking device as a result of his guilty plea. Counsel further testified he represented Applicant at his 2011 Parole hearing and Applicant was cited for cutting off his GPS tracking device and absconding to Philadelphia. Counsel testified he reviewed the validity of the GPS tracking statute. Counsel testified that the law applies retroactively. Counsel further testified he spoke with Eric Reed, Applicants Parole Officer, regarding the validity of the GPS tracking device. Counsel testified that he had no grounds to object to the GPS tracking device. Counsel further testified he filed an Appeal on Applicant's behalf.

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 at the post-conviction relief 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 accordingly. Specifically, this Court finds that Counsel's testimony is very credible while Applicant's testimony is not credible. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Ineffective Assistance of Counsel

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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, 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 rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. 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. 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).

After careful review based on the standard discussed above, the Applicant has failed to carry his burden in this action. Specifically, this Court finds that Counsel's testimony is credible while Applicant's testimony is not credible. Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel.

Counsel was ineffective for failing to object to GPS tracking device

This Court finds Applicant's allegation that he was denied effective assistance of counsel due to Counsel's failure to object to the validity of the GPS tracking device is without merit. This Court further finds that nothing in Counsel's representation fell below any reasonable professional standard. Counsel testified that he did not advise Applicant that he may be potentially required to wear a GPS monitor as a result of his guilty plea because the statute so requiring was not in effect at the time of the Applicant's plea. See Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994) (attorney is not required to be clairvoyant or anticipate changes in the law which were not in existence at time of trial), *overruled on other grounds by* Brightman v. State, 336 S.C. 347, 520 S.E.2d 614 (1999).

This Court further finds Counsel thoroughly investigated the validity of the law and correctly found that the law applies retroactively. Additionally, this Court finds Counsel's testimony that there was no basis for an objection in light of the case law established at the time of Applicant's probation revocation to be correct. This Court holds that Applicant has failed to meet his burden of proof in regards to this allegation, which must be denied and dismissed with prejudice.

After careful review based on the standard discussed above, this Court finds that Applicant has failed to carry his burden in this action. Counsel testified that he did not believe that Applicant had a meritorious ground on which an appeal could be sought and that Applicant never requested an appeal be filed. This Court finds that Counsel's performance was reasonable and effective. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

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 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 notes that that Applicant must file and serve a notice of appeal within thirty 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 post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's

behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

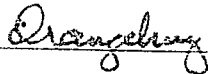
IT IS THEREFORE ORDERED:

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 27th day of June, 2013.



EDGAR W. DICKSON
Presiding Judge
First Judicial Circuit



, South Carolina

