THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Honorable J. Mark Hayes II, Circuit Court Judge

Case No. 2012-CP-42-0652

Juanito Martinez-Castenada, #349061.....Petitioner,

v.

State of South Carolina.....Respondent.

NOTICE OF APPEAL

Juanito Martinez-Castenada appeals the Order of the Honorable J. Mark Hayes II dated July 24, 2013, denying Petitioner's Application for Post Conviction Relief. Undersigned counsel received notice of entry of the Order on July 27, 2013. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,

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August 20, 2013

Other Counsel of Record:

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(803) 734-3919
Attorney for Respondent

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG **Juanito Martinez-Castenada, #349061,** Applicant, v. State of South Carolina, Respondent.	)	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT 2012-CP-42-0652 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed February 8, 2012. The Respondent made its Return on or about January 30, 2013. An evidentiary hearing into the matter was convened on April 1, 2013, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Howard R. Kinard, 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 using the assistance of a certified and sworn interpreter. Marie Bustamante, interpreter for Applicant's plea, also testified. Andrew J. Johnston, 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 September 2010 term of the Spartanburg County Grand Jury for trafficking in

cocaine over 200 grams and possession of firearm or knife during commission of or attempt to commit a violent crime (10-GS-42-5661, count 1 and 2). He was represented by Andrew J. Johnston, Esquire. On December 16, 2011, the Applicant pled guilty to the lesser included offense of trafficking in cocaine 28-100 grams.[1] He was sentenced by the Honorable J. Derham Cole, pursuant to a negotiated sentence, to confinement for a period of fifteen (15) years for that charge. 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;
   a. "Counsel failed to do any pretrial investigation."
   b. "Counsel failed to discuss defenses available"
   c. "Counsel advised defendant to plea without investigation."
2. Involuntary guilty plea

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

The Applicant alleges 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) (citing Rule 71.1(e),

[1] Count 2 of the indictment was nolle prossed in accordance with the plea negotiations.

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 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).

Applicant testified that he retained Counsel, but only met with Counsel three times during the thirteen and a half months he was in jail before the plea. Applicant testified that he did not know what charges he was facing when he went to court and that he did not believe that Counsel did much to assist him. Applicant also testified that on the day he was arrested, he was hit from behind and then the police busted in the door. Applicant testified that he wanted a new attorney

and tried to relieve Counsel, but during the recess following the discussions, Counsel approached him with a fifteen year plea offer. However, Applicant testified that he wanted to go to trial.

Counsel testified that he did meet with the Applicant three times on these charges, but also represented him on several other charges. Counsel testified that he had an interpreter with him at two of the three meetings. Counsel also testified that based upon his review of the facts and discussions with the Applicant; there was not a factual or legal defense to the charges. Counsel testified that the Applicant never provided any information to him to assist in his defense.

This Court finds that the Applicant failed to meet his burden of proof as to the allegation that Counsel was ineffective. This Court also finds Applicant's testimony to not be credible. Although the Applicant indicated in his testimony that he only met with Counsel briefly, the "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). The Applicant failed to point to any specific matters Counsel failed to discover or any defenses that could have been pursued had Counsel spent more time with the Applicant or conducted additional investigation. "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998).

This Court also finds that the Applicant's allegation of ineffective assistance of counsel lacks merit. This Court finds that the Applicant has failed to meet his burden of proof as to this claim. It is clear from the record and testimony that the Applicant was fully aware of the charge and of the negotiated sentence to a reduced charge, even though he wanted Counsel to obtain an offer for less time. Therefore, this claim is denied and dismissed.

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, 426 S.E.2d 795 (1993).

Applicant testified that Counsel brought two different interpreters with him to meet with Applicant, but Applicant could not understand them. However, Applicant acknowledged that he understood Counsel was presenting a plea offer at one meeting, to which Applicant insisted that he would not accept. When asked as to why he acknowledged the facts of the case were correct,

Applicant testified that he did not understand any of the words that were used on the day of the plea. Applicant also testified that he also had trouble understanding Ms. Bustamante at the plea. Applicant testified that he wanted a five year offer and he would have signed that immediately had Counsel been able to obtain that offer for him.

Marie Bustamante testified that she recalled Applicant's plea and she was the interpreter. Ms. Bustamante testified that she has been qualified as a court interpreter and was brought in for Applicant by the court. She testified that she met with Applicant and Counsel prior to the hearing and during the court recess. Ms. Bustamante testified that Applicant did indicate that he wished to relieve Counsel. She also testified that she never had difficulty understanding the Applicant during the meetings or plea. Ms. Bustamante testified that Applicant indicated that he wanted less time, but never said that he did not want to accept the fifteen year negotiated sentence.

Counsel testified that he was retained to represent the Applicant on these charges, but also on another trafficking charge, a possession with intent to distribute marijuana, and a driving under the influence charge. Counsel testified that John Morton, qualified interpreter, was present at two of their three meetings. Counsel testified that he never received any indication that the Applicant could not understand the conversations. Counsel testified that he discussed all of the facts with the Applicant and was able to obtain an initial offer of eighteen years. Counsel also testified that the Applicant did not provide a defense to him and faced a mandatory minimum twenty-five years based on the charge. Counsel testified that Applicant decided to plead guilty, but then indicated that he no longer wanted to plead and wanted to fire Counsel. However, ultimately, the State was willing to offer fifteen years, reduce the charge, and dismiss the remaining charges. Counsel testified that he believed that the Applicant, although not given the

five to seven year deal he desired, pled guilty freely and voluntarily based upon his knowledge of all of his options.

This Court finds Counsel's testimony and the testimony of Ms. Bustamante to be far more credible than the Applicant's testimony. This Court also finds this allegation conclusively refuted by the record. There was no indication in the record that the Applicant had difficulty understanding the interpretation or the proceedings in general. This Court finds that Applicant has failed to carry his burden of proving that his guilty plea was not freely and voluntarily entered. The overwhelming evidence in the record and presented through the testimony of the witnesses at the hearing reflects that the plea was knowingly and voluntarily entered. Boykin v. Alabama, 395 U.S. 238 (1969); Vickery v. State, 258 S.C. 33, 186 S.E.2d 827 (1972). Therefore, this Court finds that Applicant's guilty plea was freely and voluntarily entered.

Summary

This Court finds in regards to the allegations of ineffective assistance of counsel and involuntary guilty plea, the Applicant failed to meet his burden of proof. 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.

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 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 24 **day of** July **, 2013.**

J. Mark Hayes II
Presiding Judge

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2013 JUL 26 AM 8:49
M HOPE BLACKLEY

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Honorable J. Mark Hayes II, Circuit Court Judge

Case No. 2012-CP-42-0652

Juanito Martinez-Castenada, #349061.....Petitioner,

v.

State of South Carolina.....Respondent.

PROOF OF SERVICE

I certify that I have served the within Notice of Appeal on the following persons by depositing a copy of it in the United States Mail, postage prepaid, on this 20th day of August 2013, addressed as follows:

State of South Carolina:

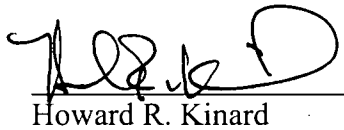
Suzanne H. White, Esq.
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

Petitioner:

Juanito Martinez-Castenada, #349061
Perry Correctional Inst.
430 Oaklawn Drive
Pelzer, SC 29669

South Carolina Office of Appellate Defense:

Robert M. Dudek, Chief Appellate Defender
1330 Lady Street
Columbia, SC 29201



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August 20, 2013

The Honorable Daniel E. Shearhouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: Juanito Martinez-Castenada, #349061, Petitioner/Appellant, v. State of South Carolina, Respondent
Case No. 2012-CP-42-0652

Dear Mr. Shearhouse:

Enclosed for filing with the Supreme Court is the ***Notice of Appeal*** on the above Post-Convuction relief matter. Also enclosed for filing are four (4) copies of the following:

1. Proof of Service of the Notice of Appeal on the Respondent and The Office of Appellate Defense;

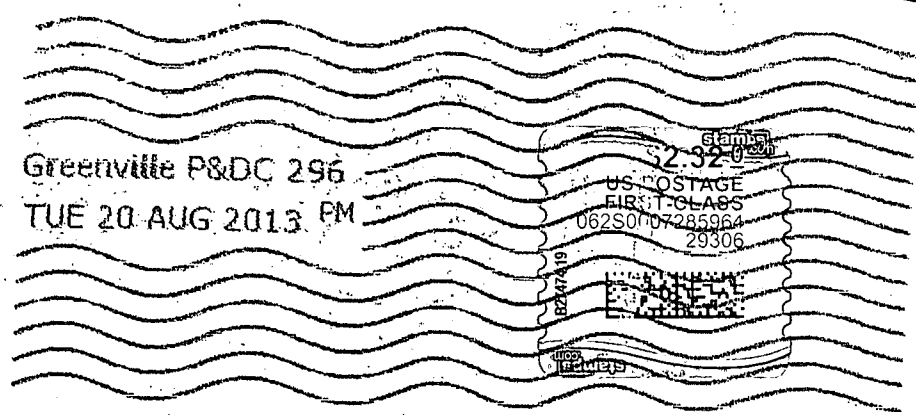
2. A copy of the Order which is being challenged on appeal.

This appeal is being filed with the Supreme Court pursuant to Rule 243(a) SCARC. Please note that I am appointed counsel pursuant to Rule 602 SCACR and therefore should be automatically relieved as appellate counsel. A copy of this letter is hereby provided to the Division of Appellate Defense for further processing, including ordering the transcript. Please do not hesitate to contact me should you have any questions regarding this matter.

Sincerely,

Howard R. Kinard

Cc: Suzanne H. White, Esq.
Juanito Martinez-Castenada, Petitioner/Appellant
Division of Appellate Defense (Robert M. Dudek, Esq.)



From

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To

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