

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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AUG 26 2013

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
HONORABLE D GARRISON HILL

S.C. Supreme Court

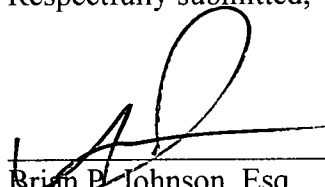
Case No.: 2011CP2305179

THOMAS GINISKI PIERCE,)
)
 PETITIONER,)
)
 vs.)
)
 STATE OF SOUTH CAROLINA)
)
 RESPONDENT.)
)

NOTICE OF APPEAL

The Petitioner, Thomas Giniski Pierce, hereby appeals the Honorable D. Garrison Hill's August 1, 2013, order denying post-conviction relief to the Petitioner. A copy of the order on appeal is attached to this notice.

Respectfully submitted,



Brian P. Johnson, Esq.
522 North Church Street
Greenville, SC 29601
Attorney for Petitioner

Date: August 21, 2013
Other counsel of record: Karen Ratigan
P.O. Box 11549/Columbia, SC 29211

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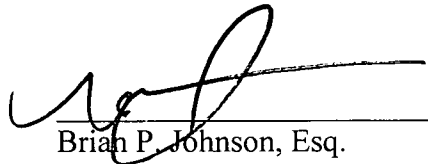
Case No.: 2011CP2305179

THOMAS GINISKI PIERCE,)
)
 PETITIONER,)
)
 vs.)
)
 STATE OF SOUTH CAROLINA)
)
 RESPONDENT.)
)

PROOF OF SERVICE

I, Brian P. Johnson, Esq., certify that I have today served the within Notice of Appeal upon the Respondent by depositing a copy in the United States Mail, postage prepaid, addressed to the attorney of record, Karen Ratigan, at P.O. Box 11549 Columbia, SC 29211.

Respectfully submitted,



Brian P. Johnson, Esq.
522 North Church Street
Greenville, SC 29601
Attorney for Petitioner

Date: August 21, 2013

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

JUDGMENT IN A CIVIL CASE

CASE NO: 2011CP2305179

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CLERK OF COURT
GREENVILLE CO S.C.

Thomas G Pierce vs. South Carolina State Of

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**
SCRC (Vol. Nonsuit); Rule 43(k), SCRC (Settled); Rule 12(b), SCRC; Rule 41(a),
 Other: _____
- ACTION STRICKEN (CHECK REASON):**
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other: _____
 Rule 40(j) SCRC; Bankruptcy:
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded;
 Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this 7th day of August, 2013.

Court Reporter:

PRESIDING JUDGE - D garrison Hill

This judgment was entered on the 7th day of August, 2013, and a copy mailed first class this 7th day of August, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Brian P. Johnson 522 North Church Street
Greenville, SC.29601

Karen Christine Ratigan PO Box 11549 Columbia,
SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Thomas Giniski Pierce,)
 S.C.D.C. No. 201290,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2011-CP-23-5179

ORDER OF DISMISSAL

FILED CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL S. WICKENS
 2013 AUG -7 PM 3:40

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed August 3, 2011. The Respondent made its return on December 30, 2011. An evidentiary hearing into the matter was convened on June 19, 2013 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Brian P. Johnson, 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, R. Mills Ariail, Jr., Esquire. The Court had before it the guilty plea and sentencing transcripts, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, the return, and the Applicant's Exhibits 1-3.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant waived presentment to the Greenville County Grand Jury for the charge of voluntary manslaughter

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(2009-GS-23-3739A). R. Mills Ariail, Jr., Esquire represented the Applicant.

On April 27, 2009, the Applicant pled guilty to voluntary manslaughter before the Honorable Eugene C. Griffith and sentencing was deferred to a later date. On September 8, 2010, the Honorable Robin B. Stilwell sentenced the Applicant to twenty-four (24) years imprisonment. The Applicant did not appeal.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:¹

1. Ineffective assistance of counsel:
 - a. "Not petitioning the courts for my confession (statement) to be suppressed."
 - b. "Not appealing Applicant's conviction within 10 days of conviction and/or not notifying Applicant of his right to appeal his conviction."
 - c. "For not petitioning the courts for an mental health evaluation or competence hearing before trial."
 - d. "For not asking judge to reconsider sentence at the close of trial."
 - e. "For insisting-N-instructing Applicant to plead guilty."
 - f. "Not petitioning the courts to suppress any evidence that police and/or prosecution might use from confession that was not voluntary."
 - g. "For insisting-N-instructing Applicant to plead guilty to a crime where attorney knew confession (statements) was coerced, involuntary made under duress of imprisonment, counsel knew Applicant was pleading guilty unknowingly and involuntary."
 - h. "For not requesting a preliminary hearing and/or made sure that Applicant got his preliminary hearing that he himself (Applicant) had put in for- filed with Clerk of Court 10-23-08 3:58pm."
 - i. "By not objecting to Applicant pleading guilty in front of 1 judge and sentenced by another."
2. "Applicant's Due-Process of law was violated":
 - a. "Applicant's Miranda Rights was violated and that he had not

¹ This Court notes the Applicant filed a pro se document captioned "Amendment to Applicant's Application for Post-Conviction Relief to Incorporate the Following Claims for Relief" on May 31, 2012. As counsel had been appointed by that date, however, this Court cannot consider the document. See Rule 11(a), SCRCP; Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002) (holding there is no constitutional right to hybrid representation either at trial or on appeal).

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- received timely Miranda warnings, that the waiver of Rights was not explicit, and that neither the reading of his rights, nor the 15-hour police interrogation in a tiny room was video or audio recorded on Oct. 11, 2006. Also interrogated Oct. 4, 6, 2006 for same crime.”
- b. “By using confession (statements) that had been obtained by coercion, involuntary to get defendant to plead guilty.”
 - c. “By police using duress of imprisonment, coercion, sleep deprivation, withholding of food until confession violated due-Process and while Applicant was under heavy mental psychological medication.”
 - d. “For Not given Applicant his Preliminary hearing.”

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).

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).

The Applicant stated he had several meetings with plea counsel and that they reviewed the discovery materials, his version of events, his statement to police, and the impact his statement had upon the defense case. The Applicant stated plea counsel should have challenged his statement based upon: the conditions of interrogation before the statement, that he asked for an attorney, and that he was taking medication at the time. The Applicant admitted, however, that he did sign the waiver of rights. The Applicant stated he made a pro se request for a preliminary hearing and that, while plea counsel said it was unnecessary because he confessed, he did not waive that hearing. The Applicant stated plea counsel failed to investigate that an eyewitness did not identify him as the perpetrator. The Applicant stated plea counsel promised he would receive a fifteen year sentence if he pled guilty. The Applicant stated plea counsel told him how to answer the plea judge's questions during the plea colloquy. The Applicant stated plea counsel should have consulted an expert to challenge his competency to plead guilty. The Applicant stated plea counsel never mentioned the possibility of an appeal.

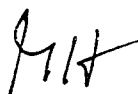
Plea counsel testified he was the third attorney appointed in this case and that he received discovery materials from both the two previous attorneys and the State. Plea counsel testified he also discussed the case with the two previous attorneys. Plea counsel testified he and the Applicant discussed the discovery materials in depth and reviewed the Applicant's version of events. Plea counsel testified they also reviewed the Applicant's statement and the circumstances surrounding it. Plea counsel testified he looked into the voluntariness of the

statement and spoke to the officers involved. Plea counsel testified he did not recall discussing whether to have a preliminary hearing. Plea counsel stated there was nothing further to investigate about the eyewitness in the case, as the Applicant admitted in his statement that someone had seen him. Plea counsel testified he never told the Applicant he would receive a fifteen year sentence if he pled guilty and that he did not make any promises about what sentence the Applicant would receive. Plea counsel testified he did not instruct the Applicant about how to answer the plea judge's questions. Plea counsel testified the Applicant informed him about his prior mental health history and treatment but that one of the Applicant's previous attorneys had him undergo a competency evaluation. Plea counsel testified he did not have any concerns about the Applicant's competency. Plea counsel testified they did not discuss an appeal and noted he did not believe there were any appealable issues from the guilty plea hearing.

Regarding the Applicant's 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 the facts recited by the solicitor were true. (Plea transcript, p.14). The Applicant also told the plea judge that he understood the trial rights he was waiving in pleading guilty and was satisfied with plea counsel's representation. (Plea transcript, pp.6-8; p.16).

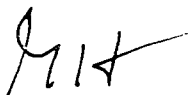
This Court finds the Applicant failed to meet his burden of proving plea counsel should have challenged the voluntariness of his statement. Plea counsel testified he reviewed the circumstances surrounding the interrogation and statement, explored the issue of voluntariness,



and spoke to the officers involved. This Court finds plea counsel's testimony is credible. This Court finds the Applicant has failed to present evidence to support his allegation that a further investigation would have led to the suppression of the statement. See, e.g., Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). Regardless, even without the Applicant's statement, the State had strong evidence of guilt. Plea counsel noted the co-defendants and an eyewitness gave statements in this case and would have all testified if the case had gone to trial. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

This Court finds the Applicant failed to meet his burden of proving he should have had a preliminary hearing in his case. This Court notes a defendant has no constitutional right to a preliminary hearing. State v. Keenan, 278 S.C. 361, 365, 296 S.E.2d 676, 678 (1982). This Court finds the Applicant has failed to demonstrate how a preliminary hearing would have changed the outcome of his case – especially in light of the fact that he had given a statement.

This Court finds the Applicant failed to meet his burden of proving plea counsel should have investigated that an eyewitness described someone he did not resemble. Plea counsel testified this was of no consequence because the Applicant acknowledged in his statement that someone saw him. Plea counsel testified there was nothing to investigate and the eyewitness's testimony would have been a jury question as to her credibility. This Court agrees and notes the



Applicant has failed to present any evidence of what he believes plea counsel could have found if he had investigated this issue further. See Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (finding the 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); Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing he would have had a defense with additional time to prepare for trial). Similarly, while the Applicant argued plea counsel should have presented evidence of his mental health history, he has failed to present any documents or expert testimony on the matter. As such, this argument is entirely speculative in nature. See, e.g., 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 promised he would receive a fifteen year sentence if he pled guilty. Plea counsel testified he never made a promise or guarantee about the sentence the Applicant would receive. This Court finds plea counsel's testimony is credible. Further, the record refutes the Applicant's allegation. See Stalk v. State, 375 S.C. 289, 300, 652 S.E.2d 402, 407 (Ct. App. 2007). During the sentencing hearing, the assistant solicitor stated there was no recommendation as to sentence and the plea judge changed the sentencing sheet to reflect this. Neither plea counsel nor the Applicant objected. (Sentencing transcript, p.6).

This Court finds the Applicant failed to meet his burden of proving he is entitled to a review of any direct appeal issues. Plea counsel has a constitutionally imposed duty to consult with the defendant about an appeal only when there is reason to think either: (1) that a rational

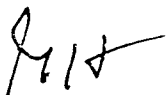
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defendant would want to appeal or (2) that this defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S. Ct. 1029, 1036 (2000). In order to make this determination, "courts must take into account all the information counsel knew or should have known." Id. (citing Strickland, 466 U.S. at 690, 104 S. Ct. at 2066). Although not determinative, a highly relevant factor will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because a plea may indicate the defendant seeks an end to judicial proceedings. Id. As this Court finds there is nothing in the record to indicate the Applicant reasonably demonstrated to plea counsel that he was interested in appealing, the allegation is denied.

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 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. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. 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 testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.



CONCLUSION

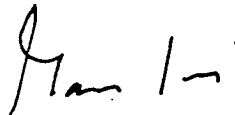
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner and the Applicant was not prejudiced by counsel's representation. 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 (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 1st day of August, 2013.



D. Garrison Hill
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina.

LAW OFFICE OF BRIAN P. JOHNSON, LLC

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brian@brianpjohnsonlaw.com

July 21, 2013

VIA U.S. POSTAL ONLY

Supreme Court of South Carolina
P. O. Box 11330
Columbia, SC 29211

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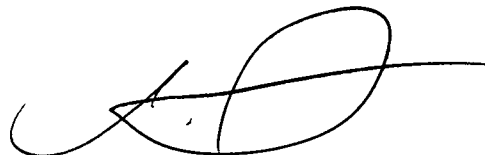
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Case No.: 2011-CP-23-05179

S.C. Supreme Court

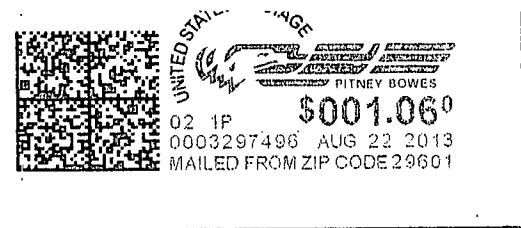
Please find the Applicant's Notice of Appeal and Proof of Service in the above reference matter. By copy of this letter, I am also forwarding copies of these documents to Ms. Ratigan and Mr. Pierce.

Yours truly,



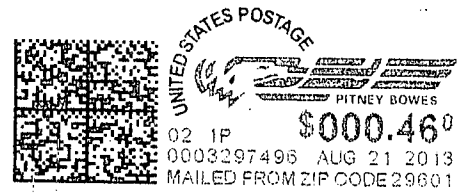
Brian P. Johnson, Esq.

BPJ/tl



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