

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2009CP4004442

Justin Harshaw, #296250

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (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):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Non-Suit); Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- 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 (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 25th day of July, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Justin Harshaw, #296250 Mark E. Schnee
ATTORNEY(S) FOR THE PLAINTIFF(S)

Megan E. Harrigan
ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

JEANETTE W. MCBRIDE
C.C. & C.S.
2009 JUL 25 PM 4:10
FILED
RICHLAND COUNTY

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Justin Harshaw, #296250,)

Case No. 2009-CP-40-4442

Applicant,)

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

RICHLAND COUNTY
FILED
2013 JUL 18 AM 10:02
FANETTE H. MCGRINDIE
C.C.P. & G.S.

PROCEDURAL HISTORY

This matter comes before the Court by way of an application for post-conviction relief filed June 24, 2009. The Respondent made its Return on August 22, 2010, requesting that all allegations beyond that whether Applicant was entitled to a White v. State¹ review of direct appeal issues be dismissed as barred by the one year statute of limitations as set forth in S.C. Code Ann. § 17-27-45. On September 2, 2010, the Honorable Allison R. Lee signed a Conditional Order of Dismissal as to all allegations beyond whether Applicant was entitled to a White review of direct appeal issues. On November 17, 2010, Judge Lee signed a Final Order of Dismissal, dismissing all of Applicant's allegations for post-conviction relief beyond whether he was entitled to a White appellate review and setting the matter for an evidentiary hearing solely as to whether Applicant was entitled to a White review. An evidentiary hearing into the matter was convened June 5, 2013, at the Richland County Courthouse. The Applicant was present at the hearing and was represented by Mark E. Schnee, Esquire. The Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office.

¹ 263, S.C. 110, 108 S.E.2d35 (1974).

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was indicted during the December 2001 term of the Richland County Grand Jury for Assault and Battery with Intent to Kill (2001-GS-40-9361) and Attempted Armed Robbery (2001-GS-40-9360). Applicant was represented by Jack B. Swerling, Esquire. On September 4, 2003, the Applicant appeared before the Honorable G. Thomas Cooper, Jr., and pled guilty as indicted. Judge Cooper sentenced Applicant to twenty years imprisonment on each charge, with the sentences to be served concurrently. Applicant did not appeal his plea and sentence.

SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. Respondent presented testimony from plea counsel, Jack B. Swerling, Esquire (herein "Counsel"). This Court also had before it Applicant's guilty plea transcript, the records of the Richland County Clerk of Court, and Applicant's records from the South Carolina Department of Corrections.

Applicant testified first on his own behalf. Applicant testified that he retained Counsel to represent him on these charges. Applicant testified that he asked Counsel what type of sentence he should expect to receive if he pled guilty, and he testified that Counsel advised him that he would likely receive a sentence of fifteen to twenty years imprisonment. Applicant testified that he received a sentence of twenty years imprisonment. He testified that he asked Counsel to file an appeal "on the same day or the day after" his guilty plea in either he county jail or holding cell outside of the courtroom. He testified that Counsel told him that he had no grounds on which to file an appeal from his guilty plea and that it was not in his best interest to file an appeal. Applicant testified that he never thought that Counsel had filed an appeal on his behalf and he

knew immediately after his guilty plea that he did not have a pending appeal. Applicant testified that he knew he had ten days to file an appeal because both Counsel and the plea court advised him of this. However, Applicant testified that his retainer agreement with Counsel included a provision for an appeal. Applicant acknowledged that he waited nearly six years after his guilty plea to file an application for post-conviction relief making this allegation against Counsel.

Following Applicant's testimony, Counsel testified that he has been practicing law for more than forty years and his practice is almost solely comprised of criminal defense work. He testified that he was retained by Applicant and Applicant's family on October 25, 2001 and that he met with Applicant on numerous occasions. He testified that he filed all appropriate discovery motions, reviewed the materials with Applicant, and full explained the charges Applicant was facing and the possible sentences. He testified that he believed a guilty plea was in Applicant's best interest and that Applicant informed him he wanted to plead guilty. Counsel testified that he was aware of Applicant's mental health concerns after speaking with Applicant and his family, and in result, had Applicant evaluated by a psychiatrist, Dr. Harold Morgan.

Counsel testified that his standard practice is advised all clients of their appellate rights and that an appeal must be filed within ten days of a guilty plea. Counsel testified that he plea court also advised Applicant of his right to appeal. Counsel testified that following Applicant's guilty plea, he discussed an appeal with Applicant. He testified that he informed Applicant that there was no arguable basis to file an appeal, as Applicant was sentenced within the statutory range and he was not aware of any constitutional issues on which an appeal could be sustained. Counsel testified that he informed Applicant that an appeal was not in his best interest. Counsel testified that Applicant understood this conversation and was aware that Counsel would not be filing an appeal on his behalf. Counsel provided a copy of his retainer agreement with

Applicant, which was introduced as Respondent's Exhibit 1. Counsel testified that the retainer agreement explicitly states that Counsel has not been retained for an appeal. Counsel testified that he still believes that Applicant does not have any grounds for an appeal of his 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 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. 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), SCRCP; 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 (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). The 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 (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 file a direct appeal

Applicant alleges that he is entitled to a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). "[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S.Ct. 1029 (2000). "Even in cases when the defendant pleads guilty, the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea

expressly reserved or waived some or all appeal rights.” Id. Absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008). “One extraordinary circumstance which would require counsel to advise a defendant of the right to appeal from a guilty plea would arise when the defendant inquires about an appeal.” Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995).

After careful review based on the standard discussed above, this Court finds that Applicant has failed to carry his burden in this action. Uncontroverted testimony reveals that Counsel reviewed Applicant’s right to appeal with him prior to his guilty plea and that the plea court also reviewed these rights during the guilty plea. Additionally, Counsel testified that he did not believe that Applicant had a meritorious ground on which an appeal could be sought and advised Applicant that it was not in his best interest to file an appeal. Counsel testified that Applicant understood he was not going to file an appeal on his behalf, and Applicant testified that he knew Counsel had not file an appeal. 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.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that 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.

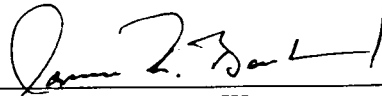
This Court notes that that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate

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), SCRPC, 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 15th day of July, 2013.



JAMES R. BARBER, III
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina.