

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF YORK) FOR THE 16TH JUDICIAL CIRCUIT
) Case No.: 2008-CP-46-0373

Donnie Mack Hagins, #315916,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

ORDER OF DISMISSAL

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 CLERK OF COURT
 YORK COUNTY, SC

This matter comes before the Court by way of an Application for Post-Conviction Relief filed January 30, 2008. The Respondent made its Return on or about May 22, 2008. An evidentiary hearing into the matter was convened on February 4, 2009, at the Moss Justice Center in York, SC. Matthew R. Niemiec, Esquire, represented the Applicant. Ashley A. McMahan, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Also testifying was Melissa A. Inzerillo, Esquire. This Court also had before it a copy of the transcript of the Applicant's guilty plea, the records of the York County Clerk of Court, and the Applicant's records from the South Carolina Department of Corrections.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Applicant was indicted at the March 2007, term of the York County Grand Jury for Distribution of Crack Within Proximity of a Public Park or Playground (2007-GS-46-0464) and Distribution of

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Crack Cocaine (2007-GS-46-0465). Melissa A. Inzerillo, Esquire, represented the Applicant. On April 2, 2007, Applicant pled guilty as indicted. The Honorable John C. Hayes, III, concurrently sentenced him to ten (10) years for Distribution of Crack Within Proximity of a Public Park or Playground and fifteen (15) years for Distribution of Crack Cocaine. The Applicant did not appeal his conviction or sentence.

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

1. Ineffective assistance of counsel; and
2. Subject Matter Jurisdiction.

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 (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), 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. 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).

Failure to Bring Up Tampering of Evidence and Mistaken ID

Applicant alleges that trial counsel was ineffective because she did not bring to the Court's attention at the guilty plea issues relating to tampering of evidence and mistaken identity.

Trial counsel testified that she discussed and prepped for the defense of mistaken identity and that it was the primary defense. Trial counsel also noted that she discussed with the Applicant the chain of evidence. At one point the name Donnie McLean was scratched out on the evidence bag and that Applicant's name was written in. Trial counsel

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stated that the Applicant's family wanted him to plead guilty and that she did not force him to plead guilty. Trial counsel noted that the Applicant was adamant about pleading guilty after hearing from his family.

Trial counsel was not ineffective. Trial counsel noted that mistaken identity was the main defense along with the issues relating to the name being scratched out on the bag of evidence. Applicant is suffering from nothing more than pleader's remorse. Further, the Applicant waived his right to a jury trial. This Court finds that the Applicant knowingly and voluntarily pled guilty, therefore the plea waives any non-jurisdictional defects and defenses, including challenges to the sufficiency of the evidence. See Whetsell v. State, 276 S.C. 295, 277 S.E.2d 891 (1981); Rivers v. Strickland, 264 S.C. 121, 213 S.E.2d 97 (1975). Based on the foregoing, this allegation is denied.

Failure to Object to Enhancement of Sentence

Applicant claims that trial counsel was ineffective for not objecting to the enhancement of his sentence. Applicant had two prior drug charges: one from Magistrate's Court and one from General Sessions court. Trial Counsel testified that she researched issues related to enhancement of the charges that the charges were enhanceable and that she discussed this with the Applicant. Trial counsel also told the Applicant what the possible sentences were that he was facing. Applicant failed to present any evidence that the Magistrate level prior conviction was not a conviction that could be used to enhance the convictions challenged herein. This Court finds that the Applicant has failed to show that the convictions were improperly enhanced. Therefore this allegation is denied.

Failure to Discuss an Appeal

The Applicant alleges that Counsel was ineffective for failing to consult with him

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about an appeal. 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 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, 120 S.Ct. 1029 (2000). Absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal, for example, because there are nonfrivolous grounds for appeal, or when the defendant reasonably demonstrated an interest in appealing, 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, 670 S.E.2d 373, (2008). There is nothing in the record to indicate that the Applicant reasonably demonstrated to Counsel that he was interested in appealing, that there were extraordinary circumstances, or nonfrivolous grounds for appeal. Therefore the allegation is totally without merit and is dismissed.

Summary

This Court finds in regards to the allegations of ineffective assistance of counsel and involuntary guilty plea, the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court further finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in their representation, and that trial counsel's conduct does not fall below the objective standard of reasonableness. Further, this Court also finds that the record in this case fully demonstrates that the Applicant understood the nature of his plea, and that his plea was made freely and voluntarily.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the

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Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial 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 trial 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.

Subject Matter Jurisdiction

The Applicant has claimed in his application that the trial court lacked subject matter jurisdiction. Subject matter jurisdiction is the power of a court to hear a particular class of cases, and it has nothing to do with the indictment document. See State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994).

An Applicant may still challenge the subject matter jurisdiction of the trial court, and such a claim is one that may be raised at any time. See Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001), *overruled in part by Gentry, supra*. However, "[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters." Gentry, supra, 610 S.E.2d at 499; See also S.C. Const. Art. V, § 7. Thus, the Applicant must present evidence that his case is of some class over which the circuit court does not have the authority to preside. The Applicant's conviction involved a criminal charge in General Sessions Court. Thus, the circuit court had subject matter jurisdiction. Therefore this allegation is denied.

CONCLUSION

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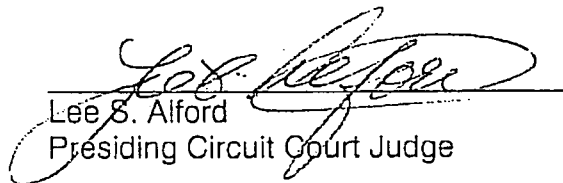
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court advises 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), SCRPC, 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 227 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!


Lee S. Alford
Presiding Circuit Court Judge

February 13, 2009

York, South Carolina

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