

Frederick Law Office

Bobby G. Frederick
Matthew S. Swilley
Trial Lawyers

PCR

P.O. Box 8219
Myrtle Beach, SC 29578
Phone: 843-444-6122
Fax: 843-444-6133
bfrederick@grandstrandlaw.com
mswilley@grandstrandlaw.com

RECEIVED

OCT 30 2013

October 28, 2013

S.C. SUPREME COURT

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

RE: Tony Moore v. State of South Carolina
Case No.: 2012-CP-13-0601

Enclosed is a Notice of Appeal with one extra copy for the above referenced case. Please file the original and return a certified copy to our office in the envelope provided.

Feel free to contact me should you have any questions or concerns.

Sincerely,



Matthew S. Swilley
Attorney at Law

cc: Karen Ratigan; Assistant Attorney General
Office of Appellate Defense

THE STATE OF SOUTH CAROLINA
SUPREME COURT

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

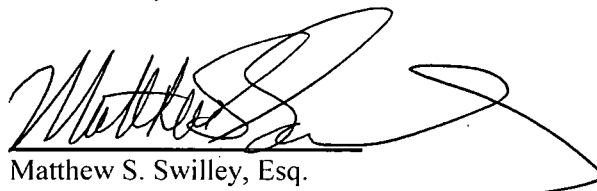
Case No. 2013-CP-13-0601

Tony MooreAppellant,
v.
The State,.....Respondent.

NOTICE OF APPEAL

Tony Moore appeals the denial of post conviction relief in this case.
The Order of Dismissal was served on Appellant on October 22, 2013.

October 25, 2013



Matthew S. Swilley, Esq.
P.O. Box 8219
Myrtle Beach, SC 29577
843-444-6122

Other Counsel of Record:
Karen Ratigan, Esquire
Assistant Attorney General
PO Box 11549
Columbia, SC 29211

RECEIVED

OCT 30 2013

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
SUPREME COURT

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge


Case No. 2013-CP-13-0601

Tony MooreAppellant,
v.
The State,.....Respondent.

CERTIFICATE OF SERVICE

I certify that I have served the Notice of Appeal on Karen Ratigan and the Attorney General's Office by depositing a copy of it in the United States Mail, postage prepaid, on October 22, 2013, addressed to:

Attorney General's Office
Karen Ratigan
P.O. Box 11549
Columbia, SC 29211
Attorney for the Respondent



Carlin Sullivan
Legal Assistant

October 31, 2013

Tony Moore,)
 S.C.D.C. No. 348089,)
 Applicant,)
 v.)
 State of South Carolina,)
 Respondent.)

ORDER OF DISMISSAL

2013 JUN 26 AM 9 50
 FAXED
 CLERK OF COURT
 CHESTERFIELD COUNTY

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed September 31, 2012.¹ The Respondent made its return on January 18, 2012. An evidentiary hearing into the matter was convened on July 17, 2013 at the Darlington County Courthouse. The Applicant was present at the hearing and represented by Matthew S. Swilley, 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, Daniel T. Jordan, Esquire. The Court had before it the transcript of the guilty plea hearing, the Chesterfield County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application (and subsequent supplement), and the return.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Chesterfield County Clerk of Court. The Applicant was indicted

¹ This Court acknowledges this date is in error and the filed date was most likely October 1, 2012.

GS-13-0532, -0533, -0534, -0535) and first-degree burglary (2011-GS-13-0563). He was represented by Daniel T. Jordan, Esquire.

On October 5, 2011, the Applicant pled guilty to four counts of second-degree burglary and four counts of grand larceny (\$1000-\$5000). He was sentenced by the Honorable Paul M. Burch to concurrent terms of ten years for each count of second degree burglary and five years for three counts of grand larceny. On the fourth count of grand larceny (2011-GS-13-0533), Judge Burch levied a consecutive sentence of three years. The Applicant did not appeal.

ALLEGATIONS

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

1. Ineffective assistance of counsel:
 - a. “[F]ailed to act diligently as my advocate to adequately protect my interests.”
 - b. “[F]ailed to make known that solicitor is related to victims. Conflict of interest.”

In a “Supplement to Application for Post-Conviction Relief and Incorporated Memorandum of Law” dated January 31, 2013, the Applicant alleged the following:

1. Ineffective assistance of counsel:
 - a. Failure to challenge the solicitor’s office prosecuting the case due to a conflict of interest.

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

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 four meetings with plea counsel and that, while they discussed his version of events, they never reviewed the State’s evidence. The Applicant stated he and plea counsel spoke about the possible sentences he could receive, his co-defendant’s participation, and the involvement of the assistant solicitor (that he was related to the victims). The Applicant stated plea counsel told him at their first meeting that, as he did not have a prior record, he could receive a sentence of 90 days and probation. The Applicant stated there was nothing he could do about the relationship of the assistant solicitor to the victims. The Applicant

was at the courthouse. The Applicant stated plea counsel told him to "take whatever he got" from the judge that day. The Applicant stated plea counsel did not tell him that he would be giving a proffer at the plea hearing.

Plea counsel confirmed he had four meetings with the Applicant before the plea hearing. Plea counsel testified he filed discovery motions and that he received those materials pursuant to the solicitor's open file policy. Plea counsel testified he and the deputy solicitor reviewed the State's evidence with the Applicant at the jail. Plea counsel testified he and the Applicant also discussed: the State's evidence, the Applicant's version of events, the co-defendant's involvement, the right to a jury trial, the elements of the charges, and the possible sentences. Plea counsel testified he told the Applicant at their second meeting that a solicitor's office employee was related to the victims. Plea counsel testified he did not believe it was necessary to move to recuse the solicitor's office because an assistant solicitor was related to the victims. Plea counsel testified he spoke to the deputy solicitor, who assured him the assistant solicitor was a part-time employee and there was a Chinese wall surrounding this case. Plea counsel testified the Applicant knew he was in court that day to plead guilty. Plea counsel testified there was an arrangement with the State to reduce the Applicant's sentence after he testified against the co-defendant – and that the co-defendant's trial was scheduled for September 2013. Plea counsel testified the Applicant knew the first-degree burglary charge had been reduced to second-degree burglary, that he was pleading guilty without a recommendation, and that the State would ask for consecutive time. Plea counsel testified he never told the Applicant he could receive a sentence of 90 days and probation. Plea counsel testified the Applicant knew he would give a proffer at

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.

This Court finds the Applicant failed to meet his burden of proving plea counsel did not properly discuss his case. Plea counsel testified he had several meetings with the Applicant and that they reviewed the discovery materials, his version of events, and the involvement of his co-defendant. Plea counsel testified the deputy solicitor was involved at one of these meetings. This Court finds plea counsel's testimony is credible. This Court finds plea counsel filed discovery motions and reviewed the State's evidence with the Applicant. This Court finds the Applicant has failed to articulate either what evidence he was not allowed to view before the plea hearing or what more plea counsel should have done to review his case. 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).

This Court finds the Applicant failed to meet his burden of proving plea counsel should have moved to recuse the solicitor's office because an assistant solicitor was related to the victims. Plea counsel testified he spoke to the deputy solicitor about this issue and was satisfied he did not need to seek recusal because: (1) the assistant solicitor was a part-time employee who only worked one day a week for the solicitor's office and (2) there was a Chinese wall in place regarding this case. This Court finds plea counsel's testimony is credible and his corroborated

up around him with regards to the facts of this case and anything – I don't even think he's reviewed the file. I had the file with me in my possession the whole time." The deputy solicitor then stated "as it relates to the prosecutorial decisions that have been made and handling of this file that has strictly been with me." (Plea transcript, p.4). The Court further notes the assistant solicitor – who spoke on the victims' behalf at the plea hearing – informed the plea judge at the start of the hearing that he "never reviewed the incident report, the statements if any. I don't know what's in this file as far as looking at it from a prosecutorial standpoint." (Plea transcript, p.5). This Court finds the Applicant has failed to present any compelling evidence or testimony either that there was a conflict of interest or that any alleged conflict prejudiced his case. That a part-time solicitor's office employee spoke on the victims' behalf at the guilty plea hearing did not necessitate the recusal of the solicitor's office in this case. Cf. State v. Inman, 395 S.C. 539, 558, 720 S.E.2d 31, 41 (2011) ("There is no inherent right to disqualification when a member of the state attorney's office is called as a witness in a case prosecuted by a state attorney in the same office, unless actual prejudice can be shown.") (citation omitted).

This Court finds the Applicant failed to meet his burden of proving plea counsel did not properly advise him about the guilty plea hearing. Plea counsel testified the Applicant knew the first-degree burglary charge was reduced to second-degree burglary. Plea counsel testified the Applicant knew he was pleading guilty without a sentence recommendation and that the State would ask for part of the sentence to be consecutive. Plea counsel testified the Applicant knew he would be pleading guilty that day and that he would give a proffer. This Court finds plea counsel's testimony is credible. This Court finds notes the Applicant signed the sentencing

allegations. See Stalk v. State, 375 S.C. 289, 300, 652 S.E.2d 402, 407 (Ct. App. 2007); see also Rayford v. State, 314 S.C. 46, 48-49, 443 S.E.2d 805, 806 (1994) (where transcript of guilty plea proceeding refuted applicant's claim that he did not understand the terms of a plea bargain, grant of PCR was inappropriate notwithstanding applicant's claim lawyer misadvised him). The Applicant did not object when the State announced at the beginning of the plea hearing that they would ask for consecutive sentencing or when the parties announced that he would proffer testimony. (Plea transcript, p.4; pp.16-19). The Applicant has failed to meet his burden of proving he was misadvised about his guilty plea hearing.²

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

² This Court also does not find reliable the Applicant's assertion that plea counsel initially advised him that he could receive a sentence of 90 days and probation. Plea counsel testified he did not make any such statement. This Court finds plea counsel's testimony is credible – especially as the Applicant was charged with first-degree burglary, which carries a minimum 15-year sentence. See S.C. Code Ann. § 16-11-311(B) (Supp. 2003).

Accordingly, this Court finds the Applicant has abandoned any such allegations.

CONCLUSION

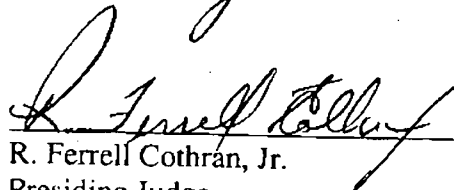
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner and the Applicant was not prejudiced by counsel's representation.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

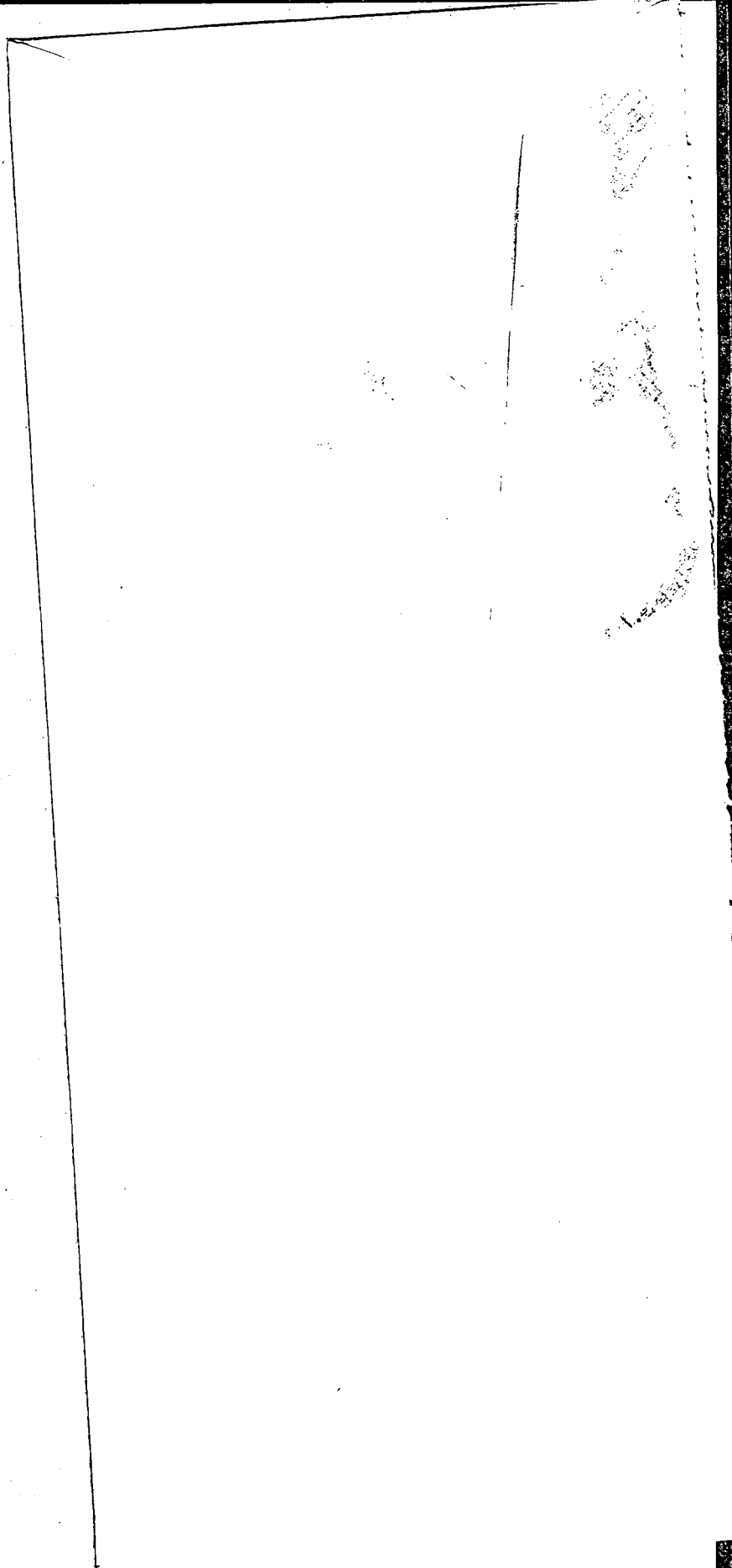
IT IS THEREFORE ORDERED:

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 19 day of Aug, 2013.


R. Ferrell Cothran, Jr.
Presiding Judge

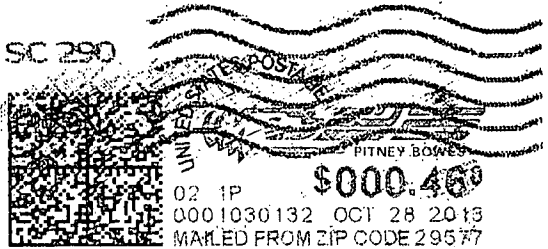
, South Carolina.



Frederick Law Office
P.O. Box 8219
Myrtle Beach, SC 29578

COLUMBIA SC 290

28 OCT 2013



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

29211133030

