

PCR



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October 30, 2013

The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

Re: Kendrix Corbitt # 348641 vs. The State of South Carolina
Case No.: 2012-CP-26-3860

Dear Mr. Shearouse:

Enclosed please find the original Notice on Appeal on the above referenced matter. Enclosed also please find a copy of the letter we sent to the court reporter requesting the transcript of the hearing on August 26, 2013.

If you have any questions or need further information, please advise. With kind regards, I am

Sincerely yours,

William Isaac Diggs

WID/jnb

CC: Joshua L. Thomas, Esquire

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SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM Horry COUNTY
Court of Common Pleas
J. Cordell Maddox, Jr., Circuit Court Judge

Case No. 2012-CP-26-3860

Kendrix Corbitt # 348641,

Appellant.

v.

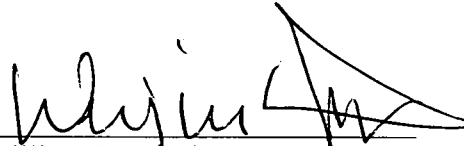
The State of South Carolina,

Respondent.

NOTICE OF APPEAL

Kendrix Corbitt appeals the Order Denying and Dismissing the Post-Conviction Relief Application with Prejudice that was entered on September 23, 2013, filed with the Court on October 1, 2013, and written notice of which was received by the undersigned counsel for the Appellant on October 15, 2013.

This 31 day of October, 2013



William Isaac Diggs
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843-626-4243

ATTORNEY FOR THE APPELLANT

Other Counsel of Record:
Joshua L. Thomas, Esquire
Office of the Attorney General
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ATTORNEY FOR RESPONDENT

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S.C. SUPREME COURT

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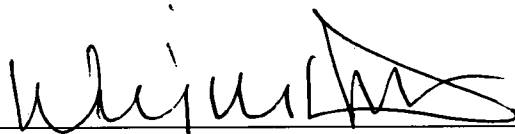
The State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

This is to certify that I have this 31 day of October, 2013, deposited one copy of the Notice on Appeal in the U.S. Postal Service with proper postage prepaid and addressed to opposing counsel at the following address:

Joshua L. Thomas, Esquire
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211-1549



William Isaac Diggs

Myrtle Beach, South Carolina

negotiated plea to voluntary manslaughter. The Honorable Thomas W. Cooper, Jr., sentenced Applicant to confinement for a period of fifteen (15) years. Applicant did not appeal his plea or sentence.

II. ALLEGATIONS

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

1. "Applicant received the ineffective assistance of counsel at his guilty plea proceeding..."
 - a. "[T]rial counsel never discussed [evidence of a knife cut on Applicant's arm] with the applicant even though the evidence forms the basis for a plea of self defense ..."
 - b. "Trial counsel never discussed with the applicant the possibility that the applicant was criminally negligent in the firing of his weapon and was therefore guilty of only involuntary manslaughter."

2. Newly and/or after discovered evidence

~~At the PCR hearing, the Applicant proceeded on only the allegations of ineffective~~
assistance of plea counsel for failure to investigate the theory of self defense and for failure to advise of possible defenses or lesser included offenses.

III. SUMMARY OF TESTIMONY

Applicant testified the underlying crime occurred on December 31, 2010, when he was eighteen years of age. On the night in question, Applicant went to a local basketball tournament with some friends. Applicant testified he arrived at the tournament at 9:30 PM and left around 11:00 PM. While there, a fight broke out among various individuals in attendance. Applicant

testified his cousin got into a fight with the victim in this case. The group then went to a nearby park, where the fight resumed. Applicant testified he tried to break up the fight when the victim pulled a knife on him. Applicant testified the victim lunged at him with the knife and cut his arm. Applicant then testified that, in response, he fired a gun into the ground two times while running away. Applicant also testified the crowd scattered and he heard other shots fired. Applicant states he used a .357 caliber handgun the night of the shooting. He alleged he was not aiming for the victim and did not realize he shot someone until the police questioned him.

Applicant further testified he only recalled meeting with plea counsel two or three times. He could not remember if they discussed any possible defenses to the charge. He stated plea counsel did not discuss the knife wound Applicant alleges he sustained just prior to discharging his weapon. He stated they never discussed self-defense or the lesser included charge of involuntary manslaughter. Applicant testified plea counsel never discussed any possible outcomes to trial other than murder and voluntary manslaughter. Applicant further testified that had he known of the availability of self-defense or involuntary manslaughter, such knowledge would have affected his decision to plea. Applicant also testified he did not recall discussing with plea counsel the fact the victim was shot with a nine-millimeter caliber handgun. However, Applicant testified he did not give plea counsel any potential leads to investigate. He further testified that he did not recall reviewing discovery with plea counsel or discussing any possible defenses to the charge. They did discuss the State's plea offer, and plea counsel informed him of the benefits of accepting the plea versus the risks of going to trial. Applicant testified it was his decision to ultimately plead guilty.

On cross-examination, Applicant testified he did not agree with the State's version of events as recited at his plea hearing. Applicant retracted this statement after reviewing the plea transcript. Applicant further alleged he did not remember telling the plea judge he was pleading freely and voluntarily. Applicant was able to recall this statement after reviewing the plea transcript. Applicant testified the reason he could not remember the plea colloquy was because he was drunk the morning of his plea hearing. However, Applicant did recall and admit to telling the plea judge that he was not under the influence of any drugs or alcohol.

Plea counsel testified he met with Applicant five or six times after being retained as counsel, with one meeting held at Applicant's home. Plea counsel testified Applicant initially said he did not fire a weapon during the fight. However, Applicant's story changed after plea counsel reviewed with him the State's responses to plea counsel's Rule 5/Brady motion. The State provided plea counsel with DVDs of interviews police conducted with Applicant. In the first interview, Applicant alleged the victim had a weapon. In the second interview, Applicant stated the victim had a small knife and threw it at Applicant. In a third interview, Applicant refers to getting rid of the alleged murder weapon. One of the interviews also included Applicant stating that he was not threatened by the knife. Plea counsel testified that Applicant admitted to firing his weapon after reviewing the discovery materials with plea counsel. Plea counsel also testified the State's discovery response included witness statements and ballistics reports. Plea counsel indicated the ballistics reports shows two shots fired into the ground and then a trail of bullets in an arc where the victim would have been running when shot. Plea counsel also testified the discovery indicated Applicant was suspected of having robbed a high

school student of a nine-millimeter handgun at some time just prior to the shooting. Plea counsel believed he would have been unsuccessful in having the evidence of Applicant's possession of a nine-millimeter handgun excluded at trial. Furthermore, plea counsel did not recall seeing anything in the discovery materials regarding Applicant's alleged knife wound. However, he testified he did discuss the wound with Applicant and felt that it was consistent with the allegation the victim attacked Applicant.

Plea counsel testified Applicant at first indicated he wanted to go to trial. Plea counsel explained to Applicant that he thought the possibility of being convicted of murder was low. However, he told Applicant that a guilty verdict on voluntary manslaughter was very likely. Plea counsel testified he discussed self-defense with Applicant, but that the trial strategy would have been to deny Applicant was the shooter and place blame on an unknown third party.

Plea counsel testified he engaged in negotiations with the State that resulted in an offer of fifteen years for manslaughter. He communicated this offer to Applicant, who made the ultimate decision to accept the offer.

Plea counsel again met with Applicant the morning of the plea. Plea counsel testified he did not detect alcohol on Applicant at that time. He further testified that Applicant did not seem impaired or under the influence. Plea counsel stated he would have not allowed the plea to go forward had he thought Applicant was impaired or not able to proceed.

On cross-examination, plea counsel testified he found Applicant's story about the knife unbelievable. He further testified Applicant eventually admitted to firing his weapon into the group of fleeing people in the park. In light of this admission and the eyewitness testimony, plea

counsel chose not to retain an expert to review the ballistic evidence. Plea counsel also testified Applicant admitted he fled town after having an acquaintance dispose of the handgun. Applicant never admitted to possessing the nine-millimeter handgun used in the killing, but plea counsel stated that Applicant would have to take the stand to refute the State's evidence that he obtained a nine-millimeter handgun in a robbery. Plea counsel testified he told Applicant self-defense was likely not a viable theory, but he would have asked for a self-defense charge at trial. He further testified he would not have asked for an involuntary manslaughter charge because Applicant admitted to shooting into the fleeing crowd.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The 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):

A. Ineffective Assistance of Plea Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel 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." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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." Id. 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, 59 (1985). Below are the Court's findings in regards to each of Applicant's allegations of ineffective assistance of plea counsel.

The Court finds Applicant's allegation he was denied effective assistance of counsel because of plea counsel's failure to investigate is without merit. Failure to conduct an independent investigation is not *per se* ineffective assistance of counsel, especially where an investigation would not have uncovered any helpful information. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998). Here, Applicant has failed to demonstrate that plea counsel could have further investigated the allegation that the victim had a knife prior to the shooting. Specifically, this Court finds that Counsel's testimony is very credible and Applicant's testimony is not credible. Applicant and plea counsel discussed the cut on Applicant's arm. However, Applicant admitted to not providing plea counsel with any leads to investigate in regards to the allegation that the victim attacked Applicant. Furthermore, plea counsel testified that Applicant admitted in a police interview that he was not threatened by the knife. In plea counsel's opinion, Applicant's story about the victim's use of the knife was not a believable story. Thus, plea counsel correctly believed the cut applicant allegedly suffered did not support a theory of self-defense. Furthermore, Applicant provided no testimony as to what further investigation would have uncovered in regards to his self-defense claim. Jackson v. State, 329 S.C. 345, 349, 495 S.E.2d 768, 770 (1998) (citing Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995)). Therefore, the court finds that plea counsel has articulated a valid reason for not further pursuing the allegation that victim attacked Applicant with a knife. Thus, plea counsel was not deficient. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be

deemed ineffective assistance of counsel.” (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992))).

Additionally, the Court finds Applicant's allegation of ineffective assistance of counsel because of plea counsel's alleged failure to advise of possible defenses and lesser-included offenses is likewise without merit. Counsel testified he discussed self-defense with Applicant. The Court finds plea counsel's testimony on this point to be credible, and Applicant's to be not credible. Plea counsel further testified that he had no reason to discuss involuntary manslaughter because Applicant admitted to firing his weapon into the fleeing crowd. Therefore, plea counsel was under no obligation to discuss involuntary manslaughter as a lesser included defense. See Arnette v. State, 306 S.C. 556, 557, 413 S.E.2d 803, 804 (1992) (counsel not ineffective for failing to advise of potential defense where no evidence exists to support the defense). Similarly, plea counsel did not discuss involuntary manslaughter because he would not have been able to ask for it at trial. Therefore, plea counsel articulated a valid reason for not advising Applicant of the possibility of involuntary manslaughter. Stokes, 308 S.C. at 548, 419 S.E.2d at 779. Thus, plea counsel was not deficient.

Furthermore, plea counsel provided competent representation in light of the overwhelming evidence against Applicant. Several witnesses gave statements implicating Applicant as having fired shots into the crowd in which the victim was running. Applicant also admits to firing his weapon in a taped interview with the police. The State had evidence Applicant possessed a nine-millimeter handgun at the time of the shooting. Applicant also fled immediately after the shooting. In light of this evidence, plea counsel was correct when he

advised Applicant that a conviction for voluntary manslaughter was highly probable. Therefore, the Court does not agree with Applicant's bare assertion that a further investigation or discussion of possible defenses and lesser included offenses would have affected his decision to plead guilty. See Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009) (applicant must show "something that would have affected counsel's advice to [the applicant] to accept the plea bargain offered or that would have caused [the applicant] to decline to accept it").

B. 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, the Court finds Applicant failed to present sufficient evidence regarding such allegations.¹ Accordingly, the Court finds Applicant has abandoned any such allegations.

V. CONCLUSION

Based on the foregoing, the 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.


¹ Although not raised as an allegation, the Court would also find that Applicant's plea was freely, willingly, knowingly, and voluntarily made. Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000) ("To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." (citing Boykin v. Alabama, 395 U.S. 238 (1969))). Plea counsel credibly testified he discussed the plea in detail with Applicant prior to the plea date. Applicant's unsubstantiated allegation that he was drunk at the time of his plea would not leave him incapable of understanding the consequences of pleading guilty to voluntary manslaughter. Cf. State v. Saxon, 261 S.C. 523, 529, 201 S.E.2d 114, 117 (1973) (holding that intoxication at the time a statement is made does not necessarily render a defendant incapable of comprehending the meaning and effect of his words). The Court finds especially credible plea counsel's testimony that he would not have allowed the plea to go forward had he suspected Applicant was intoxicated.

The Court notes that Applicant 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 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 THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 23 day of September, 2013.


THE HONORABLE J. CORDELL MADDOX, JR.
Presiding Judge
Fifteenth Judicial Circuit

Anderson, South Carolina

STATE OF SOUTH CAROLINA)
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COUNTY OF HORRY)
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)
)
KENDRIX CORBITT, #348641)
)
)
Applicant,)
)
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vs)
)
STATE OF SOUTH CAROLINA,)
)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS

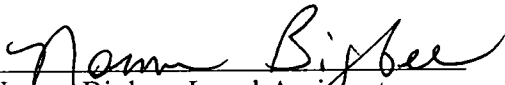
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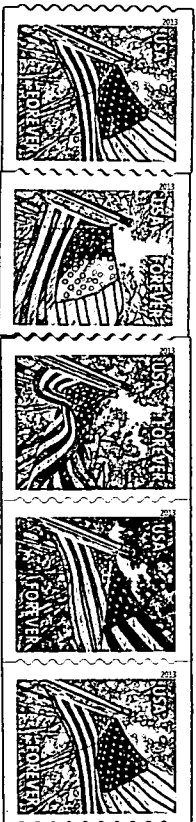
AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a filed copy of the Order of Dismissal in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

William I. Diggs, Esquire
1700 Oak St., Suite D
Myrtle Beach, SC 29577

DATED this 14TH day of October, 2013.


Norma Bigbee, Legal Assistant
For Respondent



Law Offices of
WILLIAM ISAAC DIGGS
1700 Oak Street, Suite D
Myrtle Beach, SC 29577

The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211