STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	SEVENTH JUDICIAL CIRCUIT
William H. Reid, Jr., #345611,	2011-CP-42-5638
Applicant,	
v.	ORDER OF DISMISSAL
State of South Carolina,	
Respondent.	

This matter comes before the Court by way of an Application for Post-Conviction Relief filed December 19, 2011. The Respondent made its Return on or about September 11, 2012. An evidentiary hearing into the matter was convened on June 25, 2013, at the Spartanburg County Courthouse. The Applicant was present and represented by M. Terry Haselden, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Stanley L. Myers, Esquire, and Christian G. Spradley, Esquire, testified on Respondent's behalf. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, the plea transcript, and various exhibits introduced by Applicant.

PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted the Applicant at the October 2008 term of General Sessions for possession with intent to distribute (PWID) crack cocaine (08-GS-42-6337) and trafficking in

cocaine (08-GS-42-6338). The Applicant was represented by Stanley L. Myers, Esquire, and Christian G. Spradley, Esquire. On April 11, 2011, the Applicant pled guilty as indicted. The Honorable J. Derham Cole, sentenced the Applicant to confinement, for a period of eight (8) years, for both charges, to run concurrent. The Applicant did not appeal his guilty plea or sentence.

ALLEGATIONS

In the current application, the Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel; in that,
   a. "Plea Counsel was ineffective for failure to properly prepare and investigate," and
2. Involuntary guilty plea; in that,
   a. "The drugs have not been tested and my attorney stated that the charges will be dropped if I 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 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. Specifically, the Applicant informed the court that he was proceeding on the allegations that Counsel induced Applicant to plead guilty by indicating that a motion to suppress had been filed and denied, Counsel failed to talk with witnesses who could testify that Applicant did not live at the house where the drugs were found, Applicant's wife had passed away, but it had been her home where

the drugs were found, and Counsel failed to investigate problems with the search warrant in regards to the corroboration of the confidential informant ("CI").

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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

Applicant testified that his wife, from whom he was separated at the time of arrest in June

2008, passed away in October 2008. Applicant indicated that both he and his wife had been charged with the same offenses. However, Applicant testified that he and his wife were separated at the time of arrest and Applicant had not lived in the home for more than two and a half months prior to the arrest. When asked, Applicant indicated that he "guessed" that he discussed his living situation with Counsel. Applicant testified that he informed Counsel of various witnesses who could testify that Applicant and his wife were separated at the time.

Applicant introduced a copy of the search warrant, affidavit, and return as Applicant's Exhibit #1. A copy of the unfiled motion to suppress was introduced as Applicant's Exhibit #2 and an email from the Assistant Solicitor prosecuting the case to Counsel Myers was introduced as Applicant's Exhibit #3. The email indicated that the CI would not be testifying at trial, if the case proceeded to trial. Applicant also testified that he wrote Counsel Myers, requesting that an appeal be filed on Applicant's behalf, but Myers refused.

Counsel Myers testified that he was retained by Applicant to represent him on two charges resulting from arrests in June and December 2008. Myers testified that the Applicant was incarcerated at the time he was retained on a federal probation revocation matter, so they had this case delayed until the resolution of the federal case. Myers testified that the case was called for trial the week of April 11, 2011. Applicant was picked up for a bond violation on the Thursday prior to the trial week and the Assistant Solicitor made the offer on that Friday. Myers testified that a Rule 5/Brady motion was filed, Rule 6 regarding chemical analysis of the drugs, motion for disclosure of the CI, and a memorandum in support were all filed on Applicant's behalf.

Myers testified that he had prepared a written motion to suppress, with the intent to argue the motion at trial after the jury was sworn, so that jeopardy would have attached. Myers

testified that he thought they had a strong argument, but he had no idea what the judge would do. Myers testified that he discussed that strategy with the Applicant. Myers testified that the issue of Applicant's residence was not a pretrial issue, but rather a factual issue for the jury, but witnesses were present and prepared to testify as to Applicant's residence. Myers testified that he had the Applicant's parents, sisters, and current girlfriend present, but did not have any non-family members who could testify as to Applicant's residence. However, Myers testified that incident reports appeared to indicate that mail was found to support the State's contention of Applicant living at the residence. Finally, Myers testified that in a memo to file dated May 13, 2011, he noted that he visited with the Applicant at Kirkland Correctional Institution and the Applicant never indicated that he wished to appeal the matter.

Counsel Spradley testified that he is partners with Myers. Spradley testified that the strategy of the case was discussed with the Applicant, in particular when the State indicated that they would not call the CI as a witness. Spradley testified that it did not appear to be an issue from the State's perspective and the CI was actually known to Applicant.

Involuntary Guilty Plea

In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). A defendant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52,

56, 106 S. Ct. 366, 369 (1985). A guilty plea is a solemn, judicial admission of the truth of the charges against the defendant. Statements made during the plea should be considered conclusive unless the defendant presents reasons why he should be allowed to depart from the truth of those statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

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).

Applicant testified that he was in federal prison on other charges prior to the plea, but received a letter from Mr. Myers indicating that the judge had ruled on the motion to suppress and it had been denied at a hearing. Applicant testified that he believed there were problems with the search warrant, specifically because of a lack of corroboration of the CI. Applicant testified that he first saw the motion after his plea and realized that the motion had never been filed. Applicant testified that he would have gone to trial had he known the motion had never been filed. However, he did acknowledge that he pled guilty at the time to avoid facing a possible sentence of twenty-five years.

Myers testified that he was prepared for trial and if it had been a plea all along, he would have had Applicant sign a plea acknowledgment form. Myers testified that the Applicant did not want to plead to the December 2008 charges, so the second offer from the State dismissed those charges and allowed Applicant to plead solely to the June 2008 charges. Myers testified that following Applicant's acceptance of the second offer, Myers had no concerns regarding Applicant's willingness to plea. Myers testified that in a memo to file dated May 13, 2011, he noted that he visited with the Applicant at Kirkland Correctional Institution and the Applicant

never indicated that he was unhappy with his plea. Further, he wrote a letter to Applicant following the plea explaining the sentencing.

Spradley testified that he believed the Applicant pled freely and voluntarily and knowingly waived his right to a jury trial. Spradley testified that he and Myers discussed Applicant's right to trial with him and the waiver of that right, in addition to the judge reviewing that during the plea colloquy.

This Court finds the Applicant's testimony to not be credible, in particular based upon the Applicant's answers during his plea colloquy, while this Court finds both attorneys to be credible. First, this Court finds that the Applicant has failed to meet the first prong of Strickland, in failing to establish any deficient conduct on either Counsel's behalf. In regards to the issue of the sufficiency of the search warrant and Counsel's failure to attack the warrant, this Court finds that the Applicant has failed to meet his burden of proof. Although the information on the search warrant and affidavit regarding the CI is sparse, this Court finds that it is sufficient pursuant to State v. Peters, 271 S.C. 498, 248 S.E.2d 475, (1978). Furthermore, this Court finds that the judge addressed the fact that by pleading guilty, the Applicant was waiving his right to challenge any issues with evidence in his case. (Tr. p. 9, lines 15-25).

This Court also finds that Counsel expressed a reasonable trial strategy for not filing the motion to suppress pretrial. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) *and* McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003).

This Court also finds that the Applicant failed to meet his burden of proof as to his claims that Counsel failed to properly investigate and failed to talk to witnesses regarding Applicant's

residency. To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (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). The Applicant failed to offer any information as to what could have been discovered with additional investigation. Additionally, the Applicant failed to offer the identity of anyone that could have been called as a witness that was not already identified by Counsel as present and ready to testify. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991).

As to Applicant's claim that Counsel failed to file an appeal on his behalf, this Court finds that Counsel had no duty to advise Applicant about an appeal and there was no evidence that the Applicant asked Counsel to appeal, and Counsel failed to do so. Counsel has a constitutionally-imposed duty to consult with a defendant about an appeal when there is reason to think either (1) that a rational defendant would want to 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, 120 S.Ct. 1029 (2000.)

This Court finds that the Applicant pled freely and voluntarily, based upon his discussions with Counsel and decision to avoid the possibility of additional jail time. Clearly, the Applicant has failed to establish any deficient performance by Counsel or prejudice suffered.

Therefore, as to the claims of ineffective assistance of counsel and involuntary guilty

plea, this Court finds that the Applicant has failed to meet his burden of proof and the claims are denied and dismissed.

Summary

This Court finds that Counsel are both experienced attorneys who were prepared for and effectively represented Applicant at his plea. This Court finds Counsel adequately conferred with the Applicant, was thoroughly competent in their representation, and that Counsels' conduct does not fall below the objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in their representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsels' performance. There is no evidence that the outcome of the trial would have changed based upon any of the allegations of deficiency. 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.

CONCLUSION

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 cautions 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), SCRCP, 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 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 25 day of Sept, 2013.

R. Lawton McIntosh
Presiding Judge
Seventh Judicial Circuit