STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	SIXTEENTH JUDICIAL CIRCUIT
	2000-CP-46-1414
Antonio Gordon, #259798,	
Applicant,	
v.	ORDER OF DISMISSAL
State of South Carolina,	
Respondent.	

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed June 15, 2000. The Respondent made its Return on May 2, 2001. An evidentiary hearing into the matter was convened on July 29, 2003, at the Richland County Courthouse. The parties agreed to change venue from York County to Richland County pursuant to the Consent Order Changing Venue signed by the Honorable John C. Hayes, III. Due to conflicts with the judges in the Sixteenth Circuit, this case was transferred to the Fifth Circuit in order to conduct the PCR hearing in a more timely manner. IN ADDITION A SPECIAL ORDER WAS EXECUTED GRANTING THE UNDERSIGNED JURISDICTION The Applicant was present at the hearing and was represented by Tara D. Shurling, Esquire. The Respondent was represented by Jeanette Van Ginhoven of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Testifying on behalf of the State was Daniel D'Agostino, Esquire. This Court also had before it a copy of the transcript of the proceedings against the Applicant, the records of the York County Clerk of Court and the Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to the York County Clerk of Court's orders of

commitment. On October 15, 1998, the York County Grand Jury indicted the Applicant for murder, three counts of possession of a firearm during the commission of a violent crime, two counts of attempted armed robbery, possession of a firearm by a person under twenty-one, and criminal conspiracy.

On July 16, 1999, the Applicant pled guilty as charged. On July 19, 1999, the Honorable John C. Hayes, III, sentenced the Applicant to thirty years imprisonment for murder, five years for each count of possession of a weapon during the commission of a violent crime, ten years for each count of attempted armed robbery, five years for criminal conspiracy, and five years for possession of a weapon by a person under twenty-one years of age. Daniel D'Agostino, Esquire, represented the Applicant.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals was dismissed. State v. Antonio Gordon and Monta Gordon Op. No. 2000-UP-747 (S.C. Ct. App. filed December 6, 2000).

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).

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, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

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).

INEFFECTIVE ASSISTANCE OF COUNSEL

The Applicant claims guilty plea counsel was ineffective for failing to prepare his case for trial by (1) failing to challenge the indictments for lack of subject matter jurisdiction because the indictments were not filed with the Clerk of Court within ninety (90) days after his arrest; (2) failing to challenge the murder indictment for lack of subject matter jurisdiction because the indictment did not contain the requisite elements in the body of the indictment; (3) failing to challenge the attempted armed robbery indictments for lack of subject matter jurisdiction because the indictment did not contain the requisite elements in the body of the indictments; (4) failing to challenge the indictments since an agent of the state was the only witness before the grand jury; (5) failing to make a concerted effort to get the Solicitor to remand the case to the Family Court; (6) failing to adequately pursue the Applicant's competency to stand trial; (7) failing to make a double jeopardy argument since the Applicant was charged with attempted armed robbery and possession of a weapon during the commission of a violent crime; (8) failing to advise the Applicant that if he pled guilty he would waive his right to challenge the admissibility of his statements on direct appeal; and

(9) failing to advise the Applicant he would be subject to community supervision.

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, 88 L.Ed. 2d 203 (1985).

1. Failure to Challenge Subject Matter Jurisdiction Because Indictment Not Filed withe Clerk of Court Within Ninety Days

The Applicant claims guilty plea counsel was ineffective for failing to challenge subject matter jurisdiction because the Applicant's indictments were not filed with the York Clerk of Court within ninety (90) days after his arrest. This allegation does not warrant relief. Each indictment was marked "True Bill" and signed by foreman of the grand jury. The failure to obtain an indictment within ninety days of arrest does not render it void for lack of jurisdiction. State v. Culbreath, 282 S.C. 38, 316 S.E.2d 681 (1984). This Court finds guilty plea counsel was not ineffective and that the Applicant has failed to show he was prejudiced by guilty plea counsel's performance. This Court further finds that the lower court had the subject matter jurisdiction to accept the Applicant's guilty pleas since the ninety day rule does not render an indictment void for lack of jurisdiction.

2. Failure to Challenge Subject Matter Jurisdiction Because the Murder Indictment Did Not Contain the Requisite Elements

The Applicant claims guilty plea counsel was ineffective for failing to challenge the murder indictment because the indictment failed to allege that the Applicant "willfully" and "feloniously" committed the crime. However, in Joseph v. State, the South Carolina Supreme Court held that a murder indictment was sufficient to confer subject matter jurisdiction on the court that accepted the defendant's guilty plea, even though the indictment omitted the words "willfully" and "feloniously," as the term "feloniously" was encompassed in "murder" and the term "willfully" was encompassed in "malice." 351 S.C. 551, 571 S.E.2d 280 (2002).

The Applicant's murder indictment read as follows:

> That Antonio Gordon did in York County on or about July 23, 1998, with *malice aforethought, kill* one Eric Peter Krenn by means of shooting him with a firearm and said victim died as a result thereof, all in violation of Section 16-3-10, South Carolina Code of Laws (1976, as amended).

Although the Applicant's murder indictment did not state the words "willfully" or "feloniously", these words were encompassed by the words "kill" and "malice". Therefore, this Court finds guilty plea counsel was not ineffective for failing to challenge the murder indictment and that the Applicant was not prejudiced by guilty plea counsel's performance. This Court further finds that the lower court had subject matter jurisdiction to accept the Applicant's guilty plea to murder

3. Failure to Challenge Subject Matter Jurisdiction Because the Attempted Armed Robbery Indictments Did Not Contain the Requisite Elements

The Applicant claims guilty plea counsel was ineffective for failing to challenge the attempted armed robbery indictments because the indictments failed to allege the element of asportation.

The Applicant's indictments for attempted armed robbery read as follows:

> That Antonio Gordon did in York County on or about July 23, 1998, while armed with a deadly weapon, attempt to *feloniously take from the person or presence* of Eric Krenn, by means of force or intimidation good or monies of said Eric Krenn to wit: one 1985 BMW belonging to said victim, all in violation of §16-11-330, Code of Laws of South Carolina, (1976, as amended).

In Locke v. State, 341 S.C. 54, 533 S.E.2d 324 (2000), the South Carolina Supreme Court held that the indictment language "taking of good and/or monies from the person or presence of" alleged the substance of asportation, one of the elements of common-law robbery and that this was sufficient because asportation merely meant the taking of an object with felonious intent. Therefore, this Court finds guilty plea counsel was not ineffective for failing to challenge the attempted armed robbery indictments and that the Applicant has failed to show he was prejudiced by guilty plea counsel's performance. This Court further finds that the lower court had subject matter jurisdiction to accept the Applicant's guilty pleas to attempted armed robbery.

4. Failure to Challenge Subject Matter Jurisdiction Because Only an Agent of the State Was a Witness Before the Grand Jury

The Applicant claims guilty plea counsel was ineffective for failing to challenge the indictments since an agent of the State was the only witness before the grand jury. The Applicant cites the case of State v. Anderson, 312 S.C. 185, 439 S.E.2d 835 (1993), to support this proposition.

In State v. Anderson, the South Carolina Supreme Court held that prosecutors cannot appear as a sole witness before the grand jury. In the Applicant's case, the witness before the grand jury was Officer Herring from the Rock Hill Police Department, not a prosecutor.

Further, the circuit court does not have subject matter jurisdiction to hear a guilty plea unless: (1) there has been an indictment which sufficiently states the offense; (2) there has been a waiver of

indictment; or (3) the charge is a lesser included offense of the crime charged in the indictment. Carter v. State, 329 S.C. 355, 362, 495 S.E.2d 773, 777 (1998). South Carolina law provides an indictment is sufficient if it "charges the crime substantially in the language ... of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood." S.C. Code Ann. §§ 17-19-20 (1985). "The true test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet." Browning v. State, 320 S.C. 366, 368, 465 S.E.2d 358, 359 (1995). South Carolina courts have held that the sufficiency of an indictment "must be viewed with a practical eye; all the surrounding circumstances must be weighed before an accurate determination of whether a defendant was or was not prejudiced can be reached." State v. Adams, 277 S.C. 115, 125, 283 S.E.2d 582, 588 (1981), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

The indictments in this case were marked "True Bill" and signed by the grand jury foreman. The witness before the grand jury was a police officer and not a prosecutor. The elements of the crimes were sufficiently alleged in the indictments. Therefore, this Court finds that guilty plea counsel was not ineffective for failing to challenge the Applicant's indictments and that the Applicant has failed to carry his burden in this action by failing to show prejudice from guilty plea counsel's performance. This Court further finds that the lower court had subject matter jurisdiction to accept the Applicant's guilty pleas.

5. Failure to Make Concerted Effort to Get the Solicitor's Office to Remand Case to Family Court

The Applicant claims guilty plea counsel was ineffective for failing to make a concerted effort to get the Solicitor's office to remand the case to Family Court. The Applicant claims guilty

plea counsel never discussed the differences between Family Court and General Sessions Court.

Pursuant to S.C. Code Ann. §20-7-6605, a "person sixteen years of age or older who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides a maximum term of imprisonment of fifteen years or more may be remanded to the family court for disposition of the charge at the *discretion of the solicitor*." The Applicant was sixteen years old when he committed the crime for which he was indicted and the crimes committed were Class A, B, C or D felonies. Therefore, the General Sessions Court had jurisdiction. The decision to remand the case to Family Court was within the Solicitor's discretion.

Guilty plea counsel testified that he was appointed to the case after the Applicant was indicted. He testified that he researched the fact that the Applicant was a child at the time of the commission of the crimes. Guilty plea counsel further testified that he brought this issue to the Solicitor's attention but that the Solicitor's office gave intimations that they wanted tot seek the death penalty in this case and that they would not remand this case to the Family Court. Further, the Applicant did not provide testimony from the Solicitor's office stating that they would have used their discretion and remanded the case to the Family Court.

Therefore, this Court finds that guilty plea counsel was not ineffective. This Court further finds that the Applicant has not shown that he was prejudiced by guilty plea counsel's performance.

6. Failing to Pursue Applicant's Competency to Stand Trial

The Applicant claims guilty plea counsel was ineffective for failing to pursue the Applicant's competency to stand trial. The Applicant claims that if this avenue had been explored, he would have had a defense to the charges.

Guilty plea counsel testified that he was concerned with the Applicant's mental state. The

State provided the testimony of Dr. Leslie Sandler. Dr. Sandler was qualified as an expert in forensic psychology, clinical psychology and substance abuse. (T. p. 9). Dr. Sandler testified that the Applicant was not mentally retarded. (T. p. 118). The trial court found the Applicant competent to stand trial. (T. p. 147).

Guilty plea counsel also hired a psychologist, Dr. Jonathan Venn. Dr. Venn was qualified as an expert in forensic and clinical psychology. (T. p. 108). Dr. Venn testified during the hearing concerning the admissibility of the Applicant's statements given to law enforcement. However, Dr. Venn was not able to come to an opinion concerning mental retardation. (T .p. 113).

A criminal defendant is competent to enter his guilty plea if "the accused [has] sufficient capability to consult with his lawyer with a reasonable degree of rational understanding and [has] a rational as well as a factual understanding of the proceeding against him." Jeter v. State, 308 S.C. 230, 417 S.E.2d 594, 596 (1992). An Applicant challenging his competency to plead must prove this allegation by a preponderance of the evidence. Id.

An Applicant claiming that trial counsel was ineffective in failing to pursue this defense "must produce some evidence of insanity or showing that with the exercise of due diligence, an insanity defense could have been developed." Jeter v. State, 308 S.C. 230, 233-34, 417 S.E.2d 594 (1992). The Applicant must show that he was "unable to distinguish moral or legal right from wrong and to recognize the particular act charged as morally or legally wrong."

The Applicant presented no testimony or evidence regarding the elements of the defense. The Applicant was also examined by two experts, one hired by the State and one by the defense, who either came to the conclusion the Applicant was not mentally retarded or could not reach an opinion. Therefore, this Court finds that guilty plea counsel was not ineffective. This Court further finds that the Applicant has not carried his burden in this action by showing he was prejudiced by

guilty plea counsel's performance.

7. Failure to Make Double Jeopardy Claim

The Applicant claims guilty plea counsel was ineffective for failing to make a double jeopardy claim since he was charged with attempted armed robbery and possession of a weapon during the commission of a violent crime.

In State v. Bolden, 303 S.C. 41, 398 S.E. 2d 494 (1990), the South Carolina Supreme Court held that punishment for both armed robbery and possession of a weapon during a violent crime does not violate double jeopardy. The Supreme Court held that the legislature clearly intended to provide additional punishment for possession of a weapon during the commission of a violent crime. Id.

Therefore, this Court finds guilty plea counsel was not ineffective for failing to make a double jeopardy challenge. This Court further finds that the Applicant has failed to show he was prejudiced by guilty plea counsel's performance.

8. Failure to Advise Applicant Appellate Rights are Waived Upon Entry of Guilty Plea

The Applicant claims guilty plea counsel was ineffective for failing to advise him that if he pled guilty, he would waive his right to appeal the admissibility of his statements to law enforcement officers. The Applicant testified that he would have continued to trial if he knew pleading guilty would waive his right to attack his pre-trial issues.

However, guilty plea counsel testified he advised the Applicant of his appellate rights and that if he pled guilty he could not appeal issues raised prior to the plea. The trial judge also informed the Applicant of his appellate rights during his guilty plea. (T. p. 205). The Applicant subsequently filed an appeal that was later dismissed. Antonio Gordon and Monta Gordon v. State of South Carolina, 2000-UP-747, filed December 6, 2000.

This Court finds the testimony of guilty plea counsel to be more credible than that of the Applicant. This Court finds that guilty plea counsel was not ineffective and that the Applicant has failed to carry his burden in this action by showing he was prejudiced by guilty plea counsel's performance.

9. Failure to Advise of Community Supervision

The Applicant claims guilty plea counsel was ineffective for failing to advise the Applicant he would be subject to community supervision by the South Carolina Department of Corrections. Guilty plea counsel testified that he did not advise the Applicant concerning community supervision.

However, community supervision is a collateral consequence of a guilty plea. As such, guilty plea counsel was not ineffective for failing to advise the Applicant of community supervision. *See* Smith v. State, 329 S.C. 280, 494 S.E.2d 626 (1997), (counsel is not ineffective for failing to advise a defendant regarding parole eligibility because it is a collateral consequence of sentencing.) Therefore, this Court finds guilty plea counsel was not ineffective and that the Applicant has failed to show he was prejudiced by guilty plea counsel's performance.

As discussed above, the Applicant has failed to carry his burden in this action. Therefore, this Court finds that the application must be denied and dismissed.

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 advises Applicant that he must file a notice of intent to appeal within thirty (30)

days from the receipt of this Order to secure the appropriate appellate review. His attention is also directed to South Carolina Appellate Court Rule 227 for appropriate procedures after notice has been timely filed.

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 18 day of AUG, 2003.

J. Ernest Kinard
Presiding Judge
Fifth Judicial Circuit

Camden, South Carolina.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	)	Sixteenth Judicial Circuit
		2000-CP-46-1414
Antonio Gordon,	)	
Applicant,	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
State of South Carolina,	)	
Respondent.	)	

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Personally appeared before me, Jeanette VanGinhoven, who being first duly sworn, states:

1. That I am an employee of the Office of the Attorney General.

2. That regular communication by mail exists throughout the State of South Carolina, and that this is a proper circumstance of service by mail.

3. That I have this day served a copy of the Order in the above-captioned matter on the following persons by depositing same in the United States mail, postage prepaid:

Tara D. Shurling, Esquire
3614 Landmark Drive, Suite D
Columbia, South Carolina 29204

DATED this 19th day of August, 2003.

Jeanette VanGinhoven
JEANETTE VANGINHOVEN

SWORN to before me this
19th day of August 2003.

Lyla C. Goins (L.S.)
Notary Public for South Carolina
My Commission Expires: June 2, 2007