

RECEIVED

PCR

NOV 14 2013

S.C. SUPREME COURT

Tristan M. Shaffer

Attorney at Law
140 Gibson Road
Lexington, South Carolina 29072
Telephone: (803) 575-0384
Facsimile: (803) 403-9965

November 12, 2013

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

RE: William Dove v. State

Dear Clerk of Court:

Attached is the Notice of Appeal, Proof of Service, and Order of Dismissal in the above referenced case. Please file these documents and return a stamped copy of the Notice of Appeal in the enclosed self-addressed stamped envelope.

Thank you for your help in this matter.

Sincerely,



Tristan M. Shaffer

CC:
Suzanne White
S.C. Attorney General's Office
1000 Assembly Street Room 519
Columbia, South Carolina 29201

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

J. Ernest Kinard, Circuit Court Judge

Case No. 2012-CP-34-0208

William Dove # 293245,

Petitioner,

v.


The State of South Carolina,

Respondent.

NOTICE OF APPEAL

Petitioner appeals the order dismissing his post-conviction relief action signed by the Honorable J. Ernest Kinard on September 19, 2013. This order was filed on September 25, 2013 and received by Petitioner on October 10, 2013.

November 12, 2013



Tristan M. Shaffer
140 Gibson Road
Lexington, South Carolina 29072
(803) 575-0384
SC Bar # 77565
Attorney for Petitioner

Other Counsel of Record:
Suzanne White
South Carolina Attorney General's Office
1000 Assembly Street Room 519
Columbia, South Carolina 29201
Attorney for Respondent
(803) 734-3970

RECEIVED

NOV 14 2013

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

J. Ernest Kinard, Circuit Court Judge

Case No. 2012-CP-12-0523

William Dove # 293245,

Petitioner,

v.


The State of South Carolina,

Respondent.

Proof of Service

I certify that on this day, I have served a copy of the Notice of Appeal in the above captioned case on Respondent by depositing it in the United States mail with postage prepaid and addressed to the attorney for Respondent as listed below.

November 12, 2013



Tristan M. Shaffer
140 Gibson Road
Lexington, South Carolina 29072
(803) 575-0384
SC Bar # 77565
Attorney for Petitioner

Other Counsel of Record:
Suzanne White
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-1549
Attorney for Respondent

690

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHESTER)
)
)
 William David Dove, #293245,)
)
)
 Applicant,)
)
)
 v.)
)
 State of South Carolina,)
)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 SIXTH JUDICIAL CIRCUIT

2012-CP-12-0523

ORDER OF DISMISSAL

FILED
 2013 SEP 25 A 11:10
 CLERK OF COURT
 CHESTER CO S.C.

This matter comes before the Court by way of an Application for Post-Conviction Relief filed October 17, 2012. The Respondent made its Return on or about July 17, 2012. An evidentiary hearing into the matter was convened on February 4, 2013, at the Lancaster County Courthouse. The Applicant was present at the hearing and was represented by Tristan M. Shaffer, 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, along with his mother and two sisters. Tyre D. Lee, Jr., Esquire, also testified. This Court also had before it a copy of the records of the Chester County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, the Appellate Court records, and the plea transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Chester County Clerk of Court. The Applicant was indicted at the April 2010 term of the Chester County Grand Jury for purse snatching (10-GS-12-

0204), grand larceny between \$1,000 and \$5,000 – 3rd or subsequent offense (10-GS-12-0205), burglary – 1st degree (10-GS-12-0206), and burglary – 2nd degree (10-GS-12-0208). He was then indicted at the September 2010 term of the Chester County Grand Jury for burglary – 2nd degree (10-GS-12-0523) and malicious injury to personal property between \$1,000 and \$5,000 (10-GS-12-0524). He was represented by Tyre D. Lee, Jr., Esquire.

On February 11, 2011, following the beginning of a trial on the charges of burglary – 1st degree and grand larceny between \$1,000 and \$5,000 – 3rd or subsequent offense, and the subsequent loss of a pre-trial motion regarding the admissibility of the Applicant's statement, the Applicant pled guilty to the lesser-included offense of petit larceny – 3rd or subsequent offense (10-0205) and pled to burglary – 1st degree as indicted. He was sentenced by the Honorable W. Jeffrey Young to confinement for concurrent terms of fifteen years for burglary – 1st degree and ten years for petit larceny – 3rd or subsequent offense. Applicant then pled to all other charges as indicted and waived presentment to the Grand Jury for charges of burglary – 2nd degree (11-GS-12-0160) and malicious injury to personal property under \$2,000 (11-GS-12-0161). Judge Young sentenced Applicant to confinement of concurrent terms of ten years for each charge of burglary – 2nd degree, five years for malicious injury (10-0524), three years for purse snatching, and thirty days for malicious injury (11-0161).

The Applicant filed a timely notice of appeal. An Anders brief was filed on Applicant's behalf. The South Carolina Court of Appeals dismissed Applicant's appeal. State v. Dove, Op. No. 2012-UP-491 (filed August 22, 2012). The Remittitur was returned on September 7, 2012.

ALLEGATIONS

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

1. Ineffective assistance of counsel, in that;
 - a. Counsel failed to adequately advise on the likelihood of success at trial,
2. Involuntary guilty plea, in that;
 - a. Applicant was coerced into pleading guilty.

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. 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), SCRCPP). 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).

The Applicant alleged that Counsel was ineffective for failing to adequately advise the Applicant on the likelihood of success at trial. Applicant acknowledged that he has known Counsel all of his life. Applicant testified that he met with Counsel several months after he got out of jail and rehab. Applicant testified that he spoke with Counsel only twice, right after rehab and on the day of trial. In regards to the burglary – 1st charge and his alleged confession, Applicant claimed that he gave a false statement to police. Applicant also testified that he was being charged with a couple of charges in which they claimed to have a shoe print match to him. Applicant claimed that the State had no evidence on any of the other charges until three days before he started the trial for burglary – 1st. Applicant testified that on the day of trial, following the jury selection, Counsel informed Applicant that he was going to receive a life sentence. Applicant testified that he would have proceeded with the trial had he not heard that he was going to receive a life sentence. Applicant also testified that he believed he was pleading guilty for a sentence of twelve years.

Laura Clack, Applicant's sister, testified that she recalls meeting with Counsel and her brother prior to the plea. Clack claimed that Counsel informed her brother that if he did not take

the Solicitor's plea offer for twelve years, the judge would give Applicant a life sentence. Clack testified that her brother pled because he believed he was receiving a sentence of twelve years.

Jackie Price, Applicant's sister, testified that she was present on the day of her brother's guilty plea and believed his options to be either pleading guilty or receive a life sentence. Price testified that she did not overhear Counsel say anything as to what the judge would give Applicant if he proceeded to trial.

Judith Ann Dove, Applicant's mother, testified that her son received plea offers from the Solicitor of first eighteen years, then sixteen, then fifteen, but then Counsel told them he would get Applicant a twelve year offer. Mrs. Dove testified that she never heard Counsel mention prior to the plea that the judge would give her son life if did not accept the plea.

Counsel testified that he has known the Applicant since Applicant was a juvenile and he has represented Applicant previously. Counsel testified that the public defender's office was appointed to represent the Applicant following an initial arrest, bonding out, and then second arrest. Counsel testified that his first meeting with the Applicant was August 2010 and it was his standard practice at the first meeting with a client to review a checklist that he then has them sign regarding their charges, the possible sentences, and their rights to appeal. Counsel testified that the Applicant would often come to see him at the office because the Applicant was out on bond. Counsel testified that he began preparing for trial on the burglary – 1st degree charge; however, the State had a forty-five minute recorded confession from the Applicant and had two eyewitnesses, Applicant's Great-Aunt and her son. Counsel testified that there were some issues that could have been raised regarding their identification of the Applicant because of issues with their eyes and vision. Counsel also testified that there were some other issues that could be raised on some of the other charges, but the Applicant was facing a substantial amount of time

and the possibility of a life sentence because of the burglary – 1st charge. In addition, Counsel testified that he advised the Applicant that the Solicitor would most likely try most of the cases separately.

Counsel testified that the first offer he received from the Solicitor was for the Applicant to plead to all charges and they would ask for life without parole. However, Counsel testified that he continued to negotiate and the Solicitor later offered a sentence of fifteen years, violent, and all charges would be run concurrent, which Counsel believed was a very good deal. Counsel testified that this offer was received sometime prior to trial, but the Applicant did not want to accept because he wanted a twelve year sentence. Counsel testified that the Solicitor informed him that he had given a twelve year sentence previously and the Applicant continued to commit crimes, so that was out of the question. Counsel also testified that following their loss at the Jackson v. Denno hearing, Counsel met with Applicant and advised that Counsel did not believe they would win at trial. At that time, Counsel testified that the Applicant asked if Counsel could get the fifteen year deal back. Counsel testified that he did have two conversations with the Applicant in between the pre-trial motions and the plea, one of which was also attended by Applicant's mom and two sisters. Following the end of the case and guilty plea, Counsel testified that he saw the plea judge, who stated that if the case had gone to trial, "[he] would have given [Applicant] life and not batted an eye." However, unlike testimony presented by Applicant and his family, Counsel did not have a conversation with the judge prior to the plea and did not tell Applicant or his family that the judge had indicated to him that Applicant would receive a life sentence if he proceeded to trial.

This Court finds the testimony of Counsel to be more credible than the testimony of the Applicant or his witnesses. First, this Court does not find it credible that Counsel promised a

sentence of twelve years to Applicant or Applicant's family. This Court finds that Counsel is experienced in criminal law, knew the minimum sentence for burglary -1st degree and advised Applicant of that fact. Furthermore, Counsel specifically recalled conversations with the Solicitor about the offer and why the Solicitor would not reduce the charge or offer twelve years.

This Court also finds that Counsel was prepared to proceed to trial on the two charges Applicant faced, but advised the Applicant as to the likelihood of success at trial and the benefits of pleading guilty to all charges at one time with the offer for concurrent sentencing.

Applicant has failed to offer any testimony or evidence as to anything that Counsel could have discovered or used to assist at trial had they met more or more investigation had been completed. 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). When claims of ineffective assistance of counsel are based on lack of preparation time, an Applicant challenging his conviction must also show specific prejudice resulting from counsel's alleged lack of time to prepare. United States v. Cronin, 466 U.S. 648, 104 S.Ct. 2039 (1984); U. S. v. LaRouche, 896 F.2d 815 (4th Cir. 1990).

This Court finds it credible that Counsel reviewed all of the charges and potential sentences with the Applicant, as well as advised the Applicant that they could not win at trial once the pre-trial motion was lost. The Applicant's allegation that Counsel did not properly advise him as to the likelihood of success at trial is without merit. Further, the Applicant failed to point to any specific matters Counsel failed to discover, or any defenses that could have been

pursued had Counsel been more fully prepared. Furthermore, the Applicant failed to show any prejudice that may have resulted from Counsel's alleged inadequate preparation, discussions with Applicant or lack of meetings. Accordingly, this allegation is dismissed.

Involuntary Guilty Plea

The Applicant alleges that he did not plead guilty freely and voluntarily. This Court finds that he has failed to meet his burden of proof as to this claim. To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

This Court finds that the transcript reflects that the pleas were knowingly and voluntarily entered with a full understanding of the charges and consequences of the plea to each charge. Boykin, supra; Dover, supra. Further, because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. U.S., 519 F.2d 317 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors,

the defendant would not have pled guilty, but would have insisted on going to trial. Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993). Again, this Court finds that Counsel's testimony regarding this issue is more credible than the other witnesses. Furthermore, the Applicant has failed to meet his burden of proof as to this claim. The Applicant has failed to offer any evidence or testimony which would cause this Court to consider questioning the voluntariness of Applicant's plea. This Court finds that the Applicant was not coerced into pleading guilty by the threat of a life sentence, when that was a definite possibility based upon the charges he faced and his prior record. It may be that the Applicant pled guilty so that he would not have to face that risk, but that does not indicate that he was coerced by Counsel into pleading guilty. Therefore, this claim is denied and dismissed.

Summary

This Court finds that, in regards to the allegations of ineffective assistance of counsel and involuntary guilty plea, the testimony of Counsel was most credible. This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in his representation, and that Counsel's 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 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 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.

CONCLUSION

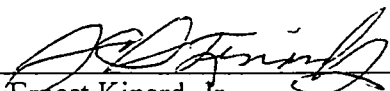
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

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 19 day of Sept, 2013.



J. Ernest Kinard, Jr.
Presiding Judge

FILED
2013 SEP 25 A 11:11
CLERK OF COURT
CHESTER CO S.C.

STATE OF SOUTH CAROLINA
COUNTY OF CHESTER

)
)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL DISTRICT

William David Dove,

)
)

2012-CP-12-0523

Applicant,

)
)

vs.

)
)

CERTIFICATE OF SERVICE BY MAIL

State of South Carolina,

)
)

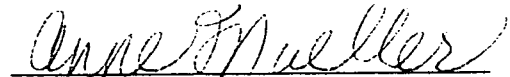
Respondent.

)
)

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 copy of the Order of Dismissal in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Tristan M. Shaffer, Esquire
Shaffer Law Firm
P.O. Box 176
Chapin, South Carolina 29036

DATED this 9th day of October, 2013



Anne A. Mueller
Legal Assistant for the Respondent

Tristan M. Shaffer
Attorney at Law
140 Gibson Road
Lexington, SC 29072

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

COLUMBIA SC 292
THU 14 NOV 2013 AM

