

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. 2011-CP-26-1434

Brandon S. McDevitt,
#331683,

Petitioner,

v.

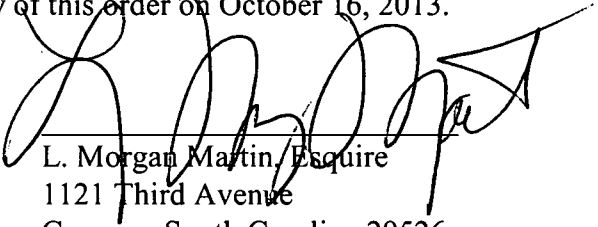
State of South Carolina,

Respondent.

NOTICE OF APPEAL

Brandon S. McDevitt appeals the order of the Honorable J. Cordell Maddox, Jr. dated September 23, 2013 denying and dismissing with prejudice his application for Post-Conviction Relief. Appellant received written notice of entry of this order on October 16, 2013.

November 13, 2013



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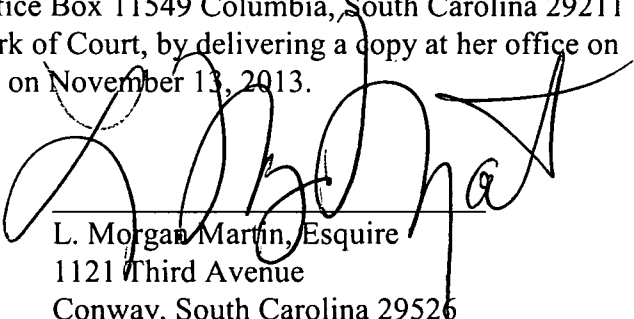
State of South Carolina,

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PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on November 13, 2013, addressed to Joshua L. Thomas, Assistant Attorney General, Post Office Box 11549 Columbia, South Carolina 29211 and The Honorable Melanie Huggins-Ward, Clerk of Court, by delivering a copy at her office on Second Avenue, Conway, South Carolina 29526 on November 13, 2013.

November 13, 2013



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STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Brandon S. McDevitt, # 331683,)
Applicant,)

Case No. 2011-CP-26-1434

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

HORRY COUNTY
13 OCT - 1 PM 1:48
MELANIE HUBBINS-WARD
CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed February 15, 2011. Respondent made its Return on March 24, 2011. The Court convened an evidentiary hearing into the matter on August 28, 2013, at the Horry County Courthouse. Applicant was present at the hearing and represented by L. Morgan Martin, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the PCR hearing. Applicant's mother also testified on his behalf. Applicant's plea counsel, William H. Monckton, VI, Esquire, also testified. The Court had before it a copy of the plea transcript, the records of the Horry County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the return.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Horry County Clerk of Court. In March 2009, the Horry County Grand Jury indicted Applicant for leaving the scene of a watercraft accident, death

resulting (2009-GS-26-1274), three counts of leaving the scene of a watercraft accident, great bodily injury resulting (2009-GS-26-1275; -1276; -1277), murder (2009-GS-26-1246), and burglary in the first degree (2009-GS-26-1247). William H. Monckton, VI, Esquire, (“plea counsel”) represented Applicant. On June 9, 2010, Applicant entered a negotiated plea to leaving the scene of a watercraft accident, death resulting, three counts of leaving the scene of a watercraft accident, great bodily injury resulting, and burglary in the first degree. The Honorable Larry B. Hyman, Jr. accepted the negotiation and sentenced Applicant to twenty-two (22) years for leaving the scene of a watercraft accident, death resulting, twenty-two (22) years for burglary in the first degree, and ten (10) years for each count of leaving the scene of a watercraft accident, great bodily injury resulting.¹ The sentences were all to run concurrently. The murder indictment was *nolle prossed* pursuant to the plea, and a warrant for criminal conspiracy (J-320948) was dismissed. 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. “Ineffective assistance of counsel”

At the PCR hearing, the Applicant proceeded on the allegation of ineffective assistance of plea counsel for failure to advise Applicant that he had a potential defense to the watercraft charges because Applicant was not the operator of the watercraft.

¹ Collectively, the charge of leaving the scene of a watercraft accident, death resulting, and the three charges of leaving the scene of a watercraft accident, great bodily injury resulting will be referred to as “the watercraft charges.”

III. SUMMARY OF TESTIMONY

Applicant testified he was not operating the watercraft when it struck another boat and injured four people, one fatally. Applicant told plea counsel he was not driving the boat that caused the accident. However, Applicant was under the impression he was charged as a principal in the indictment. He testified he did not discuss with plea counsel the difference between accomplice liability and liability as a principal. Applicant testified he would not have pled guilty had he known that operating the watercraft was an element of the crimes to which he pled. However, he entered the plea because he understood there was significant evidence against him. Applicant testified plea counsel never informed him that mere presence was enough to indict him as a principal. Applicant maintained he did not admit to being the driver of the boat.

On cross examination, Applicant testified he met with plea counsel twice and reviewed discovery and the State's evidence against him. He testified plea counsel never discussed defenses with him because the State had enough evidence to get a conviction. He further testified plea counsel did not explain the murder indictment. Applicant admitted it was his decision to plead guilty because plea counsel advised him there was little chance of success at trial. Applicant recalled the plea colloquy and agreeing with the facts presented by the State. He recalls accepting responsibility for the burglary charge and does not presently challenge his plea to that crime.

Applicant's mother, Ms. Anderson, also testified. She stated she retained plea counsel and had discussions with him about the case. She testified plea counsel never explained to her the difference between accomplice liability and liability as a principal.

Plea counsel testified he was the second attorney to represent Applicant on these charges. He did not file the initial Rule 5/Brady motions, but he did receive copies of all the State's discovery. Plea counsel testified the State's theory of the crimes was that Applicant and a co-defendant arrived at a riverfront house via boat and parked at the house's boat slip. Applicant and the co-defendant then broke into the house and removed several items. During the burglary, the homeowner's daughter saw Applicant and the co-defendant and chased them away. Applicant and the co-defendant returned to their boat and sped off, striking another boat on the river. Applicant and the co-defendant fled the scene of the boat accident and docked their watercraft nearby. When disembarking the watercraft, Applicant told a witness that he was driving the boat. Applicant also called 911 and reported that he was driving the boat.

Plea counsel testified he discussed discovery and the State's evidence with Applicant. During these discussions, Applicant admitted to his involvement in the burglary but denied he was driving the boat. Plea counsel had Applicant submit to a polygraph test, which indicated Applicant was truthful about not being the driver of the boat. Plea counsel discussed with Applicant and his mother the fact that Applicant was not the operator of the watercraft. He further testified that he arranged for Applicant to meet with the police to give a full confession in exchange for the dismissal of the murder charge.

Plea counsel testified Applicant's prior attorney received a twenty (20) year plea offer from the State, but Applicant declined that offer. Plea counsel received a twenty two (22) year plea offer, which included credit for time Applicant served on a Youthful Offender Act parole revocation. Plea counsel further testified he discussed with Applicant and his mother the fact that the State's theory at trial would be that Applicant was the operator of the watercraft. Plea

counsel discussed with Applicant the fact that he stated to a witness and the 911 operator that he was the driver of the boat. Plea counsel also told Applicant the polygraph results were inadmissible. Therefore, the only way to refute the allegation Applicant was driving the boat would have been for Applicant to testify at trial. Also, plea counsel testified the State had indicated it would go forward with the murder charge at trial. Plea counsel testified he discussed the benefits of the plea versus the risks of trial. Plea counsel testified Applicant always indicated he wanted to plea instead of go to trial, and that the ultimate decision to accept the plea offer was Applicant's.

On cross examination, plea counsel testified the State was not interested in any theory of the case other than the theory that Applicant was driving the boat. He believed the State may have gotten a conviction on the watercraft charges based on the statements to 911 and the witness. However, he testified he believed it was more likely those charges would get judicially dismissed. Plea counsel testified he explained to Applicant that success on the watercraft charges did not eliminate the possibility of being convicted under the murder indictment. Plea counsel admitted he did not explain aiding and abetting as a theory of accomplice liability, but that he believed the murder indictment was sufficient to support a murder conviction under several theories of liability. Ultimately, plea counsel explained to Applicant he may win the battle in regards to the issue of operating the watercraft, but lose the war in regards to the murder conviction.

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 plea counsel was ineffective for failing to advise Applicant that he had a potential defense to the watercraft charges because Applicant was not the operator of the watercraft to be without merit. Plea counsel testified he discussed the issue of who was driving the boat with Applicant at length. He also testified he explained to Applicant the fact that Applicant was not the operator was likely not dispositive in the case. On this point, the Court finds plea counsel's testimony to be credible and Applicant's testimony to be not credible. Furthermore, the State possessed evidence that Applicant was the driver of the boat. Plea counsel explained the possible trial strategies to counter this evidence. Therefore, the Court finds that plea counsel fully advised Applicant of the nature of the charges against him and of any possible defenses to those charges.

Likewise, plea counsel has articulated a valid reason for advising Applicant to plead guilty to the watercraft charges. 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))). Here, the State was prepared to go to trial on a murder

charge. The Court agrees with plea counsel that the State would have more than likely been successful in obtaining a murder conviction based on the facts of the case. The plea to the watercraft charges eliminated Applicant's exposure on the murder charge. Thus, plea counsel's advice was reasonable under the circumstances. Therefore, Applicant has failed to meet his burden to prove plea counsel was deficient.

Furthermore, Applicant has not shown the indictment was deficient to support a conviction for the watercraft charges. The indictment purports to charge Applicant as the operator of the watercraft. This indictment is sufficient to support a conviction as a principal or as an accomplice regardless of whether Applicant was operating the watercraft. See State v. Bachelor, 377 S.C. 341, 661 S.E.2d 58 (2008) (indictment as principal for felony DUI sufficient to support theory of accomplice liability where defendant was not driving the vehicle at the time of the wreck). Thus, Applicant cannot show he was prejudiced by plea counsel's advice regarding the requirement that he be operating the watercraft. 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).

Furthermore, plea counsel provided competent representation in light of the overwhelming evidence against Applicant. The burglary victim's daughter identified Applicant and co-defendant as the individual speeding off in the boat. Another witness overheard Applicant admit to being in the boat when the accident happened. Applicant also admitted to his involvement in the accident in the 911 call and a subsequent interview with police. Thus, plea counsel was correct in his advice that accepting the plea offer avoided the risk of trial. 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"). Therefore, plea counsel was not ineffective.

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. 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.

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), SCRCP, 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:

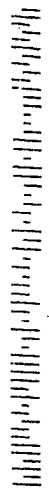
1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

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



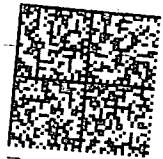
THE HONORABLE J. CORDELL MADDOX, JR.
Presiding Judge
Fifteenth Judicial Circuit

Anderson, South Carolina



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



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November 13, 2013

RECEIVED

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

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S.C. SUPREME COURT

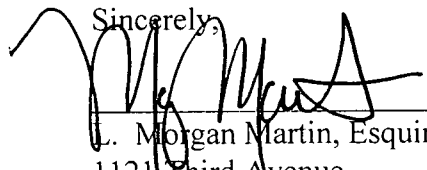
RE: Brandon S. McDevitt, #331683, Appellant, v. State of South Carolina,
Respondent, Case No. 2011-CP-26-1434

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case along with three copies and a self-addressed, stamped envelope. Also enclosed are the following:

- (1) Proof of service of the notice of appeal on the respondent.
- (2) A copy of the order which is to be challenged on appeal.
- (3) This appeal is being filed with the South Carolina Supreme Court pursuant to Rule 243(a), SCACR, which provides that a final decision under the Post-Conviction Relief Act shall be reviewed by the Supreme Court.

Sincerely,



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Attorney for Appellant

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