State of South Carolina
Fourth Circuit

Case No: 2009-CP-14-00574
Case No: 9:13-1948-RMG-BM

Plaintiff,

Vs.

Petition for Writ of Certiorari

Respondent.

The foregoing Petitioner is seeking appellate review of his PCR denial. See: Miller v. Harvey, 566 F.2d 879, 880-81 (4th Cir. 1977); Also See: Patterson v. Leeke, 556 F.2d 1168, 1170-73 & n.1 (4th Cir. 1977).

The petitioner contends he did not knowingly and intelligently waive the right to appeal. See: Odom v. State, 523 S.E.2d 753 (1999) (citing Austin); see also King v. State, 417 S.E.2d 868 (S.C. 1992) [explaining the appellate procedure in an Austin matter]; Nice v. State, 409 S.E.2d 392, 395 (1991) [every PCR applicant is entitled to "one bite at the apple," i.e. a full adjudication on the merits, which includes the right to appeal the denial of a PCR application and the right to assistance of counsel in the appeal].

The petitioner points to Ferguson v. State, 677 S.E.2d 600 (S.C. 2009), demonstrating that his mental incompetence prevented a timely filing and that he is now petitioning

to the South Carolina Supreme Court for an belated appeal to review issues that could have been raised on his appeal, to determine if there was Reversible error. See White, 208 S.E.2d at 39-40; SCACR 243 (I).

The petitioner filed his writ of habeas corpus and it was taken off the courts docket, because of the exhaustion Rule. See: Galloway v. Stephenson, 510 F. Supp. 840, 846 (W.D.N.C. 1981) So therefore, the petitioner is now asking this court for effective assistance in seeking an review of the denial of his PCR application so he will be able to proceed with his case. Attached are exhibits to foresee that the petitioner has recently went forth to his Post Conviction Hearing

Respectfully Submitted,

Lee Correctional Institution
990 Wisacky Highway
Bishopville, SC 29010

and also got accepted the opportunity to proceed back to this Honorable Court.

Law Offices of William H. Johnson, LLC
411 North Brooks Street
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Telephone 803-435-0909
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William H. Johnson*

Christopher R. DuRant

July 12, 2012

Charles Junious, # 332874
Lee Correctional Institute
990 Wisacky Highway
Bishopville, south Carolina 29010

RE: Post Conviction Relief

Dear Mr. Junious:

Enclosed please find a certified copy of the Order of Dismissal from the March 9, 2012 hearing in this matter.

Sincerely,

Terri H. Ridgeway, Legal Assistant to
William H. Johnson

/thr
enclosure

*Also Admitted to Practice in North Carolina

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CLARENDON	)	
		2009-CP-14-0574
Charles Junious, #332874,	)	
	)	
Applicant,	)	
	)	
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

ORDER OF DISMISSAL

This matter comes before the Court by way of an Application for Post-Conviction Relief filed October 6, 2009. An evidentiary hearing into the matter was convened on March 19, 2012, at the Sumter County Courthouse. The Applicant was present at the hearing and was represented by William H. Johnson, Esquire. The Respondent was represented by Mary S. Williams of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Also testifying Shaun Kent, Esquire ("Counsel"). This Court had before it the records of the Clarendon County Clerk of Court, the guilty plea transcript, and the Applicant's records from the South Carolina Department of Corrections.

PROCEDURAL HISTORY

The records before this Court indicate that The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clarendon County Clerk of Court. The Applicant was indicted at the March 2008 term of the Clarendon County Grand Jury for (1) Murder, (2) Murder, (3) Burglary First Degree, (4) Possession of a Firearm During Commission of Violent Crime, and (5) Unlawful Carrying of a Pistol (2008-GS-14-0095). Applicant

was represented by Shaun Kent, Esquire. On January 26, 2009, the Applicant pled guilty but mentally ill before the Honorable R. Ferrell Cothran, Jr. Applicant was sentenced to life imprisonment for each count of Murder, life imprisonment for Burglary First Degree, five (5) years imprisonment for Possession of a Firearm During Commission of Violent Crime, and one (1) year imprisonment for Unlawful Carrying of a Pistol. Applicant did not appeal his conviction and sentence.

In his application for post-conviction relief (PCR), Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective assistance of counsel."
2. "Mental incompetent."
3. "Counsel was ineffective when he failed to file the Notice for a Direct Appeal."

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.

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), 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, supra). 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). 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).

Failure to Advise of Direct Appeal

Applicant alleges that Counsel was ineffective in failing to consult with him about an appeal. Counsel confirmed that he did not discuss an appeal with Applicant and did not file an appeal on his behalf. The plea judge informed Applicant that if he wished to file an appeal he would need to do so within ten days of his plea. (Tr. p. 10, lines 18-23.)

When the question is whether counsel was ineffective in failing to file a direct appeal from following a guilty plea, the United States Supreme Court has held that 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). "By 'consult,' the Court means advising the defendant about the advantages and disadvantages of taking an appeal and making a reasonable effort to discover the defendant's wishes." Id. at 471. Applicant's "bare assertion that he was not advised of appellate rights is insufficient to grant relief." Rolen v. State, 384 S.C. 409, 415, 683 S.E.2d 471, 475 (2009). I find no evidence that Applicant inquired about an appeal, even after advised of such right by the plea court. I further find no extraordinary circumstance for counsel to believe that a rational defendant would want to appeal such as a potentially meritorious issue preserved for appeal. I therefore find that Applicant is not entitled to a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

Competence

Applicant further asserts that he was incompetent at the time of his plea. Counsel testified

that Applicant was evaluated by the Department of Mental Health and found to be competent and criminally responsible. The evaluation was entered into evidence at Applicant's plea. (Tr. p. 5, line 15 – p. 6, line 13.) Counsel recalled that he discussed an additional evaluation with Applicant's family and that it had been decided that an additional evaluation was not worth the additional expense. Based on his interactions with Applicant, Counsel felt that Applicant may have some mental health issue but that it did not rise to the level of incompetence. Counsel added that he had been able to convince the solicitor not to pursue the death penalty and to allow Applicant to plead "straight up" to murder. Counsel felt that it was important to seize the opportunity to avoid the death penalty, making procurement of a likely fruitless second evaluation even less appealing. Though Applicant now claims a lack of memory of his plea, a review of the plea transcript reveals that Applicant provided appropriate responses throughout. Applicant specifically denied any physical or mental infirmity that would prevent his understanding what he was doing at the time of his plea. (Tr. p. 8, lines 17-20.)

In a PCR action, the applicant bears the burden of proof to show by a preponderance of the evidence that he was incompetent when he entered his plea. Jeter v. State, 308 S.C. 230, 232-234, 417 S.E.2d 594, 595-596 (1992). Petitioner presented no medical evidence, and the plea transcript and Counsel's testimony support that Petitioner was in fact competent at the time of his plea. I therefore find that Applicant has failed to meet his burden of proving that he was incompetent at the time of his plea.

I further find that Applicant has failed to demonstrate that Counsel was ineffective in failing to procure a second evaluation in further effort to form an insanity defense or show that he was

incompetent to stand trial. One evaluation had already been done and did not support an insanity defense or incompetence. The evaluation was supported by Counsel's own observations that Applicant was not impaired to the level of incompetence. Moreover, Applicant has failed to demonstrate a reasonable probability that he was either insane at the time of the murders or incompetent at the time of his pleas. Id. I therefore find that Counsel was not ineffective in this regard.

Other Allegations

No other allegations were raised at the PCR hearing. Therefore, any additional allegations are deemed waived because no evidence was presented.

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 243 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.

[Signature on next page.]

AND IT IS SO ORDERED this 11 day of May, 2012.

W. JEFFREY YOUNG
Presiding Judge
Third Judicial Circuit

Sumter, South Carolina.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Charles E. Junious,

Petitioner,

v.

Warden Michael McCall, *Lee Correctional Institution*,

Respondent.

No. 9:13-cv-1948-RMG

ORDER

This matter comes before the Court on the Report and Recommendation of the Magistrate Judge recommending that this Court dismiss this action without prejudice. (Dkt. No. 18). For the reasons set forth below, the Court agrees with and adopts the R&R as the order of the Court.

Background

Charles E. Junious ("Petitioner"), a state prisoner proceeding pro se, has filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pursuant to 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2)(c) DSC, this matter was automatically referred to a Magistrate Judge for pretrial proceedings. Under established local procedure in this judicial district, the Magistrate Judge conducted a careful review of this pro se petition pursuant to the Rules Governing Section 2254 proceedings for the United States District Court, the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, and other habeas corpus statutes. The review has been conducted in light of the following precedents: *Denton v. Hernandez*, 504 U.S. 25 (1992); *Neitzke v. Williams*, 490 U.S. 319, 324-25 (1989); *Haines v. Kerner*, 404 U.S. 519 (1972); *Nasim v. Warden, Md. House of Corr.*, 64 F.3d 951 (4th Cir. 1995); and *Todd v. Baskerville*, 712 F.2d 70 (4th Cir. 1983). The Magistrate Judge then

issued the present R&R recommending the Court dismiss this action without prejudice because Petitioner had not yet exhausted his state court remedies. (Dkt. No. 18).

Legal Standard

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility for making a final determination remains with this Court. *Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). This Court is charged with making a de novo determination of those portions of the R&R to which specific objection is made. Additionally, the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). This Court may also "receive further evidence or recommit the matter to the magistrate judge with instructions." *Id.*

Discussion

Upon review of the record and the R&R, the Court finds the Magistrate Judge applied sound legal principles to the facts of this case and therefore adopts the R&R as the order of the Court. As noted by the Magistrate Judge, a petitioner must first exhaust his state court remedies before filing a habeas petition under 28 U.S.C. § 2254. 28 U.S.C. § 2254(b). Here, Petitioner has not yet sought appellate review of his state PCR denial, which is a requirement for his state remedies to be considered "exhausted" by this Court. Petitioner does not contest this finding, but rather asks the Court for an extension of time to allow him to seek the necessary appellate review. (Dkt. No. 21). However, the Court should not retain a habeas petition pending exhaustion absent special circumstances. *See Golloway v. Stepheson*, 510 F. Supp. 840, 846 (M.D.N.C. 1981). Petitioner has not pointed to any special circumstances, and the Court finds that none exist here.

Conclusion

For the reasons set forth above, the Court agrees with and adopts the R&R as the order of the Court. (Dkt. No. 18). Accordingly, the Court dismisses this petition without prejudice and denies Petitioner's motion for extension of time (Dkt. No. 21).

AND IT IS SO ORDERED.

Richard Mark Gergel
United States District Court Judge

October 21, 2013
Charleston, South Carolina

Charles Junious
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Agency

South Carolina Supreme Court
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