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December 10, 2013

Clerk's Office
Supreme Court
Supreme Court Bldg
Box 11330
Columbia, South Carolina 29211

RECEIVED

DEC 13 2013

RE: Daryl L. Gray vs. State of South Carolina
Case Number: 2012-CP-04-2644

S.C. Supreme Court

Dear Sir:

Enclosed please find the Notice of Intent to Appeal regarding the above captioned case along with the Certificate of Service by Mail.

With kind regards, I am

Sincerely yours,



Alice W Hunter
Legal Assistant to
Charles L. Anderson

CLA/awh

STATE OF SOUTH CAROLINA)
)
COUNTY OF ANDERSON)

Daryl L. Gray,)
#317285,)
)
PLAINTIFF,)
)
VS.)
)
STATE OF SOUTH CAROLINA)
)
DEFENDANT.)
_____)

IN THE COURT OF COMMON PLEAS
C.A. NUMBER: 2012-CP-04-2644

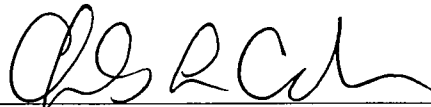
NOTICE OF INTENT TO APPEAL

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DEC 13 2013

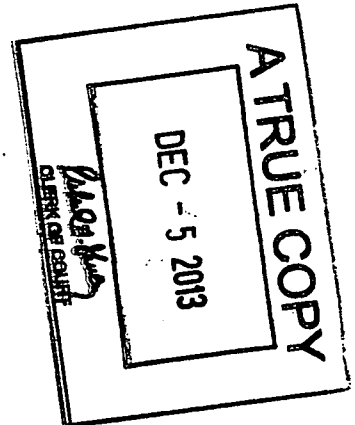
S.C. Supreme Court

The above-named applicant, Daryl L. Gray, #317285, hereby appeals to the Supreme Court for the State of South Carolina from the order of Dismissal of the Honorable R. Lawton McIntosh. The Order was filed on December 3, 2013. Plaintiff's counsel received a clocked in copy from the Clerk of Court for Anderson County on December 4, 2013.



Charles L. Anderson
ATTORNEYS FOR THE PLAINTIFF

Anderson, South Carolina
December 5, 2013



STATE OF SOUTH CAROLINA)
)
COUNTY OF ANDERSON)
)
Daryl L. Gray,)
#317285,)
)
PLAINTIFF,)
)
VS.)
)
STATE OF SOUTH CAROLINA)
)
DEFENDANT.)
_____)

IN THE COURT OF COMMON PLEAS

C.A. NUMBER: 2012-CP-04-264 **RECEIVED**


DEC 13 2013

S.C. Supreme Court

CERTIFICATE OF SERVICE APPEAL
BY MAIL

I, hereby certify that I am an employee of the law firm of Kenyon, Lusk & Anderson, and that I have this 10th day of December, 2013; served the PLAINTIFF'S NOTICE OF INTENT TO APPEAL, upon the Defendant's counsel in the above captioned case by placing a copy of the same in the United States Mail with postage affixed thereto to insure delivery thereof, addressed as follows:

Mr. J. Walt Whitmire
Office of the Attorney General
P.O. Box 11549
Columbia, South Carolina 29211-1549



Alice W Hunter

SWORN TO BEFORE ME THIS 10th day of December, 2013.



Notary Public for South Carolina

My Commission Expires: 6/15/15

At the PCR hearing, the Applicant alleged he was being held in custody unlawfully for the following reason:

1. Ineffective Assistance of Trial Counsel:
 - a. Failure to investigate and advise on the applicability of self-defense.
 - b. Failure to advise on the merits of pursuing an immunity hearing.
 - c. Failure to advise on the impact of alleged collateral federal charges prior to the guilty plea.
 - d. Failure to file a notice of appeal.
2. Involuntary Guilty Plea
 - a. The plea colloquy resulted in an involuntary guilty plea
3. Due Process Violation
 - a. Inadequate jury composition resulted in denial of a right to trial

SUMMARY OF TESTIMONY

At the PCR hearing, Applicant testified and alleged plea counsel was deficient on several grounds. Applicant testified counsel never discussed pursuing self-defense or defense of others during their consultations. Applicant was denied bond during the pendency of the disposition of the charges. Counsel met with him on four or five occasions. Applicant stated counsel did discuss the "Trayvon Martin" defense strategy with him. Applicant stated that counsel discussed the eyewitness statements with him. However, upon cross-examination, Applicant acknowledged counsel advised him the State's evidence precluded a meritorious defense strategy. Applicant acknowledged that he gave statement after the commission of the offense to Detective Oglesby. Applicant told the Oglesby that he exited his vehicle and grabbed his pistol to confront the victim subsequent to a confrontation with a third person. In Applicant's statement, he further told Oglesby he first attempted to fire a round into the victim but failed because the safety mechanism on the pistol was still in place. Subsequently, Applicant fired the first round into the victim's calf muscle before unloading the remainder of the clip at the victim. Applicant acknowledged the

third person, Applicant's girlfriend, who prompted Applicant's actions gave a statement on June 27, 2010 to Officer Brooks. She told Brooks that she pleaded with Applicant to disengage from the confrontation with the victim and leave the scene prior to the killing. Applicant acknowledged the victim's mother, Patricia Clyburn, was an eyewitness to the offense. Clyburn gave a statement on June 27, 2010 to Oglesby. In Clyburn's statement, she told Oglesby that Applicant gunned down the victim after he attempted to walk back into her residence. Clyburn watched the victim get shot by Applicant. In Clyburn's statement, she asked Applicant to leave the area after she noticed he was armed. As the victim retreated back to her residence, Applicant shot the victim in the calf which caused his fall. Applicant fired numerous shots into the victim after he fell to the ground. Applicant acknowledged that Clyburn along with other witnesses gave statements that he and his girlfriend fled after he killed the victim. Applicant also acknowledged that none of the eyewitnesses gave statements that the victim was or might have been armed with a weapon during the offense.

Applicant testified counsel advised him he was already going to be incarcerated and convicted for unknown federal charges. Applicant also testified counsel advised him to accept the offer because the probability he would be found guilty at trial and face a potential sentence of life imprisonment on the murder charge. On cross-examination, Applicant acknowledged that he never advised the plea judge that this was the but for reason of pleading guilty when the plea judge inquired if had had been influenced or coerced into entering the plea. Applicant also alleged plea counsel never discussed his right to an appeal or filed a notice of appeal on his behalf.

Applicant alleged his guilty plea was rendered involuntarily because the plea judge failed to go through the charges and requisite waiver of rights with him in colloquy. Upon cross-

examination, Applicant acknowledged the plea judge further inquired on his desire to enter the plea after Applicant contested the solicitor's version of facts to one of the elements of self-defense. Furthermore, Applicant acknowledged he utilized the opportunity provided by the plea judge to temporarily stop the plea hearing to discuss the waiver of an immunity hearing with plea counsel. Last Applicant alleged a due process violation because he claimed he desired a jury trial but pled guilty because there were an inadequate number of potential jurors that week for a jury trial.

At the PCR hearing, counsel was appointed to represent Applicant on the Anderson County charges in September of 2010. Counsel filed for discovery and reviewed the State's evidence with Applicant. Counsel discussed viable defenses included the recent "Protection of Persons and Property" statute with Applicant. Counsel discussed Applicant's right to an immunity hearing, the burden of proof at the hearing, and the possibility of an appeal prior the Supreme Court's recent decision denying the interlocutory appeal. Counsel explained the Applicant's version of the facts of the offense: Applicant accompanied his girlfriend to the victim's home to confront the victim; a confrontation between the girlfriend and the victim escalated to victim throwing a punch at the girlfriend; and Applicant engaged the victim and shot him outside the victim's residence. As a result of the overwhelming evidence, counsel entered plea negotiations with the solicitor. Counsel obtained a favorable offer to plead Applicant to voluntary manslaughter with the recommendation of a twenty-five (25) year term of imprisonment. Counsel conveyed the offer and thoroughly explained the nature of a guilty plea hearing along with the requisite constitutional waivers. Counsel stated Applicant was provided sufficient time to consider accepting the offer. Counsel stated he discussed the Applicant's right to an immunity hearing as provided by the "Protection of Persons and Property Act." Counsel

advised Applicant not to pursue a fruitless immunity hearing because the solicitor was free to withdraw the plea offer at will. Counsel advised Applicant of his full exposure to incarceration. Counsel stated he would have filed a notice of appeal had Applicant requested an appeal. Last, plea counsel stated on the day of the plea at the beginning of April in 2012, he would not have yet even been provided a list of the venire panel to begin any preliminary trial preparations.

APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668, 104 S.Ct. at 2064. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 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.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court's records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and exhibits from the prior proceedings, and, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

I.

This Court finds Applicant is not entitled to a new trial. Applicant failed to meet his burden to prove his guilty plea was entered involuntarily as a result of counsel's alleged deficiencies, error in the manner the plea judge conducted the hearing, or by an alleged due process violation. This Court also finds Applicant is not entitled a review of direct appeal issues. This Court finds counsel's testimony credible and Applicant's testimony not credible. This Court finds plea counsel effectively represented Applicant in this matter that resulted in obtaining Applicant a favorable plea offer while the there existed overwhelming evidence of guilt.

A.

This Court finds Applicant failed to prove counsel was deficient in failing to investigate and advise him regarding self-defense. "Where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the prejudice inquiry will depend largely on whether the affirmative defense likely would have

succeeded at trial. Stalk v. State, 383 S.C. 559, 562, 681 S.E.2d 592, 594 (2009).

To establish self-defense, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, if the defendant was actually in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; and (4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in the particular instance.

State v. Strickland, 389 S.C. 210, 214-15, 697 S.E.2d 681, 683-84 (Ct. App. 2010) (citing Hendrix, 270 S.C. at 657-58, 244 S.E.2d at 505-06). This Court finds counsel reasonably advised Applicant that pursuing a self-defense strategy at trial would have been futile in this case. Applicant failed to show any beneficial evidence that could have aided his defense in any of the four elements. Although Applicant testified he felt that he was subjectively in imminent danger of serious bodily injury or death, his statements provided to police after he killed the victim completely negated that testimony. Applicant attempted to shoot the victim at three different instances during the offense, two of which resulted in the victim being shot. The first instance the victim was shot, the eyewitness statements along with the pathologist's findings showed the victim was shot while he retreated from Applicant. (Plea Transcript p.8). Because of the State's evidence and overwhelming evidence of guilt, counsel's representation on the matter was sound. Counsel pursued a strategy to show the absence of malice in the offense. See Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (citing Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002) (when counsel articulates a valid reason for employing a certain strategy, such

conduct generally will not be deemed ineffective assistance of counsel.). As a result, counsel obtained a plea offer to the lesser-included offense of voluntary manslaughter. He further presented his case on the absence of malice during mitigation phase of the plea hearing in urging the plea judge to accept the solicitor's recommendation. (Plea Transcript pp.12-13).

B.

Additionally, Applicant failed to prove counsel was ineffective for advising him on his was ineffective in advising him regarding an immunity hearing. The Protection of Persons and Property Act established:

The Act provides, "It is the intent of the General Assembly to codify the common law Castle Doctrine which recognizes that a person's home is his castle...." S.C.Code Ann. § 16-11-420(A) (Supp.2010). The Act also states, "the General Assembly finds that it is proper for law-abiding citizens to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others."

State v. Duncan, 392 S.C. 404, 407-08, 709 S.E.2d 662, 663 (2011) (S.C.Code Ann. § 16-11-420(B) (Supp.2010). The immunity provision at issue provides: "A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force, unless the person against whom deadly force was used is a law enforcement officer." § 16-11-450(A) (Supp.2010). This Court finds Applicant failed to produce any evidence that showed he was entitled to the presumption of imminent danger under § 16-11-440(A) (Supp.2010) at an immunity hearing. This Court finds Applicant failed to prove that he would meet prove by a preponderance of the evidence at an immunity hearing he did not kill the victim on Clyburn's property after she asked him to leave. § 16-11-440(B). Last, this Court finds § 16-11-440(C) provided no benefit to Applicant's presumed immunity challenge for the

reasons announced above regarding the merits of self-defense at trial. Although this code section negates the fourth element of self-defense, the duty to retreat, only at the immunity hearing, the State's evidence disproved beyond a reasonable doubt any notion that Applicant was in actual or objective imminent danger of substantial harm, and was without fault in causing the incident that led to the victim's death.

This Court finds counsel's advice to forgo an immunity challenge was objectively reasonable. Counsel advised Applicant the probable finding at an immunity hearing and an unsuccessful appeal, prior to the Court's holding in State v. Isaac, did not justify the rejection of the plea offer at the risk of exposure of spending the rest of his life in the Department of Corrections. See State v. Isaac, Appellate Case No. 2013-001464, 2013 WL 4456870 (S.C. Aug. 21, 2013).

C.

Last, this Court Applicant's allegation that counsel was deficient in advising him to enter a guilty plea because he was already going to serve a prison sentence on a collateral charge is without merit. Applicant produced no evidence to show he faced pending charges in other jurisdictions. This Court finds the Department of Correction's August 13, 2012, Summary Report on Applicant stated that there were no pending detainers on Applicant. Holden v. State, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011) ("the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing."). Regardless, this Court finds Applicant did not inform the trial judge alleged collateral inducement. Therefore, this allegation is denied and dismissed.

D.

This Court finds Applicant failed to prove plea counsel was ineffective for not filing a notice of appeal on his behalf. This Court accepted consideration of this allegation over the State's objection based on Applicant's failure to make this allegation in his application for PCR or timely amend. "[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for 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, 480, 120 S.Ct. 1029 (2000). First, this Court finds that rationale defendant in Applicant's position would not have desired an appeal. The State's evidence of Applicant's guilt for voluntary manslaughter was overwhelming; the evidence of Applicant's guilt for murder was exceptionally strong. Applicant own statement after the commission of the offense shows evidence of malice. Numerous eye-witnesses gave statements that Applicant continued to shoot the victim after the initial shots left him incapacitated. Applicant killed the victim in front of his mother and immediately fled the scene. The exposure on murder charge would have precluded a reasonable defendant's in Applicant's position from desiring an appeal. Furthermore, counsel conveyed the offer along with solicitor's recommendation of twenty-five (25) year term of imprisonment to Applicant and was followed by the plea judge. Second, Applicant failed to produce any evidence that showed he indicated his displeasure or desire to appeal the conviction and sentence in a timely fashion.

E.

This Court finds Applicant failed to meet his burden to prove the plea judge's acceptance of his guilty plea constituted a due process violation. The Due Process Clause requires guilty pleas be entered into voluntarily, knowingly, and intelligently. Boykin v. Alabama, 395 U.S.

238, 89 S.Ct. 1709, 23 L.E.2d 274 (1969). "Before a court can accept a guilty plea, a defendant must be advised of the constitutional rights he or she is waiving. In addition to the requirements of Boykin, a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000). This Court finds Applicant's statement that he was defending himself went to one element of self-defense and was inconsequential where Applicant made a knowing, intelligent, and voluntary waiver of his right to trial. Furthermore, Applicant told the plea judge he was guilty of the voluntary manslaughter. (Plea Transcript p.6). Applicant accepted the State's recitation of the facts of the offense with the exception of particular location he shot the victim and subjective belief he was defending himself during the commission of the offense (Plea Transcript p.6, line 25—p.8, line 28). The plea judge further inquired on Applicant's desire to enter the guilty plea and Applicant adamantly affirmed his desire to plead guilty. (Plea Transcript, p.9). Furthermore, Applicant told the plea judge he was guilty of the voluntary manslaughter. (Plea Transcript, p.6). Therefore, this allegation is denied and dismissed.

II.

Except as discussed above, this Court finds that the Applicant affirmatively abanded the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BML, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's

failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

CONCLUSION

Based on all the forgoing, 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 for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.


This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR, Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's 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. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 26 day of Nov, 2013.

FILED - JUDGE'S OFFICE
ANDREWS SC
2013 DEC -3 A 9 34
GENERAL SESSIONS
AND


R. LAWTON MCINTOSH
Presiding Judge
Tenth Judicial Circuit

Anderson, South Carolina

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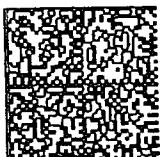
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