

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No. 2012-CP-43-1769

RECEIVED

DEC 17 2013

S.C. Supreme Court

Kwaun Ka'Shawn Peay, SCDC # 349444, Appellant

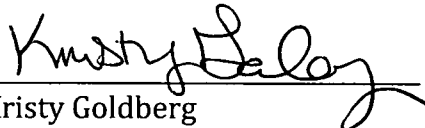
v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Applicant Kwaun Peay hereby appeals from the Order of the Honorable R. Knox McMahon presiding Judge for the 3rd Judicial Circuit, filed December 9, 2013 and received by counsel for the Applicant on December 16, 2013 in the matter of Kwaun Peay v. State of South Carolina, Case No. 2012-CP-43-1769.

December 16, 2013



Kristy Goldberg
Attorney for Plaintiff

Law Office of Kristy Goldberg, LLC.
1720 Main Street, Suite 301
Columbia, SC 29201
Phone (803) 252-2299
kristy@kristygoldberglaw.com

Other Counsel of Record:

Assistant Attorney General, Daniel Gourley
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

THE STATE OF SOUTH CAROLINA
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APPEAL FROM SUMTER COUNTY
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R. Knox McMahon, Circuit Court Judge

Case No. 2012-CP-43-1769

Kwaun Ka'Shawn Peay, SCDC # 349444, Appellant

v.

State of South Carolina, Respondent.

PROOF OF SERVICE

Personally appeared before me, Kristy Goldberg, Esquire, who being duly sworn, deposes
and states:

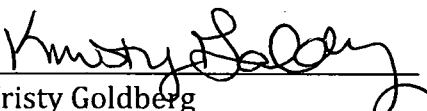
She is the counsel of record for Applicant;

Service by mail is proper in this instance; and

She has served the NOTICE OF APPEAL on the following party on December 16, 2013 by
depositing one copy in the U.S. Mail, postage prepaid:

Assistant Attorney General, Daniel Gourley
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

December 16, 2013



Kristy Goldberg

Attorney for Plaintiff

Law Office of Kristy Goldberg, LLC.
1720 Main Street, Suite 301
Columbia, SC 29201
Phone (803) 252-2299
kristy@kristygoldberglaw.com

LAW OFFICE OF
Kristy Grafton Goldberg, LLC
ATTORNEY AT LAW

December 16, 2013

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

RECEIVED
DEC 17 2013
S.C. Supreme Court

RE: Kwaun Ka'Shawn Peay, SCDC # 349444 vs. State of South Carolina
Case No. 2012-CP-43-1769

Dear Mr. Shearouse,


Enclosed for filing is a Notice of Appeal in the above referenced case. Also enclosed are a certificate of service and a copy of the court order which is to be challenged on appeal.

I would appreciate it if you could file the Notice of Appeal and mail a date-stamped copy back to me in the enclosed pre-stamped envelope.

By copy of this letter I am informing the Office of Appellate Defense of this Appeal so that they can provide Mr. Peay with an application for indigency and hopefully begin representation of Mr. Peay. If they are able to take the case, I am also hereby requesting that Appellate Defense obtain a copy of the court transcript within the time required by this court.

Please let me know if you have any questions or concerns regarding this matter.

Respectfully,



Kristy Goldberg

CC: Daniel Gourley
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549

Kwaun Peay, SCDC # 349444
Lieber Correctional Institution
Post Office Box 205
Ridgeville, SC 29472

James C. Campbell
Sumter County Clerk of Court
141 N Main St Rm 308
Sumter, SC 29150-4965

Office of Appellate Defense
Chief Appellate Defender – Robert Dudek
PO Box 11433
Columbia, SC 29211-1433

RECORDED

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER 2013 DEC -9 PM 12:29) FOR THE THIRD JUDICIAL CIRCUIT

Kwaun Ka'Shawn Peay, #349444)
JAMES C. CAMPBELL)
CLERK OF COURT)
SUMTER COUNTY S.C.)

Case No. 2012-CP-43-1769

Applicant,)

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

This matter comes before the Court by way of a post-conviction relief application filed on September 7, 2012. Respondent made its Return on January 15, 2012. An evidentiary hearing into the matter was convened on October 2, 2013, at the Sumter County Courthouse. Applicant was present at the hearing and was represented by Kristy Goldberg, Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. Applicant was true bill indicted at the March 2011 term of the Sumter County Grand Jury under a six count indictment (2011-GS-43-0431) for (1) Trafficking Cocaine Base-More than 28 Grams, Less than 100 Grams; (2) Trafficking Cocaine 200 Grams or More, But Less than 400 Grams; (3) Manufacturing Cocaine Base; (4) Possession of Marijuana; (5) Resisting Arrest; and (6) Failure to Stop for Blue Light/Siren. He was represented by Lauren Stevens, Esquire. On January 25, 2013, the Applicant pled guilty before the Honorable W.

Jeffrey Young. He was sentenced to twenty years imprisonment and a \$50,000.00 fine for Trafficking Cocaine- 28 Grams to 100 Grams; with the sentences to be served concurrently. The remaining charges were *nolle prossed* pursuant to the plea. Applicant through Todd Rutherford, Esquire, filed for a motion to reconsider the sentence on February 9th, 2012. By letter dated September 9, 2013, Todd Rutherford withdrew Applicant's request for a hearing on motion to reconsider sentence.

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following allegations:

1. Ineffective assistance of counsel regarding trial preparation
 - a. "Trial counsel did not speak to client regarding possible trial issues or strategies, evidentiary issues, or possible defenses."
2. Ineffective assistance of counsel regarding trial notice which resulted in involuntary plea.
 - a. "Trial counsel did not provide adequate notice of trial to client and did not provide client with sufficient time and information to make an informed decision whether to plea."

SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. The State presented testimony from plea counsel, Lauren Stevens, Esquire (Counsel). This Court also had before it a copy of Applicant's guilty plea transcript, the records involving the motion for reconsideration, the records of the Sumter County Clerk of Court, and records from the South Carolina Department of Corrections.

During the evidentiary hearing, Applicant testified that he met with Counsel twice prior to his guilty plea. Applicant testified during the first meeting, Counsel Stevens asked if he was going to plead or take the case to trial. Applicant testified on the second meeting, Counsel



Stevens explained that he needed to tell on someone or accept a twenty five year plea deal. However, Applicant testified he was out on bond prior to his guilty plea. Applicant testified on January 24 Applicant told the trial judge that he was represented by Murrell Smith (Counsel Smith); however Counsel Smith could not be present during the court proceeding because he had to be in general sessions court. Applicant testified Counsel Stevens again reiterated to him on January 24th that if he refused to tell on someone he would be serving twenty two out of twenty five year sentence. Applicant testified that he asked for another attorney on January 25th, but the judge denied his request. Applicant testified he requested new trial because he felt he was not given a fair chance due to Counsel's failure to review discovery material and lack of meetings. Applicant testified he chose to plead guilty as a result of the judges denial of his request for a new attorney.

Applicant testified that he never received nor reviewed discovery with Counsel Stevens. Applicant testified that he did review the arrest warrants. Applicant testified Counsel Stevens never discussed any possible defenses or trial strategies. Applicant testified he did not give Counsel Stevens any leads or witnesses to investigate. Applicant testified he felt the search warrant should have been challenged by Counsel Stevens. However, Applicant recalled telling the plea judge that he understood his constitutional rights. (Tr. p. 11-12). Applicant recalled telling the plea judge that no one had promised or coerced him into pleading guilty (Tr. p. 12). Applicant further recalled telling the plea judge that he was guilty of all charges. (Tr. p. 12-13).

Applicant testified after the guilty plea, his parents paid Todd Rutherford (Rutherford) to file a motion for reconsideration. However, Applicant explained that Rutherford did not represent him on the underlying guilty plea. Applicant testified that he never heard anything from Rutherford and was unaware that Rutherford filed the motion for reconsideration.

A handwritten signature in black ink, appearing to be the initials 'AB' or similar, located at the bottom right of the page.

Applicant testified that he never authorized Rutherford to withdraw his motion for reconsideration.

Following Applicant's testimony, Counsel Stevens was called to testify by the State. Counsel Stevens testified that she was appointed to Applicant's case sometime in January 2011. Counsel Stevens testified that she met with Applicant twice prior to his guilty plea. Counsel Stevens testified that Applicant was out on bond the entire time. Counsel Stevens explained that Applicant knew where her office was located and Applicant had her telephone number if he had any questions or concerns. Counsel Stevens testified she filed for and reviewed discovery with Applicant. Counsel testified that the State had very good evidence against Applicant. Counsel testified the Solicitor's office at the time gave very little notice as to when a case would be called for trial. Counsel Stevens testified she sent a letter to Applicant's address and tried to call him in an attempt to notify him that his case was going to be called for trial.

Counsel Stevens further testified that she told Applicant he was facing a minimum mandatory sentence of twenty five years if he proceeded to trial. Counsel Stevens testified she explained to Applicant that the plea judge could run all sentences consecutive and "he could be an old man" by the time he gets out of jail. Counsel Stevens testified that Applicant was well aware of all the consequences of his plea. Counsel Stevens testified she was prepared to take the case for trial and Applicant chose to plead guilty. Counsel explained that Merrell Smith represented Applicant on unrelated charges.

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. Specifically, this Court finds that Counsel's testimony is very credible while Applicant's testimony is less credible. 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, (1984); Butler, 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, 286 S.C. 441, 334 S.E.2d 813 (1985). Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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). Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel.

INEFFECTIVE ASSISTANCE OF COUNSEL

Plea counsel ineffective for failing to speak with Applicant regarding possible trial issues or strategies, evidentiary issues, or possible defenses.

This Court finds Applicant's allegation that he was denied effective assistance of plea counsel for failing to discuss with him possible trial issues or strategies, evidentiary issues, or possible defenses is without merit. This Court finds the guilty plea transcript, along with Counsel's credible testimony, reveals Applicant freely and voluntarily pled guilty. Counsel Stevens testified she met with Applicant twice prior to his guilty plea. Counsel Stevens testified she reviewed and discussed all discovery material with Applicant prior to his guilty plea. Counsel Stevens further testified that the State's evidence against Applicant was "very good." Counsel Stevens testified that Applicant was out on bond the entire time and Applicant knew where her office was located. Counsel Stevens further testified that Applicant had her office phone number if he had any questions or concerns. Further, Applicant testified that he did not give Counsel Stevens any witnesses or leads to investigate. This Court finds that Applicant has failed to meet his burden of proof in regards to this allegation, and accordingly this allegation must be denied and dismissed with prejudice.

This Court notes that the plea transcript reflects Applicant explaining to the plea judge that he was not satisfied with Counsel and requesting a new attorney. (Tr. p.13). The plea court denied Applicants request and found Counsel Stevens was fully prepared to take the case to trial if Applicant chose to proceed with a jury trial. (Tr. p 13-14). The plea court further found Applicant "entered into the plea freely and voluntary. He has the advice of counsel. And



although he says he is not satisfied with that, the court sees nothing that would give the court reason to think that she had not acted as a professional, and done what she could have for her client.” (Tr. p. 15). To find a guilty plea is voluntarily and knowingly entered into, the record must establish a defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969). In Boykin, the United States Supreme Court held that before a court can accept a guilty plea, a criminal defendant must be advised of the constitutional rights he is waiving. Id. In the present case, the plea court sufficiently complied with the requirements of Boykin to ensure that Applicant was making a free and knowing decision to plead guilty. This Court further finds this issue raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). This Court finds that Applicant has failed to meet his burden of proof in regards to this allegation, and accordingly this allegation must be denied and dismissed with prejudice.

Plea Counsel ineffective for not providing adequate notice of trial to Applicant and not providing Applicant with sufficient time and information to make an informed decision whether to plea.

This Court finds Applicant's allegation of ineffective assistance of plea counsel for not providing adequate notice of trial to client and not providing client with sufficient time and information to make an informed decision whether to plea is without merit. This Court finds the guilty plea transcript, along with Counsel Stevens credible testimony, reveals Applicant freely and voluntarily pled guilty. Counsel Stevens testified the Solicitor's office gave very little notice prior to trial. Counsel Stevens explained that Applicant's name was on the trial docket every week and his case would be subject to call at any point. Counsel Stevens testified after she was



given notice of trial, she attempted to contact Applicant via a letter mailed to his address and multiple phone calls to his listed number. Counsel Stevens testified Applicant was out on bond. This Court finds that Applicant has not shown that Counsel's performance fell below "professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Accordingly, this Court finds that Applicant has failed to meet his burden of proof in regards to this allegation, and accordingly this allegation must be denied and dismissed with prejudice.

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, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby 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 notes that that Applicant must file and serve a notice of appeal within thirty 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), SCRPC, 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:

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 26 day of Nov, 2013.



R. KNOX MCMAHON
Presiding Judge
Third Judicial Circuit


_____, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
RECORDED CASE NUMBER 2012CP4301769

Kwaun Ka Shawn Peay

2013 DEC 1 South Carolina State of

JAMES O. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

VERIFIED TRUE COPY
OF ORIGINAL FILED

DEPUTY CLERK OF COURT
SUMTER COUNTY, S.C.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Clerk of Court

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON): Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or, Other: _____
modify arbitration award;
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:
ORDER INFORMATION

This order ends does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled (List amount(s) below) |
|--|--|--|
| | | |
| | | |
| | | |

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge: _____

2145

Judge Code: _____

12/11/2013

Date: _____

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on, to attorneys of record or to parties (when appearing pro se) as follows:

Kwaun Ka Shawn #349444 Peay Lieber Corr Institution Po
Box 205 Ridgeville, SC 29472

Alan McCrory Wilson PO Box 11549 Columbia, SC 29211-
1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

James C. Campbell

Court Reporter

James C. Campbell - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

See attached Order.

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER
IN THE COURT OF COMMON PLEAS

KWAUN KA SHAWN PEAY, #349444

Applicant,

v.

STATE OF SOUTH CAROLINA,

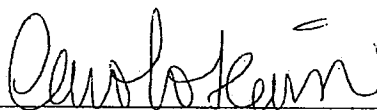
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

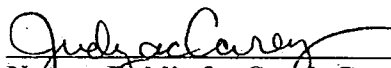
**Kristy Grafton Goldberg, Esquire
Law Office of Kristy Goldberg, LLC
1720 Main Street, Suite 301
Columbia, SC 29201**

This 13th day of December, 2013.



Caroline Kaiser, Legal Assistant
For Respondent

SWORN to before me this 13th day of December, 2013.


Notary Public for South Carolina.

My Commission expires 5/11/2014

LAW OFFICE OF
Kristy Grafton Goldberg, LLC
ATTORNEY AT LAW
1720 MAIN STREET, SUITE 301
COLUMBIA, SOUTH CAROLINA 29201

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

COLUMBIA SC 292
TUE 17 DEC 2013 AM

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