STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	2012–CP–10–3597
	)	
Leonard Roper,[1] #338094,	)	
	)	
Applicant,	)	
	)	
v.	)	**AMENDED ORDER OF DISMISSAL**[2]
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

FILED
2013 SEP 24 PM 3:13
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Presiding Judge:	Hon. Deadra L. Jefferson
Applicant's Attorney:	Joenathan S. Chaplin, Esq.
	Nicole L. Singletary, Esq.
	Edwin D. Givens, Esq.
Respondent's Attorney:	Ashleigh R. Wilson, Esq.
Plea Counsel:	Alex N. Apostolou, Esq.
Date of Hearing:	May 21, 2013
Court Reporter:	Deborah Garrison

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed June 1, 2012. The Respondent made its Return on January 23, 2013. An evidentiary hearing into the matter was convened on May 21, 2013 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Joenathan S. Chaplin, Esquire, Nicole L. Singletary, Esquire, and Edwin D. Givens, Esquire. Ashleigh R. Wilson, Esquire, of the South Carolina Attorney General's Office represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Applicant's plea counsel, Alex N. Apostolou, Esquire, and Nadia Johnson Roper, also testified at the hearing. This Court had before it the guilty plea transcript, the records of the Charleston County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the PCR application,

[1] The Applicant is also known as Jarvis Roper.
[2] Amended to correct scriveners and citation errors.

Respondent's Return thereto, and the Applicant's appellate record.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Charleston County. The Applicant was indicted at the March 2009 term of the Charleston County Grand Jury for five (5) counts of trafficking in cocaine 28–100g (2009–GS–10–1616, 1617, 1618, 1619, 1620, and 1621) and possession with intent to distribute cocaine (2009–GS–10–1621). Alex N. Apostolou, Esquire, represented the Applicant. The Applicant pled guilty to five (5) counts of trafficking cocaine 10–28g and possession with intent to distribute cocaine. The Honorable Roger M. Young, Sr. sentenced the Applicant to confinement for twenty (20) years for each trafficking charge and ten (10) years for the possession with intent to distribute charge. The sentences were to run concurrently.

The Applicant filed a timely Notice of Appeal. On appeal, the Applicant was represented by Lanelle Durant, Esquire, of the Office of Appellate Defense. The South Carolina Court of Appeals dismissed the Applicant's appeal. State v. Roper, 2011–UP–257 (S.C. Ct. App. June 1, 2011). The Remittitur was issued June 24, 2011.

ALLEGATIONS

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

1. Ineffective assistance of counsel.
    a. Failure to investigate the Petitioner's case.
    b. Failure to object to improper statements that were made at the guilty plea.
    c. Advised the Applicant to plead guilty based on erroneous sentencing advice.
    d. Failure to research the law and elements of entrapment to prepare an adequate and complete defense that denied Applicant his 6th Amendment right to effective

2 of 16

representation.
2. 4th Amendment violation.
3. Violation of due process rights.

At the evidentiary hearing, the Applicant presented testimony and evidence to support the following allegations:

1. Ineffective assistance of counsel.
    a. Failure to investigate the Petitioner's case.
    b. Failure to object to improper statements that were made at the guilty plea.
    c. Advised the Applicant to plead guilty based on erroneous sentencing advice.
    d. Failure to file a motion to discover the identity of the confidential informant.

This Court finds all other allegations raised in the application for post-conviction relief were abandoned by the Applicant.

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 his or her 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).

Summary of Testimony

The Applicant testified at the evidentiary hearing that he retained Alex N. Apostoulou, Esquire to represent him shortly after bonding out of jail. He testified he met with counsel five (5) times prior to pleading guilty for forty-five (45) minutes to one (1) hour each time. He testified counsel e-mailed the discovery to him and they discussed the documents by phone shortly before the guilty plea. He also testified they reviewed the video of his controlled buy and

the officer's statement. The Applicant conceded the voice on the video they received of the controlled buy was his voice however he contends he was not discussing drugs on the video.

The Applicant testified he felt the State had no evidence against him and his case was solely based on a statement from a confidential informant. He testified counsel should have made a motion to obtain the identity of the confidential informant. The Applicant then conceded he was aware of the identity of the confidential informant and spoke with counsel about the credibility of the informant. He further testified he did not review the drug analysis with counsel prior to his plea. He testified counsel should have investigated the drug analysis done in his case. The Applicant testified counsel also did not discuss potential witnesses that they could call at trial.

The Applicant testified counsel came to him the week of the guilty plea with a plea offer from the State. He testified counsel told him he would receive five (5) years if he pled guilty. He acknowledged his attorney seemed knowledgeable. He testified counsel did not discuss his constitutional rights, the enhancement statute, or his right to testify. He also testified counsel did not explain to him that the court did not have to accept the plea offer from the State.

The Applicant testified counsel did not investigate his case. He testified had counsel investigated, he would have discovered problems with his case, the location of the buys, and the video and audio of the buys. The Applicant also testified trial counsel did not tell him SLED officers would be present at his guilty plea and their presence alarmed them. He testified the SLED officers called him a "kingpin" at the guilty plea. The Applicant recalled his uncle and mother telling the court he was not a "kingpin" at his guilty plea. He testified the court would

take the word of law enforcement officers over that of his family. He also recalled counsel filing a Motion to Reconsider Sentence based on the statements of the SLED officers.

The Applicant testified he pled guilty because he was uncomfortable with counsel's representation and because he did not want to go to trial. He testified he also accepted the plea because the time was short enough for him to be away from his wife and kids. The Applicant then testified he now wants to go to trial to face his original charges since he did not receive a five (5) year sentence.

Nadia Johnson Roper, the Applicant's wife, also testified at the evidentiary hearing. She testified she attended three (3) meetings with counsel and that all of them were not at the attorney's office. She testified that one of the three meetings was at the Applicant's parent's home. She testified the meetings were not in depth. She testified she was not privy to all of the conversations her husband had with his attorney. Mrs. Roper also testified the Applicant and counsel discussed the plea negotiations the morning of the guilty plea. She testified counsel told the Applicant that the mandatory sentence for his charges was dropped from seven (7) years to five (5) years and the Applicant would be sentenced to five (5) years. She testified they thought five (5) years was good for the family. However, she testified she was aware the maximum exposure for the offenses was at least twenty-five (25) years. Lastly, she testified she was certain counsel did not say the Applicant could be sentenced between five (5) and twenty five (25) years in prison.

Alex N. Apostolou, Esquire, testified he has spent the last ten (10) years practicing criminal law. He testified when he was retained to represent the Applicant he had been practicing for six (6) to seven (7) years and had tried approximately ten (10) serious cases. His previous

practice was in the solicitor's office. He testified he met with the Applicant five (5) times and was unable to meet with him more frequently. Counsel testified he tried to communicate to the Applicant and his family the serious nature of the charges he was facing, but it was difficult to get in touch with the Applicant, which contributed to their communication problems. He testified he felt they should have met more times because the case was already on the plea docket several times before he was retained. He testified he tried to talk and meet with the Applicant more often however the applicant was uncooperative. He testified as a result he went to the applicant's parent's home for a meeting to convey the "monster serious" nature of the case and the fact that they needed to have an "aggressive conversations" about it.

Counsel testified he filed Brady and Rule 5 motions on the Applicant's behalf. He testified he met with the assistant solicitor in her office to receive the discovery and sent a copy to the Applicant. He testified further they had some basic conversations about the State's evidence. Counsel testified he discussed with the Applicant the elements of the charges, what the State was required to prove, possible defenses, the confidential informant's lack of credibility and the Applicant's version of the facts. He testified there was evidence of five (5) different buys on initiated by a recorded call (audio) all with the same confidential informant following the same pattern of the confidential informant calling the applicant followed by a controlled buy. He testified there were no witnesses other than the video, audio and the confidential informant.

Counsel testified his investigation of the case included a review of all discovery and a review of the video of the controlled buys. Counsel testified he was present at the preliminary hearing and was able to question all the officers and meet with the Solicitor to discover all the

evidence against the Applicant. He further testified he was not aware of any additional investigation that needed to be done in the Applicant's case.

Counsel testified he was aware of the identity of the confidential informant and did not need to file a motion to obtain his identity. Counsel testified he discussed proceeding to trial as an option with the Applicant and told him what would happen if he went to trial. He testified he discussed a motion to suppress the drugs with the Applicant and would have filed such motion had the Applicant indicated he wanted to proceed to trial.

Counsel testified the Applicant was on the plea docket prior to him being retained. He testified he was always in plea negotiations with the State and wanted to obtain a plea offer for the Applicant. He testified the State offered a plea to a lesser included offense that would reduce the minimum mandatory sentence from seven (7) years to five (5) years. He testified the Applicant would be pleading to a range of sentences from five (5) to twenty five (25) years in prison. Counsel testified he communicated the offer and he never told the Applicant he would be guaranteed a sentence of five (5) years. Counsel testified he did not advise the Applicant on whether to accept or reject the plea offer. He testified that he advised him of the pros and cons of a plea so that he could make an informed decision however under the circumstances he probably told him a plea made sense in this situation. He testified he let the Applicant make his own decision. He further testified the day before the Applicant's plea, his mother in law told him that the Applicant thought he would be getting a five (5) year sentence. Counsel testified after speaking with the Applicant's mother in law, he called the Applicant and told him that a five (5) year sentence was not guaranteed. He testified further that the Applicant never told him he desired a trial on these charges.

Counsel testified he was unaware the SLED agents would be present at the guilty plea until the morning of the plea upon arriving at court. He testified he found out the SLED officers had driven down for the plea because they were "furious" regarding the reduction in the charges. He testified the State was requesting a sentence of substantial jail time and he was aware the State was communicating with SLED. Counsel testified he was balancing several factors during the guilty plea such as law enforcement's right to be present at the plea, ensuring the plea was based on the facts and avoiding any further agitation of law enforcement regarding his client's sentence exposure. He further testified that he attempted a sidebar with the solicitor and the court because of the volatility he perceived however the solicitor would not do it. He further testified that he made a strategic decision to head this off with the substantial mitigation evidence he presented on the Applicant's behalf that would have refuted the officers' characterization of the Applicant. He testified in hindsight he wished he had objected however he was trying to balance his client's best interests at the time. Counsel testified he filed a motion to reconsider based on the SLED officer's statements to the court which was denied.

Ineffective Assistance of Counsel

The Applicant alleges that he received ineffective assistance of counsel. In a post-conviction relief action, the applicant has the burden of proving the allegations in the application by a preponderance of the evidence. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 441, 334 S.E.2d 813, 814 (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, 686, 104 S. Ct. 2052, 2064 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687–90, 104 S. Ct. at 2064–66. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. The applicant must overcome this presumption in order to receive relief. See id.; State v. Cherry, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test to evaluate 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.'" Id. (citing Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). 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." Id. at 117–18, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). "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, 466 U.S. at 694, 104 S. Ct. at 2068). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58–59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citing Hill, 474 U.S. at 59,

106 S. Ct. at 370; Jackson v. State, 342 S.C. 95, 98, 535 S.E.2d 926, 927 (2000); Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000); Rayford v. State, 314 S.C. 46, 48, 443 S.E.2d 805, 806 (1994).

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, 242–44, 89 S. Ct. 1709, 1712 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991) (citing State v. Hazel, 275 S.C. 392, 394, 271 S.E.2d 602, 602 (1980)). When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 650 (2000) (citing Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984)). When a defendant pleads guilty on the advice of counsel, the plea may only be attacked through a claim of ineffective assistance of counsel. Roscoe, 345 S.C. at 20, 546 S.E.2d at 419 (citing Al-Shabazz v. State, 338 S.C. 354, 363–64, 527 S.E.2d 742, 747 (1999)).

This Court finds counsel is a trial practitioner who has extensive experience in the trial of serious offenses. Counsel conferred with the Applicant on several occasions. During conferences with the Applicant, counsel discussed the pending charges, the elements of the charges and what the State was required to prove, the Applicant's constitutional rights, the Applicant's version of the facts, and possible defenses or lack thereof. The record reflects the Applicant's plea was entered freely, voluntarily, knowingly, and intelligently.

Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds that the Applicant's attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation

10/21/16

that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 4–5, 239 S.E.2d 750, 751–52 (1977); Strickland, 466 U.S. at 687–88, 104 S. Ct. at 2064–65; Butler, 286 S.C. 442, 334 S.E.2d 814 (1985) (citing Strickland, 466 U.S. at 687–88, 104 S. Ct. at 2064–65; Turner v. Bass, 753 F.2d 342, 348 (4th Cir. 1985), rev'd on other grounds, Turner v. Murray, 476 U.S. 28, 106 S. Ct. 1683 (1986); Marzullo v. Md., 561 F.2d 540, 544 (4th Cir. 1977)).

Failure to investigate the Petitioner's case

This Court finds counsel was not ineffective for failing to investigate the Applicant's case. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012) (citing Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011)). "An attorney need not pursue an investigation that would be fruitless, much less one that might be harmful to the defense." Harrington v. Richter, 131 S. Ct. 770, 789–90 (2011). "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (citing Kibler v. State, 267 S.C. 250, 256, 227 S.E.2d 199, 202 (1976)).

This Court finds the Applicant has failed to show specific circumstances that would have resulted had counsel further investigated his case. Counsel gave credible testimony that he fully investigated the Applicant's case and was fully aware of the State's evidence against the Applicant. This Court finds and the record reflects through counsel's testimony that counsel

11/04/16

conducted an independent investigation of the facts and circumstances of the case. This Court finds that this allegation is without merit and the Applicant has failed to carry his burden of proving counsel provided ineffective assistance of counsel for failing to investigate his case.

Failure to object to improper statements that were made at the guilty plea

This Court finds counsel was not ineffective for failing to object to what the Applicant has characterized as improper statements that were made at the Applicant's guilty plea. The Applicant alleges counsel should have objected to testimony from SLED officers during his guilty plea in which the officers referred to the Applicant as a drug "kingpin." This Court finds counsel's failure to object did not result in deficient performance. Counsel provided credible testimony that during the guilty plea he was concerned with balancing the Applicant's best interests in not further antagonizing the law enforcement officers and choosing instead to counteract the situation by presenting substantial mitigation on the Applicant's behalf. This Court finds counsel's concerns were valid. This Court finds the presence of SLED officers at a guilty plea for a case in which they have an interest is not uncommon. This Court finds further that counsel provided substantial evidence in mitigation for the Applicant which weighed against the SLED officers' characterization of the Applicant as a "kingpin." This Court finds the Applicant could have chosen to withdraw his guilty plea after the officers' statement, but instead affirmed his desire to plead guilty. (Tr. 20:5–6).

This Court further finds that no prejudice resulted from counsel's failure to object to this testimony since, after the Applicant's plea; counsel filed a Motion for Reconsideration of Sentence based on the Applicant's disagreement with the statements made by the SLED officers during the plea. While the Motion for Reconsideration was denied, the issue was properly

12 of 16

preserved for review by the Court of Appeals. After review of the issue and the entire record pursuant to Anders v. California[3], The Court of Appeals dismissed the Applicant's appeal. This Court finds this allegation is without merit and the Applicant has failed to carry his burden of proving counsel was ineffective for failing to object to improper statements that were made at the guilty plea.

Advised the Applicant to plead guilty based on erroneous sentencing advice

This Court finds counsel was not ineffective for providing erroneous sentencing advice to the Applicant. At the evidentiary hearing, the Applicant alleged counsel told him he was pleading guilty to a five (5) year sentence and that he pled guilty with the understanding he would receive a five (5) year sentence. This Court finds the Applicant's testimony lacks credibility. This Court finds counsel provided credible testimony that he did not advise the Applicant that he would receive a five (5) year sentence. Counsel testified he advised the Applicant that he would be pleading to a lesser included offense which lowered the mandatory minimum sentence from seven (7) years to five (5) years. Counsel also provided credible testimony that when he learned the Applicant thought he was pleading guilty to five (5) years, he called the Applicant to reiterate the plea offer to a lesser included offense with a lower minimum mandatory sentence of five (5) years.

This Court finds the Applicant was aware of the exposure he was facing and advised of the potential sentences he was facing by the court. The court advised the Applicant that the trafficking cocaine charge for which he was originally indicted carried a potential sentence ranging from seven to thirty years. (Tr. 3:18–22.) The court advised the Applicant that the State was allowing him to plead to trafficking cocaine 10–28 grams which carried a potential sentence

[3] 386 U.S. 738, 87 S. Ct. 1396 (1967).

of five to thirty years. (Tr. 3:18–22.) The Applicant was subsequently and repeatedly advised of the mandatory minimum five years on the trafficking charges. (Tr. 19:21–25.) The court also advised the Applicant that he could have been facing life without the possibility of parole (Tr. 4:14–23), that he was pleading to three strike offenses (Tr. 4:14–23), and that the charges were considered violent, which would affect his parole eligibility. (Tr. 5:4–15.) The Applicant told the court during his guilty plea that no one promised him anything to get him to plead guilty other than the reduction of charges. (Tr. 8:11–22.) This Court finds the Applicant's discussion with the court and his high level of education (Tr. 9:1–4) indicates he was well aware of the consequences of his guilty plea and that he was facing a potential sentence between five (5) to thirty (30) years. The Applicant stated to the court during mitigation that he "[couldn't] believe [he] allowed [himself] to be in this situation." (Tr. 25:14–16.) During the colloquy with the court, the Applicant admitted his guilt (Tr. 6:9–12), indicated he was not under the influence of any drugs or alcohol (Tr. 6:13–15), and was not suffering from any physical, mental, or emotional conditions affecting his understanding of the proceedings. (Tr. 6:16–19.) The Court informed the Applicant of his right to a jury trial and his right to challenge the State's evidence, and the Applicant indicated he still wished to plead guilty. (Tr. 5:16–6:5.) The Applicant also told the court that it was his decision solely to plead guilty. (Tr. 8:8–10.) Additionally, the Applicant communicated to the Court that he was satisfied with his attorney and did not need additional time to speak with him. (Tr. 6:20–8:7.) Applicant's attorney provided mitigation to the court by discussing Applicant's education, work history, lack of weapons involved, and family life, (Tr. 14–19), as well as providing many friends and family to speak on his behalf. (Tr. 20–25.) This Court finds the record contains no evidence the State offered or the parties agreed upon any

guaranteed recommended or negotiated sentences. This Court finds that this allegation is without merit and the Applicant has failed to carry his burden of proving counsel was ineffective for providing erroneous sentencing advice.

Failure to file a motion to discover the identity of the confidential informant

This Court finds trial counsel was not ineffective for failure to file a motion to discover the identity of the confidential informant. This Court finds this issue is moot since both the Applicant and counsel testified they knew the identity of the confidential informant. This Court further finds it is unlikely the Applicant would have benefitted from the filing of such a motion by counsel as doing so would have likely halted all plea negotiations with the State. This Court finds that this allegation is without merit and the Applicant has failed to carry his burden of proving counsel was ineffective for failing to file a motion to discover the identity of the confidential informant.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test, specifically that counsel failed to render reasonably effective assistance under prevailing professional norms. See Strickland, 466 U.S. at 688, 104 S. Ct. at 2065. The Applicant failed to present specific and compelling evidence that counsel committed either errors or omissions in her representation of the Applicant. The Applicant failed to show that counsel's performance was deficient. Therefore, this Court need not address prejudice. See id. at 694, 104 S. Ct. at 2068. Applicant's complaints concerning counsel's performance are without merit and are denied and dismissed.

CONCLUSION

Based on the foregoing, this Court finds and concludes the Applicant has not established

15816

any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner, nor was the Applicant prejudiced by counsel's representation. Therefore, this application for PCR must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of written notice of entry of this Order to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely served and filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and

2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED.

The Honorable Deadra L. Jefferson
Presiding Judge, Ninth Judicial Circuit

September 23, 2013
Charleston, South Carolina.

16