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December 16, 2013

VIA U.S. POSTAL ONLY

Supreme Court of South Carolina
P. O. Box 11330
Columbia, SC 29211

RECEIVED

DEC 19 2013

S.C. Supreme Court

Re: Bennie Lee Davenport vs. State of South Carolina
Case No.: 2011-CP-23-08175

Please find the Applicant's Notice of Appeal and Proof of Service in the above reference matter. By copy of this letter, I am also forwarding copies of these documents to Ms. Ratigan and Ms. Ross.

Yours truly,



Brian P. Johnson, Esq.

BPJ/tl

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
HONORABLE EDWARD W. MILLER

RECEIVED

DEC 10 2013

Case No.: 2011CP2308175

S.C. Supreme Court

BENNIE LEE DAVENPORT,)
)
PETITIONER,)
)
vs.)
)
STATE OF SOUTH CAROLINA)
)
RESPONDENT.)
_____)

NOTICE OF APPEAL

The Petitioner, Bennie Lee Davenport, hereby appeals the Honorable Edward W. Miller's November 26, 2013, order denying post-conviction relief to the Petitioner. A copy of the order on appeal is attached to this notice

Respectfully submitted,



Brian P. Johnson, Esq.
522 North Church Street
Greenville, SC 29601
Attorney for Petitioner

Date: December 9, 2013
Other counsel of record: Karen Ratigan
P.O. Box 11549/Columbia, SC 29211

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
HONORABLE EDWARD W. MILLER

Case No.: 2011CP2308175

BENNIE LEE DAVENPORT,)
)
PETITIONER,)
)
vs.)
)
STATE OF SOUTH CAROLINA)
)
RESPONDENT.)
)

PROOF OF SERVICE

I, Brian P. Johnson, Esq., certify that I have today served the within notice of appeal upon the Respondent by depositing a copy in the United States Mail, postage prepaid, addressed to the attorney of record, Karen Ratigan, at P.O. Box 11549 Columbia, SC 29211.

Respectfully submitted,



Brian P. Johnson, Esq.
522 North Church Street
Greenville, SC 29601
Attorney for Petitioner

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

JUDGMENT IN A CIVIL CASE

CASE NO: 2011CP2308175

2013 NOV 26 PM 2 31

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

Bennie Lee Davenport vs. South Carolina State Of

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.
- 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 modify arbitration award;
 - Other: _____
- 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;
- Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this 26th day of November, 2013.

Court Reporter:

PRESIDING JUDGE - Edward W Miller

This judgment was entered on the 26th day of November, 2013, and a copy mailed first class this 26th day of November, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Brian P. Johnson 522 North Church Street
Greenville, SC 29601

Karen Ratigan Deputy Attorney General

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Bennie Lee Davenport,)
 S.C.D.C. No. 229076,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2011-CP-23-8175

ORDER OF DISMISSAL

FILED - CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL B. WICKENSIMMER
 2013 NOV 26 PM 2 31

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed December 9, 2011. The Respondent made its return on June 5, 2012. An evidentiary hearing into the matter was convened on October 23, 2013 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Brian P. Johnson, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's plea counsel, Susannah C. Ross, Esquire. The Court had before it the transcript of the guilty plea hearing, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, and the return.

PROCEDURAL HISTORY

The Applicant was indicted at the July 2011 term of the Greenville County Grand Jury for criminal domestic violence, third offense or greater (2011-GS-23-3416). Susannah C. Ross, Esquire represented the Applicant.

On August 25, 2011, the Applicant pled guilty. The Honorable G. Edward Welmaker

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).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). 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).

The Applicant stated he only had two meetings with plea counsel and that they did not discuss his case or possible defenses. The Applicant stated they did discuss his criminal record and that he attempted to tell her the facts of what happened on the day in question. The Applicant stated plea counsel failed to obtain videotapes from a food mart and liquor store to demonstrate how he and the victim interacted that day. The Applicant stated plea counsel also failed to obtain statements from anyone in those stores and failed to take photographs of the crime scene from around the time of the incident. The Applicant stated he tried to accept a two-year plea offer from the State (that was made the day before the plea hearing) but that plea counsel told him to reject it because of the potential plea judge. The Applicant stated he was

unhappy with plea counsel on the day of the plea hearing but that he did not tell the plea judge about this because he did not want to upset the judge. The Applicant stated he pled guilty in order to get it over with. The Applicant stated he did not know he was pleading guilty without a recommendation and that plea counsel said she would try to get him a two year sentence. The Applicant stated plea counsel failed to make a motion to reconsider the sentence.

Plea counsel testified she filed discovery motions, received those materials, and reviewed them with the Applicant. Plea counsel testified they reviewed the Applicant's criminal record and his version of events. Plea counsel testified her notes indicated she had eight meetings with the Applicant. Plea counsel testified the videotapes from the stores were not available. Plea counsel testified she visited the scene, interviewed witnesses, and took pictures. Plea counsel testified the State made a two-year plea offer on June 7, 2011 and the Applicant rejected it on August 1, 2011. Plea counsel testified the case was set to go before a certain judge and that she advised the Applicant not to go forward – but that there was no plea recommendation at that time. Plea counsel testified she explained the sentence range for the offense and that, while she may have said she would argue for a two-year sentence, she would not have made any promises. Plea counsel testified she brought up a motion to reconsider and that the plea judge was willing to re-sentence the Applicant to an active five-year sentence. Plea counsel testified she contacted the Department of Corrections, who stated the Applicant would only serve one year under the sentence he received but would serve two and a half years under a five-year active sentence. Plea counsel testified that, as the Applicant had already been taken to the Department of Corrections, she opted against moving for re-sentencing.

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 the Applicant's testimony is not credible, while also finding plea counsel's testimony is credible. This Court further finds plea counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in her representation.

The Applicant admitted to the plea judge both that he was guilty and that the facts recited by the solicitor were true. (Plea transcript, p.7; p.10). The Applicant also told the plea judge that he understood the trial rights he was waiving in pleading guilty, was satisfied with counsel, and had not been coerced in any way. (Plea transcript, pp.7-9).

This Court finds the Applicant failed to meet his burden of proving plea counsel did not properly meet with him or investigate the case. Plea counsel testified they had eight meetings and reviewed the evidence, Applicant's prior criminal record, and the Applicant's version of events. Plea counsel also testified about the steps she took to investigate the case. This Court finds plea counsel's testimony is credible. This Court finds the Applicant has failed to articulate how a different investigation would have changed the outcome of his case. See Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (finding the 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); Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing he would have had a defense with additional time to prepare for trial). This Court further notes that, while the Applicant stated he was unhappy with plea counsel's investigation at the time he pled guilty, he informed the plea judge he was satisfied with her representation. (Plea transcript, p.8).

This Court finds the Applicant failed to meet his burden of proving plea counsel did not

properly advise him about the State's plea offer. This Court notes the State advised the plea judge that there was a prior recommendation in this case. (Plea transcript, p.9). Plea counsel confirmed the Applicant's testimony that the State had made an offer for a two-year sentence. Plea counsel testified, however, that she had relayed this offer to the Applicant and he rejected it on August 1, 2011. This Court finds plea counsel's testimony is credible and that she fulfilled her obligation to convey the plea offer to the Applicant. Cf. Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (holding counsel's failure to convey the State's plea offer to defendant constituted deficient performance). This Court finds the plea offer had expired by (1) the time plea counsel advised him not to proceed before a certain judge and (2) the day of the plea hearing. This Court finds the Applicant knew he was pleading guilty without a recommendation that day, as it was stated on the record at the plea hearing. (Plea transcript, p.8).

This Court finds the Applicant failed to meet his burden of proving plea counsel should have filed a motion to reconsider the sentence. Plea counsel testified that, while the plea judge was willing to re-sentence the Applicant to an active five-year sentence, she determined this would result in the Applicant serving a substantially longer sentence in the Department of Corrections. As such, plea counsel stated she did not pursue re-sentencing. This Court finds this was a strategic decision and that plea counsel was not at fault in not consulting the Applicant on the matter. See Strickland, 466 U.S., at 688, 104 S. Ct. at 2065 (holding a defense attorney has a duty to consult with the defendant regarding "important decisions" in the overall defense strategy).

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under

prevailing professional norms. The Applicant failed to present specific and compelling evidence that plea counsel committed either errors or omissions in her representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by plea counsel’s performance.

This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

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 the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

CONCLUSION

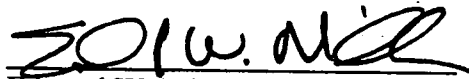
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner and the Applicant was not prejudiced by counsel’s representation. Therefore, this PCR application 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 this Order if he wants 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 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 this ____ day of 11/20, 2013.

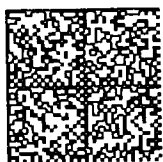



Edward W. Miller
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina.

Law Office of Brian P. Johnson
522 North Church Street
Greenville, SC 29601

Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211



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