

PCR

Johnson, Smith, Hibbard & Wildman

L A W F I R M , L . L . P

MILTON A. SMITH
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DONALD B. WILDMAN
DOUG SMITH
DONNA FAYE SHETLEY
RANSOME A. COLEMAN
STEVEN M. QUERIN
KRISTIN BURNETT BARBER
SHANE W. ROGERS

220 NORTH CHURCH STREET (ZIP CODE 29306)
MAILING ADDRESS: P.O. DRAWER 5587
SPARTANBURG, SOUTH CAROLINA 29304-5587
TELEPHONE: 864-582-8121
TELECOPIER: 864-585-5328
www.jshwlaw.com

EDWIN W. JOHNSON (1904-1979)
PAUL R. HIBBARD (1941-2004)

HOWARD R. KINARD
REID WILDMAN^
^ also admitted in North Carolina

Sender's E-Mail Address:
srogers@jshwlaw.com

December 20, 2013

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DEC 23 2013

S.C. SUPREME COURT

VIA FEDERAL EXPRESS

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

RE: Frank Bolin, Jr., Appellant, v. State of South Carolina, Respondent
Case No. 2012-CP-42-00993
Appeal from PCR Matter

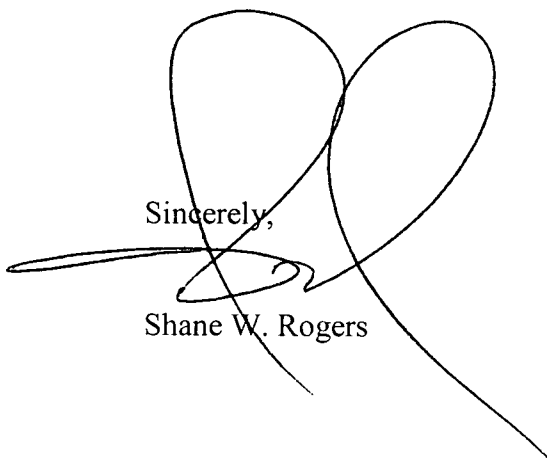
Dear Mr. Shearouse:

Enclosed for filing is an original and one copy of a Notice of Appeal in the above referenced case. Also enclosed are the following:

- (1) Proof of Service of the Notice of Appeal on the Respondent.
- (2) A copy of the Order(s) which is [are] to be challenged on appeal.
- (3) This appeal is being filed with the Supreme Court, and a filing fee omitted, because it is an appeal from a final decision entered under the Post-Conviction Relief Act pursuant to Rule 243(a), SCACR, and Rule 240(d), SCACR, respectively.
- (4) Since I am appointed counsel for the indigent appellant, it is my understanding that I will be automatically relieved under Rule 602, SCACR. Please advise as to what, if anything else, you might require of me regarding this matter.

Please return the copy of the filed Notice of Appeal to me in the enclosed self-addressed stamped envelope.

The Hon. Daniel E. Shearouse
December 20, 2013
Page 2 of 2

Sincerely,

Shane W. Rogers

Enclosures

cc: Suzanne H. White
Assistant Attorney General
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-3737
Attorney for Respondent

Frank Bolin, Jr. #209887
Unit 7-Rm 105-A
Tyger River Correctional Institute
200 Prison Rd.
Enoree, SC 29335

The Honorable R. Lawton McIntosh
P.O. Box 8002
Anderson, SC 29622
(864)-260-4059

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

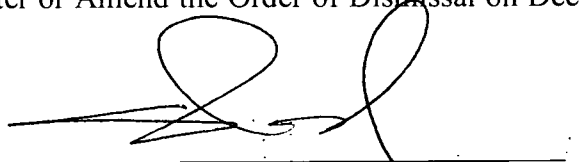
Case No. 2012-CP-42-00993

Frank Bolin, Jr.....Petitioner/Appellant
v.
State of South Carolina.....Respondent

NOTICE OF APPEAL

Frank Bolin, Jr. appeals the Order of Dismissal issued by the Honorable R. Lawton McIntosh dated October 31, 2013 denying Petitioner/Appellant's Application for Post-Conviction Relief and the Form 4 Order issued by the Honorable R. Lawton McIntosh dated December 4, 2013 denying Petitioner/Appellant's Motion to Alter or Amend the Order of Dismissal. Petitioner/Appellant received written notice of entry of the Order of Dismissal on November 13, 2013 and written notice of the Form 4 Order denying Petitioner/Appellant's Motion to Alter or Amend the Order of Dismissal on December 9, 2013.

Date: December 20, 2013



Shane W. Rogers
Johnson Smith Hibbard & Wildman, L.L.P.
Post Office Drawer 5587
Spartanburg, South Carolina 29304
(864) 582-8121 FAX: (864) 585-5328
Attorney for Petitioner/Appellant

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DEC 23 2013

S.C. SUPREME COURT

Other Counsel of Record:

Suzanne H. White
Assistant Attorney General
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-3737
Attorney for Respondent

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DEC 23 2013

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

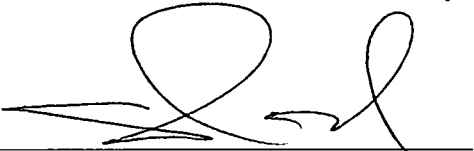
Case No. 2012-CP-42-00993

Frank Bolin, Jr.....Petitioner/Appellant
v.
State of South Carolina.....Respondent

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on December 20, 2013, addressed to its attorney of record Suzanne H. White, Assistant Attorney General, P.O. Box 11549, Columbia, SC 29211.

Date: December 20, 2013



Shane W. Rogers
Johnson Smith Hibbard & Wildman, L.L.P.
Post Office Drawer 5587
Spartanburg, South Carolina 29304
(864) 582-8121 FAX: (864) 585-5328

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DEC 23 2013

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF SPARTANBURG) SEVENTH JUDICIAL CIRCUIT
)
 Frank Bolin, Jr. #209887)
)
 Applicant)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

ORDER OF DISMISSAL

This matter comes before the court by way of an application for post-conviction relief filed on February 27, 2012. The Respondent filed its Return on January 30, 2013. An evidentiary hearing on the matter was convened on June 25, 2013, at the Spartanburg County Courthouse. The Applicant was present and represented by Shane W. Rogers, Esquire. Suzanne H. White, Esquire, represented the Respondent, State of South Carolina.

At the hearing, the Applicant testified on his own behalf. Mr. James Cheek and Mr. Matthew Shealy testified on Respondent's behalf. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, the plea transcript and submitted memoranda.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Applicant was indicted at the July 2010 term of the Spartanburg County Grand Jury for shoplifting, \$1000 or less, 3rd or subsequent offense (10-GS-42-3856), and for shoplifting, \$2000 or less, 3rd or subsequent offense (10-GS-42-3858). He was represented by James A. Cheek, Esquire. On

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 SPARTANBURG COUNTY
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 JUDICIAL DEACONLEY

April 15, 2011, the Applicant pled guilty as indicted. He was sentenced by the Honorable J. Mark Hayes, II, to confinement for concurrent terms of ten (10) years for each count of shoplifting. Judge Hayes also revoked applicant's probation in full, running it concurrent to the ten year sentences. The Applicant did not appeal his guilty plea, sentence or probation revocation.

ALLEGATIONS

In the current application and amendments, the Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel in that;
 - a. "Counsel advised me to pled, and I am not guilty."
 - b. "I am not the person who shoplifted per the narrative."

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 their 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).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial

process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

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

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

At the hearing, Applicant proceeded primarily on the issue of Shealy's failure to convey a plea offer from the State for a recommendation of five years concurrent with Applicant's probation revocation. The Applicant testified that on the day he pled, he understood there was a plea offer, but he was never told of the offer by either Shealy or Cheek. Applicant testified that

Cheek informed him that if he pled guilty he would receive a four year sentence run concurrent with his probation revocation. However, at the plea, Cheek never informed the court of any plea recommendations, present or past.

Cheek testified that he represented Applicant at the plea after Applicant indicated from the jail that he wished to meet with Cheek. Cheek testified that in his conversations with Applicant and Applicant's letters to Shealy, Applicant always wanted to plead guilty. Cheek testified that the offer had expired, but the State had agreed to not oppose Cheek's request at the plea. Cheek testified that the Applicant was informed of and aware of the sentencing range for the charges. Cheek also testified that the Applicant asked about a four year deal and Cheek informed him he would ask for a concurrent sentence with the probation revocation, but could not promise anything.

As to any claims that Cheek was ineffective in his representation at the plea or promised the Applicant a four year sentence, this Court finds that the Applicant failed to meet his burden of proof. This Court finds Applicant's testimony to be less credible than the testimony of Cheek in this regard. Additionally, the plea record is clear that Applicant was pleading guilty with no recommendations or negotiations; Applicant was advised of his rights and chose to proceed with the plea. "In the context of a guilty plea, the court must determine whether 1) counsel's advice was within the range of competence demanded of attorneys in criminal cases i.e. was counsel's performance deficient, and 2) if there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty." Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) (citing Hill v. Lockhart, 474 U.S. 52, 56-58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)). The Applicant failed to demonstrate that he would not have pled guilty, but for any alleged errors by Cheek. Therefore, this claim is denied and dismissed.

Regarding the Applicant's claim that Shealy failed to convey a plea offer, this Court finds that the Applicant failed to meet his burden of proof. "Counsel's failure to convey a plea offer constitutes deficient performance." Davie v. State, 381 S.C. 601, 609, 675 S.E.2d 416, 420 (2009). Prejudice is determined on a case-by-case approach in order to determine whether

"[B]ut for counsel's deficient performance a defendant would have accepted the State's proposed plea bargain and that he would have benefitted from the offer. Because presumed prejudice is reserved to very limited situations . . . a defendant must show actual prejudice.

However, it is not always necessary for a defendant to offer objective evidence to support a claim of actual prejudice. Instead, depending on the facts of the case, a defendant's self-serving statements may be sufficient to establish actual prejudice." Davie, 381 S.C. at 613, 675 S.E.2d at 422 (citations omitted).

Shealy testified that he did receive an email from the State (Applicant's Exhibit #1) offering a recommendation of concurrent sentencing with a five year cap if the Applicant agreed to the restitution, but indicating that the offer expired at the time that the Applicant appeared on the trial docket. However, Shealy testified that he could not find the Applicant to convey the offer to him. The email was dated October 26, 2010. Shealy testified that he tried to call Applicant on November 1st and received no answer, then sent a letter to Applicant on November 2nd, which was returned as undeliverable on November 5th of 2010. (Applicant's Exhibit #2). This testimony is supported by the probation officer's testimony at the plea that the Applicant failed to appear for a probation violation hearing scheduled for December 10, 2010. (Tr. p. 16). Further, as Shealy testified, even if the State had made the recommendation to the court, the judge could have rejected the recommendation and sentenced Applicant up to ten years on each charge.

The Court has established that a case-by-case approach is most consistent with and achieves the “ultimate goal of assessing whether but for counsel's deficient performance a defendant would have accepted the State's proposed plea bargain and that he would have benefited from the offer.” Davie v. State, 381 S.C. 601, 613, 675 S.E.2d 416, 422 (2009). Because presumed prejudice is reserved to very limited situations, a defendant must show actual prejudice. Id.

A recent United States Supreme Court case has clarified the burden on the Applicant in situations of plea offers that were not conveyed. To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, (1) not only must the Applicant show that they would have accepted the earlier plea offer, but (2) they must also show that the plea would have been entered without the State withdrawing the offer or the trial court refusing to accept it. Missouri v. Frye, 132 S. Ct. 1399, 1409, 182 L. Ed. 2d 379 (2012). “To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.” Id.

This Court finds that the Applicant failed to demonstrate that Shealy was deficient in failing to convey the offer, because this Court finds Shealy's testimony regarding his attempts to contact the Applicant credible. The Applicant failed to make contact with his attorney or provide his attorney with a current address or phone number, which made it unfeasible for his attorney to convey any plea offer to him. Therefore, any prejudice suffered was as a result of Applicant's own conduct. Therefore, the Applicant failed to meet his burden of establishing that Shealy was ineffective in this regard. These claims are denied and dismissed.

SUMMARY

This Court finds that both Shealy and Cheek are experienced attorneys who were prepared for and effectively represented Applicant at his plea. This Court finds Counsel adequately conferred with the Applicant, was thoroughly competent in their representation, and that Counsels' conduct does not fall below the objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in their representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsels' performance. There is no evidence that the outcome of the trial would have changed based upon any of the allegations of deficiency. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, this allegation is denied.

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.

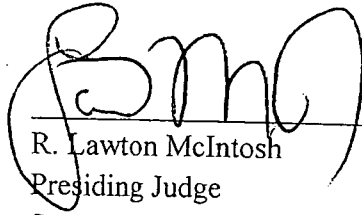
This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate

review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention 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 31 day of Oct, 2013.



R. Lawton McIntosh
Presiding Judge
Seventh Judicial Circuit

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2013 NOV - 7 AM 10:27
M. HOPE BLACKLEY

Frank Bolin, Jr., #209887,

State of South Carolina,

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : Plaintiff Defendant
 or
 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 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, 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:

Applicant's Motion to Alter or Amend, filed November 15, 2013 is denied without the necessity of a hearing. No formal order to follow.

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk :

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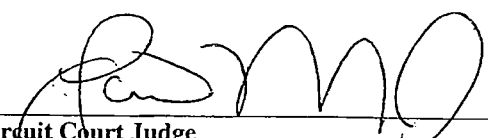
INFORMATION FOR THE JUDGMENT INDEX

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

2155
 Judge Code

11-26-13
 Date



For Clerk of Court Office Use Only

This judgment was entered on the 4 day of ~~November~~ ^{December}, 2013 and a copy mailed first class or placed in the appropriate attorney's box on this 4 day of ~~November~~ ^{December}, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Shane W. Rogers, Esquire

Suzanne White, Esquire

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)
M. Hope Blackley
CLERK OF COURT

cc

Court Reporter:

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.

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M. HOPE BLACKLEY

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Daniel E. Shearhouse, Clerk
Supreme Court-South Carolina
1231 Gervais Street

COLUMBIA, SC 29201

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Dept #

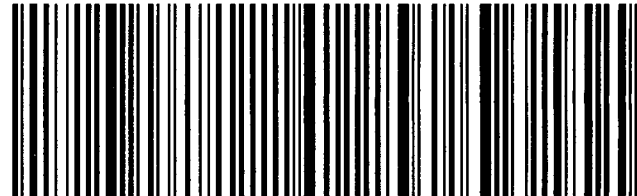
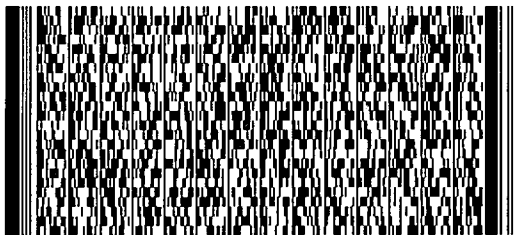
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