

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

William H. Seals, Jr., Presiding Judge

2012-CP-21-2048

RECEIVED
JAN 14 2014
S.C. Supreme Court

ANTHONY TOMMY WILSON, #350120,

Petitioner,

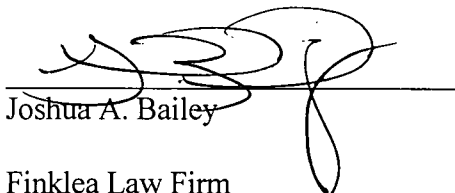
v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Anthony Tommy Wilson, #350120, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed December 10, 2013, and received by counsel on December 16, 2013, issued by the Honorable William H. Seals, Jr., presiding judge.



Joshua A. Bailey

Finklea Law Firm
P.O. Box 1317
Florence, South Carolina 29503
843-317-4900 Phone
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ATTORNEY FOR PETITIONER

This 13th day of January, 2014.

Other Counsel of Record:
Joshua Thomas, Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
Attorney for Respondent
(803) 734-3737

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE)

IN THE COURT OF COMMON PLEAS
FOR THE TWELFTH JUDICIAL CIRCUIT

Anthony T. Wilson, #350120,)

Case No. 2012-CP-21-2048

Applicant,)

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

FILED
2013 DEC 10 PM 12:25
CORNIE REEL-SHEPHERD
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed August 9, 2012. Respondent made its Return on or about October 5, 2012. The Court convened an evidentiary hearing into the matter on October 9, 2013, in Marion County. Applicant was present at the hearing and represented by Joshua A. Bailey, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office represented Respondent.

Applicant testified on his own behalf at the PCR hearing. Applicant's plea counsel, Everett G. Ballenger, Esquire, also testified. The Court had before it a copy of the plea transcript, the records of the Florence County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the amended application, the return, and the hearing exhibits.¹ The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Florence County Clerk of Court. In August 2008, Applicant was arrested for murder, first degree burglary, and armed robbery. A juvenile petition was

¹ Applicant's Exhibit Number 1 was a transcript of his interview with the Florence Police Department.

CERTIFIED: A TRUE COPY
Cornie Reel-Shepherd
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

issued in the Florence County Family Court, and Applicant's charges ultimately were waived up to circuit court. In June 2009, the Florence County Grand Jury indicted Applicant for murder, first degree burglary, and armed robbery (2009-GS-21-882, Counts One through Three). He was represented by Everett G. Ballenger, Esquire ("plea counsel"). On March 12, 2012, Applicant entered a negotiated plea to murder and first degree burglary. Applicant pled guilty to the murder charge pursuant to North Carolina v. Alford.² The Honorable Thomas A. Russo sentenced Applicant to thirty (30) years for murder and a concurrent thirty (30) years for first degree burglary. Applicant did not appeal his plea or sentence.

II. ALLEGATIONS

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

1. "On March 12th 2008 I took a guilty plea on an violation of section 16-03-0010; 16-03-0020 and 16-11-0311 which is not the correct violation."
 - a. "Section 16-03-0010; 16-03-0020 is incorrect due to the fact that the crime was committed unwillingly and without intent"

On September 5, 2013, Applicant filed an amended application for PCR, in which he alleged plea counsel was ineffective for failing to adequately investigate and move to suppress Applicant's statement to police. Applicant alleged he did not knowingly and intelligently waive his right remain silent and to have counsel present when he gave the statement. At the PCR hearing, Applicant proceeded on only the allegations of ineffective assistance of plea counsel relating to the statement.

² 400 U.S. 25 (1970)

III. SUMMARY OF TESTIMONY

Applicant testified he was taken to the police station on August 27, 2008, to be interviewed about his involvement in a murder in Florence County. Applicant was fourteen (14) years old at that time. He testified the only people present in the interview room were himself and Sergeant Godwin of the Florence Police Department. Applicant testified Sergeant Godwin did not read him his Miranda rights at first, but he read them to Applicant right before beginning to record the statement and again during the recorded statement. Applicant testified he responded that he understood the rights read to him by Sergeant Godwin "a little bit." He further testified he did not understand he did not have to talk to the police and he would not have spoken to them had he understood his right to have counsel present.

Applicant testified he was at the police complex about five hours when the statement was given and the officers offered him no food or drink during that time. He was fourteen when questioned and had completed the seventh grade. Applicant also had a prior record involving a shoplifting charge in 2005 when he was twelve. On cross-examination, Applicant admitted his mother was with him at the police complex just prior to his statement.

Applicant testified he met with plea counsel twelve or thirteen times before the plea. He testified they reviewed discovery and discussed possible defenses to the charges. Applicant and plea counsel discussed the State's offer of thirty years, and it was Applicant's decision to accept the offer. Applicant also testified he told plea counsel he wanted to file a motion to suppress.

Plea counsel testified was appointed to Applicant's case in August 2008. He filed for and received discovery from the State. He testified the State's theory of the case was Applicant and some co-defendants entered the victim's house with a crowbar with the intent to burglarize the

home. While inside, a co-defendant pressured Applicant to stab the victim. Plea counsel testified Applicant though he was innocent because he stabbed the victim under duress. However, plea counsel explained the defense of duress was not available to a murder charge.

Plea counsel reviewed the State's discovery with Applicant before Applicant's juvenile waiver hearing. That evidence included Applicant's statement, DNA evidence, witness statements, and the statements of his co-defendants. He also had Applicant evaluated by the Department of Juvenile Justice. Plea counsel testified they reviewed discovery again after the State made further disclosures after the waiver hearing. Plea counsel testified he reviewed Applicant's statement and agreed Applicant saying he only understood his rights "a little bit" gave him an argument for the statement's suppression. However, he did not believe it was sufficient to show the waiver of Applicant's rights was not knowing and intelligent. Further, plea counsel testified he attempted to have the statement suppressed at the juvenile waiver hearing. He testified he questioned the investigators about the statement and argued the conditions of the interview and Applicant's age indicate the waiver of Applicant's rights was not knowing and intelligent. However, the family court judge found the statement admissible.

Plea counsel testified his notes indicate he met with Applicant to discuss the statement at least four times: May 2010, June 2010, April 2011, and October 2011. He testified they discussed filing a motion to suppress the statement if the case went to trial. However, Applicant never wanted a trial and ultimately chose to enter a plea of guilty. Plea counsel testified he would have filed a motion to suppress the statement if Applicant had wanted a trial. Plea counsel testified that at the time Applicant prepared the plea affidavit, he discussed with Applicant the fact Applicant would waive a suppression hearing by pleading guilty.

On cross-examination, plea counsel re-iterated Applicant never wanted a suppression hearing before pleading guilty. Rather, plea counsel testified he could not file a motion to suppress until the State indicated the case would be called for trial. At that time, the offer for thirty years would likely have been withdrawn. Because Applicant chose to plead guilty, plea counsel did not have the opportunity to file a motion. Further, plea counsel admitted he advised Applicant the plea was in his best interest because the other evidence, even if the statement was excluded, was enough for a conviction.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, to closely pass upon their credibility, and to weigh 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).

A. Ineffective Assistance of Plea Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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. 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, 59 (1985).

The Court finds Applicant's allegation plea counsel was ineffective for failing to suppress the statement to be without merit. Regarding this allegation, the Court finds plea counsel's testimony to be very credible, and Applicant's to be not credible. Plea counsel met with Applicant and discussed the statement numerous times. Although Applicant alleges he only pled because the statement was not suppressed, he never indicated to plea counsel that a motion to

suppress had to be filed before he would enter a guilty plea. Furthermore, plea counsel unsuccessfully challenged the introduction of the statement at the waiver hearing. Thus, Applicant was aware of the likelihood of success of a motion to suppress in the circuit court.

Applicant was also aware of the possibility the negotiated offer of thirty years would likely be unavailable if a motion to suppress was filed. Because plea counsel was concerned the offer would be withdrawn, he has articulated a valid reason for employing the strategy of not immediately filing a motion to suppress. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). Therefore, the Court finds plea counsel acted reasonably in addressing Applicant's statement.

Furthermore, the Court finds Applicant cannot show prejudice because the motion to suppress would likely have been denied. The voluntariness of a juvenile's statement is "reviewed under the totality of the circumstances." State v. Parker, 381 S.C. 68, 86, 671 S.E.2d 619, 628 (Ct. App. 2008). Factors to be considered include: "the background, experience, and conduct of the accused; age; length of custody; police misrepresentations; isolation of a minor from his or her parent; threats of violence; and promises of leniency." Id. at 87, 671 S.E.2d at 628-29 (citing State v. Miller, 375 S.C. 370, 652 S.E.2d 444 (Ct. App. 2007)). Here, Applicant had a prior juvenile record and experience with police investigations. Furthermore, he was 14 years old and was advised of his right to remain silent twice. Applicant has presented no evidence he was of limited intelligence and didn't understand he could refuse to talk to police. See State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007) (allowing introduction of statement where juvenile did not show he "did not understand his rights or was of such low intelligence that he could not have understood his rights"). The length and conditions of

Applicant's detention were not unusual or unreasonable. Likewise, the questioning in the transcript does not indicate any misrepresentations, threats of violence, or promises of leniency. Id. at 568, 647 S.E.2d at 165 (“[C]ourts generally do not find a juvenile's confession involuntary where there is no evidence of extended, intimidating questioning or some other form of coercion.”). Finally, Applicant's mother was present with Applicant up to the time he gave his statement, including during the first recitation of his rights. Therefore, based on the totality of the circumstances, the Court finds Applicant's statement was freely and voluntarily made after a knowing and intelligent waiver of his constitutional rights.

Finally, the court finds plea counsel was not ineffective because he advised Applicant that suppression of the statement did not guarantee a victory at trial. The State possessed eyewitness statements from the co-defendants indicating Applicant stabbed the victim. Plea counsel testified an acquittal was unlikely because of the statements of the co-defendants and the forensic evidence. Furthermore, although Applicant believed he was less culpable in the murder, plea counsel correctly advised Applicant the first degree burglary charge would likely result in a conviction and maximum exposure of life imprisonment. See Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009) (applicant must show “something that would have affected counsel's advice to [the applicant] to accept the plea bargain offered or that would have caused [the applicant] to decline to accept it”). Therefore, Applicant had not shown any prejudice from plea counsel's decision not to file a suppression motion.

B. 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, the Court finds Applicant failed to present

sufficient evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

V. CONCLUSION


Based on the foregoing, the Court finds and concludes 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.

The Court notes that Applicant 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, 409 S.E.2d 395 (1991), an applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, 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 THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

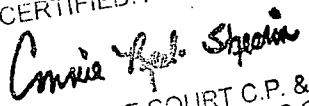
AND IT IS SO ORDERED this 27 day of Nov., 2013.


THE HONORABLE WILLIAM H. SEALS, JR.
Presiding Judge

Man, South Carolina

2013 DEC 10 PM 12:25
CONNIE REEL-SHEARIN
CCCP & GS
FLORENCE COUNTY, SC

FILED

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CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

William H. Seals, Jr., Presiding Judge

2012-CP-21-2048

ANTHONY TOMMY WILSON, #350120,

Petitioner,

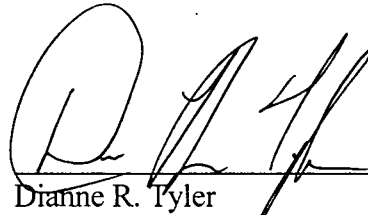
v.

STATE OF SOUTH CAROLINA,

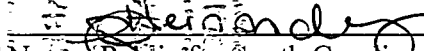
Respondent.

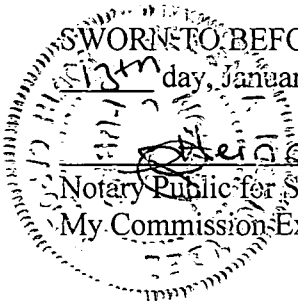
CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Petitioner's Notice of Appeal in the above-entitled case has been served upon opposing counsel, Megan Harrigan, Assistant Attorney General, P.O. Box 11549, Columbia, SC 29211, by mailing in an envelope properly addressed with postage prepaid on this 13th day of December, 2014.


Dianne R. Tyler
Assistant to Joshua A. Bailey, Esquire

SWORN TO BEFORE to before me this
13th day, January, 2014.


Notary Public for South Carolina (L.S.)
My Commission Expires: 5.18.22





FINKLEA LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW

Gary I. Finklea
Charlie J. Blake, Jr.
J. Gregory Hendrick
Joshua A. Bailey
B. Hicks Harwell, Jr.
(1933-2012)

January 13, 2014

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

RECEIVED

JAN 14 2014

S.C. Supreme Court

Re: Anthony Tommy Wilson vs.
State
Case No.: 2012CP2102048
Our File No.: 12328

Dear Honorable Shearhouse:

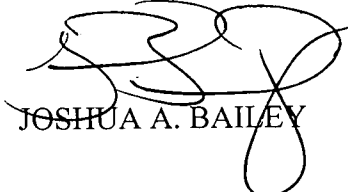
In connection with my representation in the above-referenced Post-Conviction Relief matter, please find enclosed for filing the Notice of Appeal and Certificate of Service. I would respectfully request that a copy of the filed documents be returned to my office in the self-addressed envelope enclosed.

As I was appointed to represent Mr. Wilson for purposes of post-conviction relief, I would ask that I be removed as the attorney of record and allow for an attorney from the Division of Appellate Defense assume further representation in this matter.

By copy of this letter, I am serving a copy of the Notice of Appeal and Certificate of Service on Joshua Thomas, Assistant Attorney General, and notifying the Division of Appellate Defense of my submission.

With kindest regards, I am

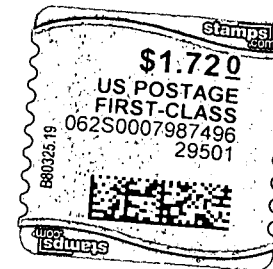
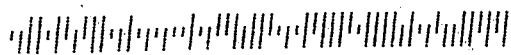
Very truly yours,



JOSHUA A. BAILEY

JAB/dt
Enclosure

cc: Anthony Tommy Wilson 00350120
Joshua L. Thomas, Esquire, South Carolina Office of the Attorney General



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