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(1933-2012)

January 13, 2014

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

Re: Donte Laquawn Capers vs. State
Case No.: 2012-CP-21-00967
Our File No.: 12202

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. Capers 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: Joshua L. Thomas, Esquire, South Carolina Office of the Attorney General
Donte Laquawn Capers

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

William H. Seals, Jr., Presiding Judge

2012-CP-21-967

DONTE L. CAPERS, #296357,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Donte L. Capers, #296357, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed December 11, 2013, and received by counsel on December 16, 2013, issued by the Honorable William H. Seals, Jr., presiding judge.

Joshua A. Bailey

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ATTORNEY FOR PETITIONER

This 13th day of January, 2014.

Other Counsel of Record:
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Columbia, SC 29211
Attorney for Respondent
(803) 734-3737

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
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2012-CP-21-967

DONTE L. CAPERS, #296357,

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, Joshua Thomas, 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~~ January, 2014.

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

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

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

STATE OF SOUTH CAROLINA COUNTY OF FLORENCE	)	IN THE COURT OF COMMON PLEAS FOR THE TWELFTH JUDICIAL CIRCUIT
Donte L. Capers, #296357, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2012-CP-21-967 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief ("PCR") filed April 11, 2012. Respondent made its Return on or about June 12, 2012. The Court convened an evidentiary hearing into the matter on October 8, 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, Scott P. Floyd, 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 applications, the return, and the exhibits introduced at the PCR hearing. 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 January 2011, the Florence County Grand Jury indicted Applicant for safecracking (2011-GS-21-14 (Count 2)), pointing and presenting a firearm (2011-GS-21-15 (Count 1)), and twelve (12) counts of first

degree burglary (2011-GS-26-3, -4, -5, -6, -7, -8, -12, -13, -14 (Count 1), -15 (Count 2), -17, and -18). He was represented by Scott P. Floyd, Esquire ("plea counsel"). On June 16, 2011, Applicant entered a plea to three counts of first degree burglary (2011-GS-21-12, -14, and -15). In exchange for his plea, the State dismissed the remaining indictments and recommended a twenty-five (25) year sentence. The Honorable Michael G. Nettles accepted the State's recommendation and sentenced Applicant to incarceration for a period of twenty-five (25) years.

Applicant filed a timely notice of appeal. The South Carolina Court of Appeals dismissed the appeal pursuant to Rule 203(d)(1)(B)(iv) on October 13, 2011. The remittitur was returned to the circuit court on November 17, 2011.

II. ALLEGATIONS

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

1. "Ineffective Assit of counsel."
    a. "Counsel fell to file a motion to suppress evidence in my case"
    b. "Counsel fell to turn over all material subject to disclosure under Rule 5"

On September 16, 2013, Applicant, through counsel, filed an amended application. The amended application alleged the search warrant in Applicant's case failed to specifically list any of the items seized from the co-defendant's apartment. The amended application also alleged plea counsel was ineffective in the following regards:

1. Plea counsel erroneously informed Applicant he would receive a life sentence.
2. Plea counsel failed to inform Applicant of the evidence against him.
3. Plea counsel informed Applicant the co-defendants would receive the same sentence as Applicant.
4. Plea counsel failed to inform Applicant of the Applicable law.

The amended application further alleged plea counsel was ineffective for challenge the

indictments for first degree burglary based on two prior burglary convictions when Applicant's prior convictions occurred on the same date. At the PCR hearing, Applicant proceeded on only the allegations relating to the search warrant and the indictment.

III. SUMMARY OF TESTIMONY

Applicant testified met with plea counsel five (5) or six (6) times while detained on these charges. He testified plea counsel did not give him a full copy of the evidence against him, and he did not have a full discovery response when he pled. Applicant further testified plea counsel never discussed the elements of burglary, any possible defenses, or the witness statements. On cross-examination, Applicant admitted the only defense he proposed to plea counsel was to have the seized evidence suppressed.

Applicant also testified he requested plea counsel file a motion to suppress the evidence seized in a search of his co-defendant's apartment. He testified his co-defendant was his girlfriend, and he lived in her apartment with her. Applicant stated plea counsel informed Applicant he would file a motion to suppress, but never did. Applicant was concerned the search warrant only listed seven (7) items to be seized, but the police seized seventy-eight (78) items. He further testified he was not at the co-defendant's apartment at the time it was searched. On cross-examination, Applicant admitted he was not the leaseholder of the apartment but maintained he lived there.

Regarding the indictments, Applicant testified he did not review them with plea counsel before the plea. He testified he did not discuss his prior burglary convictions with plea counsel. Applicant further testified he was unaware the two prior convictions were an element of the crime of first degree burglary. Applicant claims he would not have pled had he known there was

a statute requiring closely connected offense to be treated as one offense for sentencing purposes.[1]

Plea counsel testified he filed the standard Rule 5/Brady motions after being appointed. He further testified he reviewed the State's discovery response with Applicant. Plea counsel recalled taking the case file to the detention center and reviewing the entire file, including the indictments and the search warrant. He also recalled taking a copy of the code of laws to the detention center and reviewing with Applicant the elements of first degree burglary and his other charges.

Plea counsel testified he discussed the search warrant with Applicant. Trial counsel recalled he had concerns about Applicant's standing to challenge the warrant because the apartment was leased to the co-defendant. He also testified he explained to Applicant suppression of the seized items did not necessarily absolve him of the burglary charges. Plea counsel spoke to the investigators and the co-defendants' attorneys, and the co-defendants were willing to testify to Applicant's role in the crimes. Plea counsel also testified he was worried the seized items would not be excluded because they were sitting in plain view in the apartment, and he discussed the plain view exception with Applicant. Plea counsel testified he never told Applicant a suppression motion had been filed; rather, he told Applicant he would file the motion

[1] Applicant refers to S.C. Code Ann. § 15-25-50, which provides that:

> "In determining the number of offenses for the purpose of imposition of sentence, the court shall treat as one offense any number of offenses which have been committed at times so closely connected in point of time that they may be considered as one offense, notwithstanding under the law they constitute separate and distinct offenses."

if the case were to go to trial. Plea counsel maintained he would have filed a motion to suppress if Applicant had desired a trial, but Applicant ultimately made the decision to plead guilty.

Regarding the indictment, plea counsel testified he never discussed section 17-25-50 with Applicant. Plea counsel did discuss Applicant's prior record, but they did not discuss the timing of the prior burglaries because plea counsel did not believe section 17-25-50 applied. Plea counsel testified that statute concerns sentencing under the three strikes law, but the prior burglaries were an element of the crime, not a sentence enhancement. Plea counsel further testified a motion to quash the indictment would have been futile because the State had evidence Applicant was armed with a gun during each burglary, and could have used this information to re-indict Applicant for the same crime

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The 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, and to closely pass upon their credibility. The 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.

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 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 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).

1. Search Warrant

The Court finds Applicant failed to carry his burden of proof regarding his allegation plea counsel was ineffective for failing to file a motion to suppress the evidence seized from the co-

defendant's apartment. Regarding this allegation, the Court finds plea counsel's testimony to be credible, and Applicant's testimony to be not credible. Specifically, the Court finds plea counsel investigated the circumstances surrounding the search warrant and advised Applicant of the possible outcomes of a motion to suppress. Plea counsel advised Applicant there were two legal grounds for which the evidence could be admissible even if there was a defect with the warrant. Plea counsel advised Applicant either Applicant lacked standing to challenge the search, or the evidence could be admissible under a plain view exception to the search warrant exception. The Court finds plea counsel properly advised Applicant the State would likely have been successful in claiming the evidence was seized pursuant to the plain view exception. See State v. Wright, 391 S.C. 436, 443, 706 S.E.2d 324, 327 (2011) ("Hence, the two elements needed to satisfy the plain view exception are: (1) the initial intrusion which afforded the authorities the plain view was lawful and (2) the incriminating nature of the evidence was immediately apparent to the seizing authorities.").

Furthermore, a knowing and voluntary guilty plea waives any non-jurisdictional defects and defenses, including challenges to the sufficiency of the evidence. See Whetsell v. State, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981) (citing Rivers v. Strickland, 264 S.C. 121, 213 S.E.2d 97 (1975); State v. Fuller, 254 S.C. 260, 174 S.E.2d 774 (1970)). The Court finds especially credible plea counsel's testimony that he would have certainly filed a suppression motion if Applicant had chosen to go to trial. Because Applicant chose to plead guilty, he cannot now challenge the admissibility of the seized evidence.

Applicant likewise cannot show he was prejudiced by not having the evidence suppressed. Applicant's co-defendants cooperated with police and implicated Applicant in a

string of break-ins. Even without the seized evidence, those witnesses' testimony could still support a first degree burglary conviction. Furthermore, Applicant was identified by a witness to one burglary (Plea Tr. 9:6-11) and was arrested fleeing the scene of another (Plea Tr. 12:4-9). In light of this overwhelming evidence, Applicant has not shown he was prejudiced by plea counsel's advice to accept the plea. 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").

2. Indictment

The Court finds Applicant has failed to meet his burden of proving trial counsel ineffective for failing to challenge Applicant's indictment for first degree burglary. Specifically, the Court finds section 17-25-50 is not applicable in this case. Applicant was charged with first degree burglary, which is defined as the entering of a dwelling without consent, with intent to commit a crime in the dwelling, by a person with a prior record of two or more convictions for burglary. S. C. Code Ann. §16-11-311(A)(2). Thus, "two prior burglary [...] convictions are an element of first degree burglary." State v. Simmons, 352 S.C. 342, 356, 573 S.E.2d 856, 864 (Ct. App. 2002). The prior convictions are not used for sentencing purposes. In contrast, section 17-25-50 addresses situations where the State uses a prior conviction to enhance a sentence under the recidivist statute. See S.C. Code Ann. § 17-25-50 ("In determining the number of offenses *for the purpose of imposition of sentence*, [...]." (emphasis added)); cf. State v. Boyd, 288 S.C. 206, 209, 341 S.E.2d 144, 146 (Ct. App. 1986) (two or more counts under the Controlled Substance Act which arose out of acts committed in the course of a single incident

should count as one *for the purpose of sentencing.*" (emphasis added)). This section only applies when the State seeks to enhance a sentence to life without parole under the recidivist statute.

Applicant's two prior burglary convictions were not used to enhance his sentence. Rather, they were presented as an element of the crime of first degree burglary. Although first degree burglary carries a harsher penalty than lesser degrees of burglary, the sentence is greater because of the offense itself. Thus, the "closely connected offenses" provision of the recidivist statute has no application in a prosecution for first degree burglary where, as here, the State has not sought a sentence enhancement under the recidivist statue.[2] Therefore, plea counsel was not ineffective for not challenging the indictment.

B. <u>All Other Allegations</u>

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. <u>CONCLUSION</u>

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.

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[2] The Court also notes Applicant cannot show he was prejudiced by the indictment. The State possessed evidence Applicant was armed with a handgun while committing the burglaries. (Plea Tr. 11:15-19; 12:12-16). Even if plea counsel successfully quashed the indictments, the State could have re-indicted for first degree burglary based on Applicant being armed with a deadly weapon. S.C. Code Ann. § 16-11-311(A)(1)(a).

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), SCRCP, 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 25 day of Nov., 2013.

THE HONORABLE WILLIAM H. SEALS, JR.
Presiding Judge

Marion, South Carolina

FILED
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