

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas
Honorable R. Ferrell Cothran, Circuit Court Judge

Case No: 2010-CP-45-0177

William Yarborough.....Appellant
S.C.D.C. 334712
v.
The State.....Respondent

NOTICE OF APPEAL

William Yarborough, appeals his Denial for Post Conviction Relief in this case. The Order of Dismissal was imposed and signed by the Honorable R. Ferrell Cothran, January 14, 2014, which I, Charles T. Brooks, III, received on January 30, 2014.

RECEIVED

FEB 05 2014

S.C. SUPREME COURT



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PROOF OF SERVICE

I, the undersigned, do hereby certify that on this 3rd day of February, 2014, I served the foregoing **Notice of Appeal, Order of Dismissal**, as well as **Proof of Service** in this matter by depositing a true copy of it in the United States Mail, postage prepaid, on February 3, 2014, addressed to the following as indicated below:


South Carolina Supreme Court
Post Office Box 11330
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Dated: February 3, 2014



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STATE OF SOUTH CAROLINA)
COUNTY OF WILLIAMSBURG)

William Yarborough, #334712,)
Applicant,)

v.)

State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

Case No. 2010-CP-45-0177

ORDER OF DISMISSAL

FILED
JUN 21 11:11 AM '13
CLERK OF COURT
THIRD JUDICIAL CIRCUIT
SUMTER COUNTY

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on May 17, 2010 and amended on October 29, 2013. Respondent made its return on November 15, 2013. An evidentiary hearing into the matter was convened on December 16, 2013, at the Sumter County Courthouse. Applicant was present at the hearing and was represented by Charles T. Brooks, III, Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

The records before this Court indicate the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Williamsburg County Clerk of Court. The Applicant was indicted at the October 2008 term of the Williamsburg County Grand Jury for Criminal Sexual Conduct—First Degree and Burglary—First Degree (2008-GS-45-0219; -220). Applicant was represented by Steven McKenzie and William LeGrand Carraway. On May 18, 2009, Applicant pled guilty as indicted before the Honorable Howard P. King and was sentenced pursuant to State recommendation to twenty two years imprisonment for each charge. The sentences were to run concurrently. Applicant did not

appeal his guilty plea or sentence.

ALLEGATIONS

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following allegations:

1. Ineffective Assistance of Counsel
 - a. "Trial Counsel failed to inform me fully of the facts surrounding the DNA testing."
 - b. "Trial Counsel failed to point out inconsistencies in the testimony of the alleged victims."
2. Involuntary Guilty Plea.
3. Due Process Violation

Applicant amended his application alleging he is being held in custody unlawfully based on the following allegations:

1. Ineffective assistance of counsel
 - a. Counsel failed to conduct any pretrial investigation before advising Applicant to enter a plea of guilty.
 - b. Failure to provide discovery and review discovery with Applicant.

SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. Applicant also called Pamela Gowdy (Gowdy), Applicant's mother. The State presented testimony from plea counsel, Steve McKenzie, Esquire (Counsel). This Court also had before it a copy of guilty plea hearing, the Sumter County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, and the return.

At the start of the hearing, Applicant moved for a continuance in order to obtain a copy of the Solicitor's file. Applicant's PCR Counsel, Charles T. Brooks, III, stated he had previously made multiple attempts to obtain the solicitor's file. The Court denied Applicant's motion but stated he would allow Applicant ten days to review the Solicitor's file and present any additional

evidence based off of his review. This Court finds Applicant has failed to present any additional information.

During the evidentiary hearing, Applicant stated he was thirty five years old. Applicant stated, Steve McKenzie (Counsel) represented him during his plea and he never saw William Legand Carraway. Applicant stated he met with Counsel four to five times prior to his guilty plea. Applicant recalled the plea court reviewing his constitutional rights. Applicant stated that he told the plea judge that he was satisfied with Counsel's services. Applicant stated that he told the plea judge he had enough time to meet with Counsel and Counsel had done everything he felt was necessary. Applicant stated he told the plea judge that there was nothing else Counsel could have done to better represent him. Applicant stated he told the plea judge that no one had promised, coerced, or threatened him to get him to plead guilty. However, Applicant stated, Counsel told him he had no other choice but to plead guilty.

Applicant stated Counsel failed to inform of the facts concerning DNA evidence stemming from indictment 2008-GS-45-219¹. Applicant argued that he was unaware that there was a DNA reports prior to his guilty plea. Applicant argued the fact that DNA of two different males was found inside the victim goes to the credibility of the victim and could have been used to impeach her during trial. Applicant stated had he known about the DNA report he would not have pled guilty.

Regarding the facts concerning indictment number 2008-GS-45-220, Applicant argued that it was physically impossible for him to have broken into the house where the rape took place. Applicant argued that the victim's statement changed frequently and Applicant felt that

¹ Indictment number 2008-GS-45-0219 states that Applicant did in Williamsburg County on or about June 13, 2002, violated Section 16-3-652 of the Code of Laws of South Carolina (1976), as amended, in that the said Applicant engaged in sexual batter with the victim thru the use of aggravated force and/or while forcibly confining or kidnapping the victim. The sexual battery occurred under circumstances where victim was also victim of burglary, housebreaking or similar offense or act. Count two indictment charged Applicant with Burglary in First Degree.

this information could have been brought out during trial. Applicant stated had he known about the victim's statement changing he would not have pled guilty.

Applicant stated he suffered from Post-Traumatic Stress Disorder due to his service in the Marine Corp. Applicant stated he was mentally evaluated prior to his guilty plea and Counsel was aware of his background. Applicant recalled apologizing to the plea court for the pain and sorrow that he had caused. Applicant stated he pled guilty to the crimes he was charged because he did not want to face a potential life sentence.

Following Applicant's testimony, Pamela Gowdy was called by Applicant to testify. Gowdy stated she was the mother of Applicant. Gowdy explained Applicant was charged with two separate rapes among other charges. Gowdy explained that indictment number 2008-GS-45-219 occurred in June of 2002 and indictment number 2008-GS-45-220 occurred in January 2007. Gowdy explained that the rape kit of the 2002 victim contained DNA of two males. Gowdy stated she paid for an independent DNA analysis of the DNA found inside the victim of the 2002 case. Gowdy stated she was aware that Applicant's DNA matched the DNA found in the victim of the 2002 case.

Following Applicant's testimony, Counsel was called to testify by the State. Counsel stated he had been practicing law since 1994. Counsel stated he was retained and was prepared to represent Applicant on both 2008-GS-45-219 and 2008-GS-45-220. Counsel stated he met with Applicant at least four to five times while Applicant was incarcerated in the Williamsburg County jail. Counsel stated he filed for and reviewed all Brady material with Applicant. Counsel stated he discussed Applicant's version of the facts. Counsel stated he discussed the possible defenses with Applicant. Specifically, Counsel stated he was first retained to represent Applicant on 2008-GS-45-220. Counsel stated Applicant had been charged with Criminal

Sexual Conduct in the First Degree and Burglary in the First Degree. Counsel stated Applicant worked for the victim's father HVAC Company and was dating the victim at the time the rape occurred. Counsel stated the victim claimed Applicant broke into her house and forcibly raped her while holding a gun or knife to her head. Counsel stated in his opinion Applicant had a viable defense to the rape and burglary charges because the facts did not match victim's statement. Specifically, Counsel stated it was almost physically impossible for Applicant to have climbed through the kitchen window as was alleged by the victim. Furthermore, Counsel stated Applicant voluntarily submitted his DNA for testing because they were prepared to argue consensual sex due to Applicant and victim's relationship, prior inconsistent statement's given by the victim, and the factual context of the case. Counsel stated Applicant's DNA was run through the Combined DNA Indexing System (CODIS) and Applicant's DNA matched both the DNA found for the victim in 2008-GS-45-220 and the DNA found inside the victim of 2008-GS-45-219.

Counsel stated he was prepared to represent Applicant on the 2008-GS-45-219 charges in addition to the 2008-GS-45-220 charges. Counsel stated the victim in the 2008-GS-45-219 claimed someone had broken into her house, put a hand over her mouth, held either a gun or knife over her throat, and forcibly raped her. Counsel stated the rape occurred in July 2002; approximately a month prior to Applicant being deployed overseas for the next five years. Counsel stated the facts in 2008-GS-45-219 were not favorable to Applicant. Counsel stated Applicant suffered from a drinking problem, prior to his deployment. Counsel stated the victim's house was directly behind a bar Applicant frequented. Additionally, Counsel stated Applicant told him he could not recall his whereabouts the night the incident occurred. Counsel stated the victim in the case could not provide a description of her assailant because it was dark

in her house. Counsel further stated that Applicant and victim did not have a previous relationship. Counsel stated the rape kit taken of the victim provided DNA for two males, Applicant and James Timmons (Timmons). Counsel explained Timmons was a suspect shortly following the rape in 2002. Counsel stated Applicant's DNA came back as a positive match and that it was 1 in 290 million chance that it was not Applicant. Counsel stated that Timmons DNA amounted to a small trace amount and there was no doubt Applicant was the main contributor. Counsel stated both Applicant and Gowdy had copies of the SLED DNA report, which ultimately ruled Timmons as a suspect.

Furthermore, Counsel stated both Applicant and Gowdy were highly upset about the outcome of the SLED DNA report. Counsel stated Gowdy paid approximately 6,000 dollars to have an independent analysis conducted of the DNA. Counsel stated he advised both Applicant and Gowdy if the results of the independent analysis came back as a positive match for Applicant it would only strengthen the State's case. Counsel stated that the independent analysis report showed Applicant's DNA matched the DNA found inside the victim and ruled out Timmons. Counsel stated it was Applicant's decision to plead guilty.

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 at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Specifically, this Court finds that Counsel's testimony is very credible while Applicant's and Gowdy's testimony are less credible. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (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, (1984); Butler, 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, 286 S.C. 441, 334 S.E.2d 813 (1985). Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating 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." 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. 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 (1985). Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel.

INEFFECTIVE ASSISTANCE OF COUNSEL

Counsel was ineffective for failing to inform Applicant of facts surrounding the DNA testing.

This Court finds Applicant's allegation that he was denied effective assistance of counsel for failing to fully advise him of the facts surrounding the DNA evidence is without merit. This Court finds plea counsel had numerous meetings with Applicant prior to his plea and that they reviewed the discovery materials. Applicant alleges he was unaware that the rape kit taken from the victim in the 2002 case contained DNA for two males. However, Counsel stated both he and Gowdy were provided with SLED DNA report's showing that there were two male contributors. Counsel explained that Applicant's DNA was a positive match and that there was a 1 in 290 million chance it was not Applicant's DNA. Counsel further explained that the second male DNA belonged to James Timmons, a person of interest shortly following the rape in 2002. Counsel stated that the DNA matching Timmons was a small trace amount and Timmons was ultimately ruled out as a suspect. Counsel stated the DNA results revealed that Applicant was the main contributor. Counsel further stated Applicant and victim did not have a previous relationship and Applicant could not explain why his DNA was found inside the victim. Counsel further stated Gowdy paid for an independent analysis of the DNA results because the DNA found inside the victim matched two separate males. This Court finds Applicant was well aware that the SLED DNA reports. This Court finds Counsel's action were reasonable under professional norms. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Therefore, this Court finds this allegation should be denied and dismissed with prejudice.

Ineffective Assistance of Counsel for failing to conduct any pretrial investigation and failing to provide and review discovery with Applicant prior to his guilty plea.

This Court finds Applicant's allegation that he was denied effective assistance of counsel for failing to adequately investigate, provide and review discovery with Applicant is without merit. This Court finds plea counsel had numerous meetings with Applicant prior to his plea and they reviewed the discovery materials. The Court notes Counsel stated he filed for and reviewed discovery with Applicant prior to his guilty plea. Furthermore, Counsel stated he provided both Applicant and Gowdy a copy of the SLED DNA report which led to Gowdy paying for an independent analysis of the DNA. This Court finds the Applicant failed to articulate what more Counsel should have done to investigate and change the outcome of his proceedings. 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). Therefore, this Court finds this allegation should be denied and dismissed with prejudice.

Involuntary Guilty Plea

This Court finds that the Applicant's guilty plea was entered freely and voluntarily. To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and

defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977)). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir.1975).

This Court finds that this allegation is without merit and the Applicant has failed to carry his burden of proving that his guilty plea was involuntarily made. This Court finds that the Applicant's testimony was entered freely and voluntarily. The Applicant testified at the evidentiary hearing that he was pleading guilty freely and voluntarily. This Court finds further that the record reflects the Applicant was thoroughly advised of the waiver of his constitutional rights by both counsel and the plea judge. The record reflects the Applicant at his plea proceeding told the court that he wished to plead guilty. (T. 14). The record also reflects that the Applicant told the court that he had not been promised or threatened by anyone to get him to plead guilty. (T. 15-16). This Court finds that the Applicant had a full understanding of the consequences of his plea and the charges against him. Specifically, this Court notes Applicant stated "fully aware of what's going on." (T. 8). This Court finds that the plea judge correctly found that the Applicant's plea was freely, voluntarily, and intelligently made. (T. 20).

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 his 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.

The Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. This Court also concludes the Applicant has failed to meet his burden of proving his guilty plea was not knowing and voluntary. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

ALL OTHER ALLEGATIONS

Except as discussed above, this Court finds that the Applicant affirmatively waived the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

CONCLUSION

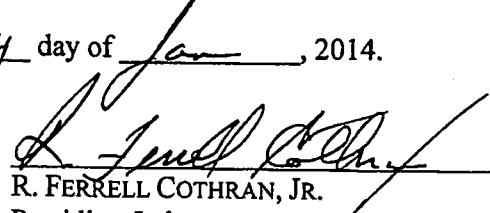
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

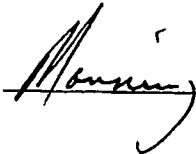
This Court notes that that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of 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:

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 14 day of Jan, 2014.


R. FERRELL COTHRAN, JR.
Presiding Judge
Third Judicial Circuit

, South Carolina

The Brooks Law Office, LLC

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February 3, 2014

South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

RE: William Yarborough, #334712 vs. State of South Carolina
2010-CP-45-0177

Dear Sir or Madam:

Enclosed herewith you will find the **Notice of Appeal, Order of Dismissal**, along with a **Proof of Service** in reference to the above named Applicant.

If you have any questions or concerns, please contact my office at the number stated above.

With kind regards, I am

Sincerely,

Charles T. Brooks, III
CTB/srw

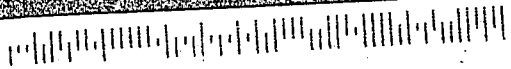
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S.C. SUPREME COURT

Enclosed as stated

Cc: Daniel Gourley, Office of Attorney's General
South Carolina Office of Appellate Defense
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COLUMBIA SC 292
JUN 14 2011

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