

R. MILLS ARIAIL, JR.
ATTORNEY AT LAW

11 NORTH IRVINE STREET, SUITE 11 • GREENVILLE, SC 29601
PHONE 864.232.9390 • FAX 864.232.9392 • E-MAIL MILLS@RMALAWOFFICE.COM

February 6, 2014

Via US Mail

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

***Re: Notice of Intent to Appeal from Eric Lee Graham v. State of South Carolina,
C.A. No.: 2013-CP-39-0761***

Dear Mr. Shearouse:

I was Court Appointed in the above referenced matter, and I expect that appellate defense will handle the appeal and petition for certiorari. On behalf of my client, enclosed for filing please find the Notice of Appeal and proof of service. I've enclosed a copy of Judge Welmaker's Order of Dismissal to be challenged on appeal. I must inform the Supreme Court that as an officer of this Court, I am unable to identify any issue which can be reviewed on appeal. By copy of this letter, I am instructing Petitioner that if he must notify this Court, in writing, no later than twenty (20) days from the date of this letter, of any arguable basis for an appeal from his guilty plea as required by Rules 203(d)(1)(B) of the South Carolina Appellate Court Rules. By copy of this letter, I am also serving counsel for the State of South Carolina, the Pickens County Solicitor's Office, the South Carolina Commission of Indigent Defense - Appellate Defense Division and the Pickens County Clerk's Office.

Thank you for your assistance in this matter and if you have any questions, please feel free to contact me.

Sincerely,
LAW OFFICE OF R. MILLS ARIAIL, JR.
Attorney at Law


R. Mills Ariail, Jr.

RECEIVED

FEB 18 2014

S.C. SUPREME COURT

RMAjr/dcd
Enclosures (as stated)

cc: Pickens County Clerk's Office
Pickens County Courthouse
214 E. Main Street
Pickens, SC 29671

Karen C. Ratigan
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211-11549

Eric Lee Graham
SCDC #305817
Broad River Correctional Institution
4460 Broad River Road
Columbia, SC 29210

Pickens County Solicitor's Office
Pickens County Courthouse
214 E. Main Street
Pickens, SC 29671

SC Commission of Indigent Defense
Division of Appellate Defense
1122 Lady Street
Columbia, SC 29201-3218

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

G. Edward Welmaker, Circuit Court Judge

Case No. 2013-CP-39-0761

Eric Lee Graham,..... Appellant,
SCDC #305817

v.

State of South Carolina Respondent.

NOTICE OF APPEAL

Eric Lee Graham appeals the Honorable G. Edward Welmaker's Order of Dismissal dismissing Graham's application for post-conviction relief. On January 21, 2014, the Honorable G. Edward Welmaker signed an order dismissing Appellant's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on January 27, 2014. A copy of Judge Welmaker's Order is attached.



R. Mills Ariall, Jr.
Attorney at Law
11 North Irvine St., Suite 11
Greenville, SC 29601
Telephone (864) 232-9390
Facsimile (864) 232-9392
Attorney for Eric Graham

Greenville, South Carolina
February 6, 2014

RECEIVED

FEB 18 2014

S.C. SUPREME COURT

Other Counsel of Record and Interested Parties:

Karen C. Ratigan, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211
803-734-3970
Attorney for the State of South Carolina

Pickens County Clerk's Office
Pickens County Courthouse
214 E. Main Street
Pickens, SC 29671

Pickens County Solicitor's Office
Pickens County Courthouse
214 E. Main Street
Pickens, SC 29671

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

G. Edward Welmaker, Circuit Court Judge

Case No. 2013-CP-39-0761

Eric Lee Graham, Appellant,
SCDC #305817

v.

State of South Carolina Respondent.

CERTIFICATE OF SERVICE

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this 10th day of February, 2014 I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

Karen C. Ratigan, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211
Attorney for the State of South Carolina

Pickens County Solicitor's Office
Pickens County Courthouse
214 E. Main Street
Pickens, SC 29671

SC Commission of Indigent Defense
Division of Appellate Defense
1122 Lady Street
Columbia, SC 29201-3218

Denise Tanner LaBeck
Denise Tanner LaBeck
Paralegal to R. Mills Ariail, Jr.
LAW OFFICE OF R. MILLS ARIAIL, JR.

February 10, 2014
Greenville, SC

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF PICKENS

CASE NO: 2013CP3900761

IN THE COURT OF COMMON PLEAS

2014 JAN 23 AM 8 34

Eric Lee Graham (#305817) vs State of South Carolina

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

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: _____

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

Order of Dismissal

Dated at Pickens, South Carolina, this .

Court Reporter:

PRESIDING JUDGE -

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

S. nail
Eric Lee Graham (#305817) ,
R. Mills Ariail Jr. 11 North Irvine St., Ste., 11
Greenville, SC 29601

emailed
Karen Christine Ratigan PO Box 11549 Columbia, SC
29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

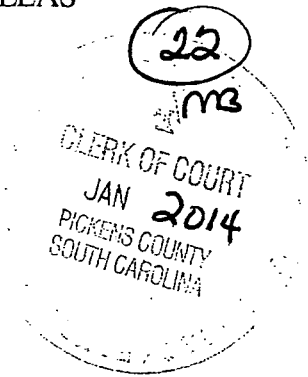
MS

ATTORNEY(S) FOR THE DEFENDANT(S)
Harold P. Welborn, Jr.
Harold P Welborn, Jr. - Clerk of Court

MB

STATE OF SOUTH CAROLINA)
)
 COUNTY OF PICKENS)
)
 Eric Lee Graham,)
 S.C.D.C. No. 305817,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2013-CP-39-0761



ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed June 13, 2013. The Respondent made its return on October 14, 2013. An evidentiary hearing into the matter was convened on December 18, 2013 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by R. Mills Ariail, Jr., 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, Perry D. DeLoach, Jr., Esquire. The Court had before it the transcript of the guilty plea hearing, the Pickens County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, and the return.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Pickens County Clerk of Court. The Applicant was indicted at the September 2011 term of the Pickens County Grand Jury for second-degree assault and battery by mob (2011-GS-39-1294), failure to stop for a blue light (2011-GS-39-1295), and first-

degree burglary (2011-GS-39-1298). He was represented by Perry D. DeLoach, Jr., Esquire.

On January 28, 2013, the Applicant pled guilty.¹ The Honorable Edward W. Miller sentenced the Applicant to concurrent sentences of time-served for third-degree assault and battery by mob and twelve years for second-degree burglary. Judge Miller levied a three year sentence for failure to stop for a blue light and ordered it to be consecutive to the sentence for second-degree burglary. The Applicant did not appeal.

ALLEGATIONS

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

1. Ineffective assistance of counsel.

At the PCR hearing, the Applicant proceeded upon allegations of ineffective assistance of plea counsel and involuntary guilty plea. The Applicant clarified that he was only proceeding upon allegations related to his second-degree burglary conviction.

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).

¹ The Applicant also waived presentment and pled guilty to a Greenville County charge of attempted armed robbery (2013-GS-23-0289). Judge Miller sentenced him to five years, concurrent to the Pickens County sentences.

Ineffective Assistance of Counsel/Involuntary Guilty Plea

The Applicant alleges his guilty plea was involuntary and that 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).

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000) (citing Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)).

The Applicant stated he met with plea counsel four or five times at the jail. The Applicant stated plea counsel did not review the discovery materials but later admitted they

reviewed items such as the warrants, statements, and police reports. The Applicant stated plea counsel said the statements were not strong enough for a jury "to bite on." The Applicant stated he and plea counsel discussed his brother (who was his co-defendant) and that a witness would say the Applicant was not involved. The Applicant stated he asked plea counsel to look into an alibi – that he was at his grandmother's house that day and later picked up his brother at an Ingles. The Applicant stated he discussed the State's fifteen-year plea offer with plea counsel and said he did not plead guilty the first time he was brought into court. The Applicant stated plea counsel told him that, if he did not take the fifteen-year offer he would go to trial. The Applicant stated he felt that he had to plead guilty. The Applicant stated he lied to the plea judge when he stated he was satisfied with counsel and guilty of the charges.

Plea counsel testified he was an associate of the Applicant's original attorney. Plea counsel testified the original attorney had already filed discovery motions. Plea counsel testified he met with the Applicant six or seven times at the jail and that they discussed: the discovery materials, elements, potential sentences, and possible defenses. Plea counsel testified both victims knew the Applicant and gave statements implicating him and his brother. Plea counsel testified he visited the Applicant's brother (who had already plead guilty and was incarcerated), and the brother said the Applicant was not there but that he should tell the Applicant to "do the right thing." Plea counsel testified he passed this information along to both the Applicant and the assistant solicitor. Plea counsel testified he and the Applicant discussed a possible alibi but he did not recall how much he investigated this once the Applicant decided he wanted to plead guilty. Plea counsel testified he told the Applicant that he believed there was a 50/50 chance of winning and trial and that the Applicant decided he wanted a plea offer. Plea counsel testified the Applicant was brought to the courthouse to plead guilty on two occasions. Plea counsel

testified that, after the Applicant balked at the first plea hearing, the State put the case on the trial docket and the Applicant decided he wanted to plead guilty again.

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 his representation.

This Court finds the Applicant failed to meet his burden of proving plea counsel did not properly investigate or prepare his case. Plea counsel testified that discovery motions had been filed in this case and that he (and the original ^{fw} attorney) had given copies of the discovery materials to the Applicant. Plea counsel testified he met with the Applicant six or seven times at the jail and that they discussed the elements of the charges, the sentencing ranges, and possible defenses. Plea counsel testified he and the Applicant discussed his brother/co-defendant. This Court finds plea counsel's testimony is credible. This Court finds plea counsel properly investigated and prepared this case and that the Applicant has failed to demonstrate what else plea counsel could have done that would have affected 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 finds the Applicant failed to meet his burden of proving plea counsel did not properly investigate and pursue an alibi defense. Plea counsel testified they discussed an alibi



defense but that he did not know if he fully investigated this avenue once the Applicant decided he wanted to accept the plea recommendation. This Court finds this was a valid strategic decision. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel). Regardless, this Court finds the Applicant has failed to set forth any credible evidence or testimony to substantiate his claim that he had an alibi in this case. Without such evidence, this Court cannot speculate as to whether there could have been a viable alibi defense. See, e.g., Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme Court “has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness’ failure to testify at trial.”) (emphasis in original).

This Court finds the Applicant failed to meet his burden of proving plea counsel coerced him into accepting the State’s plea recommendation and pleading guilty. The Applicant and his attorney discussed the fifteen-year plea offer from the State and the Applicant decided to accept this offer. After the Applicant balked at the first plea hearing, plea counsel testified the State put the case on the trial docket. Plea counsel testified he had begun to prepare the case for trial. Plea counsel testified, however, that the Applicant subsequently decided to plead guilty. 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.15). The Applicant also told the plea judge that he understood the trial rights he was waiving in pleading guilty and was satisfied with counsel. (Plea transcript, p.7). This Court finds the Applicant’s testimony at the PCR hearing that he lied to the plea court during the plea colloquy is not credible. This Court finds there is no evidence in


the guilty plea transcript to support the Applicant's assertion that he was pressured into entering a guilty plea; therefore the transcript has refuted this allegation. See Stalk v. State, 375 S.C. 289, 300, 652 S.E.2d 402, 407 (Ct. App. 2007); see also Rayford v. State, 314 S.C. 46, 48-49, 443 S.E.2d 805, 806 (1994) (where transcript of guilty plea proceeding refuted applicant's claim that he did not understand the terms of a plea bargain, grant of PCR was inappropriate notwithstanding applicant's claim lawyer misadvised him). This Court finds the Applicant entered a knowing and voluntary guilty plea. See Boykin v. Alabama, 395 U.S. at 243-44, 89 S. Ct. at 1712.

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.

This 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

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.

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CLERK OF COURT
JAN 2014
PICKENS COUNTY
SOUTH CAROLINA

CONCLUSION

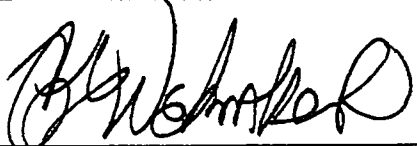
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner and the Applicant was not prejudiced by counsel's representation. Furthermore, the Applicant's guilty plea was entered knowingly and voluntarily within the mandates of Boykin. 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 21 day of Jan, 2014.



G. Edward Welmaker
Presiding Judge
Thirteenth Judicial Circuit

Pickens, South Carolina.

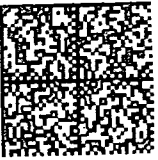


R. MILLS ARIALL, JR.



11 NORTH IRVINE STREET, SUITE 11
GREENVILLE, SC 29601

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



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