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February 19, 2014

RECEIVED

FEB 24 2014

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

S.C. Supreme Court

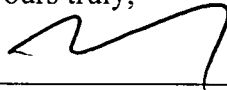
Re: Antonio Calloway SCDC#343102 vs. State of South Carolina
Case No: 2012-CP-23-6181

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and a Proof of Service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,



Rodney Richey

RWR/tlg

enclosures

cc: Karen Ratigan, Esquire

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

HONORABLE G. EDWARD WELMAKER

2012-CP-23-6181

Antonio Calloway, SCDC # 343102,

APPELLANT,

against

STATE OF SOUTH CAROLINA,

RESPONDENT.

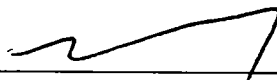
RECEIVED

FEB 24 2014

S.C. Supreme Court

NOTICE OF APPEAL

Antonio Calloway appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable G. Edward Welmaker, Circuit Judge on December 18, 2013 and Order issued on January 30, 2014 and filed on February 17, 2014. The Appellant received notice of the judgment on February 18, 2014.



Rodney W. Richey
Attorney for the Appellant
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(864) 467-0503

Other Counsel of Record:
Karen Ratigan, Esquire
Office of Attorney General State of SC
Post Office Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
HONORABLE G. EDWARD WELMAKER

2012-CP-23-6181

Antonio Calloway, SCDC # 343102,

against

STATE OF SOUTH CAROLINA,

RESPONDENT.

RECEIVED

FEB 24 2014
FEB 24 2014


S.C. Supreme Court
S.C. Supreme Court

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on February 20, 2014, addressed to their attorney of record, Karen Ratigan, Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: February 20, 2014

RICHEY & RICHEY, P.A.



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Greenville, South Carolina 29603
(864) 467-0503

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2012CP2306181

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2014 FEB 17 AM 11:32

Antonio C Calloway vs. South Carolina State Of

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: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 - Affirmed;
 - Reversed;
 - Remanded;
 - Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

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

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE - G Edward Welmaker

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:

Rodney Wade Richey PO Box 10916 Greenville, SC 29603-0916

Karen Christine Ratigan PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
Antonio Courvesier Calloway,)
S.C.D.C. No. 343102,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
C.A. No. 2012-CP-23-6181

ORDER OF DISMISSAL

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER
2014 FEB 17 AM 11 32

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed September 25, 2012. The Respondent made its return on January 31, 2013. An evidentiary hearing into the matter was convened on December 18, 2013 at the Greenville County Courthouse. The Applicant was present and represented by Rodney W. Richey, 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, Christopher T. Posey, Esquire. The Court had before it the transcript of the guilty plea hearing, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, the return, and Applicant's Exhibit 1.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the July 2011 term of the Greenville County Grand Jury for two counts of possession of a

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weapon during the commission of a violent crime (2010-GS-23-7919, -7932), armed robbery (2010-GS-23-7920), and attempted murder (2010-GS-23-7949). The Grand Jury issued amended indictments at the February 2012 term for attempted armed robbery (2010-GS-23-7923), kidnapping (2010-GS-23-7926), and two counts of armed robbery (2010-GS-23-7931, -7955, count 1). He was represented by Christopher T. Posey, Esquire.

On May 4, 2012, the Applicant pled guilty.¹ The Honorable C. Victor Pyle, Jr., sentenced the Applicant to concurrent terms of five years for each count of possession of a weapon during the commission of a violent crime, twenty years for each count of armed robbery, twenty-five years for attempted murder, ten years for attempted armed robbery, and twenty-five years for kidnapping. 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.
2. "S.C. Statue [sic] Eg: Hand of one/Hand of all law, by and through 'Equal protections' of the law U.S. Const., XIV, Sec. #, S.C. Const. Article I – Sec. #3...."

The Applicant, through counsel, submitted an amendment to his application filed September 18, 2013, in which he alleged the following:

1. Ineffective assistance of counsel:
 - a. Failed to conscientiously discharge professional responsibilities.
 - b. Failed to effectively challenge search and seizure.
 - c. Failed to act as a diligent and conscientious advocate.
 - d. Failed to give complete loyalty.
 - e. Did not have Applicant's best interest in mind.
 - f. Failed to serve the cause in good faith.
 - g. Neglected necessary investigations and preparation.

¹ The State also dismissed several charges.

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- h. Did not do necessary factual investigations.
- i. Did not do necessary legal research.
- j. Did not conscientiously gather information to protect rights.
- k. Did not try to have the case settled in a manner that would have been to my best advantage.
- l. Did not advise me of all my rights or take any of the actions that were necessary to protect and preserve them.
- m. Never properly ascertained whether or not I actually understood or comprehended all of the issues involved in the case.
- n. Never properly consulted with me or kept me informed.
- o. Never explained to me or discussed with me any of the elements.
- p. Never made any attempt to ascertain whether or not I actually knew the elements of the crime charged or whether or not I understood exactly what "criminal element" meant.
- q. Never explained or discussed with me how the elements of the crime charged and the evidence that the prosecution planned to introduce into evidence against me related to one another and did not discuss how the sentencing would be done especially as it related to the elements of the crime as in State v. Boyd.
- r. Never informed me of any of the defenses that were available to me.
- s. Never intended to offer any defense to the court on my behalf.
- t. Never explained to me or discussed with me any kind of defense strategy.
- u. Never explained to me or discussed with me any of the tactical choices that were made or planned to be made.
- v. Dictated to me exactly how my case was going to be handled and offered no alternative options.
- w. Failed to properly acquaint herself with the law and facts surrounding my case and, as a result, there was a very serious error in the assessment of both the law and the facts.
- x. No defense at all was put in issue for me during the Court proceedings.
- y. Did not subject the prosecution's case to any adversarial testing.
- z. Failed to oppose the prosecution's case with any adversarial litigation.
- aa. Failed to function as the government's adversary in any sense of the word.
- bb. Failed to pursue any of the legal recourse that was available.
- cc. Failed to function as the counsel that the Constitution's Sixth Amendment guarantees.
- dd. Failed to call alibi witnesses on my behalf.
- ee. Failed to appeal my case.

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).

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).

The Applicant stated he met with plea counsel and reviewed the evidence and sentence ranges for the charges. The Applicant stated he told plea counsel his version of events and that he was innocent. The Applicant stated his co-defendant gave a second statement in which he

recanted the first statement (where he stated the Applicant was involved). The Applicant stated he discussed this second statement with plea counsel but counsel did not do anything with it. The Applicant stated he gave a confession in this case because plea counsel told him to do so. The Applicant stated there was a ten-year plea offer in his case and he believed he was pleading guilty to that offer. The Applicant stated he pled guilty because plea counsel said he would receive a 25-30 year sentence if he went to trial. The Applicant admitted he did not tell the plea judge that he was pleading guilty in exchange for a ten-year plea offer. The Applicant stated plea counsel did not provide effective mitigation evidence – mental health and social history – to the plea judge. The Applicant stated he was not satisfied with plea counsel but told the plea judge he was satisfied because he believed he would receive a ten-year sentence.

Plea counsel testified he was appointed to represent the Applicant on 39 charges. Plea counsel testified he filed discovery motions, received those materials, and reviewed them with the Applicant. Plea counsel testified they reviewed the sentence ranges for the charges and the Applicant's version of events. Plea counsel testified he used the co-defendant's recanted statement to get another bond hearing for the Applicant. Plea counsel testified, however, that the co-defendant reverted back to his original statement and would have testified against the Applicant at trial. Plea counsel testified the Applicant originally denied involvement but – after his co-defendant flipped on him – the Applicant decided to speak to the assistant solicitor and tell him what happened. Plea counsel testified the Applicant asked the assistant solicitor for a ten-year plea offer and that the assistant solicitor stated he would not make a recommendation but would not argue against ten years. Plea counsel testified there was never a ten-year plea offer in this case and that the Applicant knew that he was pleading guilty without a sentence recommendation. Plea counsel noted the Applicant did not have a lot of family support and

testified he gave mitigation to the plea judge based on what the Applicant told him. Plea counsel testified a mitigation expert would not have changed the outcome of the Applicant's case.

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. See Bennett v. State, 371 S.C. 198, 204 S.E.2d 673 (2006).

The Applicant admitted to the plea judge that the facts recited by the solicitor were true. (Plea transcript, pp.12-13). The Applicant also told the plea judge that he understood the trial rights he was waiving in pleading guilty, was satisfied with counsel, and had not been coerced in any way. (Plea transcript, p.5; pp.7-8).

This Court finds the Applicant failed to meet his burden of proving plea counsel did not properly address the issue of the co-defendant's recanted statement. Plea counsel testified he was aware of this statement and, in fact, used it to secure another bond hearing. Plea counsel also testified the co-defendant reverted back to his first statement. This Court finds the Applicant has failed to articulate what more plea counsel could have done with the co-defendant's second statement. While plea counsel could have used that statement to impeach the co-defendant if the case went to trial, the Applicant chose to confess and plead guilty to several of his charges.

This Court finds the Applicant failed to meet his burden of proving plea counsel somehow misadvised him about the sentence he was facing if he entered a guilty plea. Both plea counsel and the Applicant testified they discussed the sentence ranges for the charges. While the

Applicant he pled guilty pursuant to a ten-year plea offer, plea counsel testified there was never a ten-year plea recommendation in this case. Plea counsel explained the Applicant confessed and asked the assistant solicitor for a ten-year deal but that no recommendation was made. Plea counsel testified the Applicant knew he was pleading guilty without a sentence recommendation. This Court finds plea counsel's testimony is credible. This Court notes a sentence recommendation was not made at the guilty plea hearing and the Applicant stated he had not been made any promises in exchange for his guilty plea. (Plea transcript, p.5). This Court further notes that plea counsel urged the plea judge to sentence the Applicant to the minimum sentence of ten years imprisonment. (Plea transcript, pp.14-16).

This Court finds the Applicant failed to meet his burden of proving plea counsel should have presented more thorough mitigation or obtained a mitigation expert. This Court notes plea counsel presented a detailed mitigation argument to the plea judge, including that the Applicant: had no prior record, became the sole caretaker of his younger siblings at a young age, and performed well academically with no history of behavior misconduct at school. (Plea transcript, pp.13-16). This Court notes that, as the Applicant has failed to present either mitigation evidence or a mitigation expert, it cannot speculate as to whether such information would have had an impact upon the Applicant's case. See Lorenzen v. State, 376 S.C. 521, 530, 657 S.E.2d 771, 777 (2008) (finding that, as the applicant failed to present any expert testimony at the PCR hearing, "it is merely speculative that these allegedly favorable expert witnesses would have aided in his defense"); Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, as the applicant failed to have an expert testify at the evidentiary hearing, "any finding of prejudice is merely speculative").

Accordingly, this Court finds the Applicant has failed to prove the first prong of the

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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. 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.

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. 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 30 day of Jan, 2014.



G. Edward Welmaker
Thirteenth Judge
Thirteenth Judicial Circuit

Birkens, South Carolina.