

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

David Colter, Jr., #336366,
Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

Case No. 2009-CP-38-2022

ORDER OF DISMISSAL

SEP 20 11 41 AM '11

PROCEDURAL HISTORY

This matter comes before the Court by way of an application for post-conviction relief filed December 16, 2009. The Respondent made its Return on May 5, 2010. An evidentiary hearing into the matter was convened on December 1, 2011, at the Dorchester County Courthouse. The Applicant was present at the hearing and was represented by Andrew J. Brown, Esquire. The Respondent was represented by Assistant Attorney general Robert D. Corney of the South Carolina Attorney General's Office.

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. Applicant was indicted during the October 2008 term of the Orangeburg County Grand Jury for Felony Driving under the Influence (Death) (2008-GS-38-0820). On August 6, 2009, Applicant appeared before the Honorable Edgar W. Dickson, where he pled guilty as indicted. Judge Dickson sentenced Applicant to eight years imprisonment. Applicant did not appeal his guilty plea or sentence.

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. Failure to investigate

2. "Bias by Trial Judge"
 - a. Plea judge and attorney had worked in the same law firm.
3. Denial of preliminary hearing

In its Return, Respondent interpreted Applicant's claims to be three various allegations of ineffective assistance of counsel. At the evidentiary hearing, Applicant presented his claims are three allegations of ineffective assistance of counsel.

SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf and presented testimony from plea counsel, C. Bradley Hutto, Esquire (herein "Counsel"). This Court also had before it a copy of the Applicant's guilty plea transcript, the records of the Orangeburg County Clerk of Court, and the Applicant's records from the South Carolina Department of Corrections.

During the evidentiary hearing, Applicant testified that that he retained Counsel to represent him for this charge and that he met with Counsel twice prior to his guilty plea. Applicant testified that he received a sentence of eight years imprisonment and he knew he could receive a possible sentence of one to twenty-five years imprisonment. Applicant testified that he did not receive a preliminary hearing and that he feels Counsel was ineffective for failing to ensure he had a preliminary hearing. However, Applicant testified that he never discussed a preliminary hearing with Counsel or asked Counsel to request a preliminary hearing.

Additionally, he testified that he feels Counsel was ineffective for failing to review all of the evidence with him. Specifically, Applicant testified that he wanted Counsel to review the results of his blood alcohol test, the accident report, and the MAIT team report with him. Applicant testified that Counsel failed to review his indictment with him and that he was unaware he had been charged with "felony DUI." However, Applicant acknowledged that he

had previously seen a copy of his traffic citation stating he was cited for "Felony Driving Under the Influence." Applicant testified that he did not cause the accident giving rise to this charge, but that another driver hit his car, causing him to strike and fatally injure the victim.

Furthermore, Applicant testified that he feels Counsel was ineffective because he allowed Applicant to plead guilty before Judge Dickson. Applicant elaborated that "Mr. Hutto and the Judge Dickson were at the same firm and I just thought that I didn't get a fair shake during the time." However, Applicant testified that Judge Dickson allowed him to report for his incarceration a few days after sentencing to allow him time with his family and to ensure his affairs were in order, and that he believes Judge Dickson was so understandable because of Counsel's prior relationship with him.

Following Applicant's testimony, Counsel was called to testify by Applicant. Counsel testified that he has been practicing law for approximately thirty years and the entirety has been in Orangeburg. Counsel testified that he has handled "thousands of DUI cases and probably close to a hundred, or, between a hundred and 200 felony DUIs." Counsel testified that he has known Judge Dickson for twenty years and that they practiced law together for fifteen years. Counsel stated that he did not believe that there was any conflict of interest in Judge Dickson hearing this matter. He elaborated that Judge Dickson is one of two resident judges in Orangeburg, so he often appears before Judge Dickson without incident. He stated that "if there was a particular reason that I knew we had a conflict, we could get another judge. But I didn't know of any conflict in this case."

Counsel testified that he did not request a preliminary hearing because he was not immediately retained by Applicant and it was "too late" to request a hearing by the time he became involved with the case. Counsel testified that he did not think a preliminary hearing

would have been any benefit to Applicant, as he received all information that would have been presented at such a hearing. He testified that Applicant was true bill indicted by the Orangeburg County Grand Jury. Counsel testified that while he has no independent recollection of showing Applicant the physical indictment, he is certain that he discussed the charge of Felony DUI - Death with Applicant, as well as the elements of the charge and possible sentences. He elaborated that Applicant "had a lot of questions" and he believes he "answered all over time."

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 testimony is not 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).

Ineffective Assistance of Counsel

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (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, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

After careful review based on the standard discussed above, the Applicant has failed to carry his burden in this action. Specifically, this Court finds that Counsel's testimony is credible while Applicant's testimony is not credible. Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel.

Counsel failed to investigate

This Court finds that the Applicant's allegation that he was denied effective assistance of trial counsel due to Counsel's lack of investigation is without merit. This Court finds that the guilty plea transcript, along with Counsel's credible testimony, reveals the proficient competency of counsel. Applicant alleges that Counsel should have investigated the results of the blood alcohol test, the accident report, and the MAIT team report, and reviewed this information with

Applicant prior to his guilty plea. However, Counsel testified that he reviewed Applicant's case extensively with Applicant and answered all of Applicant's questions. At the evidentiary hearing, Applicant failed to produce any witnesses or evidence to show what additional information might have been gleaned from additional investigation. "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." Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998). This Court finds that the Applicant's attorney demonstrated a normal degree of skill, knowledge and professional judgment that is expected of an attorney who practices criminal law. Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

Counsel failed to object to a biased trial judge

This Court finds that the Applicant's allegation that Counsel was ineffective for allowing him to plead guilty before Counsel's former law partner is without merit. Applicant testified that he felt he "didn't get a fair shake" during his guilty plea because the plea judge, Judge Dickson, is a former law partner of Counsel. However, he acknowledged that Judge Dickson allowed him to return home for a few days to get his affairs in order and spend time with his family before starting his prison sentence and testified that he believes Judge Dickson was so understandable because of his prior relationship with Counsel. Counsel testified that he appears before Judge Dickson regularly, as he is one of two resident judges for Orangeburg and that he does not believe any conflict existed. Based on the foregoing, this Court finds that Counsel's performance was reasonable and effective in regards to this allegation.

Furthermore, Applicant failed to meet his burden of showing he was prejudiced by Counsel's alleged deficiency. Applicant testified that he believes Judge Dickson was

understandable and afforded him additional time with his family and to put his affairs in order before starting his sentence. Additionally, this plea was entered without any negotiation or recommendation and Applicant received significantly less than the maximum sentence of twenty-five years imprisonment. This Court holds that the Applicant has failed to meet his burden of proof in regards to this allegation, which must be denied and dismissed with prejudice.

Counsel failed obtain a preliminary hearing for Applicant

This Court finds that the Applicant's allegation that Counsel was ineffective for failing to secure a preliminary hearing for Applicant is without merit, as Applicant was true bill indicted by the grand jury prior to the convening of the preliminary hearing. Under Rule 2(b), SCRCrimP, a preliminary hearing "shall not be held...if the defendant is indicted by a grand jury...before the preliminary hearing is held." Further, "any delay in holding the preliminary hearing is not a ground for delay in prosecution of the case in the court of general sessions." State v. Hawkins, 310 S.C. 50, 55, 425 S.E.2d 50, 53 (Ct. App. 1992). Applicant's charge was true bill indicted by the Orangeburg County Grand Jury on October 15, 2008. Therefore, Applicant was no longer entitled to a preliminary hearing on the charges after October 15, 2008.

Additionally, in the context of Strickland v. Washington, Applicant has failed to carry his burden in proving resulting prejudice from any alleged deficiency on Counsel's part in this regard. Applicant testified that he never requested a preliminary hearing or discussed his desire for such with Counsel. The charge was presented to the Orangeburg County Grand Jury where sufficient probable cause was found, as evidenced by the true bill indictments returned October 15, 2008. Therefore, this Court can find no reasonable probability that had counsel demanded such a preliminary hearing be held, the charge would have been dismissed by the presiding magistrate judge. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of

sufficient prejudice, which...will often be so, that course should be followed." Strickland v. Washington, 466 U.S. 668, 697, 104 S.Ct. 2052, 2069 (1984). For all of the reasons stated above, this allegation is denied and dismissed with prejudice.

CONCLUSION

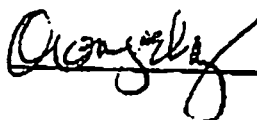
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

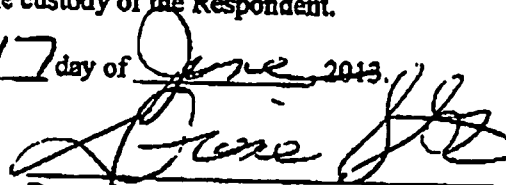
This Court notes that that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), 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:

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 17 day of June, 2013.

 South Carolina


DIANE S. GOODSTEIN
Presiding Judge
First Judicial Circuit



ALAN WILSON
ATTORNEY GENERAL

January 22, 2014

Andrew J. Brown, Esquire
Culler & Brown, LLP
1540 Russell Street, S.E.
Suite 103
Orangeburg, SC 29115

Re: David Colter, Jr., #336366 v. State of South Carolina
2009-CP-38-2022

Dear Mr. Brown:

Enclosed please find a copy of the filed **Order of Dismissal** in the above-captioned case that our office received on January 21, 2014. If you have any questions or concerns, please contact me at (803) 734-3737 or mharrigan@scag.gov.

Sincerely,

Megan E. Harrigan
for Megan E. Harrigan
Assistant Attorney General

MEH/ko
Enclosure(s)

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

DAVID COLTER, JR., #336366,

Applicant,

v.

STATE OF SOUTH CAROLINA,


Respondent.

CERTIFICATE OF SERVICE

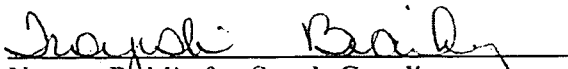
The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

Andrew J. Brown, Esquire
Culler & Brown, LLP
1540 Russell Street, S.E.
Suite 103
Orangeburg, SC 29115

This 22nd day of January, 2014.


s. MEGAN E. HARRIGAN
ATTORNEY FOR RESPONDENT

SWORN to before me this 22nd day of January, 2014.


Notary Public for South Carolina.

My Commission Expires: 8/22/2022

STATE OF SOUTH CAROLINA,)
)
 COUNTY OF ORANGEBURG)
)
 David Colter, Jr.,)
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 Petitioner)
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 The State of South Carolina,)
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 Respondent.)

IN THE COURT OF COMMON PLEAS
 FIRST JUDICIAL CIRCUIT

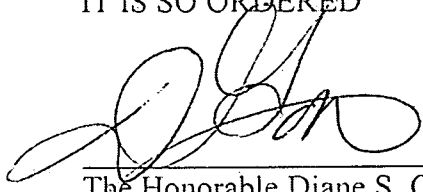
Ex-Parte Order for Funding
 Post-Conviction Relief
 2009-CP-38-2022

FILED FOR RECORD
 V. J. BROWN
 CLERK OF COURT
 ORANGEBURG COUNTY, SC
 2013 FEB -7 PM 12:02

This matter comes before me in an ex-parte manner, on the motion of Attorney Andrew J. Brown, counsel for the Petitioner, for funds related to obtaining a transcript of Petitioner's PCR hearing. I find that a showing has been made that due process required that defense counsel have access to the above referenced expert.

THEREFORE IT IS ORDERED that \$107.25 is approved for additional funding for the purposes set forth in this case and that South Carolina Office of Indigent Defense is to reimburse the law firm of Culler & Brown, LLP, counsel for the Petitioner, as allowed by SC Appellate Court Rule 602 G. Any additional expenses shall be submitted in a separate petition and Order for the Court's review.

IT IS SO ORDERED



The Honorable Diane S. Goodstein

Orangeburg, South Carolina
 This 6th day of February 2013

ATTEST: TRUE COPY
Wingja B. Clark
 CLERK OF COURT
 ORANGEBURG COUNTY, SC