

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Derham Cole, Circuit Court Judge

Case No. 2011-CP-42-5117

The State, Respondent,


v.

Eddie J. Pilcher, Appellant.

NOTICE OF INTENT TO APPEAL

Eddie J. Pilcher appeals the denial of his application for Post-Conviction Relief in this case. The Order of Dismissal was imposed by the Honorable J. Derham Cole on February 20, 2014. Appellant received notice of the same on that date.

February 28, 2014


CHRISTOPHER D. BROUGH
175 Magnolia St., Suite 202
SPARTANBURG, SC 29306
(864) 585-3088
ATTORNEY FOR APPELLANT

Other Counsel of Record:
Suzanne H. White
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211-11549
(803) 734-3737

RECEIVED

MAR 04 2014

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Derham Cole, Circuit Court Judge

Case No. 2011-CP-42-5117

The State,

Respondent,

v.

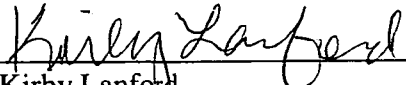
Eddie J. Pilcher,

Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that he is a person of such age and discretion as to be competent to serve papers and that a copy of the **Notice of Intent to Appeal**, was served upon the following person(s) on the State, by depositing copies of the same in the United States Mail, with sufficient postage affixed thereto, on February 28, 2014, addressed as follows:


The Honorable Alan Wilson
SC Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, S.C. 29201



Kirby Lanford

SWORN BEFORE ME THIS

28 DAY OF February, 2014.



NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES: Aug 3, 2019

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
Eddie J Pilcher, #303616)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2011-CP-42-5117

ORDER OF DISMISSAL

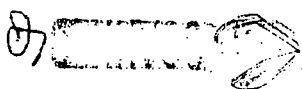
FILED
 CLERK OF COURT
 SPARTANBURG COUNTY
 2014 FEB 20 PM 4:51
 M. JORDAN

This matter comes before the Court by way of an Application for Post-Conviction Relief filed November 21, 2011, but received by Respondent on May 17, 2012, and amendment filed September 17, 2013. The Respondent made its Return on or about February 20, 2013. An evidentiary hearing into the matter was convened on October 1, 2013, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Christopher D. Brough, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Derrick Balsa, Esquire, Detective Dale Arterburn, J. Roger Poole, Esquire, and James A. Cheek, Esquire, also testified. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, the plea transcript and Applicant's exhibits.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Applicant was



indicted by the Spartanburg County Grand Jury for armed robbery (11-GS-42-1970) and attempted burglary – 1st degree (11-GS-42-1971). The Applicant was represented by James A Cheek, Esquire. On June 21, 2011, the Applicant was sentenced by The Honorable Roger L. Couch to concurrent sentences of twenty-five years on each charge. The Applicant did not appeal his conviction or sentence.

ALLEGATIONS

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

1. Ineffective assistance of counsel, in that;
 - a. Counsel failed to exercise due diligence in his representation of the Applicant,
2. Involuntary guilty plea;
3. Lack of subject matter jurisdiction;
4. Conflict of interest, in that;
 - a. Counsel represented both the Applicant and his co-defendant and Applicant did not waive the conflict,
5. Prosecutorial misconduct, in that;
 - a. Solicitor's office was aware of the conflict of interest, but did not inform the court,
 - b. Solicitor's office failed to disclose an audio copy of the Applicant's statement, which contained exculpatory information in violation of Rule 5/Brady requests.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2014 FEB 20 PM 4:51
M. ROPE BARBER

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) (citing Rule 71.1(e), SCRPC). 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 v. State, 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, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

Applicant testified that Counsel never had copies of the indictments for the charges that

Applicant pled guilty to. Applicant introduced Exhibits #3 and #4, letters to Roger Poole dated December 8, 2010, and April 7, 2012, respectively. Applicant also testified that he received a letter from Roger Poole indicating that Poole did not have the indictments. Applicant introduced the letter as Exhibit #10. Applicant testified that the State obtained the phone records of Yvonne Mitchell, Applicant's ex-girlfriend, and subpoenaed the phone records of Dana Lewis, one of the victims. The Applicant also testified that although the Detective indicated that he received the names of the co-defendant from Applicant, Applicant could not remember if he gave the Detective any names.

Detective Arterburn testified that he was the investigating officer who interviewed Applicant on these cases. Arterburn testified that he gave Applicant his Miranda warnings on October 4, 2010, and interviewed him on that date, but completed the summary of the interview on October 5, 2010. Arterburn testified that the two events occurred on two separate dates.

J. Roger Poole, Esquire, original attorney appointed to Applicant's case testified that he recalled Applicant's case. Poole indicated that Applicant was charged with three counts each of burglary, armed robbery, and kidnapping. Poole testified that Applicant's preliminary hearing was scheduled for November 6, 2010, but the hearing was waived. Poole testified that he reviewed discovery materials with Applicant on that date. Poole testified that the Applicant admitted his involvement in the crimes to the investigator/interviewer from the public defender's office and indicated that he wanted the best possible deal. Poole testified that Applicant wanted to plead guilty when the State dropped all of the kidnapping charges and allowed Applicant to plead to one count of armed robbery and burglary – 1st degree.

Counsel testified that he met with Applicant, who informed Counsel that Applicant and his co-defendants had tried to rob a stash house. Applicant told Counsel that he kicked the door,

2014 FEB 20 11:45 AM
CLEARING HOUSE
MIRANDA

but denied ever having a gun. Applicant also told Counsel that he left to get masks when they were unsuccessful and then changed clothing before the attempt at the second location the next day. Counsel testified that Applicant also told him that Applicant was in charge of the crimes, but co-defendant Wilkie provided information as to what was going on. Counsel testified that he explained the concept of “hand of one, hand of all” to Applicant in the event that even if Applicant did not have a gun, the others participating in the armed robbery did have guns. Counsel also testified that prior to the plea he reviewed the indictments and sentencing sheets with the Applicant. Counsel testified that he never received any indication from Applicant that he wished to proceed with anything other than a plea.

This Court finds the testimony of Applicant to lack credibility. Other than alleged that Counsel did not have copies of the indictments, Applicant has failed to offer any other testimony or evidence to support his claim that Counsel was ineffective. To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). The Applicant failed to point to any specific matters Counsel failed to discover, or any defenses that could have been pursued had Counsel “exercised due diligence” in his representation of Applicant. Furthermore, the Applicant failed to show any prejudice that may have resulted from Counsel’s alleged inadequate preparation. Accordingly, this allegation is dismissed.

Conflict of Interest

The mere possibility of a conflict of interest is insufficient to challenge a criminal conviction. Langford v. State, 310 S.C. 357, 426 S.E.2d 793 (1993). "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809 (1984). The Applicant must show that his attorney actually owed duties to a party whose interests were adverse to the Applicant. Id; Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001).

Applicant testified that attorney Roger Poole was originally appointed to represent him, but James Cheek ("Counsel") represented Applicant at his guilty plea. Applicant testified that Counsel also represented Applicant's co-defendant, Jonathan Goss. Applicant testified that his story did not match the story of Goss. However, Applicant testified that Counsel never had Applicant sign a waiver of conflict. Additionally, Applicant testified that Counsel favored Goss during the guilty plea because Goss had no criminal record and because Goss indicated that the Applicant threatened him. Applicant introduced Applicant's Exhibit #1, Goss' guilty plea transcript. Applicant testified that he and Goss pled on the same day, although Applicant pled first and then Goss pled after Applicant. Applicant introduced Exhibit #2, a copy of Goss' statement to police and waiver of rights form. Applicant testified that he never saw a copy of Goss' statement prior to his plea, but he should have because Goss stated that Applicant had a gun. Applicant testified that he felt betrayed by Counsel's representation of his co-defendant. Counsel testified that he also reviewed Goss' statement with the Applicant prior to the plea. Counsel testified that he met with Goss a few minutes prior to his plea, at which time Goss informed Counsel of Applicant's threats. However, Counsel testified that the Applicant had already pled and been sentenced at that time, so Counsel was not concerned about any potential

of conflict. Poole testified that originally the co-defendant Goss was assigned to Poole, but then reassigned.

As the testimony and record indicated, both Applicant and Goss wanted to plead guilty and Applicant pled guilty prior to Goss on the same day. Applicant failed to demonstrate that any alleged conflict interest adversely affected Counsel's performance. Not only did the Applicant fail to raise any objection to Counsel representing both Applicant and Goss, but because he pled first, nothing that Counsel said at Goss' plea affected the outcome of Applicant's plea. Therefore, this claim is denied and dismissed.

Involuntary Guilty Plea

In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). A defendant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). A guilty plea is a solemn, judicial admission of the truth of the charges against the defendant. Statements made during the plea should be considered conclusive unless the defendant presents reasons why he should be allowed to depart from the truth of those statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

In Hill v. Lockhart, 474 U.S. 52 (1985), the United States Supreme Court held that the

two-part standard adopted in Strickland v. Washington, supra, for evaluating claims of ineffective assistance of counsel applies, as well, to guilty plea challenges based on ineffective assistance of counsel. To meet the Court's "prejudice" requirement, a criminal defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Hill at 59. Not only did the Applicant fail to establish that Counsel was deficient in his representation of Applicant in any manner, but the Applicant has failed to establish that he would have proceeded to trial, but for, these alleged deficiencies of Counsel. Applicant's own testimony indicated that he always wanted to plead guilty. Further, the record is clear that the Applicant informed the court that he "committed the crime," and although he asserted that he did not have a gun, he acknowledged that others participating had a gun. (Tr. p. 16; 18-19). The testimony and record are clear that the Applicant pled guilty freely and voluntarily. Therefore, this claim is denied and dismissed.

Prosecutorial Misconduct

The Applicant alleged that the State failed to inform the court of the conflict of interest and failed to disclose exculpatory information in violation of Brady. In evaluating post-trial Brady claims, the Applicant must show that (1) the prosecution suppressed evidence, (2) the evidence would have been favorable to the accused, and (3) the suppressed evidence is material. United States v. Wolf, 839 F.2d 1387 (10th Cir. 1988). A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., 434 S.E.2d at 268.

Applicant testified that he believed that the State had exculpatory information that was never turned over to Counsel. Applicant offered Exhibit #5, a copy of Applicant's Rule 5/Brady Motions; Exhibit #6, affidavit of discovery from Solicitor's office; Exhibit #7, incident report and copy of typed statement from Detective Arterburn regarding his interview with Applicant; and Exhibit #8, CD of Applicant's interview with police. Applicant testified that he denied wearing shorts in the interview and denied having a gun in the interview. However, Applicant testified that person alleged to be him in still photos from a surveillance camera showed a man in white shorts. Applicant introduced the photo as Exhibit #9.

Arterburn testified that he did not prepare and submit a copy of the audio recording of the interview, but indicated on the report that there was an audio recording. However, Arterburn testified that the recording was very distorted and muffled sounding. Arterburn testified that throughout the interview Applicant maintained that he did not have a gun and denied that he was wearing shorts. Applicant also declined to offer a written statement. Arterburn testified that during the interview, Applicant also indicated to Arterburn that perhaps Applicant was involved, but only as an accessory.

Derrick Balsa, Deputy Solicitor for the Seventh Judicial Circuit, testified that he was the prosecutor in charge of this case. Balsa stated that he did not have a copy of the audio recording of Applicant's interview with police at the time of the plea. Balsa stated that he did not attempt to get a copy because he was provided with a summary of the interview on paper. Balsa testified that he requested the file from archives when PCR Counsel requested a copy of the recording and there was not a copy in the file, so he called the Detective and requested a copy.

This court finds that the Applicant's Brady rights were not violated. The Applicant's guilty plea was knowing and voluntary, and he waived any defense or attacks to the sufficiency

CLERK OF COURT
JANET M. HARRIS
2014 FEB 20 PM 3:51
M. ROBERTSON

of the evidence. The Applicant's primary claim is that he told the Detective that he was not wearing shorts, did not have a gun, and suggested that he merely an accessory. As the testimony indicates, the information about the shorts and gun was also provided to Poole and Counsel. However, as the testimony also indicates, the Applicant acknowledged his participation in the crimes as well, which contradicts any claims that Applicant was an accessory and not principal. The interview was not withheld from the Applicant because clearly the Applicant was aware of the interview and of what he said. Even if the Applicant did not have a copy of the audio recording of the interview prior to entering his plea, it is clear that he was entirely aware of the information contained in the interview and had seen the Detective's summary before the court accepted his guilty plea. Furthermore, this Court finds that the recording contained no material, favorable evidence that would have changed the result of the proceeding. Therefore, this allegation is dismissed.

Lack of subject matter jurisdiction

Although raised in his application, the Applicant failed to pursue these claims at his hearing. Therefore, this Court finds that the Applicant voluntarily abandoned these claims.

Summary

This Court finds in regards to the allegations presented at the hearing, the Applicant's testimony is not credible. This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in his representation, and that Counsel's conduct does not fall below the objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that

2014 FEB 20 PM 4:51
M. HOPKINS
CLERK OF COURT

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 Counsel’s performance. This Court concludes the Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, this allegation is denied.

CONCLUSION

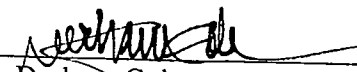
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court cautions Applicant that he 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 (1991), an Applicant has a right to an appellate counsel’s assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant’s behalf. Your attention 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 20 day of February, 2014.



J. Derham Cole
Presiding Judge

CLERK OF COURT
COURT HOUSE
2014 FEB 20 PM 4:51
M. HOPE BLAINE



The Brough Law Firm



Christopher D. Brough
175 Magnolia Street, Suite 202
Spartanburg, SC 29306

Phone: 864-585-3088
Fax: 864-585-3058
www.broughlaw.com

February 27, 2014

PCM

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

RE: THE STATE VS. EDDIE J. PILCHER

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

- (1) Original Proof of Service upon opposing counsel.
- (2) Order of Dismissal.

If I can be of any further assistance please feel free to call me.

Sincerely,

Christopher D. Brough

Enclosure

cc: South Carolina Office of the Attorney General

RECEIVED
MAR 04 2014
S.C. SUPREME COURT

The Brough Law Firm
175 Magnolia St., Suite 202
Spartanburg, SC 29306

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