STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHESTER	)	2013-CP-12-0285
Andrew J. Mack, #353612, Applicant,	)	
v.	)	**ORDER OF DISMISSAL**
State of South Carolina, Respondent.	)	

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This matter comes before the Court by way of an Application for Post-Conviction Relief filed June 25, 2013. An evidentiary hearing was convened on February 3, 2014, at the Lancaster County Courthouse. The Applicant was present at the hearing and was represented by Nathan J. Sheldon, Esquire. The Respondent was represented by Mary S. Williams of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Also testifying was Everett B. Stubbs, III, Esquire ("Counsel"). This Court had before it the records of the Chester County Clerk of Court, the guilty plea transcript, and the Applicant's records from the South Carolina Department of Corrections.

PROCEDURAL HISTORY

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Chester County Clerk of Court. The Applicant was indicted for trafficking in cocaine base 28 to 100 grams (2012-GS-12-445) and possession or display of firearm or knife during commission of a violent crime (2012-GS-

12-447). Applicant was represented by Everett Stubbs, III, Esquire. On December 19, 2012, Applicant pled guilty. Applicant was sentenced by the Honorable Brooks P. Goldsmith to seven (7) years for trafficking in cocaine base 28-100 grams (second offense) and to a concurrent term of five (5) years for weapon possession. The Applicant did not appeal his conviction or sentence.

In his application for post-conviction relief (PCR), Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel

At the PCR hearing, Applicant addressed the following specific concerns:

- Failure to spend adequate time with him.
- Incorrect information regarding a prior drug charge.
- Failure to file motion to reconsider sentence.
- Failure to file direct appeal.

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. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80.

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), SCRCP). 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, supra). 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). 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).

Failure to Investigate / Inadequate Preparation

Applicant felt that he did not have adequate time with his attorney prior to his plea. Counsel stated that Applicant had retained an attorney for bond hearings. Counsel was assigned the case in his capacity as a public defender. Counsel and Applicant both testified that there had been some discussion that the case may be assumed by federal prosecutors, but the case ultimately remained at the state level. Counsel informed the court during the plea that there had really only been about 1 ½ - 2 months of preparation after the determination the case would not be federally prosecuted. (Tr. p. 12, line 20 – p. 13, line 4.) Counsel commented that while the time he had to prepare was not ideal, additional time would not have changed the outcome of the proceeding. Counsel testified that he had time to review case law with Applicant with regard to the search, and Counsel believed that the solicitor would prevail on that issue at trial. He had obtained discovery and reviewed statutes. Counsel testified that Applicant received a very advantageous plea offer and was faced with the choice of entering a plea or proceeding to trial on Monday. Counsel further reflected that this was not unusual and often clients felt rushed in this way. Counsel had also reviewed a checklist prior to the plea in which he reviewed essential concepts like the right to appeal. I also note that Applicant informed the plea court that he had enough time to discuss the charges with his attorney, and his attorney had answered all questions. (Tr. p. 11, lines 20-24.)

I find Counsel's testimony to be credible. Under these circumstances, Counsel's performance was within reasonable professional norms. Though he had less time than he would have liked, Counsel had time to review the potential trial evidence and analyze his client's case. Moreover, Applicant has failed to show that had Counsel had additional time for preparation he would have proceeded to trial on trafficking third offense rather than accepting the very advantageous plea offer

to trafficking second offense. See for example Harris v. State, 377 S.C. 66, 75 - 76, 659 S.E.2d 140, 145 (2008) (Applicant failed to carry burden where it was merely speculative that there would have been a different result had counsel spent additional time with his client); Stalk v. State, 383 S.C. 559, 681 S.E.2d 592 (2009) (applicant failed to establish that if counsel were more prepared for trial he would have found a witness or evidence helpful to the case such as would alter counsel's advice to accept the plea bargain and plead guilty).

Prior Record

Applicant further asserted that Counsel failed to ensure that the solicitor and court had accurate information as to his prior offenses. Applicant agreed with the solicitor's statement that he had a prior conviction for possession of cocaine base in Fairfield County. Applicant disagreed with the statement that he had been convicted in Richland County for possession of crack cocaine; Applicant maintained that his conviction in Richland County had involved "pills," presumably illegal prescription drugs. Applicant argued that while it was correct that the present drug offense would therefore properly be characterized as third offense, the solicitor and court may have been willing to enter into an even more beneficial plea arrangement had they known this was only his second offense involving crack cocaine.

Pursuant to plea negotiations, Applicant pled to trafficking cocaine base 28-100 grams (second offense). This carried a sentence range of 7-30 years. This plea reduced Applicant's sentence exposure as a third offense carries a sentence range of 25-30 years. Pursuant to negotiations, the solicitor recommended the minimum seven year sentence, and the plea court followed the solicitor's recommendation.

Even if Applicant's conviction in Richland County is, as he contends, a conviction for

possession of a controlled substance (Schedule I-III), the offense still serves to enhance the charge presently at issue. Therefore, based on Applicant's prior convictions from Fairfield County and Richland County, the charge to which he pled guilty could properly be considered a third offense. The solicitor's reduction of the charge to a second offense greatly reduced Applicant's sentence exposure, and the solicitor's recommendation for the minimum term further reduced Applicant's sentence. Applicant merely speculates that had the parties agreed that his Richland County offense involved a narcotic other than crack there would have been even greater concessions.[1] There is no evidence in the record that the solicitor would have offered any further reduction. Counsel testified that the solicitor had never indicated that the plea offer was in any way based on the misinformation regarding the type of narcotic in the Richland County charge. The solicitor's comments at the plea indicate that the offer was made based on the fact that Applicant had not been incarcerated before and a third offense would have carried 25-30 years. (Tr. p. 7, lines 19-24.) Further, Applicant has made no assertion that but for the purported error he would have gone to trial facing the charge as a third offense. For all these reasons, I find Applicant has failed to carry his burden in this regard.

Failure to File Motion to Reconsider

Applicant further argues that Counsel was ineffective in failing to file a motion to reconsider sentence after Applicant requested that he do so. Counsel noted that the request to file a motion to reconsider was made well beyond the time in which to file such motions. State v. Campbell, 376 S.C. 212, 215, 656 S.E. 2d 37, 373 (2008) (noting "long-standing rule of law that a trial judge is without jurisdiction to consider a criminal matter once the term of court during which judgment was entered

[1] Additionally, Applicant's assertion that a recommendation of 7 years in a plea to first offense trafficking in cocaine base 28-100 grams would have made him eligible for parole sooner is incorrect. A first offense carries 7-25 years. Therefore, both first and second offenses would require service of 85% of the sentence prior to eligibility for parole. S.C. Code

expires" has "two exceptions: a timely post-trial motion and a motion for new trial based on after-discovered evidence."); Rule 29(a), SCRCrimP ("Except for motions for new trials based on after-discovered evidence, post-trial motions shall be made within ten (10) days after the imposition of sentence.") Counsel also noted that Applicant received the minimum sentence for the offense and that the sentence could not be suspended. Counsel also had no additional evidence to present the court as a basis for such a motion.

Under these circumstances, I find Counsel's failure to file a motion to reconsider sentence was well within reasonable professional norms. Attorneys "are expected and required to have lawful and reasonable bases for motions presented to the trial judge." State v. Rayfield, 369 S.C. 106, 114, 631 S.E.2d 244, 248 (2006). In the present case, Applicant's request that the motion be filed was well out of time, based on no additional information to present to the court, and was made following the court's pronouncement of the lowest possible sentence Applicant could receive. Further, Applicant has shown no evidence of prejudice in that he has presented no additional evidence which he could have presented had the motion been filed and has made no showing that the outcome would have been different had the untimely motion been filed. For all these reasons, this claim is denied and dismissed with prejudice.

Failure to File Notice of Appeal

As set forth in Turner v. State, 380 S.C. 223, 224-225, 670 S.E.2d 373, 374 (2008):

> Absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal) or when the defendant reasonably demonstrated an interest in appealing, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. Roe v. Flores–Ortega, 528

§§24-13-100 and 24-13-150.

U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995).

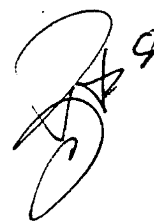
Counsel testified that he reviewed a plea checklist with Applicant prior to his plea, and the checklist included informing Applicant that he had a right to appeal within ten days of his plea. Counsel did not advise Applicant of this again after the plea. Counsel testified that he received no communication from Applicant requesting an appeal. Counsel also testified that Applicant would have been able to make this request as prisoners were able to send what Counsel termed "jail-o-grams" – messages transmitted from the prison to the public defender's office. Counsel added that he had also advised clients that family members could contact him.

Based on the foregoing, I find that Applicant has failed to demonstrate that Counsel was ineffective in this regard. I find Counsel's testimony to be credible. Counsel did inform Applicant of his right to an appeal. Applicant did not notify Counsel of his desire to appeal and Counsel had no reason to believe that an appeal was desired or potentially meritorious. Therefore, Applicant has failed to carry his burden in this regard.

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 advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order to secure the appropriate appellate review. His attention is also directed to Rule 243, SCACR, for appropriate procedures after notice has been timely filed.

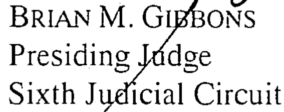


IT IS THEREFORE ORDERED:

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 _____ day of ___________, 20__. 2/23/14



____
BRIAN M. GIBBONS
Presiding Judge
Sixth Judicial Circuit

_________________, South Carolina.