STATE OF SOUTH CAROLINA COUNTY OF GREENWOOD	)	IN THE COURT OF COMMON PLEAS EIGHTH JUDICIAL CIRCUIT
Zachary Phillips. #269602, Applicant, v. State of South Carolina, Respondent.	)	2011-CP-24-1428 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed December 16. 2011. The Respondent made its Return on September 26, 2012. An evidentiary hearing into the matter was convened on November 29, 2012, at the Laurens County Courthouse. Tommy Stanford, Esquire represented the Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Caroline Horlbeck, Esquire also testified. This Court also had before it a copy of the records of the Greenwood County Clerk of Court, records from the South Carolina Department of Corrections, and the guilty plea transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenwood County Clerk of Court. The Applicant was indicted at the March 2010 term of the Greenwood County Grand Jury for Trafficking in Cocaine Base (2010-GS-24-0403) and Possession of Marijuana with Intent to Distribute (PWID) (2010-GS-24-0407). The Applicant was represented by Caroline Horlbeck, Esquire. On May 9, 2011, the

Applicant pled guilty to Trafficking Crack Cocaine, 2nd offense and PWID Marijuana, 3rd offense. On May 17, 2011, the Honorable Eugene C. Griffith sentenced the Applicant to confinement for fifteen (15) years for each charge to run concurrently. The Applicant filed a Motion to Reconsider his sentence, which was granted. On July 13, 2011, Judge Griffith re-sentenced the Applicant to twelve (12) years for each charge to run concurrently. The Applicant did not appeal his conviction and sentence.

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

1. "Ineffective Assistance of Counsel"
   a. "My counsel fail(sic) to let me know they never had possess(sic) of the car. The car was never impound(sic) into police evidence room."
   b. "My counsel fail(sic) to let the court know the officer in my case had to resign."

At the PCR hearing, the Applicant proceeded on his claim that Counsel was ineffective for not arguing for less than fifteen years' incarceration at the plea hearing.

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 (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), 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. 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).

Arguing for a Lesser Sentence

At the hearing, the Applicant testified Counsel failed to argue for a sentence that was less

than fifteen years. He also stated it was not until the hearing on his Motion for Resentencing did Counsel argue for less than fifteen years when she argued for a sentence of seven years. The Applicant testified he had discussion with Counsel about the State's recommendation of fifteen years, but also stated he thought he could get less time. The Applicant further testified these discussions with Counsel affected his decision to plead guilty.

On cross-examination, the Applicant admitted while he pled to Trafficking Crack Cocaine, 2nd offense. he was originally charged with Trafficking Crack Cocaine, 3rd offense, which carries a mandatory minimum of twenty-five years in prison. He also testified he agreed with the facts of the case as read by the solicitor at the plea hearing. The Applicant further admitted he told the plea judge there were no promises, other than the State recommending a fifteen-year sentence, to induce him to plead guilty. The Applicant testified he told the plea judge, under oath, that he was, in fact, guilty of the charged crimes. He also stated he was satisfied with Counsel, and Counsel had answered all of his questions.

Counsel testified she met with the Applicant several times and discussed his constitutional rights, the discovery from the State, and the minimum and maximum penalties. She also stated she explained the State was recommending a fifteen-year sentence for all charges, to run concurrently. Counsel testified she did not promise the Applicant that he would receive a certain sentence. Additionally, she stated she asked the plea court for leniency in sentencing. Counsel further testified she filed a Motion for Resentencing on the Applicant's behalf, which was granted, and thereafter, the Applicant's sentence was reduced to twelve years.

On cross-examination, Counsel stated stated it was the Applicant's decision to plead guilty, and the strength of the State's case was solidified by the Applicant's own statement that there was

crack cocaine in the vehicle he was driving on the incident date. Counsel further stated that while she did not ask the plea court for a sentence that was less than fifteen years, she did ask the plea court for leniency in sentencing.

This Court has reviewed the evidence presented at the hearing as well as the plea transcript and other records. This Court finds Counsel's testimony concerning her asking the plea court for leniency is credible. First, in the plea transcript, Counsel does, in fact, as the plea court for leniency in the mitigation stage of the plea. (Tr. p. 28 ll. 5-6). The fact that Counsel did not specifically ask the plea court for a sentence that was less than fifteen years is of no consequence. The Applicant was facing a mandatory minimum of twenty-five years on the Trafficking Crack Cocaine, 3rd offense alone. He was facing a total of nearly sixty years for all of his charges. The Applicant also pled guilty, according to the record, freely and voluntarily. Furthermore, the Applicant specifically stated, under oath, he had not been promised anything besides the State recommending a fifteen-year sentence. (Tr. p. 16 ln. 10). *See* Holden v. State, 393 S.C. 565, 575-76, 713 S.E.2d 611, 617 (2011) ("[W]ishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made." quoting Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997)).

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 Counsel committed either errors or omissions in her 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. Therefore, these allegations are 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 notifies the 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!

R. Lawton McIntosh
Presiding Circuit Court Judge
Eighth Judicial Circuit

3-25, 2013
Anderson, South Carolina