THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

RECEIVED
MAR 26 2014
S.C. Supreme Court

Case No. 2012-CP-42-2121

Xavier L. Perry.....Petitioner/Appellant
v.
State of South Carolina.....Respondent

NOTICE OF APPEAL

Xavier L. Perry appeals the Order of Dismissal issued by the Honorable J. Derham Cole dated February 20, 2013 (sic) and filed February 20, 2014 with the Spartanburg County Clerk of Court, wherein Judge Cole denied Appellant's Application for Post-Conviction Relief. Appellant, by and through his undersigned attorney, received written notice of entry of the Order of Dismissal on February 25, 2014.

Date: March 25, 2014

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THE STATE OF SOUTH CAROLINA

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2012-CP-42-1444

Xavier L. Perry.....Petitioner/Appellant
v.
State of South Carolina.....Respondent

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on March 25, 2014 addressed to its attorney of record Suzanne H. White, Assistant Attorney General, P.O. Box 11549, Columbia, SC 29211.

Date: March 25, 2014

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
Xavier La-Lord Perry, #346891,	)	2012-CP-42-2121
Applicant,	)	
v.	)	**ORDER OF DISMISSAL**
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of an Application for Post-Conviction Relief filed May 18, 2012, and amended applications filed July 23, 2012, and June 4, 2013. The Respondent made its Return on or about March 26, 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 W. Reid Wildman, 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. 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, Applicant's exhibit, and Applicant's post-hearing memorandum.

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 at the June 2011 term of the Spartanburg County Grand Jury for eight (8) counts of

armed robbery (11-GS-42-2353, -2354, -3044, -3069, -3070, -3072, -3075, and -3076). He was represented by James A. Cheek, Esquire. On July 15, 2011, the Applicant pled guilty to the charges as indicted. He was sentenced by the Honorable Roger L. Couch to confinement for concurrent terms of thirty (30) years for seven (7) counts of armed robbery, and a consecutive term of ten (10) years for the remaining armed robbery charge (11-2354). The Applicant did not appeal his guilty plea or sentence.

ALLEGATIONS

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

1. Ineffective assistance of counsel, in that;
   a. Counsel engaged in a conflict of interest by representing both Applicant and his co-defendant.
   b. Counsel failed to conduct an adequate pretrial investigation by not spending adequate time with Applicant before plea hearing, and by failing to interview potential witnesses, or make a motion to request funding for investigator or expert witness.
   c. Counsel failed to provide Applicant with discovery pursuant to Brady v. Maryland in advance of plea hearing or sentencing.
   d. Counsel failed to make Applicant aware of ramifications of plea agreement.
2. Involuntary guilty plea in that;
   a. Applicant was under the impression that he would receive no more than ten (10) years for his plea and that he would receive life in prison if he proceeded to trial.
3. The Court lacked subject matter jurisdiction because a preliminary hearing was not held pursuant to S.C. Code Ann. § 22-5-320.

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), 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. "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 he pled guilty on July 15, 2011, to eight counts of armed robbery. Applicant testified that he was originally represented by Robert Hall from the Seventh Circuit Public Defender's office, but never met with Mr. Hall. Instead, Applicant testified that he met with Mr. James Cheek ("Counsel") twice at the detention center and once at the courthouse regarding a plea. Applicant testified that he informed Counsel at the second meeting that he wished to retain counsel and thought that it was in his best interest to hire another attorney. Applicant testified that he also discussed the facts and circumstances of the case with Counsel and turned down an initial offer for an open plea between ten and thirty years because he wanted a more favorable offer. However, Applicant testified that he was not aware of all of the charges he faced at the time of this first plea discussion. Applicant testified that Counsel informed him that the Solicitor's office did not want to negotiate any further.

Applicant testified that Counsel also represented his co-defendant, Chad Anderson, at his plea, which Applicant claimed is a conflict of interest. However, Applicant acknowledged that he did not mention any concerns over the alleged conflict of interest at his plea. Applicant testified that he did not think that Counsel conducted any investigation into the case other than meeting with the Applicant and his co-defendant.

Applicant's co-defendant, Chad Anderson, also testified. Anderson testified that he also met with Counsel and with the Applicant on the day of the plea. Anderson testified that Counsel told them that if they pled guilty, they would receive no more than ten years, but if they proceeded to trial, they would receive a life sentence.

Counsel testified that he did represent both the Applicant and his co-defendant, Anderson. Counsel testified that he spoke with each of them separately, but then also spoke to them both together. Counsel testified that the charges they faced were classified as violent and most serious and the State would not have to try all charges at the same time. Counsel testified that there were eight chances for convictions and the State might seek a life without parole sentence after the second conviction. Counsel testified that the offer for an open plea between ten and thirty years concurrent on each charge was open until the middle of the next court term. Counsel testified that he never told Applicant or Anderson that they would receive ten years if they pled guilty. Counsel did tell Applicant and Anderson that if they did not want to accept the plea offer, Counsel would refer the case back to a trial attorney. Counsel informed them both that he did not handle trials, but only conveyed plea offers and handled pleas. Counsel also told both that at that time the victims had expressed no desire to speak at the guilty plea. However, Counsel testified that after Anderson spoke at the plea, the victims commented to the court.

Counsel testified that Applicant's girlfriend shared information with the police to link Applicant to the city investigation and the police found incriminating evidence following the search of Applicant's home. Counsel testified that based on the evidence, the Applicant would have come out great with a sentence of twenty years or less. Counsel testified that the Applicant never informed him that he wished to hire another attorney.

This Court finds the testimony of Counsel to be more credible that the testimony of the Applicant or his co-defendant, Chad Anderson. This Court finds that the Applicant has failed to meet his burden of proof as to the allegation that Counsel operated under a 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). No evidence or testimony was presented to support this claim or that would indicate that Counsel's performance was adversely affected by a conflict of interest. Therefore, this claim is denied and dismissed.

The Applicant's allegation that Counsel did not conduct an adequate investigation is without merit. Following testimony and review of the transcript, it is clear that Counsel had reviewed the facts and evidence, as well as the options that Applicant faced. The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). 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 been more fully prepared. Furthermore, the Applicant failed to show any prejudice that may have resulted from Counsel's alleged inadequate preparation. Accordingly, this allegation is dismissed.

The Applicant also alleged that Counsel failed to provide Applicant with discovery materials in advance of the plea hearing. Although this allegation was raised in his application,

the Applicant did not proceed on this allegation at the hearing. Therefore, this Court finds that the Applicant voluntarily waived this allegation.

Involuntary Guilty Plea

The Applicant also alleges that he did not plead guilty freely and voluntarily. To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

This Court finds that the transcript reflects that the pleas were knowingly and voluntarily entered with a full understanding of the charges and consequences of the plea to each charge. Boykin, supra; Dover, supra. Further, because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. U.S., 519 F.2d 317 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795

(1993).

Applicant testified that Counsel informed him that Applicant faced life in prison, but even if the sentences were to run consecutively, it was not life, but 240 years. Applicant also testified that Counsel did not fully explain each of the charges and consequences of the convictions prior to the plea. Applicant testified that he would have proceeded to trial on all of the charges, but for Counsel's telling him he faced life.

This Court finds that the Applicant has failed to meet his burden of proof as to this claim. Furthermore, this Court does not find the Applicant's testimony credible. The Applicant was facing eight charges of armed robbery and a possibility of life without parole if he were to be tried and convicted separately on the charges. The plea colloquy is thorough and the Applicant indicates that he was pleading freely and voluntarily and with full knowledge the consequences and risks. Therefore, this claim is denied and dismissed.

Lack of Subject Matter Jurisdiction

The Applicant alleged that the court lacked subject matter jurisdiction because a preliminary hearing was not held. Applicant testified that he never had a preliminary hearing, even though he requested one. Applicant introduced a letter regarding his preliminary hearing as Applicant's Exhibit #1.

A defendant's right to request a preliminary hearing is not required either by the State or Federal Constitution and is not necessary before a grand jury can indict a person for a crime. State v. McClure, 277 S.C. 432, 289 S.E.2d 158 (1982) (citing State v. Irby, 166 S.C. 430, 164 S.E.2d 912 (1932)). A circuit court has subject matter jurisdiction to convict a defendant of an offense if there is an indictment that sufficiently states the offense, the defendant waives presentment, or the offense is a lesser-included offense of the crime charged in the indictment.

State v. Wilkes, 353 S.C. 462, 464-465, 578 S.E.2d 717, 719 (2003) (citing Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001)). In this case, the Applicant was indicted by the Spartanburg County grand jury. That indictment was true-billed and signed by the foreman of the grand jury. The said indictment contains all the necessary elements of the offense, and further cites the applicable statute. A presumption of regularity attaches to all proceedings in the courts of this State, and it is incumbent upon one who challenges a proceeding to prove his claims. *See, e.g.*, Tate v. State, 345 S.C. 577, 549 S.E.2d 601 (2001); Pringle v. State, 287 S.C. 409, 339 S.E.2d 127 (1986).

This Court finds that this allegation lacks merit and it is clear from the record that the Applicant was properly indicted. The court had jurisdiction to accept the Applicant's plea, even though he claims he was not provided with the opportunity to have a preliminary hearing. Therefore, this claim is denied and dismissed.

Summary

This Court finds in regards to the allegations, Counsel's testimony is more credible than the Applicant's testimony. 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 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

Johnson, Smith, Hibbard & Wildman

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March 25, 2014

VIA FEDERAL EXPRESS
The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

RE: Xavier L. Perry, Appellant, v. State of South Carolina, Respondent
Case No. 2012-CP-42-2121
Appeal from PCR Matter
JSHW File # 212252.000

Dear Mr. Shearouse:

Enclosed for filing is an original and one copy of a Notice of Appeal in the above referenced case. Also enclosed are the following:

(1) Proof of Service of the Notice of Appeal on the Respondent.

(2) A copy of the Order(s) which is [are] to be challenged on appeal.

(3) This appeal is being filed with the Supreme Court, and a filing fee omitted, because it is an appeal from a final decision entered under the Post-Conviction Relief Act pursuant to Rule 243(a), SCACR, and Rule 240(d), SCACR, respectively.

(4) Since I am appointed counsel for the indigent appellant, it is my understanding that I will be automatically relieved under Rule 602, SCACR. Please advise as to what, if anything

else, you might require of me regarding this matter.

Please return the copy of the filed Notice of Appeal to me in the enclosed self-addressed stamped envelope.

Sincerely,

Reid Wildman

WRW/tfv
Enclosures

cc: Suzanne H. White
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