

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

G. Edward Welmaker, Circuit Court Judge

Case No. 2012-CP-23-2385

Craig Rolen ,..... Appellant,
SCDC # 257993

v.

State of South Carolina Respondent.

NOTICE OF APPEAL

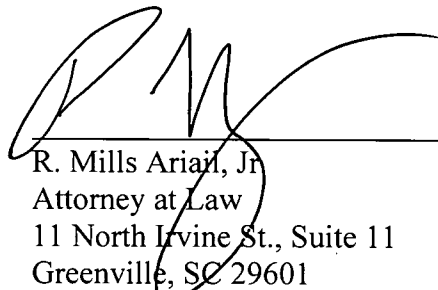
Appellant appeals the Honorable G. Edward Welmaker's Order of Dismissal dismissing Appellant's application for post-conviction relief. On March 19, 2014, the Honorable G. Edward Welmaker signed an order dismissing Appellant's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on March 27, 2014. A copy of the Honorable G. Edward Welmaker's Order of Dismissal is attached.

RECEIVED

APR 01 2014

S.C. SUPREME COURT

Greenville, South Carolina
March 28, 2014



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Craig Rolen,..... Appellant,
SCDC # 257993

v.

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CERTIFICATE OF SERVICE

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on March 28, 2014, I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

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Denise Tanner LaBeck

Denise Tanner LaBeck
Paralegal to R. Mills Ariail, Jr.
LAW OFFICE OF R. MILLS ARIAIL, JR.

March 28, 2014
Greenville, SC

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

JUDGMENT IN A CIVIL CASE

CASE NO: 2012CP2302385

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2014 MAR 25 PM 1:35

Craig Rolen vs. South Carolina State Of

CHECK ONE:

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):
SCRCP (Vol. Nonsuit); Rule 12(b), SCRCP; Rule 41(a),
 Rule 43(k), SCRCP (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other: _____
 Rule 40(j) SCRCP; Bankruptcy;
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded;
 Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE - G Edward Welmaker

This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

R. Mills Ariail Jr. 11 North Irvine St., Ste. 11
Greenville, SC 29601

ATTORNEY(S) FOR THE PLAINTIFF(S)

Karen Christine Ratigan PO Box 11549 Columbia,
SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
C.A. No. 2012-CP-23-~~4930~~ 2385

Craig S. Rolen,
S.C.D.C. No. 257993,

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER
2014 MAR 25 PM 12 35

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed April 5, 2012. The Respondent made its return and partial motion to dismiss on August 10, 2012. An evidentiary hearing into the matter was convened on February 19, 2014 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by R. Mills Ariail, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's plea counsel, E.P. "Bill" Godfrey, Esquire. The Court had before it: the transcript of April 5, 2010 hearing, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, the return and partial motion to dismiss, the order of dismissal from the first PCR action, and the appellate records.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the November 2003 term of the Greenville County Grand Jury for murder (2003-GS-23-8222).

1


He was represented by E.P. "Bill" Godfrey, Esquire.

Guilty Plea

On April 11, 2005, the Applicant pled guilty to voluntary manslaughter. The Honorable C. Victor Pyle, Jr. sentenced the Applicant to twenty-five years imprisonment. The Applicant did not appeal his conviction or sentence.

Post-Conviction Relief

The Applicant filed a PCR application on August 5, 2005 (2005-CP-23-4930). An evidentiary hearing was convened at the Greenville County Courthouse on April 19, 2006. The Applicant was represented by Caroline Horlbeck, Esquire. The Honorable James E. Lockemy denied relief in an order dated July 6, 2006.

The Applicant filed a notice of appeal at the South Carolina Supreme Court. Wanda H. Carter, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The Supreme Court granted the petition for writ of certiorari and both parties submitted briefs. On June 29, 2009, the Supreme Court reversed Judge Lockemy's order and remanded the case to the plea judge to a place in time after the plea had been accepted and at "the point in the guilty plea proceeding in which counsel should have sought to withdraw the plea." Rolen v. State, 384 S.C. 409, 683 S.E.2d 471 (2009).

Remand to Plea Judge

On April 5, 2010, the matter was back before the original guilty plea judge, the Honorable C. Victor Pyle, Jr. As in the original guilty plea hearing, the Applicant was represented by E.P. "Bill" Godfrey, Esquire. After counsel moved to withdraw the plea, Judge Pyle denied the motion. On June 3, 2010, Judge Pyle issued a formal written order in which he denied the Applicant's motion to withdraw his guilty plea and affirmed the prior sentence of



twenty-five years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. The appeal was perfected by LaNelle C. DuRant, Esquire of the South Carolina Office of Appellate Defense. The Court of Appeals affirmed Judge Pyle's denial of the Applicant's motion to withdraw his guilty plea. State v. Rolen, Op. No. 2012-UP-085 (S.C. Ct. App. filed Feb. 22, 2012).

ALLEGATIONS

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

1. Ineffective assistance of counsel:
 - a. Failed to move to withdraw the guilty plea at the April 11, 2005 guilty plea hearing.
 - b. Failed to "object to new issue of case being too old" at the April 5, 2010 hearing on the motion to withdraw his guilty plea upon remand from the Supreme Court.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record 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).

Partial Motion to Dismiss

The Respondent argued any issues related to the Applicant's original guilty plea hearing should be dismissed as untimely and successive. This Court agrees.¹ The Applicant pled guilty

¹ This Court notes the Applicant testified plea counsel was deficient in failing to locate potential witnesses Jimmy Arder, Tamara Thomas, and Kathy Deal. This issue (regarding these specific witnesses) was addressed at both the original PCR hearing and in the subsequent order of dismissal.

and was sentenced on April 11, 2005. As this action was filed on April 5, 2012, it was clearly filed outside the expiration of the one-year statute of limitations. See S.C. Code Ann. § 17-27-45(a) (Supp. 2003). This is the Applicant's second application for post-conviction relief. Successive PCR applications are disfavored. See Land v. State, 274 S.C. 243, 246, 262 S.E.2d 735, 737 (1980). This Court finds the Applicant had the opportunity to litigate all issues related to his original guilty plea hearing at the evidentiary hearing for his first PCR application on April 19, 2006. See Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999) (“[A]n applicant is entitled to a full adjudication on the merits of the original petition, or ‘one bite at the apple.’”).

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). For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006).

At the April 5, 2010 hearing, counsel moved to withdraw the Applicant's guilty plea and then provided some background information about the case and his representation. (Transcript, pp.3-8). The assistant solicitor asked the judge to deny the motion. (Transcript, pp.8-12). During her remarks, the assistant solicitor stated:

If you are inclined to grant the motion to withdraw the plea, Your Honor, the State would be severely prejudiced. The case already was five years old almost at the time of the trial. There were many – this was a drug transaction-type thing.

And the main witness in the case was a crack-addict prostitute who was an eyewitness. We had a very hard time finding her five years ago. And, at this point, I'm not sure that she could be found, if she's even alive. I've been told she was HIV positive two or three years ago when she was involved in another case. We would be substantially prejudiced, at this point, if Your Honor would choose to let him withdraw his guilty plea.

(Transcript, p.12). The Applicant spoke on his own behalf and proclaimed his innocence.

(Transcript, pp.12-15). The judge denied the motion to withdraw the guilty plea. (Transcript, p.15).

The Applicant stated he told counsel at the April 5, 2010 hearing to advise the judge that he did not want counsel to represent him. The Applicant stated counsel should have objected when the assistant solicitor told the judge that the case was too old to bring to trial.

Counsel testified the purpose of the April 5, 2010 hearing was for him to move to withdraw the Applicant's guilty plea. Counsel confirmed the Applicant did not originally want him to represent him at this hearing. Counsel stated the Applicant changed his mind from wanting his representation to not wanting his representation. Counsel stated on the day of the hearing, however, that the Applicant had changed his mind again and agreed to have counsel represent him. Counsel stated the witness named by the assistant solicitor at this hearing could not be found by either the State or counsel in 2005. Counsel stated there was no prejudicial effect from the assistant solicitor's statement.

Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds the Applicant's testimony is not credible, while also finding counsel's testimony is credible.

This Court finds the Applicant failed to meet his burden of proving counsel should have objected to the assistant solicitor's comment during the April 5, 2010 hearing. The Applicant

has failed to demonstrate that the assistant solicitor's comment was so improper that counsel was deficient in failing to object. Regardless, this Court also finds the Applicant has failed to demonstrate the assistant solicitor's comment prejudiced his case. Counsel testified the witness referenced by the solicitor could not be found back in 2005, when the Applicant originally pled guilty. Counsel testified there was no prejudicial effect from the assistant solicitor's comment. This Court agrees. This Court finds there is nothing in the record to suggest the judge took the solicitor's comment into consideration in denying the motion to withdraw the guilty plea in this case. The Applicant failed to meet his burden of proving otherwise and this Court will not engage in speculation. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

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 Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (holding that in a PCR proceeding, the applicant bears the burden of proving the allegations in their application).

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations.

Accordingly, this Court finds the Applicant has abandoned any such allegations.

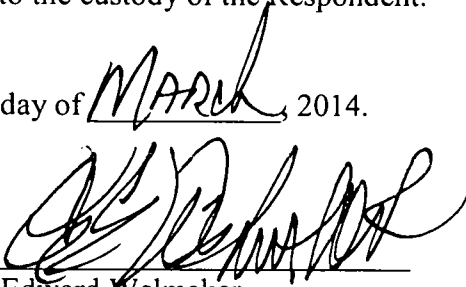
CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations. Counsel was not deficient in any manner and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice. This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.


IT IS THEREFORE ORDERED:

1. That the Respondent's partial motion to dismiss is granted and all issues related to the April 11, 2005 guilty plea hearing are denied as untimely and successive.
2. That the allegation in the PCR application related to counsel's representation at the April 5, 2010 hearing is denied and dismissed with prejudice.
3. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 19 day of MARCH, 2014.



G. Edward Welmaker
Presiding Judge
Thirteenth Judicial Circuit



Greenville, South Carolina.

R. MILLS ARIAIL, JR.
ATTORNEY AT LAW

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March 28, 2014

Via US Mail

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

RECEIVED

APR 01 2014

S.C. SUPREME COURT

**Re: Notice of Intent to Appeal from Craig S. Rolen v. The State of South Carolina
C.A. No.: 2013-CP-23-2385**

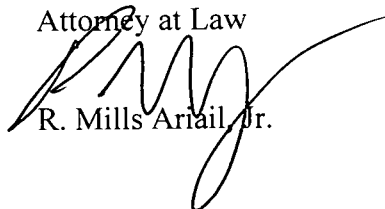
Dear Mr. Shearouse:

I was Court Appointed in the above referenced matter, and I expect that appellate defense will handle the appeal and petition for certiorari. On behalf of my client, enclosed for filing please find the Notice of Appeal and proof of service. I've enclosed a copy of the Honorable G. Edward Welmaker's Order of Dismissal to be challenged on appeal.

In regards to Judge Welmaker's decision in regards to the State's Partial Motion to Dismiss, I must inform the Supreme Court that as an officer of this Court, I am unable to set forth any arguable basis for asserting that the determination by Judge Welmaker that the PCR application was barred as untimely and successive was improper. By copy of this letter, I am instructing Appellant that he must notify this Court, in writing, no later than twenty (20) days from the date of this letter, of any arguable basis that the determination that this PCR application was barred as untimely and successive was improper as required by Rules 203(d)(1)(B) of the South Carolina Appellate Court Rules. By copy of this letter, I am also serving counsel for the State of South Carolina, the South Carolina Commission of Indigent Defense - Appellate Defense Division and the Greenville County Clerk's Office.

Thank you for your assistance in this matter and if you have any questions, please feel free to contact me.

Sincerely,
LAW OFFICE OF R. MILLS ARIAIL, JR.
Attorney at Law


R. Mills Ariail, Jr.

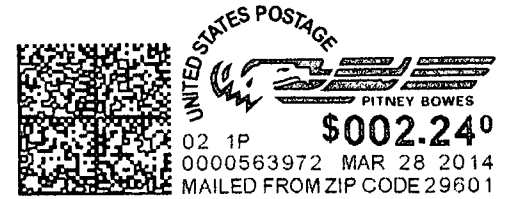
RMAjr/dl
Enclosures (as stated)

cc: Greenville County Clerk's Office
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