

LAW OFFICE OF



TARA DAWN SHURLING, PA

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April 3, 2014

RECEIVED

APR 07 2014

The Honorable Daniel E. Shearouse
South Carolina Supreme Court Clerk
Post Office Box 11330
Columbia, South Carolina 29211-1330

S.C. SUPREME COURT

Re: Marcus Greene, #309647 v. State of South Carolina; 2012-CP-28-1034.

Dear Mr. Shearouse:

Enclosed please find for filing a Notice of Appeal on behalf of the above-captioned Post-Conviction Relief client. I would appreciate your returning two (2) clocked copies to me in the envelope provided. Inasmuch as I was court-appointed in this matter, I will now be turning this file over to the South Carolina Commission on Indigent Defense, Office of Appellate Defense for perfection of this appeal. I would note that Judge Robert Hood issued a written Order of Dismissal on this case which was filed with the Kershaw County Clerk of Court's Office on March 14, 2014. With my thanks for your assistance in this matter, as always, I remain,

Sincerely yours,

A large, stylized handwritten signature in black ink that reads "Tara Dawn Shurling".

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg

Enclosures

cc: Megan Harrigan, Assistant Attorney General
Lorienne French, South Carolina Office of Appellate Defense

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM Kershaw County
Court of Common Pleas
Robert E. Hood, Presiding Judge

2012-CP-28-1034

MARCUS GREENE, #309647

Applicant,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

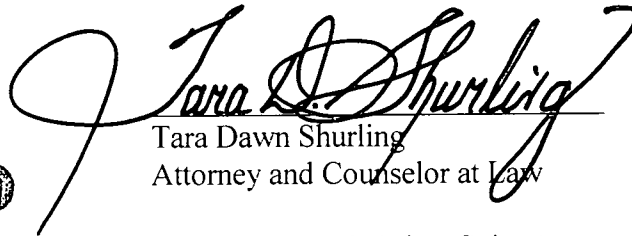
NOTICE OF APPEAL

NOW COMES the Applicant in the above-captioned Post-Conviction Relief matter, acting by and through his undersigned counsel, giving notice of his appeal from the Order of Dismissal, denying him Post-Conviction Relief, filed with the Kershaw Clerk of Court's Office on March 14, 2014.

RECEIVED

APR 07 2014

S.C. SUPREME COURT



Tara Dawn Shurling
Attorney and Counselor at Law

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ATTORNEY FOR APPLICANT

This 3rd day of April, 2014.

Other Counsel of Record:
Megan Harrigan, Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211
Attorney for Respondent
(803) 734-3737

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas
Robert E. Hood, Presiding Judge

2012-CP-28-1034

MARCUS GREENE, #309647

Applicant,

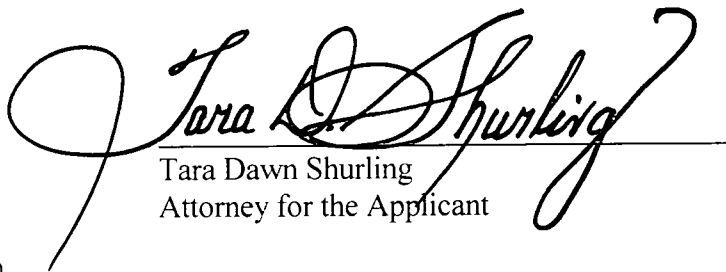
v.

THE STATE OF SOUTH CAROLINA,

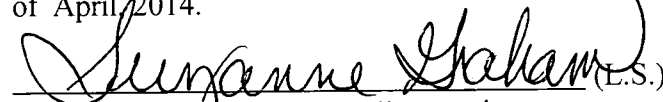
Respondent.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that one copy of the Applicant's Notice of Appeal in the above-entitled cause has been served upon opposing counsel, Megan Harrigan, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 3rd day of April, 2014.


Tara Dawn Shurling
Attorney for the Applicant

SWORN TO BEFORE me this 3rd day
of April, 2014.


Suzanne Graham (L.S.)
Notary Public for South Carolina
My Commission Expires: 2/28/24

FILED TO RECORD

STATE OF SOUTH CAROLINA)
COUNTY OF KERSHAW)

IN THE COURT OF COMMON PLEAS)
FOR THE FIFTH JUDICIAL CIRCUIT)

Marcus Greene, #309647,)
Applicant,)

Case No. 2012-CP-28-1034

v.)

ORDER OF DISMISSAL

State of South Carolina,)
Respondent.)

2014 MAR -
PM 12:14

PROCEDURAL HISTORY

This matter comes before the Court by way of an application for post-conviction relief filed November 6, 2012. Respondent made its Return on June 21, 2013, requesting an evidentiary hearing be held. Thereafter, Applicant amended his application on November 19, 2013. An evidentiary hearing was convened November 20, 2013, at the Richland County Courthouse. Applicant was present at the hearing and was represented by Tara D. Shurling, Esquire. Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office.

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 Kershaw County Clerk of Court. Applicant was indicted during the October 2011 term of the Kershaw County Grand Jury for Armed Robbery (2011-GS-28-0749) and Burglary in the First Degree (2011-GS-28-0753). Thereafter, Applicant waived presentment to the Kershaw County Grand Jury for: two counts of Failure to Stop on Blue Light - First Offense (2012-GS-28-0270, -0274), Resisting Arrest (2012-GS-28-0271), Possession of Schedule I-V Drug - First Offense (2012-

ATTEST True, Correct & Certified
Copy of Original on File in this
Court
[Signature]
Clerk of Court Kershaw County

GS-28-0272), and Possession/Attempt to Possess Crack Cocaine – Second Offense (2012-GS-28-0273). Charlie J. Johnson, Jr., Esquire, represented Applicant. On February 27, 2012, Applicant appeared before the Honorable J. Ernest Kinard, Jr., where he pled guilty to Burglary in the Second Degree (Non-Violent), Resisting Arrest, Possession of Schedule I-V Drug – First Offense, Possession/Attempt to Possess Crack Cocaine – Second Offense, two counts of Failure to Stop for a Blue Light, and Strong Armed Robbery. Judge Kinard sentenced Applicant to an aggregate sentence of twenty years imprisonment pursuant to negotiations between Applicant and the State. No direct appeal was taken.

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following allegations of ineffective assistance of counsel:

1. Plea Counsel failed to file a direct appeal;
2. Plea counsel conspired with the State to coerce Applicant to plead guilty;
3. Plea counsel failed to inform the court that it lacked subject matter jurisdiction;
4. Plea counsel failed to object to defective arrest warrants;
5. Plea counsel failed to object to defective search warrants.

In his amended application, filed by his counsel on the eve of the evidentiary hearing¹, Applicant alleges:

1. “Plea counsel failed to provide him the opportunity to review the discovery materials in his case before requiring him to make a decision about waiving his rights to a jury trial;”
2. “Applicant alleges his pleas were not voluntarily and intelligently entered inasmuch as they were the product of ineffective assistance of counsel prior to and during his plea proceeding;”

¹ Respondent objected to these amendments, citing a lack of notice to both the State and trial counsel, Charlie J. Johnson, Jr. This Court agrees that Applicant’s late amendments, served only hours before the hearing, prejudiced Respondent, but in an interest of justice, allowed the late amendments with leave for Respondent to submit an affidavit from trial counsel if necessary following the hearing. Respondent ultimately decided an affidavit from trial counsel was not necessary following the hearing.

3. "Plea counsel was ineffective for advising Applicant to enter pleas of guilty to charges on which he did not represent Applicant and had not engaged in the investigation of and not received discovery concerning;"
4. "Applicant alleges that his pleas of guilty were not voluntarily and intelligently entered inasmuch as they were coerced by misrepresentations made by the State concerning evidence that would be presented against him if he went to trial by jury;"
5. "Plea counsel was ineffective for advising Applicant to plead guilty without disclosing or discussing inconsistencies present in the victim's two statements with the Applicant, and without advising him how those inconsistencies might be used to his advantage at a trial by jury;"
6. "Plea counsel was ineffective for failing to advise the Applicant of problems with the victim's pre-trial participation in a photo-lineup, and for failing to discuss with the Applicant how that evidence might be used in his defense at a trial by jury;"
7. "Plea counsel was ineffective for failing to obtain a preliminary hearing for the Applicant;"
8. "Plea counsel was ineffective for advising the Applicant to plead guilty to drug charges without first obtaining discovery concerning the chemical analysis of the evidence alleged to be controlled substances;" and
9. "The Applicant alleges that his pleas were entered in violation of his right to the equal protection of the law where his co-defendants received the benefit of full disclosure of the discovery materials which resulted in their right to jury trial and their eventual acquittal."

At the evidentiary hearing, Applicant proceeded forward on the nine allegations as set forth in his amended application.

TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. Respondent presented testimony from plea counsel Charlie J. Johnson, Jr., Esquire (hereafter "Counsel"), as well as former Assistant Solicitor Ron Moak and prosecuting Assistant Solicitor Brett Perry. This Court

also had before it a copy of the Applicant's plea transcript, the records of the Kershaw County Clerk of Court, and Applicant's records from the South Carolina Department of Corrections.

During the evidentiary hearing, Applicant testified that he retained Counsel in August of 2011 to represent him on the Burglary in the First Degree, Armed Robbery, and Kidnapping² charges from the first incident. He testified that he ultimately had four separate sets of charges stemming from four different incidents and he pled to all of these charges on the same day. He testified that he never formally retained Counsel to represent him on the other three sets of charges, but that Counsel undertook representation on all pending charges and another attorney was never appointed for the additional charges. Applicant testified that he met with Counsel three times prior to his guilty plea, as well as discussed the case by telephone and through written correspondence. Applicant initially testified that he only discussed payment with Counsel, but later testified that he reviewed discovery and witness statements with Counsel. Applicant testified that Counsel never requested a preliminary hearing and never discussed the reasons why he would want a preliminary hearing with him. He testified that to his knowledge, Counsel never filed any discovery motions for the other three incidents and never reviewed any discovery materials with him for these other three events. He testified that his attorney told him that he had been identified by the victims from a photo lineup and that his co-defendant had given a statement that would be used against him at trial. Applicant testified that Counsel advised him that he would likely be convicted at trial, as his co-defendant would likely testify against him.

He testified that Counsel told him that he could plead guilty and get a non-violent sentence of twenty years, or he could go to trial and risk getting a life sentence. He testified that Counsel informed him that if he pled guilty, the State would allow him to plead to the lesser

² The Kidnapping charge was dismissed pursuant to the plea agreement with the State.

included offenses of strong armed robbery and burglary in the second degree, as well as the dismissal of other charges. He acknowledged that he did receive a twenty year sentence and was allowed to plead to these lesser included offenses per negotiations with the State. He testified that part of the plea negotiation was that if he testified against his co-defendant, the State would move to reduce his sentence to thirteen years based on his substantial assistance. He testified that in order to receive this plea negotiation, he gave several statements to law enforcement. He testified that he was lying in these various signed statements to law enforcement and that he lied upon Counsel's advice. He testified that instead of fulfilling this negotiation, the State dismissed the charges against his co-defendant because he refused to testify against his co-defendant.

Applicant testified that Counsel reviewed the maximum and minimum sentences he could receive with him, as well as the rights he would be waiving by pleading guilty. He acknowledged that Counsel reviewed a waiver of rights form with him and that he signed this form. He acknowledged that he told the plea court while under oath that he was guilty and agreed with the facts presented by the State. He testified that he is guilty of all offenses from all four instances. He testified that he told the plea court he was satisfied with Counsel's representation. He testified that it was his decision to accept this plea offer and that he did not want to proceed to trial.

He testified that he is now dissatisfied with Counsel's representation, as Counsel did not inform him that the victim gave two different statements and identified more than one perpetrator when shown the six person line-up. He also testified that Counsel was lying to him when he told him his co-defendant had given a statement against him, because no such statement is in his discovery materials. He testified that this is why he refused to testify at his co-defendant's trial.

Following Applicant's testimony, Counsel testified. Counsel testified that he was retained to represent Applicant on the home invasion set of charges that occurred in August 2011. He testified that Applicant then got the new charges while out on bond for the home invasion charges. He testified that he did not modify his agreement with Applicant to include the new charges, but that Applicant was aware that Counsel was representing him on all pending charges. He testified that the home invasion charges were by far the most serious charges, carried the most sentence exposure, and were of primary concern to both himself and Applicant. He testified that he filed appropriate discovery motions on the first three sets of charges and reviewed this material with Applicant. He testified that he also reviewed the elements of the offenses and what the State would be required to prove with Applicant, as well as minimum and maximum sentences. He testified that he did not request a preliminary hearing because Applicant told him that he was involved in all the crimes and there was no question of guilt. He testified that a preliminary hearing would have been fruitless, as there was no possibility that Applicant's charges would have been dismissed at a preliminary hearing. He elaborated that Applicant freely admitted his guilt for all four incidents to him.

He testified that after his initial meeting with Applicant, he spoke with the prosecuting Assistant Solicitor, who told him this was a "hot case." Counsel testified that shortly thereafter, he ran into counsel representing co-defendant, who told Counsel that co-defendant was willing to give law enforcement a statement and testify against Applicant. Counsel testified that the "first hog at the trough" usually gets the best deal, so he advised Applicant that it would be favorable for him to give a statement first and testify against his co-defendant if required by the State. He testified that he never told Applicant that his co-defendant had already given a statement or that

the State said co-defendant had given a statement. He testified that after advising Applicant of this, Applicant agreed to give a statement. He testified that he and Applicant met with prosecuting Deputy Solicitor Brett Perry, former Assistant Solicitor Ron Moak, who was prosecuting co-defendant's case, and an investigator. At this meeting, Applicant gave a statement implicating himself and his co-defendant. He testified that he never told Applicant to lie and had no reason to believe Applicant was lying in this statement. He testified that in exchange for this statement, the State offered an extremely favorable plea deal for an aggregate sentence of twenty years imprisonment for non-violent offenses, which would require Applicant to serve significantly less time. He testified that the State also agreed to file a motion based on substantial assistance to further reduce Applicant's sentence if he testified against his co-defendant at trial.

Counsel testified that he reviewed the victim's two statements, given a few hours apart. He testified that while one of the statements contained more detail than the other, the statements were consistent and named Applicant as one of the perpetrators. He also testified that he was not surprised that the victim had circled two suspects in the photo-line up, as there were two perpetrators. The suspects she identified were Applicant and his co-defendant.

He testified that the evidence against Applicant was overwhelming, including the victim's statements naming Applicant as the perpetrator, the victim's identification of Applicant, and Applicant's own statements. He testified that he advised Applicant that he would not likely be successful if he proceeded to trial and he should accept the State's advantageous plea offer. Counsel testified that the State's plea offer would allow Applicant to resolve all pending charges,

which he felt was in Applicant's best interest. He testified that he advised Applicant of this, and Applicant was eager to accept the State's offer.

Counsel testified that following Applicant's plea, Applicant was supposed to testify against his co-defendant. He testified that shortly before the hearing, the prosecuting assistant solicitors called Counsel and advised him that they were unable to proceed forward on the charges against Applicant's co-defendant, as Applicant had lied in all of his previous statements. He testified that as a result, the charges against Applicant's co-defendant had to be dropped.

Following Counsel's testimony, former Assistant Solicitor Ron Moak testified. Moak testified that he was formerly with the Fifth Circuit Solicitor's office and prosecuted Applicant's co-defendant's case. He testified that Deputy Solicitor Brett Perry was prosecuting Applicant's case, and he was surprised with the favorable plea offer that Applicant received, as he would have pushed for a harsher sentence. He testified that he worked closely with Perry on the two cases and is certain that neither he nor Perry ever told Applicant or his Counsel that the co-defendant had given a statement. He testified that as part of his plea agreement, Applicant was supposed to assist with the prosecution of his co-defendant. He testified that he had Applicant transported from SCDC to prepare for the co-defendant's trial, and when Applicant arrived, he was upset with Counsel and refused to speak with anyone until he saw a complete copy of his discovery materials. He testified that he allowed Applicant to see his discovery, and Applicant was very agitated that there was not a statement from his co-defendant in his discovery materials. He elaborated that Applicant told him he was upset because Counsel had told him his co-defendant had given a statement to law enforcement. He testified that after learning there was no statement from his co-defendant, Applicant changed his story and stated that he had lied to law

enforcement in his previous statements. Moak testified that based on Applicant's inconsistencies, he was forced to dismiss the charges against Applicant's co-defendant because Applicant's statements and credibility were crucial to his prosecution of the co-defendant. He testified that Applicant has contacted him multiple times while incarcerated asking for him to testify at his post-conviction relief hearing.

Moak testified that in regards to the victim's two statements, her second statement contained more detail because law enforcement initially instructed her to give a brief statement without much detail. He elaborated that the second statement contains much more detail, but is consistent with the first statement.

Respondent called Deputy Solicitor Brett Perry to testify. He testified that he prosecuted Applicant's cases. He testified that Applicant was originally arrested for the charges stemming from the home invasion. He testified that he met with Counsel several times and Counsel wanted him to reduce or drop several charges to reduce Applicant's sentence exposure. He testified that he reached an agreement with Counsel for an aggregate sentence of twenty years of non-violent time in exchange for Applicant's full cooperation. He testified that Applicant gave a voluntary confession and statement implicating his co-defendant. He testified that based on Applicant's statement and cooperation, he recommended that Applicant have a reduced bond, which allowed Applicant to be released on bond. He testified that while Applicant was released on bond, the three other incidents occurred and Applicant was re-arrested. He testified that because Applicant was still cooperating with law enforcement, he informed Counsel that Applicant could plead to all of the newly acquired charges for concurrent sentences. Additionally, he testified that in order to secure Applicant's continued cooperation, he agreed to

file a motion to reduce Applicant's sentence based on substantial assistance if Applicant testified at his co-defendant's trial. He testified that when it was time for Applicant to testify, the State had to dismiss all charges against his co-defendant because they discovered Applicant had been lying.

He testified that he never informed Counsel that Applicant's co-defendant had provided a written statement to law enforcement. He testified that the victim gave two statements to law enforcement, with the second statement containing more detail, but that the two statements were consistent. He testified that the victim identified two people on the photo line-up, because two perpetrators entered her home and she identified both from the line-up.

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 (1985).

Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel 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 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether an 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, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. 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 (1985).

"A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a 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." Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011), citing Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009).

After careful review based on the standard discussed above, this Court finds that Applicant has failed to meet his burden in this action. Specifically, this Court finds that Counsel's testimony, along with the testimony of former Assistant Solicitor Ron Moak and Deputy Solicitor Brett Perry, is very credible while Applicant's testimony is not credible. Below are the specific findings of this Court in regards to each of Applicant's allegations of ineffective assistance of counsel:

Counsel's alleged failure to provide discovery materials before requiring him to make a decision regarding whether to plead guilty

Applicant alleges that Counsel was ineffective for failing to review discovery materials with him prior to his guilty plea. Counsel testified that he filed the appropriate discovery motions and reviewed the discovery materials with Applicant prior to his guilty plea. Additionally, the uncontroverted testimony from Applicant and Counsel is that Applicant readily admitted to his guilt involving all four instances and that Applicant wanted Counsel to secure a favorable plea offer from the beginning of his representation. This Court rejects Applicant's assertion that he was unable to make an informed decision as to whether or not to plead guilty based on a lack of discovery review, when Applicant testified that he was guilty of all crimes charged, did not want to proceed to trial, and wanted Counsel to secure a favorable plea deal on his behalf. This Court finds that Counsel performed within the competency required based on the circumstances and Applicant has failed to satisfy his burden of establishing a deficiency of counsel.

Additionally, this Court finds that Applicant has failed to establish any resulting prejudice from Counsel's alleged deficiency. Applicant failed to present any evidence that but for Counsel's alleged failure to show him all discovery materials, he would not have pled guilty.

Additionally, as there was overwhelming evidence of guilt, including Applicant's confession and the statement and identification by the victim, Applicant cannot establish any prejudice. See Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994) (holding where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial); See also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001). Therefore, this allegation must be denied and dismissed with prejudice.

Counsel's alleged deficiency in advising Applicant to plead guilty on charges for which he did not represent Applicant and had not received discovery

Applicant alleges that Counsel was ineffective for advising him to plead guilty to the charges arising out of the three subsequent events following the home invasion, as he was not retained to represent Applicant on those charges and did not have discovery for these charges. This Court finds that Applicant has failed to meet his requisite burden of proof in establishing that Counsel was deficient. Counsel testified that although he was only formally retained to represent Applicant on the home invasion charges, when Applicant received the subsequent charges, it was understood by both Applicant and Counsel that Counsel was representing him on all pending charges. Counsel testified that the home invasion charges were of paramount concern for both him and Applicant, and he was able to secure an extremely favorable plea deal for Applicant on these charges. Counsel testified that once Applicant subsequently received charges for the three other instances, the State agreed to allow him to plead to concurrent time for the new charges to secure Applicant's continued cooperation. This Court finds that Counsel's performance in advising Applicant to accept a highly advantageous plea offer from the State that would resolve all pending charges was prudent and proficient. As Applicant has failed

to meet his burden of establishing any deficiency of Counsel in regards to this allegation, it must be denied and dismissed with prejudice.

Additionally, as discussed prior, this Court finds that Applicant has failed to establish any resulting prejudice, as there was overwhelming evidence of guilt, Applicant readily admitted his guilt, and stated that he never wanted to proceed to trial. Therefore, this allegation must be denied and dismissed with prejudice.

Alleged coercion by Counsel and the State to get Applicant to plead guilty

Applicant alleges that Counsel and the State intentionally misrepresented evidence, particularly a written statement made by Applicant's co-defendant, to coerce him to plead guilty. However, the credible testimony from Counsel, Deputy Solicitor Perry and former Assistant Solicitor Moak all strongly refute this allegation. Counsel testified that after a chance meeting, counsel for Applicant's co-defendant informed him that his client was *willing* to testify against Applicant. Counsel testified that he relayed this information to Applicant and informed him that if he wanted to receive a favorable offer, he would have to cooperate with law enforcement. Both Perry and Moak testified that they never informed Applicant or Counsel that they had any statements, written or otherwise, from Applicant's co-defendant. Counsel testified that Applicant asked him to secure a favorable plea offer from the State and readily admitted his guilt. This Court finds that Applicant has failed to meet his burden of proof, and this allegation must be denied and dismissed with prejudice.

Counsel's alleged deficiency in advising Applicant to plead guilty without disclosing and discussing alleged inconsistencies in the victim's statements.

Applicant alleges that Counsel was ineffective for failing to review and discuss alleged inconsistencies in the victim's two statements with him and how these inconsistencies could be

used to his benefit at trial. This Court finds that Applicant has failed to meet his required burden of proof. After hearing the testimony from the witnesses and reviewing the two statements given by the victim, which were introduced into evidence by Applicant, this Court finds that while the second statement contains more detail, there are no striking inconsistencies that have any significant impact on Applicant's case. This is supported by the testimony from Counsel, Perry, and Moak. This Court finds that as there were no considerable inconsistencies between the two statements, Counsel's performance was reasonable and this allegation must be denied and dismissed with prejudice.

Counsel's alleged deficiency in advising Applicant to plead guilty without disclosing and discussing alleged problems with the photo line-up

Applicant alleges that Counsel was ineffective for failing to review and discuss alleged problems with the photo line-up, particularly that the victim identified two individuals. Counsel, Perry, and Moak all testified that the victim circled two individuals because there were two perpetrators that broke into the victim's home. It is uncontroverted that one of the individuals selected is Applicant and that the other individual is Applicant's co-defendant. This Court finds that Counsel's performance was reasonable and that Applicant has failed to establish any resulting prejudice. Therefore, this allegation must be denied and dismissed with prejudice.

Counsel's alleged deficiency in failing to request a preliminary hearing for Applicant

Applicant alleges that Counsel was ineffective for failing to obtain a preliminary hearing on his behalf. When questioned as to why he did not request a preliminary hearing, Counsel testified that Applicant fully admitted his guilt to all crimes and gave a confession for the home invasion charges. Counsel testified that he did not see any benefit that could be derived from a preliminary hearing, because there was no likelihood that the charges would have been

dismissed. This Court agrees with Counsel and finds that his performance was reasonable based on the facts of Applicant's case. Therefore, this allegation must be denied and dismissed with prejudice.

Counsel's alleged deficiency in advising Applicant to plead guilty to drug charges without first obtaining discovery concerning the chemical analysis of the substances

Applicant alleges that Counsel was ineffective for advising him to plead guilty to drug charges without obtaining discovery regarding the chemical analysis of the substances. However, Applicant testified he was guilty of the drug offenses. Additionally, Counsel testified that after discussing the offenses with Applicant, Applicant admitted he was guilty and that the substances were indeed illegal drugs. This Court finds that Counsel was reasonable in advising Applicant to take advantage of a favorable plea offer for concurrent sentences for the drug charges when Applicant freely admitted to him that the substances were drugs. As Applicant has failed to establish any deficiency, this allegation must be denied and dismissed with prejudice.

Counsel's alleged deficiency in advising Applicant to plead guilty without seeing discovery when his co-defendant's charges were dismissed.

Applicant alleges that Counsel was ineffective for advising him to plead guilty without reviewing discovery when his co-defendant's charges were dismissed. However, the testimony from Perry and Moak, the prosecutors handling the case, both testified that the co-defendant's charges were only dismissed because Applicant's repetitive lying and inability to be a reliable witness. This Court finds that Applicant has failed to establish his burden of proof of either deficiency of counsel or prejudice in regards to this allegation, which must be denied and dismissed with prejudice.

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 notes that Applicant must file and serve a Notice of Appeal within thirty 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 post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That this application for post-conviction relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to and remain in the custody of the State

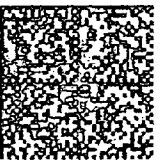
AND IT IS SO ORDERED this 6th day of March, 2014.



ROBERT E. HOOD
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina

FIRST-CLASS



UNITED STATES POSTAGE
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PTINBY BOWES
0002929654 APR 03 2014
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Law Office of

TARA DAWN SHURLING, PA

3614 LANDMARK DRIVE, SUITE D
COLUMBIA, SOUTH CAROLINA 29204



The Honorable Daniel E. Shearouse
South Carolina Supreme Court Clerk
Post Office Box 11330
Columbia, South Carolina 29211-1330