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STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
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Aaron Orlando Smalls,)
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Applicant,)
)
v.)
)
State of South Carolina,)
)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
S.C. Supreme Court
2011-CP-10-9603

FILED
2014 MAR - 5 PM 12:12
JULIE J. ROBERTSON
CLERK OF COURT
BY _____

ORDER OF DISMISSAL

Presiding Judge: The Honorable Stephanie P. McDonald
Applicant's Attorney: Aaron Smalls- *Pro Se*
Respondent's Attorney: Ashleigh R. Wilson, Esquire
Trial Counsel: Edward Brown, Esquire
Date of Hearing: January 10, 2014
Court Reporter: Joy C. Rueger

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed December 29, 2011, and amended November 21, 2013. The Respondent made its Return on June 20, 2012. An evidentiary hearing into the matter was convened on January 10, 2014 at the Charleston County Courthouse. The Applicant was present at the hearing and represented himself. Ashleigh R. Wilson, Esquire, of the South Carolina Attorney General's Office represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. The Applicant also called to testify his co-defendant Sharonda Wright. The Applicant's plea counsel, Edward Brown, Esquire, and Gregory Voight, Assistant Solicitor, also testified at the hearing. This Court had before it the guilty plea transcript, the records of the Charleston County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the PCR application, and the Respondent's Return thereto.

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PROCEDURAL HISTORY

The Applicant was indicted at the April 2009 term of the Charleston County Grand Jury for possession with intent to distribute (PWID) cocaine base- third offense (2009-GS-10-3226), possession with intent to distribute (PWID) within ½ mile of a school (2009-GS-10-3227), and manufacturing cocaine base- third offense (2009-GS-10-3225). Edward Brown, Esquire, represented the Applicant. The Applicant pled guilty to PWID cocaine base within ½ mile of a school- first offense and manufacturing cocaine base- second offense. The remaining PWID cocaine base charge was *nolle prossed*. Pursuant to a negotiated plea agreement, the Honorable Deadra L. Jefferson sentenced the Applicant to confinement for eight years. The sentences were to run concurrently. The Applicant did not appeal his conviction or sentence.

ALLEGATIONS

In his original application, the Applicant alleged he was held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
2. Involuntary guilty plea.

In his application amended November 21, 2013, the Applicant alleges:

1. Ineffective assistance of counsel.
 - a. Counsel failed to conduct an adequate investigation of the relevant facts and laws governing the Applicant's defense.
 - b. Counsel failed to seek a suppression hearing in order to challenge the evidence used by the State to support the charge of manufacturing cocaine base.
 - c. Counsel stated in open court that he could not adequately defend the Applicant at trial.
 - d. Counsel failed to object to the trial court's repeated coercion of the Applicant to plead guilty.
 - e. Counsel failed to withdraw the Applicant's guilty plea.
 - f. Counsel failed to allow the Applicant to listen to the audio tape of an alleged undercover drug buy.
 - g. Counsel continued with the Applicant's guilty plea after Applicant stated he was not satisfied with counsel's representation.

2. Involuntary guilty plea.

- a. Counsel fraudulently asserted that the State had tested additional substances seized at the Applicant's residence, and those substances proved to be cocaine. Counsel used this false information to compel the Applicant's guilty plea.

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 his or her 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).

Summary of the Testimony

At the start of the Applicant's evidentiary hearing, the Court confirmed that the Applicant was previously advised of his right to counsel.¹ The Court advised the Applicant of the risks associated with pursuing post-conviction relief along with the minimum mandatory sentences he would be facing if he were granted a new trial. The Applicant stated he was aware of his right to counsel and wanted to proceed with his post-conviction relief application *pro se*.

The Applicant took the stand and testified he spoke with counsel five (5) times before pleading guilty. He also testified he did not review discovery with his attorney. He testified he discussed possible defenses with his attorney and did not give his attorney any leads or witnesses to investigate. The Applicant testified counsel did not investigate any of his witnesses or look

¹ The Applicant's evidentiary hearing was originally scheduled for November 21, 2013. At the November 2013 hearing, the Applicant moved to relieve his counsel- Tommy Thomas, Esquire. Thomas consented to being relieved and the Applicant expressed to the Court his desire to represent himself at the PCR hearing. The Applicant was advised by the Court of the risks and pitfalls of proceeding without counsel and the hearing was continued until the next term of court. The Honorable Stephanie P. McDonald relieved Thomas from representation of the Applicant in this matter by Order filed December 2, 2013.

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into drugs found in the microwave. He testified counsel came to his home and took photos of the scene, but otherwise would not do anything that he asked. The Applicant testified he wanted a suppression hearing prior to trial and trial counsel wanted to wait until the day of trial to present the motion to the Court.

The Applicant also testified trial counsel told him that the State had additional drugs that had not been tested. He testified the drugs purchased by the confidential informant were never submitted for testing at SLED. He testified further counsel told him that if he proceeded to trial the State would bring additional charges against him. The Applicant testified counsel told him it was not in his best interest to proceed to trial.

The Applicant testified he told Judge Jefferson during his guilty plea that he wanted to proceed to trial. He testified he did not want to plead guilty, but felt he had no choice because counsel tried to bail on him. The Applicant testified that during his guilty plea he was advised by the Court of the penalty for the charges he was facing and the elements of the charges he was facing. He testified he told the Court he was not promised, threatened, or coerced anything to plead guilty. He testified he told the Court his plea was freely and voluntarily entered and that no one pressured him to plead guilty. The Applicant testified he recalled telling the Court that his answers were truthful during his guilty plea and that he was being truthful during his guilty plea.

Lastly, the Applicant testified that his guilty plea transcript was inaccurate. He testified his guilty plea did not take 80 pages and that an audio recording of the guilty plea would reflect a different proceeding. The Applicant testified further that during his guilty plea he blacked out and does not recall what happened.

The Applicant called to testify his co-defendant Sharonda R. Wright. Wright testified that she is the Applicant's girlfriend and has three (3) children with the Applicant. Wright testified

she was charged with possession of cocaine base within the proximity of a school and her charge was dismissed. Wright testified that at the plea proceeding the Applicant wanted to go to trial. She testified counsel kept trying to talk the Applicant out of going to trial and tried to get her to talk him out of going to trial. Wright testified that counsel said he would not do his best if the Applicant went to trial. Lastly, Wright testified she was not at every meeting between the Applicant and his attorney.

Also present to testify was Edward Brown, Esquire. Brown testified he has been practicing criminal law for the last thirty-nine (39) years. He testified he was retained to represent the Applicant at least a year prior to the Applicant's guilty plea. He testified he met with the Applicant frequently to discuss his case. Brown testified he filed Brady and Rule 5 motions on the Applicant's behalf and reviewed the received discovery materials with the Applicant. Counsel testified he also reviewed with the Applicant the audio of the controlled buy between the confidential informant and the Applicant. He testified further that nothing exculpatory was on the tape.

Counsel testified he discussed with the Applicant the elements of the charges he was facing and what the State was required to prove, the Applicant's version of the facts, and possible defenses. Counsel testified the Applicant did not have any viable defenses to present at trial. He testified further the Applicant's criminal background would hurt the Applicant if he chose to take the stand to testify at trial.

Counsel testified that during their talks the Applicant was caught up on drugs found in a place where the Applicant claimed he did not live. Counsel testified the Applicant claimed he lived in a detached garage and his co-defendant lived in the home where the drugs were found. He testified he received a copy of the search warrant executed in the case and reviewed it

thoroughly with the Applicant. He testified ^{that he} filed a motion to suppress all evidence in the Applicant's case and thought it was unlikely that the evidence was going to be suppressed. He testified he discussed the likelihood of the motion's success with the Applicant. Counsel testified he explained to the Applicant that police could search both the home and garage and that drugs were found in both the home and garage.

Counsel testified the Applicant did not give him any witnesses or leads to investigate. Counsel testified his investigation of the case included visiting the home where the drugs were found. He testified the Applicant brought it to his attention that all the evidence had not been sent to SLED for testing. He testified he ultimately received a second testing report from the State. Counsel testified he gave the Applicant a copy of the report. He testified he was prepared for trial and based on his investigation felt comfortable advising the Applicant on whether it was in his best interest to plead guilty.

Counsel testified he spoke with the solicitor several times about a plea offer. He testified that ultimately the State offered a negotiated sentence of eight (8) years, concurrent. Counsel testified he communicated the offer to the Applicant, informed the Applicant of the consequences of his plea, and informed the Applicant of his constitutional rights.

Counsel testified he felt awkward during the Applicant's guilty plea when the Applicant indicated he was not pleased with his services. He testified that his statements to the Court during the Applicant's guilty plea were made in the context of him being prepared for trial, but thinking that nothing he could do would satisfy the Applicant. He testified the Applicant wanted to fire him and get someone else.

Counsel testified the Applicant did not black out during his guilty plea proceeding. He testified the Applicant understood what was happening. He testified ultimately it was the

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Applicant's decision to accept the plea offer and he did not coerce, threaten, or pressure the Applicant to get him to plead guilty. Counsel testified further he reviewed the transcript of the Applicant's guilty plea and it accurately reflects the plea proceeding.

The State called to testify Gregory Voight, Assistant Solicitor. Voight testified the Applicant's case was reassigned to him several months prior to the Applicant's guilty plea. Voight testified a search warrant was obtained for the Applicant's residence after a controlled buy at the Applicant's home. He testified police searched the Applicant's residence and found a small quantity of cocaine and firearms.

Voight testified the Applicant was scheduled to plead guilty three or four times. He testified when he took over the Applicant's case he left open a plea offer from the prior solicitor and the offer was rejected by the Applicant. He testified there was no offer going into the Applicant's trial.

Voight testified further ^{that} while preparing for the Applicant's trial he realized that some of the evidence had not been sent to SLED for testing. Voight testified the issue was initially brought to his attention by Brown because the Applicant had brought the issue to his attention. Voight testified he spoke with counsel about the evidence that was not sent for testing and then sent a pan and whisk found in the detached garage to SLED for testing. He testified he received a SLED report from the second set of tests and forwarded the report to counsel for the Applicant. He testified the pan and whisk seized both tested positive for a small amount of cocaine. Voight testified there were all together two SLED reports from the testing of evidence found in the Applicant's home.

At the conclusion of the Applicant's evidentiary hearing, the Court advised the Applicant of his right to appeal the Court's denial and dismissal of his application for post-conviction

relief.

Ineffective Assistance of Counsel

The Applicant alleges that he received ineffective assistance of counsel. In a post-conviction relief action, the 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). 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 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test to evaluate 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." Id. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. 668). 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." Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness

and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

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, 243-44 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000) (citing Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)). When a defendant pleads guilty on the advice of counsel, the plea may only be attacked through a claim of ineffective assistance of counsel. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2002) (citations omitted).

As an initial matter, this Court finds the testimony of the Edward Brown, Esquire, and Gregory Voight, Esquire, to be credible. This Court finds further ^{that} the testimony of the Applicant was not credible. The Applicant's lack of credibility was evidenced by his claim that the transcript of his guilty plea did not accurately reflect his guilty plea proceeding. At the evidentiary hearing, the Applicant relied upon and highlighted for the Court several statements in the guilty plea transcript made by plea counsel. The Applicant also claimed that he "blacked out" during his guilty plea and did not recall what happened. In light of the conflicting testimony presented by the Applicant, this Court finds the Applicant's claim that the transcript of his guilty plea was inaccurate is wholly without merit and a direct reflection of the Applicant's poor credibility.

This Court finds counsel is a trial practitioner who has extensive experience in the trial of

serious offenses. Counsel conferred with the Applicant on numerous occasions. During conferences with the Applicant, counsel discussed the pending charges, the elements of the charges and what the State was required to prove, the Applicant's constitutional rights, the Applicant's version of the facts, and possible defenses or lack thereof.

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 Applicant's attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, 466 U.S. at 668; Butler, 286 S.C. 441, 334 S.E.2d 813. This Court further finds counsel adequately conferred with the Applicant, conducted a proper investigation, and provided thorough representation. This Court finds that counsel's representation did not fall below an objective standard of reasonableness.

This Court finds that trial counsel was not ineffective for failing to investigate the Applicant's case. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 521-22 (2003).

This Court finds counsel adequately investigated the Applicant's case prior to the Applicant's guilty plea. Counsel reviewed all materials received in discovery and visited the Applicant's residence where drugs were found. This Court also finds the Applicant has failed to show what would have been discovered had counsel investigated the Applicant's case further. This Court finds that this allegation is without merit and the Applicant has failed to carry his burden of proving counsel was deficient and that prejudice resulted from counsel's performance.

This Court finds that counsel was not ineffective for failing to seek a suppression hearing. This Court finds counsel provided credible testimony that he filed a motion to suppress all evidence in the Applicant case. This Court also finds credible counsel's testimony that he discussed the motion to suppress and the likelihood of the motion's success with the Applicant prior to the Applicant pleading guilty. This Court finds it is not unreasonable for criminal defendants to seek resolution of motions to suppress shortly prior to trial. This Court also finds it is not unreasonable for counsel to abandon pursuing a motion to suppress evidence once a defendant expresses interest in pleading guilty. This Court finds the Applicant has also failed to provide any basis for the suppression of the drugs found by police in his residence. This Court finds that this allegation is without merit and the Applicant has failed to carry his burden of proving counsel's performance was deficient and resulted in prejudice.

This Court finds further ^{that} counsel was not ineffective for failing to allow the Applicant to listen to the audio of the controlled buy made by police prior to the execution of the search warrant for the Applicant's home. This Court finds credible counsel's testimony that he listened to the audio tape with the Applicant. Counsel testified further that the contents of the tape were not exculpatory. This Court finds the Applicant has failed to show how his review of the audio tape of the controlled buy in any way affected his decision to plead guilty or the outcome of his

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proceeding. This Court finds that this allegation is without merit and the Applicant has failed to carry his burden of proving counsel's performance was deficient and resulted in prejudice.

Involuntary Guilty Plea

The Applicant alleges that his guilty plea was entered involuntarily. This Court finds that the Applicant's guilty plea was entered freely and voluntarily. To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)).

A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing 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. United States, 519 F.2d 347 (4th Cir.1975).

This Court finds that this allegation is without merit and the Applicant has failed to carry his burden of proving that his guilty plea was involuntarily made. This Court finds the Applicant was fully advised of the consequences of pleading guilty and made aware of all the constitutional rights he was waiving as a result of pleading guilty. The record reflects the Applicant initially

wanted to reject the State's plea offer and proceed to trial, but had a change of heart. (Tr. 3:6-8, 13:2-9). The record reflects the Applicant was advised by the Court of the substance of the negotiated plea offer he was accepting. (Tr. 17:12-23). The Applicant told the Court he was not under the influence and did not suffer from any physical or emotional problems that would keep him from understanding the plea proceeding. (Tr. 19:18-20:2, 22:13-16). The Court advised the Applicant of the potential penalties for the charges he was facing. (Tr. 21:4-22:12).

The Applicant was also advised of his constitutional rights including his right to a jury trial, his right to remain silent, his right to confront his accusers, and his right to appeal. (Tr. 36:6-24, 80:7-10). The Applicant agreed with the facts presented by the State and told the Court he was certain he wanted to plead guilty. (Tr. 28:20-29:3, 33:13-23, 71:4-7). The Applicant told the Court he was not promised anything, threatened, coerced, forced, or pressured to plead guilty. (Tr. 78:11-23, 79:19-23). The record also reflects the Applicant told the Court he was indeed guilty of the charges he was pleading to. (Tr. 33:21-23, 36:2-5). This Court finds the Applicant was fully aware that he could proceed to trial instead of pleading guilty if he chose to. This Court also finds the Applicant was not pressured to plead guilty. This Court finds the Applicant has failed to carry his burden of proving that his guilty plea was not freely and voluntarily entered.

Accordingly, this Court finds^{that} the Applicant has failed to prove the first prong of the Strickland test, specifically 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 while representing the Applicant. The Applicant failed to show that counsel's performance was deficient. Therefore, this Court need not address prejudice. The Applicant's complaints concerning counsel's performance are without

merit and are denied and dismissed.

All Other Allegations

As to any and all allegations that were raised in the original or amended application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations. Therefore, they are hereby denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes ^{that} the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner, nor was the Applicant prejudiced by counsel's representation. Therefore, this application for PCR must be denied and dismissed with prejudice.

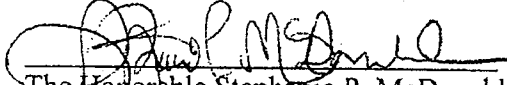
This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of written notice of entry of this Order to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely served and filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 4th day of March, 2014.

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The Honorable Stephanie P. McDonald
Presiding Judge
9th Judicial Circuit

Charleston, South Carolina.



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BY: EC

ALAN WILSON
ATTORNEY GENERAL

February 28, 2014

The Honorable Stephanie P. McDonald
100 Broad Street, Suite 427
Charleston, SC 29401

Re: Aaron Smalls v. State, 2011-CP-10-9603

Dear Judge McDonald:

Attached is the State's proposed order of dismissal in the above referenced post-conviction relief matter over which you presided on January 10, 2014. Mr. Smalls, who represented himself at the hearing, has been copied on this letter and will be sent a copy of this order by mail. Please advise if anything further is needed from the State with regard to this matter. Thank you.

Ashleigh R. Wilson
Assistant Attorney General

Enclosure: Order of Dismissal

Cc: Aaron Smalls by mail
P.O. Box 20261
Charleston, SC 29401

1640 Marietta Street
North Charleston, SC 29406