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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
In The Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2012-CP-42-3582

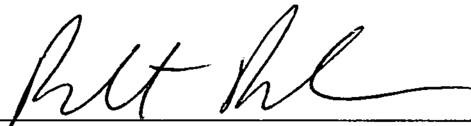
Brian Oneil Robinson, #349471 .... Appellant,

v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable J, Derham Cole's February 20, 2014, order denying post conviction relief to the Petitioner. Undersigned Counsel received notice of entry of the order on February 24, 2014. A copy of the order on appeal is attached to this notice.



Brandt Rucker
522 North Church Street
Greenville, S.C. 29601
Attorney for the Appellant

March 20, 2014

Other Counsel of Record:
Suzanne White
S.C. Attorney General's Office
P.O. Box 11549
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Proof of Service

I, Brandt Rucker, certify that I have today served the within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, address to its attorney of record, Suzanne White, P.O. Box 11549, Columbia, S.C. 29211. I further certify that all parties required by Rule to be served have been served this 20th day of March, 2014.

Brandt Rucker
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Attorney for the Appellant

March 20, 2014

Other Counsel of Record:
Suzanne White
S.C. Attorney General's Office
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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG)
) 2012-CP-42-3582
Brian Oneil Robinson, #349471,)
)
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 August 23, 2012. The Respondent made its Return on or about July 17, 2012. An evidentiary hearing into the matter was convened on October 3, 2013, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by J. Brandt Rucker, 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. Robert B. Hall, 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 and exhibits presented during the hearing.

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. He was indicted at the October 2011 term of the Spartanburg County Grand Jury for count one – felony DUI – death (2011-GS-42-5932) and count two – reckless homicide (2011-GS-42-5932A). The Applicant

was represented by Robert Hall, Esquire. On January 30, 2012, the Applicant pled guilty before the Honorable Roger L. Couch and was sentenced to confinement for fifteen years for felony driving under the influence, death results. Applicant did not appeal his conviction and 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 failed to give Applicant Rule (5) Discovery,
   b. Counsel failed to investigate the fact that the alleged victim was struck by another vehicle.

The Applicant amended his application orally to include a claim that Counsel failed to file a direct appeal on his behalf.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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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).

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Applicant testified that he pled guilty to a felony DUI charge on January 30, 2012, and received a fifteen year sentence. Applicant testified that he met two or three times with Counsel. Applicant testified that Counsel reviewed the videotape evidence and facts of the case with Applicant. Applicant testified that on the night he hit the victim, a second car stopped to assist and had their flashing lights on, but then a third car did not see the victim and hit the victim. Applicant testified that he called 911 and did not try to leave the scene. Applicant testified that Counsel informed him that the field sobriety tests were okay and that the blood alcohol content

registered .05 and some marijuana. The Applicant testified that he did not know that a consent form was required to take his blood and he signed the form the day after his blood was taken. Applicant testified that he believes an intervening act cause the death of the victim. Applicant also testified that there were questions of the victim's mental stability because of a prior accident the victim was involved in. Applicant testified that the only witnesses were the people in the car with Applicant.

Applicant testified that he did not know what charge he was pleading guilty to. However, Applicant testified that he knew it was possible that he would have been convicted if he proceeded to trial. Applicant testified that Counsel did not promise a sentence of fifteen years or less, but Applicant understood that he would get less than fifteen because he pled guilty.

Counsel testified that this case had been set for a trial the entire time. Counsel testified that he discussed possible defenses with the Applicant, including an unclear video of the sobriety tests, questions regarding his Miranda rights, and research on the blood alcohol content. Counsel testified that he consulted with several attorneys that handled DUI cases regularly. Counsel also testified that he looked into the possibility of there being an intervening act. However, the victim's motorcycle was essentially impaled on the Applicant's truck and the MAIT report indicated that the victim's right blinker had been on. Counsel testified that he did not recall an extraordinary time being between the blood test and the arrest. Counsel reviewed Applicant's Exhibit #1, document regarding interference with video; and Exhibit #2, the implied consent form. Counsel testified that he did not recall the Applicant stating that he had signed the implied consent form at a different time than he was given the blood test or that there was a missing date on the form. Counsel testified that the MAIT team would have testified at trial. Counsel also testified that he could not recall if he spoke to the driver of the second car, the minivan.

Counsel testified that he great difficulty in locating the possible witnesses for trial, even having a witness lie about his residence. Counsel testified that he begged the Applicant to come in the week before trial in order to discuss and get the witness information and was finally able to meet with both the Applicant and the witness. Counsel testified that he did make a motion for continuance on Applicant's behalf on the first day of trial because the Applicant wanted to hire an attorney, but Counsel stated that he was ready for trial. Counsel testified that the State made an offer to dismiss the reckless homicide and allow Applicant to plead to felony DUI with a cap of fifteen. Counsel testified that after the Applicant spoke with his mother about the offer, he decided to accept. Counsel testified that he had no concern based on conversations with the Applicant, that the Applicant did not understand what he was pleading to or the possible sentence.

This Court finds the testimony of Counsel to be more credible that the testimony of the Applicant. The Applicant's allegation that Counsel did not conduct an adequate pre-trial investigation or was unprepared for trial 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

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defenses that could have been pursued had Counsel been more fully prepared. This Court finds that the issues raised regarding the consent form, possible intervening act, and blood alcohol content were all issues that could have been developed at trial; however, the Applicant has not demonstrated that pursuit of those issues would have led to a different outcome in this situation. Furthermore, the Applicant failed to show any prejudice that may have resulted from Counsel's alleged inadequate preparation. Accordingly, this allegation is dismissed.

In Hill v. Lockhart, 474 U.S. 52 (1985), the United States Supreme Court held that the two-part standard adopted in Strickland v. Washington, supra, for evaluating claims of ineffective assistance of counsel applies, as well, to guilty plea challenges based on ineffective assistance of counsel. To meet the Court's "prejudice" requirement, a criminal defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Hill at 59. Not only did the Applicant fail to establish that Counsel failed to prepare for trial or that Applicant did not fully understand the charge he was pleading guilty to, but the Applicant has failed to establish that he would have proceeded to trial, but for, these alleged deficiencies of Counsel. Therefore, this claim is denied and dismissed.

Summary

This Court finds in regards to the allegation of ineffective assistance of counsel, the Applicant's testimony is not credible. 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.

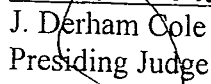
This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.E. 453 (1991), an Applicant has a 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**, 2013.**



J. Derham Cole
Presiding Judge

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M. HOPE BLACKLEY

OCR

Brandt Rucker
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March 27, 2014

The Honorable Daniel Shearouse
Clerk of the South Carolina Supreme Court
1231 Gervais Street
Columbia, S.C. 29201

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S.C. SUPREME COURT

RE: Notice of Appeal

Mr. Shearouse:

Please find enclosed for filing the Notice of Appeal for the Appellant, Circuit Court Order, Proof of Service on the Respondent and the filing fee pursuant to South Carolina Appellate Court Rules, Rule 203. The Notice of Appeal was served on the Respondent on March 20, 2014. This is an Appeal in a Post Conviction Relief matter.

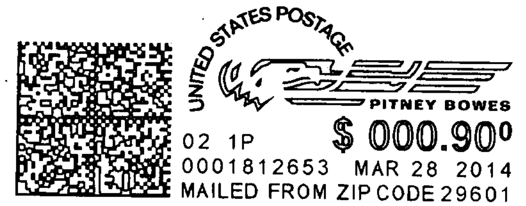
If you have questions or concerns, please do not hesitate to contact me.

Sincerely,

Brandt Rucker

BR/lj

Brandt Rucker Law Office
522 North Church Street
Greenville, South Carolina 29601



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