

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM YORK COUNTY
Court of Common Pleas

S.C. Supreme Court

J. Michael Baxley, Circuit Court Judge

Civil Action Number: 2013-CP-46-02033

Richard Keith Poe #259297,

Petitioner,

v.

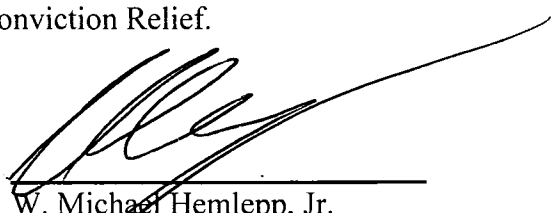
STATE OF SOUTH
CAROLINA,

Respondent.

NOTICE OF APPEAL

Richard Keith Poe appeals the order of the Honorable J. Michael Baxley dated December 11, 2013 denying her application for Post-Conviction Relief.

March 30, 2014



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Richard Keith Poe,

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PROOF OF SERVICE

I certify that I have served the Notice of Appeal in the above captioned case on the following individuals by depositing a copy of it in the United States Mail, postage prepaid, on April 1, 2014, addressed to:

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March 31, 2014

A handwritten signature in black ink, appearing to read 'W. Michael Hemepp, Jr.', written over a horizontal line.

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STATE OF SOUTH CAROLINA)
COUNTY OF YORK)
Richard Keith Poe, #259297,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

C/A NO. 2013-CP-46-2033

**ORDER DENYING
POST-CONVICTION RELIEF**

DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

2014 MAR 14 PM 4:25

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This matter came before the Court by way of an Application for Post-Conviction Relief (“PCR”), filed July 3, 2013. Respondent made its Return on September 10, 2013. An evidentiary hearing into the matter was convened on January 22, 2014 at the Moss Justice Center in York, South Carolina. W. Michael Hemlepp, Jr., Esquire, represented the Applicant, and J. Rutledge Johnson, Esquire, of the South Carolina Attorney General’s Office, appeared on behalf of the Respondent.

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At the hearing, Applicant testified on his own behalf. Applicant’s counsel for his guilty plea, Sean F. Cronin, Esquire, also testified at the hearing on Applicant’s PCR. This Court had before it a copy of the records of the York County Clerk of Court, records from the South Carolina Department of Corrections, and Applicant’s guilty plea transcript.

PROCEDURAL HISTORY

Applicant is currently incarcerated with the South Carolina Department of Corrections pursuant to the York County Clerk of Court’s orders of commitment. Applicant was indicted at the November 2012 term of the York County Grand Jury for Burglary, First Degree (2012-GS-46-3771), Petit Larceny (2012-GS-46-3769), and Criminal Conspiracy (2012-GS-46-3772). Applicant was represented by Sean F. Cronin, Esquire. On June 4, 2013, Applicant pleaded

guilty to Burglary, Second Degree as a lesser included offense, and Petit Larceny and Criminal Conspiracy as indicted. The Honorable John C. Hayes, III sentenced Applicant, pursuant to recommendations from the State, to confinement for thirteen (13) years for Burglary, Second Degree, ten (10) years, concurrent, for Petit Larceny and five (5) years, concurrent, for Criminal Conspiracy. Applicant did not appeal his conviction or sentence.

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

1. "Ineffective Assistance of Counsel"; and
2. "Prejudice by 16th Circuit Solicitor also by Judge Hayes and Judge Alford[.]"

At the hearing, Applicant proceeded on his claim of ineffective assistance of counsel.

SUMMARY OF TESTIMONY

Applicant testified that plea counsel was his second attorney, appointed because there was a conflict with the Public Defender's Office due to its representation of his co-defendant. He stated he was arrested on April 29, 2012, received no bond, and was incarcerated for four hundred days. Applicant testified that when he first spoke with counsel, there was an offer from the State for a sentence of twelve years as a violent offense. Applicant rejected this offer because he believed it was too long. He also questioned whether his offense constituted a Burglary, First Degree charge, because the breaking involved a storage shed, not a residence. Further, Applicant testified the crime was not violent, as it occurred in the daytime. Applicant stated he only met with counsel one time very briefly at the jail, then spoke with counsel on the phone four times prior to trial. During these discussions, Applicant and counsel discussed a guilty plea as opposed to a trial. Applicant claimed he was not familiar with the criminal law process and had a history of mental illness that included two suicide attempts.

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In June 2013, Applicant's case was called for trial. Prior to this, Applicant testified he received an offer from the State of fifteen years, non-violent or twelve years, violent. Applicant stated he wanted a jury trial because he felt he had not committed the offense of Burglary, First Degree. Applicant felt that his offense constituted a Burglary, Third Degree because the shed he burglarized was not a house. He further testified that the building in question was an out building surrounded by a fence. Applicant then testified he spoke with counsel and gave counsel a list of witnesses he wished to call at trial, including on "Miss Donna" who was a neighbor of the victim, the victim Kenneth Stiles, Applicant's sister Wanda Kimbrell, Travis Burrows, Roddy Gordon, and Lisa McDonald (his co-defendant). Applicant stated none of these witnesses were subpoenaed for trial.

Applicant testified that counsel did not discuss any of the discovery with him, nor did Applicant receive a copy of his indictment. Applicant claimed he had a rocky relationship with counsel, and that there were phone records to reflect this. He stated his co-defendant was charged with the same charges, but she had her charges dismissed. Applicant testified he was mentally evaluated to determine whether he was competent to stand trial, but did not receive information concerning the evaluation. He stated he discussed this with counsel and did not object to the evaluation.

Lastly, Applicant testified that while he knew what results the PCR process could bring, he was willing to risk the chance of a new trial. He claims he was not guilty of Burglary, First Degree because the structure he burglarized was not a house, nor did the incident occur during the nighttime. Applicant finally claimed that he did not know what he was pleading to and did not know his charges were considered violent charges.

On cross-examination, Applicant admitted that during the plea hearing, the plea judge explained to him that this was considered a violent offense. (Tr. p. 37 lines 4-10). Applicant also admitted that he had two prior burglary convictions which resulted in him being charged with Burglary, First Degree. Applicant admitted he testified that no other promises other than a range of twelve to fifteen years were made to get him to plead guilty. Additionally, Applicant admitted he pled freely and voluntarily and agreed with the facts as read by the Solicitor. Further, Applicant admitted he lied to the plea judge when he stated he was satisfied with counsel's services. Lastly, Applicant admitted his guilt in this case.

Counsel testified that he was appointed to this case and has been practicing law for four years. This was not counsel's first criminal case. Counsel stated he filed for discovery and visited Applicant in jail. Counsel testified that at this initial meeting, he reviewed the discovery with Applicant, including the indictments, the charges and punishments, and possible defenses. Counsel also stated that Applicant told him Applicant's version of the facts and contact information for Applicant's sister. Counsel testified Applicant thought he was overcharged, and seemed to be fixated on this point throughout the representation; meaning he should not have been charged with Burglary, First Degree. However, counsel stated he researched the law and found that a building in the curtilage of the home can be considered part of the dwelling for purposes of Burglary, First Degree. Counsel further testified that because Applicant had two prior burglary convictions, Applicant could be properly indicted for Burglary, First Degree.

Counsel testified he had a number of discussions with the Solicitor and received offers from the Solicitor. Counsel stated that because of Applicant's prior criminal history, the Solicitor wanted Applicant to serve prison time. Counsel testified that the first offer from the State was for a prison term of twelve years to Burglary, Second Degree, which Applicant

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rejected. Counsel testified the second offer from the State was for five years, which Applicant again rejected. Consequently, counsel then prepared for a trial. Counsel also filed pre-trial motions in this case, one of which was a hearing pursuant to Jackson v. Denno, 378 U.S. 368 (1964), to determine the voluntariness of Applicant's statement that he made to law enforcement. This motion was ultimately denied. Afterwards, the Solicitor offered a plea agreement in which she would allow Applicant to plead to Burglary, Second Degree (violent) and recommend a sentence in the range of twelve to fifteen years. Counsel testified Applicant wanted to accept this offer after the loss of the Denno hearing. Counsel further testified that this was Applicant's decision and he did not force Applicant to accept this offer.


Additionally, Counsel testified there were two indictments in this case. The first was for Burglary, First Degree as the State was going to argue the shed was a dwelling and this incident occurred at nighttime. The second was a re-indictment because Applicant had two prior burglary convictions. Counsel stated he relayed this information to Applicant and that Applicant had some difficulty understanding why he was being indicted for Burglary, First Degree because Applicant thought the shed should not be considered a dwelling and the incident occurred around 6:45 a.m.

Counsel lastly testified that his advice to Applicant during the plea was to answer questions honestly, and that Applicant understood this. Counsel stated during the plea the indictments were read aloud, as well as the facts and Applicant's side of the story. Counsel also stated, in his opinion, he did not see any "winnable" issues in this case.

On cross-examination, counsel stated he has not handled more than five burglary cases. Counsel testified he received discovery from the Solicitor, including around twelve pictures from the crime scene. Counsel admitted he did not visit the crime scene. Counsel stated that,

although he knows of the process of hiring a private detective, he did not do so in this case. Counsel also stated Applicant wanted him to investigate collateral matters by way of other witnesses. Counsel testified he and Applicant did not have a difficult relationship.

Counsel testified he did not request a preliminary hearing on the arrest warrant. He also reiterated that he researched the law and found cases that held buildings for storage may be considered part of a dwelling for the purposes of Burglary, First Degree. Counsel testified he received offers from the State through emails and discovery materials. He stated the three offers were twelve years, five years, and a range of twelve to fifteen; Applicant rejected the twelve and the five year offers and only accepted the range of twelve to fifteen after an unsuccessful Jackson v. Denno hearing, immediately prior to the start of his trial.

 Applicant was recalled and testified that he only learned of the five year offer at the plea hearing.

Counsel was then recalled in sur-reply and a letter Applicant wrote to counsel was introduced which stated that Applicant would only accept an offer of eighteen months to two years' prison sentence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has had the opportunity to review the record in its entirety and hear the testimony presented at the PCR hearing. The 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 (2003).

Ineffective Assistance of Counsel

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), SCRPC). 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 (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. 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, 106 S.Ct. 366 (1985).

This Court finds counsel was competent and diligent in his representation of Applicant in this case. Counsel sufficiently advised Applicant of the charges against him, the potential penalties if convicted at trial, and the evidence the State would produce at trial. Counsel satisfactorily investigated this case based on the information supplied by Applicant and the evidence available. Counsel also engaged in plea negotiations that were beneficial to the Applicant, but Applicant's unreasonable position as to whether the case involved a burglary first, as well as the fact that he would only accept a sentence of less than two years, put counsel (and ultimately Applicant himself) in an untenable position. The Court also finds Applicant was well informed by counsel in this case. The Applicant expressed to the plea court that he was satisfied with counsel's representation. Moreover, Applicant admitted his guilt and accepted responsibility for his actions. Applicant pled guilty without any threat or coercion and was not under the influence of any intoxicant at the plea. Applicant also voluntarily waived the constitutional rights afforded to him. Accordingly, the Court finds the Applicant pled guilty knowingly, voluntarily, and of his own free will.

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The Court further finds Applicant's testimony regarding counsel's performance is not credible, while also finding counsel's testimony is credible. Applicant was facing a Burglary, First Degree charge due to his prior burglary convictions. He was also indicted for Burglary, First Degree because, according to the original indictment, the State intended to argue that the building the Applicant burglarized was within the curtilage of the residence and that this incident occurred at night. Whether either of these is the case is ultimately a question for the jury, but the Solicitor would certainly be allowed to argue it to the jury. This Court finds Applicant had a tough decision to make, but the decision to plead guilty was made by Applicant, in his own best interests given the circumstances, without threats or coercion from counsel or any other

individual; thus, Applicant's plea was freely and voluntarily made. The Court finds Applicant has failed to meet his burden of proving counsel's performance was deficient or that he was prejudiced thereby. As a result, this allegation of ineffective assistance is denied.

CONCLUSION

Based on the foregoing, the Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his Post-Conviction Relief Application. Therefore, this application must be denied and dismissed, with prejudice.

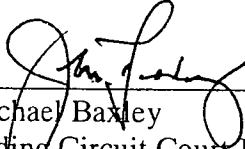
The Court hereby notifies Applicant he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of a 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 Applicant's behalf. Applicant's attention is directed to South Carolina Appellate Court Rule 243 for the appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The Application for Post-Conviction Relief is denied and dismissed, with prejudice; and
2. Applicant must remain in custody of Respondent for completion of his sentence.

IT IS SO ORDERED.

March 6, 2014
Hartsville, SC



J. Michael Baxley
Presiding Circuit Court Judge
Sixteenth Judicial Circuit