

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County

In the Court of Common Pleas

James R. Barber, III, Presiding Judge

Case No.: 2013-CP-40-1556


ALVIN S. SAMUELS, II, #351567 APPELLANT,

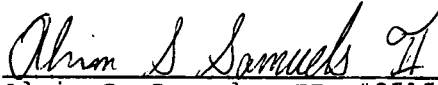
v.

STATE OF SOUTH CAROLINA RESPONDENT.

NOTICE OF APPEAL

Alvin S. Samuels, II, appeals the letter, and/or order of the Honorable James R. Barber, III, dated February 10, 2014, denying post-conviction relief. No written notice of final order was taken. The Court requested that Attorney General prepare an order consistent with her arguments at the hearing.

 3, 2013
April


Alvin S. Samuels, II, #351567
McCI F-4 144-B
386 Redemption Way
McCormick, SC 29899
Phone: None
Fax: None
Email: None

RECEIVED

APR 07 2014

S.C. SUPREME COURT

Other Counsel of Record:

Megan E. Harrigan

Assistant Attorney General S.C. Attorney General's Office

P.O. Box 11549

Columbia, S.C. 29211

Attorney for Respondent

Phone: (803)734-3970

No order or judgment was filed or on file with the Clerk of Court of Richland County, South Carolina.

The court order is attached

*Rule 59(e) was filed according to South Carolina rules
of Court*

RECEIVED

APR 07 2014

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

Alvin S. Samuels, II, #351567,)
)
Appellant,)
)
vs.)
)
The State of South Carolina,)
)
Respondent.)

Case No.: 2013-CP-40-1556

CERTIFICATE OF SERVICE

The Appellant, Alvin Samuels, II, #351567, does hereby certify that a true copy of a NOTICE OF APPEAL and letter from Judge James R. Barber has been delivered upon Richland County Clerk of Court, Jeanette McBride, Assistant Attorney General Megan E. Harrigan and South Carolina Supreme Court Clerk of Court.

Jeanette McBride
Clerk of Court
1701 Main Street
P.O. Box 2766
Columbia, S.C. 29201

Megan E. Harrigan
Assistant Attorney General
P.O. Box 11549
Columbia, S.C. 29211

Daniel E. Shearouse
Supreme Court
Clerk of Court
P.O. Box 11330
Columbia, S.C. 29211

SWORN to and subscribed before me this

23 day of April, 2014

J. Franklin
Notary Public of South Carolina

My Commission Expires 12-16-2019

Alvin S. Samuels
Alvin S. Samuels, II, #351567
McCI F-4 144-B
386 Redemption Way
McCormick, SC 29899

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2013CP4001556

Alvin S #351567 Samuels II

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the ____ day of _____, 20 ____ and a copy mailed first class or placed in the appropriate attorney's box on this 4 March 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Alvin S #351567 Samuels II

Anna Rawl Good

Megan E. Harrigan

Alvin S #351567 Samuels II

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeanette W. McBride

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Alvin Samuels, II, #351567,)

Case No. 2013-CP-40-1556

Applicant,)

v.)

State of South Carolina,)

Respondent.)

ORDER OF DISMISSAL

RICHLAND COUNTY
FILED
2014 MAR -4 AM 8:48
JEANETTE W. ROSENDE
C.C.P. & G.S.

PROCEDURAL HISTORY

This matter comes before the Court by way of an application for post-conviction relief filed March 14, 2013. The Respondent made its Return on June 21, 2013, requesting an evidentiary hearing be held. Evidentiary hearings into the matter were convened October 2, 2013 and January 22, 2014, both at the Richland County Courthouse. Applicant was present at the hearing and was represented by counsel, Anna Good, Esquire. At the beginning of the second hearing, Applicant moved to relieve counsel, Anna Good, and proceed *pro se*. This Court made an inquiry of both counsel and Applicant, and after determining that the decision was made knowingly, voluntarily, and intelligently, this Court relieved counsel and allowed Applicant to proceed *pro se*.¹ The 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 Richland County Clerk of Court. Applicant was indicted during the June 2012 term of the Richland County Grand Jury for: two counts of Armed Robbery (2011-GS-40-01806, -01807), Possession

¹ At this Court's request, counsel Good remained at counsel table for the hearing as "stand by" counsel and to answer any legal questions that Applicant may have during the proceeding.

SCANNED

of a Weapon During the Commission of a Violent Crime (2011-GS-40-01808), Attempted Murder (2011-GS-40-01809), Assault and Battery – First Degree (2012-GS-40-03497), Pointing and Presenting a Firearm (2012-GS-40-03498), and Kidnapping (2012-GS-40-03499). He was represented by James Shadd, III, Esquire. On July 12, 2012, Applicant appeared before the Honorable DeAndrea G. Benjamin, where he pled guilty as indicted. Pursuant to negotiations with the State, Judge Benjamin sentenced Applicant to eighteen years imprisonment for each count of Armed Robbery, five years imprisonment for Possession of a Weapon During the Commission of a Violent Crime, eighteen years imprisonment for Attempted Murder, ten years imprisonment for Assault and Battery – First Degree, ten years imprisonment for Pointing and Presenting a Firearm, and eighteen years imprisonment for Kidnapping; with the sentences to be served concurrently. Applicant did not appeal his conviction and sentence.

In his application for post-conviction relief, Applicant alleged he was being held in custody unlawfully based on claims of:

1. Ineffective assistance of counsel;
 - a. "...trial counsel failed to conduct constitutionally 'reasonable' investigation thereby violating Hill Standard such that Applicant's plea is rendered involuntary."
 - b. "...trial counsel failed to investigate and procure exculpatory evidence regarding the 'Asportation' element of the armed robbery charge violated Hill Standard such that Applicant plea is render involuntary."
 - c. "...trial counsel failed to investigate and procure evidence which demonstrates mitigation to Applicant's convictions and sentences to the trial courts violated Hill Standard such that Applicant's plea is rendered involuntary."
 - d. "...trial counsel failed to object and move to withdrawal of plea on grounds of 'Breach of Plea Agreement' violated Hill Standard, such that Applicant's plea is involuntary, where plea agreement called for no recommendation from the state as to Applicant's sentence but state solicitor recommended the trial court to sentence Applicant to the maximum sentence."
 - e. "...trial counsel failed to object to and to move to quash of dismiss the Armed Robbery charge for insufficient proof of the 'Asportation'

- element of the Armed Robbery charge violated Hill Standard such that Applicant plea is rendered involuntary.”
- f. “...trial counsel’s misrepresentation and gross misadvice in advising Applicant that the ‘Malice’ element of Attempted Murder charge may be implied by a jury because the use of a deadly weapon violated Hills Standard such as that Applicant’s plea is involuntary.”
 - g. “...trial counsel failed to move for a continuance in order to secure the presence of victim Nathaniel Irvin and witness Konassi Ogubi to attend the plea proceedings to testify on Applicant’s behalf to mitigate Applicant’s convictions and sentencing liabilities violates Hills Standard such that Applicant’s plea is rendered involuntary.”
 - h. “...trial counsel misadvised Applicant to the elements of ‘Asportation’ regarding the Armed Robbery indictment violated Hills Standard such that Applicant pleas is rendered involuntary.”
2. Due process violation;
- a. “Applicant was denied the right to due process under the U.S. Constitution and South Carolina Constitution when State solicitor breached the plea agreement by recommending the trial court to sentence Applicant to the maximum term of negotiated plea, while the plea agreement clearly called for ‘No State Recommendation’ from the state.”
 - b. “Applicant was denied the right to due process under the U.S. Constitution and South Carolina Constitution when trial counsel misadvised and lied to Applicant that if the Applicant agreed to plea guilty the counsel promised to secure victim Nathaniel Irvin and witness Kouassi Ogubi attendance for the plea proceeding to testify on Applicant’s behalf to mitigate Applicant’s conviction and sentencing liabilities.”
 - c. “Applicant was denied the right to due process under the U.S. Constitution and South Carolina Constitution by trial counsel coercing and inducing Applicant to plea guilty through gross misadvice and misrepresentation.”
 - d. “Applicant was denied the right to due process under the U.S. Constitution and South Carolina Constitution by the state solicitor procuring Applicant’s plea of guilty through deceptive tactics.”
3. Brady Violation; and
- a. “Applicant was denied the right to Brady Rule (5) under the U.S. Constitution and South Carolina Constitution where applicant was denied constitutional right pursuant Brady v. Maryland, 83 S.Ct. 1194 where state solicitor failed to fully and timely disclose Brady Material to Applicant.”
 - b. “Applicant was denied U.S. Constitutional and South Carolina Constitutional rights pursuant to Brady v. Maryland, when solicitor illegally suppressed favorable material and exculpatory evidence from the Applicant.”

4. Involuntary guilty plea.
 - a. "Applicant's plea of guilty was involuntary, unknowingly and unintelligently under the U.S. Constitution and South Carolina Constitution when prosecution breached plea agreement."

At the evidentiary hearing, Applicant proceeded forward on the following allegations of ineffective assistance of counsel:

1. Failure to explain all elements of the charged offenses to Applicant;
2. Failure to move to quash the indictments based on the State's failure to satisfy the elements necessary for each crime charged;
3. Failure to investigate, including failure to investigate that the State had met each element necessary for the crimes charged;
4. Failure to present mitigation to the plea court, including witness Konassi Ogubi; and
5. Failure to object and/or move to withdraw Applicant's plea when the State made a recommendation for sentence length in violation of the plea agreement.

SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf and presented testimony from Konassi Ogubi, Stanley Samuels, Tyrisha Hopkins, and William Feldon. Respondent presented testimony from plea counsel, James Shadd, III, Esquire (herein "Counsel"). This Court also had before it Applicant's guilty plea transcript, the records of the Richland County Clerk of Court, and Applicant's records from the South Carolina Department of Corrections.

Applicant testified first on his own behalf. He testified that he was originally represented by Luke Shealey, Esquire, from the Richland County Public Defender's Office, but retained

Counsel to represent him in March, 2011. He testified that he met with Counsel four times prior to his guilty plea. He testified that he had numerous bond reduction hearings with Counsel, but that he was never released on bond. He testified that he told Counsel that he wanted a trial, but that Counsel told him he would receive a sentence of ten years if he pled guilty, so he decided to enter a plea. He testified that Counsel never fully reviewed discovery materials with him, but only showed him "loose papers." He testified that he thinks his statement was included in these papers, but he is not sure. He testified that Counsel informed him that if he proceeded to trial, his statement would likely be used against him by the State. He testified that he told Counsel that he should not have been charged with armed robbery, because he did not take any money from anyone. He testified that he asked Counsel to hire an investigator and gave him the names of potential witnesses, but Counsel did not get an investigator or do any independent investigation. He testified that Counsel refused to prepare for trial, telling him that a trial would be "fruitless" because of the State's evidence. He testified that he filed a motion to relieve counsel, but that he withdrew this motion voluntarily.

He testified that Counsel presented him with various plea deals, including one for ten years imprisonment and one for a cap of twenty years imprisonment, which he turned down. He testified that Counsel finally presented him with a plea offer for a cap of twenty-five years imprisonment, which he reluctantly accepted because he did not think he could proceed forward to trial with Counsel's "misrepresentation" and receive a harsher sentence. He testified that Counsel told him on the day of the plea that although the plea agreement was for a cap of twenty-five years imprisonment, Counsel informed him on the day of the plea that he would not receive a sentence of more than ten years. He testified that Counsel told him the State would not

make a recommendation of what sentence he should receive within the range of ten to twenty-five years imprisonment. He testified that during the guilty plea, the State asked for a sentence of twenty-five years in violation of the plea agreement. He testified that Counsel should have objected to this comment and moved to withdraw his guilty plea. He testified that he would not have pled guilty if he knew the State was going to ask for a twenty-five year sentence, but acknowledged that he knew he could possibly receive a twenty-five year sentence when he pled guilty. He acknowledged several times that he knew he was facing a total of one-hundred and forty-five years imprisonment based on the various charges. He also acknowledged that he told the plea court while under oath that he was guilty, agreed with the State's facts, apologized to the victims, and was completely satisfied with Counsel's representation. Applicant testified that he is guilty.

Applicant testified that he discussed an appeal with Counsel before his guilty plea and understood that he only had ten days to request one. He testified that he asked Counsel to file an appeal immediately after his plea while he was sitting in the jury box, as well as by letter sent on the 17th or 19th. He was unable to produce a copy of the letter during the hearing.

Following Applicant's testimony, Konassi Ogubi testified on Applicant's behalf. He testified that he is the owner of the clothing store where the incident took place and also a victim. He testified that Applicant pointed a gun at him during the incident and that he witnessed Applicant pistol whip a female victim more than once. He testified that he was asking Applicant to leave the store because he was afraid he would kill everyone. He testified that he witnessed Applicant shoot through a closed door, seriously injuring another victim. He testified that he gave a statement to law enforcement following the event, as well as identified Applicant by his

photograph. He testified that he has known Applicant for years, as Applicant frequented his store. He testified that he was also contacted by an investigator, to whom he gave a second statement where he indicated that he wanted Applicant to be rehabilitated rather than punished. He testified that he asked for Applicant to be sent to boot camp, but acknowledged that he did not know the mandatory minimum sentence that Applicant could receive was ten years. He testified that he was never contacted by Counsel, but would have spoken to Counsel or come to Applicant's plea proceeding if requested to tell the court that he wanted Applicant to receive rehabilitation.

Following Ogubi's testimony, Applicant's father, Stanley Samuels, testified on his son's behalf. He testified that he was present at his son's guilty plea and discussed the plea terms with Counsel prior to the plea. He testified that he understood the terms of the plea to be for a sentence within the range of ten to twenty-five years, but that the State would make no recommendation as to a particular sentence. He testified that he understood his son could receive a sentence of twenty-five years if he pled guilty. He testified that Counsel was also supposed to have several witnesses present but failed to have any on the day of the plea.

Next, Applicant presented testimony from his girlfriend, Tyrisha Hopkins. Hopkins testified that she hired Counsel to represent Applicant in March, 2010, but did not discuss the case with him until December, 2011 because Counsel was waiting on Applicant's approval for Counsel to discuss the case with her. However, on cross examination, Hopkins admitted that she was confused regarding dates and that she had actually not hired Counsel until March, 2011. She testified that she met with Counsel a "few times" but was unsure of an exact number of meetings. She testified that prior to the plea, Counsel informed her that Applicant could receive a sentence

of between ten to twenty-five years, but that the State would not make a recommendation as to a specific sentence. She testified that she was at the plea and heard Applicant tell the court he was guilty and apologize to the victims. She testified that she also heard the victims state that they were fearful of Applicant and asked for a significant sentence.

Applicant also called William Feldon, his former employer, to testify on his behalf. He testified that he was not contacted by Counsel but would have come to the plea to speak on behalf of Applicant's good character. He testified that he knew that Applicant had experienced violence from other neighborhood gang members and was aware that Applicant carried a weapon. He testified that there is no excuse for what Applicant did but thinks the event was "a lot of misunderstanding." He testified that Applicant is a "good kid" who started going down the wrong path. He testified that he thinks the army or another rehabilitative program would be best for Applicant.

Following Applicant's witnesses, Respondent presented testimony from Counsel. Counsel testified that he has been practicing law for thirteen years and that approximately forty percent of his practice is criminal defense. He testified that he was retained in March, 2011 by Applicant's girlfriend, Tyrisha Hopkins. He testified that he had previously represented Applicant on a Criminal Domestic Violence charge in which Hopkins was the victim, as well as knew Applicant personally. He testified that he filed several bond reduction motions on Applicant's behalf, but was never able to secure a bond that would allow for Applicant's release. He testified that he filed all necessary discovery motions and reviewed the materials thoroughly with Applicant at least three times and gave Applicant a copy of the discovery. He testified that Applicant understood what evidence the State had against him "very well." He testified that he

reviewed the elements for each crime with which Applicant was charged with him, as well as what the State would need to prove at trial. He testified that he believed that the State's evidence satisfied each element necessary for each charge and he saw no reasonable meritorious ground on which to move to quash the indictments. He testified that he reviewed the sentencing ranges with Applicant and explained to him that he was facing a maximum of one-hundred and forty-five years imprisonment for all charges. He testified that Applicant understood these conversations.

Counsel testified that Applicant readily admitted to having a gun, pistol whipping the female victim, taking money, and shooting through the door at another victim. He characterized the State's evidence as "overwhelming," including three victims who would testify at trial, four witnesses, including Mr. Ogubi, and all witnesses knew Applicant well and could readily identify him. He testified that Applicant turned himself in to law enforcement at Counsel's urging after evading law enforcement for a period of time. He testified that Applicant had no viable defense, as he had no alibi, was easily identified by all witnesses, and readily admitted his guilt. He testified that Applicant told him that he was highly intoxicated during the incident, but Counsel explained to him that voluntary intoxication is never a viable defense. He testified that he was aware of Mr. Ogubi's desire for Applicant to receive rehabilitation, as he had been provided with a copy of his statement. He testified that he informed the plea court of this during Applicant's guilty plea. He testified that Applicant did not provide him with any additional witnesses. He testified that when he took over representation, the Public Defender's office had already used a private investigator. He testified that he fully reviewed the investigator's notes and report, and that Applicant's father was also working on tracking down and talking to witnesses. Counsel

testified that based on these two things, he did not see any benefit from hiring another private investigator.

He testified that Applicant wanted him to secure a favorable plea deal from the very beginning. Counsel testified that Applicant told him he wanted a sentence of less than ten years, and that he explained to Applicant that this was not possible, as the mandatory minimum sentence for armed robbery is ten years imprisonment. He testified that he tried to get the State to allow Applicant to plead to strong armed robbery rather than armed robbery to reduce the mandatory minimum sentence below ten years, but the State refused. He testified that the best offer he received was for a cap of twenty-five years, which he immediately conveyed to Applicant and his family. He testified that he informed Applicant and his family that the plea would mean Applicant could receive a sentence between ten to twenty-five years and that he never promised Applicant or his family that Applicant would receive a specific sentence. He testified that he also explained to Applicant that this did not mean that the State could not ask for him to receive the full twenty-five year sentence, and advised Applicant that he very well may receive the full sentence. He testified that he informed Applicant of the consequences of his guilty plea and that it was Applicant's decision to plead guilty. He testified that he prepared and presented mitigation at Applicant's guilty plea, which included several character witnesses. He testified that he advised Applicant of his right to appeal his guilty plea, as did the plea court. He testified that Applicant never requested he file an appeal.

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, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; 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, 104 S.Ct. 2052, 2064 (1984); Butler, 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, 286 S.C. 441, 334 S.E.2d 813 (1985). 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, 106 S.Ct. 366 (1985).

After careful review based on the standard discussed above, the Applicant has failed to carry his burden in this action. Specifically, this Court finds that Counsel's testimony is very credible while Applicant's testimony, along with the testimony of Applicant's witnesses, is lacking credibility. Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel.

Counsel's alleged failure to explain all elements of the charged offenses to Applicant

Applicant asserts that Counsel was ineffective for failing to explain all elements of the offenses charged to him. This Court finds that this allegation is without merit. Counsel's credible testimony reveals that he thoroughly reviewed all the elements of the various offenses with Applicant, along with what the State would be required to prove at trial. Counsel testified that Applicant understood all of these conversations. This Court finds that the Applicant has not shown that Counsel's performance fell below "professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Furthermore, the Applicant has failed to establish any resulting prejudice from the alleged deficiency of counsel. Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

Counsel's alleged Failure to move to quash the indictments based on the State's failure to satisfy the elements necessary for each crime charged

Applicant asserts that Counsel was ineffective for failing to move to quash the indictments against him for the State's failure to satisfy all required elements for each offense.

However, this Court finds that this allegation is without merit and must be denied. Counsel testified that the discovery provided to him, along with Applicant's own testimony, revealed that the State had satisfied the elements for all offenses charged. Counsel testified that he explained this to Applicant, as well as told Applicant that there was no meritorious grounds on which he could move to quash the indictments. This Court agrees with Counsel and finds that the State was able to meet each element for the variety of offenses with which Applicant was charged. Therefore, this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to investigate, including failure to investigate that the State had met each element necessary for the crimes charged

Applicant asserts that Counsel was ineffective for failing to investigate his case. However, Counsel's credible testimony was that by the time he was retained, the Public Defender's office had already employed an investigator and that he was privy to the investigator's notes and reports. Additionally, he testified that Applicant's father was actively tracking down potential witnesses and gathering statements. Furthermore, Counsel testified that Applicant readily admitted to his guilt. Counsel testified that he did not believe there was any benefit to be derived from hiring another investigator. This Court agrees and finds that Counsel's investigation and performance was reasonable given the facts of the case. Additionally, this Court finds that Applicant has failed to meet his burden of establishing any resulting prejudice, as he failed to present any favorable evidence which could have been garnered from additional investigation. Therefore, this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to present mitigation to the plea court

Applicant asserts that Counsel was ineffective for failing to present sufficient mitigation to the plea court. However, Counsel's credible testimony and the record from the guilty plea proceeding show that Counsel presented several character witnesses in mitigation at Applicant's plea proceeding. Additionally, Counsel testified and the record shows that Counsel informed the plea court that Mr. Ogubi wanted Applicant to receive a minimal and rehabilitative sentence. See Tr. pp. 29-30. This Court finds that Counsel's performance was reasonable based upon professional norms and that Counsel was not deficient. Therefore, this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to object and/or move to withdraw Applicant's plea when the State made a recommendation for sentence length in violation of the plea agreement

Applicant asserts that Counsel was ineffective for failing to object to the State's recommendation that Applicant receive a twenty-five year sentence and for failing to move to withdraw Applicant's guilty plea based on the State's comment as a violation of his plea agreement. However, Counsel testified that he fully explained to Applicant and his family that Applicant could receive any sentence between ten to twenty-five years and that the State could still ask the plea court to sentence Applicant to twenty-five years. Counsel testified that he did not find this comment by the State to be in violation of Applicant's plea agreement, so he did not think there was a basis to object or move to withdraw his client's plea. This Court agrees and finds that Counsel's performance was reasonable. Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

CONCLUSION


Based on all the foregoing, this Court finds and concludes that 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 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), SCRCR, 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 the Application for Post-Conviction Relief shall be denied and dismissed with prejudice; and
2. The Applicant shall be remanded to and remain in the custody of the Respondent.

AND IT IS SO ORDERED this 3RD day of MARCH, 2014.



JAMES R. BARBER, III
Presiding Judge
Fifth Judicial Circuit

Blenahie, South Carolina.

Alvin S. Samuels 351567
MCI FH Rm 144B
386 Redemption Way
McCormick, S.C. 29899



Daniel E. Shearouse
Supreme Court of South Carolina
Clerk of Court
P.O. Box 11330
Columbia, SC 29211

