

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Case No. 2009-CP-40-08162

RECEIVED

APR 11 2014

S.C. Supreme Court

Nickole Cunningham, #258018,Petitioner,

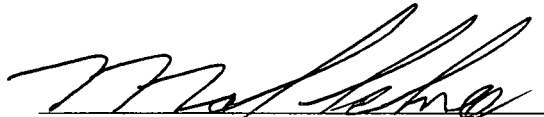
v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Nickole Cunningham appeals the Order of Dismissal to his Application for Post-Conviction Relief. The Application for Post-Conviction Relief by the Petitioner was filed on November 17, 2009. The Order of Dismissal was imposed by the Honorable Clifton B. Newman on March 11, 2014. Counsel for the Petitioner received notice of the Order of Dismissal on March 12, 2014.

April 11, 2014



Mark Schnee
The Schnee Law Firm
1720 Main Street, Suite 202
Columbia, South Carolina 29201
(803) 771-0075
Attorney for Petitioner

Other Counsel of Record:

Assistant Attorney General Megan E. Harrigan
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

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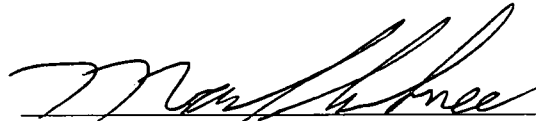
v.

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PROOF OF SERVICE

I hereby certify that a true copy of the Notice of Intent to Appeal in the above-referenced case has been served upon opposing counsel by delivering same this date to her office at the Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina, 29211.

April 11, 2014



Mark Schnee
The Schnee Law Firm
1720 Main Street, Suite 202
Columbia, South Carolina 29201
(803) 771-0075
Attorney for Petitioner

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Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

Nickole Cunningham, #258018,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Case No. 2009-CP-40-8162

ORDER OF DISMISSAL

2014 MAR 11 PM 1:39
CANCELED
C.C.P. & G.S.

PROCEDURAL HISTORY

This matter comes before the Court by way of an application for post-conviction relief filed November 17, 2009. Respondent made its Return on May 19, 2010, requesting an evidentiary hearing be held. An evidentiary hearing was convened February 13, 2012, at the Richland County Courthouse. Applicant was present at the hearing and was represented by Mark E. Schnee, Esquire. Respondent was represented by Assistant Attorney General Robert D. Corney 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 2008 term of the Richland County Grand Jury for Murder and two counts of Assault and Battery with Intent to Kill (2008-GS-40-0741,-0742,-0743). Kris Hines, Esquire, of the Richland County Public Defender's Office represented Applicant. On April 24, 2009, Applicant appeared before the Honorable L. Casey Manning, where he pled guilty pursuant to North Carolina v. Alford¹ to both counts of

¹ 400 U.S. 25 (1970).

Assault and Battery with Intent to Kill as indicted, as well as the lesser included offense of Voluntary Manslaughter. Judge Manning deferred sentencing at that time.

Shortly thereafter, Applicant filed a Motion to Withdraw his guilty plea with retained counsel James Ervin. In response to this Motion, Counsel Hines filed a Motion to be Relieved as Counsel. A hearing on Counsel Hines' Motion to Be Relieved was heard on May 18, 2009, at which time Judge Manning relieved Hines as the counsel of record and formally made Counsel Ervin counsel of record for Applicant.

On September 1, 2009, Applicant, alongside Counsel Ervin, appeared before Judge Manning for a hearing on his motion to relieve counsel and sentencing. At that time, Judge Manning denied Applicant's Motion to Withdraw his guilty plea and sentenced Applicant to twenty-three years for voluntary manslaughter and twenty years for each count of Assault and Battery with Intent to Kill, with all sentences to be served concurrently. Applicant elected not to file a notice of appeal.

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on a general allegation of ineffective assistance of counsel without any supporting facts or additional detail. At the evidentiary hearing, Applicant stated that he was proceeding forward on an allegation that counsel was ineffective for failing to present mitigation evidence regarding his medical condition to the plea court during his sentencing hearing.

TESTIMONY PRESENTED

At the evidentiary hearing, Applicant presented testimony from Kris Hines, Esquire (hereafter "Hines"). Respondent presented testimony from counsel James Ervin, Esquire

(hereafter "Ervin"). This Court also had before it a copy of the Applicant's plea and sentencing transcripts, the records of the Richland County Clerk of Court, and Applicant's records from the South Carolina Department of Corrections.

During the evidentiary hearing, Hines testified that she took over representation of Applicant on September 1, 2008 from another attorney in the Public Defender's Office. She testified that since she was assigned the case from another attorney in her office, she instantly received the entire file, including all discovery and investigative materials. She testified that an investigator was already working on the case and continued to do so. Hines testified that in addition to using an investigator, she also visited the scene. Additionally, she testified that she hired crime scene investigator Don Gurnt and gunshot residue analyst Jeff Holeyfield to assist in trial preparation and that both would be able to present favorable testimony and evidence for Applicant at trial. Counsel testified that as the trial date neared, she had prepared potential questions for all witnesses anticipated to be called at trial and had organized all witnesses' information and these potential questions into individual folders. She testified that she asked fellow Richland County Public Defender James D. Cooper, III, to act as second chair for trial, which is the standard practice of the Richland County Public Defender's Office when a case proceeds to trial.

She testified that she met with assigned trial judge, Judge Manning, numerous times along with the prosecuting assistant solicitor, which is Judge Manning's common practice before trial. She testified that at one of the initial meetings, Judge Manning suggested that the State make an offer to the lesser included offense of voluntary manslaughter. She testified that the

State had not previously extended an offer of any less than murder. She testified that following this meeting, the State extended an offer of voluntary manslaughter to Applicant without any negotiations or recommendations as to a numerical sentence. She testified that she presented this offer to Applicant, who wanted to meet with family members before deciding whether to accept the offer. She testified that she again met with Judge Manning and the prosecuting assistant solicitor and asked that Applicant be able to meet with his family. She testified that Judge Manning made arrangements to allow Applicant to meet with his mother and grandmother, and after this meeting, Applicant told her he wanted to accept the State's plea offer.

Hines testified that she again met with Judge Manning and the prosecuting assistant solicitor to discuss the case, including that Applicant suffered from sickle cell anemia, which greatly reduced his life expectancy. She testified that Judge Manning indicated that he had previous experience with defendants afflicted with the same condition, that he understood that the conditions of incarceration are especially harsh for someone with sickle cell anemia, and that he would take this into account in his sentencing. She testified that Judge Manning and opposing counsel both agreed to defer sentencing to allow Hines to prepare mitigation regarding Applicant's health.

Hines testified that Applicant pled guilty on April 24, 2009 and that Judge Manning was very thorough in his questioning of the Applicant. She testified that pursuant to her earlier discussions with the court, Judge Manning deferred sentencing to allow her to gather additional mitigation, including more information about Applicant's health concerns. She testified that shortly thereafter, Applicant filed a Motion to Withdraw his guilty plea through retained counsel,

James Ervin. She testified that she moved to be relieved at this time due to a possible conflict of interest. She testified that Judge Manning heard and granted her motion to be relieved on May 18, 2009, and at that time, Ervin became Applicant's counsel of record.

Following Hines' testimony, Respondent presented testimony from Ervin. Ervin testified that he was retained to handle Applicant's Motion to Withdraw his guilty plea, and that if the motion was successful, to represent Applicant at trial. He testified that alternatively, he was retained to represent Applicant at his sentencing hearing if the motion was denied. He testified that Applicant pled guilty pursuant to Alford, which would make it more difficult to have his Motion to Withdraw granted as Applicant had already acknowledged during his guilty plea that the State had enough evidence to convict him at trial. He testified that Applicant's Motion to Withdraw his guilty plea was heard on September 1, 2009, and Judge Manning immediately proceeded to sentencing after denying Applicant's motion. He testified that he did not have any opportunity to present mitigation on Applicant's behalf due to the speed at which Judge Manning moved into sentencing. He acknowledged that he did not have any medical professionals present at the sentencing hearing, but he was prepared to present mitigation regarding Applicant's sickle cell anemia. He testified that following the plea, he informed Applicant and his family that they could pursue post-trial motions, such as a motion to reconsider, or file an appeal, but that none were requested.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to

observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

"A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011), citing Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009).

After careful review based on the standard discussed above, this Court finds that Applicant has failed to carry his burden in this action. Specifically, this Court finds that the testimony of counsels Hines and Ervin are credible and that the record shows that neither counsels were deficient in regards to their representation of Applicant.

At the post-conviction hearing, Applicant alleged and proceeded forward with the allegation that he received ineffective assistance of counsel² due to a failure to present mitigation regarding his medical condition. Hines testified that she was diligently working on preparing such mitigation when Applicant sought other counsel and moved to withdraw his guilty plea. She testified that due to a potential conflict of interest, she moved to be relieved, which was granted and at that time Ervin became counsel of record for Applicant. Ervin testified that he

² Applicant never clearly asserted which counsel (Hines or Ervin) that this allegation was made against; regardless, this Court finds that neither counsels performed deficiently and this allegation must be denied and dismissed as to each Hines and Ervin.

was prepared to present such mitigation at Applicant's sentencing, but the plea court abruptly moved from the denial of Applicant's Motion to Withdraw his guilty plea into sentencing with such speed that he was unable to interject. The Court finds that Applicant has failed to establish any deficiency of either counsel in regards to this allegation. Therefore, this allegation must be denied and dismissed with prejudice.

Additionally, this Court finds that Applicant is unable to show any resulting prejudice from this alleged deficiency of counsel. During Applicant's guilty plea proceeding on April 24, 2009, Judge Manning indicated he would like additional time to think about the information presented and possibly request additional information, such as a possible presentence investigation (Tr. p. 51 lines 16-24; p. 55 line 19 – p. 57 line 4). Additionally, Judge Manning was aware of Applicant's health concerns at the time of his guilty plea proceeding, as Hines stated during this proceeding that Applicant suffered from sickle cell anemia. (Tr. p. 51 lines 5-15). This comports with Hines' testimony that she discussed Applicant's health condition with the plea court in chambers and that Judge Manning indicated he had previous experiences with defendants suffering from sickle cell anemia. Additionally, the record from the September 1, 2009 sentencing hearing shows that plea court's intention in deferring sentencing was to allow for additional reflection on all aspects presented at the guilty plea proceeding, not merely to allow Applicant's plea counsel to present additional information on his medical condition as Applicant asserts:

MR. IRVIN: On top of that, even though the deferred sentencing was based on his illness, he has sickle cell anemia, and, Your Honor, I think this case ---

THE COURT: No, it wasn't based on his illness, it was based on a conversation I had with all parties involved. I said, I would accept the plea and wait for sentencing.

MR. IRVIN: My apologies, Your Honor, I thought that but here we are today.

(Tr. 9, lines 15-24). Based on the foregoing, this Court finds that Applicant has failed to establish any resulting prejudice from counsels' alleged deficiency.

As this Court finds that Applicant has failed to meet his burden of establishing deficiency of counsel, as well as any resulting prejudice from this alleged deficiency, this application must be denied and dismissed with prejudice.

CONCLUSION

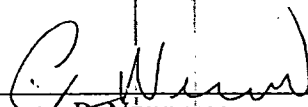
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), 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 this application for post-conviction relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to and remain in the custody of the State

AND IT IS SO ORDERED this 17th day of March, 2014.



CLIFTON B. NEWMAN
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina