

R. MILLS ARIAIL, JR.
ATTORNEY AT LAW

11 NORTH IRVINE STREET, SUITE 11 • GREENVILLE, SC 29601
PHONE 864.232.9390 • FAX 864.232.9392 • E-MAIL MILLS@RMALAWOFFICE.COM

April 15, 2014

RECEIVED

APR 21 2014

Via US Mail

Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

S.C. Supreme Court

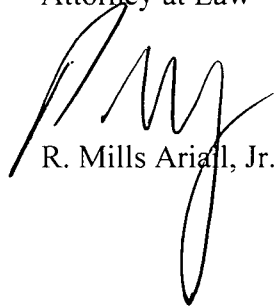
***Re: Notice of Intent to Appeal from Favian Hayes v. The State of South Carolina
C.A. No.: 2012-CP-23-5862***

Dear Mr. Shearouse:

I was Court Appointed in the above referenced matter, and I expect that appellate defense will handle the appeal and petition for certiorari. On behalf of my client, enclosed for filing please find the Notice of Appeal and proof of service. I've enclosed a copy of the Honorable G. Edward Welmaker's Order of Dismissal to be challenged on appeal.

Thank you for your assistance in this matter and if you have any questions, please feel free to contact me.

Sincerely,
LAW OFFICE OF R. MILLS ARIAIL, JR.
Attorney at Law


R. Mills Ariail, Jr.

RMAjr/dcd
Enclosures (as stated)

cc: Greenville County Clerk's Office
Greenville County Courthouse
305 East North Street
Greenville, SC 29601

Karen C. Ratigan
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211-11549

Favian Alphonzo Hayes SCDC# 293544
Lee Correctional Institution
990 Wisacky Highway
Bishopville, SC 29010

SC Commission of Indigent Defense
Division of Appellate Defense
1122 Lady Street
Columbia, SC 29201-3218

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

G. Edward Welmaker, Circuit Court Judge
Case No. 2012-CP-23-5862

RECEIVED

APR 21 2014

S.C. Supreme Court

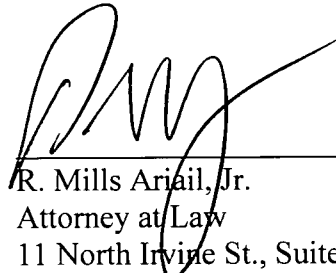
Favian Hayes, Appellant,
SCDC # 293544

v.

State of South Carolina Respondent.

NOTICE OF APPEAL

Appellant appeals the Honorable G. Edward Welmaker's Order of Dismissal dismissing Appellant's application for post-conviction relief. On April 3, 2014, the Honorable G. Edward Welmaker signed an order dismissing Appellant's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on April 14, 2014. A copy of the Honorable G. Edward Welmaker's Order of Dismissal is attached.



R. Mills Ariail, Jr.
Attorney at Law
11 North Irvine St., Suite 11
Greenville, SC 29601
Telephone (864) 232-9390
Facsimile (864) 232-9392
Attorney for Appellant

Greenville, South Carolina
April 15, 2014

Other Counsel of Record and Interested Parties:

Karen C. Ratigan, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211
803-734-3970
Attorney for the State of South Carolina

Greenville County Clerk's Office
Greenville County Courthouse
305 East North Street
Greenville, SC 29601

SC Commission of Indigent Defense
Division of Appellate Defense
1122 Lady Street
Columbia, SC 29201-3218

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

RECEIVED

APR 21 2014

G. Edward Welmaker, Circuit Court Judge

S.C. Supreme Court

Case No.2012-CP-23-5862

Favian Hayes,..... Appellant,
SCDC # 293544

v.

State of South Carolina Respondent.

CERTIFICATE OF SERVICE

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this April 15, 2014, I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

Karen C. Ratigan, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211
Attorney for the State of South Carolina

Greenville County Clerk's Office
Greenville County Courthouse
305 East North Street
Greenville, SC 29601

SC Commission of Indigent Defense
Division of Appellate Defense
1122 Lady Street
Columbia, SC 29201-3218

Denise Tanner LaBeck

Denise Tanner LaBeck
Paralegal to R. Mills Ariail, Jr.
LAW OFFICE OF R. MILLS ARIAIL, JR.

April 15, 2014
Greenville, SC

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

JUDGMENT IN A CIVIL CASE
CASE NO: 2012CP2305862

FILED-CLERK OF COURT
GREENVILLE COUNTY, S.C.
PAUL B. WICKENSIMER
2014 APR - 9 PM 3: 01A

Favian Hayes vs. South Carolina State Of

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), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; 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; Statement of Judgment by the Court;

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE - G Edward Welmaker

This judgment was entered on the . and a copy mailed first class this . to attorneys of record or to parties (when appearing pro se) as follows:

R. Mills Ariail Jr, 11 North Irvine St., Ste., 11
Greenville, SC 29601

ATTORNEY(S) FOR THE PLAINTIFF(S)

Karen Christine Ratigan PO Box 11549 Columbia,
SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Favian Alphonzo Hayes,)
 S.C.D.C. No. 293544,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2012-CP-23-5862

ORDER OF DISMISSAL

FILED-CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL B. WICKENHUISER
 2014 APR -9 P 3:04

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed September 13, 2012. The Respondent made its return on March 28, 2013. An evidentiary hearing into the matter was convened on February 18, 2014 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by R. Mills Ariail, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's plea counsel, Christopher T. Posey, Esquire. The Court had before it the transcript of the guilty plea hearing, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, and the return.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Greenville County Grand Jury indicted the Applicant at the April 2011 term for threatening the life of a public employee (2010-GS-23-9938) and threatening death, damage, or destruction by explosive (2010-

1 

GS-23-9986). He was represented by Christopher T. Posey, Esquire.

On May 16, 2012, the Applicant pled guilty. The Honorable Robin B. Stilwell sentenced the Applicant to concurrent terms of five years for threatening the life of a public employee and ten years for threatening death, damage, or destruction by explosive.¹ The Applicant did not file an appeal.

ALLEGATIONS

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

1. Ineffective assistance of counsel:
 - a. "Counsel only spoke w/ Applicant about his case (1) time, on day of sentence."
2. Involuntary guilty plea:
 - a. "Applicant was told if he was to plea he would receive an 5 yr. sentence."

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 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/Involuntary Guilty Plea

The Applicant alleges his guilty plea was involuntary and that he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his

¹ The Applicant was already serving a twenty-five year sentence for armed robbery (2008-GS-43-0646). This sentence was imposed in Sumter County on June 1, 2009.

2


allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). 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, 106 S. Ct. 366, 370 (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, 89 S. Ct. 1709, 1712 (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)).

The Applicant stated plea counsel was the second attorney on his case. The Applicant stated that his first attorney had him evaluated. The Applicant stated his first attorney conveyed a five-year plea offer but that he did not know what happened to that offer. The Applicant stated he had one telephone conversation and one meeting with plea counsel before he pled guilty. The Applicant stated they discussed the following: the five-year plea offer; that the Applicant

asserted corrections officers would testify on his behalf, and that handwriting on the threatening letter was not his. The Applicant stated plea counsel told him the five-year offer was not available and that he could plead guilty without a recommendation. The Applicant stated he decided to plead guilty because plea counsel said he had no defense and would receive the maximum sentence if he went to trial. The Applicant stated that, while he wanted a trial, he did not express this to the trial judge because plea counsel led him to believe he would receive the maximum sentence at trial.

Plea counsel testified he was appointed approximately 10-14 days before the plea hearing and that the case was already on the trial docket. Plea counsel confirmed the Applicant had been evaluated while being represented by his first attorney and that he was clearheaded on the day of the plea hearing. Plea counsel confirmed he had one telephone and one in-person meeting with the Applicant before he pled guilty. Plea counsel testified they reviewed the discovery materials, the elements of the charges, and the sentence ranges. Plea counsel testified there were no defenses in this case and the State had overwhelming evidence of guilt. Plea counsel testified the Applicant's chief concern was that he did not want the case to go forward until his Sumter County PCR had been ruled upon. Plea counsel testified he called the Applicant's PCR attorney in Sumter, who told him the case had been denied. Plea counsel testified he relayed this to the Applicant, who was willing to proceed. Plea counsel testified he was aware of the prior five-year plea offer, but that he told the Applicant it was no longer available and that he would be pleading guilty without a recommendation. Plea counsel testified the Applicant told him the corrections officers could testify as character witnesses. Plea counsel testified he did not recall an issue regarding the handwriting on the letter.

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 the Applicant's testimony is not credible, while also finding plea counsel's testimony is credible. This Court further finds plea counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

The Applicant admitted to the plea judge that he was guilty. (Plea transcript, p.6). The Applicant also told the plea judge that he understood the trial rights he was waiving in pleading guilty, was satisfied with counsel, and had not been coerced in any way. (Plea transcript, pp.4-6; p.8). This Court finds there is no evidence in the guilty plea transcript to support the Applicant's assertion that he was misadvised about entering a guilty plea; therefore the transcript has refuted this allegation. See Stalk v. State, 375 S.C. 289, 300, 652 S.E.2d 402, 407 (Ct. App. 2007); see also Rayford v. State, 314 S.C. 46, 48-49, 443 S.E.2d 805, 806 (1994) (where transcript of guilty plea proceeding refuted applicant's claim that he did not understand the terms of a plea bargain, grant of PCR was inappropriate notwithstanding applicant's claim lawyer misadvised him). This Court finds the Applicant entered a knowing and voluntary guilty plea. See Boykin v. Alabama, 395 U.S. at 243-44, 89 S. Ct. at 1712.

This Court finds the Applicant failed to meet his burden of proving plea counsel did not properly review his case prior to the plea hearing. Plea counsel testified he and the Applicant discussed the discovery materials and the elements and sentencing ranges for the offenses. Plea counsel testified he was aware of the prior five-year plea offer but that he informed the Applicant this offer was no longer available and that he would be pleading guilty without any sentence recommendation from the State. This Court finds plea counsel's testimony is credible. This Court finds plea counsel adequately discussed and reviewed the Applicant's case with him before the guilty plea hearing. This Court finds plea counsel was not deficient in informing the

Applicant that he could receive a twenty-year sentence if he was unsuccessful at trial because this was an accurate statement.² See Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (finding that, before a defendant can enter a guilty plea, he “must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived”). In any event, this Court finds the Applicant cannot prove he was prejudiced as a result of plea counsel’s preparation of his case because: (1) there was overwhelming evidence of his guilt and (2) the Applicant admitted making the threats at the plea hearing. (Plea transcript, pp.8-10; pp.10-11).

This Court finds the Applicant failed to meet his burden of proving plea counsel should have investigated his case. The Applicant testified plea counsel failed to speak to corrections officers who would testify on his behalf and also failed to look into the handwriting issue. Plea counsel testified the officers would have been character witnesses and would not have exonerated the Applicant. Plea counsel testified he did not recall discussing the handwriting issue. This Court finds plea counsel’s testimony is more credible. This Court cannot speculate as to what the corrections officers would have testified to because they did not testify at the PCR hearing. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme Court “has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness’ failure to testify at trial.”) (emphasis in original). This Court also cannot speculate as to whether investigating the handwriting on the threatening letter would have made a difference because neither the letter nor

² Regardless, this Court notes plea counsel asked the plea judge to impose a five-year sentence. (Plea transcript, p.13).

6 

a handwriting expert were presented at the PCR hearing. See Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (finding the failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result).

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that plea 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 plea counsel’s performance.

This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. This Court also concludes the Applicant has failed to meet his burden of proving his guilty plea was not knowing and voluntary. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

CONCLUSION

Based on all the foregoing, this Court finds and concludes 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 and the Applicant was not

A handwritten signature in black ink, appearing to be "A. M. J.", located at the bottom center of the page.

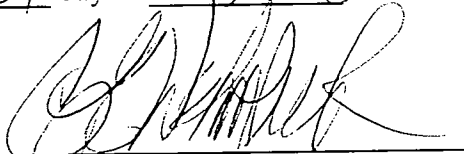
prejudiced by counsel's representation. Furthermore, the Applicant's guilty plea was entered knowingly and voluntarily within the mandates of Boykin. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants 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 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 31 day of March, 2014.

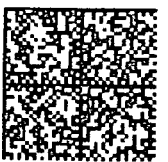


G. Edward Welmaker
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina.

Law Office of R. Mills Anhall, Jr.
11 N. Irvine Street, Suite 11
Greenville, SC 29601

Daniel E. Shaurouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia SC 29211



UNITED STATES POSTAGE
02 1P
0000563972 APR 15 2014
MAILED FROM ZIP CODE 29601
PITNEY BOWES
\$003.500