

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No: 2012-CP-10-2100

Ethan Mack.....Appellant
S.C.D.C. 343243
v.
The State.....Respondent

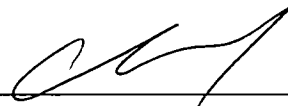
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MAY 16 2014

S.C. SUPREME COURT

NOTICE OF APPEAL

Ethan Mack, appeals his Denial for Post Conviction Relief in this case. The order of Dismissal was imposed and signed by the Honorable R. Markley Dennis, Jr., May 6, 2014, which I, Charles T. Brooks, III, received on May 15, 2014.



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PROOF OF SERVICE

I, the undersigned, do hereby certify that on this 15th day of May, 2014, I served the foregoing **Notice of Appeal, Order of Dismissal**, as well as **Proof of Service** in this matter by depositing a true copy of it in the United States Mail, postage prepaid, on May 15, 2014, addressed to the following as indicated below:


South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

South Carolina Office of Appellate Defense
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29211-1589

Office of Attorney's General
Attn: Karen C. Ratigan, Esquire
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Mr. Ethan Mack, 343243
Perry Correctional Institution
430 Oaklawn Road
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Dated: May 15, 2014


Charles T. Brooks, III
Attorney for the Appellant
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STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
Ethan Carlos Mack,)
S.C.D.C. No. 343243,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
C.A. No. 2012-CP-10-2100

ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed March 27, 2012. The Respondent made its return on January 7, 2013 and its amended return on June 7, 2013. An evidentiary hearing into the matter was convened on April 17, 2014 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Charles T. Brooks, III, 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, David Aylor, Esquire. The Court had before it the transcript of the plea hearing, the Charleston County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, the return, the amended return, and Respondent's Exhibit 1.

PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Charleston County Clerk of Court's orders of commitment. The Charleston County Grand Jury indicted the Applicant at the February 2010 term of General Sessions for

murder (2010-GS-10-1823). David Aylor, Esquire represented the Applicant.

On April 1, 2011, the Applicant pled guilty to a negotiated sentence for voluntary manslaughter, pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160 (1970). The Honorable Deadra L. Jefferson accepted the negotiated sentence and sentenced the Applicant to twenty-five years imprisonment, concurrent to the fifteen-year sentence he was already serving. The Applicant did not appeal.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:¹

1. Ineffective assistance of counsel:
 - a. Failed to file an appeal as instructed.
 - b. “[H]elped the solicitor violate my Brady Motion.”
 - c. Failed to ensure the “(3) main Constitutional rights were waived.”
 - d. Failed to challenge the chain of custody.
 - e. Failed to challenge the co-defendant’s statements.
 - f. Failed to object to “the fraudulent indictments.”
 - g. Failed to challenge “the prosecution misconduct.”
 - h. Failed to review discovery with the Applicant.
 - i. Failed to move to “properly quash the indictments in accordance with S.C. Code Ann. § 17-19-90.”
 - j. Failed to “fully apprise” of the sentencing consequences of the guilty plea.
2. “Applicant was a victim of malicious prosecution by the solicitor’s office by violating his right to due process.”
3. “[C]onviction was obtained pursuant to a deliberate perversion of the plea bargain process.”
4. “[D]id not receive a full, fair or constitutionally adequate hearing in state court.”

¹ The Applicant’s attorney filed a pro se “Brief in Support of and Amendment to Application for Post-Conviction-Relief” on June 17, 2013. As hybrid representation is prohibited, this Court will not consider this document. See Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002) (counsel cannot serve as a mere conduit for pro se documents in an effort to avoid the prohibition against hybrid representation and the displeasure of his client).

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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

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

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).

The Applicant stated he had several meetings with plea counsel but never reviewed the evidence in his case. The Applicant stated he pled guilty because plea counsel told him the State would bring additional charges against him. The Applicant stated he first learned of these

additional charges when he wrote the clerk of court after he pled guilty. The Applicant stated he wanted a trial on this charge and had refused prior plea offers for a fifteen- and seventeen-year sentences. The Applicant stated that, even though he entered into a proffer agreement² with the State, he still intended to go to trial. The Applicant stated that, while plea counsel explained the nature of a negotiated sentence, he did not explain the meaning of an Alford plea.

Plea counsel testified he filed discovery motions and received full discovery from the State. Plea counsel testified he independently reviewed the discovery materials and then reviewed that evidence and the facts with the Applicant. Plea counsel testified they also discussed the Applicant's version of events. Plea counsel testified there was consistent communication with the State regarding plea negotiations and that the State was very accommodating throughout this case. Plea counsel testified that, after the jury was hung when the murder case was brought to trial, the Applicant never told him to refrain from plea negotiations. Plea counsel confirmed there were other charges that could have been brought against the Applicant. Plea counsel testified they entered into a proffer agreement with the State (in which the Applicant gave an explanation of the factual situation in this case) and that he explained the nature of this agreement to the Applicant. After the proffer agreement, plea counsel testified the State made a plea offer for the Applicant to enter an Alford plea in exchange for a twenty-five year negotiated sentence, and that he reviewed this with the Applicant. Plea counsel testified the Alford plea was very important to the Applicant. Plea counsel testified the Applicant never told him after the proffer agreement that he wanted to go to trial. Plea counsel testified the Applicant was not pressured by any party to enter his Alford plea and that he did not waver during the plea hearing.

² Respondent's Exhibit 1.

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This Court finds plea counsel's testimony is credible. In contrast, this Court finds the Applicant's testimony is self-serving and not credible. For example, while the Applicant stated he never reviewed the State's evidence in this case, this indictment had been brought to trial (which resulted in a hung jury) approximately six months before he entered his Alford plea. In another example, while the Applicant stated he was not aware of additional charges until after he pled guilty, the Solicitor stated at the plea hearing that she was dismissing indictments for unlawful carrying of a firearm, conspiracy, and accessory after the fact of murder. (Plea transcript, p.3).

This Court finds the Applicant failed to meet his burden of proving plea counsel was ineffective. This Court finds plea counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation. Plea counsel reviewed the evidence, facts, and circumstances of this case with the Applicant. Plea counsel reviewed the Applicant's version of the facts. The Applicant was certainly aware of the additional pending charges against him both because of his discussions with plea counsel and because of the State's mention of such during the plea hearing. (Plea transcript, p.3). This Court finds plea counsel did a magnificent job of representing the Applicant. This Court finds the Applicant received a tremendous benefit as the result of plea counsel's negotiations with the State and that the result of this proceedings was clearly what the Applicant wanted.

This Court finds the Applicant failed to meet his burden of proving plea counsel pressured him to plead guilty. In fact, the plea transcript refutes this allegation because he told the plea judge that he was satisfied with counsel and had not been coerced in any way. (Plea transcript, pp.15-16). 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

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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). Further, this Court does not find credible the Applicant's contention that he wanted to go to trial in this case. Plea counsel testified the Applicant did not tell him after the execution of the proffer agreement that he wanted a jury trial. Plea counsel testified the Applicant did not waver during the plea hearing. This Court finds this testimony is credible and notes the plea transcript is devoid of any equivocation by the Applicant during the plea hearing. See id.

This Court finds the Applicant failed to meet his burden of proving plea counsel did not explain an Alford plea to him. Plea counsel testified they discussed this matter and that the Applicant wanted an Alford plea. This Court finds this testimony is credible. Regardless, even assuming arguendo that plea counsel did not explain the purpose of an Alford plea, any such omission was cured when the Applicant informed the plea judge that he agreed the State could produce sufficient evidence to prove his guilt beyond a reasonable doubt at trial. (Plea transcript, p.12). See Holden v. State, 393 S.C. 565, 575, 713 S.E.2d 611, 616 (2011).

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. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

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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

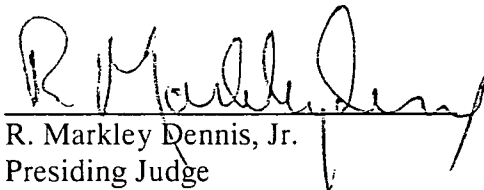
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his plea and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this 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 6th day of May, 2014.


R. Markley Dennis, Jr.
Presiding Judge
Ninth Judicial Circuit

Moncks Corner, South Carolina.

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The Brooks Law Office, LLC

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CR

May 15, 2014

South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

RE: RE: Ethan Mack, 343243 vs. State of South Carolina
2012-CP-10-2100

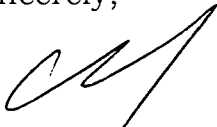
Dear Sir or Madam:

Enclosed herewith you will find the **Notice of Appeal, Order of Dismissal**, along with a **Proof of Service** in reference to the above named Applicant.

If you have any questions or concerns, please contact my office at the number stated above.

With kind regards, I am

Sincerely,



Charles T. Brooks, III
CTB/srw

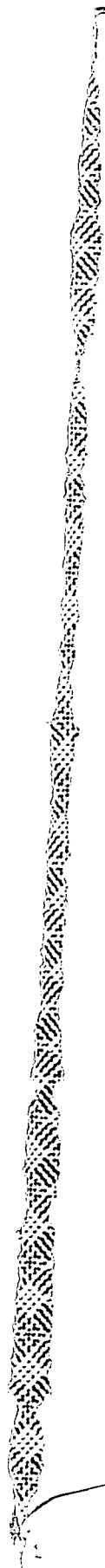
Enclosed as stated

cc: Karen C. Ratigan, Office of Attorney's General
South Carolina Office of Appellate Defense
Ethan Mack, 343243

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U.S. SUPREME COURT

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15 MAY 2014



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