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RECEIVED

fcr

MAY 14 2014

S.C. SUPREME COURT

May 9, 2014

Via Regular Mail

Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: GREGORY GOSNELL v. State


Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondents. The Notice has been filed with the Greenville County Clerk of Court.

These matters are being referred to the Office of Appellate Defense in that we were participating as Court appointed counsel at trial.

Thank you for your attention to this matter.

Yours very truly,


Caroline M. Horlbeck, Esq.

Enclosure

cc: Office of the Attorney General
Office of Appellate Defense

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

APPEAL FROM GREENVILLE COUNTY MAY 14 2014
Court of Common Pleas
THE HONORABLE G. Edward Welmaker

S.C. SUPREME COURT

CA No. 2013-CP-23-0057

GREGORY GOSNELL,

APPELLANT,

vs.

STATE OF SOUTH CAROLINA

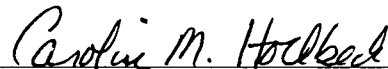
RESPONDENT.

FILED - CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER
2014 MAY 9 AM 8 54

NOTICE OF APPEAL

Appellant GREGORY GOSNELL, appeals from the Order of the Honorable G. Edward Welmaker, Circuit Court Judge clocked April 9, 2014.

Respectfully submitted,



Caroline M. Horlbeck, Esq.
101 Whitsett St
Greenville, SC 29601

Date: May 8, 2014

Other Counsel of Record: Karen Ratigan, Esq.
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE SUPREME COURT

Gregory Gosnell,)
)
)
Appellant,)

C.A. No. 2013-CP-23-0057

-vs-)

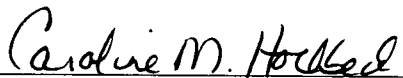
CERTIFICATE OF SERVICE

State of South Carolina,)
)
)
Respondent.)

This is to certify that I am an employee in the law office of Caroline M. Horlbeck, attorneys for Appellant, and that I have this day caused to be served upon the person(s) named below Appellant's Notice of Appeal by placing copies of same in the United States mail, with adequate postage thereon, addressed as follows:

Ms. Lorie French
S.C. Office of Appellate Defense
P.O. Box 11433
Columbia, SC 29211

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


Caroline M. Horlbeck

Greenville, South Carolina

May 9, 2014

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Gregory Gosnell,)
 S.C.D.C. No. 135877,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2013-CP-23-0057

ORDER OF DISMISSAL

FILED CLERK OF COURT
 GREENVILLE, S.C.
 PAUL B. WICKENS/SHAR
 2014 APR -9 P 3:00

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 4, 2013. The Respondent made its return on May 7, 2013. An evidentiary hearing into the matter was convened on February 21, 2014 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.¹

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's plea counsel, Brian P. Johnson, 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 Applicant was indicted

¹ At the start of the hearing, counsel for the Applicant made a motion for funding in order to (1) perform DNA testing of several swabs from the victim's home and (2) obtain an autopsy expert. This Court denied the motion.

¹ *[Handwritten signature]*

at the November 2011 term of the Greenville County Grand Jury for murder (2011-CP-23-8334). He was represented by Brian P. Johnson, Esquire.

On September 10, 2012, the Applicant pled guilty to voluntary manslaughter. The Honorable Larry B. Hyman, Jr. sentenced the Applicant to seventeen and a half years imprisonment. The Applicant did not 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. "Applicant is a mental health patient."
2. Involuntary guilty plea.

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 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

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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 he had several meetings with plea counsel and that they reviewed his version of events, some of the State's evidence, and the statement he had given to police. The Applicant stated plea counsel never reviewed the elements of the offense. The Applicant stated plea counsel failed to file motions pursuant to Brady and Rule 6 and that he had a Brady issue because a toxicology report was not provided. The Applicant stated plea counsel failed to provide him a copy of his discovery materials. The Applicant stated plea counsel should have obtained an expert witness regarding the autopsy because heart disease was a contributing factor to the victim's death. The Applicant stated he gave plea counsel the name of a witness (Jeffrey

Tomko) but that counsel stated he could not find this person. The Applicant stated he had prior psychiatric treatment but admitted he did not tell plea counsel. The Applicant stated he asked plea counsel to file an appeal. The Applicant stated he pled guilty because plea counsel scared him. The Applicant stated plea counsel said he would receive a life sentence if he pled guilty. The Applicant admitted he ^{KNOW} ~~know~~ the State had served a notice of intent to seek life imprisonment without parole.

Plea counsel testified he filed Brady and Rule 5 motions and received a complete file from the State. Plea counsel testified that, after the Applicant's discovery materials were stolen at the jail, he decided not to give him a second copy. Plea counsel testified he reviewed the State's evidence both independently and with the Applicant. Plea counsel testified they reviewed the elements of murder, voluntary manslaughter, involuntary manslaughter, and self-defense and the sentence ranges for the offenses. Plea counsel testified they reviewed the Applicant's statement, its impact upon the defense case, and the Applicant's version of events. Plea counsel testified the autopsy concluded the cause of death was blunt force trauma with a secondary factor of heart disease. Plea counsel testified he decided not to obtain an independent expert after considering the evidence, witnesses, and the fact that the heart issue may have been brought about by the beating. Plea counsel testified he gave the names of any witnesses he received to his investigator and that the investigator could not find Tomko. Plea counsel testified he did not receive a timely request for an appeal but stated there were no appealable issues from the guilty plea hearing. Plea counsel confirmed the notice of life imprisonment without parole (LWOP) had been served and that he explained to the Applicant that he would have received an LWOP sentence if he was convicted of murder or voluntary manslaughter at trial. Plea counsel testified the Applicant pled guilty because the trial judge found his statement was voluntary.



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, reviewed the facts and elements and possible sentence ranges for the offense, conducted a proper investigation, and was thoroughly competent in his representation.

This Court finds the Applicant has failed to meet his burden of proving he pled guilty because he believed plea counsel had not adequately investigated the case and told him that he would be convicted. The record indicates a Jackson v. Denno hearing was held and the trial judge ruled the Applicant's statement was admissible. (Transcript, p.76). The Applicant indicated he wished to plead guilty and plea counsel asked for a moment to speak with him. (Transcript, p.78). The State agreed to dismiss the first-degree burglary charge, reduce the murder charge to voluntary manslaughter, and withdraw the LWOP notice if the Applicant pled guilty. (Transcript, p.78-80; p.83). The Applicant admitted to the plea judge that he was guilty. (Transcript, p.91). 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. (Transcript, pp.84-86; p.91). The Applicant told the plea judge his answers were truthful. (Transcript, p.92). This Court finds there is no evidence in the guilty plea transcript to support the Applicant's assertion that he was pressured into 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). Ultimately, the Applicant failed to demonstrate that he would have insisted upon going to trial, especially in light of the trial judge's ruling following the Denno hearing and the State's offer not to pursue and LWOP sentence. This Court finds the Applicant entered a knowing and

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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 handle matters related to discovery. The Applicant argued plea counsel failed to: (1) file proper Brady motions and (2) provide him a second copy of his discovery materials. Plea counsel testified he filed all appropriate discovery motions and received full discovery in this case. Plea counsel also testified he declined to give the Applicant a second copy of his discovery materials because he had previous cases where inmates had stolen discovery materials in hopes they could testify against fellow inmates and help their own case. This Court finds plea counsel is credible and articulated a valid reason for not providing a second set of discovery materials.

This Court finds the Applicant failed to meet his burden of proving plea counsel did not properly investigate potential witnesses. The Applicant testified he asked plea counsel to locate Jeffrey Tomko. The Applicant testified plea counsel should have obtained an expert witness regarding the findings of the autopsy. Plea counsel testified his investigator was unable to locate Tomko. Plea counsel testified he did not believe an expert witness would have been able to refute evidence of the victim's cause of death, but that he as adequately prepared to argue this at trial. This Court finds plea counsel's testimony is credible. This Court cannot speculate as to Tomko's potential trial testimony, as he 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). Similarly, this Court finds the Applicant failed to demonstrate that he suffered any prejudice from the lack of an expert witness. See Lorenzen v. State, 376 S.C. 521, 530, 657 S.E.2d 771, 777 (2008)

(finding that, as the applicant failed to present any expert testimony at the PCR hearing, “it is merely speculative that these allegedly favorable expert witnesses would have aided in his defense”); Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, as the applicant failed to have an expert testify at the evidentiary hearing, “any finding of prejudice is merely speculative”).

This Court finds the Applicant failed to meet his burden of proving he is entitled to an appeal. Plea counsel has a constitutionally imposed duty to consult with the defendant about an appeal only when there is reason to think either: (1) that a rational defendant would want to appeal or (2) that this defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S. Ct. 1029, 1036 (2000). Although not determinative, a highly relevant factor will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because a plea may indicate the defendant seeks an end to judicial proceedings. Id. This Court finds the Applicant made a clear, informed choice to plead guilty. See Boykin v. Alabama, 395 U.S. at 243-44, 89 S. Ct. at 1712. The Applicant did not indicate at any point that he was doing so based on coercion of counsel. Based on the thorough and complete guilty plea colloquy, it is unlikely a rational defendant would have wanted to appeal. See Roe v. Flores-Ortega, 528 U.S. at 480, 120 S. Ct. at 1036. Further, this Court does not find credible the Applicant’s assertion that he made a timely request for counsel to file an appeal.

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.

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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 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.

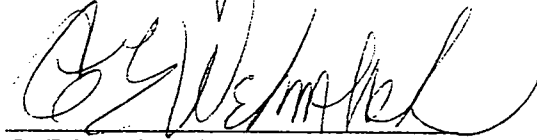
This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate 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 3 day of April, 2014.



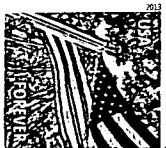
G. Edward Welmaker
Presiding Judge
Thirteenth Judicial Circuit

Greenville South Carolina.

CAROLINE M. HORLBECK

Attorney At Law

101 WHITSETT ST.
GREENVILLE, SOUTH CAROLINA 29601



Via Regular Mail

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