

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2011-CP-42-5359

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S.C. SUPREME COURT

David Anthony Stewart

Appellant.

v.

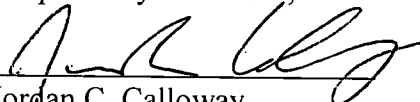
State of South Carolina

Respondent.

NOTICE OF APPEAL

Appellant David Anthony Stewart appeals from an order of the Honorable J. Derham Cole denying Appellant's application for post-conviction relief. The order was dated February 20, 2014, and was received by Appellant on April 25, 2014.

Respectfully submitted,


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Attorney for Appellant (PCR atty.)

Other attorney of record:

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May 22, 2014

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STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
David Anthony Stewart, #344762,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT
S.C. SUPREME COURT
2011-CP-42-5359

ORDER OF DISMISSAL

This matter comes before the Court by way of an Application for Post-Conviction Relief filed December 5, 2011. The Respondent made its Return and Motion to Dismiss on or about September 28, 2012. A Conditional Order of Dismissal was served on October 1, 2012. Following Applicant's response to the Conditional Order, Respondent set the matter for hearing. An evidentiary hearing into the matter was convened on September 30, 2013 at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Jordan C. Calloway, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

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At the hearing, the Applicant testified on his own behalf. Albert V. Smith, Esquire, also testified. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, and the plea transcript.

PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg

County Grand Jury indicted the Applicant at the November 2009 term of General Sessions for trafficking in cocaine +400g (09-GS-42-6024). The Applicant was represented by Albert V. Smith, Esquire. On February 9, 2011, the Applicant pled guilty to the lesser included offense of trafficking in cocaine 28g-100g. The Honorable J. Mark Hayes II sentenced the Applicant to confinement, for a period of seven (7) years and ordered Applicant to pay a fine of \$50,000. The Applicant did not appeal his guilty plea or sentence.

ALLEGATIONS

In his application and response to the Conditional Order of Dismissal, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Insufficient evidence; in that,
 - a. "My arrest and seizure violates Federal and State law,"
 - b. "The officer making the arrest did not have a warrant or probable cause,"
2. Lack of Subject Matter Jurisdiction; in that,
 - a. Indictment reflected charge for trafficking in cocaine +400g, but Applicant was convicted and sentenced for trafficking in cocaine 28-100g,
 - b. Defects in indictment
3. Ineffective assistance of counsel, in that;
 - a. Counsel failed to investigate,
 - b. Counsel failed to move for production of audio and videotape from officer's car,
 - c. Counsel failed to move to suppress the evidence found in the hotel because of Fourth Amendment violations.

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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) (citing Rule 71.1(e), SCRCF). 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, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 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, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

Applicant testified that he was arrested when the police followed him into a hotel, but

Applicant testified he never saw a warrant and believed the search was improper. Applicant testified that he was advised on the day of trial that their expert witness, who was hired to attack the qualifications and training of the drug dog, did not appear. Applicant also testified that the videotape evidence from the officer's car only showed the police pulling up behind the car at the hotel and the dog walking around the car, but did not show the entire trip of the Applicant's car. Applicant also testified that he was never indicted for the charge of trafficking in cocaine 10-28 grams and does not believe that it is a lesser-included offense of trafficking in cocaine +400 grams. Applicant testified that he believed the lesser-included offense should have been a possession with intent to distribute. Applicant also testified that the co-defendant had agreed to accept responsibility for all of the drugs. Applicant testified that Counsel advised him he would receive a sentence of twenty-five years if he proceeded to trial. Applicant testified that prior to trial he was out on bond and located in New York, but felt that Counsel was not doing enough in his case. Applicant testified that he would not have pled guilty except for the fact that he had no Counsel was not prepared for trial.

Counsel testified that he was retained to represent the Applicant on the charge of trafficking in cocaine. Counsel testified that he had the entire video of the stop. Counsel also testified that he had retained an expert from Texas to review the training procedures for the drug dog. However, Counsel testified that the expert's testimony would not be favorable to Applicant's defense, so Counsel did not subpoena the expert to testify. Counsel testified that he filed a motion to quash the indictment, but lost that motion. Counsel testified that the Applicant was present for the hearing on the motion to quash and suppress evidence. Counsel testified that Applicant never informed him that the co-defendant was going to accept responsibility. In fact, Counsel testified that he never received any indication from the co-defendant's attorneys that the co-defendant would

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accept a plea. The co-defendant barely showed up for his plea. Counsel testified that he knew that the Applicant was reluctant to plead guilty, but chose to plead guilty once the charge was reduced and he faced seven to twenty-five years, rather than a minimum of twenty-five.

This Court finds the testimony of Counsel to be more credible than the testimony of the Applicant. The Applicant's allegation that Counsel did not conduct an adequate pre-trial investigation is without merit. Following testimony and review of the transcript, it is clear that Counsel had reviewed the facts and evidence, as well as the options that Applicant faced. It is also clear that Counsel consulted with the Applicant and discussed various defenses and attacks on the State's evidence. The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Skeen v. State, 340 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). The Applicant failed to point to any specific matters Counsel failed to discover, or any meritorious defenses that could have been pursued had Counsel been more fully prepared. Furthermore, the Applicant failed to show any prejudice that may have resulted from Counsel's alleged inadequate preparation. Accordingly, this allegation is dismissed.

In Hill v. Lockhart, 474 U.S. 52 (1985), the United States Supreme Court held that the two-part standard adopted in Strickland v. Washington, *supra*, for evaluating claims of ineffective assistance of counsel applies, as well, to guilty plea challenges based on ineffective assistance of counsel. To meet the Court's "prejudice" requirement, a criminal defendant must

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show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Hill at 59. Although the Applicant testified that he would not have pled guilty had Counsel been prepared for trial, this Court does not find that testimony credible. A review of the guilty plea transcript reflects that the Applicant was fully informed of his constitutional rights and chose to waive those rights. The Applicant acknowledged his guilt and informed the court that he was pleased with Counsel's representation. The Applicant has failed to establish that he would have proceeded to trial, but for any alleged deficiencies of Counsel. Therefore, this claim is denied and dismissed.

Insufficient Evidence

The Applicant alleged "insufficient evidence," and the State moved to summarily dismiss the claim. A guilty plea generally constitutes a waiver of non-jurisdictional defects and claims of violations of constitutional rights. See Rivers v. Strickland, 264 S.C. 121, 124, 213 S.E.2d 97, 98 (1975) (a plea of guilty constitutes a waiver of non-jurisdictional defects and defenses, including claims of violation of constitutional rights prior to the plea); Whetsell v. State, 277 S.C. 295, 297 S.E.2d 891 (1981). Therefore the plea waives any non-jurisdictional defects and defenses, including challenges to the sufficiency of the evidence. "Where a defendant voluntarily, intelligently, and understandingly enters a plea of guilt, this makes it unnecessary for the State to offer evidence to prove the offense charged in the warrant or indictment." State v. Allen, 261 S.C. 448, 200 S.E.2d 684, 686 (1973). This is because the guilty plea "admits all matter of fact averments of the accusation." Id. The defendant admits all circumstances described in the indictment, leaving only sufficiency of the indictment for review and waiving all other defenses. State v. Thomason, 341 S.C. 524, 534 S.E.2d 708, 709 (2000). Additionally, PCR is not a proper avenue to challenge the sufficiency of evidence. Simmons v. State, 264 S.C. 417, 215 S.E.2d

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883 (1974); S.C. Code Ann. § 17-27-20(a)(6). Therefore, this Court finds that this claim is summarily dismissed based upon S.C. Code Ann. §17-27-70(c) (1985), which authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”

Lack of Subject Matter Jurisdiction

The Applicant alleged a lack of subject matter jurisdiction based upon the fact that he was indicted for trafficking in cocaine +400 grams, but pled to and was sentenced for trafficking in cocaine 28-100 grams. This Court finds that this allegation lacks merit. The circuit court has subject matter jurisdiction to accept a defendant's guilty plea to an offense if “*the defendant pleads to a lesser included offense of the crime charged in the indictment.*” State v. Timmons, 338 S.C. 287, 289, 525 S.E.2d 906, 907-08 (S.C. Ct. App. 1999) aff'd, 349 S.C. 339, 589 S.E.2d 657 (2002) overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) (emphasis added). “Presentment of an indictment or a waiver of presentment is not needed to confer subject matter jurisdiction on the circuit court.” State v. Gentry, 363 S.C. 93, 610 S.E.2d 494, 499 (2005). Therefore, this Court finds that any defects in the indictment did not affect the subject matter jurisdiction of the court and the Applicant properly pled guilty to the lesser-included charge. Therefore, this claim is denied and dismissed.

Summary

This Court finds in regards to the allegation of ineffective assistance of counsel, the Applicant’s testimony is not credible. This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in his representation, and that Counsel’s conduct does not fall below the objective standard of

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reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that 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 Counsel’s performance. This Court concludes the Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, this allegation is denied.

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 application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

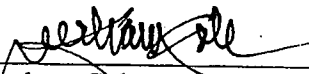
This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel’s assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRPC, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant’s behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

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IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 20 day of February, 2014.



J. Derham Cole
Presiding Judge

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PCR

McGowan, Hood & Felder, LLC

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May 22, 2014

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Hon. Daniel E. Shearouse
Supreme Court of South Carolina
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MAY 27 2014

S.C. SUPREME COURT

Re: David Anthony Stewart v. State of South Carolina
C.A. No. 2011-CP-42-5359

Dear Mr. Shearouse:

I have enclosed original and one copy of a Notice of Appeal for the above-referenced matter. Please file the original and return the copy in the enclosed envelope.

Please feel free to call if you have any questions.

Sincerely,

Jordan Calloway

JCC/shg

Enclosures

cc: Hon. Alan Wilson
Hon. M. Hope Blackley



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