

IN THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY

COURT OF COMMON PLEAS

ALISON RENEE LEE, CIRCUIT COURT JUDGE

2013-CP-40-0962

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JUN - 6 2014

S.C. Supreme Court

Clarence Myers,.....Petitioner.

vs

The State of South Carolina,.....Respondent.

NOTICE OF APPEAL

Clarence Myers appeals the Honorable Alison Renee Lee's May 29, 2014, order denying post-conviction relief to the Petitioner. Undersigned counsel received notice of entry of the order on June 5, 2014. A copy of the order on appeal is attached to this notice.

Respectfully submitted,



Anna R. Good
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Attorney for the Petitioner.

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S.C. SUPREME COURT

June 6, 2014.

OTHER COUNSEL OF RECORD:

Megan Harrigan
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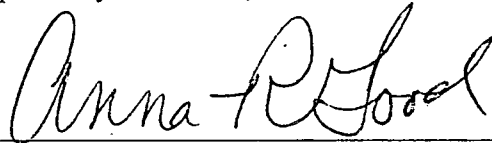
vs

The State of South Carolina,.....Respondent.

PROOF OF SERVICE

I, Anna Good, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to the attorney of record, Megan Harrigan, P.O. Box 11549, Columbia, South Carolina 29211-1549. I further certify that all parties required by Rule to be served have been served this 6th day of June 2014.

Respectfully submitted,



Anna R. Good, Esquire
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STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
Clarence T. Myers, #352916,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL DISTRICT

Case No. 2013-CP-40-00062

S.C. Supreme Court

ORDER OF DISMISSAL

JENNIFER M. McBRIDE
S.C.P. & G.S.
2014 MAY 29 AM 11:16
RICHLAND COUNTY
FILED

This matter comes before the Court by way of an application for post-conviction relief filed February 14, 2013. The State filed its Return on May 16, 2013. An evidentiary hearing into the matter was convened March 19, 2014, at the Richland County Courthouse. Applicant was present at the hearing and was represented by counsel, Anna R. Good, Esquire. Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office. After reviewing all testimony and other evidence presented at the hearing, along with a review of all records provided to the Court, this Court finds that there are no constitutional deprivations or other grounds on which to grant relief and is denying and dismissing this application with prejudice.

PROCEDURAL HISTORY

The records before this Court indicate that 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 February 2009 term of the Richland County Grand Jury for murder (2009-GS-40-0611) and destruction or desecration of human remains (2009-GS-40-0612). Jennifer C. Davis, Esquire, represented Applicant. On October 19, 2012, Applicant appeared before the Honorable L. Casey Manning, where he pled guilty pursuant to North Carolina v. Alford¹ to the lesser included offense of voluntary manslaughter and destruction or desecration of human remains. Judge Manning sentenced Applicant to fifteen years imprisonment for voluntary manslaughter and ten years imprisonment for the destruction or desecration of human remains, both sentences to be served concurrently.

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¹ 400 U.S. 25 (1970).

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During the plea, Applicant and his counsel learned of additional DNA swabs taken from the victim that did not match Applicant but another suspect, Elijah White. A subsequent hearing was convened on October 25, 2012 to address the additional DNA swabs. Applicant was present at this hearing with his attorney, Jennifer Davis. After a discussion between Applicant and the court, Applicant indicated that he was satisfied with the plea and the sentence imposed by the court and did not want to withdraw his plea. No subsequent appeal was taken.

In his application for post-conviction relief, Applicant alleged that he was being held in custody unlawfully based on allegations of ineffective assistance of counsel for failure to investigate and failure to provide discovery materials.

SUMMARY OF TESTIMONY PRESENTED AT EVIDENTIARY HEARING

At the evidentiary hearing, Applicant testified on his own behalf. Respondent presented testimony from plea counsel, Jennifer C. Davis (hereinafter "Counsel"). This Court also had before it Applicant's guilty plea and post-plea transcripts, the records from the Richland County Clerk of Court regarding the subject convictions, and Applicant's records from the South Carolina Department of Corrections.

Applicant testified first on his own behalf. He is a high school graduate who attended three years of college. He testified that he has no criminal record, but conceded on cross examination that he does have a prior record. See Guilty Plea Tr. p. 76. He was arrested in January 2009 for murder and James H. May from the Richland County Public Defender's Office was originally appointed to represent him. May represented Applicant for approximately three years and that he met with May approximately ten times. May offered to do a lot of things for him but never ended up doing them, so Applicant fired May. His next appointed attorney was Counsel, with whom he met five or six times. He met with Counsel for the first time in May 2012 and this initial meeting lasted for two hours. Applicant informed Counsel that he wanted to proceed to trial at this first meeting.

Applicant testified that he never reviewed discovery with May, but that he reviewed all discovery materials with Counsel five or six times. The discovery materials contained: a DNA report showing that his DNA matched semen found on the victim; a paystub containing his name found near the victim's body; statements he had given to law enforcement; investigative reports; autopsy photographs; pathology and toxicology reports; and crime scene photographs. He testified that there were three other suspects, but at least one suspect, Elijah White, could no

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longer be investigated because he was deceased. He testified that Counsel used a private investigator to help with his defense and that he met with the investigator two or three times. Applicant discussed possible defenses with Counsel and thought they were prepared for trial.

The trial began in October 2012 with a pre-trial Jackson v. Denno hearing on his motion to suppress his statements. He testified that he had trouble hearing due to a clog in his left ear. He testified that Counsel, along with co-counsel Fielding Pringle, was aware of this and acknowledged that they wrote notes for him so that he could follow the hearing's progress.

After the denial of his motion to suppress his statements, Counsel presented him with a plea offer from the State allowing him to plead guilty pursuant to Alford for a fifteen year sentence. He testified that he felt threatened by Counsel, who told him if he did not accept the plea offer he would likely be convicted and receive a sentence between thirty years to life imprisonment. However, he acknowledged that Counsel explained to him numerous times that murder carries a mandatory minimum sentence of thirty years imprisonment up to life imprisonment without parole. He testified that he accepted the State's plea offer because he wanted a fifteen year sentence and acknowledged that he did receive a fifteen year sentence.

He testified that he first learned that another suspect Elijah White's DNA was also found on the victim at the plea proceeding. He elaborated that White's semen was found in the victim. He testified that Counsel never informed him of this, but acknowledged that Counsel objected at the plea and stated this was the first time she had learned of this as well. He testified that he would not have pled guilty if he had known this. He testified that he appeared before the plea court for a subsequent hearing shortly after his plea. He testified that the plea court questioned him regarding a withdrawal of his plea based on the discovery of White's DNA and that he decided not to withdraw his plea because he wanted the fifteen year sentence the court had imposed.

Following Applicant's testimony, the State presented testimony from Counsel. Counsel testified that she has been employed by the Richland County Public Defender's Office for seven-and-a-half years. She was originally assisting with Applicant's case as a second chair to James May and that when May left the Public Defender's Office she took over the case as lead counsel. She met with Applicant at least twelve times and that based on notes in the file, May met with Applicant at least six times. Notes in the file reflect that May gave Applicant a complete copy of

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all discovery materials. She reviewed all discovery materials with Applicant several times. She also used two private investigators to help with the case.

Counsel was prepared for trial and that the defense strategy was three-fold: first, the pathologist's report showed that the victim's cause of death was a drug overdose, not strangulation; second, Applicant's confessions were false and coerced by a voice stress test outlawed in South Carolina; and third, Elijah White was the actual perpetrator. Applicant gave three statements to law enforcement: an initial statement completely denying involvement; a second statement that he found the victim after she was deceased and ejaculated on her; and a third statement that he strangled her to death and then ejaculated on her. Counsel moved to suppress these statements, which was denied following a Jackson v. Denno hearing. She testified that following the Denno hearing, the State made an offer for fifteen years imprisonment if Applicant pled pursuant to Alford. She testified that she explained the State's offer to Applicant, who decided to accept the offer.

Counsel did not learn of the DNA match of White to semen found in the victim until Applicant's guilty plea hearing. She testified that May had previously moved to compel the State to turn this information over and was shocked to learn that it was found buried in the discovery materials that comprised more than one thousand pages. She testified that she objected based on this information and the plea court held a subsequent hearing based on this. She fully explained to Applicant that he could move to withdraw his plea based on this information and proceed to trial. She testified that she explained to him that this would help with his third party guilty defense against Elijah White. Applicant ultimately decided not to withdraw his guilty plea because he was satisfied with the State's plea offer. She testified that he also informed her that he did not think the DNA sample matching White was that exculpatory, as he (Applicant) was not charged with any sex crime.

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. This Court finds that Counsel's testimony is credible and that Applicant's testimony lacks credibility. 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).

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In a post-conviction relief action, the applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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 (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).

After careful review based on the standard discussed above, including a review of the testimony of the witnesses presented at the evidentiary hearing and the documentation provided, this Court denies this application on the basis that Counsel's performance did not fall below the standard required and there was no resulting prejudice to Applicant from any alleged deficiencies. Specifically, this Court notes that the case had been called for trial and a hearing was conducted pursuant to Jackson v. Denno on the voluntariness of the three statements given by Applicant. Both the officer and Applicant testified. Applicant asserted in his application that evidence regarding the voice stress test should not be admitted during the trial. Legal memoranda had been prepared on the voice stress test but had not been argued to the court. The court ruled the statements were admissible.

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Information about the other suspects had been provided to the defense in discovery. An appropriate investigation had been conducted, even though Elijah White was deceased at the time of trial. While the defense acknowledged that learning of the DNA of Elijah White earlier would have been helpful to the third party guilty defense, Applicant did not wish to go forward with trial. Applicant pled pursuant to Alford allowing him to acknowledge that the State had sufficient evidence on which the jury would likely find his guilt on the charge and to acknowledge that the benefit of the plea would allow him to avoid a lengthy prison sentence. Applicant was aware of and understood the plea, and it was freely and voluntarily entered. Based on the foregoing, this Court finds that this application must be denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that 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), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on an applicant's behalf. Applicant 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 shall be denied and dismissed with prejudice; and
2. The Applicant shall remain remanded to the custody of the State.

AND IT IS SO ORDERED.



ALISON RENEE LEE
Presiding Judge
Fifth Judicial Circuit

May 28, 2014
Columbia, South Carolina.

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June 6, 2014

South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589

RECEIVED

Re: Clarence Myers v. The State of South Carolina
Docket No.: 2013-CP-40-0962

JUN 09 2014

S.C. SUPREME COURT

To Whom It May Concern:

Enclosed please find a copy of the following:

1. Notice of Appeal;
2. Proof of Service; and
3. Order of Dismissal signed by Judge Alison Renee Lee on May 29, 2014.

Mr. Myers filed for post-conviction relief, which was denied after a hearing by Judge Lee. By copy of this letter I am notifying the Supreme Court that I am requesting that Appellate Defense assume the responsibility of this Appeal pursuant to Rule 602(e)(4), SCACR, since Mr. Myers is indigent and has no family to hire a private attorney. I was previously appointed by the court under rule 608 for his post-conviction relief case; however, I have no experience with appeals. Please advise if you need anything further from me, and I will be happy to comply. With warm personal regards, I am

Very truly yours,

Anna R. Good
Anna R. Good

Enc

cc: Megan Harrigan, SC Attorney General's Office
Clarence Myers, Petitioner
The Honorable Daniel E. Shearouse, Clerk of the Supreme Court

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