

per

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
HONORABLE D. GARRISON HILL

Case No.: 2013CP230242

RECEIVED

JUN 24 2014

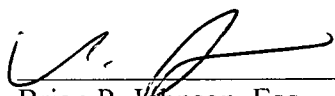
S.C. SUPREME COURT

KENNETH HENRY SHERMAN,)
)
 PETITIONER,)
)
 vs.)
)
 STATE OF SOUTH CAROLINA)
)
 RESPONDENT.)

NOTICE OF APPEAL

The Petitioner, Kenneth Henry Sherman, hereby appeals the Honorable D. Garrison Hill's, order denying post-conviction relief to the Petitioner. A copy of the order on appeal is attached to this notice

Respectfully submitted,



Brian P. Johnson, Esq.
522 North Church Street
Greenville, SC 29601
Attorney for Petitioner
SC Bar: 73996

Date: June 20, 2014
Other counsel of record: Karen Ratigan
P.O. Box 11549/Columbia, SC 29211

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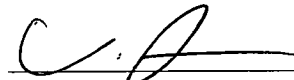
S.C. SUPREME COURT

KENNETH HENRY SHERMAN,)
)
PETITIONER,)
)
vs.)
)
STATE OF SOUTH CAROLINA)
)
RESPONDENT.)

PROOF OF SERVICE

I, Brian P. Johnson, Esq., certify that I have today served the within notice of appeal upon the Respondent by depositing a copy in the United States Mail, postage prepaid, addressed to the attorney of record, Karen Ratigan, at P.O. Box 11549 Columbia, SC 29211.

Respectfully submitted,



Brian P. Johnson, Esq.
522 North Church Street
Greenville, SC 29601
Attorney for Petitioner
SC Bar: 73996

Date: June 20, 2014
Other counsel of record: Karen Ratigan
P.O. Box 11549/Columbia, SC 29211

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2013CP2300242

FILED - CLERK OF COURT
GREENVILLE OF S.C.
PAUL B. WICKENSIMER
2014 MAY 20 PM 3 5

Kenneth Sherman 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 - D Garrison Hill

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:

Brian P. Johnson 522 North Church Street
Greenville, SC 29601

Karen Christine Ratigan PO Box 11549 Columbia,
SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

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

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Kenneth Henry Sherman,)
 a/k/a Henry Kenneth Sherman,)
 S.C.D.C. No. 183789,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2013-CP-23-0242

**ORDER OF DISMISSAL
 GRANTING WHITE V. STATE
 APPEAL**

FILED-CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL B. WISSEMAN
 2014 MAY 20 11 3 55

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 15, 2013. The Respondent made its return on June 21, 2013. An evidentiary hearing into the matter was convened on April 23, 2014 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Brian P. Johnson, 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 trial counsel, John K. "Jake" Erwin, Jr., Esquire. The Court had before it a copy of the guilty plea transcript, the records of the Greenville County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the return.

PROCEDURAL HISTORY

The Applicant was indicted by the January 2012 term of the Greenville County Grand Jury for possession with intent to distribute (PWID) cocaine base (2011-GS-23-5695) and

git

trafficking heroin (2011-GS-23-5696). He was represented by John K. "Jake" Erwin, Jr., Esquire.

On February 13, 2012, the Applicant pled guilty to PWID cocaine base, second offense and trafficking heroin (4 or more grams). The Honorable Edward W. Miller sentenced the Applicant to concurrent sentences of sixteen years on each charge.

A pro se notice of appeal was filed at the South Carolina Court of Appeals. In an order filed October 30, 2012, the Court of Appeals dismissed the appeal based on the Applicant's failure to serve the notice of appeal upon opposing counsel. The remittitur was issued December 13, 2012.

ALLEGATIONS

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

1. Ineffective assistance of counsel:
 - a. "Failed to object or file any motion about the sentence."
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 the witnesses who testified at the hearing, and closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the 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

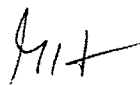
The Applicant alleges his guilty plea was involuntary and that he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his

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 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) (citation omitted).

The Applicant stated plea counsel was not his first attorney but started representing him in November or December 2011. The Applicant stated he and plea counsel discussed the evidence (including that the drugs were found on his person) and his version of events. The Applicant stated he wanted a trial. The Applicant stated there was a suppression hearing the morning of trial and plea counsel argued the drugs should be suppressed because the officer exceeded the scope of his duties. The Applicant stated he should have testified at the



suppression hearing but plea counsel advised him not to. The Applicant stated plea counsel admitted his ineffectiveness at the suppression hearing because he said he could not properly investigate the case. The Applicant stated that both the plea judge and plea counsel pressured him to plead guilty during off-the-record discussions.

Plea counsel confirmed he was not the Applicant's first attorney and that he assumed representation in October or November 2011 when that attorney ^{took another position in} ~~went to~~ Anderson, South Carolina. Plea counsel testified he and the Applicant discussed the discovery materials and the Applicant's version of events. Plea counsel testified they always planned to have a suppression hearing and that he argued there was an illegal search and seizure in this case. Plea counsel testified he discussed with the Applicant whether or not he should testify but stated he concluded the Applicant's testimony would not add anything to his legal arguments. Plea counsel testified the plea judge remembered the Applicant from a prior case and was informational and friendly when he explained he would receive a mandatory minimum sentence of twenty-five years if he was found guilty at trial. Plea counsel testified the plea judge was not being heavy-handed in this discussion. Plea counsel testified the assistant solicitor stated the charge would be reduced if he pled guilty. Plea counsel testified he discussed the advantages and disadvantages of a plea versus a trial with the Applicant over the lunch break and that the Applicant understood there was no sentence recommendation. Plea counsel testified the Applicant decided to plead guilty. GHS

This Court finds the Applicant failed to meet his burden of proving plea counsel did not properly represent him at the hearing on the motion to suppress. The Applicant argued plea counsel admitted to the plea judge that he was unable to fully investigate the case. The Applicant argued he should have been allowed to testify at the suppression hearing. This Court finds these allegations are without merit. While plea counsel did state he did not think he "can

effectively represent [the Applicant] without being able to investigate this stuff,” this Court finds this is neither an example nor an admission of ineffectiveness. (Plea transcript, p.6). Rather, plea counsel was merely expressing his frustration to the judge that a police officer would not talk to him about the case. The plea judge then properly advised the witness was not obligated to speak with him. This Court finds plea counsel vigorously argued a well-researched motion to suppress the evidence in this case and that the Applicant has failed to demonstrate what else plea counsel could have investigated in preparation for the hearing. See Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding 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). Plea counsel also explained that he discussed the suppression motion with the Applicant and whether or not the Applicant would testify. This Court finds plea counsel’s testimony is credible. This Court further finds plea counsel’s decision not to call the Applicant as a witness at the hearing was a legitimate strategic decision, as the arguments made at the hearing were primarily legal arguments. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel). This Court notes the Applicant admitted plea counsel made proper legal arguments at the suppression hearing in arguing the arresting officer exceeded his scope during the stop and seizure. This Court finds the Applicant’s testimony at the suppression hearing would not have changed the outcome of the hearing. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel’s deficient performance could have reasonably affected the result of defendant’s trial); cf. Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) (“When the defendant claims that counsel’s failure to articulate a Fourth

Amendment claim was ineffective assistance, defendant must show that such claim is meritorious and that the verdict would have been different absent the evidence that should have been excluded.”).

This Court finds the Applicant failed to meet his burden of proving his guilty plea was involuntary. While the Applicant stated the plea judge and plea counsel pressured him into pleading guilty, this Court does not find this testimony is credible. Plea counsel testified the plea judge was being very friendly with the Applicant in advising him of the risks of going to trial. Plea counsel testified he was given time to discuss the options of a guilty plea versus a trial with the Applicant and that the Applicant decided to plead guilty. This Court finds plea counsel’s testimony is both credible and supported by the record. The Applicant admitted to the plea judge both that he was guilty and that the facts set forth in the suppression hearing were true. (Plea transcript, p.31). The Applicant also told the plea judge 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.30-31). This Court finds there is no evidence in the 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); 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.

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.

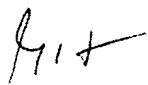
This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. This Court also concludes the Applicant has failed to meet his burden of proving his guilty plea was not knowing and voluntary. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d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

Appeal

This Court finds the Applicant’s allegation that he was denied a direct appeal is meritorious. The Applicant stated he asked plea counsel to file an appeal. Plea counsel testified he did not recall whether the Applicant asked him to file an appeal but noted his general practice would be to file an appeal if requested. Where the post-conviction relief judge determines that the applicant did not freely and voluntarily waive their appellate rights, the applicant may petition the South Carolina Supreme Court for review of direct appeal issues pursuant to White v. State. See Rule 243(i)(1), SCACR; Davis v. State, 288 S.C. 290, 291, n.1, 342 S.E.2d 60, 60, n.1 (1986) (“Even where the post-conviction relief judge makes this finding, he may not grant relief on this basis. Instead, the applicant must petition this Court for a White v. State review.”). The Court finds the Applicant did not knowingly and voluntarily waive his right to a direct appeal. The Court concludes the Applicant is entitled to a review of his conviction.

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 evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

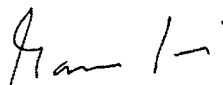
CONCLUSION

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, however, concludes the Applicant is entitled to a review of his direct appeal issues pursuant to White v. State.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice;
2. Within thirty (30) days of service of this Order, counsel for the Applicant must file a Notice of Appeal to secure the appropriate review of the Applicant's convictions. Counsel and the Applicant are directed to Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986) and Rule 243(i), SCACR for the appropriate procedure for securing appellate review; and
3. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 16 day of May, 2014.



D. Garrison Hill
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina

Law Office of Brian P. Johnson, LLC
522 North Church Street
Greenville, SC 29601



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MAILED FROM ZIP CODE 29601

Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211