

STATE OF SOUTH CAROLINA)
)
 COUNTY OF MARLBORO)
)
 Marcus Jermale Townsend,)
 S.C.D.C. No. 348435,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS

2012-CP-34-0208

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ORDER OF DISMISSAL S.C. Supreme Court

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed September 27, 2012. The Respondent made its return on March 15, 2013. An evidentiary hearing into the matter was convened on July 15, 2013 at the Darlington County Courthouse. The Applicant was present at the hearing and represented by Tristan M. Shaffer, 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, Emily M. Crayton, Esquire. The Court had before it the transcript of the guilty plea hearing, the Marlboro 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 Marlboro County Clerk of Court. The Applicant was indicted at the July 2010 term of the Marlboro County Grand Jury for armed robbery (2010-GS-34-0448) and murder (2010-GS-34-0450). He was represented by Emily M. Crayton, Esquire.

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On October 31, 2011, the Applicant pled guilty to armed robbery and the lesser-included offense of voluntary manslaughter. He was sentenced by the Honorable Michael G. Nettles to concurrent terms of twenty-three years for armed robbery and twenty-three years for voluntary manslaughter. The Applicant did not file an 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. “[F]ailure to investigate case.”
 - b. “[R]endered ineffective assistance.”
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 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 the evidence in his case. The Applicant stated they reviewed "parts" of the videotaped statements – both his own and some witnesses' statements – but that he never saw his co-defendants' statements. The Applicant stated he told plea counsel his version of events and that counsel explained the concept of "the hand of one is the hand of all" and told him the State had a strong case. The Applicant stated the recommendation was for a twenty-five year sentence and that plea counsel said she would argue for less time. The Applicant stated, however, that plea counsel did not argue strongly enough for a lesser sentence. The Applicant stated he lied to the

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plea judge when he said he was guilty.

Plea counsel testified she received discovery on a rolling basis and reviewed those materials with the Applicant. Plea counsel testified they also discussed the Applicant's version of events. Plea counsel testified she watched all of the videotaped statements in the case and – while the Applicant watched most of these videos – she informed him of the contents of those he did not see. Plea counsel testified she explained to the Applicant that the State had a “very strong” case against him because all of the co-defendants gave videotaped statements. Plea counsel testified she explained the concept of “the hand of one is the hand of all” to the Applicant multiple times and that he was aware the plea recommendation in this case was for a twenty-five year cap. Plea counsel testified Judge King ordered a “mini evaluation” by the county instead of the South Carolina Department of Mental Health and that the Applicant was found competent.

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, conducted a proper investigation, and was thoroughly competent in her representation.

The Applicant admitted to the plea judge that he was guilty. (Plea transcript, pp. 9-12). 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 (Plea transcript, pp.9-12). 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.

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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.

This Court finds the Applicant failed to meet his burden of proving plea counsel did not show him all of the videotaped statements in his case. Plea counsel testified the Applicant viewed his videotaped statement, as well as those of his co-defendants and some of the witnesses. Plea counsel testified there were notes in the file that corroborated her recollection. Plea counsel testified she would have told the Applicant about the content of any videos he did not view. This Court finds plea counsel's testimony is credible. Regardless, as the Applicant failed to introduce any of these videotaped statements at the PCR hearing, this Court cannot speculate as to whether the contents of any of these videos would have had some impact upon the defense case. Cf. Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (holding that, since the contents of challenged documents were not presented at the PCR hearing, the Applicant could not demonstrate how the failure of counsel to obtain these documents prejudiced the defense).

This Court finds the Applicant failed to meet his burden of proving plea counsel failed to properly investigate the case and present a mitigation case at the plea hearing. At the guilty plea hearing, plea counsel noted: the Applicant's age and lack of a prior record, the conflicting statements about who was the shooter, the Applicant's respectful nature, and the Applicant's familial support. Plea counsel then asked the plea judge to impose the minimum sentence. (Plea transcript, pp.13-16). Regardless, the Applicant failed to present any evidence or testimony at

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the PCR hearing about what plea counsel should have argued in mitigation at his guilty plea hearing. As such, this Court cannot speculate as to what impact a different mitigation argument might have had upon the Applicant's plea hearing. See, e.g., 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).

This Court finds the Applicant failed to meet his burden of proving plea counsel should have asked for him to be evaluated by the South Carolina Department of Mental Health. Plea counsel testified Judge King ordered a "mini evaluation" to be performed by the county and that the Applicant was found competent. "In a PCR action, the petitioner bears the burden of proof and is required to show by a preponderance of the evidence he was incompetent at the time of his plea." Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 596 (1992). To sustain a claim that plea counsel was ineffective for failing to request competency hearing, the petitioner must show reasonable probability that he would have been found incompetent. Id. at 233, 417 S.E.2d at 596. This Court finds the Applicant has failed to present either evidence or testimony indicating there was a "reasonable probability" that a competency evaluation by the South Carolina Department of Mental Health would have yielded a different result than the one performed by the county. As such, this allegation must be denied. See id.; cf. Dempsey v. State, 365 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").

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

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that plea counsel committed either errors or omissions in her 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.

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 this (30) days from the receipt of this Order if he wants to secure appropriate appellate review. 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.

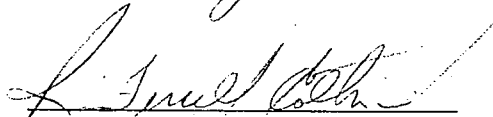
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IT IS THEREFORE ORDERED:

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 26 day of Aug, 2013.



R. Ferrell Cothran, Jr.
Presiding Judge

Manning, South Carolina.

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