

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Derham Cole, Circuit Court Judge

Case No.: 2012-CP-42-5340

The State,

Respondent,

v.

Eugene Rhinehart,

Appellant.

NOTICE OF INTENT TO APPEAL

Eugene Rhinehart appeals the denial of his application for Post-Conviction Relief in this case. The Order of Dismissal was imposed by the Honorable J. Derham Cole on July 25, 2014. Appellant received notice of the same on that date.

August 4, 2014



CHRISTOPHER D. BROUGH
175 Magnolia St., Suite 202
SPARTANBURG, SC 29306
(864) 585-3088
ATTORNEY FOR APPELLANT

Other Counsel of Record:
Suzanne H. White
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211-11549
(803) 734-3737

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The State, Respondent,

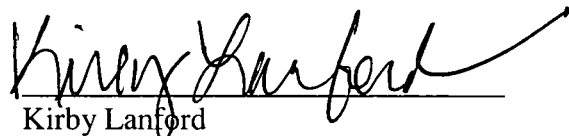
v.

Eugene Rhinehart, Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that he is a person of such age and discretion as to be competent to serve papers and that a copy of the **Notice of Intent to Appeal**, was served upon the following person(s) on the State, by depositing copies of the same in the United States Mail, with sufficient postage affixed thereto, on August 4, 2014, addressed as follows:

The Honorable Alan Wilson
SC Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, S.C. 29201


Kirby Lanford

SWORN BEFORE ME THIS
4 DAY OF August, 2014.


NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: Aug. 3, 2019

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
Eugene Rhinehart, #198225,)
)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2012-CP-42-5340

ORDER OF DISMISSAL

This matter comes before the Court by way of an Application for Post-Conviction Relief filed December 13, 2012. The Respondent made its Return on or about February 28, 2014. An evidentiary hearing into the matter was convened on April 11, 2014, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Christopher Brough, 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. Cory Walker, Applicant's son, testified on Applicant's behalf. The victim in this matter, Tiffany, also testified. James A. Cheek, Esquire, testified on behalf of the State. 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 presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the March 2011 term of the Spartanburg County Grand Jury for criminal sexual conduct with a



minor – 2nd degree (2011-GS-42-2027). James A. Cheek, Esquire, represented Applicant. On October 9, 2012, Applicant pled guilty pursuant to NC v. Alford. Following a recommendation by the State, the Honorable R. Ferrell Cothran sentenced Applicant to a sentence of eight years. The Applicant did not appeal his conviction and sentence.

ALLEGATIONS

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

1. Ineffective assistance of counsel, in that;
 - a. Applicant was misled by Counsel to believe he was pleading to a lesser charge and would receive no more than three years non-violent.

The Applicant orally amended the application at the hearing, with no objection from the Respondent, to include an allegation of newly discovered evidence based upon Applicant's recent discovery of an alleged statement by the victim to the Applicant's son, which Applicant believed to be exculpatory.

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

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evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1e, 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 the first 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).

The Applicant testified that Matthew Shealy was his original appointed attorney, but Applicant never met with Mr. Shealy. However, Applicant testified that he met with and was represented at the plea by Counsel. Applicant testified that he remained in jail for almost two years before his plea because although his bond on this charge was minimal, because he violated

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his federal parole, his bond for the violation was \$1 million. Applicant testified that he has been told by the victim's mother that the victim is Applicant's daughter. Applicant testified that during the time the alleged abuse occurred, Applicant had not seen the victim at all.

Applicant alleged that Counsel guaranteed him that he would receive no more than three years on a non-violent sentence if he agreed to plead guilty. Applicant testified that he was never aware that he faced a potential sentence of twenty years. Applicant also testified that he was unaware that the charge required sex offender registry. Applicant acknowledged that he may have told the plea judge that he understood the charge was a most serious, violent and required sex offender registry, but Applicant testified that he did not really know what was going on at the time of the plea.

Counsel testified that he spoke with Applicant about the twenty year maximum sentence as well as possible negotiations for a specific sentence. Counsel testified that he was aware of the Applicant's federal parole violation and the Applicant indicated that he was very concerned as to whether or not he would serve his time in the South Carolina Department of Corrections or the Federal Bureau of Prisons. Counsel testified that he never guaranteed the Applicant that the sentence would run concurrent with the parole violation. Counsel also testified that he discussed with the Applicant the requirement to register as a sex offender and the fact that the charge would be violent.

This Court does not find Applicant's testimony to be credible. However, this Court finds Counsel's testimony to be credible. This Court finds that Counsel discussed the elements and nature of the charge with the Applicant, as well as potential sentences Applicant could receive. Counsel also reviewed with the Applicant the collateral consequence of sex offender registry and the effect the plea may have on Applicant's federal parole. As the record and testimony

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indicates, the Applicant was allowed to plead guilty pursuant to NC v. Alford¹, to a negotiated sentence cap. The record is clear that the Applicant pled guilty freely and voluntarily with full knowledge of the consequences he faced. Applicant stated on the record that he was satisfied with Counsel's representation. This Court finds that the Applicant has failed to meet his burden of proof as to this claim. Therefore, this claim is denied and dismissed.

Newly Discovered Evidence

The Applicant also alleged that he should be granted a new trial because of newly discovered evidence. A defendant requesting a new trial based on after discovered evidence must show that the evidence:

- (1) Is such as would probably change the result if a new trial was had;
- (2) Has been discovered since the trial;
- (3) Could not by the exercise of due diligence have been discovered before the trial;
- (4) Is material to the issue of guilt or innocence; and
- (5) Is not merely cumulative or impeaching. Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983).

Cory Walker testified that the Applicant is his father. Walker testified that the Applicant's sister, Tiffany, was possibly his sister and he believed that she was his sister. Walker testified that he reached out to Tiffany once the allegations came out and asked her what happened. Walker testified that Tiffany told him that nothing ever happened. Walker acknowledged that at the time of the conversation with Tiffany, he was 16 years old and Tiffany was probably 12 or 13 years old. Walker testified that the conversation occurred before Applicant's guilty plea. Walker testified that he never told Applicant or Counsel about the conversation at the time it occurred and the first time he mentioned this conversation with Tiffany was the week of this scheduled PCR hearing.

Tiffany, the victim in this matter testified that she knew the Applicant and was aware that

¹ 400 U.S. 25 (1970).

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there was a possibility that Applicant was her father. Tiffany testified that when she first reported the abuse, she spoke with officers and the Children's Advocacy Center about the allegations. Tiffany testified that she knew Cory Walker and considered him a family member. Tiffany acknowledged that Cory approached her after the allegations were known and asked her if the abuse occurred and she told him it did not. However, Tiffany testified that because she did not want to talk with anyone about what happened, she told Cory that the abuse never occurred. At the time of the conversation with Cory, Tiffany testified that she was 11 years old.

Counsel testified that he would have advised the Applicant to still plead guilty to the charge, even if he had been informed of the victim's statement to Mr. Walker, based upon Counsel's investigation and review of discovery materials.

This Court finds both Mr. Walker and Tiffany's testimonies to be credible; however, this Court is convinced that Tiffany was truthful when she testified that she did not want to discuss the details of the abuse with Mr. Walker, so she instead told him the abuse had not occurred. In light of the allegations, the alleged relationships between the victim, Applicant, and Mr. Walker, and victim's age at the time of the conversation, this Court finds it more likely than not that the victim's denial was an attempt to protect herself. This Court does not find that this conversation between Tiffany and Mr. Walker qualifies as newly discovered evidence. This Court finds that the Applicant failed to offer any testimony or evidence to indicate that he would have proceeded to trial and failed to produce any evidence that the outcome would have been different, had he been aware of the conversation between Tiffany and Mr. Walker. Furthermore, this Court finds that the information was discoverable at the time of the plea based upon Mr. Walker's admission that the conversation took place prior to Applicant's guilty plea. Therefore, this Court finds that the Applicant has failed to meet his burden of proof as to this claim and it is denied and

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dismissed.

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

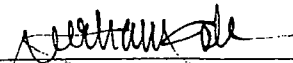
This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR, 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 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 25 day of July, 2014.



J. Derham Cole
Presiding Judge



The Brough Law Firm



Christopher D. Brough
175 Magnolia Street, Suite 202
Spartanburg, SC 29306

Phone: 864-585-3088
Fax: 864-585-3058
www.broughlaw.com

August 4, 2014

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

RE: THE STATE VS. EUGENE RHINEHART

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

- (1) Original Proof of Service upon opposing counsel.
- (2) Order of Dismissal.

If I can be of any further assistance please feel free to call me.

Sincerely,

Christopher D. Brough

Enclosure

cc: South Carolina Office of the Attorney General
Eugene Rhinehart

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The Brough Law Firm
175 Magnolia St., Suite 202
Spartanburg, SC 29306

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

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