IN THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM LEXINGTON COUNTY

COURT OF COMMON PLEAS

WILLIAM P. KEESLEY, CIRCUIT COURT JUDGE

2013-CP-32-1511

RECEIVED
AUG 22 2014
S.C. Supreme Court

Jason Boney #354029,.....Petitioner.

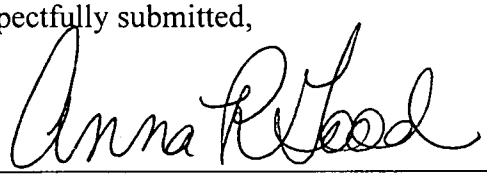
vs

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

NOTICE OF APPEAL

Jason Boney appeals the Honorable William P. Keesley's May 29, 2014, order denying post-conviction relief to the Petitioner. This order was clocked on August 5, 2014 and undersigned counsel received notice of entry of the order on August 21, 2014. A copy of the order on appeal is attached to this notice.

Respectfully submitted,



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Attorney for the Petitioner.

August 22, 2014.

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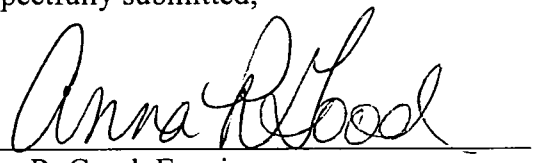
PROOF OF SERVICE

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, Walt Whitmire, 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 22nd day of August 2014.

Respectfully submitted,



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ORIGINAL

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON)	ELEVENTH JUDICIAL CIRCUIT
Jason Boney,)	C.A. No. 2013-CP-32-1511
S.C.D.C. No. 354029,)	
Applicant,)	
v.)	**ORDER OF DISMISSAL**
State of South Carolina,)	
Respondent.)	

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed April 30, 2013. Respondent made its Return. An evidentiary hearing into the matter was convened on April 14, 2014 at the Lexington County Courthouse. Applicant was present and was represented by Anna R. Good, Esq. Respondent was represented by Assistant Attorney General Walt Whitmire.

WPW #1

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Lexington County. Applicant was indicted at the October 2012 term of the Court of General Sessions for Lexington County for criminal sexual conduct with a minor, second-degree (2012-GS-32-2465). Assistant Public Defender Salley J. Henry represented Applicant. On January 22, 2013, Applicant pleaded guilty as indicted. The Honorable Clifton Newman sentenced Applicant to a term of imprisonment for ten (10) years. Applicant did not appeal his sentence or conviction.

At the PCR hearing, Applicant alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:
   a. failure to submit Applicant for a mental evaluation;
   b. failure to adequately apprise Applicant of the terms of the plea agreement and the constitutional implications of entering a guilty plea;
   c. failure to present Applicant's mother and step-father during the mitigation phase of the plea hearing;
   d. failure to file a notice of appeal.
2. Involuntary Guilty Plea:
   a. Applicant allegedly abused prescription medication and was incompetent to knowingly and voluntarily enter his guilty plea

SUMMARY OF TESTIMONY AT THE PCR HEARING

Applicant testified he met with counsel on occasions prior to the plea hearing. He stated that the first meeting occurred in October of 2012. He stated they discussed proceeding to trial. He was provided a copy of discovery materials from counsel. He stated that he told counsel that he was suicidal. He stated that he bonded out of pre-trial detention during the pendency of his case. He stated that the next meeting with counsel occurred on the morning of his plea hearing. He stated that it was his impression he was attending a roll call appearance instead of entering a plea that day. Applicant recalled the events of the morning in an attempt to convince this Court that he was misled. He stated that he was initially unable to locate counsel. He stated he tried checking around. Court personnel allegedly informed him that his name was not on the roll call roster. He testified that the news surprised him. Upon further investigation, Applicant was informed by personnel from the Solicitor's Office that he was scheduled to plead guilty that day. He stated he contacted family and expressed his apprehension about the new development. He stated that he met counsel at 10:30 a.m. He expressed his concerns to counsel. He claims that they did not discuss his case, the charges, and the terms of plea agreement on this occasion. He

stated that counsel advised him to enter the plea. He stated that he was clothed in jeans and a t-shirt, and asserted that he would have dressed himself in nicer clothing had he known that he was proceeding to a plea hearing.

He opined that the stress and anxiety of the events that morning led him to abusing prescription medication. He stated that he originally took one Prozac pill, then another, followed by three more pills. His prescription to the medication for the relevant time period was moved into evidence. He speculated that as a result of his alleged drug abuse, he was unable to comprehend his discussions with counsel prior to the plea. He stated he could not comprehend his colloquy with the plea judge. He asserted that he felt "loopy" during the plea colloquy. He stated that he did not want to plead guilty.

Applicant stated he attempted to phone his mother after the plea hearing. He stated the attempt failed and he was unable to inform his mother of his sentence. He stated that he discussed an appeal with counsel and directed her to file a notice of appeal. He stated that counsel assured him that if he desired an appeal, she would file the notice on his behalf.

Applicant's mother testified. She stated Applicant was living with her prior to the disposition of his charges. She claimed she tried contacting counsel for status updates on Applicant's case, but was not able to get information from the Public Defender's office. She stated that she was unaware Applicant was scheduled to plead guilty on January 22, 2013. Similar to Applicant, she stated that she was under the impression he was scheduled for a roll call appearance. Copies of incomplete phone records in the form of text messages between Applicant and his mother were offered into evidence. She stated that she learned that Applicant had been sentenced to imprisonment. She met counsel at the courthouse to collect Applicant's belongings and discovered that he drafted a note to her and placed it on the windshield of his

truck. She stated that she also secured Applicant's journal and various papers from his truck. She testified that Applicant is a wonderful son and a good father who was in the process of turning his life around prior to his current incarceration. She stated that she would have offered the same sentiment had counsel requested she address the plea judge during the mitigation phase of the hearing.

Applicant's step-father testified on his behalf. He described Applicant as a partial resident of his home. He stated that he made attempts to speak with counsel on the day of the representation. He stated his efforts fell short and that he was only able to speak an assistant he believed to be named Trish. Similar to his wife, he stated that he would have testified on Applicant's behalf during the mitigation phase of the plea hearing.

Counsel testified to her course of conduct during the representation. She stated that she has worked with the Public Defender's office for nearly twenty years. She provided a brief chronology of her appointment and developments in Applicant's case. Applicant was arrested in July of 2012. Counsel's first interview with Applicant occurred in September, followed by an office consultation with Applicant in November. Counsel described the policies and procedures utilized by Circuit Public Defender Madsen in selecting attorneys for appointment. She also described her general procedures in conducting her initial meeting with a new client, which includes apprising the client of the nature of charge, his constitutional rights, and the maximum exposure to incarceration. At the initial meeting in this matter, Applicant informed counsel of his anxiety disorder. Ms. Henry indicated that she knew of the Applicant's emotional issues. Counsel asserted that a mental health evaluation was unnecessary, based upon her observations and interactions with Applicant. She noted that she has submitted clients for evaluation in past cases and would have done so in this case, if it would have appeared to be warranted. She also

stated that her understanding was that the Applicant was on bad terms with his mother and step-father during the representation. Sometime after he bonded out, his parents kicked him out of their home. As a result, she understood that the Applicant had been living out of his truck prior to the plea hearing. Counsel recalled receiving a letter from Applicant's mother and speaking to her during the representation. She noted that she would have obtained Applicant's expressed consent prior to releasing information to his mother regarding the case. Counsel has reviewed the call logs from the Public Defender's Office in anticipation of the hearing.

Counsel stated that the Applicant told her of his version of the events that led to his arrest. She stated that he claimed he was entrapped by his common-law wife. He explained that his common-law wife had planned a feigned trip with the children and her friends in order to provide an opportunity to catch him committing adultery. The wife and her friends furtively followed Applicant to the victim's home and eventually observed Applicant commit adultery, which constituted criminal sexual misconduct with a minor.

Counsel stated that the case was not necessarily a plea from the beginning. She independently evaluated the State's evidence and developed an impression on the strength of the State's case. Yet, as the case developed, the Applicant decided he wanted to enter a guilty plea. She recalled plea negotiations with the solicitor and noted the solicitor was steadfast on pleading Applicant as indicted. Through the discovery of new inculpatory evidence that Applicant had engaged in sexual intercourse with the victim when she was even younger, counsel stated the solicitor was in the process of indicting Applicant on a new and more serious offense near the time of the plea hearing. As a result, Applicant decided to plead as indicted in order to avoid the prospect of more serious charges. Counsel stated the additional charge was ultimately *nol prosed* after the plea hearing.

Counsel discussed the terms of the plea offer and the collateral consequences with the Applicant, including mandatory post-incarceration registry as a sex offender. As a matter of general procedure, counsel stated she does not typically discuss an appeal with a client in prior to a plea. She explained her confusion at the plea hearing regarding mandatory post-incarceration G.P.S. monitoring and that it resulted from new precedent concerning the length of monitoring. Counsel was adamant that she provided notice to the Applicant and that he was well aware that his case had been scheduled for a guilty plea on January 22, 2013. She stated convincingly that "clients just don't show up and plead." Counsel stated that Applicant provided her no reason to believe he was ambushed or off guard that morning that he scheduled to plead guilty. Similarly, Applicant's conduct that day gave her no reason to believe that he was intoxicated. Counsel testified that she requested a probationary sentence in her mitigation case. After the plea hearing, counsel met with Applicant's mother to provide her with his personal belongings

WPA #6

APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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, (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668, 104 S.Ct. at 2064. The Applicant must

overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, *supra*. 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.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WPK #1

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, the Court finds that Applicant's testimony not to be credible when he asserts that he was not aware of what he was doing when he entered his plea, that he was coerced, and that he did not understand the process and his rights. Alleged statements about being suicidal were not enough to require evaluation. He failed to present sufficient evidence regarding Strickland's prejudice prong on the majority the allegations before the Court. No evidence was offered to show how abuse of Prozac would have hampered his cognition and

render his plea involuntary. He presented no medical personnel or pharmacist to allow the court to evaluate his claim that he was "loopy." The plea judge obviously saw nothing to raise a concern, nor did his attorney.

While it is understandable that relatives of a defendant want to know about the defendant's case, the discussions between an attorney and her client are generally confidential. Counsel gave a very reasonable explanation of why things would not be discussed with someone other than the Applicant, particularly where counsel understood there to be tension between the Applicant and his relatives. Applicant's Sixth Amendment protections do not extend to his mother and step-father. Counsel has no duty to communicate and apprise Applicant's parents of developments in the case.

A.

Applicant failed to meet his burden to prove counsel was ineffective for not submitting him for a competency or criminal responsibility evaluation. Due process prohibits the conviction of an incompetent defendant, and this right may not be waived by a guilty plea. Lee v. State, 396 S.C. 314, 320; 721 S.E.2d 442, 446 (Ct. App. 2011). "The test of competency to enter a plea is the same as required to stand trial." The accused must have sufficient capability to consult with his lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings against him." Lee v. State, 396 S.C. 314, 320, 721 S.E.2d 442, 446 (Ct. App. 2011) (internal citations and quotations omitted). "In order to find that petitioner's trial counsel was ineffective for refusing to request a Blair hearing on petitioner's competency to stand trial, petitioner must show that counsel was deficient and that the deficiency prejudiced the outcome of petitioner's proceedings." Matthews v. State, 358 S.C. 456, 459, 596 S.E.2d 49, 50–51 (2004). To show "prejudice within the context of counsel's failure to fully

investigate the petitioner's mental capacity, the [petitioner] need only show a reasonable probability that he was either insane at the time [the crime was committed] or incompetent at the time of the plea." Matthews, 358 S.C. at 459, 596 S.E.2d at 50.

This Court finds Applicant did not present sufficient evidence to overcome counsel's credible testimony. In adjudicating credibility here, this Court notes counsel's ample experience representing criminal clients. Furthermore, Applicant notably did not indicate that his mild disclosed psychological disorder impacted the disposition of his prior conviction. It is impractical to impose a *per se* duty on a criminal defense attorney to submit a client for an evaluation when the client has previously received mental health treatment or projects mood affectations reasonably associated with one having to cope with the prospect of conviction and incarceration. Regardless, the allegation rests upon mere speculation where Applicant has failed to produce expert testimony and findings regarding competency or criminal responsibility. See Porter v. State, 368 S.C. 378, 386, 629 S.E.2d 353, 358 (2006) ("Mere speculation of what a witness' testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for PCR."). Therefore, this allegation is denied and dismissed.

B.

Applicant failed to meet his burden to prove counsel was ineffective for failing to adequately apprise Applicant of the terms of the plea agreement and the constitutional implications of entering a plea. "A PCR applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the applicant would not have pled guilty and would have insisted on going to trial." Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). Dalton v. State, 376 S.C. 130, 136, 654 S.E.2d 870, 873 (Ct. App. 2007). "An applicant

may attack the voluntary, knowing, and intelligent character of a guilty plea entered on the advice of counsel by demonstrating that counsel's representation was below an objective standard of reasonableness." Porter, 368 S.C. at 383–84, 629 S.E.2d at 356.

The credible evidence is that counsel apprised the Applicant about the elements of the offense and his sentencing exposure from the outset of the representation. Noting that Applicant pleaded as indicted, without recommendation or negotiations, Applicant received sound advice here. Applicant has not presented any credible evidence to the contrary. Furthermore, Applicant has failed to meet Strickland's prejudice prong. Counsel testified credibly that Applicant was primarily induced to enter a guilty plea in January of 2013 in hopes of avoiding exposure to more serious charges and the strength of the case against him. Therefore, this allegation is denied and dismissed.

WPH #10

Similarly, the allegation that counsel was ineffective in failing to adequately advise him of the collateral consequences of his conviction is without merit. "The imposition of a sentence may have a number of collateral consequences ... and a plea of guilty is not rendered involuntary in a constitutional sense if the defendant is not informed of the collateral consequences." Brown v. State, 306 S.C. 381, 382, 412 S.E.2d 399, 400 (1991). "Refusing to invalidate a plea where the court had failed to advise the defendant that he might be civilly committed, even though commitment flowing from the crime he committed was, for all intents and purposes, automatic." Page v. State, 364 S.C. 632, 638, 615 S.E.2d 740, 742 (2005) (citing Cuthrell v. Director, 475 F.2d 1364, 1366–67 (4th Cir.1973). Regardless, counsel advised Applicant on mandatory registry as a sex offender. Applicant has not shown that counsel provided inaccurate advice on the matter. See Smith v. State, 329 S.C. 280, 283, 494 S.E.2d 626, 628 (1997) ([I]f the defendant's attorney undertakes to advise the defendant about parole eligibility and gives

erroneous advice, then the plea may be collaterally attacked."). The allegation that counsel's confusion over the prospect of lifetime G.P.S. monitoring at the plea hearing constituted deficient performance is facially without merit. See State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013) ("[S]tatutory requirement of lifetime monitoring without judicial review related to an assessment of risk of reoffending violates due process."). There has been no proof that the confusion demonstrated in the plea transcript created prejudice to the Applicant.

C.

Applicant failed to prove counsel was ineffective for failing to present his mother and step-father in mitigation at the plea hearing. A defendant has a right to counsel at sentencing. Jones v. United States, 783 F.2d 1477, 1482 (9th Cir. 1986). Counsel's failure to introduce family mitigating evidence at sentencing in this non-capital case has not been shown to be likely to change the outcome, so no prejudice has been shown. Jackson v. Roth, 24 F.3d 1002 (7th Cir. 1994). This Court's finds that counsel's reasoning that Applicant's parents would not have been favorable mitigation witnesses at sentencing was valid in light of the particular circumstances here. At a minimum, counsel performed within the accepted parameters of competence in assessing the benefit versus harm that might be derived from having these relatives speak on the Applicant's behalf at the plea. See Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993) ("This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial."). Applicant's prejudice argument was entirely speculative in light of the fact that Applicant was a recidivist sexual offender. (Plea Tr. pp.6-7). See Garrett v. State, 320 S.C. 353, 465 S.E.2d 349 (1995) (A trial judge is allowed broad discretion in sentencing within statutory limits.). Applicant's mother and step-father have demonstrated in their PCR testimony that anything they might have offered at sentencing would

be basic character testimony, and there is no proof that this would have been likely to have changed the outcome of the proceedings.

D.

Applicant failed to meet his burden to prove counsel was ineffective for failing to file a notice of appeal on his behalf. "[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S. Ct. 1029, 1036, 145 L. Ed. 2d 985 (2000). Although counsel testified she typically does not advise a client on an appeal prior to a plea hearing, Applicant testified they discussed the matter. This Court does not find the Applicant's testimony to be credible. Counsel testified credibly about her diligence in this regard. See Burt v. Titlow, 134 S. Ct. 10, 17, 187 L. Ed. 2d 348 (2013) ("It should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance' "). Therefore, this allegation is denied and dismissed.

E.

Applicant has failed to prove his alleged abuse of Prozac rendered his plea involuntary. A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969). "The accused must have sufficient capability to consult with his lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings against him." Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 596 (1992). This Court finds this allegation suspect in light of the plea judge

accepting the plea and Applicant's silence on the matter at the plea hearing. This Court finds counsel's testimony that Applicant did not demonstrate alarming conduct on the day of his plea to be credible. Applicant offered his Prozac bottle as an exhibit. The fact that the bottle is five pills short and that he testified that he took five pills that morning, even if true, does not constitute sufficient evidence that Applicant did not understand what he was doing. There was no expert testimony about what impact taking five Prozac pills over the period of time involved in this case would have had upon the Applicant, so the court is left to speculate. There is no evidence about post-plea effects of an alleged overdose.

As to the testimony and text messages concerning the Applicant's lack of prior knowledge about the purpose of the court date, the Applicant bears the burden of proof to show that there was deficient performance of counsel that prejudiced him under the Strickland definition. Even if the Applicant and his mother were under the false assumption that Applicant was only at court for a roll call appearance on January 22, 2013, that does not demonstrate deficient performance of counsel. The reason he came to court is not determinative of whether his guilty plea was entered in violation of Boykin v. Alabama.

WM #13

Regardless, Applicant has failed to meet Strickland's prejudice prong. As previously stated, the Applicant has provided no credible scientific evidence that the ingestion of five Prozac pills rendered him incompetent to knowingly and voluntarily plead guilty. Furthermore, this Court notes Applicant addressed the plea judge in an intelligent and cogent manner indicative of a person of sound mind. His attorney testified that she saw no reason for concern as to his competency at the time of the plea. Therefore, this allegation is denied and dismissed.

F.

Except as discussed above, this Court finds that the Applicant affirmatively abandons the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

CONCLUSION

Wpc #14

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 for post-conviction relief. 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 intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 29th day of May, 2014.

William P. Keesley

WILLIAM P. KEESLEY
Presiding Judge
Eleventh Judicial Circuit

Edgefield, South Carolina

#15

FILED
2014 AUG -5 P 12:10
BETH A. CARINGG
CLERK OF COURT
LEXINGTON, SC