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pc

August 20, 2014

RECEIVED

AUG 27 2014

S.C. SUPREME COURT

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

Re: Brian W. Sturgeon, SCDC# 316514 vs. The State of South Carolina
Case No: 2012-CP-23-3618

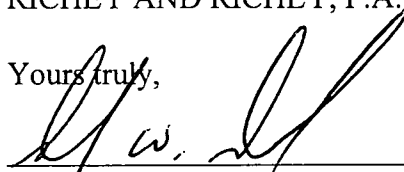
John Forest Ham, Jr. SCDC# 240615 vs. The State of South Carolina
Case No: 2011-CP-23-6136

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and an affidavit of service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,


Rodney Richey

RWR/

enclosures

cc: Karen Ratigan, Esquire

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

HONORABLE ROBIN B. STILWELL

2011-CP-23-6136

John Forrest Ham, Jr., SCDC # 240615,

APPELLANT,

against

STATE OF SOUTH CAROLINA,

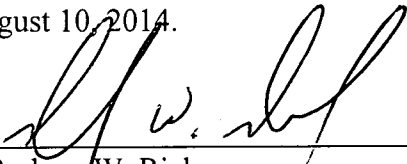
RESPONDENT.

RECEIVED

S.C. SUPREME COURT

NOTICE OF APPEAL

John Forrest Ham, Jr. appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Robin B. Stilwell, Circuit Judge on June 18, 2014 and Order issued on August 1, 2014 and filed on August 5, 2014. The Appellant received notice of the judgment on August 10, 2014.



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Attorney for the Appellant
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Other Counsel of Record:
Karen Ratigan, Esquire
Office of Attorney General State of SC
Post Office Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

HONORABLE ROBIN B. STILWELL

2011-CP-23-6136

John Forrest Ham, Jr., SCDC#: 240615,

APPELLANT,

against

STATE OF SOUTH CAROLINA,

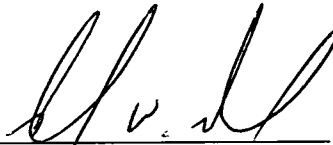
RESPONDENT.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on August 20, 2014, addressed to their attorney of record, Karen C. Ratigan, Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: August 20, 2014

RICHEY & RICHEY, P.A.



Rodney W. Richey
Attorney for the Appellant
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Greenville, South Carolina 29603
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STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2011CP2306136

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2011 AUG 5 AM 9 54

John Forrest Ham Jr 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 - Robin B Stilwell

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:

Rodney Wade Richey PO Box 10916 Greenville,
SC 29603-0916

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)
)
 John Forrest Ham, Jr.,)
 S.C.D.C. No. 240615,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2011-CP-23-6136

FILED-CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL B. WICKENSIMMER
 2014 AUG 5 PM 9 54

ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed September 14, 2011. The Respondent made its return on March 15, 2012. An evidentiary hearing into the matter was convened on June 18, 2014, at the Greenville County Courthouse.¹ The Applicant was present at the hearing and represented by Rodney W. Richey, Esquire.² Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified at the PCR hearing. Also testifying were R. Mills Ariail, Jr., Esquire and the Applicant's plea counsel, Alex Stalvey, Esquire. The Court had before it the transcripts of the guilty plea and sentencing hearings, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, and the return.

¹ This hearing was consolidated with the hearing on the Applicant's other PCR application (2012-CP-39-0177). The applications were not merged but – as the issues and witnesses for each case overlapped – the parties agreed it was most expeditious to have a single hearing.

² Mr. Richey represented the Applicant on both of his PCR applications.

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PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections. The Applicant was indicted by the Greenville County Grand Jury for Assault and Battery with Intent to Kill (ABWIK) (2009-GS-23-9547, count 1), Pointing and Presenting a Firearm (2009-GS-23-9548), Resisting Arrest with a Deadly Weapon (2009-GS-23-9549), Failure to Stop for a Blue Light (2009-GS-23-9554), and Kidnapping (2009-GS-23-9570). He was represented by Alex Stalvey, Esquire.

On May 19, 2010, the Applicant pled guilty and the Honorable Edward W. Miller deferred sentencing to a later date. On September 1, 2010, the Applicant appeared before the Honorable G. Edward Welmaker for sentencing and received concurrent terms of twenty years for ABWIK, five years for Pointing and Presenting a Firearm, five years for Resisting Arrest with a Deadly Weapon and three years for Failure to Stop for a Blue Light. Judge Welmaker levied a sentence of twenty-two years for Kidnapping, to be consecutive to the sentence for Failure to Stop for a blue light. The Applicant did not 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. Allowed the Applicant's attorney for another set of charges to draft a motion and consent order.
 - b. Failed to inform of right to appeal.
 - c. Failed to have the kidnapping victim's name removed from the indictment "since I had already [sic] been sentenced for carjacking her in Federal Court for the same incident."
 - d. Failed to properly advise about the kidnapping charge.
 - e. Failed to properly advise about the ABIK charge, including the possibility of self-defense or a lesser-included charge.
2. Involuntary guilty plea.

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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, 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) (citing Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)).

The Applicant stated he had federal charges, State Grand Jury charges, and Greenville County charges. The Applicant stated his federal public defender called plea counsel (and also his attorney for his State Grand Jury charges) and that they agreed he would go into federal custody with concurrent state sentences. The Applicant stated he would have pled guilty "to anything" in order to receive this deal. The Applicant stated plea counsel never advised him of the *mens rea* for the kidnapping charges. The Applicant admitted he did not dispute the factual recitation at either the guilty plea or sentencing hearing. The Applicant admitted he did not tell the plea judge he had been made any promises.

Plea counsel testified he filed discovery motions and received those materials. Plea counsel testified he reviewed the discovery with the Applicant, as well as the elements and sentence ranges for his charges. Plea counsel testified the incident that led to these charges occurred while the Applicant was out on bond for the State Grand Jury charges. Plea counsel testified there were several witnesses (including police officers) and there was no possible defense. Plea counsel testified his strategy would be to argue for the best possible sentence. Plea counsel testified he was aware of the Applicant's federal charges (and tried to have the Applicant serve his time in federal prison), but that he did not promise or guarantee the Applicant would go to federal prison. Plea counsel testified the Applicant never said he wanted a jury trial if he could not serve his time in federal custody.

R. Mills Ariail, Jr. represented the Applicant on his State Grand Jury charges. Ariail testified the Applicant was released on bond for these charges, then accrued the Greenville County charges, and then accrued the federal charges. Ariail testified the Applicant said he wanted to be in federal custody, so he spoke to the Applicant's other attorneys about this. Ariail stated the Applicant's attorneys all signed a consent order to attempt to have the Applicant be taken into federal custody first, but that the Federal Bureau of Prisons did not give credence to this order.

This Court finds the Applicant failed to meet his burden of proving his guilty plea was involuntary. The Applicant admitted to the plea judge that he was guilty. (Plea transcript, p.7). 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.6-7). This Court finds there is no evidence in the guilty plea transcript to support the Applicant's assertion that his guilty plea was not knowing, intelligent, or voluntary; 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.

This Court finds the Applicant failed to meet his burden of proving plea counsel did not explain the concept of *mens rea* regarding the kidnapping charge. Plea counsel testified he discussed the discovery materials, elements of the charges, and possible sentence ranges for the charges with the Applicant. This Court finds plea counsel's testimony is credible. This Court

notes the Applicant did not dispute the kidnapping charge or that he did “unlawfully seize, abduct, confine, inveigle, decoy or carry away [the victims] . . . without the authority of law.” (Plea transcript, p.4). This Court notes the Applicant stated at the guilty plea hearing that he reviewed the evidence with plea counsel. (Plea transcript, pp.7-8). This Court further notes the Applicant did not dispute the facts of the kidnapping at either the guilty plea hearing or sentencing hearing. See Stalk v. State, 375 S.C. at 300, 652 S.E.2d at 407.

This Court finds the Applicant failed to meet his burden of proving plea counsel was deficient in not ensuring he would serve his time in federal custody. The Applicant stated his attorneys all worked together and entered into a consent order in August 2010, the intent of which was that he would initially go to the federal Bureau of Prisons. Plea counsel testified, however, that he did not make any promises or guarantees to the Applicant that he would serve his time in federal prison. Further, plea counsel testified the Applicant never stated he would not plead guilty if he would not be able to serve his time in federal prison. This Court finds plea counsel’s testimony is credible.³ This Court finds the Applicant was aware of the charges he was facing and their sentencing ranges. The Applicant told the plea judge he was not made any promises in exchange for pleading guilty. (Plea transcript, p.6). This Court finds plea counsel was not deficient in his representation and could not have anticipated the Bureau of Prisons’ interpretation of the Applicant’s state and federal sentences. While the parties clearly hoped the Applicant would serve his sentences in federal custody, the Applicant was aware of the sentences he was facing and was not made any promises of federal custody in exchange for his guilty pleas to these charges. Cf. Holden v. State, 713 S.E.2d 611, 617, 393 S.C. 565, 575-76 (2011) (citing

³ In contrast, this Court does not find credible the Applicant’s assertion that he would not have pled guilty to these charges if he had known he would not serve his sentence in federal prison. Based on the overwhelming evidence of the Applicant’s guilt, this statement is highly improbable.

Roddy v. State, 339 S.C. 29, 36, 528 S.E.2d 418, 422 (2000)) (“Wishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made.”).

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.

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

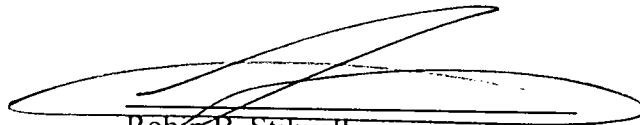
prejudiced by counsel's representation. Furthermore, the Applicant's guilty plea was entered knowingly and voluntarily within the mandates of Boykin. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His 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.

IT IS THEREFORE ORDERED:

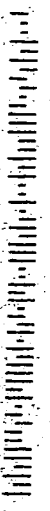
1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 1 day of August, 2014.



Robin B. Stilwell
Presiding Judge
Thirteenth Judicial Circuit

Gville, South Carolina.



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Greenville, South Carolina 29603

The Honorable Daniel E. Shearouse
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