

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
THE HONORABLE Robin B. Stilwell

CA No. 2013-CP-23-2303

RECEIVED

SEP 16 2014

S.C. SUPREME COURT

KEVIN LEE KEITH,

APPELLANT,

vs.

STATE OF SOUTH CAROLINA

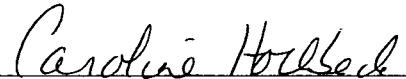
RESPONDENT.

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER
2014 SEP 8 PM 2 14

NOTICE OF APPEAL

Appellant KEVIN LEE KEITH, appeals from the Order of the Honorable Robin B. Stilwell, Circuit Court Judge clocked August 11, 2014.

Respectfully submitted,



Caroline M. Horlbeck, Esq.
101 Whitsett St
Greenville, SC 29601

Date: September 8, 2014

Other Counsel of Record: Karen Ratigan, Esq.
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE SUPREME COURT

Kevin Lee Keith,)
)
)
Appellant,)

C.A. No. 2013-CP-23-2303

-vs-)

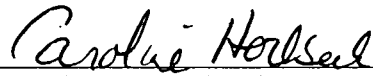
CERTIFICATE OF SERVICE

State of South Carolina,)
)
)
Respondent.)

This is to certify that I am an employee in the law office of Caroline M. Horlbeck, attorneys for Appellant, and that I have this day caused to be served upon the person(s) named below Appellant's Notice of Appeal by placing copies of same in the United States mail, with adequate postage thereon, addressed as follows:

Ms. Loriene French
S.C. Office of Appellate Defense
P.O. Box 11433
Columbia, SC 29211

Karen Ratigan, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211


Caroline M. Horlbeck

Greenville, South Carolina

9.11, 2014

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Kevin Lee Keith,)
 S.C.D.C. No. 174394,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2013-CP-23-2303

FILED - CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL B. WICKENSIMER
 2014 AUG 11 PM 4 18

ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed April 24, 2013. The Respondent made its return on October 18, 2013. An evidentiary hearing into the matter was convened on June 17, 2014, at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Caroline Horlbeck, 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, Symmes W. Culbertson, Sr., Esquire. The Court had before it the guilty plea transcript, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, the return and Applicant's Exhibit 1.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the November 2012 term of the Greenville County Grand Jury for three counts of first-degree

burglary (2011-GS-23-9368, 2012-GS-23-2034, and 2012-GS-23-2038), financial transaction card (FTC) theft (2012-GS-23-2029), and strong arm robbery (2012-GS-23-2040). He was represented by Symmes W. Culbertson, Sr., Esquire.

On January 7, 2013, the Applicant pled guilty.¹ The Honorable Letitia H. Verdin sentenced the Applicant to concurrent terms of eighteen years for each count of first-degree burglary, fifteen years for strong arm robbery, and five years for FTC theft. 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. Counsel did not meet with Applicant enough.
 - b. Counsel did not afford Applicant the chance to present a complete defense.
 - c. Counsel did not keep Applicant reasonably informed.

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).

¹ The State not crossed indictments for FTC fraud (2012-GS-23-2030, -2031, -5058), criminal conspiracy (2012-GS-23-2032, -2037), petit larceny (2012-GS-23-2033), first-degree burglary (2012-GS-23-2035, -2039), petit larceny, third offense or greater (2012-GS-23-5056), and FTC theft (2012-GS-23-5057).

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 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).

The Applicant stated he was indicted for second-degree burglary (non-violent) in 2011, but that the charge was first-degree burglary when he went to court. The Applicant stated that he did not realize the charge in which he plead guilty plea to was different than the charge he was indicted for until after the fact. He further alleges that counsel failed to explain why the charge he was pleading guilty to was different from the charge he was originally indicted for. The Applicant stated he had approximately one month to consider a fifteen-year plea offer and that he decided to accept it on the day of the plea hearing. The Applicant stated plea counsel told him the case was set for trial and that the fifteen-year offer was still available. The Applicant stated plea counsel did not promise he would receive fifteen years, but that the State would make this recommendation. The Applicant stated he would have gone to trial if he had not thought a

fifteen-year sentence was "a done deal."

Plea counsel testified he was appointed in this case and not the Applicant's first attorney. Plea counsel testified the Applicant wanted to plead guilty and that several plea offers were extended to the Applicant both prior to and during his representation. Plea counsel testified the Applicant rejected these offers. Plea counsel testified the Assistant Solicitor made a plea offer on June 18, 2012 to nol pros several charges and recommend a fifteen-year sentence. Plea counsel testified the Applicant was informed of this offer. Plea counsel testified the assistant solicitor sent a letter on November 30, 2012 indicating he was informed the Applicant did not want this offer so the case would likely be put on the January 2013 trial docket. Plea counsel testified he did not tell the Applicant on the day of the plea hearing that he was sure he would receive a fifteen year sentence. Plea counsel testified he did not recall why the burglary charge was enhanced to first-degree but that it was likely because of the Applicant's prior record.

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 his representation.

This Court finds the Applicant failed to meet his burden of proving plea counsel did not advise him that he was pleading guilty to first-degree burglary. While the Applicant stated he did not realize he was pleading guilty to first-degree burglary until he received the sentencing sheets after the plea hearing, this Court does not find this testimony to be credible. At the beginning of the guilty plea hearing, the clerk stated the Applicant is pleading guilty to three counts of first-degree burglary and the Applicant did not object. (Plea transcript, p.4). The plea

judge stated the sentence ranges on the three counts of first-degree burglary are between fifteen years and life imprisonment and the Applicant stated he understood. (Plea transcript, pp.4-5). This Court finds the Applicant's assertions are refuted by the plea transcript. 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 failed to meet his burden of proving plea counsel misadvised him about the sentence he would receive if he pled guilty. The Applicant stated he believed he was pleading guilty in exchange for a fifteen-year plea recommendation. This Court does not find the Applicant's testimony is credible. The Applicant signed the sentencing sheets prior to the guilty plea hearing and the box for "without negotiations or recommendation" was checked. In addition, plea counsel had a letter from the prosecutor in his file dated November 30, 2012 reflecting the prosecutor's understanding that the Applicant rejected the fifteen-year plea offer. As the case was on the trial docket, this Court finds the Applicant knew he was pleading guilty without a recommendation. Regardless, this Court finds that, even assuming arguendo that plea counsel misadvised the Applicant about the recommendation, any error was cured by the plea colloquy. See Holden v. State, 393 S.C. 565, 575, 713 S.E.2d 611, 616 (2011); Burnett v. State, 352 S.C. 589, 593-94, 576 S.E.2d 144, 246 (2003). Plea counsel noted this was a "straight up plea" and the Applicant did not object. (Plea transcript, p.10). Nor did the Applicant object after imposition of the eighteen-year sentence. (Plea transcript, pp.12-13). Additionally, as the Applicant gave a statement for one burglary charge and was caught in the residence for another burglary charge, this Court does not find credible the Applicant's assertion

that he would have pled guilty if he had known he would not receive a fifteen-year sentence.

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. 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. Therefore, this PCR application must be denied and dismissed with prejudice.

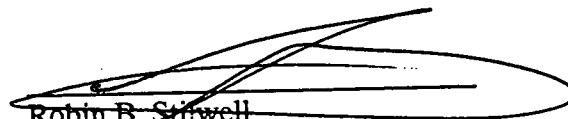
This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules

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 11 day of April, 2014.



Robin B. Stilwell
Presiding Judge
Thirteenth Judicial Circuit

COVILLE, South Carolina.

CAROLINE M. HORLBECK
ATTORNEY AT LAW

PCR

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RECEIVED

SEP 16 2014

September 11, 2014

S.C. SUPREME COURT

Via Regular Mail

Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: KEVIN LEE KEITH v. State

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondents. The Notice has been filed with the Greenville County Clerk of Court.

These matters are being referred to the Office of Appellate Defense in that we were participating as Court appointed counsel at trial.

Thank you for your attention to this matter.

Yours very truly,



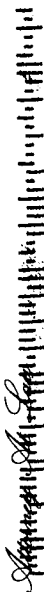
Caroline M. Horlbeck, Esq.

Enclosure

cc: Office of the Attorney General

Office of Appellate Defense

CAROLINE M. HORLBECK



Signature
101 WHITSETT ST.

GREENVILLE, SOUTH CAROLINA 29601

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Via Regular Mail

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