

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

J. ERNEST KINARD, JR, Circuit Court Judge

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OCT - 3 2014

Civil Action Number: 2013-CP-46-3897

S.C. Supreme Court

DEITRICK WILLIAMS
#288124,

Petitioner,

v.

STATE OF SOUTH
CAROLINA,

Respondent.

NOTICE OF APPEAL

The Petitioner above appeals the order of the Honorable J. Ernest Kinard, Jr. dated September 26, 2014 denying his application for Post-Conviction Relief.



September 30, 2014

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J. Ernest Kinard, Jr., Circuit Court Judge

Civil Action Number: 2013-CP-46-03897

Deitrick Williams,

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State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal in the above captioned case on the following individuals by depositing a copy of it in the United States Mail, postage prepaid, on October 2, 2014, addressed to:

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OCT - 3 2014

S.C. Supreme Court

October 1, 2014



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STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Detrick T. Williams, #313922,)
Applicant,)

2013-CP-46-3897

v.)

ORDER OF DISMISSAL

State of South Carolina,)
Respondent.)

DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

FILED-RECEIVED
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This matter comes before the Court by way of an Application for Post-Conviction Relief filed December 20, 2013. The Respondent made its Return on April 10, 2014. An evidentiary hearing into the matter was convened on August 6, 2014, at the Moss Justice Center in York, SC. W. Michael Hemlepp, Jr., Esquire represented the Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Phil Smith, Esquire also testified. This Court had before it a copy of the records of the York County Clerk of Court, records from the South Carolina Department of Corrections, the application, the State's Return and the trial transcript.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Applicant was indicted at the May 2013 term of the York County Grand Jury for Indecent Exposure (2013-GS-46-0850). Phil Smith, Esquire, represented him. On June 19, 2013, Applicant proceed to a bench trial before the Honorable R. Knox McMahon, was found guilty and was sentenced to three (3) year's incarceration, concurrent

to the time he was already serving. Applicant did not appeal his convictions or sentences.

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

1. "Trial counsel failed to advise me about an appeal and failed to file an appeal"
2. "I was refused my Miranda rights"
3. "Ineffective counsel"
4. "I was not giving(sic) a preliminary hearing on warrant"

At the hearing, Applicant proceeded on his claims of ineffective assistance of trial counsel for failing to file an appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. The Court also has read the trial transcript, all of which assists the Court in judging their credibility.

Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

Ineffective Assistance of Counsel

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) (citing Rule 71.1(e), SCRCP). 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 (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 this 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.

Failure to file an appeal

The Applicant alleges Counsel was ineffective for failing to file an appeal on the following issues: the process of the direct indictment; the correct charge; the judge proceeding with a bench trial; and ruling of the court concerning lesser included offenses.

At the PCR hearing, the Applicant testified he told Counsel he wanted an appeal. He also stated he received from Counsel "appeal papers." Applicant testified he did not hear anything back from Counsel regarding an appeal. Applicant further testified he knew of the 10-day window in which to file an appeal and that he wrote Counsel when he learned that no appeal was filed on his behalf.

Counsel testified Applicant proceeded to a bench trial and that he had filed an appeal on Applicant's behalf on a different trial. Counsel also testified he discussed with Applicant an appeal

from the bench trial and that Applicant wanted an appeal; however, Counsel did not perfect an appeal. Additionally, Counsel stated Applicant received a concurrent sentence to the time he was already serving and that he was not required to register as a sex offender. Counsel then stated Applicant said he was "good with thing," which Counsel believed meant not to appeal this case. When Counsel received the letter from Applicant expressing his desire to appeal, the time to appeal had run.

On cross-examination, Counsel testified he discussed the differences between a jury and bench trial with Applicant. Counsel also testified he argued the direct indictment issue to the court, which Judge McMahon denied. Counsel further testified he argued for lesser included charges in this case, but Judge McMahon also denied that motion.

Applicant must show how Counsel prejudiced his case by his performance. The decision of the South Carolina Supreme Court, in White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974), holds that even though the post-conviction relief court finds that the Applicant had never voluntarily and intelligently abandoned his appeal, the court has no jurisdiction to grant a belated appeal. However, where an accused establishes in a post-conviction relief hearing that he was unconstitutionally deprived of his statutory right to a direct appeal, the South Carolina Supreme Court, upon an appeal of the post-conviction relief decision, will review the trial record and pass upon all issues properly raised and argued as if the direct appeal has been perfected.

This Court finds the Applicant has failed to show that the outcome of his case would have been different had Counsel filed an appeal on his behalf. Cherry, supra. Applicant received a three-year sentence in this case which runs concurrently with the sentence he was already serving. If Applicant were to be successful in this case and on appeal, he could put himself in a much worse

position than he is currently in: his sentence could be run consecutively and face three additional years in prison. Applicant has not convinced this Court that a belated review of direct appeal issues in his best interest. Therefore, this allegation is denied.

CONCLUSION

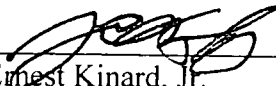
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court notifies the 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 for appeal.

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!



J. Ernest Kinard, Jr.
Presiding Circuit Court Judge
Sixteenth Judicial Circuit

9/3, 2014

Berkeley, South Carolina

2013 CP 46 3897 JER