THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

J. ERNEST KINARD, JR, Circuit Court Judge

Civil Action Number: 2013-CP-46-2491

DANNY RAY PITTMAN
#294081,

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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v.

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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STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS SIXTEENTH JUDICIAL CIRCUIT
Danny Ray Pittman, #347976, Applicant, v. State of South Carolina, Respondent.	)	2013-CP-46-2491 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed August 16, 2013. Respondent made its Return on December 30, 2013. An evidentiary hearing into the matter was convened on August 4, 2014, at the Moss Justice Center in York, SC. W. Michael Hemlepp, Jr., Esquire represented Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. Harry Dest, 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 guilty plea 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 charged with two counts of Attempted Murder and one count of Grand Larceny. Harry Dest, Esquire, represented him. On December 20, 2012, Applicant waived presentment of the charges to the grand jury and pled pursuant to North Carolina v. Alford to two counts of Assault and Battery of a High and Aggravated

Nature (ABHAN) and Grand Larceny before the Honorable Michael G. Nettles. Judge Nettles sentenced the Applicant to twenty (20) years for one count of ABAHN, five years, consecutive, for the other count of ABHAN, and five (5) years, concurrent, for Grand Larceny.

A Notice of appeal was filed on Applicant's behalf, but the South Carolina Court of Appeals dismissed his appeal. The Remittitur was issued on May 22, 2013.

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

1. "Ineffective Assistance of Counsel"
   a. "Failing to provide proof of paperwork that we (cannot read)"
2. "Challenge the validity of plea"
   a. "That I have gained nothing by pleading guilty"
3. "Breach of plea agreement"
   a. "the same as a trial. I received the max sentence."

At the hearing, the Applicant proceeded on his claims of ineffective assistance of plea counsel listed in his amended application.

SUMMARY OF TESTIMONY

At the evidentiary hearing, Applicant testified Counsel represented him and met with him three or four times. He claimed he did not review the entire case with Counsel. Applicant also claimed that he and Counsel discussed the medical records of the Victims, but Counsel never mentioned these pre-existing conditions during the guilty plea. Applicant testified he has since seen medical records that refute the injuries sustained by the Victims and could have been used in mitigation.

On cross-examination, Applicant admitted he was not under the influence of drugs or alcohol and had no mental or emotion issues during the guilty plea. Applicant also agreed with the facts of the case as the solicitor articulated during the plea. Applicant admitted the plea judge advised him of his constitutional rights and that he waived them in order to plead guilty. Applicant testified he was satisfied with Counsel's representation and had no complaints about Counsel. Applicant stated it was his decision to plead guilty and that nobody threatened him or promised him anything to plead guilty. He also stated he understood the court's questions and answer them truthfully.

Counsel testified he is the Chief Public Defender for the 16th Circuit and has been practicing criminal defense for twenty-four years. Counsel testified he received discovery in the case and discussed it with Applicant. Applicant pled under North Carolina v. Alford because Applicant so many drugs on the day of the incident, including 30-40 hydrocodone pills, Xanax, crack cocaine and marijuana, that he blacked-out and did not remember the incident. Counsel testified the evidence at trial would have been that Applicant was with Victim, his girlfriend, and her 11-year old daughter found her and her son in her house in pools of blood. Applicant then fled the scene and was apprehended in Horry County, where police found Victim's blood on Applicant's clothing. Victims also had skull fractures. Counsel testified that from the medical records and forensic evidence, there was overwhelming evidence of Applicant's guilt.

Counsel additionally testified that during mitigation at the guilty plea, he explained that Applicant was heavily under the influence of drugs during the incident, that Applicant was extremely remorseful, that letters were written on Applicant's behalf, and that Applicant need treatment for drug addiction. Counsel testified he was allowed to ask for the minimum sentence during the plea

and that the plea could have been much worse because the amount of prison time was left up to the plea judge.

Counsel also testified he met in chambers with Judge Nettles and the State prior to the plea hearing and that the sentence Judge Nettles handed down was legal. He stated he filed an appeal on Applicant's behalf, but found no reason to file a motion for reconsideration. Counsel lastly stated that when he viewed the crime scene photographs, skull fractures, and medical records, there was no need to argue over small issues.

On cross-examination, Counsel testified Applicant testified he received all of the discovery from the State, including the medical records of Victims. In these medical records, there were records that Victim #1 had a history of headaches and Victim #1 had a prior speech impediment. Counsel testified he decided not to argue these points due to the traumatic injuries to the Victims, including skull fractures. He stated he filed an appeal on Applicant's behalf after receiving a phone call from Applicant's mother. Counsel lastly testified he did not file a motion for reconsideration because he found no reason to and was not required to do so.

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 at the post conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. This Court finds the testimony of the Applicant not credible while finding Counsel's testimony very credible. 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. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

This Court finds Counsel provided effective assistance of counsel in this case. Counsel

advised Applicant of all of the charges and the sentences the charges carried. Counsel also negotiated with the State in Applicant's best interest. This Court finds Applicant made the decision on his own accord with the help of learned counsel. Additionally, this Court finds Applicant made this decision freely and voluntarily without any threats or promises from anyone else. Furthermore, this Court finds that it was ultimately the Applicant's decision to plead guilty.

This Court finds the Applicant's testimony regarding Counsel's ineffectiveness is not credible while also finding Counsel's testimony is credible. This Court finds the Applicant has failed to meet his burden of proving counsel's performance was deficient or that he was prejudiced thereby. Accordingly, this allegation is denied.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that 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 Counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. Therefore, these allegations are 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), SCRCP, 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

Beaufort, South Carolina