

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
Post Conviction Relief

2010-CP-38-00086

Maite Murphy, Circuit Court Judge

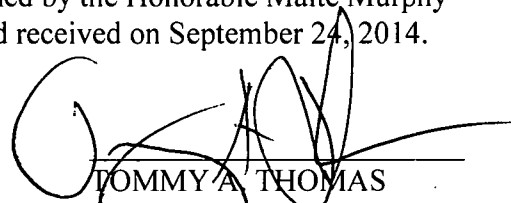
Johnny White #243047,..... Appellant,

vs.

State of South Carolina,Respondent.

NOTICE OF APPEAL

Johnny White #243047 appeals the order signed by the Honorable Maite Murphy on August 26, 2014, filed on September 12, 2014 and received on September 24, 2014.


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Irmo, South Carolina
October 10, 2014

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S.C. SUPREME COURT

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CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for the Appellant hereby certify that I placed in the United States Mail, a copy of an Notice of Appeal, with postage prepaid and the return address clearly shown on said envelope to Megan E. Harrigan, Esq. of the Attorney General's Office, at:

Megan E. Harrigan, Esq.
Attorney General's Office
P.O. Box 11549
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October 10, 2014
Irmo, SC

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS)
FOR THE FIRST JUDICIAL CIRCUIT)

Johnny White, #243047,)

Case No. 2010-CP-38-00086)

Applicant,)

ORDER OF DISMISSAL)

v.)

State of South Carolina,)

Respondent.)

This matter comes before the Court by way of an application for post-conviction relief filed January 19, 2010. The State made its Return on April 1, 2011, requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on May 29, 2014, at the Dorchester County Courthouse. Applicant was present at the hearing and was represented by counsel, Tommy Thomas, Esquire. Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office. After reviewing all testimony and other evidence presented at the hearing, along with a review of all records provided to the Court, this Court finds that there are no constitutional deprivations or other grounds on which to grant relief and is denying and dismissing this application with prejudice.

PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. Applicant was indicted during the December 2008 term of the Orangeburg County Grand Jury for Burglary in the First Degree (2008-GS-38-1951) and Assault

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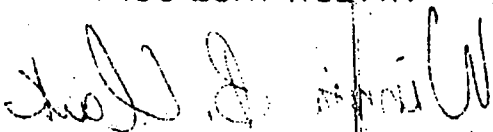
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Winyia B. Clark

CLERK OF COURT

ORANGEBURG COUNTY, SOUTH CAROLINA

ATTEST: TRUE COPY



ORANGEBURG, SOUTH CAROLINA

and Battery with Intent to Kill (2008-GS-38-1592). He was represented by Assistant Public Defender Jillian D. Ullman, Esquire. On July 20, 2009, Applicant appeared before the Honorable Edgar W. Dickson, where he pled guilty as indicted. Judge Dickson sentence Applicant to twenty-eight years imprisonment for Burglary in the First Degree and to twenty years for Assault and Battery with Intent to Kill.

Applicant filed a timely notice of appeal. The South Carolina Court of Appeals dismissed the appeal for failure to provide a sufficient explanation as required by Rule 203(d)(B)(iv), SCACR. The Remittitur was issued October 8, 2009.

In his application for post-conviction relief, Applicant alleged that he was being held in custody unlawfully based on the following allegations:

1. Ineffective assistance of counsel.
 - a. "Counsel fail[ed] to seek my medical evaluation concerning my mental health."
 - b. "Fail to file a directed appeal/motion for reconsideration and mollified sentence."
2. "5th, 6th, 14th Amendment Violations."
 - a. "Violate life and liberty interest."
3. "Due Process Rights."

At the evidentiary hearing, Applicant also alleged that Counsel was ineffective for failing to challenge his indictments pursuant to Rule 3(c), SCRCrimP. Applicant did not proceed forward on allegations 2 and 3 from above.

SUMMARY OF TESTIMONY PRESENTED AT EVIDENTIARY HEARING

At the evidentiary hearing, Applicant testified on his own behalf and testimony was presented from plea counsel, Jillian D. Ullman (hereinafter "Counsel"). This Court also had before it Applicant's guilty plea transcript, the records from the Orangeburg County Clerk of

Court regarding the subject convictions, Applicant's appellate records, and Applicant's records from the South Carolina Department of Corrections.

Applicant testified first on his own behalf. He testified that Counsel was appointed to represent him and that he met with her at least ten times before he pled guilty. He testified that he was able to discuss his case with Counsel and assist her in preparation for trial. He testified that he reviewed the elements of the offense and possible sentences with Counsel. He testified that he reviewed discovery with Counsel, including an audio recording where he described the crime, his involvement, and his need to fabricate an alibi defense that was obtained through a wiretap of another person's phone on an unrelated federal case. However, he denied that he was a participant to this call and stated that it was someone else being recorded. He testified that he discussed possible defenses with Counsel, including a possible alibi defense. He testified that he was preparing to proceed to trial with an alibi defense, but pled guilty on Counsel's recommendation after the audio recording was provided. He testified that his plea was not voluntary because he did not commit the offenses. He acknowledged that he pled guilty while under oath and admitted to the facts giving rise to these charges. He testified that he pled guilty because he did not know what was going on and did not think Counsel was prepared for trial.

He testified that he has mental health problems and a current diagnosis of schizophrenia brought on by stress. He testified that he suffers from memory related problems due to his condition. He testified that he is currently on medication to control the symptoms. He testified that he informed Counsel of his mental health concerns and requested she seek a mental health evaluation and obtain records from the Department of Mental Health, but she failed to do so. He

introduced copies of these records as Applicant's Ex. No 1 and 2. He testified that he was forced to move for an evaluation on his own. He acknowledged that he had a hearing on this motion, which was ultimately denied by the court. He acknowledged that he was able to discuss his charges and defenses with Counsel and assist in his defense.

He testified that he was not indicted within ninety days of his arrest as required by Rule 3(c), SCRCrimP. He testified that Counsel should have moved to quash his indictment based on this. He testified that he wanted to appeal his convictions and sentences, but that Counsel never discussed it with him. He testified that he was forced to file a notice of appeal on his own and that it was dismissed for failure to state an arguable basis for proceeding.

Counsel testified following Applicant. Counsel testified that she was appointed to represent Applicant as an Assistant Public Defender for Orangeburg County. She testified that she met with Applicant numerous times. She testified that one of her initial questions for new clients is whether he or she has any mental health concerns and she recalled having this discussion with Applicant. She testified that Applicant told her that he was previously treated and medicated for a mental health condition, but that he was not currently being treated or experiencing any symptoms. She testified that she had no reason to doubt Applicant's competency, as she communicated with him well and he assisted in preparing his defense for trial. She testified that Applicant never asked her to request his mental health records and she did not request any records because mental health was not a concern during her representation of Applicant. She elaborated that Applicant had his GED, was employed, and was consistently paying child support, all indicative of competency.

She testified that Applicant only began to discuss mental health concerns after the wiretapped telephone conversation surfaced. She testified that he appeared to be malingering in an attempt to minimize his involvement and to lessen his potential sentence. She testified that she did not join in his *pro se* motion for an evaluation because she did not believe Applicant was incompetent or that an evaluation was necessary. However, she testified that she allowed Applicant to present his motion to the court, which was ultimately denied.

Counsel testified that she was preparing for Applicant's trial and had noticed the State of a possible alibi defense when the wiretapped telephone conversation was provided to her. She testified that the voice on the recording was clearly Applicant describing how he had committed the crime and a fabricated alibi he planned to use in his defense. She testified that she reviewed the recording with Applicant and discussed how it negatively impacted his case. She testified that she advised Applicant that the recording would likely be used against him at trial and that she had no standing to move for suppression. She testified that based on this recording, as well as other overwhelming evidence including the victim knowing Applicant and being able to identify him, she advised Applicant it was in his best interest to plead guilty. She testified that she was able to reach a plea deal with the State for a recommended cap of twenty-eight years imprisonment. She testified that it was Applicant's decision alone whether to accept his plea offer. She testified that she thinks that resolving Applicant's charges by plea was in his best interest, as he likely would have been convicted at trial.

Counsel testified that she did not see any successful or viable basis on which to challenge Applicant's indictments. She testified that in her experience, any errors with an indictment are

curable and readily fixed by the Solicitor's office. She testified that even if she had moved to quash Applicant's indictments under Rule 3(c), SCRCrimP, Applicant's charges would not have been dismissed, but rather, the State would have amended the indictments.

Counsel testified that she filed a notice of appeal on Applicant's behalf after he requested she do so. She testified that because Applicant was challenging an appeal, she was required to provide a sufficient explanation as to why he should be allowed to proceed with his appeal pursuant to Rule 203(d)(B)(iv), SCACR. She testified that she did not think Applicant had such a reason, and therefore, was unable to provide one for the Court of Appeals.

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 that Counsel's testimony is credible and should be afforded great weight; conversely, this Court finds that Applicant's testimony lacks 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 (1985).

Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant has the burden of proving the allegations in his or her application and establishing that he is entitled to relief. Abney v. State, 408 S.C. 41, 45, 757 S.E.2d 544, 546 (S.C. Ct. App. 2014), *reh'g denied* (Apr. 24, 2014) (citing Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012)). 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 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether an 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, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. 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. "[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Abney, 408 S.C. at 46, 757 S.E.2d at 546 (citing Strickland, 466 U.S. at 690). 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 (1985); Roscoe v. State, 345 S.C. 16546 S.E.2d 417 (2001).

After careful review based on the standard discussed above, including a review of the testimony of the witnesses presented at the evidentiary hearing, this Court denies this application on the basis that Counsel's performance did not fall below the standard required and there was no resulting prejudice to Applicant from these alleged deficiencies. Below are the findings in regards to each of Applicant's claims of ineffective assistance of counsel:

Allegation that Counsel failed to seek a mental health evaluation

Applicant alleges that Counsel was ineffective for failing to request a mental health evaluation. Applicant made a *pro se* motion for an evaluation, which was denied by the trial court after a motions hearing. Counsel testified that she did not join in Applicant's motion or make her own motion for an evaluation because she had no reason to doubt Applicant's competency. Counsel testified that Applicant informed her that he previously had mental health issues, but he did not have any on-going issues and was not experiencing any symptoms indicative of a mental health condition. She testified that Applicant assisted her in trial preparation and that she was able to communicate with him without concern. Additionally, she testified that Applicant did not begin to raise any competency challenge until after a damaging video recording surfaced and that he appeared to be malingering.

This Court finds that this allegation is without merit and must be denied and dismissed with prejudice. First, this Court finds that Counsel's performance was not deficient, as she testified that Applicant was able to discuss his case and assist in his defense during the course of

her representation and Counsel had no reason to question Applicant's competency. This Court finds that Counsel's performance was reasonable according to professional standards and, therefore, did not perform deficiently in regards to this allegation.

Furthermore, this Court finds that Applicant has failed to establish that he was prejudiced by Counsel's alleged deficiency, as his *pro se* motion for an evaluation was heard and denied by the trial court. See Cherry, supra (holding that to establish prejudice, the result of the proceeding would have been different but for counsel's unprofessional error). Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

Allegation that Counsel failed to perfect an appeal on Applicant's behalf

Applicant alleges that Counsel was ineffective for failing to perfect a direct appeal on his behalf. Applicant elaborated that Counsel never discussed an appeal with him or asked if he would like to appeal his guilty plea. Counsel testified that she filed a notice of appeal upon Applicant's request, but that she was unable to provide the Court of Appeals with a sufficient reason for why the appeal should be allowed to proceed forward under Rule 203(d)(B)(iv), SCACR because she did not believe such a reason existed.

"[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 non-frivolous 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 (2000). "Even in cases when the defendant pleads guilty, the court must consider such factors as whether the defendant received the

sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights.” Id. Absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008). “One extraordinary circumstance which would require counsel to advise a defendant of the right to appeal from a guilty plea would arise when the defendant inquires about an appeal.” Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995).

After careful review based on the standard discussed above, this Court finds that Applicant has failed to carry his burden in regards to this allegation. Counsel testified that she filed a notice of appeal upon Applicant’s request, but that she was unable to provide a sufficient explanation as to why the appeal should proceed forward based on her duty of candor to the court. Counsel testified that she did not believe that Applicant had a meritorious ground on which an appeal could be sought, as Applicant pled guilty and was sentenced in accordance with the recommendation reached in plea negotiations with the State. This Court finds that Counsel’s performance was reasonable based on professional standards. Additionally, this Court finds that Applicant cannot establish the requisite prejudice, as he was afforded an opportunity to provide a sufficient reason why his appeal should go forward pursuant to Rule 203(d)(B)(iv), SCACR. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

Allegation that Counsel failed to challenge his indictments

Applicant alleges that Counsel was ineffective for failing to move to quash his indictments because he was not indicted within ninety days of his arrest pursuant to Rule 3(c), SCRCrimP. Counsel testified that she did not make a motion to quash his indictment because in her experience, such defects are commonly and readily remedied by amendments or other means and rarely, if ever, result in dismissal of charges.

~~Criminal rule requiring solicitor to act within 90 days after receipt of an arrest warrant from the Clerk of Court is administrative and nonjurisdictional, and thus failure of solicitor to act on warrant within 90 days does not within itself invalidate warrant or prevent subsequent prosecution. State v. Edwards 374 S.C. 543, 649 S.E.2d 112 (S.C.App. 2007), *rehearing denied, certiorari granted, reversed on other grounds*, 384 S.C. 504, 682 S.E.2d 820 (2009); State v. Culbreath, 282 S.C. 38, 316 S.E.2d 681 (1984)(rule requiring solicitor to take action on warrant within 90 days after its receipt by him was not jurisdictional, and thus failure of solicitor to act within 90 days did not within itself invalidate warrant or prevent subsequent prosecution).~~

This Court finds that this allegation is without merit and must be denied and dismissed with prejudice. This Court finds that Applicant has failed to establish that he was prejudiced by Counsel's alleged deficiency, such a challenge would not have resulted in the dismissal of his charges or prevented subsequent prosecution. Therefore, Applicant cannot show that the result of the proceeding would have been different absent Counsel's alleged deficiency and this allegation must be denied and dismissed with prejudice.

CONCLUSION

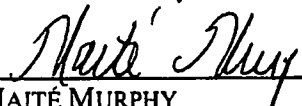
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a Notice of Appeal within thirty 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 post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on an applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

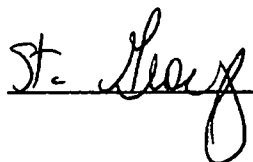
IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief shall be denied and dismissed with prejudice; and
2. The Applicant shall remain remanded to the custody of the State.

AND IT IS SO ORDERED this 26 day of Aug., 2014.



MAITÉ MURPHY
Presiding Judge
First Judicial Circuit


_____, South Carolina.

PCR

Tommy A. Thomas

ATTORNEY AND COUNSELOR AT LAW

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October 10, 2014

The South Carolina Supreme Court
Daniel E. Shearouse, Clerk of Court
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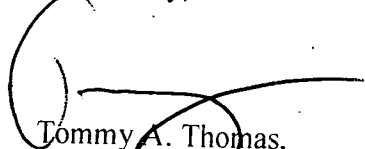
RE: Johnny White #243047 v. State of South Carolina
Case No.: 2010-CP-38-00086

Dear Sir or Madam:

Enclosed please find for filing, an original and a copy of a Notice of Appeal and Certificate of Service by Mail in the above referenced matter. Kindly return a clocked copy to me in the enclosed envelope.

Thank you and should you have any questions, please feel free to contact me.

Yours truly,


Tommy A. Thomas,
Attorney at Law

TAT/jem
cc: Megan E. Harrigan, Esq.
Johnny White #243047

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