

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DARLINGTON)
)
 Derrick Javard George,)
 S.C.D.C. No. 241851,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS

2012-CP-16-0735

ORDER OF DISMISSAL

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This matter comes before the Court by way of an application for post-conviction relief (PCR) filed August 29, 2012. The Respondent made its return on January 17, 2013. An evidentiary hearing into the matter was convened on July 17, 2013 at the Darlington County Courthouse. The Applicant was present at the hearing and represented by Parker E. Howle, 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, John M. Ervin, III, Esquire. The Court had before it the transcript of the guilty plea hearing, the Darlington County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, and the return.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Darlington County Clerk of Court. The Applicant was indicted at the May 2011 term of the Darlington County Grand Jury for concealing a weapon by an inmate (2011-GS-16-0553) and two counts of armed robbery (2011-GS-16-0554, -0557). He

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was represented by John M. Ervin, III, Esquire.

On August 29, 2012, the Applicant pled guilty. He was sentenced by the Honorable Howard P. King to concurrent terms of ten years for concealing a weapon by an inmate and thirteen years on each count of armed robbery. 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 fail to bring the attention of th[e] Court that appellants mental health status. That appellants [sic] did inform counsel that he was mental health, and diagnosis [sic] with mental illness psychosis."
2. "Preliminary hearings denied."
3. Involuntary guilty plea:
 - a. "Pressured to plead guilty."

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

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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 initially stated he did not review any of the State's evidence with plea counsel. The Applicant later admitted plea counsel brought him the discovery materials and they reviewed the DNA, fingerprint, and videotape evidence in his case. The Applicant stated he told plea counsel he was mentally ill (diagnosed with psychosis and antisocial personality disorder) and did not know anything about the charges. The Applicant stated his mother also mentioned his mental health history to plea counsel. The Applicant stated plea counsel pressured him to

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plead guilty and did not mention his mental health history to the plea judge. The Applicant admitted he told the plea judge he was satisfied with counsel's performance and could not explain why he did not tell the plea judge about his mental health history after counsel did not. The Applicant stated he filed a notice of appeal but plea counsel said there was no merit.

Plea counsel testified he was retained to represent the Applicant on Darlington County and Florence County charges. Plea counsel testified he filed discovery motions, received those materials, and reviewed them with the Applicant. Plea counsel testified they also reviewed the Applicant's version of events and that the Applicant never told him he did not remember what happened. Plea counsel testified he understood his communications with the Applicant and the Applicant never indicated he did not understand. Plea counsel testified neither the Applicant nor his mother ever mentioned the Applicant had a history of mental illness. Plea counsel testified he did not feel the Applicant had any problems with competency to plead guilty. Plea counsel testified the State made a thirteen-year offer that was a "package deal" and that he explained it to the Applicant.

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.

The Applicant admitted to the plea judge that he was guilty. (Plea transcript, pp.11-12). The Applicant also told the plea judge that he understood the trial rights he was waiving in pleading guilty and was satisfied with counsel. (Plea transcript, pp.10-11; pp.13-14). This Court finds there is no evidence in the guilty plea transcript to support the Applicant's assertion that he

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was pressured into entering a guilty plea; 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 investigate and present evidence regarding his mental health history. Plea counsel testified neither the Applicant nor the Applicant's mother ever advised him that the Applicant had a history of mental illness. Plea counsel testified he did not have any problems communicating with the Applicant and did not have any concerns about his competency. Court finds plea counsel's testimony is credible. This Court finds the Applicant's allegation is refuted by the guilty plea transcript because the Applicant – upon being asked by the plea judge whether he was aware of “any physical, emotional, or nervous problem that would keep [him] from understanding what [he was] doing here today” – stated “[n]o, sir.” (Plea transcript, p.6). See Rayford v. State, 314 S.C. at 48-49, 443 S.E.2d at 806; Stalk v. State, 375 S.C. at 300, 652 S.E.2d at 407. Regardless, as the Applicant neither presented an expert witness nor introduced any medical records at the PCR hearing, this Court cannot speculate as to the potential impact such testimony or evidence would have had upon the Applicant's case. See Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, as the applicant failed to have an expert testify at the evidentiary hearing, “any finding of prejudice is merely speculative”); see also Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (holding that, since the

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contents of challenged documents were not presented at the PCR hearing, the Applicant could not demonstrate how the failure of counsel to obtain these documents prejudiced the defense).

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 174.¹

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

¹ This Court notes the Applicant alleged “[p]reliminary hearings denied” in his PCR application. As the Applicant has failed to present any evidence or testimony regarding this claim, this Court finds it has been abandoned. Regardless, this Court finds the Applicant could not prevail upon this issue in any event because there is no constitutional right to a preliminary hearing. State v. Keenan, 278 S.C. 361, 365, 296 S.E.2d 676, 678 (1982).

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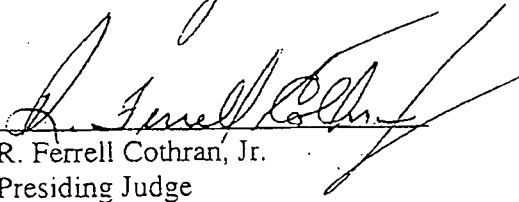
sentencing proceedings. Counsel was not deficient in any manner and the Applicant was not prejudiced by counsel's representation. Furthermore, the Applicant's guilty plea was entered knowingly and voluntarily within the mandates of Boykin. Therefore, this PCR application must be denied and dismissed 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:

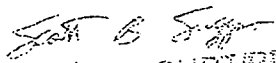
1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 19 day of Aug., 2013.


R. Ferrell Cothran, Jr.
Presiding Judge

Manning, South Carolina.

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