

RECEIVED

DEC 8 2014

750

STATE OF SOUTH CAROLINA
COUNTY OF CHEROKEE
IN THE COURT OF COMMON PLEAS

S.C. Supreme Court

JUDGMENT IN A CIVIL CASE

CASE NO: 2012CP1100611

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2014 MAR 17 AM 11:05
BRANDY W. MCBEE

David Parker #250125 vs. State Of South Carolina

CHECK ONE:

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):
 - Rule 12(b), SCRPC;
 - Rule 41(a), SCRPC (Vol. Nonsuit);
 - Rule 43(k), SCRPC (Settled);
 - Other: _____
- ACTION STRICKEN (CHECK REASON):
 - Rule 40(j) SCRPC;
 - Bankruptcy;
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 - Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 - Affirmed;
 - Reversed;
 - Remanded;
 - Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court;

Order of Dismissal

Dated at Gaffney, South Carolina, this the 17th day of March, 2014.

Court Reporter:

s/ J. Derham Cole

PRESIDING JUDGE - J. Derham Cole

This judgment was entered on the the 13th day of March, 2014, and a copy mailed first class this the 17th day of March, 2014, to attorneys of record or to parties (when appearing pro se) as follows:

James Kenneth Robertson PO Box 5888
Spartanburg, SC 29304

Alan McCrory Wilson PO Box 11549 Columbia,
SC 29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Brandy W. McBee

Brandy W. McBee - Clerk of Court

STATE OF SOUTH CAROLINA)
COUNTY OF CHEROKEE)
David L. Parker, #250125,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2012-CP-11-0611

ORDER OF DISMISSAL

RECORDED
INDEXED
2013
AUG 17 11 33 AM
CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief filed August 23, 2012. The Respondent made its Return on or about August 19, 2013. An evidentiary hearing into the matter was convened on January 9, 2013, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by J. Kenneth Robertson, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. S. Mitchell Slade, Esquire, also testified. This Court also had before it a copy of the records of the Cherokee County Clerk of Court regarding the subject convictions. Applicant's records from the South Carolina Department of Corrections, the Return, and the plea transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. He was indicted at the August 2011 term of the Cherokee County Grand Jury for two counts of armed robbery (2011-GS-11-0484, -0485), and the Applicant was indicted at the April 2012 term of the

Cherokee County Grand Jury for attempted armed robbery (2012-GS-11-0308). The Applicant was represented by Mitch Slade, Esquire. On April 16, 2012, the Applicant pled guilty before the Honorable Roger L. Couch and was sentenced to confinement for two concurrent eight year terms for the lesser included offenses of common law robbery, and eight years, concurrent, for attempted armed robbery. Applicant did not appeal his conviction and sentence.

ALLEGATIONS

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

1. Ineffective assistance of counsel, in that;
 - a. Counsel was ineffective for failing to motion the court for a continuance,
 - b. Counsel was ineffective for failing to suppress photo lineup,
 - c. Counsel was ineffective for failing to motion for dismissal of charges, and
2. Due process violations, in that;
 - a. Conviction was obtained in direct violation of United States Constitution 6th and 14th Amendments and the South Carolina Constitution Article I, Section 4.

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

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) (citing Rule 71.1(e), SCRPC). 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, 80 L.Ed.2d 674, 692 (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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

Applicant testified that he pled guilty to two counts of common law robbery and one count of attempted armed robbery, and received a sentence of eight and one-half years as a negotiated sentence. Applicant testified that he was informed by the plea judge that he was

pleading to a most serious and violent offense, but Applicant testified that he believed the charge was non-violent. Applicant testified that he did not think he had enough time to prepare for trial, so he felt that he was forced to plead guilty. Applicant also testified that because of the confusion over whether or not the attempted armed robbery charge was non-violent or violent, the State agreed to reduce the negotiated sentence to eight years.

Counsel testified that he was appointed to represent the Applicant on these charges and began work on the case in September 2011. Counsel testified that he discussed the possibility of a trial and possible defenses with the Applicant. Counsel testified that one of the issues in proceeding to trial was the fact that the Applicant had given police a statement admitting that he asked four people for rides to the ATM, but denied threatening each person. Counsel testified that although he did not have the 911 call tape from the final victim, he did have written statements from each victim. Counsel testified that he discussed an alibi defense with Applicant, but it was not a viable defense. They did discuss a possible defense if Applicant was not shown on the videotapes from the ATMs, but Counsel did not ever get any of the footage from the ATMs. Counsel also testified that because one of the victims dropped Applicant off around Fourth Street, the defense of a drug deal gone bad was also discussed. The Applicant was concerned about the charge being considered violent because he was facing five charges (four armed robbery charges and one attempted armed robbery) and had prior offenses. Counsel testified that he did make a mistake when initially advising the Applicant that the charge would be non-violent, but that issue was resolved at the plea when the State agreed to reduce the negotiated sentence further and the violent nature of the charge was discussed with Applicant. Ultimately, Counsel testified that he discussed the options that Applicant faced with the Applicant and Applicant picked the option to plead guilty with the negotiated sentence.

First, this Court finds that although the Applicant specifically raised the allegations that Counsel was ineffective for failing to move for a continuance, failing to move to suppress the photo lineup, and failing to move for dismissal of all charges in his application, he did pursue any of those allegations at the hearing. Therefore, this Court finds that the Applicant voluntarily abandoned these allegations.

As to the allegations raised at the hearing, this Court finds the testimony of Counsel to be more credible than the testimony of the Applicant. Applicant's testimony appeared to allege that Counsel was unprepared to proceed to trial, which led to Applicant's reluctant acceptance of the plea. The Applicant's allegation that Counsel failed to conduct an adequate pre-trial investigation is without merit. Following testimony and review of the transcript, it is clear that Counsel had reviewed the facts and evidence, as well as the options that Applicant faced. The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). The Applicant failed to point to any specific matters Counsel failed to discover, or any meritorious defenses that could have been pursued had Counsel been more fully prepared. Furthermore, the Applicant failed to show any prejudice that may have resulted from Counsel's alleged inadequate preparation. Accordingly, this allegation is dismissed.

In Hill v. Lockhart, 474 U.S. 52 (1985), the United States Supreme Court held that the

two-part standard adopted in Strickland v. Washington, *supra*, for evaluating claims of ineffective assistance of counsel applies, as well, to guilty plea challenges based on ineffective assistance of counsel. To meet the Court's "prejudice" requirement, a criminal defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Hill at 59. Although it was clear through testimony that Counsel did misadvise the Applicant as to the non-violent/violent nature of his charge, this Court finds that the error was cured by the plea court and further discussions with the Applicant as to his understanding and willingness to continue with the plea. Even where counsel fails to advise, or even misadvises, a defendant regarding a critical aspect of his charges, such as sentencing range, the error is cured where the trial court during a guilty plea properly advises the defendant about the matter in question. Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998). The Applicant failed to establish that he would have proceeded to trial, but for, Counsel's incorrect advice and failure to fully investigate possible defenses. Therefore, this claim is denied and dismissed.

Due Process Violations

This Court finds that, although raised in the application, this allegation was not pursued by Applicant at the hearing. Therefore, this Court finds that the allegation was voluntarily abandoned by the Applicant.

Summary

This Court finds in regards to the allegation of ineffective assistance of counsel, the Applicant's testimony is not credible. This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in his representation, and that Counsel's conduct does not fall below the objective standard of

reasonableness.

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. See Frasier supra. Therefore, this allegation is denied.

CONCLUSION

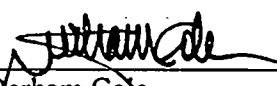
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court cautions 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 this 13 day of March, 2014.



J. Derham Cole
Presiding Judge

RECORDED & INDEXED

MAR 17 11 09 AM '14