THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

HONORABLE FRANK R. ADDY, JR.

2011-CP-30-0559

Marcus D. Young, SCDC # 321575,

APPELLANT,

against

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Marcus D. Young appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Frank R. Addy, Jr., Circuit Judge on October 14, 2014 and Order issued on November 7, 2014 and filed on November 17, 2014. The Appellant received notice of the judgment on December 8, 2014.

Rodney W. Richey
Attorney for the Appellant
Post Office Box 10916
Greenville, South Carolina 29603
(864) 467-0503

Other Counsel of Record:
J. Rutledge Johnson, Esquire
Office of Attorney General State of SC
Post Office Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

HONORABLE FRANK R. ADDY, JR.

2011-CP-30-0559

Marcus D. Young, SCDC# 321575,

against

STATE OF SOUTH CAROLINA,

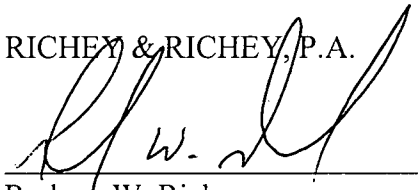
RESPONDENT.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on December 9, 2014, addressed to their attorney of record, J. Rutledge Johnson, Esquire, Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: December 9, 2014

RICHEY & RICHEY, P.A.



Rodney W. Richey
Attorney for the Appellant
Post Office Box 10916
Greenville, South Carolina 29603
(864) 467-0503

LYNN W. LANCASTER

STATE OF SOUTH CAROLINA COUNTY OF LAURENS	)	IN THE COURT OF COMMON PLEAS EIGHTH JUDICIAL CIRCUIT
	)	
	)	2014 NOV 17 P 2:05
Marcus D. Young, #321575,	)	2011-CP-30-0559
	)	
Applicant,	)	
	)	LAURENS COUNTY
v.	)	CLERK OF COURT
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

ORDER OF DISMISSAL

This matter comes before the Court by way of an Application for Post-Conviction Relief filed June 9, 2011. Respondent made its Return on September 14, 2011. An evidentiary hearing into the matter was convened on October 14, 2014, at the Greenwood County Courthouse. The Applicant was present and represented by Rodney Richey, Esquire relieved as counsel. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, Applicant testified on his own behalf. Joe St. Pierre, Esquire, also testified. This Court also had before it a copy of the records of the Laurens County Clerk of Court, records from the South Carolina Department of Corrections, the guilty plea transcript, DSS records from the minor children and medical records for the minor children.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Laurens County Clerk of Court. Applicant was indicted at the November 2008 term of the Laurens County Grand Jury for three counts of Assault and Battery with Intent to Kill (2008-GS-30-1634, 1635, 1636) and one count of Assault and Battery of a High and

Aggravated Nature (2008-GS-30-1637). Applicant was represented by Joseph St. Pierre, Esquire. On October 20, 2010, the Applicant pled pursuant to North Carolina v. Alford to one count of Assault and Battery with Intent to Kill as indicted, one count of Assault and Battery of a High and Aggravated Nature as indicted, and two counts of Assault and Battery of a High and Aggravated Nature as a lesser included offense of Assault and Battery with Intent to Kill before the Honorable J. Derham Cole. Applicant received a 15-year sentence for Assault and Battery with Intent to Kill and 10-year sentences for each Assault and Battery of a High and Aggravated Nature conviction. All sentences were to be served concurrently. Applicant did not appeal his conviction and sentence.

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

1. "Ineffective Assistance of Counsel"
2. "Involuntary Plea"

At the hearing, Applicant proceeded on the ineffective assistance of counsel and involuntary guilty plea claims.

SUMMARY OF TESTIMONY

Applicant testified he pled guilty to Assault and Battery with Intent to Kill (ABWIK) and ABHAN after beginning a trial. Applicant's main contention was that Counsel failed to investigate the facts of his case. He stated Counsel was appointed to his case and proceeded to a jury trial, which was then stopped in exchange for a plea pursuant to North Carolina v. Alford. Applicant testified Counsel explained to him his rights concerning a guilty plea.

Applicant testified Counsel did not properly investigate his case because Counsel did not obtain the minor children's medical records before trial. Applicant then stated he only saw these records after he pled guilty. Applicant claims these records did not corroborate the State's case and

he would not have pled guilty if he would have seen them before the trial. Additionally, Applicant testified the DSS records of the minor children show other physical abuse and that he did not know these records existed. Applicant claimed Counsel did not investigate these records and that they show that someone else could have abused the children.

Applicant testified Counsel should have challenged the arrest warrant as there was no probable cause for his arrest. Applicant also stated he would have pursued a trial if Counsel would have investigated the arrest warrant. Applicant further testified he thought Counsel was ineffective for not obtaining grand jury empanelment documents because he believes the grand jury only had 16 members during the indictment process. Applicant lastly testified that while Counsel hired an investigator, this investigator never discussed the records with Applicant nor discussed the possibility of calling medical personnel as witnesses on Applicant's behalf.

On cross-examination, Applicant admitted that he stopped the jury trial and decided to plead guilty. Applicant admitted that he had enough time to discuss his case with Counsel and that Counsel explained to him the evidence that State possessed, the charges and the sentences. Applicant attempted to argue that he thinks that because all of the charges occurred at the same time, he should have only been charged with one offense. Applicant admitted that he waived his constitutional rights by pleading guilty including right to a jury trial, right to present witnesses on his own behalf and the right to remain silent. Applicant stated he pled freely and voluntarily and that he was not forced to plead nor threatened to plead. He lastly testified he was willing to accept the offer from the State at the time of the plea. On re-direct examination, Applicant testified he would not have pled guilty if he had a chance to review the DSS records prior to the plea.

Counsel testified Applicant was charged with three counts of ABWIK and one count of

ABHAN. Counsel testified he engaged the State concerning plea offer but Applicant refused any offers because Applicant was adamant that he was innocent. Counsel stated he received the children's medical reports in the discovery material. Counsel then testified he hired an investigator and had extensive interviews with Applicant, during which Counsel thoroughly review the medical reports with Applicant. Counsel explained that the female minor victim's report were not favorable to Applicant; Counsel discussed this with Applicant. Counsel further testified the other children's medical reports were evidence of ABHAN but not ABWIK.

Counsel testified he believed there was a "fair chance" that Applicant would have pursued a trial if he had told Applicant the medical records were helpful to Applicant's case. Counsel also stated he did not believe that calling medical providers as witnesses at trial would be to Applicant's benefit and that it was the State's burden of proving the victim's injuries were caused by Applicant's actions. Counsel testified he consulted with a physician concerning this case, but could not recall specifics. Counsel further stated he did not recall the female minor child's pre-existing condition, but that could have been beneficial information; however, given that child's other injuries, Applicant did not have a good chance of acquittal at trial.

Concerning the arrest warrant issue, Counsel testified he reviewed the warrant and the affidavit and found no issues with either. Counsel stated the State had sufficient probable cause to arrest Applicant.

On cross-examination, Counsel testified he received the DSS records and reviewed these with Applicant. Counsel also stated had he found the arrest warrant deficient, he would have challenged it prior to trial. Counsel further stated Applicant decided to plead on the second day of trial, which was after a Jackson v. Denno hearing and other motions to suppress evidence. Counsel additionally

testified the State withdrew any offers at the beginning of trial, but that it was Applicant's decision to testify without any threats or coercion.

On re-direct examination, Counsel testified that female minor child's pre-existing lung condition would have helped to impeach the medical records. Counsel also stated the medical records would have been introduced at trial while the DSS records would not have been entered into evidence.

On re-cross examination, Counsel testified he would have challenged the medical records if Applicant wanted to continue with the trial and sought out the discrepancies in them. Lastly, Counsel testified there was overwhelming evidence of Applicant's guilt as to the female victim's injuries as to sustain a conviction for ABWIK.

On recall, Applicant testified that while he does not know whether Counsel reviewed the arrest warrant, he did not review it with Counsel.

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. 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, 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. 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, 88 L.Ed. 2d 203 (1985).

Failure to Investigate

Applicant claims Counsel was ineffective because Counsel failed to properly investigate his case prior to his guilty plea.

"Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998). 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).

Applicant alleged Counsel was ineffective for failing to obtain the minor children's medical records and DSS reports prior to trial and failing to review those reports with Applicant.

Counsel testified he received discovery from the State in this case and extensively discussed it with the Applicant. The discovery included, but was not limited to, the medical and DSS reports concerning the minor children. Counsel testified while some of the medical reports would not sustain convictions of ABWIK for all of the minor children involved in this incident, the medical reports of the minor female child were very damaging to Applicant's case.

Additionally, Counsel testified he prepared for trial and even started the trial. Counsel challenged the Applicant's statement to law enforcement in a Jackson v. Denno[1] hearing. However, the trial judge ruled the statement was admissible. Counsel testified he spoke with Applicant the next morning, and Applicant told Counsel he wanted to plead guilty. Counsel further testified he reviewed the arrest warrants and supporting affidavit, found no issue with either, but would have challenged them if he found any deficiencies.

This Court finds the Applicant's testimony regarding Counsel's ineffectiveness is not

credible while also finding Counsel's testimony is credible. Counsel, based on his experience as a defense attorney, sufficiently prepared this case for trial. Counsel thoroughly discussed with the Applicant all of the discovery documents on numerous occasions. Counsel also was prepared to challenge the minor children's medical records should Applicant have decided to continue with his trial.

Applicant also alleged he had witnesses ~~that~~ who would have proven Counsel was ineffective. However, no witnesses testified on the Applicant's behalf at the evidentiary hearing. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992).

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.

Involuntary Guilty Plea

Applicant alleged that he would not have pled guilty had Counsel provided him with and reviewed with him the DSS and medical records of the minor children.

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, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621 (1977). Therefore,

---

1 378 U.S. 368 (1964).

statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. U.S., 519 F.2d 317 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993).

Applicant's alleges his plea was involuntarily entered. This Court finds that this allegation is conclusively refuted by the record. At the guilty plea hearing, the Applicant testified he had enough time to speak with his attorney. (Tr. p. 5). Applicant stated Counsel explained the indictments and potential sentences in this case. (Tr. p. 5). Applicant testified he understood his constitutional rights (Tr. pp. 7-9). Applicant further testified he was pleading freely and voluntarily without threats or coercion. (Tr. p. 11). Counsel testified at the hearing that it was Applicant's decision to plead guilty and that he did not threaten or coerced Applicant to plead. Counsel also testified he reviewed and discussed the medical records with Applicant prior to trial.

This Court finds that Applicant has failed to carry his burden of proving that his guilty plea was not freely and voluntarily entered. The overwhelming evidence in the record reflects that the plea was knowingly and voluntarily entered. Boykin v. Alabama, 395 U.S. 238 (1969); Vickery v. State, 258 S.C. 33, 186 S.E.2d 827 (1972). Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63 (1977). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal

inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. U.S., 519 F.2d 317 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976). The Applicant showed no reason why he should be allowed to depart from the truth of the statements he made during his guilty plea hearing. This Court finds the Applicant's testimony at the PCR hearing lacked credibility. Therefore, this Court finds that Applicant's guilty plea was freely and voluntarily entered.

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 advises 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!

Frank R. Addy, Jr.
Presiding Circuit Court Judge
Eighth Judicial Circuit

Nov. 7, 2014
Greenwood, South Carolina

A TRUE COPY OF ORIGINAL
Lynn W. Lancaster
Lynn W. Lancaster
Laurens County CCCP & GS

RICHEY AND RICHEY

A PROFESSIONAL ASSOCIATION

ATTORNEYS AT LAW

RODNEY W. RICHEY
LOLA S. RICHEY

POST OFFICE BOX 10916
GREENVILLE, SOUTH CAROLINA 29603

(864) 467-0503
(864) 467-0646 FAX
888-882-4878 Toll Free

December 9, 2014

The Honorable Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Re: Marcus D. Young, SCDC# 321575 vs. State of South Carolina
Case No: 2011-CP-30-0559

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and a Proof of Service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,

Rodney Richey

RWR/tlg
enclosures
cc: J. Rutledge Johnson, Esquire

Richey & Richey, PA
Attorneys at Law
Post Office Box 10916
Greenville, South Carolina 29603

The Honorable Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

29211$1330 B099