THE STATE OF SOUTH CAROLINA
SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2012-CP-26-9603

The State, ...Respondent.

v.

Justin Rayl..Appellant.

NOTICE OF APPEAL

Justin Rayl appeals the denial of post-conviction relief in this case. The Order of Dismissal was served on Appellant on November 25, 2014.

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Phone: 843-444-6122
Attorney for Appellant

Other Counsel of Record:
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December 17, 2014

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PROOF OF SERVICE

I certify that I have served the Notice of Appeal and copy of the Request for Transcript to the following recipients by depositing a copy of it in the United States Mail, postage prepaid, on December 17, 2014, addressed to:

Daniel Shearouse, Clerk of Court
Supreme Court Building
1231 Gervais Street
Columbia, SC 29201

Horry County Common Pleas
Horry County Clerk of Court
P.O. Box 677
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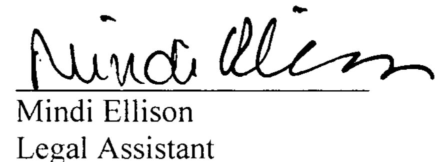

Mindi Ellison
Legal Assistant

December 17, 2014

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Justin Monroe Rayl,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

C.A. No.: 2012-CP-26-9603

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HORRY COUNTY
MELANIE HUGGINS-WARD
CLERK OF COURT

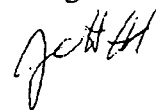
ORDER

This is a Post-Conviction Relief Proceeding

Application filed this Application for post-conviction relief (PCR) on December 13, 2012 along with a Supplement to application and memorandum of law.[1] The undersigned heard this case on October 27, 2014. Lacy Lee, II, Esquire, represented the Applicant. The State was represented by Josh Thomas, Esquire.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the July 2007 term of the Horry County Grand Jury for abuse/to inflict great bodily injury upon a child (2007-GS-26-3067) and assault and battery of a high and aggravated nature (2007-GS-26-3068). Kia Wilson, Esquire, represented Applicant. On December 113, 2011, Applicant proceeded to trial by jury. However, on December 14, 2011, Applicant pled guilty to abuse/to inflict great bodily injury upon a child. The Honorable Edward B. Cottingham sentenced Applicant to ten years imprisonment. The State nolle prossed the assault and battery of a high and aggravated nature charge on December 16, 2011 (84628-1).

[1] This Supplement is spiced with facts which have not been substantiated by the evidence presented at the hearing. The facts addressed in this Order are those developed at the hearing.



Applicant filed an appeal on December 21, 2011 to the South Carolina Court of Appeals. The South Carolina Court of Appeals dismissed Applicant's appeal on July 18, 2012 and the matter was remitted to the lower court. The state avers that Applicant currently has another pending appeal.

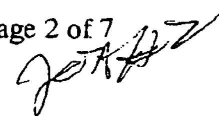
Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Trial counsel rendered ineffective assistance of counsel by:
   a. failing to properly review all evidence prior to trial
   b. failing to fully investigate and interview potential witnesses
   c. failing to retain testimony of expert witnesses to refute State's medical expert testimony
   d. failing to provide discovery evidence to client for review prior to trial
   e. failing to effectively cross examine state's witnesses."
2. "Plea counsel's actions resulted in Mr. Rayl's guilty plea not being freely, voluntarily, and understandingly made."

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). 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 on 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* 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 80 L.Ed.2d 674. The Applicant must overcome this presumption in order to receive relief. *Cherry v. State*, 300 S.C115, 386 S.E.2d 624 (1989).

The reviewing court applies 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, the court measures an attorney's performance by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 386 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.E. at 117-18, 386 S.E.2d at 625.

The court reads the allegation of the application for post-conviction relief to be an allegation of ineffective assistance of counsel.

With respect to guilty plea trial counsel, the Applicant must show 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, 59 (1985).

Applicant testified that he met with trial counsel three of four times and that trial counsel was aware that Applicant had been interviewed twice by law enforcement and given a polygraph test. Applicant testified that when he plead he was not aware that trial counsel did not have the transcript of the interview.

Applicant testified that he did not receive discovery until after his plea and that he never received a copy of his second interview and the transcript he did receive had errors "throughout."

Applicant testified that trial counsel received one-half of a transcript and that it contained discrepancies. Trial counsel testifies that she did not have a copy of a transcript of the second interview and the tapes she did get were inaudible. Trial counsel testified Applicant never told her of a second interview nor did anyone else. Trial counsel informed the trial judge that she had not been provided anything regarding a second interview. This is reflected by her statement to the trial judge (TR p. 26 LL 3-25) during a *Jackson v. Denno*[2] hearing. At the *Jackson v. Denno*

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[2] Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964).

hearing trial counsel asserted to the court that she was unaware of the second interview and the trial court gave trial counsel overnight to review the state's transcription. The transcript of Applicant's trial and plea reflects the second statement issue was not addressed on the next day.

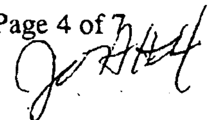
The record reflects that trial counsel exerted all efforts a reasonable attorney would when she found out, the day of trial, that a second interview of Applicant had taken place. This effort resulted in the trial judge granting trial counsel overnight to review the second interview transcript and discuss its ramifications with Applicant.

The Applicant has not provided this court with transcripts of either interview and therefore the court cannot address what, if any value, they had to the State or Applicant. The hearing testimony from trial counsel was that the second interview transcript had a confession on it and that Applicant had never conveyed to her that he had confessed and actually when confronted with its existence Applicant claimed he did not remember it. Applicant testified that his statements during the second interview did not constitute a confession.

Again, the second tape issue is moot as Applicant has failed to place into evidence the tape or the transcripts for this court's assessment of its value or impact on Applicant's trial.

In addition to allegations specifically listed as failures of trial counsel, Applicant additionally asserts his guilt was not freely, voluntarily, or understandingly made based on "plea counsel's advice."

Based on Applicant's testimony his complaint regarding his plea is several fold. First, he testifies he would not have plead guilty if he knew trial counsel did not have the transcription of the second interview. This is belied by the fact that at the time of the plea he was well aware of the issue regarding the second interview as it had been discussed by the state, trial counsel, the Court, and himself on the first day of his trial.



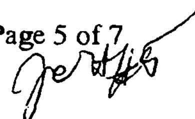
Applicant also alleges he would not have plead guilty but for trial counsel's insistence that he needed to plea or he would be convicted and get a thirty year sentence. Trial counsel testified that she encouraged Applicant to enter a plea of guilt, testified that based on the confession in the second interview Applicant had no defense and told Applicant this. Trial counsel testified she advised Applicant that he could go forward with his trial but she had nothing to offer.

Trial counsel's father, an attorney, was present on the morning of the second day and met with trial counsel and Applicant.[3] Applicant testified that trial counsel's father advised him to plead or he would get a 30 year sentence which is exactly what trial counsel had conveyed to Applicant. Applicant testifies trial counsel's father told him trial counsel had done the best she could do and that applicant had no option but to plea. There is nothing in the record that establishes that trial counsel shared any confidential information with her father.

Applicant has not proven that trial counsel's advice was ineffective. That is, the record does not reflect this advice was not true or lacked factual or legal basis. Trial counsel's advice was well within the range of competence demanded of attorneys in criminal cases. Clearly, trial counsel felt the advice she conveyed to Applicant was in his best interest. This being the case, this court need not analyze the second prong of the applicable standard, the "but for" prong, as trial counsel was not ineffective and committed no errors in her representation of Applicant nor in her advice as to a plea being in his best interest.

Applicant attempts the usual artful dodge when confronted with his answers to questions posed by the trial judge during the plea. The dodge is "my attorney made me do it." This position is not supported by the record or the hearing testimony. Applicant claims he was told to

[3] Trial counsel also testified that her father also was present when she spoke with the judge prior to Applicant's guilty plea.



couch his answers, not based on the truth, but on what the trial judge wanted to hear. Applicant points to his hesitance to answer the trial judge at page 115 lines 17-25 of the transcript. This portion of colloquy does not support but rather negates Applicant's position. At this point it does appear Applicant had been remonstrated by the trial judge for what the trial judge considered a hesitancy in answering the trial judge's question. At this point, Applicant did confer with counsel (TR p. 115 LL 5-9). Thereafter, the trial judge makes it clear he was not looking for particular answers but wanted to be assured Applicant was pleading guilty freely and voluntarily and Applicant confirmed his plea (TR p. 115 L 9 through p. 116 L 4). If Applicant was simply parroting answer, the trial judge made it clear that what he wanted was confirmation of a free and voluntary plea. Applicant thereafter unequivocally confirmed his plea was being entered freely and voluntarily.

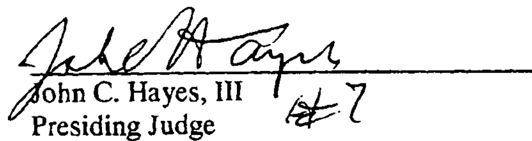
Applicant cannot now dodge his responses to the judge by now stating he lied to the judge. In *Dalton v. State*, 376 S.C. 130, 654 S.E.2d 870 (Ct. App. 2007) the Court of Appeals fully addressed the standard by which apply to review of a plea of guilt, *Dalton* establishes the sanctity of a guilty plea and the hurdles one attacking his or her plead of guilt must vault. Applicant has not established that trial counsel told him how to answer the questions posed by the judge. Even if she told him how to couch his answers this does not eviscerate his plea. Applicant, regardless of how he answered, stated repeatedly, as set forth herein above that he was entering his plea freely and voluntarily. Applicant cannot now with any degree of credibility establish his plea, regardless of how he answered the judge's questions, was anything other than a free and voluntary act on his behalf.

Applicant has failed to carry his burden of proof and failed to prove his counsel was ineffective or that his plea was anything but freely, voluntarily, and understandingly made.

Wherefore, Applicant's Application for Post-Conviction Relief is denied and dismissed with prejudice.

Applicant is hereby placed on notice that any petition for certiorari to the South Carolina Supreme Court must be filed within thirty (30) days. See Appellate Court Rules 203, 206, and 227(b).

IT IS SO ORDERED.



John C. Hayes, III
Presiding Judge

November 16th, 2014
Conway, South Carolina

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December 17, 2014

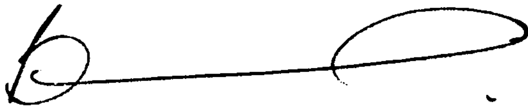
Daniel Shearouse
Supreme Court Building
1231 Gervais Street
Columbia, South Carolina 29201

RE: Justin Rayl #00349311 v. State of South Carolina
Case No.: 2012-CP-26-9603

Daniel:

Enclosed is the Order of Dismissal, Notice of Appeal and request for transcript. I have enclosed an extra copy of the notice and request. Please file the Notice of Appeal and request and return a clocked copy of each in the envelope provided.

Please feel free to contact our office should you have any questions.



Bobby G. Frederick
Attorney at law

CC: Joshua Thomas

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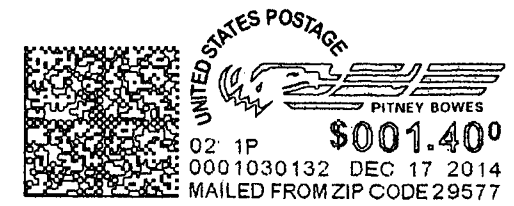

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