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December 17, 2014

Via Regular Mail

Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: DERRICK A. YOUNG v. State

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondents. The Notice has been filed with the Greenville County Clerk of Court.

These matters are being referred to the Office of Appellate Defense in that we were participating as Court appointed counsel at trial.

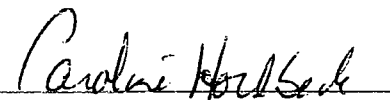
Thank you for your attention to this matter.

Yours very truly,

RECEIVED

DEC 22 2014

S.C. SUPREME COURT


Caroline M. Horlbeck, Esq.

Enclosure

cc: Office of the Attorney General
Office of Appellate Defense

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
THE HONORABLE JAMES R. BARBER

CA No. 2013-CP-23-4575

DERRICK A. YOUNG,

APPELLANT,

vs.

STATE OF SOUTH CAROLINA

RESPONDENT.

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER
2014 DEC 18 PM 10 37

NOTICE OF APPEAL

Appellant DERRICK A. YOUNG, appeals from the Order of the Honorable James R. Barber, Circuit Court Judge clocked November 17, 2014 and received by counsel on November 18, 2014.

RECEIVED

DEC 22 2014

S.C. SUPREME COURT

Respectfully submitted,

Caroline M. Horlbeck

Caroline M. Horlbeck, Esq.

101 Whitsett St
Greenville, SC 29601

Date: December 17, 2014

Other Counsel of Record: Karen Ratigan, Esq.
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE SUPREME COURT

Derrick A. Young,)
)
)
Appellant,)

C.A. No. 2013-CP-23-4575

-vs-)

CERTIFICATE OF SERVICE

State of South Carolina,)
)
)
Respondent.)
_____)

This is to certify that I am an employee in the law office of Caroline M. Horlbeck, attorneys for Applicant, and that I have this day caused to be served upon the person(s) named below Applicant's Notice of Appeal by placing copies of same in the United States mail, with adequate postage thereon, addressed as follows:

Ms. Lorie French
S.C. Office of Appellate Defense
P.O. Box 11433
Columbia, SC 29211

Karen Ratigan, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211



Caroline M. Horlbeck

Greenville, South Carolina

Dec. 18, 2014

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE)

C.A. No. 2013-CP-23-4575

Derrick Antron Young,)

S.C.D.C. No. 273562,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

ORDER OF DISMISSAL

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER
2014 NOV 17 PM 2 08

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed August 21, 2013. The Respondent made its return on March 26, 2014. A hearing was held on August 28, 2014 at the Greenville County Courthouse. The Applicant was present and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf. Also testifying was the Applicant's plea counsel, Christopher T. Posey, Esquire. The Court had before it the guilty plea transcript, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, the return, and Applicant's Exhibits 1-2.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the December 2010 term of the Greenville County Grand Jury for resisting arrest with assault (2010-GS-23-8605), at the April 2011 term for possession with intent to distribute (PWID) cocaine base (2010-GS-23-9819), and at the June 2012 term for trafficking cocaine (2011-GS-

23-6189) and trafficking cocaine base (2011-GS-23-6190). The Applicant also waived presentment on the charge of failure to stop for a blue light (2012-GS-23-8436). He was represented by Christopher T. Posey, Esquire.

On October 9, 2012, the Applicant pled guilty.¹ The Honorable Letitia H. Verdin sentenced Applicant to concurrent terms of 10 years for resisting arrest with assault, 13 years for PWID cocaine base, second offense, 13 years for trafficking cocaine (28-100 grams), second offense, 13 years for trafficking cocaine base (28-100 grams), first offense, and 3 years for failure to stop for a blue light. The Applicant did not appeal.

ALLEGATIONS

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

1. Violations of the 4th, 5th, 6th, and 14th Amendments.
2. Ineffective assistance of plea counsel:
 - a. Applicant was denied counsel "at a critical stage during proceedings prior to guilty plea."
 - b. Counsel failed to thoroughly investigate and have the evidence suppressed.
 - c. Counsel failed to obtain video of the traffic stop.
 - d. Counsel failed to object to "unfounded allegations" at plea.
 - e. Counsel advised Applicant to sign sentencing sheets before they were filled out.

This Court notes that, while nothing about his Anderson County charges was mentioned in his PCR application, the Applicant attempted to address issues related to those charges at this PCR hearing. This Court, however, cannot rule upon the Anderson County allegations. One

¹ On the same date, the Applicant also pled guilty to several Anderson County charges: two counts of first-degree assault and battery (2011-GS-04-1069, -1070), PWID cocaine (2011-GS-04-1071), and unlawful carrying of a pistol (2011-GS-04-1072). The Applicant was sentenced to concurrent terms of 10 years for each count of first-degree assault and battery, 10 years for PWID cocaine, and 5 years for unlawful carrying of a pistol. This Court notes there is some confusion in the guilty plea transcript, as the indictments are captioned as Pickens charges on the cover of the transcript.

must file a PCR application in the county of conviction in order to challenge that conviction. S.C. Code Ann. § 17-27-40 (Supp. 2006). As the Applicant's Anderson County charges resulted in Anderson County convictions, he must file a PCR application in Anderson County in order to challenge those convictions. A PCR judge with jurisdiction over Tenth Judicial Circuit PCR matters will be able to rule upon any allegations in an Anderson County PCR application. S.C. Code Ann. § 17-27-80 (Supp. 2006).

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).

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).

The Applicant stated he retained plea counsel for both the Anderson and Greenville charges. The Applicant stated he had several meetings with plea counsel both at the jail and at counsel's office. The Applicant stated he did not review the audio/video tapes but admitted plea counsel provided his discovery materials. The Applicant stated he wanted plea counsel to challenge the search and seizure from his March 19th and May 20th incidents. The Applicant stated plea counsel met with him five days before the plea hearing and said there was a seven-year plea agreement that he worked out with the plea judge (and that the State was not involved).

Plea counsel testified he filed discovery motions and – to the best of his knowledge – received full discovery from the State. Plea counsel testified he did not recall there were any audio/video tapes from these incidents. Plea counsel testified he reviewed the discovery materials with the Applicant, as well as the charges, elements, and sentencing ranges for the offenses. Plea counsel testified the Applicant relayed his version of the events related to his various charges. Plea counsel confirmed he met with the Applicant several times at both the jail and at his office. Plea counsel testified he discussed Fourth Amendment issues with the Applicant on all of his charges but that he did not believe any individual case was strong to prevail on a suppression motion. Plea counsel testified there was never a seven-year plea recommendation in this case. Plea counsel testified there was an agreement (but not a formal recommendation) for the Applicant to plead guilty in June 2012 where he would ask for a nine-year sentence and the State would not object. Plea counsel explained this deal was no longer available after the Applicant was arrested on a bench warrant. Plea counsel testified he told the

Applicant that he would be pleading guilty without a recommendation.

This Court finds the Applicant failed to meet his burden of proving plea counsel did not adequately meet with him to review the case. Plea counsel testified they had numerous meetings, reviewed the discovery materials, and discussed the Applicant's version of events related to his various charges. Plea counsel also testified he informed the Applicant of the elements of the charges and the potential sentence ranges of each. This Court finds plea counsel's testimony is credible. This Court also notes plea counsel did not believe there were audio or video recordings in this case. As the Applicant failed to demonstrate that any such recordings existed, he cannot prevail upon his assertion that he did not have access to them before his plea hearing. Cf. Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (holding that, since the 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).

This Court finds the Applicant failed to meet his burden of proving plea counsel should have made Fourth Amendment challenges in the incidents occurring on March 19th and May 20th. This Court notes plea counsel testified he did not believe any arguments in this vein would have been strong enough to prevail on a motion to suppress. Regardless, this Court finds the Applicant cannot prove either deficiency of counsel or resulting prejudice because he failed to demonstrate that such Fourth Amendment challenges would have been successful. See Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) ("When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, defendant must show that such claim is meritorious and that the verdict would have been different absent the evidence that should have been excluded.") (citation omitted).

This Court finds the Applicant failed to meet his burden of proving plea counsel misadvised that he would receive a seven-year sentence if he pled guilty. Plea counsel testified there was never a seven-year plea offer in this case. Rather, plea counsel testified he had an agreement with the State that he would request a nine-year sentence at a June 2012 plea hearing and the State would not object. Plea counsel testified, however, that they could not avail themselves of this agreement because the Applicant was arrested on a bench warrant. This Court finds plea counsel's testimony is credible. This Court notes the Applicant failed to present any evidence of a seven-year offer. See Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (holding that, in a PCR proceeding, the applicant bears the burden of proving the allegations in their application). This Court finds there was no seven-year offer in this case and that the Applicant knew he was pleading guilty that day without a sentence recommendation. The Applicant signed sentencing sheets that were marked "without negotiations or recommendation" and he did not object when the State noted there was no plea recommendation during the guilty plea hearing. (Plea transcript, p.25).

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. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

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

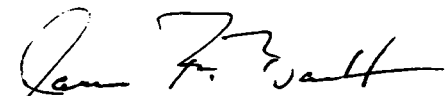
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner and the Applicant was not prejudiced by counsel's representation. 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 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.

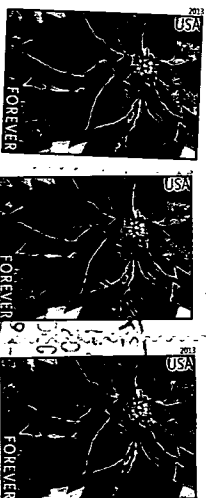
AND IT IS SO ORDERED this 6th day of November, 2014.



James R. Barber, III
Presiding Judge
Thirteenth Judicial Circuit

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