

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

ALISON R. LEE, Circuit Court Judge

Civil Action Number: 2014-CP-46-1517

BRIAN E. GAINES #293395,

Petitioner,

v.

STATE OF SOUTH
CAROLINA,

Respondent.

NOTICE OF APPEAL

The Petitioner above appeals the order of the Honorable Alison Renee Lee, dated December 10, 2014, and filed with the Clerk's Office on December 16, 2014, denying his application for Post-Conviction Relief.



January 15, 2015

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S.C. Supreme Court

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Brian Gaines,

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State of South Carolina,

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PROOF OF SERVICE

I certify that I have served the Notice of Appeal in the above captioned case on the following individuals by depositing a copy of it in the United States Mail, postage prepaid, on January 12, 2015, addressed to:

David Hamilton, Clerk of Court
York County Court of Common Pleas
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S.C. Supreme Court

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STATE OF SOUTH CAROLINA)
 COUNTY OF YORK)
)
 Brian Gaines, #293395,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 SIXTEENTH JUDICIAL CIRCUIT

Case No. 2014-CP-46-01517

ORDER OF DISMISSAL

DAVID HAMILTON
 CLERK, C.P. & G.S.
 YORK COUNTY, SC

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This matter comes before the Court by way of an application for post-conviction relief filed May 7, 2014. The State made its Return on August 20, 2014 requesting an evidentiary hearing. A hearing was convened November 20, 2014 at the York County Courthouse. Applicant was present at the hearing and was represented by counsel, W. Michael Hemlepp, Jr., Esquire. Respondent was represented by Assistant Attorney General J. Rutledge Johnson. After reviewing all testimony and evidence presented at the hearing, along with a review of all records provided to the Court, this Court finds that there are no constitutional deprivations or other grounds on which to grant relief and denies and dismisses this application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Applicant was indicted during the August 2013 term of the York County Grand Jury for trafficking crack cocaine (2013-GS-46-02979). Melissa Inzerillo, Esquire, represented Applicant on this charge. On October 8, 2013, Applicant appeared before the Honorable Derham Cole, where he pled guilty to the lesser included offense of trafficking crack cocaine, second offense. Judge Cole sentenced Applicant to incarceration for twenty years pursuant to a negotiated sentence, with credit for time served. Applicant did not appeal his conviction or sentence.

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully based on allegations of ineffective assistance of counsel for failure to investigate, prepare for trial, and request continuance; prosecutorial misconduct because of unethical practices; and constitutional violations under the South Carolina Constitution and the United States Constitution.

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SUMMARY OF TESTIMONY PRESENTED AT EVIDENTIARY HEARING

At the evidentiary hearing, Applicant testified on his own behalf. Respondent presented testimony from plea counsel, Melissa Inzerillo. This Court also had before it Applicant's guilty plea transcript, the records from the York County Clerk of Court regarding the subject conviction, and Applicant's records from the South Carolina Department of Corrections.

Applicant testified first on his own behalf. He testified that he completed the ninth grade. He was arrested February 9, 2013 for trafficking crack cocaine and was released on bond two to three days later. Inzerillo was appointed as his public defender, and he talked with her three to four times. They discussed his case, possible sentences, and whether he would like to proceed to trial or take a plea. He testified that he did speak with Inzerillo about his right to appeal.

Applicant testified that during his plea, he was distracted in the courtroom. He did not inform Inzerillo after entry of his plea that he wanted to appeal at that time, and Inzerillo did not bring up the possibility of an appeal either. Applicant testified, and the transcript supports, that Judge Cole did not say anything to Applicant about a right to appeal or advise him on this right when taking Applicant's plea. However, Applicant testified that he knew there was a ten day time limit to appeal the entry of a guilty plea. Before signing the sentencing sheet, Applicant informed Inzerillo that he would want to appeal, but he did not say anything after the sentence. Applicant testified that after he was sentenced, he had no time to speak to Inzerillo, as he was taken immediately out of the courtroom. Applicant clarified that the only relief he seeks is the right to have a belated appeal.

Inzerillo testified a Life Without Parole notice had been served on Applicant on September 5, 2013. Applicant decided to plead guilty after he lost a pretrial suppression hearing and the trial began. Inzerillo explained to Applicant his right to appeal, including the ten day time limit, immediately prior to Applicant entering his plea. At no point did Applicant say he wished to file an appeal, and the only request she ever received was from Applicant's mother in March of the following year asking if Applicant could get an appeal. Inzerillo testified that she did not see any appealable issues in Applicant's case. Applicant was immediately taken to a holding cell after being sentenced. Inzerillo did not talk to him; Applicant was very upset and angry. Inzerillo testified that clients usually request an appeal by sending her a letter or having someone contact her on their behalf. Inzerillo testified she did not receive any letters in this case.

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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, 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.

Applicant submits Inzerillo rendered ineffective assistance of plea counsel. In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Claims of ineffective assistance of counsel are evaluated under a two-prong test. See *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, the court measures an attorney's performance by its "reasonableness under professional norms." *Id.* at 117, 386 S.E.2d at 625. 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." *Id.* at 117-18, 386 S.E.2d at 625.

The United States Supreme Court discussed under what circumstances counsel has an obligation to consult with a defendant about an appeal in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). The Court stated that "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Roe*, 528 U.S. at 477. However, when the defendant has not instructed counsel to file an appeal, the court should look to whether counsel consulted with the defendant about an appeal. "If counsel has consulted with the defendant, the question of deficient performance is easily answered: Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." *Id.* at 478.

There is no dispute that Inzerillo spoke with Applicant before entry of his plea about his right to appeal within ten days. The only dispute is whether Applicant informed Inzerillo that he would like to appeal. Applicant testified that he informed Inzerillo before entry of his guilty plea that he would want to appeal; Inzerillo testified that at no point did Applicant ever tell her that he wanted to appeal. This Court finds the testimony of Inzerillo credible and the testimony of the Applicant not credible. Therefore, because Applicant was fully informed of his right to an

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appeal and did not inform Inzerillo that he wanted to appeal, this Court denies this application on the basis that Counsel's performance did not fall below the standard required.

Applicant is only seeking the right to a belated appeal. All other issues raised in his application for post-conviction relief were abandoned at the hearing.

CONCLUSION

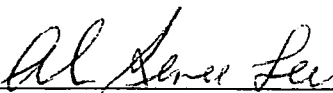
Based on all the foregoing, this Court finds that Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief is denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a Notice of Appeal within thirty 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 post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on an applicant's behalf. Applicant 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 shall be denied and dismissed with prejudice; and
2. The Applicant shall remain remanded to the custody of the State.

AND IT IS SO ORDERED.



ALISON RENEE LEE
Presiding Judge

December 10, 2014
Columbia, South Carolina

