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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2013-CP-39-01262

Rickey Lee Smith,..... Appellant,

v.

State of South Carolina Respondent.

NOTICE OF APPEAL

Appellant appeals the Honorable Eugene C. Griffith's Order of Dismissal dismissing Appellant's application for post-conviction relief. On January 29, 2015, the Honorable Eugene C. Griffith signed an order dismissing Appellant's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on March 9, 2015. A copy of the Honorable Eugene C. Griffith's Order of Dismissal is attached.



R. Mills Ariall, Jr.
Attorney at Law
11 North Irvine St., Suite 11
Greenville, SC 29601
Telephone (864) 232-9390
Facsimile (864) 232-9392
Attorney for Rickey Lee Smith

Greenville, South Carolina
March 10, 2015

Other Counsel of Record and Interested Parties:

Karen C. Ratigan, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211

Pickens County Clerk's Office
Pickens County Courthouse
214 East Main Street
Pickens, SC 29671

SC Commission of Indigent Defense
Division of Appellate Defense
PO Box 11433
Columbia, SC 29211-1433

Rickey Lee Smith SCDC# 321505
Lee Correctional Institution
990 Wisacky Highway
Bishopville, South Carolina 29010

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CERTIFICATE OF SERVICE

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this March 10, 2015, I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

Karen C. Ratigan, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211

Pickens County Clerk's Office
Pickens County Courthouse
214 East Main Street
Pickens, SC 29671

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Columbia, SC 29211-1433

Denise Tanner LaBeck
Denise Tanner LaBeck

March 10, 2015

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

JUDGMENT IN A CIVIL CASE
CASE NO: 2013CP3901262

2015 MAR - 14 P 3:09
CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

Ricky Lee Smith vs. South Carolina The State of

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):**
SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other: _____
 Rule 12(b), SCRPC; Rule 41(a);
- ACTION STRICKEN (CHECK REASON):**
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other: _____
 Rule 40(j) SCRPC; Bankruptcy:
- 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 WAS NOT MAILED TO THE ATTORNEYS UNTIL MARCH 4, 2015

Dated at Pickens, South Carolina, this .

Court Reporter:

PRESIDING JUDGE -

This judgment was entered on the . and a copy mailed first class this March 4, 2015 , to attorneys of record or to parties (when appearing pro se) as follows:

Ricky Lee Smith
R. Mills Ariail Jr. 11 North Irvine Street, Suite 11
Greenville, SC 29601

Karen Christine Ratigan PO Box 11549 Columbia, SC
29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Harold P. Welborn, Jr.
Harold P. Welborn, Jr. - Clerk of Court

STATE OF SOUTH CAROLINA)
)
 COUNTY OF PICKENS)
)
 Ricky Lee Smith,)
 S.C.D.C. No. 321505,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2013-CP-39-1262

CLERK OF COURT
 PICKENS COUNTY
 SOUTH CAROLINA

2015 FEB -2 A 10: 30

ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed October 8, 2013. The Respondent made its return on March 26, 2014. An evidentiary hearing into the matter was held on December 15, 2014 at the Pickens County Courthouse. The Applicant was present and represented by R. Mills Ariail, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's plea counsel, Michael Johnson, Esquire. The Court had before it the transcript of the guilty plea hearing, the Pickens County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, and the return.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Pickens County Clerk of Court. The Pickens County Grand Jury indicted the Applicant at the August 2012 term of General Sessions for two counts each of: first-degree burglary (2012-GS-39-1580, -1584), second-degree burglary (2012-GS-39-1581, -1655),

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grand larceny (2012-GS-39-1582, -1583). The Applicant also waived presentment on the charge of escape (2013-GS-39-0297). He was represented by Michael Johnson, Esquire.

On April 22, 2013, the Applicant pled guilty pursuant to a negotiated plea.¹ The Honorable Edward W. Miller sentenced the Applicant to concurrent terms of 22 years for each count of first-degree burglary, 15 years for each count of second-degree burglary, and 5 years for each count of grand larceny (\$2000-\$10,000). Judge Miller levied a consecutive sentence of 1 year for escape. The Applicant did not appeal.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:²

1. Ineffective assistance of counsel:
 - a. "Applicant was not given adequate information by trial counsel in order to make an intelligent decision."
 - b. "Trial counsel failed to properly inform Applicant of the negotiations from the plea."
 - c. "Trial counsel's ineffectiveness caused Applicant to plead involuntarily and unintelligently."
2. Involuntary guilty plea.

At the PCR hearing, the Applicant proceeded solely upon issues of ineffective assistance of 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

¹ The State not crossed the following charges the next day: first-degree burglary (2012-GS-39-1575, -1577, -1579, -1587), petit larceny (2012-GS-39-1576, -1586, -1588), grand larceny (2012-GS-39-1578), possession of marijuana (2012-GS-39-1585). (Plea transcript, p.9).

² This Court will not consider the pro se amendments filed by PCR counsel on November 26, 2014, as there is a prohibition against hybrid representation. See Rule 11(a), SCRCP; Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002) (counsel cannot serve as a mere conduit for pro se documents in an effort to avoid the prohibition against hybrid representation and the displeasure of his client).

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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 that, while he told plea counsel his version of the facts, they only reviewed discovery materials for five minutes. The Applicant stated plea counsel told him there were no defenses in this case and that he would receive consecutive life sentences if he did not plead guilty. The Applicant stated he signed up to plead guilty to a 19-year sentence, but that plea counsel said the assistant solicitor changed her mind. The Applicant admitted plea counsel

explained to him before the plea hearing that he was pleading guilty to a negotiated sentence of 23 years and that the State was dismissing several charges. The Applicant stated he asked plea counsel to file an appeal, but that one was not filed. The Applicant stated he wanted to appeal his sentence because he should have received 19 years.

Plea counsel testified he was retained in this case. Plea counsel testified he filed discovery motions and received the discovery material over time. Plea counsel testified he reviewed the discovery materials with the Applicant, as well as the elements of the charges and the sentencing ranges. Plea counsel testified the Applicant also relayed his version of events. Plea counsel testified there was a prior plea offer while the Applicant was represented by his first attorney, and that it was for 18 years (before the escape charge). Plea counsel testified the offer was no longer available when he was retained and that he was unsuccessful in having this offer reinstated. Plea counsel testified he explained the nature of a negotiated sentence to the Applicant on two occasions. Plea counsel testified he did not recall the Applicant asking to file an appeal, but that he would have done so if requested. Plea counsel testified there were no appealable issues from the guilty plea hearing.

This Court finds the Applicant failed to meet his burden of proving plea counsel did not adequately meet with him and discuss the case. Plea counsel testified they discussed the discovery materials and charges in this case. Plea counsel admitted at the plea hearing that they had reviewed the evidence. (Plea transcript, p.7). There was a thorough plea colloquy during which the Applicant admitted to the plea judge that he was guilty. (Plea transcript, p.7). The Applicant also told the plea judge that he understood the trial rights he was waiving in pleading guilty, was satisfied with counsel, and was pleading guilty freely and voluntarily. (Plea transcript, pp.6-7). The Applicant did not register any complaints he had with plea counsel when

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he pled guilty to this negotiated sentence. This Court also notes the Applicant failed to articulate what more he wanted plea counsel to do in order to prepare this case. See, e.g., Skcen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding 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).

This Court finds the Applicant failed to meet his burden of proving plea counsel should have filed an appeal. Plea counsel has a constitutionally imposed duty to consult with the defendant about an appeal only when there is reason to think either: (1) that a rational defendant would want to appeal or (2) that this defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S. Ct. 1029, 1036 (2000). In order to make this determination, "courts must take into account all the information counsel knew or should have known." Id. (citing Strickland, 466 U.S. at 690, 104 S. Ct. at 2066). Although not determinative, a highly relevant factor will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because a plea may indicate the defendant seeks an end to judicial proceedings. Id. Plea counsel testified he did not recall the Applicant asking him to file an appeal and that he would have done so if requested. This Court finds plea counsel's testimony is credible. Based on the thorough and complete guilty plea colloquy, it is unlikely a rational defendant would have wanted to appeal. See id.

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 (30) 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.

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AND IT IS SO ORDERED this 29th day of January, 2015.

Eugene C. Griffith, Jr.
Eugene C. Griffith, Jr.
Presiding Judge
Thirteenth Judicial Circuit

Newberry, South Carolina.

79021

R. MILLS ARIAIL, JR.
ATTORNEY AT LAW

11 NORTH IRVINE STREET, SUITE 11 • GREENVILLE, SC 29601
PHONE 864.232.9390 • FAX 864.232.9392 • E-MAIL MILLS@RMALAWOFFICE.COM

March 10, 2015

Via US Mail

Daniel Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

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S.C. Supreme Court

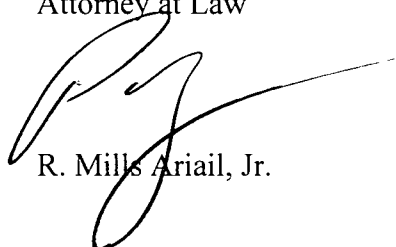
**Re: Notice of Intent to Appeal from Rickey Lee Smith vs. State of South Carolina
C.A. No.: 2013-CP-39-01262**

Dear Mr. Shearouse:

I was Court Appointed in the above referenced matter, and I expect that appellate defense will handle the appeal and petition for certiorari. On behalf of my client, enclosed for filing please find the Notice of Appeal and proof of service. I've enclosed a copy of the Honorable Eugene C. Griffith's Order of Dismissal to be challenged on appeal. I must inform the Supreme Court that as an officer of this Court, I am unable to identify any issue which can be reviewed on appeal. By copy of this letter, I am instructing Appellant that if he must notify this Court, in writing, no later than twenty (20) days from the date of this letter, of any arguable basis for an appeal from his guilty plea as required by Rules 203(d)(1)(B) of the South Carolina Appellate Court Rules. By copy of this letter, I am also serving my client, counsel for the State of South Carolina, the South Carolina Commission of Indigent Defense - Appellate Defense Division and the Pickens County Clerk's Office.

Thank you for your assistance in this matter and if you have any questions, please feel free to contact me.

Sincerely,
LAW OFFICE OF R. MILLS ARIAIL, JR.
Attorney at Law



R. Mills Ariail, Jr.

RMAjr/dl
Enclosures (as stated)

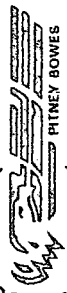
cc: Pickens County Clerk's Office
Pickens County Courthouse
214 East Main Street
Pickens, SC 29671

Karen C. Ratigan
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211-11549

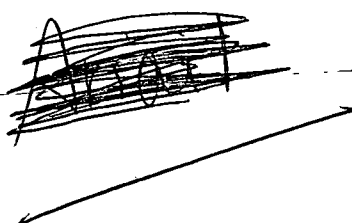
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R. MILLS ARIAIL, JR.

11 NORTH IRVINE STREET, SUITE 11
GREENVILLE, SC 29601

Daniel Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211