

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

APR 13 2015

S.C. Supreme Court

Daniel D. Hall, Circuit Court Judge

Case No. 2014-CP-23-3770

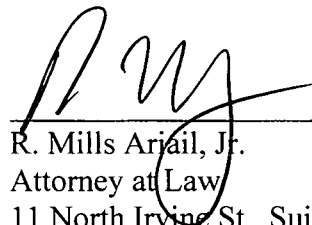
James Daniel Mayberry,..... Appellant,

v.

State of South Carolina Respondent.

NOTICE OF APPEAL

Appellant appeals the Honorable Daniel Hall's Order of Dismissal dismissing Appellant's application for post-conviction relief. On March 2, 2015, the Honorable Daniel D. Hall 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 23, 2014. A copy of the Honorable Daniel Hall's Order of Dismissal is attached.



R. Mills Arjail, Jr.
Attorney at Law
11 North Irvine St., Suite 11
Greenville, SC 29601
Telephone (864) 232-9390
Facsimile (864) 232-9392
Attorney for James Daniel Mayberry

Greenville, South Carolina
April 7, 2015

Other Counsel of Record and Interested Parties:

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

Greenville County Clerk's Office
Greenville County Courthouse
305 East North Street
Greenville, SC 29601

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

James Daniel Mayberry SCDC# 356631
Perry Correctional Institute
430 Oaklawn Road
Pelzer, SC29669

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CERTIFICATE OF SERVICE

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this April 7, 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
Attorney for the State of South Carolina

Greenville County Clerk's Office
Greenville County Courthouse
305 East North Street
Greenville, SC 29601

James Daniel Mayberry SCDC# 356631
Perry Correctional Institute
430 Oaklawn Road
Pelzer, SC 29669

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

Denise Tanner LaBeck
Denise Tanner LaBeck

April 7, 2015

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

JUDGMENT IN A CIVIL CASE

CASE NO: 2014CP2303770

FILED-CLERK OF COURT
GREENVILLE CO.S.C.
PAUL B. WICKENSIMER
2015 MAR 19 PM 3:38

James Daniel Mayberry vs. South Carolina 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):**
SCRCP (Vol. Nonsuit); Rule 43(k), SCRCP (Settled); Rule 12(b), SCRCP; Rule 41(a),
 Other: _____
- ACTION STRICKEN (CHECK REASON):**
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other: _____
 Rule 40(j) SCRCP; 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:

Dated at Greenville, South Carolina, this 19th day of March, 2015.

Court Reporter:

PRESIDING JUDGE - Daniel D Hall

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

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)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

James Daniel Mayberry,
S.C.D.C. No. 356631,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
C.A. No. 2014-CP-23-3770

ORDER OF DISMISSAL

ENTERED COMPUTER

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER
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This matter comes before the Court by way of an application for post-conviction relief (PCR) filed July 8, 2014. The Respondent made its return on October 30, 2014. An evidentiary hearing was held on February 19, 2015 at the Greenville County Courthouse. The Applicant was present and represented by R. Mills Ariail, Jr., Esquire.¹ 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, Brian P. Johnson, Esquire. The Court had before it the transcript of the guilty plea hearing, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, the return, and Applicant's Exhibit 1.

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

¹ At the beginning of the hearing, PCR counsel noted he also represented the Applicant's co-defendant (who is also the Applicant's brother) on his PCR action. PCR counsel noted he had discussed the possibility of a conflict of interest with the Applicant, who waived any potential issues. This Court questioned the Applicant about a potential conflict of interest and is satisfied the Applicant made a knowing waiver of any potential conflict.

at the November 2012 term of the Greenville County Grand Jury for attempted murder (2012-GS-23-9352, count 1), two counts of attempted armed robbery (2012-GS-23-9352, counts 2, 4), three counts of carjacking (2012-GS-23-9352, counts 3, 5, 7), armed robbery (2012-GS-23-9352, count 6), possession of a weapon during commission of a violent crime (2012-GS-23-9352, count 8), and pointing or presenting a firearm (2012-GS-23-9352, count 9). He was represented by Brian P. Johnson, Esquire.

On August 15, 2013, the Applicant pled guilty to attempted murder, two counts of attempted armed robbery, three counts of carjacking, and armed robbery.² The Honorable Brian M. Gibbons sentenced the Applicant to concurrent terms of 20 years for attempted murder, 10 years for each count of attempted armed robbery, 10 years for two counts of carjacking, and 30 years suspended upon service of 20 years for armed robbery. Judge Gibbons levied a consecutive sentence of 10 years for the third count of carjacking. Judge Gibbons denied the subsequent motion for reconsideration. The Applicant did not appeal.

ALLEGATIONS

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

1. Ineffective assistance of counsel.
 - a. Failure to investigate, prepare, and review discovery materials with the Applicant. Failure to consult with the Applicant "about material evidence in discovery so that Applicant could make an informed decision weather to stand trial or plead guilty."
 - b. Failure to convey all formal plea offers. The Applicant states he rejected the first plea offer (14-16 years) but plea counsel failed to convey the second plea offer (16-18 years).
 - c. Failure to challenge hearsay evidence.
 - d. Advised the Applicant "to plead guilty to dueplexity and moeplexity to all criminal charges."

² The indictments for possession of a weapon during commission of a violent crime and pointing or presenting a firearm were not proessed.

- e. Failure to file an appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record 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 and plea counsel reviewed “the basics” of discovery but that plea counsel did not know the “full story” in this case. The Applicant stated he did not tell plea

counsel the full facts of the case because it was too complicated. The Applicant stated plea counsel explained the elements of the charges and the concept of "the hand of one is the hand of all" but that they did not discuss a defense. The Applicant stated he had difficulties communicating with plea counsel and he sent letters to plea counsel, the Public Defender, and the Bar about this. The Applicant stated he told plea counsel about prior mental health treatment but that counsel never had him evaluated (though he said he would set one up). The Applicant admitted he never directly told plea counsel he did not understand what was happening. The Applicant stated plea counsel brought him a plea offer for 14-16 years and said he could receive that sentence at trial and to think about it. The Applicant stated he refused this offer and wanted a ten year offer. The Applicant stated he later told plea counsel to accept the offer but counsel told him in a July 29, 2013 letter that the offer had expired. The Applicant stated plea counsel visited him on August 14, 2013 and told him to accept a 10-30 year offer. The Applicant stated he learned at this meeting that there had been a prior 16-18 year plea offer. The Applicant stated plea counsel told him they would go to trial if he did not accept the 10-30 year offer and he would argue at the plea hearing that the armed robbery and attempted murder charges should be dropped. The Applicant stated he pled guilty without a recommendation and knew he could get a substantial prison sentence. The Applicant stated he felt obligated to plead guilty and that he lied when he told the plea judge he was satisfied with plea counsel's representation. The Applicant stated he asked plea counsel to file an appeal because he did not feel he was properly represented.

Plea counsel testified he filed discovery motions, received those materials, and made a copy for the Applicant. Plea counsel testified they had videoconference and in-person meetings. Plea counsel testified they reviewed the discovery materials, the elements of the charges, and the

sentence ranges. Plea counsel testified he believe the state had a strong case against the Applicant. Plea counsel testified he did not recall the Applicant stating he had prior mental health treatment. Plea counsel testified he did not recall saying he would set up a competency evaluation. Plea counsel testified he had no problems communicating with the Applicant and that there were no competency issues. Plea counsel testified the State made a tiered plea offer in this case. Plea counsel testified there was a 14-16 year offer and a 16-18 year offer – these were based upon the Applicant accepting responsibility within a certain time period. Plea counsel testified he relayed this to the Applicant and explained the 14-16 year offer expired in March and the 16-18 year offer expired mid-April to May. Plea counsel testified he told the Applicant to consider accepting the 14-16 year offer but that the Applicant did not think this was fair and wanted a 10-year offer. Plea counsel testified the State refused this counteroffer and he told the Applicant of such. Plea counsel testified the Applicant told him in July that he wanted to accept the 14-16 year offer but that the State refused to consider this and he told the Applicant of such. Plea counsel testified there was no 10-30 year offer in this case and that the Applicant pled guilty without a sentence recommendation. Plea counsel testified he told the Applicant there was no recommendation and explained the maximum sentences. Plea counsel testified he and the Applicant discussed a motion to reconsider and an appeal and that, as there were no grounds to appeal, he would file a motion to reconsider. Plea counsel testified he did not recall the Applicant asking for an appeal.

Initially, this Court finds there was thorough plea colloquy in this case. The Applicant admitted to the plea judge that he was guilty. (Plea transcript, p.6). The Applicant also told the plea judge that he understood the trial rights he was waiving in pleading guilty, was satisfied with counsel, and had not been coerced in any way. (Plea transcript, pp.4-8). This Court finds

there is no evidence in the guilty plea transcript to support the Applicant's assertion that he was somehow pressured into entering a guilty plea; therefore the transcript has refuted this allegation. See Stalk v. State, 375 S.C. 289, 300, 652 S.E.2d 402, 407 (Ct. App. 2007); see also Rayford v. State, 314 S.C. 46, 48-49, 443 S.E.2d 805, 806 (1994) (where transcript of guilty plea proceeding refuted applicant's claim that he did not understand the terms of a plea bargain, grant of PCR was inappropriate notwithstanding applicant's claim lawyer misadvised him).

This Court finds the Applicant failed to meet his burden of proving plea counsel did not adequately meet with him and discuss his case. Plea counsel testified he had numerous meetings with the Applicant and that they reviewed the discovery materials, the charges (and their elements), and the sentence ranges. Plea counsel testified the Applicant never said he did not understand their discussions. This Court finds plea counsel's testimony is credible. This Court finds the Applicant has failed to demonstrate what plea counsel should have done to better investigate or prepare this case. See Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing he would have had a defense with additional time to prepare for trial); Skeen 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 did not adequately explain and convey plea offers. Plea counsel testified he conveyed a tiered plea offer to the Applicant and advised him of the potential plea recommendations and their expiration dates. Plea counsel testified the Applicant did not want to plead guilty to these sentences and wanted a 10-year plea offer. Plea counsel testified the Applicant never advised him that he

wanted to accept the 14-16 year offer. Plea counsel testified he explained the Applicant would be pleading guilty without a recommendation. This Court finds plea counsel's testimony is credible. This Court finds plea counsel fulfilled his obligation to convey and explain the plea offers to the Applicant. See Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (holding counsel's failure to convey the State's plea offer to defendant constituted deficient performance). An attorney cannot force his client to accept a plea offer and that the decision whether to accept or reject such an offer rests solely with the client. See Rule 1.2(a), RPC, Rule 407, SCACR. The Applicant decided to reject the State's tiered plea offer and ultimately pled guilty without a sentence recommendation.

This Court finds the Applicant failed to meet his burden of proving plea counsel should have arranged for a competency evaluation. Plea counsel testified he did not recall the Applicant telling him about any prior mental health treatment. Plea counsel testified he did not recall telling the Applicant that he would arrange for a competency evaluation. This Court finds plea counsel's testimony is credible. This Court notes the Applicant failed to present any evidence either that (1) he did, in fact, undergo prior mental health treatment or (2) he was not competent to plead guilty. As such, this Court cannot speculate as to the potential impact such evidence may have had upon this case. See Lee v. State, 396 S.C. 314, 721 S.E.2d 442 (Ct. App. 2011) (holding plea counsel cannot be found deficient if she has no indication of the defendant's mental health history); Jeter v. State, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992) (holding that, to sustain a claim that plea counsel was ineffective for failing to request a competency hearing, petitioner must show reasonable probability he would have been found incompetent).

This Court finds the Applicant failed to meet his burden of proving plea counsel should have filed an appeal. Plea counsel testified he and the Applicant discussed a motion to

reconsider and an appeal and that, as there were no grounds to appeal, he would file a motion to reconsider. Plea counsel did not recall the Applicant asking for an appeal. This Court finds plea counsel's testimony is credible and that he advised the Applicant of the right to appeal. This Court finds, however, that the Applicant simply chose not to pursue an appeal. See Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004) ("To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal.").

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.

AND IT IS SO ORDERED this 2nd day of March, 2015.



Daniel D. Hall
Presiding Judge
Thirteenth Judicial Circuit

York, South Carolina.

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

April 7, 2015

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Via US Mail

Daniel Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
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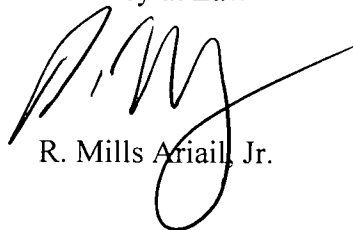
Re: Notice of Intent to Appeal from James Daniel Mayberry v. State of South Carolina C.A. No.: 2014-CP-23-3770

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 Daniel Hall's Order of Dismissal to be challenged on appeal. 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 Greenville 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: Greenville County Clerk's Office
Greenville County Courthouse
305 East North Street
Greenville, SC 29601

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

James Daniel Mayberry SCDC# 356631
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PO Box 11433
Columbia, SC 29211-1433

Law Office of R. Little Arall, Jr.
111 N. Linden Street, Suite 111
Greenville, SC 29601

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

