*Hugh W. Welborn*

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May 8, 2015

RECEIVED
MAY 12 2015
S.C. Supreme Court

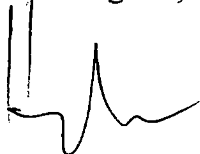
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

In RE: David Dale Sheriff, #171192 vs. State of South Carolina
Case #: 2013-CP-04-1431

Dear Sir/Madam:

Please find enclosed herewith the original and one (1) copy of the Appellant's Notice of Appeal in connection with the foregoing matter which I ask that you file for record, returning the clocked copy to my office. I also enclose a copy of the Order of Dismissal and the original Proof of Service on Walt Whitmire, Office of the Attorney General. Please use the enclosed self-addressed envelope to return the clocked copy to my office.

With kind regards,



Hugh W. Welborn

HWW/sba

cc: Office of the Appellate Defense
cc: Office of the Attorney General

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS

HONORABLE EDGAR W. DICKSON

2013-CP-04-1359

DAVID DALE SHERIFF, #171192

APPELLANT,

vs

STATE OF SOUTH CAROLINA,

RESPONDENT.

RECEIVED
MAY 12 2015
S.C. Supreme Court

## NOTICE OF APPEAL

David Dale Sheriff, #171192 appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Edgar W. Dickson, Circuit Court Judge on July 30, 2014, and Order of Dismissal issued on May 1, 2015, and filed on May 7, 2015. The Appellant received Order of Dismissal on May 8, 2015.

Hugh W. Welborn
Attorney for the Appellant
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(864) 226-5787
Attorney for David Dale Sheriff, #171192

Other Counsel of Record:
Walt Whitmire
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Columbia, South Carolina 29211

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS

HONORABLE EDGAR W. DICKSON

2013-CP-04-1431

DAVID DALE SHERIFF, #171192

APPELLANT,

vs

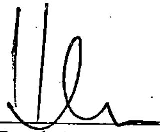
STATE OF SOUTH CAROLINA,

RESPONDENT.

RECEIVED
MAY 12 2015
S.C. Supreme Court

## PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail postage prepaid on May 8, 2015, addressed to its attorney of record Walt Whitmire, Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549



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8 May, 2015

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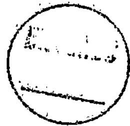

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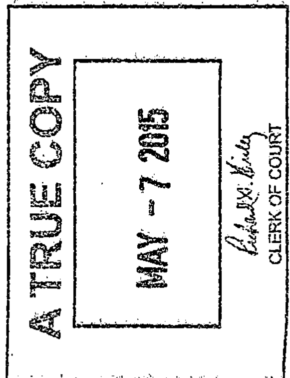
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF ANDERSON | ) | TENTH JUDICIAL CIRCUIT |
| David Dale Sheriff,<br>S.C.D.C. No. 171192, | ) | C.A. No. 2013-CP-04-1431 |
| Applicant, | ) | |
| v. | ) | **ORDER OF DISMISSAL** |
| State of South Carolina, | ) | |
| Respondent. | ) | |




This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed June 12, 2013. Respondent subsequently filed its responsive pleadings. An evidentiary hearing into the matter was convened on July 30, 2014 at the Anderson County Courthouse. Applicant was present and was represented by Hugh W. Welborn, Esq. Respondent was represented by Walt Whitmire, Esq., of the Office of the Attorney General. Kurt Tavernier, Esq., (counsel) testified to his course of conduct during the representation on the matters at issue.

## PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Anderson County. The Applicant was indicted for burglary, first-degree at the December 2009 term of the Court of General Sessions for Anderson County (2009-GS-04-2990). The Applicant was represented by Kurt Tavernier, Esq. On July 19, 2010, the State called its case to trial before the Honorable R. Lawton McIntosh. The jury found Applicant guilty as indicted. Judge McIntosh sentenced Applicant to a term of life without the possibility of parole (LWOP).

A timely notice of appeal was filed on Applicant's behalf and perfected by LaNelle Durant, Esq., of the Office of Appellate Defense pursuant to Anders v. California.[1] The South Carolina Court of Appeals affirmed Applicant's sentence and conviction State v. David Dale Sheriff, No. 2012-UP-453 (S.C. Ct. App. filed on July 18, 2012). The Remittitur was issued on August 10, 2012.

At the PCR hearing, Applicant proceeded on the limited allegations of ineffective assistance of counsel in his assertion that he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:
   a. Counsel issued advice to Applicant to the effect that no defense was possible to his charge
   b. "Counsel did not familiarize himself with the facts of the case;"
   c. Failure to file a motion for reconsideration of the sentence.

**Summary of Testimony and Evidence presented at the PCR Hearing**

Applicant testified that counsel's representation constituted a conflict of interest. Applicant testified that he had his original appointed attorney, Tenth Circuit Asst. Public Defender Andrew Potter, Esq., removed because of a personal conflict. Applicant explained that conflict as follows: Attorney Potter successfully moved to quash a defective indictment. He was dissatisfied with Attorney Potter after the State subsequently re-indicted him. Applicant testified that the Trial Judge granted Applicant's motion to have Attorney Potter relieved and further conflicted Applicant's case from the Tenth Circuit Public Defender's Office. Applicant reasoned "there should not have been anyone having anything to do with the Public Defender's Office involved with his case, and then counsel was appointed." Applicant testified that "I can't say that [counsel] did anything personally against me." Instead, he reasoned that counsel's representation

[1] Anders v. California, 386 U.S. 738 (1967).

was in violation of the Trial Judge's order because "[counsel] was an assistant to the Public Defender's Office." Applicant testified that counsel utilized resources from the Public Defender's Office; yet he was unaware if counsel's posture here was done to benefit his case. Upon cross-examination, Applicant testified to his 1994 PCR action from a prior conviction where he previously had raised a similar conflict of interest allegation. Applicant explained that he originally raised the conflict allegation in 1994 because "he was told to do so." In contrast, Applicant testified that he raised the allegation in the present case after personally researching the purported error.

Applicant alleged counsel should have done more to investigate his case. Applicant testified that counsel failed to do his own independent investigation of Applicant's case and that counsel relied solely upon Attorney Potter's previous work product. However, Applicant conceded his guilt. Last, Applicant alleged that counsel should have negotiated for more favorable plea offers. Applicant explained that the plea negotiations were held after the State called his case to trial. Applicant testified that the State offered him a thirty year sentence and that he would have accepted the offer but for the State changing it to a forty year sentence the following day.

At the PCR hearing, counsel testified to his course of conduct during the representation. Counsel briefly summarized his previous experience in criminal law as follows: he was a police officer for five years prior to his matriculation into law school; he has been licensed as an attorney since 1989; he worked for the Greenville Solicitor's Office before entering private practice; counsel left private practice to head the narcotics unit for the Anderson County Solicitor's Office; since then, he returned to private practice and has held a contract for indigent representation since 2002.

Counsel testified to the circumstances surrounding his appointment as substituted counsel on Applicant's case. Counsel testified that he handles six to twelve conflict cases a year from the Tenth Circuit Public Defender's Office. Counsel operates his own law firm. He further explained that his office is totally removed from the Public Defender's Office; all case files are housed in his office and maintained by his staff. Counsel testified that his contract with Indigent Defense is wholly unrelated to the Public Defender's Office. Counsel was appointed as substitute counsel after Applicant successfully moved to have Attorney Potter relieved based upon a personal dispute. He met with Attorney Potter to review the case. Counsel could not recall Applicant expressing any concern over his involvement in the case.

Counsel summarized the State's evidence against Applicant as follows: blood smears established that Applicant was at the victim's house where he had no right to be there. He acknowledged his guilt and never denied culpability during the representation. Counsel testified that he personally conducts his own investigations into his client's cases. He met with Applicant prior to trial to prepare for the case. Counsel testified to his failed efforts to negotiate a plea as follows: the initial offer was a recommendation for a forty-year term of imprisonment; Applicant refused that offer. Counsel was able to elicit a second offer for a recommendation of a thirty-year term of imprisonment that would expire when the State called the case for trial. Counsel testified that he conveyed the second offer to Applicant. He apprised Applicant of the constitutional consequences and implications of accepting and rejecting the plea offers. He testified that Applicant was competent and understood the ramifications of what would happen if he was convicted; he would have no alternative to LWOP.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the

witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject's convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, Applicant claims that due to his attorney's sub-standard performance, he has been denied his constitutionally protected right to counsel. In deciding a claim of ineffective assistance of counsel, the focus is on "the fundamental fairness of the proceeding whose result is being challenged." Strickland v. Washington, 466 U.S. 668 (1984). Applicant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id.

The Court finds that Applicant was not deprived of effective assistance of counsel. Defense counsel's pre-trial investigation and discussions with Applicant were reasonable in the circumstances, and did not fall below professional norms. The Court finds that defense counsel competently advised Applicant of the charge and possible sentences. The Court finds no conflict of interest existed with defense counsel representing Applicant. As such, the Court finds there was no prejudice towards the Applicant from defense counsel's representation of Applicant. The Court finds defense counsel's testimony regarding communications with Applicant credible, and does not find Applicant's testimony credible. Therefore, the court is denying the application.

Furthermore, this Court finds Applicant's conviction was supported by overwhelming evidence of his guilt. At trial, the State presented thorough testimony from the victim on the

extent of the burglary. Trial Tr. pp.43-51. The police obtained a blood sample that subsequently was matched to Applicant's D.N.A. profile. Trial Tr. p.73; pp. 103-04. After deliberating for forty-one minutes, the jury found Applicant guilty as indicted. Trial Tr. pp.144-45.

## APPLICABLE LAW

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). Where the application alleges ineffective assistance of counsel 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 upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 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, 466 U.S. at 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea 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, *supra*. 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.C. at 117-18, 386 S.E.2d at 625.

A.

This Court finds Applicant has failed to meet his burden to prove counsel's performance was either deficient or ineffective for his purported conflict of interest in handling Applicant's case. "To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance." Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001). "An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008) (internal citation omitted). This Court finds counsel's testimony on the matter to be credible and convincing.

First, this Court finds that Applicant lacks standing to raise this *post hoc* allegation in PCR. Judge Peeples' order from Applicant's prior PCR Application from the mid-1990s shows that he is knowledgeable of this issue; this Court finds that Applicant has produced no credible justification to explain why he did not raise his concerns on the purported conflict to the Trial Judge at his trial. See State v. Patterson, 263 S.C. 176, 179, 209 S.E.2d 39, 40 (1974) ("Furthermore, appellant was not treading new ground. He was an experienced accused, and, as his testimony makes clear and the trial judge found, he fully understood his rights as an accused being subjected to custodial interrogation."). Second and alternatively, this Court finds that Applicant's argument is unsound as a matter of law. Third and alternatively, Applicant has entirely failed to present any competent evidence that showed Attorney Tavernier's substitution on his case inured to his detriment. Instead, the record clearly shows that Applicant received a windfall benefit on having counsel appointed to his case where his performance, on the matters at issue here, was exemplary. Therefore, this Court readily denies and dismisses this allegation with prejudice.

B.

Applicant's allegation that counsel's performance was deficient and ineffective in purportedly failing to adequately investigate his case is similarly without merit. "Criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (internal citations omitted). "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Id.

This Court finds that Applicant failed to make a sufficient prima facie showing here. See United States v. Schaflander, 743 F.2d 714, 721 (9th Cir. 1984) (In order to prevail on an ineffectiveness claim, a petitioner must make a sufficient factual showing to substantiate the claims. A petitioner must still show conduct below an objective standard of reasonableness as well as prejudice, and must also show more than conclusory allegations. Mere conclusory allegations are deficient.). In light of Applicant's silence on the basis and purported prejudice here, he testified that he was in fact guilty. In contrast, this Court finds counsel's testimony concerning his investigation procedures and his efforts in Applicant's case to be credible and sound. Therefore, this allegation is readily denied and dismissed with prejudice.

C.

This Court finds that Applicant's allegation that counsel's performance was deficient and ineffective for not eliciting a more favorable plea offer than the State's offer to recommend a thirty year prison sentence is without merit. Absent detrimental reliance, not present in this case, a criminal defendant has no right to a plea bargain. Instead, the constitutional authority here rests solely within the purview of the prosecuting office. See Ex parte Harrell v. Attorney Gen. of

State, 409 S.C. 60, 66, 760 S.E.2d 808, 810-11 (2014) (citing State v. Thrift, 312 S.C. 282, 306, 440 S.E.2d 341, 355 (1994) (internal quotations omitted) ("Noting that the State possesses "wide latitude in selecting what cases to prosecute and what cases to plea bargain, the Court observed that the Attorney General's authority to prosecute derives from our state constitution.")). Therefore, this allegation is denied and dismissed with prejudice.

Applicant also failed to meet his burden to prove that counsel's performance on advising him to accept the State's second offer that included the State's recommendation for a thirty year sentence constituted either deficient or ineffective performance. "Where counsel's ineffective advice led to an offer's rejection, and where the prejudice alleged is having to stand trial, a defendant must show that but for the ineffective advice, there is a reasonable probability that the plea offer would have been presented to the court, that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the actual judgment and sentence imposed." Lafler v. Cooper, -- U.S. --, 132 S. Ct. 1376, 1380 (2012). "Simply put, the first inquiry is whether trial counsel's advice was deficient." Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991). This Court finds counsel's testimony on the matter to be compelling and dispositive in light of his consistent representations to the Trial Judge on the matter. Trial Tr. p.30. Notably, Applicant was silent here where he could have addressed the Court on the matter if he felt that the State pulled the offer before he had sufficient time to accept it. Most importantly, Applicant did not correct counsel's representation that "[both offers] of which he rejected and he requested and he wished for a jury trial on this charge." Trial Tr. p.30, ln. 5-6. This Court finds that even Applicant's assertion, when viewed in isolation, that "he would have taken the thirty" to be dubious and a product of wishful thinking. Therefore, this allegation is denied and dismissed with prejudice.

D.

Except as discussed above, this Court finds that the Applicant affirmatively abandoned the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

## CONCLUSION

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

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

**IT IS THEREFORE ORDERED**

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of Respondent

**AND IT IS SO ORDERED** this 1st day of May, 2015.

EDGAR W. DICKSON
Presiding Judge
Tenth Judicial Circuit

Orangeburg, South Carolina

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COMMON PLEAS AND
GENERAL SESSIONS

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May 8, 2015

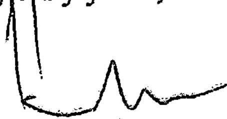
South Carolina Office of Appellate Defense
P. O. Box 11589
Columbia, South Carolina 29211-1589

In RE: David Dale Sheriff, #171192 vs. State of South Carolina
Case #: 2013-CP-04-1431

Dear Sir or Madam:

In connection with the foregoing matter, please be advised that I was the Court Appointed Attorney and enclose herewith a copy of my appointment. I also enclose copies of all documents you requested for filing a copy of the Appellant's Notice of Appeal in this matter together with a copy of the Order and Proof of Service. I ask that your office assume representation of this indigent Applicant.

Very truly yours,



Hugh W. Welborn

HWW/sba
Enclosures

cc: Court of Appeals
Office of Attorney General

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