

LAW OFFICE OF
Kristy Grafton Goldberg, LLC
ATTORNEY AT LAW

May 18, 2015

RECEIVED
MAY 20 2015
SC SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Larry Prophet, SCDC # 354669, vs. State of South Carolina
Appeal of Case No. 2013-CP-40-06813


Dear Mr. Shearouse,

Enclosed for filing is a Notice of Appeal in the above referenced case. Also enclosed are a certificate of service and a copy of the original court order which is to be challenged on appeal. I would appreciate it if you could file the Notice of Appeal and mail a date-stamped copy back to me in the enclosed pre-stamped envelope.

By copy of this letter I am informing the Office of Appellate Defense of this Appeal so that they may begin representation of Mr. Prophet, as I was appointed to represent him in this PCR action. I am also hereby requesting that Appellate Defense obtain a copy of the court transcript within the time required by this court.

Please let me know if you have any questions or concerns regarding this matter.

Respectfully,


Kristy Goldberg

CC: Clay Mitchell
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549

Larry Prophet, SCDC # 354669
Lee Correctional Institution

990 Wisacky Highway
Bishopville, SC 29010

Jeanette McBride, Clerk of Court
1701 Main Street, Room 205
Post office Box 2766
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Office of Appellate Defense
Chief Appellate Defender – Robert Dudek
PO Box 11433
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Case No. 2013-CP-40-06813

RECEIVED

MAY 20 2015

SC SUPREME COURT

Larry L. Prophet, SCDC # 354669, Appellant

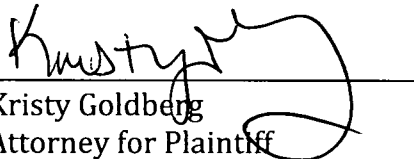
v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Applicant Larry Prophet hereby appeals from the Order of the Honorable Brooks P. Goldsmith presiding Judge for the 5th Judicial Circuit, filed May 13, 2015 and received by counsel for the Applicant on May 18, 2015 in the matter of Larry Prophet v. State of South Carolina, Case No. 2013-CP-40-06813.

May 18, 2015



Kristy Goldberg
Attorney for Plaintiff

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Phone (803) 667-6633
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Other Counsel of Record:
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Case No. 2013-CP-40-06813

RECEIVED

MAY 20 2015

SC SUPREME COURT

Larry L. Prophet, SCDC # 354669, Appellant

v.

State of South Carolina, Respondent.

PROOF OF SERVICE

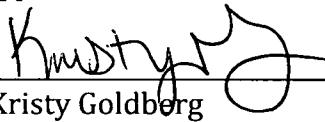
Personally appeared before me, Kristy Goldberg, Esquire, who being duly sworn, deposes
and states:

She is the counsel of record for Applicant;

Service by mail is proper in this instance; and

She has served the NOTICE OF APPEAL on the following party on May 18, 2015 by
depositing one copy in the U.S. Mail, postage prepaid:

Assistant Attorney General, Clay Mitchell
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211



Kristy Goldberg
Attorney for Plaintiff

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Other Counsel of Record:
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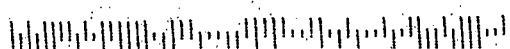
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The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211



STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Larry L. Prophet, #354669

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2013-CP-40-06813

ORDER OF DISMISSAL

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed November 6, 2013. Respondent made its Return on March 6, 2014, requesting an evidentiary hearing be convened. Kristy G. Goldberg, Esquire, was appointed by the Richland County Clerk of Court. An evidentiary hearing was held on April 1, 2015, at the Richland County Courthouse. Applicant was present and represented by Counsel Goldberg. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent.

At the PCR hearing, Applicant testified on his own behalf. Also testifying was Applicant's plea counsel, Melissa J. Armstrong, Esquire. The Court had before it the Richland County Clerk of Court records, Applicant's South Carolina Department of Corrections records, the PCR application, the Return, the family court waiver hearing transcript, and the guilty plea transcript.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was charged with first degree burglary, first degree criminal sexual conduct (CSC), armed robbery, and kidnapping in Petition Numbers 2010-JU-40-1524, -1525, -1527, -1528. On May 7, 2012, a contested waiver

hearing was held before the Honorable Leslie K. Riddle to determine whether the charges should be transferred from family court to the Court of General Sessions. Judge Riddle ruled that jurisdiction should be transferred by written order signed May 18, 2012. Applicant was then indicted by the Richland County Grand Jury at the June 2012 term for first degree CSC (2012-GS-40-03065), armed robbery (2012-GS-40-03067), first degree burglary (2012-GS-40-03068), and kidnapping (2012-GS-40-03069). On March 18, 2013, Applicant appeared before the Honorable G. Thomas Cooper, Jr., where he pleaded guilty as indicted. Judge Cooper sentenced him to thirty (30) years' for first degree CSC, a concurrent thirty (30) years' for armed robbery, a concurrent forty-five (45) years' suspended upon the service of thirty (30) years' with five (5) years' probation to follow for first degree burglary, and a consecutive fifteen (15) years' suspended upon the service of five (5) years' probation for kidnapping. Applicant did not appeal his guilty pleas or sentences.

In this action, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel in failing to appeal the family court's decision to waive jurisdiction and transfer the case to the Court of General Sessions.
 - a. Failing to file a motion for reconsideration; and
 - b. Failing to investigate and call witnesses at the waiver hearing.

II. SUMMARY AND EVIDENCE PRESENTED AT THE PCR HEARING

Applicant's Testimony

Applicant testified Counsel represented him on the charges he is currently challenging. Applicant testified there was no appeal taken in his case. He claimed he contacted Counsel and requested a notice of appeal be filed on his behalf.



Counsel Melissa J. Armstrong's Testimony

Counsel testified she represented Applicant on the charges currently before the Court. Counsel testified she was appointed to represent Applicant through the family court system. She testified Applicant was charged in 2010, and the waiver hearing was held in May 2012. Counsel testified Applicant underwent a number of evaluations; Dr. James Smith testified in the State's case at the waiving hearing. Counsel testified Dr. Smith was a very positive witness and supported much of Applicant's position. Counsel believed Dr. Smith's testimony was beneficial because he was the State's expert witnesses and gave testimony contrary to the State's position. Counsel believed Dr. Smith's testimony would be looked at favorably by Judge Riddle because he was an independent evaluator. Counsel noted the State really treated Dr. Smith as a hostile witness.

Counsel testified Dr. Smith did not have several documents such as older school records and Department of Juvenile Justice jail records. Counsel explained that those documents would not have been helpful as Applicant had problems and incidents in school and at the jail. Counsel testified Applicant had over a dozen juvenile charges on his record.

Counsel testified the order issued by Judge Riddle fully addressed each Kent¹ factor in bullet point format. Counsel testified that when analyzing the first five Kent factors, Judge Riddle was likely to find in favor of the State's argument because the incident was so violent and serious. Counsel testified the Kent factors were just that, factors, and the family court can give them the appropriate weight as it deems necessary. There is no requirement that each factor be established in order to transfer jurisdiction to general sessions. Counsel testified Applicant's intelligence quotient (IQ) score fluctuated dramatically. She testified the evaluators would not

¹ Kent v. United States, 383 U.S. 541, 86 S. Ct. 1045 (1966).



expect to see a fluctuation that large. Counsel believed she highlighted this in her cross-examination of Dr. Smith.

Counsel testified she did not appeal the family court's decision because she did not believe an interlocutory appeal to be allowed. Counsel hoped to preserve the ruling for a direct appeal after the case had come to a final resolution.

In mitigation, Counsel had Jack Hamrick, Applicant's former teacher, speak in support of the mitigation phase of his plea. Counsel testified she did not call Hamrick as witness at the waiver hearing. Counsel testified she filed a Motion to Reconsider Sentence Based Upon Mental Health Concerns after Judge Cooper sentenced Applicant. Counsel testified she hoped to highlight Applicant's mental issues further in this filing and hoped for an amended, more lenient sentence.

III. APPLICABLE LAW

In a post-conviction relief action, Applicant bears the burden of proving the allegations in the 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, 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, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 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. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).



Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced 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. With respect to guilty plea counsel, the Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

IV. 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 has reviewed the Clerk of Court records regarding the subject convictions, the guilty plea transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. 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, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds counsel's testimony to be credible and persuasive on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below.



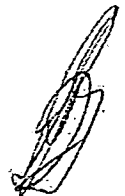
Ineffective Assistance of Counsel

In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. See Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (1999) (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the applicant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citations omitted).

An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969).

Notice of Appeal

Applicant argues Counsel was ineffective in failing to file a notice of appeal to challenge Judge Riddle's order waiving jurisdiction to the Court of General Sessions. Applicant further alleges Counsel was ineffective in failing to file an interlocutory appeal from the waiver order. Respondent argues Applicant waived all nonjurisdictional challenges to his convictions and sentences by pleading guilty and therefore could not raise any issues from the family court's decision on appeal. Respondent also argues an interlocutory appeal was not proper because the family court's decision is not a final disposition to the case. This Court agrees with Respondent.



Even considering Applicant's allegations on the merits, this Court finds Applicant failed to meet his burden in proving Counsel ineffective and any resulting prejudice.

This Court finds State v. Rice², persuasive. In Rice, the South Carolina Supreme Court held that "an erroneous order transferring a juvenile to general sessions court would be judicial error – not a jurisdictional error." Id at 333, 486. A juvenile would therefore waive any challenge to the judge's error by pleading guilty. The court in Rice encountered this same issue and expressly ruled a challenge to the family court's waiver order is *not* jurisdictional and is therefore waived if the juvenile pleads guilty. The court cited long-held authority for this proposition:

a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the plea . . .

Id at 332, 4866 (citing Tollett v. Henderson, 411 U.S. 258, 267, 93 S. Ct. 1602 (1973)). This Court finds Applicant waived any challenge to Judge Riddle's order by pleading guilty and cannot now challenge the ruling.

To the extent Applicant alleges Counsel was ineffective for failing to file an interlocutory appeal, this Court finds the allegation without merit. A family court order transferring jurisdiction to general session is interlocutory and *not* subject to immediate appeal. State v. Lockhart, 275 S.C. 160, 267 S.E.2d 720 (1980).

Motion for Reconsideration

Applicant also alleges Counsel was ineffective for failing to file a motion for reconsideration of the family court's order. Counsel found no basis to file a motion for

² 410 S.C. 330, 737 S.E.2d 485 (2013).



reconsideration. This Court agrees. This Court finds Counsel's performance was objectively reasonable under the prevailing professional norms. Further, Applicant has failed to prove resulting prejudice. The record before this Court and testimony provided at the hearing firmly convinces this Court Applicant would have been no better off in filing a motion for reconsideration.

Failure to Investigate and Call James Hamrick

This Court finds Applicant failed to meet his burden to prove that Counsel's performance was either deficient or ineffective for failing to investigate and to call James Hamrick as a witness at the family court waiver hearing. "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 allegation rests entirely on speculation. See Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) ("failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result."). Applicant failed to present any evidence or testimony from Hamrick. Even if Hamrick's testimony would have comported with his statements at the plea hearing, much of this testimony was not favorable to Applicant. He stated at plea hearing that if Applicant was released it is likely he would reoffend if he fell under the influence of others. This Court finds even if it were to consider Hamrick's statement, it would not have changed the result of the family court waiver hearing. Accordingly, this Court finds Applicant failed to meet his burden with regards to the allegations addressed above.



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, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

V. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate counsels' performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

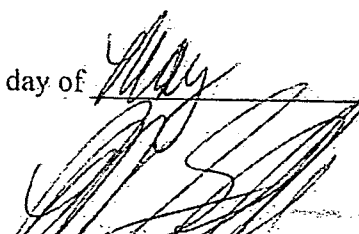
The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.



IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant will remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 8 day of May, 2015.



BROOKS P. GOLDSMITH
Presiding Judge

_____, South Carolina

