

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

Steven McElrath, # 328413,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT
Case No: 2009-CP-04-0012

ORDER OF DISMISSAL

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed January 2, 2009. The State submitted its Return on or about April 2, 2009. An evidentiary hearing into the matter was convened on June 15, 2010, at the Anderson County Courthouse. The Applicant was present at the hearing and was represented by George Sands, Esquire. The Respondent was represented by A. West Lee of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. The State presented testimony from Applicant's Plea Counsel, Charles Anderson, Esquire. This Court also had before it a copy of the transcript from the Applicant's guilty plea proceedings, the records of the Anderson County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the Application for Post-Conviction Relief, the State's Return, and evidence presented at the hearing.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. Applicant was indicted at the June

A TRUE COPY
AUG 24 2010

2007 term of the Anderson County Grand Jury for kidnapping (2007-GS-04-1896) and criminal sexual conduct – first degree (2007-GS-04-1897). Scott D. Robinson, Esquire, represented the Applicant. On May 19, 2008, Applicant pled guilty as indicted. The Honorable J.C. Nicholson, Jr., consecutively sentenced him to confinement for a period of thirty (30) years for kidnapping and ten (10) years for criminal sexual conduct – first degree.

A Notice of Appeal was filed on Applicant's behalf. The South Carolina Court of Appeals dismissed the appeal on September 23, 2008, for lack of any showing that there is an issue preserved for appellate review. The Remittitur was issued on October 9, 2008.

In his current application for post-conviction relief, the Applicant alleges he is being held in custody unlawfully for the following reasons:

- 1) Ineffective Assistance of Counsel
 - a. "Counsel was ineffective in failing to object to the sentence given to Applicant."
 - b. "Counsel was ineffective for failing to provide Applicant with knowledge of a viable defense that was available to him, causing him to accept his guilty plea without full knowledge of the consequences of that plea."
 - c. "Counsel was ineffective for failing to investigate the mental capacity of the Applicant to plead guilty causing the Applicant to enter into a plea of guilty without full understanding of the nature of the plea."
- 2) Involuntary Guilty Plea

APPLICABLE LAW

Ineffective Assistance of Counsel

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of Counsel is alleged 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption 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. First, the Applicant must prove that Counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). 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. With respect to guilty Plea Counsel, the Applicant must show that 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, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the Applicant 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 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

An Applicant who enters a plea on the advice of Counsel may only attack the voluntary and

intelligent character of the plea by showing that trial Counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for trial Counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial, Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993). Given Applicant's burden of proof and the analysis to be applied to this claim, the Applicant's claim of involuntary plea is, in essence, a claim of ineffective assistance of Counsel, and it will be treated as such.

Involuntary Guilty Plea

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant 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 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

The transcript reflects that the guilty plea was knowingly and voluntarily entered with a full understanding of the charges and consequences of the plea. Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, [an Applicant's] right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63 (1977). Statements made during a guilty plea should be considered conclusively, unless an [Applicant] presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975) *overruled on other grounds by U.S. v. Whitley*, 759 F.2d 327 (4th Cir. 1985). This Court finds that Applicant presented no reasons to show that he should be allowed to depart from the truth of the statements he made during his guilty plea

that double jeopardy should not have allowed him to be sentenced on both the sexual assault and the kidnapping. He also testified Counsel should have filed a motion for reconsideration.

Scott Robinson, Esquire

Counsel testified that he met with the Applicant on multiple occasions. He testified that he discussed with the Applicant the charges, the elements of those charges, and what the state had to prove in order for the Applicant to be found guilty. Counsel also testified that he discussed with the Applicant the potential punishments he faced and his constitutional rights. Counsel testified that it was Applicant's position that the sex was consensual, but added that it was always the victim's position that it was not consensual.

Counsel testified that he received the State's evidence in the case, and reviewed it with the Applicant. He stated that the only part of the discovery he may not have had occasion to review with the Applicant was the forensic evidence, which he did not receive until a few weeks before trial. Counsel testified that the evidence included statements given by the Applicant and the victim, as well as the forensic evidence. He stated that after reviewing the evidence and discussing it with the Applicant, he came to the conclusion that the State had a very good case and could likely prove the Applicant guilty beyond a reasonable doubt.

Counsel testified that, to the best of his knowledge, double jeopardy would not have applied in this case because the Applicant moved the victim into the closet and kept her there until she was rescued. Counsel testified that Applicant also told him that he was intoxicated at the time of the incident and when he gave his confession. He testified that he would have contested the statement if the Applicant had elected to proceed to trial, but added that voluntary intoxication would not have been a defense to the crime itself. However, Counsel testified that

the Applicant ultimately wanted to plead guilty. He testified that the Applicant expressed remorse for his actions, and recollected that the Applicant made an apology of sorts at the guilty plea hearing.

Finally, Counsel testified that he did not object to the sentence because there was nothing objectionable about it. Further, he testified that he did not make a motion for reconsideration because Applicant did not ask him to.

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, closely 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 (2003).

Involuntary Guilty Plea

With respect to this claim, this Court finds that the Applicant has failed to meet his burden of proof. This Court finds Counsel's testimony that he met with the Applicant, discussed the charges, the Applicant's constitutional rights and the discovery, and that the Applicant ultimately made an informed and voluntary decision to plead guilty to be credible, while simultaneously finding Applicant's testimony on this issue not to be credible.

This finding is supported by a review of the guilty plea transcript. At the guilty plea hearing, the Applicant testified that he had not consumed any drugs or alcohol in the past twenty-four hours. (Tr. p. 5, lines 7-9). He also testified that although he took prescription medication, it did not affect his ability to understand the proceedings against him. (Tr. p. 5, line 10 – p. 7,

line 4). He testified that he understood the possible punishments he was facing, that he understood his constitutional rights, and that he was satisfied with the services of his attorney. (Tr. p. 7, line 5 – p. 13, line 2).

The Applicant testified that no one had threatened him, coerced him, or promised him anything in order to secure his guilty plea. (Tr. p. 13, lines 6-13). He testified that he pled guilty of his own free will, and further testified that he understood all the court's questions and had answered the court's questions truthfully. (Tr. p. 13, lines 20-24). Applicant further testified that he wished to plead guilty, and in fact was guilty of the charges. (Tr. p. 14, lines 3-6). Finally, he agreed with the Solicitor's statement of facts (Tr. p. 17, lines 18-20), and made an apology of sorts. (Tr. p. 26, lines 4-25).

Based on the testimony presented at the PCR Hearing and a review of the record of the guilty plea hearing, this Court finds that the Applicant's guilty plea was knowingly, intelligently, freely and voluntarily entered. Therefore, this allegation is denied and dismissed.

Failure to Object to the Sentence or File Motion for Reconsideration

With respect to this claim, this Court finds that the Applicant has failed to meet his burden of proof. This Court finds Counsel's testimony that he did not object to the sentence because he saw nothing objectionable about the sentence and did not believe double jeopardy to apply to be credible. This Court notes that the sentences handed down to the Applicant were within the parameters allowed by their respective statutes, and further notes that it was within the plea judge's discretion to run the sentences concurrently or consecutively. That he chose to run them consecutively is not a reflection upon Counsel's representation. Additionally, this Court notes that the facts of the case were sufficient to charge kidnapping as a separate offense. As

such, this Court finds that the Applicant cannot prove that he received ineffective assistance of counsel or resulting prejudice. Accordingly, this claim is denied and dismissed.

Failure to Provide Applicant with Knowledge of Viable Defense

With respect to this claim, this Court again finds that the Applicant has failed to meet his burden of proof. Applicant testified that he informed Counsel that he was intoxicated at the time of the incident and when he gave his confession. Counsel testified that if the Applicant had elected to proceed to trial, he would have challenged the confession, but added that this was not the Applicant's desire. Counsel also testified that voluntary intoxication would not have been a viable defense to the crime. Applicant also testified that the sex was consensual, and Counsel corroborated that this was the Applicant's position. However, Counsel also testified that the victim's position was always that it was not consensual, and that he would not have been confident in the Applicant's chances of success when it was his word versus that of the victim.

This Court finds that Counsel's testimony on these issues is credible, while simultaneously finding that the Applicant's testimony is not credible. Further, this Court notes that the Applicant has provided no additional evidence of other defenses that should have been explored on his behalf. As such, this Court finds that the Applicant is unable to prove ineffective assistance of counsel or resulting prejudice. Accordingly, this allegation is denied and dismissed.

All Other Claims

Except as discussed above, this Court finds that the Applicant affirmatively waived 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, 455 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 issue 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. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court advises Applicant that he must file and serve a notice of appeal within thirty (30) 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 PCR. Rule 71.1(g), SCRCP, provides that if the Applicant wishes to seek appellate review, PCR Counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 227 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 13 day of August, 2010.



R. Lawton McIntosh
Presiding Judge
Tenth Judicial Circuit

Anderson, South Carolina.

RECEIVED
GENERAL COUNSEL

2010 AUG 23 PM 3:58

10101