

THE GIESE LAW FIRM, LLC

1315 BLANDING STREET
COLUMBIA, SC 29201

W. BARNEY GIESE

JUSTIN M. KATA

KEITH GIESE

KELLY L. GIESE

JONATHAN D. WALLER

RECEIVED

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JUN 04 2015

S.C. SUPREME COURT

June 2, 2015

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

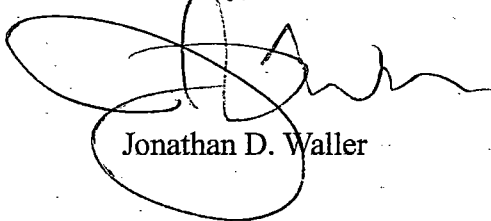
Re: Maurice Kinard vs. State of South Carolina
C/A No: 2014-CP-40-02212

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope. I was appointed counsel on this case and have also included a copy of the Order of Dismissal.

If you have any questions, please do not hesitate to ask. My telephone number is 803-708-6767.

Sincerely,



Jonathan D. Waller

Enclosures

Cc: Megan Harrigan

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JUN 04 2015

APPEAL FROM RICHLAND COUNTY
Brooks P. Goldsmith, Circuit Court Judge

S.C. SUPREME COURT

2014-CP-40-02212

Maurice Kinard, #271081,

Appellant,

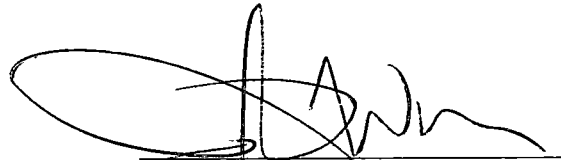
v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Maurice Kinard, #271081, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed May 22, 2015, issued by the Honorable Brooks P. Goldsmith, Presiding Judge, Fifth Judicial Circuit.



Jonathan D. Waller

The Law Office of Jonathan Waller, LLC
SC Bar No.: 76290
1720 Main Street, Suite 104
Columbia, SC 29201
803-256-0011 (phone)
866-213-8870 (fax)
jonathanwallerlaw@gmail.com
ATTORNEY FOR PETITIONER

This 2 day of June, 2015.

Other Counsel of Record:

J. Clayton Mitchell, Assistant Attorney General

Post Office Box 11549

Columbia, SC 29211

(803) 734-3319

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JUN 4 2015

APPEAL FROM RICHLAND COUNTY
Brooks P. Goldsmith, Circuit Court Judge

S.C. SUPREME COURT

2014-CP-40-02212

Maurice Kinard, #271081,

Appellant,

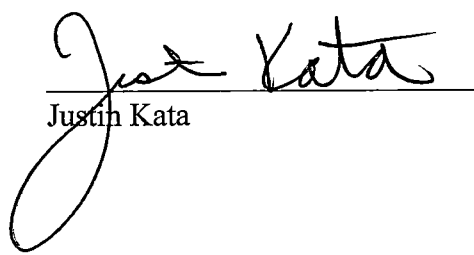
v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, J. Clayton Mitchell, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 2 day of June 2015.


Justin Kata

SWORN TO BEFORE me this 2 day
of June, 2015.


Notary Public for South Carolina
My Commission Expires: 3/25/23

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2014CP4002212

Maurice #271081 Kinard

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (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):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Non-suit); Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other _____

FILED
 2015 MAY 22 PM 12:22
 JENNIFER W. MCBRIDE
 C.C.P. & G.S.

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 (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 22 May 2015 to attorneys of record or to parties (when appearing pro se) as follows:

Maurice #271081 Kinard

Jonathan D Waller

Megan Harrigan Jameson

Maurice #271081 Kinard

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeanette W. McBride

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Maurice Kinard, #271081

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2014-CP-40-02212

ORDER OF DISMISSAL

JEANETTE W. McNEIL
C.C.P. & G.S.

2015 MAY 22 PM 12:19

RICHLAND COUNTY
FILED

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed April 7, 2014. Respondent made its Return on June 13, 2014, requesting an evidentiary hearing be convened. Jonathan D. Waller, 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 Waller. 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, Tivis C. Sutherland, 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, 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 indicted during the February 2011 term of the Richland County Grand Jury for murder (2011-GS-40-1134). Applicant was represented by Tivis C. Sutherland, IV, Esquire. On December 9, 2013, Applicant appeared before the Honorable Diane S. Goodstein, where he pleaded guilty to voluntary

manslaughter. Pursuant to the negotiated sentencing range of fifteen (15) to twenty-five (25) years', Judge Goodstein sentenced Applicant to twenty-five (25) years' imprisonment. Applicant did not appeal his guilty plea or sentence.

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 prepare, in failing to file a notice of appeal, and in failing to properly advise on self-defense.

II. SUMMARY AND EVIDENCE PRESENTED AT THE PCR HEARING

Applicant's Testimony

Applicant testified Counsel was appointed to represent him on the charges at issue in April 2013. He was his sixth attorney. Applicant testified Counsel met with him between five to six times while he was incarcerated. Applicant acknowledged Counsel reviewed the charges, potential penalties, discovery, and all evidence the State was prepared to introduce in their case.

Applicant believed he acted in self-defense when he killed the victim. Applicant acknowledged that dozens of eyewitnesses saw him unload a clip into the victim. The State categorized the killing as an execution. Applicant explained that he and the victim had prior altercations and that he kept coming around the neighborhood. Applicant claimed Counsel was not prepared to take the case to trial. Applicant testified he gave Counsel names of people who would corroborate his version of events. Applicant testified Counsel hired an investigator who spoke to some, but not all of these witnesses. Applicant did not believe the witnesses were subpoenaed and ready to testify in his defense.

Applicant testified that he ultimately chose to plead guilty to the lesser included offense of voluntary manslaughter. Applicant noted that if he was convicted or pled to murder he would



have to serve that sentence day for day which was not the case with a plea to voluntary manslaughter.

Applicant claimed he requested Counsel to file an appeal after the plea hearing concluded. Applicant recalled that the plea judge advised him that he would have ten (10) days to file a notice of appeal. Applicant acknowledged his testimony at the plea hearing contradicted much of what he swore to the plea judge.

Counsel Tivis C. Sutherland's Testimony

Counsel testified he represented Applicant on the charges currently before the Court for about eight (8) months. Counsel testified he was appointed to represent Applicant. Counsel testified he was previously employed by the Fifth Circuit Public Defenders' Office. He testified he often gets appointed on difficult cases where the public defenders' office may have a conflict. Counsel testified Applicant had been in jail for a while and had several attorneys appointed to represent him.

Counsel testified he was fully prepared to try Applicant's case. Counsel noted that he and Applicant "worked and worked" on his testimony and attempted to prepare Applicant for an aggressive cross-examination. Counsel testified he hired an investigator to interview various witnesses. Counsel explained that many witnesses were reluctant to speak to investigators and were especially skeptical of law enforcement. Counsel testified he had witnesses subpoenaed who were likely to testify that the victim was a bully, had done drive by shootings and shot into homes, and had issued threats to Applicant after previous altercations between the two. Those witnesses were at the courthouse and were ready to testify the day Applicant pled. Counsel believed the witnesses would show the victim terrorized the neighborhood. Counsel testified he considered putting up a self-defense case at trial, but believed that a voluntary manslaughter



conviction would be a best case scenario. Counsel testified the facts in the case were bad. Applicant emptied a pistol into the victim then was reported as saying, "You ain't dead yet, m***** f*****," and then asking for another gun to continue shooting.

Counsel emphasized that he met with the prosecuting solicitors for nearly an hour after a jury had been qualified in an attempt to convince them the case warranted a voluntary manslaughter charge and not a murder charge. The State agreed to a negotiated deal with a sentencing range of fifteen (15) to twenty-five (25) years' imprisonment. Counsel testified he advised Applicant of the offer and that he accepted. Counsel explained the difference in time that Applicant would be required to serve if convicted of murder or manslaughter. Counsel believed this was a favorable plea deal and that he would be fortunate to get this result at trial.

Counsel testified he did not recall whether Applicant asked for a notice of appeal to be filed. He testified he received a letter from Applicant after the time to file had passed that mentioned an appeal. Counsel testified that this was a negotiated plea deal, a contract, and that they worked hard to get it. He also testified he believed any appeal would be frivolous.

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).

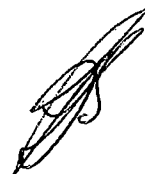
Counsel's Preparation

This Court finds Applicant failed to meet his burden to prove that counsel's performance was either deficient or ineffective for failing to sufficiently prepare for trial. To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). This Court finds trial counsel's testimony more credible than Applicant's testimony. This Court finds Counsel was thoroughly

prepared to take Applicant's case to trial as a jury was qualified just before Applicant pled guilty. Applicant testified he believed he had witnesses who could testify to his version of events and believed they have been at the courthouse ready to do so. This Court finds Counsel had them at the courthouse ready testify the day Applicant pled guilty. Furthermore, Applicant failed to produce any evidence at the PCR hearing to show what Counsel should have but did not investigate at the PCR hearing, and therefore cannot prove any resulting prejudice. See Frasier v. State, 306 S.C. 158, 160-61, 410 S.E.2d 572, 573 (1991). This allegation is denied and dismissed.

Notice of Appeal

This Court finds Applicant has failed to carry his burden to prove Counsel was ineffective in failing to file a notice of appeal. "[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular 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, 145 L. Ed. 2d 985 (2000). Here, Counsel believed an appeal would be frivolous. He credibly emphasized that the two worked hard for the plea deal and received what Counsel testified as a near best case scenario in being able to plead to voluntary manslaughter. This Court finds Applicant was advised by the plea court that if he wished to appeal, he would have ten (10) days to do so. This Court also finds Applicant failed to present any evidence showing how he may be prejudiced by this alleged deficiency. See Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). This Court finds there were no objections made at the guilty plea hearing, and Counsel had not reason to file a notice of appeal.



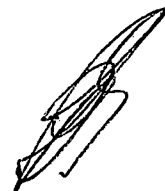
Advice on Self Defense

To the extend Applicant raises an allegation that Counsel failed to advise him on self-defense, this Court finds Applicant failed to meet his burden. Counsel's credible testimony is persuasive on the issue. There was no issue as to whether Applicant killed the victim. There were numerous witnesses to the incident all of which stated Applicant acted unprovoked. Counsel did not believe the facts supported a strong self-defense claim and thought a voluntary manslaughter conviction, rather than a murder conviction, would be beneficial to Applicant. This Court agrees. This Court further finds Applicant was advised of the risks of going to trial and facing a possible murder conviction. He was also advised of the likelihood of success of presenting a self-defense claim. Furthermore, Applicant failed to present any evidence that he would have proceeded to trial but for the alleged deficiency.

It is of significant note that Applicant pleaded guilty and, thus, waived all nonjurisdictional defenses and challenges. "A guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights." Jamison v. State, 410 S.C. 456, 467, 765 S.E.2d 123, 129 (2014) (citing State v. Rice, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485-86 (2013); Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). 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.

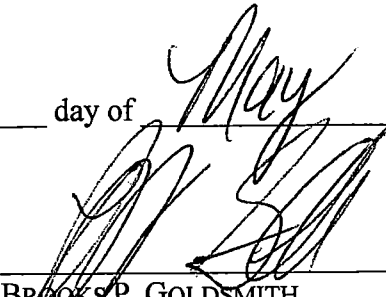
SCANNED



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 13 day of May, 2015.



BROOKS P. GOLDSMITH
Presiding Judge

_____, South Carolina



ALAN WILSON
ATTORNEY GENERAL

May 19, 2015

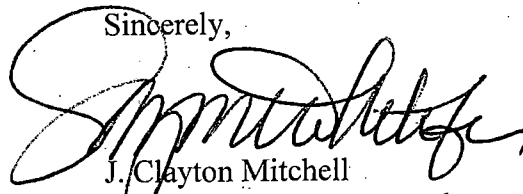
The Honorable Jeanette W. McBride
Clerk of Court, Richland
1701 Main Street
Post Office Box 2766
Columbia, SC 29202

Re: Maurice Kinard, #271081, v. State of South Carolina
2014-CP-40-02212

Dear Ms. McBride:

Enclosed please find the original **Order of Dismissal** signed by the Honorable Brooks P. Goldsmith, in the above-captioned case, for filing in your office. Please forward a **time stamped copy** back to our office for our file.

Sincerely,



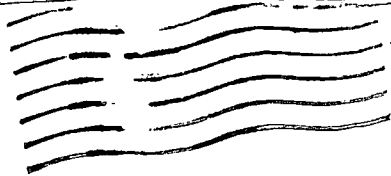
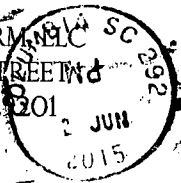
J. Clayton Mitchell
Assistant Attorney General

JCM/sbm
Enclosure

cc: Jonathan D. Waller, Esquire

SCANNED

THE GIESE LAW FIRM, PLLC
1315 BLANDING STREET
COLUMBIA, SC 29201



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