

LAW OFFICE OF

Kristy Grafton Goldberg, LLC

ATTORNEY AT LAW

June 30, 2015

RECEIVED

JUL 02 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: Jasmine D. Jennings, SCDC # 355568, vs. State of South Carolina
Appeal of Case No. 2014-CP-41-111

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 Ms. Jennings as I was appointed in this matter. 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: Walt Whitmire
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549

Jasmine Jennings, SCDC # 355568
Graham (Camille Griffin) Correctional
Institution
4450 Broad River Road
Columbia, SC 29210

The Honorable Doris B. Holmes
Clerk of Court
100 East Church Street
Saluda, South Carolina 29138

Office of Appellate Defense
Chief Appellate Defender – Robert Dudek
PO Box 11433
Columbia, SC 29211-1433

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Case No. 2014-CP-41-111

Jasmine D. Jennings, SCDC # 355568, Appellant


v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Applicant Jasmine D. Jennings hereby appeals from the Order of the Honorable Brooks P. Goldsmith presiding Judge for the 11th Judicial Circuit, filed June 23, 2015 and received by counsel for the Applicant on June 30, 2015 in the matter of Jasmine D. Jennings v. State of South Carolina, Case No. 2014-CP-41-111.

June 30, 2015



Kristy Goldberg
Attorney for Plaintiff

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM SALUDA COUNTY
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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 June 30, 2015 by
depositing one copy in the U.S. Mail, postage prepaid:

Assistant Attorney General, Walt Whitmire
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211



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Attorney for Plaintiff

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Other Counsel of Record:
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STATE OF SOUTH CAROLINA
COUNTY OF SALUDA

Jasmine D. Jennings,
S.C.D.C. No. 355568

Applicant,

v.

State of South Carolina,

Respondent.

FILED

) IN THE COURT OF COMMON PLEAS
2015 JUN 23 AM 10:02
) ELEVENTH JUDICIAL CIRCUIT

CLERK OF COURT
SALUDA COUNTY No. 2014-CP-41-111

**ORDER OF DISMISSAL
(with prejudice)**

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on May 21, 2014. Respondent made its return on September 22, 2014. An evidentiary hearing into the matter was convened on April 20, 2015, at the Lexington County Courthouse. Applicant was present at the hearing and was represented by Kristy G. Goldberg, Esq. Respondent was represented by Walt Whitmire, Esq., of the Office of the Attorney General.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Saluda County. Applicant was indicted at the May 2013 term of General Sessions for Saluda County for two counts of reckless homicide (2014-GS-41-136; -137). She was represented by Robert T. Williams (Theo), Esq. On May 30, 2013 Applicant pled guilty as indicted before the Honorable William P. Keesley. Judge Keesley accepted her plea and sentenced her to two terms of ten (10) years imprisonment on each count of reckless driving. The sentences were to be served concurrently. Applicant did not appeal her sentences or convictions. Subsequently, Judge Keesley convened a post-plea hearing on Applicant's motion for a reconsideration of her sentence.

In her current Application, Applicant alleges that she is being held in custody unlawfully for the following reasons:

- (a) Ineffective assistance of counsel – failure of trial counsel to request and receive a better plea agreement;
- (b) Ineffective assistance of counsel – trial counsel informed the Applicant that if she pled guilty she would receive a probationary sentence;
- (c) Ineffective assistance of counsel – failure of trial counsel to sufficiently represent the Applicant during her guilty plea by failing to object to introduction of MAIT report and diagram, failing to object when the Solicitor interjected his opinion into the facts, failing to call witnesses, and failing to address concerns such as the involvement of a 3rd vehicle and the intoxication level of the victim;
- (d) Ineffective assistance of trial counsel – failure of trial counsel sufficiently mitigate the Applicant's case by failing to call character witnesses and failing to adequately explain Ms. Jennings personal details.

SUMMARY OF TESTIMONY

At the PCR hearing, Applicant testified that she retained counsel after her arrest. Applicant offered testimony concerning counsel's performance in his evaluation of State evidence and investigation of facts of car accident. She testified that she told counsel her version of the facts of the accident. In pertinent part, she testified that S.L.E.D.'s expert M.A.I.T. report on the matter was materially inaccurate because it ignored the presence of a third vehicle between her vehicle and the victim's vehicle. Applicant testified that it was her opinion further investigation here would have negated the State's ability to prove the intent element on the underlying offense. Furthermore, Applicant testified that counsel should have further investigated the victim's toxicology based on her opinion that it held exculpatory value. Applicant introduced several exhibits from counsel's file in support of these allegations.

Applicant testified that counsel erroneously told her that she would get a probationary sentence if she pled guilty. Apparently she made her decision to plead on this purported misadvice because she wanted the case to be resolved so that she could be with her child.

Applicant also provided testimony on her complaints related to the plea hearing itself. Applicant asserts counsel should litigated causation, intent, and other substantive matters concerning the State's evidence during the presentation of Applicant's mitigation case. Last, Applicant testified that she wished counsel would have objected to Solicitor Myers' description of reckless conduct. **Plea Tr. p.32, ln.24—p.33, ln.6.** Applicant asserted that Solicitor Myers was improperly interjecting his opinion as the facts of the case.

Counsel testified to his course of conduct during the representation. Counsel provided a brief outline of his experience that included thirty-nine (39) years of primarily criminal law practice. Counsel summarized the State's evidence against Applicant. Applicant was excessively speeding on a rural stretch of road, at a late hour, and that she been drinking while she was underage. Counsel testified to his impression of this evidence where he reasoned the State counsel had a strong enough case to successfully prosecute Applicant for D.U.I., resulting in death, even absent the requisite B.A.C. presumption. Based on his investigation and labors, counsel reasoned that the State's case against Applicant for reckless homicide constituted overwhelming evidence of guilt. Counsel conveyed this impression to Applicant and that any post-trial sentencing would probably would have been substantial based upon the aggravating factors at play. Counsel testified to his review of the victim's toxicology report and its lack of import to the defense's case. The report positively identified low levels of drug use. Based upon counsel's experience, he reasoned that it would have been impossible to prove that the victim was intoxicated at the time of the accident. Counsel again shared his impressions here with Applicant.

Counsel testified that Applicant was insistent on pleading guilty because she was very remorseful. It was also his opinion that the plea would be the best outcome in Applicant's case.

Counsel was resolute that he did not promise Applicant that she would get probation where he advised her that the structure of the plea placed all discretion with the sentencing judge. Counsel testified to the manner in which he presented Applicant's mitigation case. Counsel testified that Judge Keesley was able to sort out the facts from theory.

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 (1985).

As a matter of general impression, this Court finds the PCR action lacks global credibility where it was entirely support by Applicant's suspect and speculative testimony. In contrast, counsel gave compelling testimony on his methodical approach to the case. Concerning the allegations at issue, the evidence before this Court dispostively shows that Applicant made a knowing, intelligent, and voluntary decision to plead guilty based on counsel's exceptional performance.

EFFECTIVE 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), SCRCP; 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, (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, she 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). After careful review based on the standard discussed above, the Applicant has failed to carry her burden in this action.

A.

This Court finds Applicant has fell well short of meeting her burden to prove "(c) Ineffective assistance of counsel – failure of trial counsel to sufficiently represent the Applicant during her guilty plea by failing to object to introduction of MAIT report and diagram, failing to object when the Solicitor interjected his opinion into the facts, failing to call witnesses, and failing to address concerns such as the involvement of a 3rd vehicle and the intoxication level of the victim." "Specifically, the voluntariness of a guilty plea is not determined by an examination

of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000). "A guilty pleas act as a waiver of all non-jurisdictional defects and defenses, including claims of constitutional violations." Whetsell v. State, 276 S.C. 295, 277 S.E.2d 891 (1981).

This allegation rested entirely upon unfounded speculative testimony. In comparison, this Court finds counsel's testimony convincing and dispositive where the disputed facts were immaterial to the State's overwhelming evidence of guilt. This Court agrees with counsel's testimony that the victim's toxicology report and the possible variances in the M.A.I.T. report provided Applicant no safe harbor to mount any viable meritorious defense. Therefore, this allegation is readily denied and dismissed with prejudice.

This Court also finds Applicant's allegation "(d) Ineffective assistance of trial counsel – failure of trial counsel sufficiently mitigate the Applicant's case by failing to call character witnesses and failing to adequately explain Ms. Jennings personal details" to be without merit. This Court finds the record shows that counsel fully litigated an exceptional mitigation case at the plea hearing and in his post-trial motion. In comparison, Applicant has presented no additional credible evidence of import to show how counsel's performance was lacking on this matter. Therefore, this allegation is also readily denied and dismissed with prejudice.

B.

This finds the Applicant's allegation "(b) Ineffective assistance of counsel – trial counsel informed the Applicant that if she pled guilty she would receive a probationary sentence" to be without merit. In light of Applicant's dubious and incredible testimony on the matter, this Court

finds counsel's testimony here to be convincing and dispositive. Where further discussion is unnecessary, this Court rejects this allegation and denies and dismisses it with prejudice.

Last, this Court find's Applicant's allegation "(a) Ineffective assistance of counsel – failure of trial counsel to request and receive a better plea agreement" facially defective. It is the sole constitutional province of the Solicitor's office to dictate the terms of plea offer. Ex parte Harrell v. Attorney Gen. of State, 409 S.C. 60, 69, 760 S.E.2d 808, 812 (2014). Because, Strickland does not impose a duty on criminal defense attorneys to invade the constitutional province of the executive branch of government, this allegation is summarily denied and dismissed with prejudice.

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.

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 her application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

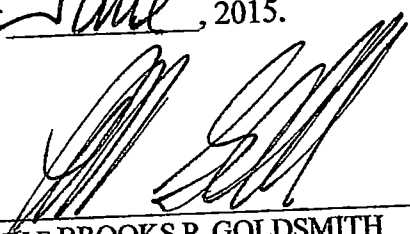
This Court notes that that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-

conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 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 3 day of JUNE, 2015.



HONORABLE BROOKS P. GOLDSMITH
Presiding Judge
Eleventh Judicial Circuit

_____, South Carolina