

IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM LEXINGTON COUNTY
COURT OF COMMON PLEAS

RECEIVED

JUL -9 2015

S.C. Supreme Court

DEANDREA G. BENJAMIN, CIRCUIT COURT JUDGE

2013-CP-32-3947

Robert Fletcher Herbert, #231709,.....Petitioner.

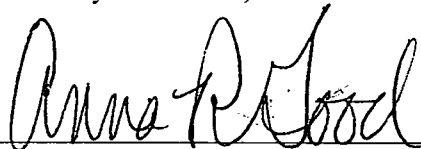
vs

The State of South Carolina,.....Respondent.

NOTICE OF APPEAL

Robert Fletcher Herbert appeals the Honorable DeAndrea G. Benjamin's June 11, 2015, order denying post-conviction relief to the Petitioner. This order was clocked on June 22, 2015 and undersigned counsel received notice of entry of the order on July 7, 2015. A copy of the order on appeal is attached to this notice.

Respectfully submitted,



Anna R. Good
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Attorney for the Petitioner.

July 9, 2015

Clayton Mitchell
South Carolina Attorney General's Office
Post Office Box 11549
Columbia, SC 29211-1549

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PROOF OF SERVICE

I, Anna Good, certify that I have today served the within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to the attorney of record, Clayton Mitchell, P.O. Box 11549, Columbia, South Carolina 29211-1549. I further certify that all parties required by Rule to be served have been served this 9th day of July 2015.

Respectfully submitted,



Anna R. Good, Esquire
Law Office of Anna Good, LLC
PO Box 7284
Columbia, South Carolina 29202

ORIGINAL

FILED

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

Robert Fletcher Herbert, #231709

2013-CP-32-3947
KATHA A. CARRIG
CLERK OF COURT
LEXINGTON, SC

Applicant,

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed November 12, 2013. Respondent made its Return on April 29, 2014, requesting an evidentiary hearing be convened. Anna R. Good, Esquire, was appointed by the Lexington County Clerk of Court. An evidentiary hearing was held on October 15, 2014, at the Lexington County Courthouse. Applicant was present and represented by Counsel Good. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent. The Court took this matter under advisement and held the record open. The hearing was reconvened on February 11, 2015, at the Richland County Courthouse. Applicant and Counsel Good were both present. The parties waived venue to allow the hearing to proceed in Richland County.

At the PCR hearing, Applicant testified on his own behalf. Also testifying were Applicant's plea counsel, Sarah Hahn Mauldin, Esquire, and Matthew C. Buchanan, Esquire. The Court had before it the Lexington 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 Lexington County Clerk of Court. Applicant was true bill indicted at the July 2012 term of the Lexington County Grand Jury on two counts of burglary, second degree (2012-GS-32-1452; -1454), intimidation of a witness (2012-GS-32-2176), manufacture of destructive device (2012-GS-32-2167), arson, third-degree (2012-GS-32-2166, and burglary, third-degree first offense (2013-GS-32-1259). Applicant was initially represented by Counsel Buchanan and then by Counsel Mauldin. On June 6, 2013, Applicant pleaded guilty as indicted without negotiations or recommendations. The State was represented by Asst. Solicitor Angela Garrick, Esquire. The Honorable Edward B. Cottingham, Sr., sentenced Applicant to ten (10) years imprisonment on each burglary, second-degree violent charge, ten (10) years imprisonment for intimidation of a witness, two (2) years imprisonment for manufacture of destructive device; three (3) years imprisonment for arson, and five (5) years imprisonment for burglary, third-degree first offense. Excluding one burglary, second-degree violent charge, all sentences were to be served concurrently. Burglary, second-degree violent (2012-GS-32-1452) was to be served consecutively. Applicant did not appeal his sentence or conviction.

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 request concurrent time be given; and
2. Ineffective assistance of counsel in failing to convey a plea offer.

II. SUMMARY AND EVIDENCE PRESENTED AT THE PCR HEARING

Applicant's Testimony

Applicant testified Counsel Buchanan represented him initially. He testified adamantly that Counsel Buchanan only met with him one time which was in August 2012. Applicant testified he had difficulties with Counsel Buchanan and wrote a letter to the Lexington County Clerk of Court asking that he be relieved. He testified he was never advised of a plea offer dated August 24, 2012, that consisted of a cap of fifteen (15) years imprisonment with all charges to be concurrent. (See Plaintiff's Ex. 1). Applicant testified that if that offer had been conveyed, he would have accepted it.

Applicant testified Counsel Mauldin was then appointed to represent him after Counsel Buchanan left the public defenders' office. Applicant testified he threatened to file ethical complaints against Counsel Buchanan and that he actually filed a civil suit against investigators. Applicant also testified he believed Counsel Mauldin should have requested the plea court sentence him to concurrent time on the multiple charges.

Counsel Sarah Hahn Mauldin's Testimony

Counsel Mauldin testified she represented Applicant on the charges currently before the Court, and took over for Counsel Buchanan in March 2013. She testified she met with Applicant on April 2, 2013, where they discussed the elements and penalties associated with the charges and his various rights. Counsel Mauldin explained Applicant was offered a deal on January 14, 2013, but he was served with additional warrants around March 5, 2013. She testified there was another offer made which included two groups of charges, with one consecutive to the other. Applicant declined that offer.



Counsel Mauldin testified Applicant left her a variety of messages requesting a trial and bond hearing. A bond reduction hearing was scheduled, and Applicant saw Judge Cottingham's interactions with other inmates. Applicant then insisted he wanted to plead guilty. She testified she was surprised he wanted to plead guilty that day. Counsel Mauldin testified she spoke to the solicitor who agreed to allow him to plead guilty to several charges, without specifying that some of the charges be consecutive to others. Counsel Mauldin stressed that there was no agreement that all sentences were to run concurrently. Counsel Mauldin testified the plea was open and did not consist of any recommendations or negotiations with the solicitor.

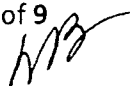
Counsel Matthew C. Buchanan's Testimony

Counsel Buchanan testified he has been practicing law for about ten (10) years. He testified he is currently General Counsel at the South Carolina Department of Probation, Parole, and Pardons and was formerly a public defender with the Lexington County Public Defenders Office. Counsel Buchanan testified he met with Applicant several times. He agreed that he did meet with Applicant in August 2012, but that he also met with Applicant on November 9, 2012, January 14, 2013, and February 11, 2013.

As to the plea offer dated August 24, 2012, Counsel Buchanan testified he fully reviewed and explained the offer to Applicant on January 14, 2012. He noted that Applicant had an opportunity to accept this offer at their February 11, 2013 meeting.

III. 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

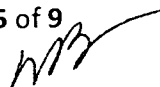


of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Applicant's testimony and assertions to not be credible. In contrast, this Court finds counsels' 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).



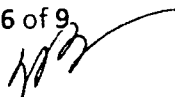
Failure to Request Concurrent Time

Applicant argues Counsel Mauldin was ineffective in failing to request concurrent sentences. This Court finds Applicant failed to meet his burden in proving Counsel Mauldin was ineffective. Specifically, the Court finds Counsel Mauldin acted reasonably in light of prevailing professional norms during the guilty plea proceeding by asking that he be given credit for time that he served, by requesting a probationary sentence, and by offering mitigation evidence and testimony.

This Court further finds Applicant failed to produce any evidence that he was prejudiced by this alleged deficiency. Applicant failed to prove that even if Counsel Mauldin had asked for concurrent sentences, that the plea court would have complied with her request. The Court emphasizes that despite Counsel Mauldin's failure to request concurrent sentences, the plea court imposed concurrent sentences for four of Applicant's charges. This proves that Counsel Mauldin's failure to request concurrent sentences did not persuade the sentencing judge to either impose or refrain from imposing any concurrent sentences. This Court further finds Applicant failed to meet his burden in proving prejudice as he failed to show that he would have gone to trial instead of pleading guilty but for Counsel Mauldin's alleged advice that he would receive concurrent time. During the guilty plea proceeding, Applicant indicated that he understood there was a possibility the sentencing judge could run the sentences consecutively, and yet, he chose to continue with the plea. This allegation is denied and dismissed with prejudice.

Failure to Convey August 24, 2012 Plea Offer

Applicant further alleges Counsel Buchanan was ineffective in failing to convey the plea offer dated August 24, 2012. (See Plaintiff's Exhibit 1). This Court finds Applicant failed to prove Counsel Buchanan was ineffective in any regard. To be successful on an allegation of an



un-conveyed plea offer, Petitioner must prove: (1) trial counsel's failure to communicate the State's initial plea offer constituted deficient performance, and (2) Petitioner was prejudiced by the deficient performance, or there was a reasonable probability that but for this deficient performance, he would have accepted the original plea offer. Davie v. State, 381 S.C. 601, 608, 675 S.E.2d 416, 420 (2009). Generally, failure to convey a plea offer constitutes deficient performance, although the existence of prejudice needs to be evaluated on a case-by-case basis. Id. at 613, 675 S.E.2d at 422. To show prejudice from a failure to convey a plea offer, Applicant must:

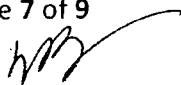
Demonstrate a reasonable probability [he] would have accepted the earlier plea offer had they been afforded effective assistance of counsel. [He] must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

Missouri v. Frye, ___ U.S. ___, 132 S.Ct. 1399, 1409 (2012).

Here, Counsel Buchanan's testimony is persuasive on all issues. Counsel Buchanan met with Applicant multiple times, not just once as Applicant claimed. This Court finds Applicant's testimony to not be credible. This Court finds Counsel Buchanan properly conveyed the August 24, 2012, plea offer to Applicant multiple times. Applicant had the opportunity to accept the plea and chose to decline the offer. This Court sees no need to reach a prejudice analysis because it is clear that Counsel Buchanan not only communicated the offer to Applicant, but fully advised him of the offer at multiple meetings.

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.

IV. 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.

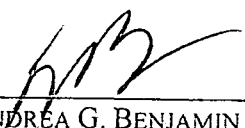
The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a 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 11 day of June, 2015.



DEANDREA G. BENJAMIN
Presiding Judge

Columbia, South Carolina