

R. MILLS ARIAIL, JR.
ATTORNEY AT LAW

11 NORTH IRVINE STREET, SUITE 11 • GREENVILLE, SC 29601
PHONE 864.232.9390 • FAX 864.232.9392 • E-MAIL MILLS@RMALAWOFFICE.COM

July 29, 2015

RECEIVED

AUG 03 2015

S.C. SUPREME COURT

Via US Mail

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

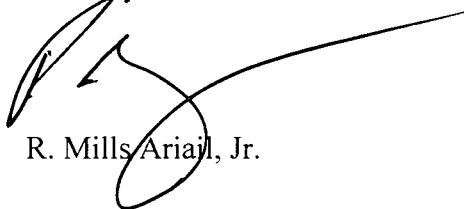
Re: Notice of Intent to Appeal from Mickey Lane Mayberry vs. State of South Carolina C.A. No.: 2014-CP-23-1082

Dear Mr. Shearouse:

I was Court Appointed in the above referenced matter, and I expect that appellate defense will handle the appeal and petition for certiorari. On behalf of my client, enclosed for filing please find the Notice of Appeal and proof of service. I've enclosed a copy of the Honorable Perry H. Gravely's Order of Dismissal to be challenged on appeal. By copy of this letter, I am also serving my client, counsel for the State of South Carolina, the South Carolina Commission of Indigent Defense - Appellate Defense Division and the Greenville County Clerk's Office.

Thank you for your assistance in this matter and if you have any questions, please feel free to contact me.

Sincerely,
LAW OFFICE OF R. MILLS ARIAIL, JR.
Attorney at Law



R. Mills Ariail, Jr.

RMAjr/dl
Enclosures (as stated)

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Case No. 2014-CP-23-01082

RECEIVED

AUG - 3 2015

S.C. Supreme Court

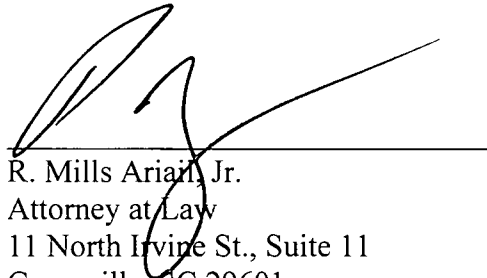
Mickey Lane Mayberry,..... Appellant,

v.

State of South Carolina Respondent.

NOTICE OF APPEAL

Appellant appeals the Honorable Perry H. Gravely's Order of Dismissal dismissing Appellant's application for post-conviction relief. On July 12, 2015, the Honorable Perry H. Gravely signed an order dismissing Appellant's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on July 24, 2015. A copy of the Honorable Perry H. Gravely's Order of Dismissal is attached.



R. Mills Ariani, Jr.
Attorney at Law
11 North Irvine St., Suite 11
Greenville, SC 29601
Telephone (864) 232-9390
Facsimile (864) 232-9392
Attorney for Mickey Lane Mayberry

Greenville, South Carolina
July 29, 2015

Other Counsel of Record and Interested Parties:

Karen C. Ratigan, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211

Greenville County Clerk's Office
Greenville County Courthouse
305 East North Street
Greenville, SC 29601

SC Commission of Indigent Defense
Division of Appellate Defense
PO Box 11433
Columbia, SC 29211-1433

Mickey Lane Mayberry SCDC# 356630
Lieber Correctional Institution
Post Office Box 205
Ridgeville, South Carolina 29472

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

AUG 03 2015

Perry H. Gravely, Circuit Court Judge

S.C. SUPREME COURT

Case No.2014-CP-23-01082

Mickey Lane Mayberry,..... Appellant,

v.

State of South Carolina Respondent.

CERTIFICATE OF SERVICE

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this July 29, 2015, I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

Karen C. Ratigan, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211
Attorney for the State of South Carolina

Greenville County Clerk's Office
Greenville County Courthouse
305 East North Street
Greenville, SC 29601

Mickey Lane Mayberry SCDC# 356630
Lieber Correctional Institution
Post Office Box 205
Ridgeville, South Carolina 29472

SC Commission of Indigent Defense
Division of Appellate Defense
PO Box 11433
Columbia, SC 29211-1433

Denise Tanner LaBeck
Denise Tanner LaBeck

July 29, 2015

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP231082

Mickey Lane Mayberry,
S.C.D.C No. 356630

State of South Carolina

FILED - S.C. COURT
GREENVILLE, S.C.
PAUL B. WICKEN
2015 JUL 20 P
38

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 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. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 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: _____

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 JUDGMENT 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 (List amount(s) below)

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.

[Signature]
Circuit Court Judge

2755
Judge Code

7/16/2015
Date

For Clerk of Court Office Use Only

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

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

TC Atty: ~~Brad Johnson~~
Mills Ariail

D Atty Karen Ratigan

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Mickey Lane Mayberry,)
 S.C.D.C. No. 356630,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2014-CP-23-1082

FILED-CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL B. WICKENSIMER
 2015 JUL 20 PM 4 38

ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed February 27, 2014. The Respondent made its return on May 8, 2014. An evidentiary hearing was held on June 18, 2015 at the Greenville County Courthouse. The Applicant was present and represented by R. Mills Ariail, Jr., Esquire.¹ Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying were assistant solicitor Allen O. Fretwell, Esquire and the Applicant's plea counsel, Scott D. Robinson, Esquire. The Court had before it the transcript of the guilty plea hearing, the Greenville County Clerk of Court records, the South Carolina Department of Corrections records, the PCR application, and the return.

¹ At the beginning of the hearing, PCR counsel noted he also represented the Applicant's co-defendant (who is also the Applicant's brother) on his PCR action. PCR counsel noted he had discussed the possibility of a conflict of interest with the Applicant, who waived any potential issues. This Court questioned the Applicant about a potential conflict of interest and is satisfied the Applicant made a knowing waiver of any potential conflict.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the November 2012 term of the Greenville County Grand Jury for attempted murder (2012-GS-23-9351, count 1), two counts of attempted armed robbery (2012-GS-23-9351, counts 2 and 4), three counts of carjacking (2012-GS-23-9351, counts 3, 5, and 7), armed robbery (2012-GS-23-9351, count 6), possession of a weapon during commission of a violent crime (2012-GS-23-9351, count 8), and pointing or presenting a firearm (2012-GS-23-9351, count 9). He was represented by Scott D. Robinson, Esquire.

On August 15, 2013, the Applicant pled guilty to attempted murder, two counts of attempted armed robbery, three counts of carjacking, and armed robbery.² The Honorable Brian M. Gibbons sentenced the Applicant to concurrent terms of 20 years for attempted murder, 10 years for each count of attempted armed robbery, 10 years for two counts of carjacking, and 30 years suspended upon service of 25 years for armed robbery. Judge Gibbons levied a consecutive sentence of 10 years for the third count of carjacking. The Applicant did not appeal.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
2. "Unkept plea advice."
3. "Inadequate mitigation as for first offence."

² The indictments for possession of a weapon during commission of a violent crime (2012-GS-23-9351, count 8) and pointing or presenting a firearm (2012-GS-23-9351, count 9) were not pressed.

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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). When there has been a guilty plea, the applicant must prove that counsel’s representation was below the standard of reasonableness and that, but for counsel’s unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

The Applicant stated he had 3-4 meetings with plea counsel. The Applicant stated they reviewed the Sheriff’s report and his version of events. The Applicant stated they reviewed the maximum sentences he was facing on these charges. The Applicant stated plea counsel did not investigate his case. ~~The Applicant stated he Applicant plea counsel to investigate whether there~~

was enough evidence for the case to go to trial. The Applicant stated plea counsel told him the State was not offering a Youthful Offender Act sentence in his case. The Applicant stated plea counsel gave him a copy of a plea agreement with a sentence range of 10-30 years. The Applicant stated he was hesitant but that plea counsel said he could get the Applicant a 10-year sentence if he signed the sentencing sheets. The Applicant stated he did not challenge the State's comment during the plea hearing that there was no specific recommendation because he "was blind to the law."

Plea counsel testified he met with the Applicant at least 3-4 times. Plea counsel testified he filed discovery motions, received those materials, and reviewed them with the Applicant. Plea counsel testified they reviewed the elements of the charges and the sentence ranges. Plea counsel testified there would have been very little likelihood of success at trial and he explained this to the Applicant. Plea counsel testified they reviewed the Applicant's statements to law enforcement and his identification by several victims. Plea counsel testified the Applicant never said he was not guilty. Plea counsel testified the Applicant pled guilty after his brother/co-defendant decided to do so. Plea counsel testified sentencing under the Youthful Offender Act would not have been possible with these charges. Plea counsel testified there was never a plea offer from the State that the Applicant would accept. Plea counsel testified the "offer" referred to by the Applicant was a list of charges and their sentence ranges but did not have a sentence recommendation. Plea counsel testified there was never a discussion of the Applicant receiving 10 years and he never promised such to the Applicant.

Assistant solicitor Allen Fretwell testified he sent plea counsel an email on February 22, 2013, which stated: (1) he was not considering reducing the charges, (2) offering an initial incarceration period of 10-30 years, and (3) a period of probation would follow with a

suspended consecutive sentence. Fretwell testified he did not make a sentence recommendation and plea counsel said he would get back in touch. Fretwell testified he sent an email to plea counsel on February 27, 2013 (after he spoke to the victims) and would make the following offer for the March 2013 term of court: (1) 14-16 years for armed robbery and attempted murder, (2) 20 years for attempted armed robbery and carjacking with a suspended 5-year probation sentence, and (3) all other charges to be concurrent. Fretwell testified he also noted this offer would be available in the April 2013 term of court to a modified degree – the range for armed robbery and attempted murder would be 15-18 years and the recommendation for attempted armed robbery and carjacking would be 25 years with a suspended 5-year probation sentence. Fretwell testified he received an email from plea counsel on March 5, 2013 that the Applicant wanted to plead guilty – but wanted a 10-year recommendation. Fretwell testified he responded that he would not make this recommendation but that plea counsel could argue for a lesser sentence. Fretwell testified a guilty plea did not happen in March or April 2013 and that the Applicant was waiting to see what his co-defendant would do. Fretwell testified he never made a plea offer for 10-30 years (though he writes the sentence ranges for the charges on the sentencing sheets) and that he never made an offer for a 10-year sentence.

This Court finds the Applicant failed to meet his burden of proving plea counsel did not properly investigate his case. The Applicant stated he did not see any investigation by plea counsel and that he wanted to know if there was enough evidence for the case to go to trial. The Applicant, however, did not specify what more plea counsel should have done to prepare his case. The Applicant also failed to present any evidence or witnesses to demonstrate what plea counsel could have discovered with a different investigation. This Court finds the Applicant failed to meet his burden of proof on this issue. See Jackson v. State, 329 S.C. 345, 495 S.E.2d

768 (1998) (finding the 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); Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing he would have had a defense with additional time to prepare for trial).

This Court finds the Applicant failed to meet his burden of proving plea counsel misadvised him about a plea offer in this case. This Court finds the State's plea offers for the March and April terms of court in 2013 were conveyed to the Applicant, who chose not to accept them. This Court finds plea counsel fulfilled his obligation in that regard. See Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (holding counsel's failure to convey the State's plea offer to defendant constituted deficient performance). This Court finds the Applicant was aware he was pleading guilty without a sentence recommendation. This Court does not find credible the Applicant's testimony that he was promised a 10-year sentence if he pled guilty. Plea counsel testified he made no such promise and this Court finds his testimony is credible. Furthermore, the plea transcript refutes the Applicant's contention that he believed he was pleading guilty pursuant to a 10-30 year recommendation (with a promise of a 10-year sentence from plea counsel). See Stalk v. State, 375 S.C. 289, 300, 652 S.E.2d 402, 407 (Ct. App. 2007). The plea judge conducted a thorough colloquy and any misapprehension the Applicant could have had about the sentence he was facing was cured by that colloquy. See Holden v. State, 393 S.C. 565, 575, 713 S.E.2d 611, 616 (2011). The Applicant stated he had not been made any promises in exchange for his guilty pleas. (Plea transcript, p.7). The Applicant did not object when the State said they were not making "a specific recommendation." (Plea transcript, p.14). This Court also notes the Applicant's contention that plea counsel promised him a 10-year sentence does not

make sense when the plea judge noted he would be "a fairly old man" when he was released and the Applicant agreed. (Plea transcript, pp.16-17). This Court finds the Applicant was aware he was pleading guilty that day without a sentence recommendation. This Court finds the Applicant failed to meet his burden of proving he was in any way misadvised about the sentence he would receive when he pled guilty.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that plea counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by plea counsel's performance.

This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

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, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and

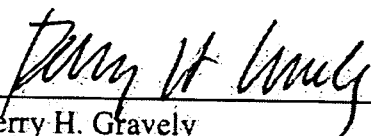
dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 12th day of July, 2015.



Perry H. Gravely
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina.

R. MILLS ARIAIL, JR.
ATTORNEY AT LAW

11 NORTH IRVINE STREET, SUITE 11
GREENVILLE, SC 29601

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



UNITED STATES POSTAGE
02 1P
\$002.96⁰
0000563972 JUL 29 2015
MAILED FROM ZIP CODE 29801

