Hugh W. Welborn

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November 5, 2015

RECEIVED

NOV 0 9 2015

S.C. SUPREME COURT

South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

In RE: Devin M. Nimmons, #355132 vs. State of South Carolina
Case #: 2013-CP-04-1769

Dear Sir/Madam:

Please find enclosed herewith the original and one (1) copy of the Appellant's Notice of Appeal in connection with the foregoing matter which I ask that you file for record, returning the clocked copy to my office. I also enclose a copy of the Order of Dismissal and the original Proof of Service on Walt Whitmire, Office of the Attorney General. Please use the enclosed self-addressed envelope to return the clocked copy to my office.

With kind regards,

s/Hugh W. Welborn (sba)

Hugh W. Welborn

HWW/sba

cc: Office of the Appellate Defense
Office of the Attorney General
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS

HONORABLE J. CORDELL MADDOX, JR.

2013-CP-04-1769

DEVIN M. NIMMONS, #355132

APPELLANT,

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NOV 09 2015

S.C. SUPREME COURT

vs

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Devin M. Nimmons, #355132 appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable J. Cordell Maddox, Jr., Circuit Court Judge on February 18, 2015, and Order of Dismissal issued on October 28, 2015, and filed on October 30, 2015. The Appellant received Order of Dismissal on November 5, 2015.

s/ Hugh W. Welborn (sba)

Hugh W. Welborn
Attorney for the Appellant
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Attorney for Devin M. Nimmons, #355132

Other Counsel of Record:
Walt Whitmire
Office of Attorney General State of SC
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Columbia, South Carolina 29211

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS

HONORABLE J. CORDELL MADDOX, JR.

2013-CP-04-1769

DEVIN M. NIMMONS, #355132

APPELLANT,

vs

STATE OF SOUTH CAROLINA,

RESPONDENT.

RECEIVED
NOV 0 9 2015
S.C. SUPREME COURT

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail postage prepaid on November 5, 2015, addressed to its attorney of record Walt Whitmire, Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549

s/ Hugh W. Welborn (eka)

Hugh W. Welborn
Attorney for the Appellant
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Anderson, South Carolina 29622
(864) 226-5787
Attorney for Devin M. Nimmons, #355132

Anderson, South Carolina

November 5, 2015

A TRUE COPY
OCT 30 2015
CLERK OF COURT

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON	TENTH JUDICIAL CIRCUIT
Devin M. Nimmons, S.C.D.C. No. 355132	C.A. No. 2013-CP-04-1769
Applicant,	
v.	**ORDER OF DISMISSAL (with prejudice)**
State of South Carolina,	
Respondent.	

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COMMON PLEAS AND
GENERAL SESSIONS

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on July 31, 2013. Respondent responsive pleadings followed. An evidentiary hearing into the matter was convened on February 18, 2015 at the Anderson County Courthouse. Applicant was present at the hearing and was represented by Hugh Welborn, 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 Anderson County Clerk of Court. Applicant was indicted by the August 2011 term of the Anderson County Grand Jury for three counts of accessory/accessory before the fact to a felony (2011-GS-04-1364; -1365; -1366), and conspiracy (2011-GS-04-0527), Applicant was represented by W. Norman Epps, Ill., Esq. On April 23, 2013, the State called its case. Applicant entered guilty pleas to burglary, second-degree violent (-1364); strong armed robbery (-1365), kidnapping (-1366) and conspiracy (-0527). The Honorable R. Lawton McIntosh sentenced Applicant to fifteen (15) years imprisonment for burglary, second-degree violent, fifteen (15) years imprisonment for strong armed robbery, fifteen (15) years imprisonment for kidnapping. The sentences were to be served concurrently. Judge McIntosh

further sentenced Applicant to five (5) years imprisonment for conspiracy suspended on the service of five (5) years probation. The conspiracy sentence was to be served consecutively. Applicant did not appeal his sentence or conviction.

At the PCR hearing, Applicant alleged that he is being held in custody unlawfully for the following reasons:

(a) Ineffective assistance of counsel for failing to interview Heather Campbell;
(b) Ineffective assistance of counsel for failing to interview the arresting officers;
(c) Ineffective assistance of counsel for failing to advise Applicant to accept the State's initial plea offer of recommended twelve (12) year aggregate sentence;
(d) Ineffective assistance of counsel for failing to address the conflict of interest created by Attorney Drawdy;
(e) Ineffective assistance of counsel for failing to move to recuse Judge McIntosh from presiding of the plea;
(f) Ineffective assistance of counsel for failing to file a notice of appeal.

SUMMARY OF TESTIMONY

At the PCR hearing, Applicant testified to his impressions of counsel and to his concerns on the competency of representation that he received. Applicant testified that his guilty plea was rendered involuntary because he was under the impression that his case was proceeding to trial on the day of his plea. He claimed he was forced to accept the plea because he believed that counsel was not prepared to try his case. Applicant testified that he met with counsel on six occasions prior to the plea; he noted that counsel was always diligent in returning his phone calls. Applicant testified that he was not aware of the State's overwhelming evidence of guilt until the eve of his guilty plea. Applicant testified that he was originally promised a five (5) year sentence in the early stages of the cases.

Applicant testified to his impression that counsel did not thoroughly investigate his case. Applicant testified that counsel reviewed police reports but neglected to interview the relevant

police officers. He further testified that counsel neglected to interview a woman named Heather Campbell, his purported post-offense alibi. Applicant claimed that Campbell's testimony would have shown that he distanced himself from the co-defendants. Applicant testified that counsel indicated to him that an expert would be consulted on the case; yet, this did not occur.

Applicant testified that he would have accepted the State's initial plea offer had he known the true strength of the State's evidence. He testified that he was still discussing trial strategy with counsel on the weekend leading up to the plea. He testified that he should have taken the twelve (12) year offer.

Applicant testified that counsel, with Applicant's permission, discussed his trial strategy with Attorney Drawdy. Applicant testified that counsel did this without the knowledge that Attorney Drawdy was retained on co-defendant Tubbs' case: the main person that implicated Applicant. Applicant testified that counsel should have moved to recuse Judge McIntosh from presiding over the plea because the Judge represented a member of Applicant's family prior to election to the bench. Last Applicant testified that he wanted an appeal. He stated that he made attempts to contact counsel on the matter.

Applicant's mother, Lisa McBride, testified to her interactions with counsel; she also testified to her impressions of counsel on the day of the plea hearing. McBride held the lay opinion that counsel was not fully prepared to try Applicant's case on the day of the plea. She testified that counsel should have been "more upfront" about the strength of the State's evidence. McBride recalled counsel's discussions on an appeal, amongst other post-trial maneuverings.

Counsel testified to his course of conduct during the representation. Counsel summarized the underlying facts concerning the litany of offenses that Applicant committed. Counsel testified to his efforts to successfully obtain a pre-trial bond. The State made numerous discovery disclosures during the course of the representation that included: Applicant's statements, recorded

statements from the co-defendants, and wiretap recordings. Upon reviewing each new item of evidence, counsel would discuss the matter with Applicant. Counsel noted that the possible defenses to the various charges were weak at best. The war veteran victim of the home invasion placed Applicant in his residence. Counsel testified that the prosecuting solicitors intended to proceed to trial on six indictments; the accessory charges sunk any viable defense theory of the case because of Applicant's own confessions. The State also had the discretion to prosecute additional charges. Regardless, counsel rigorously prepared for trial.

Counsel also had numerous meetings with prosecuting solicitors and law enforcement where he made strides to negotiate a favorable plea offer from the start of the case. Counsel was wearry about the mandatory-minimums for the indicted offenses. He communicated the State's twelve (12) year offer to Applicant. Counsel had extensive negotiations with Applicant on benefits and detriments of entering a plea. Applicant was aware that he was exposed to sixty-five (65) years imprisonment. Once Applicant made the decision to accept the State's offer to plead to lesser-included offenses, counsel turned his attentions to preparing an extensive mitigation case. Counsel was adamant that he never guaranteed Applicant a certain prison sentence.

Counsel testified that he attempted to discuss an appeal with Applicant immediately after the sentencing pronouncement; however, Applicant was distraught and terminated the conversation. Neither Applicant nor his family communicated a desire for counsel to pursue an appeal during the relevant filing period. Counsel also noted that he told Applicant and his family that he would move to have a different Circuit Judge preside over Applicant's plea if they desired him to do so; however, Applicant was adamant that the prior relationships would inure to his benefit in sentencing.

Last, counsel provided a full accounting of the circumstances that surrounded the purported conflict of interest. Counsel explained that: (1) Tubbs and Brown were the two co-defendants on

the home invasion; (2) McBride was the co-defendant on the movie theatre robbery. Through counsel's investigation, counsel made the strategic decision to form a united Attorney Drawdy on one of the sets of charges. He later learned that Attorney Drawdy also represented a separate co-defendant from home invasion that turned State's evidence against Applicant. Counsel met with Attorney Drawdy to discuss his concerns about the potential for a conflict of interest where she assured counsel that there was no conflict. Counsel took additional steps to consult Rob Wilcox, Dean of the State's established law school, and Dessa Ballard. After these consultations, counsel continued with the representation. Counsel noted that he was careful to not violate privilege during his interviews, inter alia.

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 and exhibits 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).

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), 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). After careful review based on the standard discussed above, the Applicant has failed to carry his burden in this action.

A.

Applicant's abandoned his burden of production to prove: (a) Ineffective assistance of counsel for failing to interview Heather Campbell; and (b) Ineffective assistance of counsel for failing to interview the arresting officers.

In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The court may receive proof by affidavits, depositions, oral testimony or other evidence and may order the applicant brought before it for hearing. S.C. Code Ann. § 17-27-80. This Court will uphold the findings of the PCR court when there is any evidence of probative value to support them. However, it will reverse the decision of the PCR court when its decision is not supported by probative evidence of record or it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007).

In light of counsel's convincing testimony on the matter, Applicant has produced no credible evidence to corroborate his incredible testimony that counsel's performance was deficient for failing to investigate purported witnesses. See Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) ("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"). Furthermore, this Court finds McBride's testimony to be of little relevance and dubious at best. Therefore, these allegations are denied and dismissed.

B.

Applicant has fallen well short of meeting his burden to prove (c) Ineffective assistance of counsel for failing to advise Applicant to accept the State's initial plea offer of recommended twelve (12) year aggregate sentence.

"The Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected. That right applies to "all 'critical' stages of the criminal proceedings." Missouri v. Frye, ---- U.S. ----,----, 132 S.Ct. 1399, 1402 (2012). "The question is whether defense counsel has the duty to communicate the terms of a formal offer to accept a plea on terms and conditions that may result in a lesser sentence, a conviction on lesser charges, or both." Id., ---- U.S. at ----. 132 S.Ct. at at 1408. "A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness." Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). "To show prejudice from ineffective assistance of counsel in a case involving a plea offer, petitioners must demonstrate a reasonable probability that (1) they would have accepted the earlier plea offer had they been afforded effective assistance of counsel, and (2) 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." Merzbacher v. Shearin, 706 F.3d 356, 366 (4th Cir. 2013) cert. denied, 134 S. Ct. 71, 187 L. Ed. 2d 56 (U.S. 2013) reh'g denied, 134 S. Ct. 725, 187 L. Ed. 2d 580 (U.S. 2013) (internal quotations omitted).

The present case presents a classic example of a criminal defendant who did not want to plead guilty, but also did not want to go trial. See Merzbacher at 366-67 ("But it is entirely clear that to demonstrate a reasonable probability that he would have accepted a plea, a petitioner's testimony that he would have done so must be credible.") In contrast, this Court finds counsel's testimony dispositive concerning his extensive efforts to investigate Applicant's case; This Court finds counsel went above and beyond for Applicant. Despite the fact that this allegation is fatally reliant on speculation, this Court finds it hard to believe that there was anything further counsel could have investigated or done on behalf of Applicant; furthermore, this Court notes that counsel spent countless hours counseling and advising Applicant. This Court finds Applicant received the full benefit of competent counsel and then some. Regardless, this allegation is without merit because there was no discernable difference between the first and ultimate plea offer. Just because Judge McIntosh exercised his full discretion in sentencing does not mean the plea agreement was any less beneficial to Applicant. Therefore, this allegation is denied and dismissed.

C.

Applicant has fallen well short of his burden to prove (d) Ineffective assistance of counsel for failing to address the conflict of interest created by Attorney Drawdy.

To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance." Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001). "An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007). "To be valid, a waiver of a conflict of interest must not only be voluntary, it must be done knowingly and intelligently." United States v. Swartz, 975 F.2d 1042, 1048–49 (4th Cir.1992).

In light of counsel's convincing testimony that he took every precaution to ensure his work with Attorney Drawdy did not harm Applicant's case, Applicant failed to produce any authority that denotes counsel's performance here as deficient. Most importantly, Applicant has produced no evidence to establish a prima facie case that counsel's limited cooperation with Attorney Drawdy on one of Applicant's numerous sets of charges adversely impacted Applicant. See Jones v. Gomez, 66 F.3d 199, 204 (9th Cir. 1995) ("Conclusory allegations not supported by specifics do not warrant relief."). Therefore, this allegation is denied and dismissed with prejudice.

Similarly, this Court finds Applicant's allegation (e) Ineffective assistance of counsel for failing to move to recuse Judge McIntosh from presiding of the plea to be entirely without merit. This Court finds counsel astutely advised Applicant that he could proceed in front of a separate Circuit Judge. However, Applicant specifically wanted to plead in front of Judge McIntosh because he thought it would inure to his benefit. This Court finds this allegation is indicative of the Applicant's entire PCR action: wishful thinking. See Wolfe v. State, 485 S.E.2d 367, 371, 326 S.C. 158, 165 (1997) (Wishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made). Therefore, this allegation is also denied and dismissed with prejudice.

D.

Applicant has failed to meet his burden to prove (f) Ineffective assistance of counsel for 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).

In light of counsel's credible testimony on this matter, this Court finds Applicant was advised of his right to appeal but choose to ignore counsel while he made juvenile outbursts. See White v. Livingston, 231 S.C. 301, 308, 98 S.E.2d 534, 537 (1957) ("[E]vidence adduced before the referee indicates that the result of the case is not a serious miscarriage of justice, if it is a miscarriage at all. At any rate, appellant has made his bed and he must lie in it"). Therefore, this allegation is 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 his 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*

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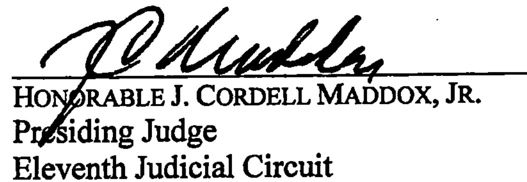
behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

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 28 day of October, 2015.



HONORABLE J. CORDELL MADDOX, JR.
Presiding Judge
Eleventh Judicial Circuit

Anderson, South Carolina

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November 5, 2015

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P. O. Box 11589
Columbia, South Carolina 29211-1589

In RE: Devin M. Nimmons, #355132 vs. State of South Carolina
Case #: 2013-CP-04-1769

Dear Sir or Madam:

In connection with the foregoing matter, please be advised that I was the Court Appointed Attorney and enclose herewith a copy of my appointment. I also enclose copies of all documents you requested for filing a copy of the Appellant's Notice of Appeal in this matter together with a copy of the Order and Proof of Service. I ask that your office assume representation of this indigent Applicant.

Very truly yours,

s/Hugh W. Welborn sba

Hugh W. Welborn

HWW/sba
Enclosures

cc: South Carolina Supreme Court
Court of Appeals
Office of Attorney General