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November 23, 2015

Clerk of Court
Supreme Court of South Carolina
PO Box 11330
Columbia, SC 29201

Dear Clerk:

I have enclosed duplicate originals of a Notice of Appeal and Certificate of Service in the above action along with a copy of Judge Hyman's November 18, 2015 Order of Dismissal and Grant of Appeal pursuant to White v State. Please return a file stamp copy of the Notice and Certificate in the enclosed SASE.

Thank you and with best regards, I am,

James K Falk

Cc J. Rutledge Johnson, Esq.

THE STATE OF SOUTH CAROLINA

In The Supreme Court

RECEIVED

NOV 30 2015

S.C. Supreme Court

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Honorable Larry B Hyman, Jr. Circuit Court Judge

Case No.: 2013-CP-10-5445

Joshua Monroe #344735.....Petitioner

v.

State of South Carolina.....Respondent

NOTICE OF APPEAL

The Petitioner ~~Daniel Hamrick~~ Joshua Monroe appeals the Honorable Larry B Hyman, Jr's November 18, 2015 Order of Dismissal and Grant of Appeal Pursuant to White v State. Undersigned counsel received notice of entry of the order on November 20, 2015. A copy of the order on appeal is attached to this notice.

Respectfully submitted

James Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402
Attorney for Petitioner

November 23, 2015

Other counsel of Record
J. Rutledge Johnson
S.C. Attorney General's Office
Columbia, SC 29211

THE STATE OF SOUTH CAROLINA

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CERTIFICATE OF SERVICE

I, James K Falk, 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 J. Rutledge Johnson S.C. Attorney General's Office PO Box 11549 Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this November 23, 2015.

Respectfully submitted

James Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402
Attorney for Petitioner

November 23, 2015

Other counsel of Record
J. Rutledge Johnson

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT
Joshua Monroe, #344735, Applicant, v. State of South Carolina, Respondent.	)	2013-CP-10-5445 **ORDER OF DISMISSAL AND GRANT OF APPEAL PURSUANT TO WHITE V. STATE**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed August 17, 2013. Respondent made its Return on April 2, 2015. An evidentiary hearing into the matter was convened on September 10, 2015 at the Charleston County Courthouse. Jim Falk, Esquire represented Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. Michael Dupree, Esquire and Milton Stratos, Esquire also testified. This Court had before it a copy of the records of the Charleston County Clerk of Court, records from the South Carolina Department of Corrections, the application, the State's Return and the guilty plea transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the October 2008 term of the Charleston County Grand Jury for three counts of

kidnapping (2008-GS-10-8123, -8145, -8111), two counts of armed robbery (2008-GS-10-8149, -8120), attempted armed robbery (2008-GS-10-8109), and criminal sexual conduct- first degree (2008-GS-10-8143). The Applicant was represented by Milton Stratos, Esquire.

On November 18, 2010, the Applicant pled guilty as indicted. On February 3, 2011, the Applicant was sentenced by the Honorable Roger M. Young, Sr. to confinement for a period of twenty years for attempted armed robbery and twenty-five years for all remaining charges. The sentences were to be served concurrently.

The Applicant filed a timely Notice of Appeal. The Appeal was dismissed for failure to serve opposing counsel pursuant to Rule 203, SCACR. The Remittitur was issued on October 11, 2012.

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

1. Ineffective assistance of counsel.
    a. Failing to properly file the Applicant's appeal.
    b. Advising the Applicant to plea to CSC.
    c. Failing to move to quash the indictment for CSC in light of Applicant's denial and State's lack of evidence.
    d. Failing to move for dismissal of armed robbery charge because of variance between allegations in the indictments.
2. Denial of due process of law.

In his amended application, the Applicant, through counsel, alleged:

1. "Former trial counsel Michael Dupree... Provided ineffective assistance counsel by advising applicant to make incriminating proffer statement to the Ninth circuit Solicitor's office, without first:
    a. Adequately investigating in analyzing the strength of the evidence against applicant, and;
    b. Advising applicant of weakness in the State's case and evidence against applicant."

At the hearing, the Applicant proceeded on his claims of ineffective assistance of plea counsel.

SUMMARY OF TESTIMONY

At the evidentiary hearing, Applicant testified he retained Mike Dupree as counsel, who filed a Rule 5 motion, but did not review with applicant. Applicant then stated he met with Counsel Dupree twice in preparation for a guilty plea. Counsel had applicant give a statement to law enforcement under a proffer, and it was Applicant's understanding that the statement could not be used against him and he did not know if he got a benefit from giving the statement. Applicant stated he signed the statement and that he was acting as a lookout for his codefendants. Applicant testified Counsel did not explain the theory of hand of one, hand of all. Applicant stated he felt he was exempt from other charges, because he admitted his involvement in the Chuck E. Cheese and Applebee's incidents. Applicant then testified he did not review evidence with Counsel and that Counsel did not explain a trial to him. Applicant stated he went along with Counsel's advice, and that when he entered the plea, he was satisfied with Counsel's performance. Applicant also testified he told Counsel Dupree that he wanted to make bond, but could not get bond because of the charges. Applicant stated Counsel got upset with Applicant because Applicant said Counsel was the reason he was still locked up. Applicant stated Counsel would not withdraw from this case.

As to Counsel Stratos, applicant testified his grandmother hired him. Applicant testified that during the guilty plea he stated to the judge that he was satisfied with Counsel Stratos, but felt that he had no choice but to pursue a trial because of the statement he gave to law enforcement. Applicant stated his only choice was a plea or trial, but that his statement would hinder any defense.

Additionally, Applicant stated Counsel Stratos filed his appeal and waived reconsideration of his sentence. Lastly, Applicant alleged counsel filed the appeal, but failed to serve it timely.

On cross-examination, Applicant admitted that at the guilty plea, he stated he was satisfied with Counsel and needed no more time with Counsel prior to pleading guilty. Applicant also admitted that he waived his constitutional rights, including the right to trial. Applicant stated there were no promises made to get him to plead guilty and that no one threatened or coerced him to plead guilty. However, Applicant attempted to say that he was threatened to plead guilty based on the amount of time he was facing. Also, he admitted at the plea that he truthfully answered the judge's questions, and he was pleading guilty because he was guilty. At the guilty plea, Applicant agreed to the facts as the State presented them under Alford.

Counsel Dupree testified he was retained to represent Applicant, and met Applicant in his conference room to discuss the charges and defenses, including an alibi defense. Counsel testified he retained a private investigator and contacted the North Charleston Police Department. Counsel stated that he was shown the evidence, including the videos from the restaurants, which clearly showed applicant on the video. Counsel stated he spoke with Applicant, and Applicant admitted his involvement. Counsel explained to Applicant that if he was the first one to the table, he could benefit from his cooperation. Counsel contacted the solicitor concerning the proffer to law enforcement. Counsel also stated that he had Applicant go to the North Charleston Police Department to give a statement, but Applicant's codefendants had already given statements. Counsel stated he tried to help Applicant and that the State could try Applicant on 3 separate incidents and attempt to get a life without parole sentence for Applicant. Counsel further stated, as to the criminal sexual conduct charge, there was a preliminary hearing where all 3 codefendants were bound over and evidence was

presented. Counsel stated Applicant was not going to get a bond reconsideration. Additionally, Counsel stated that Applicant wanted to retract his statement because Applicant claimed it was a lie. Counsel advised Applicant that retracting the statement was not to his benefit and that the evidence shown implicated Applicant in the incidents. Specifically, one video showed Applicant extensively involved. Counsel then testified Judge Young gave Applicant and codefendant benefits for cooperating. Upon questioning from this Court, counsel testified that he advised Applicant to give the statement; however, one codefendant had already given a statement before Applicant did.

Counsel Stratos testified he was retained after the preliminary hearing and filed for discovery. Counsel testified he was aware Applicant had already given a statement to law enforcement and that codefendant, who was Applicant's cousin, had given a full statement implicating applicant in the three charged arm robberies, but also various other Dorchester County armed robberies. Counsel testified Applicant had given his statement while being represented by Counsel Dupree. Counsel stated there were no other statements given in this case. Counsel opined that this was not a case to take to trial, and he was not willing to risk Applicant's life; because applicant was facing a potential life without parole sentence. Counsel testified he was hired to work out the best plea offer he could. Counsel testified Applicant's statement implicated Applicant as a lookout and that he explained the theory of hand of one, hand of all to Applicant. Counsel then stated that the Chuck E. Cheese incident had bad facts, and only someone who was involved could have such knowledge. Counsel testified that Applicant's statement would have prejudiced his trial, and that there was substantial other evidence tying Applicant to the crimes. Counsel stated that in the video you could see Applicant's tattoos, and that the risk of trial outweighed the potential reward. Counsel also testified there was a video and statement tying Applicant to the Noisy Oyster incident. Importantly, Counsel

stated Applicant admitted to being at the Noisy Oyster to him and the solicitor. Applicant also admitted he was involved in this incident, and Counsel advised him about the sex offender registry.

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 fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

Ineffective Assistance of Counsel

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) (citing Rule 71.1(e), SCRCP). 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, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 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, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

This Court finds the Applicant's testimony regarding Counsel Dupree's and Counsel Stratos's ineffectiveness is not credible while also finding both Counsels' testimony is credible.

This Court also finds both Counsel Dupree and Counsel Stratos provided effective assistance of counsel in this case. Counsel advised Applicant of the charges and the sentences the charges carried. Counsel negotiated with the State in Applicant's best interest. Counsel was able to negotiate a plea agreement which eliminated applicant's potential exposure to a life without parole sentence. Applicant admitted nobody threatened him to plead guilty, and there were no promises other than the negotiations to entice him to plead guilty. This Court finds Applicant made the decision to plead guilty on his own accord with the help of learned counsel. Additionally, this Court finds Applicant made this decision freely and voluntarily without any threats or promises from anyone else. Furthermore, this Court finds that it was ultimately the Applicant's decision to plead guilty.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing

professional norms. The Applicant failed to present specific and compelling evidence that 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 Counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. Therefore, these allegations are denied.

Nevertheless, this Court agrees that the allegation that the Applicant was denied a direct appeal is meritorious. In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal if requested or comply with the procedure required by Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Where the post-conviction relief judge determines that the applicant did not freely and voluntarily waive his appellate rights, the applicant may petition the South Carolina Supreme Court for review of direct appeal issues pursuant to White v. State. See Rule 227(g)(1), SCACR; Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986).

The Court affirmatively finds that the Applicant did not knowingly and voluntarily waive his right to a direct appeal. The Court concludes that the Applicant is entitled to a belated review of his conviction(s). A petition for belated review pursuant to White v. State can remedy the Applicant's lack of a direct appeal.

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 also finds as to all other allegations that Applicant failed to present evidence of such claims and thus, this Court deems them abandoned.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) 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 PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant's attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That this current Application for Post-Conviction Relief be dismissed with prejudice.

2. That the Applicant is granted a belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). Within thirty days of service of this Order, counsel for the Applicant must file a Notice of Appeal to secure the appropriate review of the Applicants' convictions. Counsel and the Applicant are directed to Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986) and South Carolina Appellate Court Rule 227(g) for the appropriate procedure for securing belated appellate review.

3. That Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED!

Larry B. Hyman
Presiding Circuit Court Judge
Ninth Judicial Circuit

11-18, 2015

Conway, South Carolina

2013-CP-10-5445

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