

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

Ronald Smith, #347780

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

RECEIVED

DEC 09 2015

CASE NO.: 2012-CP-38-010

SC Court of Appeals

ORDER OF DISMISSAL

FILED FOR RECORD
WINNIE P. CLARK
CLERK OF COURT
ORANGEBURG, SC
2015 FEB -4 PM 12:24

THIS MATTER COMES BEFORE THE COURT pursuant to an application for post-conviction relief (PCR) filed June 26, 2012. Respondent made its Return on November 29, 2012, requesting an evidentiary hearing be convened. James B. Jackson, Jr., Esquire, was appointed by the Orangeburg County Clerk of Court. On April 16, 2013, Applicant filed a Motion to Relieve Counsel. A hearing was held on said Motion on November 1, 2013, at the Dorchester County Courthouse. Applicant and Counsel Jackson were present. After questioning Applicant and counsel, this Court denied Applicant's Motion to Relieve Counsel. A formal Order was issued on January 7, 2014.

South Carolina Court Administration informed Respondent by written letter on June 12, 2014, that a transcript of Applicant's guilty plea hearing could not be produced. Respondent made six different requests for this transcript to be produced. Applicant then filed a Motion to Grant Post Conviction Relief on June 2, 2014. Applicant argued that since a transcript could not be produced, that relief should be summarily granted. Respondent filed a Return to Applicant's Motion to Grant Post-Conviction Relief on July 2, 2014. Respondent argued that summary relief should not be granted as Applicant did not cite any case law, statutes, or any authority to support his motion. Respondent argued that Applicant's allegations could be refuted by testimony of

Applicant, his trial counsel, and other witnesses without reliance on a transcript of the proceeding.

An evidentiary hearing was held on October 27, 2014, at the Dorchester County Courthouse. Applicant was present and represented by Counsel Jackson. J. Clayton Mitchell, Esquire of the South Carolina Attorney General's Office represented Respondent.

Applicant testified on his own behalf at the PCR hearing. Also testifying was Applicant's plea Counsel, Margaret E. Hinds, Esquire. The Court had before it the Orangeburg County Clerk of Court records, Applicant's South Carolina Department of Corrections records, the PCR application, the Return, and the appellate records.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. Applicant was indicted during the May 2011 term of the Orangeburg County Grand Jury for Murder (2011-GS-38-1076). Applicant was represented by Margaret Hinds, Esquire.

On September 13, 2011, Applicant proceeded to trial before the Honorable Edgar W. Dickson. On September 14, 2011, after a number of witnesses testified, Applicant pleaded guilty. Judge Dickson sentenced Applicant to confinement for a period of thirty-one years.

A Notice of Appeal was filed with the South Carolina Court of Appeals. An Order of Dismissal was issued on November 23, 2011, for failure of Appellant to identify an appealable issue. The Remittitur was issued on December 14, 2011.

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

1. Ineffective assistance of counsel in that counsel failed to adequately investigate the case.
2. Involuntary guilty plea.

PCR HEARING

At the PCR hearing, Applicant testified that Counsel was ineffective for failing to fully investigate the incident. Applicant testified that Counsel did not discuss his rights or defenses and that he did not fully understand his rights, charges, or penalties. He testified that he did not tell Counsel everything he knew about the incident. Applicant testified that he wanted a trial and emphasized that he did not fire the shot that killed the victim. Codefendant Donald Harmon testified on the second day of trial and according to Applicant "sank the ship." He testified this is when he began talking to Counsel about pleading guilty.

Applicant testified that there was an investigative report issued by Investigator James Shumpert that stated Harmon was the likely shooter. Applicant stated that if he knew about this report he would not have pled guilty. Applicant stated that he did not plead guilty knowingly and voluntarily because he was unaware of a third-party guilt defense.

Applicant testified that the plea judge did go over the Constitutional rights he was waiving by pleading guilty. The plea judge did go over whether he was threatened or promised anything to plead guilty, but Applicant said he did not believe the judge asked him about his mental health history or whether he was aware of the maximum sentence he could receive. Applicant did recall the solicitor's recitations of the facts. He also admitted that in pleading guilty, he agreed that the State could prove the elements of murder in this case.

Counsel testified that she has been practicing law for eighteen years and is currently in practice with the Public Defender's Office. She stated that Applicant was originally charged with two counts of Attempted Murder but that as the investigation went on, the State believed Applicant was more culpable as more evidence was obtained. Counsel testified she did have a copy of the investigative report Applicant referred to in his testimony, but stressed this was an

early report and as more information became available, the State changed their position and indicted Applicant with Murder. Counsel hired a ballistic expert to review the State's investigative report and believed there would be testimony that Applicant fired a gun, but the State did not have Applicant's, or any, gun in evidence. She detailed that it was the State's position that Applicant fired the bullet which killed the victim. She testified the State supported that theory with evidence of where the shell casings were recovered at the scene. Counsel testified that she was afraid the jury would believe the State's theory that Applicant fired the shot that killed the victim. It was pointed out that Donald Harmon was also charged in this incident and testified in the State's case at the second day of trial.

It was after Mr. Harmon's testimony that Applicant changed his mind and conveyed his wishes to plead guilty straight up, according to Counsel. The State did not make any plea offers leading up to the trial. Counsel spoke to the judge, who indicated he would accept the plea and sentence Applicant to thirty-one years. Applicant then decided to plead guilty.

Counsel testified that the State had video surveillance evidence that was presented during the first day of trial and introduced over her pre-trial objection. She testified that this video surveillance was reviewed in great detail with Applicant and recalled that they actually watched the entire sequence three times in a row during a meeting.

Counsel testified that she reviewed with Applicant the various rights he would waive by pleading guilty. She stated her PCR testimony was not impacted by the lack of a plea transcript and emphasized that Judge Dickson is a resident judge who she has pled clients before many times and is very familiar with his plea colloquy. Counsel testified that she could not recall exactly what Judge Dickson asked Applicant during the colloquy, but did agree that in her experience it was Judge Dickson's normal practice to review: indictment(s), potential sentence

and collateral consequences, whether the defendant was promised or threatened to plead guilty, whether defendant was pleading guilty freely and voluntarily, Constitutional rights that must be waived, the defendant's prior record, the State's recitation of the facts, and any mitigation offered by a defendant. Counsel testified that if she believed there were any problems with the plea proceeding, she would have objected or made a motion to withdraw the plea. She stated that was not the case here and that Applicant knew what rights he was waiving by pleading guilty. She also testified that Judge Dickson would not have accepted the plea or allowed the plea to go forward if any issues arose.

APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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, 80 L.Ed.2d 674, 692 (1984); *Butler*, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. 668. Applicant must overcome this presumption in order 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. *Id.* at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. *Id.* Under this prong, courts measure an attorney's performance by its "reasonableness

under prevailing professional norms." *Id.* (citing *Strickland*, 466 U.S. at 688). Second, any 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." *Id.* at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show 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, 59 (1985).

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, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, Applicant's appellate records, the transcript of the first day of Applicant's trial, 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.

Plea Transcript

This Court finds that, although a transcript of the guilty plea proceeding was not available for review, it is not necessary to its determinations and ruling. *See Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008) (In determining guilty plea issues in a PCR proceeding, it is proper to consider the plea transcript *as well* as evidence at the PCR hearing.) (emphasis added). A presumption of regularity attaches to proceedings in the Court of General Sessions. *Weathers v. State*, 319 S.C. 59, 62, 459 S.E.2d 838, 839 (1995) (citing *Pringle v. State*, 287 S.C. 409, 411, 339 S.E.2d 127, 128 (1986) *State v. Jones*, 211 S.C. 319, 45 S.E.2d 29 (1947)). It is incumbent

upon one who challenges a proceeding to prove his claims. *See Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998). Applicant argues relief should be granted because the Court is without the full record of the plea proceeding. Applicant has presented no evidence other than his own self-serving testimony that the plea was not proper and that he did not knowingly and voluntarily plead guilty. This allegation is without merit as Counsel's testimony was persuasive to this issue. It is important to note that Applicant pled guilty before Judge Dickson, the resident Orangeburg circuit court judge, with whom Counsel Hinds has appeared before numerous times. Counsel is familiar with the structure of Judge Dickson's normal plea proceedings and testified that there is no reason to think Applicant's plea deviated from those practices. Applicant's testimony supports this finding. Applicant testified that he was asked a number of questions at the plea hearing including whether he wished to waive his Constitutional rights, whether he agreed with the solicitor's recitations of the facts, and whether he was threatened or promised anything in exchange for his plea. Therefore, this Court finds that the plea transcript is not necessary to its ruling.

Involuntary Guilty Plea

Applicant's allegation that he did not knowingly and voluntarily plead guilty is without merit.

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 and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial.

Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009). "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.” *Holden v. State*, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011).

Applicant claims that he would not have pled guilty if he knew the investigative report authored by Investigator Shumpert existed. In this report, Investigator Shumpert states that it appears Harmon shot the victim in the back of the head. Based on the evidence presented, this Court can find no way in which Counsel’s performance was deficient, or how such an alleged deficiency resulted in prejudice to Applicant. This report was done early in the investigation, but as more evidence and information was collected, the State’s case against Applicant became stronger. The State obtained additional video surveillance of the shooting which strongly implicated Applicant. Counsel had this report in her file and was aware that Donald Harmon was initially implicated as the one who fired the shot which killed the victim. This report just gives an initial account of the events that took place from video surveillance which Applicant was intimately familiar with. Applicant had seen the video surveillance footage before trial and reviewed it extensively with Counsel. Counsel’s testimony reflects that she gave Applicant all of the necessary information and advice necessary to make a knowing, intelligent and voluntarily decision whether to enter a plea of guilty. Counsel reviewed the various rights Applicant would be waiving by pleading guilty by going through a checklist she reviews with her clients. Applicant has failed to show that he did not voluntarily and intelligently plead guilty. This allegation is denied and dismissed with prejudice.

Failure to Investigate

Applicant’s allegations that Counsel was ineffective for failing to investigate is unfounded. “[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent

investigation of the facts and circumstances of the case.” *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. *Jackson v. State*, 329 S.C. 345, 495 S.E.2d 768 (1998).

Applicant makes a vague allegation that Counsel failed to investigate the report authored by Investigator Shumpert. Counsel hired a ballistics expert in an attempt to challenge Investigator Shumpert’s report. The expert concluded that Applicant did fire a gun that night, which is clearly not helpful to his case. The investigative report referenced by Applicant is merely an account of what was captured by video surveillance. Applicant reviewed this video in detail with Counsel prior to trial. The State also played this video for the jury on the first day of trial. Applicant has not shown that Counsel failed to investigate any matters that could have been pursued.

Applicant testified that he did not share with Counsel all of the details of what occurred at the scene. “The reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions. Counsel’s actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information.” *Strickland v. Washington*, 466 U.S. at 691. “The reasonableness of the investigation involves ‘not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.” *St. Aubin v. Quarterman*, 470 F.3d 1096, 1101 (5th Cir. 2006), quoting in part *Wiggins*, 539 U.S. at 527; see also *Taylor v. State*, 404 S.C. 350, 745 S.E.2d 97 (2013). Applicant has failed to show what

material evidence Counsel was unaware of that was critical to his defense. Applicant has also failed to show that Counsel's investigation into the incident was unreasonable. Applicant has failed to show that further investigation of the incident, which was captured by video surveillance, undermined confidence in the outcome of the case and creates a reasonable probability that the result of the proceeding would be different. This allegation is denied and dismissed with prejudice.

CONCLUSION

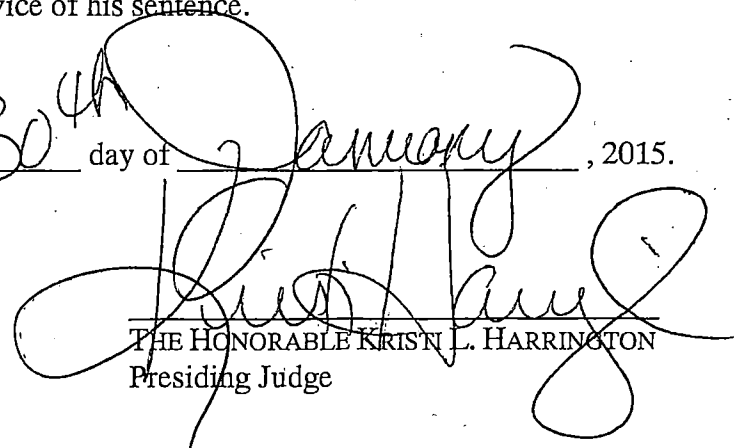
Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate Counsel's performance was unreasonable under prevailing professional norms or that the outcome of his plea would have been different had Counsel performed differently. *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 is denied and dismissed with prejudice.

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 30th day of January, 2015.

Charles, South Carolina


THE HONORABLE KRISTIN L. HARRINGTON
Presiding Judge