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RECEIVED

JAN 26 2016

S.C. SUPREME COURT

January 9, 2016

Honorable Daniel E. Shearouse
The Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re.: Junior L. Kiker v. State of South Carolina
2014-CP-29-0633

Dear Mr. Shearouse:

Please find enclosed the Notice of Appeal and Certificate of Service on the above referenced case along with a copy of each of those documents and a self-addressed stamped envelope to return the filed copies. I have also enclosed the Final Order from which Appellant appeals from. I have sent a copy of all of these documents to the Office of Appellate Defense as well. Please contact me with any additional questions or concerns. Thank you.

Sincerely Yours,

Nathan Sheldon
The Law Office of Nathan J. Sheldon

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JAN 26 2016

S.C. SUPREME COURT

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No. 2014-CP-29-0633

State of South Carolina, Respondent,

v.

Junior L. Kiker, #321516, Appellant.

NOTICE OF APPEAL

Junior L. Kiker appeals the order of the Honorable R. Knox McMahon dated December 10, 2015. Appellant received written notice of entry of this order on January 4, 2016.

January 9, 2016

Nathan J. Sheldon
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Other Counsel of Record:
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No. 2014-CP-29-0633

State of South Carolina, Respondent,

v.

Junior L. Kiker, #321516, Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on J. Croom Hunter with the Attorney General's Office by depositing a copy of it in the United States Mail, postage prepaid, on January 9, 2016 mailed to Post Office Box 11549, Columbia, South Carolina 29211-1549.

January 9, 2016

Nathan Sheldon
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STATE OF SOUTH CAROLINA COUNTY OF LANCASTER	)	IN THE COURT OF COMMON PLEAS FOR THE SIXTH JUDICIAL CIRCUIT
Junior L. Kiker, #321516,	)	Case No. 2014-CP-29-0633
Applicant,	)	
v.	)	**ORDER OF DISMISSAL**
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on May 15, 2014. Respondent made its return on December 31, 2014. An evidentiary hearing into the matter was convened on August 11, 2015, at the Lancaster County Courthouse. Applicant was present at the hearing and was represented by Nathan Sheldon, Esquire. Respondent was represented by Assistant Attorney General J. Croom Hunter of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Lancaster County Clerk of Court's orders of commitment. The Applicant was indicted at the October 2011 term of the Lancaster County Grand Jury for murder (2011-GS-29-1121), first degree burglary (2011-GS-29-1122), armed robbery (2011-GS-29-1123), and the possession of a firearm during the commission of a violent crime (2011-GS-29-1124). Jason B. Tumblad, Esquire represented the Applicant.

The Applicant pled guilty as indicted. On September 16, 2013, the Honorable J. Ernest Kinard, Jr., sentenced Applicant to concurrent terms of thirty (30) years imprisonment for murder, first degree burglary, and armed robbery and five (5) years imprisonment for possession of a firearm.

Applicant timely filed a Notice of Appeal. By Order filed December 6, 2013, the South Carolina Court of Appeals dismissed the matter for failure to provide a sufficient explanation as required by Rule 203(d)(1)(B)(iv) of the South Carolina Appellate Court Rules. The Remittitur was sent on December 27, 2013.

ALLEGATIONS

At the post-conviction relief hearing, Applicant proceeded to argue his confinement is unlawful based upon the following grounds:

1. Ineffective assistance of counsel.
    a. Counsel failed to thoroughly prepare Applicant's case for trial.
    b. Counsel failed to hire a private investigator.
    c. Counsel failed to subpoena phone records.
2. Involuntary guilty plea.

SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. Applicant also presented testimony from his father, Harvey Kiker. The State presented testimony from plea counsel, Jason B. Turnblad, Esquire (Counsel). This Court also had before it a copy of the plea transcript, the Lancaster County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, and the return.

As an initial matter, this Court finds the testimony of plea counsel to be credible. Conversely, this Court finds the testimony Applicant presented was not credible. This Court

finds the testimony of Applicant's father was credible; however, it was not beneficial to Applicant's case.

Applicant testified at the PCR hearing that he is imprisoned for a murder he did not commit, and that he pled guilty two years after the victim was murdered. Applicant testified that his main complaints with Counsel were that he felt Counsel did not prepare for trial, that Counsel did not hire a private investigator, and that Counsel did not subpoena certain phone records belonging to his codefendant Samantha Humphries. Applicant testified he met with Counsel numerous times, but they did not discuss a strategy for trial. Applicant maintained Counsel should have "done more," but Applicant failed to enumerate any specific actions Counsel could have taken to alleviate his guilt. Furthermore, Applicant testified the statement to the police was given under duress. Applicant adamantly denied his guilt at the PCR hearing, despite the overwhelming evidence to the contrary.

Applicant's father testified he hired counsel but he did not recall how much counsel was paid for his services. Applicant's father testified he was present at many of the meetings between applicant and plea counsel. Applicant's father testified he thought Applicant's case would go to trial, and he thought Counsel could have done more to prepare the case. However, Applicant's father did not give any specifics as to what Counsel could have done better. Applicant's father further testified he did not discuss the particulars of the case with Applicant.

Counsel testified he has been practicing law for 8 years and has participated in 15 to 20 murder cases. Counsel testified that for the first 5 years of his practice, it was entirely devoted to criminal defense. Counsel testified he filed rule 5 and Brady motions and reviewed the discovery materials with applicant. Counsel testified he went over Applicant's statement with him. Counsel testified Applicant's statement was very detailed and that Applicant told Counsel he was present

at the scene of the crime. Counsel testified he discussed the hand of one, hand of all defense with Applicant. Counsel further testified that after Applicant told him he participated in the murder, he felt it would be difficult to present a successful defense at trial. Counsel testified that based upon the evidence presented in the discovery materials, he did not believe Applicant had any chance of winning at trial. Counsel testified that a witness identified Applicant as the shooter and Applicant's statement was damning. Counsel testified that Applicant told him someone at the jail told Applicant that his codefendants were planning to set him up to take the fall for the murder. Counsel testified he attempted to track down that lead but was unsuccessful. Counsel testified that between May, 2012 and September, 2013 he met with applicant between 12 and 15 times. With regard to the phone records Applicant wanted Counsel to subpoena, Counsel testified that by the time Applicant made him aware of the records, it was too late to get them because phone companies destroy records after a certain amount of time. Counsel testified he discussed hiring a private investigator with Applicant but he told Applicant that his family would have to pay for the investigator. Counsel testified he recommended Don Girndt should Applicant decide to hire an investigator. Counsel testified that a private investigator is not hired or needed for every murder case. Counsel testified he looked through the crime scene photos, went to the murder scene, and went to the location where Applicant was arrested. Counsel testified he also reviewed the evidence obtained from SLED. Counsel testified he believed it was not necessary to hire any experts. Counsel testified it would be difficult to argue at trial that Applicant was not an active participant in the victim's murder. Counsel testified he felt the evidence against Applicant was overwhelming, but he would have gone to trial if Applicant wished to do so. Finally, Counsel testified that Applicant mailed him a letter after his guilty plea, in which Applicant thanked Counsel for representing him on the charges and discussed the possibility of retaining Counsel

for his appeal. This letter was entered into evidence by the State.

INEFFECTIVE ASSISTANCE OF COUNSEL

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his 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. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 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, 88 L.Ed. 2d 203 (1985).

This Court finds Applicant failed to demonstrate that Counsel's performance was deficient in any way. This Court further finds that Applicant presented no evidence to show any prejudice resulting from Counsel's representation. This Court finds that Counsel met with Applicant an adequate number of times and went over the evidence against him. This Court further finds that despite Applicant's allegations, Counsel conducted a thorough investigation into the facts of the case, as evidenced by Counsel's testimony that he visited the scene of the crime and attempted to locate the jailhouse informant. Additionally, Applicant has failed to show how any further investigation by Counsel or a private investigator would have been beneficial to Applicant, which precludes a finding of ineffectiveness. See Rollinson v. State, 346 S.C. 506, 552 S.E.2d 290 (2001).

With regard to the phone records that Applicant says Counsel should have subpoenaed, Applicant has also failed to meet his burden of showing how those phone records would have benefited him at trial. Applicant did not present any phone records as exhibits during the PCR hearing. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at PCR. See Underwood v. State, 309 S.C. 560, 425 S.E.2d (1992). As such, the allegations for failure to hire an expert and failure to subpoena the phone records are merely speculative and unfounded. Finally, this Court finds Counsel showed a thorough understanding of Applicant's case and was able to easily explain his reasoning for the way he approached Applicant's case.

Accordingly, this Court finds Applicant did not demonstrate any deficiencies in Counsel's representation. This Court finds that because Counsel's representation was well within the range of competence required in criminal cases, Applicant has further failed to make any showing that but for Counsel's alleged deficiencies, the result of Applicant's case would have

been any different. Moreover, this Court finds that even if Applicant were able to show any ineffectiveness on the part of Counsel, which he has failed to do, the overwhelming nature of the evidence against Applicant would preclude a finding of prejudice. See Mincey v. State, 314 S.C. 355, 444 S.E.2d 510 (1994).

INVOLUNTARY GUILTY PLEA

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against him. See Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969). In Boykin, the United States Supreme Court held that before a court can accept a guilty plea, a criminal defendant must be advised of the constitutional rights he is waiving. Id. at 243, 89 S. Ct. at 1712. Specifically, the accused must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. Id. Moreover, a criminal defendant entering a guilty plea "must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citation omitted). A criminal defendant's knowing and voluntary waiver of statutory or constitutional rights in a guilty plea "must be established by a complete record, and may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)).

When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000) (citing Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)).

This Court finds Applicant has failed to demonstrate that his guilty plea was entered involuntarily. Once again, this Court finds Counsel's testimony to be credible and Applicant's testimony to be not credible, particularly in light of the letter that Applicant wrote to Counsel after his plea.

This Court finds Applicant was aware of the nature of the charges he was facing and the possible penalties. This Court finds Applicant was well aware that by pleading guilty he waived his ability to challenge the evidence against him. This Court further finds Applicant was well aware of the constitutional rights he was waiving by pleading guilty. This Court finds that Applicant made a well-reasoned decision to plead guilty, rather than proceed to a jury trial on the charges where Applicant not only confessed, but he was identified as the shooter by an eyewitness. This Court further finds that Applicant pled guilty voluntarily and of his own free will. This Court finds there is no evidence to suggest Applicant's plea was forced or coerced, despite Applicant's claim that he felt he did not have any other choice. This Court further finds that the plea judge thoroughly explained the consequences of Applicant's negotiated plea. Applicant testified that Counsel told him if he did not plead, he would be found guilty and sentenced to life in prison. However, Counsel's testimony indicated that he did not tell Applicant he would receive a specific sentence if found guilty. This court finds Counsel's testimony credible and does not believe that Counsel put undue pressure on Applicant to force him to plead guilty. As such, Applicant's claims are without merit.

Accordingly, this Court finds Applicant's guilty plea was knowingly and voluntarily entered. This Court finds that the evidence presented at the evidentiary hearing as well as contained within the guilty plea transcript clearly supports a finding that the guilty plea was not coerced or involuntary; rather, it was freely, knowingly, and voluntarily entered. This Court finds

Applicant was informed of the nature and elements of the offenses with which he was charged and to which he pled guilty. This Court further finds that Applicant was fully apprised of the rights he was forfeiting in order to plead guilty and that Applicant decided to go forward with his guilty plea.

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 sufficient evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

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. Plea counsel rendered effective assistance in regard to the claims raised by Applicant. 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:

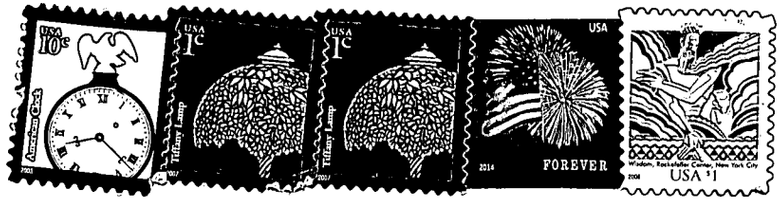
1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 10 day of DEC, 2015.

R. KNOX MCMAHON
Presiding Judge
Sixth Judicial Circuit

Lexington, South Carolina



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