

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM Horry COUNTY
Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

Case No. 2011-CP-26-3625

State of South Carolina,

Respondent,

v.

David L. Barnes, #266971

Appellant.

NOTICE OF APPEAL

David L. Barnes appeals the order of the Honorable Thomas A. Russo dated December 21, 2015. Appellant received written notice of the entry of this order on January 8, 2016.

January 25, 2016



Steven W. Fowler, Esquire
1019 Highway 17 South #229
North Myrtle Beach, SC 29582
843-663-0006
Attorney for Appellant

RECEIVED

JAN 28 2016

S.C. SUPREME COURT

Other Counsel of Record:
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803-734-3970
Attorney for Respondent

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
David L. Barnes, #266974,)	Case No. 2011-CP-26-3625
)	
Applicant,)	
)	
v.)	ORDER OF DISMISSAL
)	
State of South Carolina,)	
)	
Respondent.)	
_____)	

Horry County
 2016 JAN -4 PA 2:29
 HELLERIE J. KINARD
 CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief filed June 3, 2014. Respondent made a timely Return on or about October 16, 2014. The Court convened an evidentiary hearing into the merits of the case on November 12, 2015 at the Horry County Courthouse. Applicant was present at the hearing and represented by Steven Fowler, Esquire. Jessica E. Kinard, Esquire of the South Carolina Attorney General's Office, represented Respondent.

Applicant and Applicant's plea counsel, W. Thomas Floyd, Esquire, testified at the hearing. The Court had before it a copy of the trial transcript, the records of the Horry County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In June 2013, the Horry County Grand Jury indicted Applicant for two (2) counts of first degree burglary (2013-GS-26-2578, -2581). William Thomas Floyd, Esquire, represented Applicant. On March 11, 2014, Applicant pled guilty to the lesser included offense of second degree burglary on one (1) indictment, and pled under North

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Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970), to the lesser included offense of second degree burglary on the other indictment. The Honorable Larry B. Hyman Jr. sentenced Applicant to consecutive terms of ten (10) years imprisonment on the guilty plea and seven (7) years imprisonment on the Alford plea. Applicant did not appeal his plea or sentence.

II. ALLEGATIONS

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

1. "Extremely Prejudicial Ineffective Assistance of Counsel"
 - a. "Counsel did not perform basic ministerial Functions which resulted in involuntary guilty plea"
2. "Cruel and Unusual Punishment; Excessive Sentencing"
 - a. "Consecutive Violent Sentences"

At the evidentiary hearing, Applicant proceeded with all allegations, though the allegations regarding excessive sentencing were addressed as being an effect of Mr. Floyd's alleged ineffective assistance of counsel.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The 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.

A. Summary of Testimony

David Lee Barnes

Applicant testified first on his own behalf. He began by stating that he was illiterate, and therefore relied heavily on Mr. Floyd and was at a disadvantage because of it. The Applicant

went on to testify that Mr. Floyd represented him for approximately a year, during which time Mr. Floyd visited three (3) or four (4) times. Applicant's PCR counsel presented several notes from Applicant to the Public Defender's Office (Mr. Floyd's office) asking about his case or for a meeting. These were admitted into evidence over the State's hearsay objection, which was based on the fact that Applicant cannot write more than his own name. The Court ruled that these were essentially produced by the Applicant and, therefore, he could authenticate them.

Applicant went on to testify that Mr. Floyd had not thoroughly investigated his case, primarily because he failed to interview several key witnesses. In particular, he stated that he was in places other than the scenes of these crimes, and that witnesses or video evidence could prove that fact, but witnesses were never interviewed. Upon cross-examination, Applicant testified that he understood at the time of his plea what was happening, the rights that he was waiving, and the functioning of an Alford plea, but that he felt threatened by the idea of potentially receiving life imprisonment if he went to trial. Applicant also briefly discussed that he had tried to fire Mr. Floyd because of his dissatisfaction. The Court interjected to ask what relief Applicant hoped to receive if he were successful with this PCR, and admonished Applicant for not being truthful either at the time of his plea or at the present moment. Applicant could not provide a valid reason, in this Court's opinion, for being untruthful.

W. Thomas Floyd

The State called Mr. Floyd, who testified that he had been practicing since 1988, and was employed by the Public Defender's Office, both currently and at the time of this plea. Mr. Floyd testified that he requested and received discovery, and reviewed it all with the Applicant, including reading it to him. He further testified that he met Applicant approximately six (6) times prior to the plea. When asked about how the case progressed, Mr. Floyd stated that the solicitor

wanted to plead out both charges from the beginning, with a ten (10) year non-violent sentence for each charge. Mr. Floyd was careful to differentiate between the two (2) burglary charges that Applicant was facing: Applicant maintained that he was at the courthouse with his sister when one of the crimes was committed, but he never wanted to discuss the other charge. When Mr. Floyd informed Applicant that the State intended to go to trial on the second charge, Applicant said *for the first time* that he could not do that, because he actually did commit that crime. It was for this latter crime that the witnesses Mr. Floyd did not interview would have allegedly been beneficial; however, because this charge could not proceed to trial, Mr. Floyd did not pursue these witnesses. Mr. Floyd testified to a great deal of difficulty in preparing the cases because Applicant only wanted to focus on the charge that he thought he would be exonerated on.

Upon cross-examination, Mr. Floyd testified that Applicant received a bond hearing as requested, but bond was denied. He also testified that Applicant received a plea offer on three (3) different occasions (orally, in writing, and at arraignment). Furthermore, Mr. Floyd did not recall being asked by Applicant for a new attorney, because he would have made efforts to transfer the case within the Public Defender's Office due to his frustration with getting information from Applicant. Mr. Floyd testified that he did not know if there was any fingerprint or DNA evidence involved in this case, but he remembered that property was found in Applicant's possession. Mr. Floyd also testified that he remembered explaining the mechanics of an Alford plea with the Applicant.

B. Ineffective Assistance of Trial Counsel

In a post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective

assistance of counsel as a ground for relief, Applicant must prove counsel's "conduct so undermined the proper functioning of the adversarial process" that the proceedings "cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, the Court measures counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced 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.

The Court finds Applicant failed to meet his burden to show counsel rendered ineffective assistance of counsel. Regarding the allegation upon which Applicant proceeded, the Court finds counsel's testimony credible, and Applicant's was less credible, as well as insufficient to challenge the weight of counsel's testimony. Accordingly, the Court finds counsel conducted a

proper investigation, adequately conferred with Applicant, and was thoroughly competent in his representation.

Applicant's allegations are without merit. Counsel's testimony proved that he had considered all aspects of this case with the benefit of his extensive experience. Applicant opined regarding how Mr. Floyd's interviewing of potential witnesses would have helped him, but this is not a theory upon which relief can be granted. See Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998) ("This Court has repeatedly held a PCR applicant *must produce the testimony* of a favorable witness *or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial." (emphasis in original, additional citations omitted)). This was also the basis for much of Applicant's frustration with and accusations toward Mr. Floyd, as he believed that, by not pursuing these witnesses, Mr. Floyd was not assisting him. However, there is nothing in the record that causes this Court concern regarding preparation other than the Applicant's lack of cooperation, as it is very difficult to prepare for trial when a defendant wants to focus on a charge that is not going forward.

Furthermore, the testimony presented is incontrovertible as to the thoroughness of Mr. Floyd's representation. It is clear that he reviewed discovery materials with Applicant; appeared at court hearings; advised Applicant of relevant law; provided competent representation; and reasonably consulted and visited. Accordingly, Applicant fails to meet his burden in demonstrating that plea counsel was ineffective.

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.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes that Applicant has not established any constitutional violations or deprivations, or any ineffective assistance of counsel that would require this Court to grant his application. There is no deficiency in Mr. Floyd's representation according to the standards of Strickland. In regard to the plea itself, there is no inherent deficiency because the plea judge provided explanations, such as the mechanics of Alford. In fact, the plea transcript shows that the plea judge went to great lengths to remind Applicant that he did not have to enter into that plea. There is no evidence to show that this plea was anything other than voluntarily and intelligently entered, especially when combined with the testimony at this hearing. Applicant knew what he was doing, understood the process, and then was untruthful to this Court regarding the circumstances. Regarding the allegations that Applicant wanted a new lawyer, this Court finds it unfortunate that there is a pervasive and misguided understanding that because an applicant is unhappy with their counsel, ~~they~~^{he} can fire one and get another. This is simply not so. Ultimately, the standard under Strickland has not been met: plea counsel prepared and presented this case to the best of his ability, and did not prejudice the Applicant. For all of the above reasons, 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

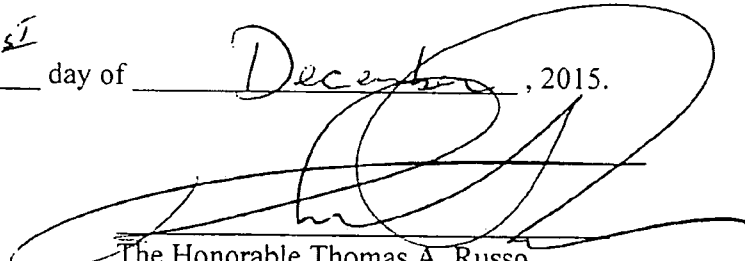
of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice;
and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 21st day of December, 2015.

Florence, South Carolina


The Honorable Thomas A. Russo
Presiding Judge

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)
)
DAVID L. BARNES, #266971)
)
)
vs)
)
STATE OF SOUTH CAROLINA,)
)
)
Respondent.)
_____)

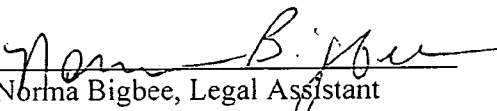
IN THE COURT OF COMMON PLEAS
2011-CP-26-3625

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a filed copy of the Order of Dismissal, in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Steven W. Fowler, Esquire
1019 Highway 17 South #222
North Myrtle Beach, SC 29582

DATED this 8TH day of January, 2016.


Norma Bigbee, Legal Assistant
For Respondent



ALAN WILSON
ATTORNEY GENERAL

January 8, 2016

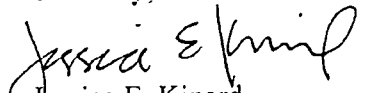
Steven W. Fowler, Esquire
1019 Highway 17 South #222
North Myrtle Beach, SC 29582

**Re: David L. Barnes, #266974 v. State of South Carolina
2011-CP-26-3625
Zireek R. Brooks, #352900 v. State of South Carolina
2014-CP-26-1018**

Dear Mr. Fowler:

Enclosed please find filed copies of the Orders of Dismissal signed by Judge Russo, in the above-captioned case.

Sincerely,


Jessica E. Kinard
Assistant Attorney General

JEK/nb
Enclosure