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February 23, 2016

Daniel E. Shearouse
Clerk of Court – SC Supreme Court
Supreme Court
P.O. Box 11330
Columbia, SC 29211

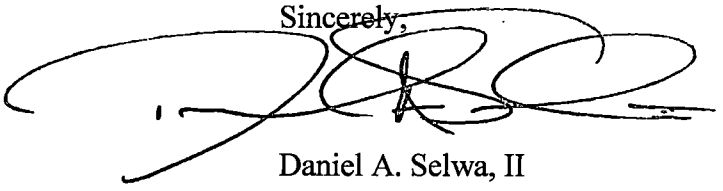
Re: Gregory Pencille, #312332 v. State of South Carolina
2013-CP-26-7463

Dear Mr. Shearouse:

Enclosed please find the original Notice of Appeal in the above-entitled action and two copies. Please file and return one copy to me in the self addressed stamped envelope enclosed.

If you should have any questions or concerns, please do not hesitate to contact me.

Sincerely,



Daniel A. Selwa, II

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Thomas A. Russo, Circuit Court Judge

Case No.: 2013-CP-26-7463

Gregory Pencille, #312322,..... Petitioner,

v.

State of South Carolina,..... Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable Thomas A. Russo, January 15, 2016, order, denying the Applicant's Petition for post-conviction relief. Undersigned counsel received notice of entry of the order on February 5, 2016. A copy of the order on appeal is attached to this notice.

Respectfully submitted,

Daniel A. Selwa, II
1053 London Street, Suite A
Myrtle Beach, SC 29577
Attorney for the PCR Applicant

February 23, 2016

Other counsel of record:
Alan Wilson, Attorney General
Joshua L. Thomas, Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
FEB 29 2016
S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Honorable Thomas A. Russo Circuit Court Judge

Case No.: 2013-CP-26-7463

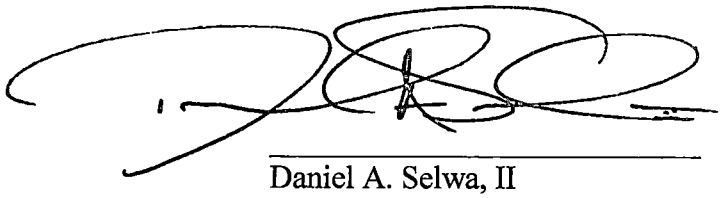
Gregory Pencille, #312332,..... Petitioner,

v.

State of South Carolina,..... Respondent.

PROOF OF SERVICE

I, Daniel A. Selwa, II, certify that I have served the within Notice of Appeal on the Respondent, the State of South Carolina, by depositing a copy of the same in the United States Mail, postage prepaid, addressed to his attorney of record, Alan Wilson, Attorney General, Post Office Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this 24th day of February, 2016.



Daniel A. Selwa, II
1053 London Street, Suite A
Myrtle Beach, SC 29577
Attorney for the PCR Applicant

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Gregory Pencille, #312332, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2013-CP-26-7463 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed November 8, 2013. Respondent made a Return on or about June 10, 2014. The Court convened an evidentiary hearing into the matter on November 9, 2015, at the Horry County Courthouse. Applicant was present at the hearing and represented by Daniel Selwa, Esquire. J. Croom Hunter, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Scott Bellamy, Esquire, also testified. The Court had before it a copy of the transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the pleadings in this matter. 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 November 2008, the Horry County Grand Jury indicted Applicant for first degree criminal sexual conduct (2008-GS-26-4686). G. Scott Bellamy, Esquire, represented Applicant. On August 9, 2010, Applicant pled guilty as indicted. In exchange for the plea, the State dismissed two pending charges of kidnapping (2008-GS-26-4687,

2009-GS-26-5015) and one charge of first degree criminal sexual conduct (2009-GS-26-5014). The Honorable Larry B. Hyman, Jr., sentenced Applicant to twenty (20) years imprisonment.

Applicant filed a motion to reconsider his sentence on August 10, 2010. Applicant also filed a notice of appeal on August 10, 2010. The South Carolina Court of Appeals dismissed the notice of appeal without prejudice pending the resolution of the motion to reconsider on February 9, 2011.

On March 14, 2012, Judge Hyman convened a hearing on the motion to reconsider the sentence. By order filed April 3, 2012, Judge Hyman denied the motion.

Applicant filed a timely notice of appeal, and Robert M. Pachak, Esquire, of the Office of Appellate Defense, perfected the appeal with the filing of an Anders[1] brief. The Court of Appeals dismissed the appeal on June 5, 2013. State v. Pencille, Op. No. 2013-UP-235 (S.C. Ct. App. filed June 5, 2013). The remittitur was returned to the circuit court on June 21, 2013.

II. ALLEGATIONS

In his PCR application, Applicant raised numerous allegations; however, at the PCR hearing, Applicant proceeded with the following allegations:

1. Involuntary Guilty Plea:
   a. Counsel failed to object to inflammatory testimony at Applicant's sentencing.
   b. Applicant did not understand the plea.
2. 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. This Court finds Counsel's

[1] Anders v. California, 386 U.S. 738 (1967)

testimony credible and Applicant's testimony not credible. 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 (2003). Furthermore, this Court finds that Applicant abandoned all allegations except for those specifically addressed below.

A. Involuntary Guilty Plea

In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (2000) (citing Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993)). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citing Hill v. Lockhart, 474 U.S. 52; Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994)). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. at 56. Furthermore, "[a] guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant. Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Id. at 137-38, 654 S.E.2d at 874 (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)).

1. Failure to object to inflammatory testimony at sentencing

At the PCR hearing, Applicant alleged counsel was deficient for failing to object to the solicitor's and the victim's characterization of him as a serial rapist during Applicant's sentencing. This Court finds the allegation to be without merit. Initially, the Court notes the characterization of Applicant was not inaccurate. The record before the plea judge clearly indicated Applicant was not a one-time offender. The solicitor indicated during the plea colloquy that the Applicant's DNA was obtained from the victim in a separate 2005 case where Applicant pled guilty to kidnapping a twelve year old girl. Once Applicant's DNA was entered into the crime database, it was matched to two separate unsolved rapes, one from 2001 and one from 2004. Applicant was indicted based on the DNA matches, and the plea Applicant is currently challenging resulted from those indictments. The other set of charges was nolle-prossed as part of the plea.

Additionally, even if the comments were inflammatory, Applicant cannot show any resulting prejudice. The comments were directed to the plea judge outside the presence of a jury after Applicant's plea had already been qualified. Counsel testified he did not believe he had a reason to object to the statements, and he rarely, if ever, objects to statements made by a victim. Counsel testified the absence of a jury made an objection pointless. Furthermore, counsel testified the plea judge made it clear at the resentencing hearing that his sentence was not based on any inflammatory testimony. Accordingly, this Court finds the allegation is without merit.

2. Applicant did not understand the plea

Applicant testified at his PCR hearing that plea counsel did not thoroughly prepare him for his guilty plea. Specifically, Applicant alleged he did not understand what sentence he was potentially facing by pleading guilty. This Court finds Applicant's testimony to be not credible. The plea colloquy is clear; the plea judge went over Applicant's right to trial as well as Applicant's potential exposure as

a result of pleading guilty. Furthermore, Applicant told the plea judge he understood he was facing a maximum sentence of thirty years, rather than life imprisonment, by pleading guilty. Applicant specifically told the plea judge he did not wish to have a jury trial, and he wanted to give up that right and enter a plea of guilty. Additionally, plea counsel testified he went over all of those things with Applicant prior to his guilty plea. This Court has no reason to doubt plea counsel's testimony and finds it credible. Applicant is merely unhappy with the decision he made to plead guilty. The record and testimony before this Court leave no doubt Applicant was fully aware of his right to a jury trial and the consequences of his guilty plea. Applicant's conflicting testimony from the PCR hearing and the plea indicates he was lying at one or both of the proceedings. Because of Applicant's obvious willingness to place his hand on the Bible and tell the truth while doing the opposite, this Court is unable to discern when Applicant was being truthful and when he was not. Therefore, Applicant's credibility with this Court is nonexistent. As this Court can find no evidence Applicant's plea was not entered freely, knowingly, and voluntarily, the allegation is without merit and must be denied.

B. Ineffective Assistance of Counsel

In this 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 trial counsel as a ground for relief, Applicant must prove trial 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." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether trial 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 trial 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 trial counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove trial counsel's performance was deficient. Id. Under this prong, the Court measures trial counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial 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.

This Court finds Applicant has failed to show Counsel's performance fell below an objective standard of reasonableness. Counsel's testimony indicated he was extremely familiar with the facts of Applicant's case. This Court finds Counsel met with Applicant an adequate number of times and was familiar with the discovery materials. Counsel indicated he explained Applicant's constitutional rights, and he explained the differences between going to trial and entering a guilty plea. Counsel indicated he never had trouble communicating with Applicant, and he never had any concern that Applicant did not fully understand their conversations. Counsel testified Applicant made a fully informed decision to plead guilty in order to avoid life imprisonment, and Counsel agreed with the decision. As such, Counsel's testimony indicated his performance was well within the range required under the law. This Court finds no reason to believe Counsel's testimony was not credible. Additionally, this Court finds Applicant's claims that Counsel did not discuss all the evidence with him hard to believe. At the PCR hearing, Applicant testified the State's evidence was not strong enough to result in a conviction, and he

is an innocent man. However, Applicant's DNA matches tend to show otherwise. Applicant's unhappiness with his decision to plead guilty is not a ground for post-conviction relief. Accordingly, this Court finds Applicant's allegations are without merit.

C. 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 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.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from 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, her post-conviction relief attorney must serve and file a notice of appeal on Applicant's behalf. Applicant and her attorney are 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 15th day of JAN., 2015.

THOMAS A. RUSSO
Presiding Judge
Fifteenth Judicial Circuit

Florence, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

GREGORY PENCILLE, #312332
vs
STATE OF SOUTH CAROLINA,
Respondent.

IN THE COURT OF COMMON PLEAS

2013-CP-26-7463

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:

Daniel A. Selwa, II, Esquire
1053 London St., Suite A
Myrtle Beach, SC 29577

DATED this 1ST day of February, 2016.

Norma Bigbee, Legal Assistant
For Respondent

DANIEL A. SELWA, II
ATTORNEY AT LAW, L.L.C.

1053 London Street, Ste. A
Myrtle Beach, S.C. 29577

Daniel E. Shearouse
Clerk of Court – SC Supreme Court
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