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March 3, 2016

Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Rion Beaty, 2014-CP-07-01495

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal and Grant of Appeal pursuant to White v State, in the above Beaufort County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,

James K Falk

Thank you for your assistance.

Cc: Rutledge Johnson, Esq.; Rion Beaty 337153.

Mailing Address: PO Box 1058, Charleston, S.C. 29402
Location: 38 Broad Street, Suite 350, Charleston, S.C. 29401

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Honorable Roger L Couch, Circuit Court Judge

Case No.: 2014-CP-07-1495

Rion Beaty #337153.....Petitioner

v.

State of South Carolina.....Respondent

NOTICE OF APPEAL

The Petitioner Rion Beaty appeals the Honorable Roger L. Couch's February 12, 2016 Order of Dismissal and Grant of Appeal Pursuant to White v State. Undersigned counsel received notice of entry of the order on February 26, 2016. 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

March 7, 2016

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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PROOF 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 March 3, 2016.

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

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	)	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
Rion Beaty, #337153, Applicant, v. State of South Carolina, Respondent.	)	2014-CP-07-1495 **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 (PCR) filed June 23, 2014. The State filed its Return on August 28, 2015. An evidentiary hearing was held at the Beaufort County Courthouse on October 20, 2015. The Applicant was represented by James K. Falk, Esquire. The Respondent was represented by J. Rutledge Johnson, Esquire, Assistant Deputy Attorney General. Applicant, Applicant's mother, and Lee Mitchell testified on Applicant's behalf. Donald Colongeli, Esquire, also testified.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. The Applicant was indicted at the October 2012 term of the Beaufort County Grand Jury for kidnapping (2012-GS-07-2107) armed robbery (2012-GS-07-1999), and possession of a weapon during the commission of a violent crime (2012-GS-07-2000). Donald Colongeli, Esquire, represented the Applicant. On April 22, 2013, the Applicant pled guilty as indicted before the Honorable J. Ernest Kinard, Jr. Judge Kinard sentenced the Applicant to terms of confinement for fifteen (15) years for

kidnapping, fifteen (15) years for armed robbery, and five (5) years for possession of a weapon during the commission of a violent crime. These sentences were to run concurrently.

The Applicant filed a notice of appeal on May 2, 2013; however, this was untimely, as the court did not receive the notice until the following day, after the allotted time to file had passed. By Order dated July 8, 2013, the South Carolina Court of Appeals dismissed the appeal. The Remittitur was issued on July 29, 2013.

First PCR Application: 2013-CP-07-1651

The Applicant filed an application for Post-Conviction Relief on June 25, 2013, while his direct appeal was still pending. In light of this, the State filed a Return and Motion to Dismiss. By Order dated August 28, 2013, the Honorable Carmen T. Mullen dismissed this application without prejudice.

Current PCR Application: 2014-CP-07-1495

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

1. "Ineffective Assistance of Counsel"
    a. "[Counsel] filed my motion of reconsideration wrong"
    b. "Got convicted of a charge I never had a warrant for"
    c. "Promised me 10 years"
    d. "Never told me my rights to appeal"
    e. "Promised me a 10 year sentence and to go for an open plea"
    f. "If it wasn't for my lawyer's errors the outcome would of [sic] been different"
2. "Violation of 5th Amendments"
    a. "I was charged with separate offenses which was all one crime and my lawyer never ask me anything about the case like where I have been at the time of the

crime and who could back that up. Neither on the date of the trial. He left me to be a witness to myself"

3. "Violation of 6th, 14th Amendments"
    a. Never asked about witnesses or alibi in my favor. He just said we [are] going to trial. He never even called anyone to try and see if I had witnesses"

SUMMARY OF TESTIMONY

At the hearing, Applicant's mother testified that she attempted to meet with Counsel several weeks before the court date and left several phone messages. Applicant's mother also stated she spoke with Counsel's wife, but did not meet Counsel until the day of the plea, whereupon Counsel stated Applicant would be receiving a 10 year sentence. She also testified Counsel told her to tell Applicant to take the plea.

Lee Mitchell, Applicant's stepfather, testified that he was in court on the day of the plea and spoke with Counsel, who stated he was shooting for 10 years. Mr. Mitchell thought Applicant was getting 10 years. On cross-examination, Mr. Mitchell admitted that Counsel stated he would attempt to get Applicant a 10 year sentence.

Applicant testified that he asked Counsel to file a motion to reconsider. Applicant stated he called Counsel, but spoke with his secretary. Applicant thought Counsel had appealed this case and that Counsel tried to persuade Applicant's family to get Applicant to accept the plea offer. Applicant claimed he was "out of it" during the plea and he received 15 years. Applicant then stated he did not have much contact with Counsel and that when Counsel came to see him, they did not talk much about the case. Applicant also testified that Counsel did not speak with Applicant's alibi witnesses, but that Counsel showed Applicant the evidence against him, including pictures from a video and statements made.

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Applicant then claimed he pled guilty because Counsel stated that he could not defend the case; and Applicant did not want to go to trial. Applicant admitted that he and Counsel discussed possible defenses, including alibi witnesses. Applicant claimed he signed the plea affidavit because Counsel told him to, but admitted that he read the questions prior to signing the plea affidavit. Applicant then testified that his answers at the plea would be different because he was blind about the law. Applicant then stated Counsel did not explain his investigation to Applicant; but Counsel supposedly said that he was going to get DNA testing on a bandana.

On cross-examination, Applicant admitted this was not his first involvement with the criminal justice system. Applicant admitted that he did not tell the truth at the guilty plea while under oath. Applicant also admitted he did not tell the plea judge that he was "out of it." Applicant further admitted that he did not stop the plea court at any time to explain he did not understand what was occurring. Applicant then testified there were two eye witnesses to him committing the crimes and that he agreed to the facts as presented by the solicitor.

Counsel testified he was appointed to this case and has been in practice since 1993. Counsel stated he met with Applicant between 6 and 12 times and met with him the night before Applicant was scheduled to go to trial. Counsel also stated he corresponded with Applicant by mail and phone. Applicant testified he discussed the evidence and discovery with Applicant, showing still photos of Applicant that were taken from the video identifying Applicant. Counsel stated the swaying factor for Applicant pleading guilty was the photos. Counsel stated Applicant's family was upset, but once they saw the photos, they knew Applicant was a participant. Applicant was privy to his entire file. Counsel stated Applicant had been identified by surveillance footage and that Applicant had been employed at/near the store that he robbed.

Counsel then stated that there were three people in the store and that Applicant held Victim at gunpoint; Victim identified Applicant in a photo lineup.

Counsel then testified that he does not recall Applicant asking about a motion to reconsider and did not think Applicant was hysterical during the plea, as he had spent much time with Applicant prior to and during the plea. Counsel then testified that this was a very well prepared prosecution case, in that there was overwhelming evidence of Applicant's guilt. Counsel stated he gave Applicant the best advice possible and that he wanted to feel out the plea judge before the guilty plea. Counsel stated there may have been possible miscommunication about potential sentences because Applicant was locked in to a 10 year plea. Counsel stated the 10 year offer was not locked by any means, as there were no recommendations or negotiations in this case.

Counsel stated that he, in fact, filed an appeal, but that it was untimely, as there was some waffling by Applicant on whether he desired an appeal. Counsel admitted that he did not subpoena any witnesses to trial, as there were no necessary witnesses in this case. Counsel stated this case was a tossup because the State's case was solid; they "crossed every T and dotted every I;" this was a "slam-dunk" case. Counsel was concerned about the time Applicant was facing and that the plea judge went out of his way to explain the sentence to Applicant. Counsel stated the sentence was within the sound discretion of the plea judge and that he was shocked because he thought the sentence was too high. Counsel stated he still thinks a plea was the correct decision because he opined that Applicant would lose at trial and face a much harsher sentence.

Counsel testified as to the kidnapping charge that there was no confusion concerning the kidnapping in the store. Counsel stated he may have told Applicant discharge could fall away,

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but explained that the State could meet the elements of kidnapping. Counsel stated he did the most thorough investigation he could based on evidence in the case and that he researched the case to the best of his ability. Counsel attempted to get Applicant to understand the kidnapping charge and was not surprised by this charge; he was adequately prepared.

On cross-examination, Counsel testified he was prepared for the kidnapping charge. He stated he did not have a basis for a motion to reconsider because the sentences were legal and the motion would not be successful. Counsel also testified he did not promise Applicant a 10 year sentence. Counsel also testified he thoroughly discussed the plea with Applicant and that Applicant understood the plea. Counsel then stated he did not tell Applicant how to answer the plea judge's questions, did not threaten the Applicant, and did not promise Applicant anything to get him to plead guilty. Counsel lastly stated he based his advice on the facts of the case, his experience as an attorney, and on the information that Applicant gave to him.

On redirect examination, Counsel testified he explained the maximum and minimum penalties to Applicant. Counsel also testified he never thought the kidnapping charge would come off of the table; he lastly discussed the strengths and merits of the kidnapping charge.

On re-cross examination, Counsel testified it was Applicant's decision to plead guilty.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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 Applicant's testimony regarding Counsel's ineffectiveness is not credible while also finding Counsel's testimony is credible.

This Court also finds Counsel provided effective assistance of counsel in this case. Counsel advised Applicant of all of the charges and the sentences the charges carried. Counsel

testified he did not promise Applicant a 10 year sentence and that the plea judge was well within his discretion to sentence Applicant to 15 years. Applicant admitted that nobody threatened him to plead guilty, and there were no promises 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, prepared 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.

This Court also finds the guilty plea transcript dispositive of this case, as it is a contemporaneous recording of the proceedings. This Court finds the Applicant waived his rights to challenge the video, the identification by the victim and statements made to law enforcement.

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.

White v State Claim

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 belated 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).[1]

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.

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.

[1] "Even where the post-conviction relief judge makes this finding, he may not grant relief on this basis. Instead, **the Applicant must petition this Court for a White v. State review**." [Emphasis added]. Davis, 288 S.C. at 291, n. 1, 342 S.E.2d at 60.

AND IT IS SO ORDERED this 12th day of February, 2016.

Roger L. Couch
Presiding Judge
Fourteenth Judicial Circuit

Spartanburg, South Carolina.

2014-CP-07-1495

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