

FALK LAW FIRM, LLC.

James K. Falk

(843) 606-6007

(843) 972-9005 Fax

Admitted to practice: KY(1984) S.C. (2010)

jfalklaw@gmail.com

March 21, 2016

RECEIVED

MAR 23 2016

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

S.C. SUPREME COURT

Re: Bernardo Evans, 2015-CP-26-0709

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Horry 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: Jessica Kinard, Esq.; Bernardo Evans 361706.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

MAR 23 2016

S.C. SUPREME COURT

APPEAL FROM Horry COUNTY

Court of Common Pleas

Honorable D. Craig Brown, Circuit Judge

Case No.: 2015-CP-26-0709

Bernardo Evans 361706.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Bernardo Evans appeals the Honorable D. Craig Brown's March 7, 2016, Order of Dismissal. Undersigned counsel received notice of entry of the order on March 19, 2016. A copy of the order on appeal is attached hereto.



James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

March 21, 2016

Jessica E. Kinard, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY

Court of Common Pleas

Honorable D. Craig Brown, Circuit Judge

RECEIVED

MAR 23 2016

Case No.: 2015-CP-26-0709

S.C. SUPREME COURT

Bernardo Evans 361706.....PETITIONER

V.

State of South Carolina.....RESPONDENT

PROOF OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Jessica Kinard, Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this 21 day of March, 2016.



James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Bernardo J. Evans, #361706,)

Case No. 2015-CP-26-0709

Applicant,)

v.)

ORDER OF DISMISSAL
(Ends action)

State of South Carolina,)

Respondent.)

HORRY COUNTY
2016 MAR 10 PM 2:23
MELANIE HUGGINS-WARD
CLERK OF COURT

This matter came before the Court by way of an Application for Post-Conviction Relief filed January 27, 2015. Respondent filed a return on or about August 28, 2015. The Court convened an evidentiary hearing into the matter on February 11, 2016, at the Horry County Courthouse. Applicant was present and represented by James K. Falk, Esquire. Jessica E. Kinard, Esquire of the South Carolina Attorney General's Office, represented Respondent.

Applicant and Applicant's plea counsel, Jonathan D. McCoy, Esquire, testified at the hearing. The Court had before it a copy of the plea 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 armed robbery (2013-GS-26-2764) and kidnapping (2012-GS-26-2765). Applicant waived presentment of an indictment for assault and battery of a high and aggravated nature (2014-GS-26-4205). Johnathan D. McCoy, Esquire, represented Applicant. On October 7, 2014, Applicant pled guilty to armed robbery and assault and battery of a high and aggravated nature. The Honorable Benjamin H. Culbertson

COPY

sentenced Applicant to concurrent terms of ten years for armed robbery and fifteen years for assault and battery of a high and aggravated nature. Applicant did not appeal his plea or sentence.

II. ALLEGATIONS

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

1. "Ineffective Counsel"
2. "they charged me with (Arm Robbery)"
3. "they charge me with (Assault & Battery High Nature)"

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

Applicant called plea counsel first to testify, and he began to testify regarding the longstanding friendship he had with the Applicant. He never questioned that he would represent the Applicant, and never charged the Applicant for his services. He further stated that he told Applicant to turn himself in but not make a statement until he could get there, as he was protected for a federal court matter. Plea counsel then testified regarding evidence in the case, which included a surveillance tape that had, as he characterized it, evidence that would convince any jury beyond a reasonable doubt that Applicant had committed the crimes for which he was charged. Additionally, he testified that the evidence in the case was always available for Applicant to see, including the surveillance tape, even if they needed an appointment with the solicitor to go view it. He then testified about plea negotiations, and how difficult this case could be because of the degree to which the victim continued to suffer, including suicide

attempts. This factored into decisions such as not to have a preliminary hearing (especially combined with the evidence at hand) and extensive plea negotiations in order to avoid a trial. Plea counsel discussed his investigations into the case, and that there was not much to look into beyond the surveillance tape. He mentioned to Applicant that an investigator could be hired, which would cost about five thousand dollars, but one was never hired. This Court finds plea counsel's testimony to be very credible.

Applicant testified next and went through his memory of events. Applicant's testimony differed from plea counsel's significantly. This Court does not find applicant to be very credible. He testified that he did turn himself in on plea counsel's advice, but added that the officers said plea counsel had called and told them that Applicant had committed the crime and that he was remorseful. Applicant also admitted that he did not want to watch the surveillance tape at first, but also did not think that plea counsel had a copy of the tape for him to watch. Applicant testified that plea counsel demanded more money if they were going to go to trial, which is counter to plea counsel's testimony that money was never discussed except in relation to the possibility of hiring an investigator. Regarding facts, Applicant testified that he had no knowledge of what happened the night of the incident other than a drug relapse. He pled because he had no knowledge of the law and trusted plea counsel, though he felt as if they were not ready for the case. Applicant was under the impression that he was pleading to ten (10) years plus ankle monitoring for two (2) years, but he still did not want that sentence.

B. Ineffective Assistance of Plea 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 plea counsel as a ground for relief, Applicant must prove plea counsel's "conduct so undermined the proper

functioning of the adversarial process" that the plea 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 plea 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 plea 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 plea counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove plea counsel's performance was deficient. Id. Under this prong, the Court measures plea counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, plea 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. In the context of a guilty plea, Applicant must show there is a reasonable probability that, but for plea 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).

The Court finds Applicant failed to meet his burden to show plea counsel rendered ineffective assistance of counsel. The plea hearing transcript shows no misunderstanding of the charge that Applicant was present for, or of the consequences that he faced. At the plea hearing, Applicant acknowledged that he had been given sufficient time to consider his options with counsel, and that he had done everything requested. Plea counsel testified that he negotiated extensively on his client's behalf, and that this led to the best outcome possible. His testimony was that they both agreed from the

outset that their best hope was to push hard in negotiations, and this is the tactic that was used. This Court finds plea counsel conducted a proper investigation, adequately conferred with Applicant, and was thoroughly competent in his representation.

C. Involuntary Guilty Plea

This Court also finds Applicant's allegation that his guilty plea was involuntary 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. Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011) (citing Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)).

To find that a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both. Holden at 573, 713 S.E.2d at 615 (citing Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999)). The longstanding test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Id.

In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). Specifically, 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

guilty plea, and also from the record of the PCR hearing. Roddy, 339 S.C. at 33, 528 S.E.2d at 420. "[I]n South Carolina, a guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights." State v. Rice, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485-86 (2013) (citing Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). "A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed." Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (2007). Further, "a defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." Brady v. U.S., 397 U.S. 742, 757 (1970).

Based on the guilty plea transcript as well as evidence at the PCR hearing, this Court is firmly convinced that Applicant's guilty plea was entered into freely, voluntarily, knowingly, and intelligently. Applicant testified to those exact statements during the plea hearing, and there is no evidence in the transcript or presented at the PCR hearing to show otherwise. There can be no question that Applicant was fully aware of his sentence and its collateral consequences at the time of the plea hearing. Furthermore, plea counsel spoke eloquently and thoroughly during mitigation. As a result, Applicant has failed to meet his burden, and this allegation is denied and dismissed.

D. 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. The record shows no prejudice to the Applicant, nor does it show any action by plea counsel that would be deficient under the terms provided by Strickland. Plea counsel was not deficient and did not perform at a level that fell below prevailing professional norms. Even if he had, there is no evidence to show prejudice to this Applicant. Additionally, Applicant has failed to show that his guilty plea was anything other than knowingly, intelligently, and voluntarily entered, and has not shown that, but for the defects he alleges in his plea, he would have proceeded to trial. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

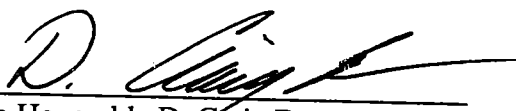
The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a 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.

Remainder of page intentionally left blank.

IT IS THEREFORE ORDERED THAT:

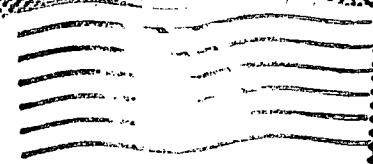
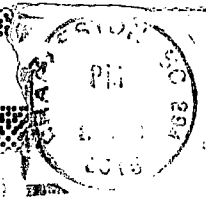
1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 7 day of March, 2016.


The Honorable D. Craig Brown
Presiding Judge

Florence, South Carolina

FALK LAW FIRM
PO Box 1058
Charleston, SC 29402



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

2921131330 8059

