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March 25, 2016

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

RECEIVED

MAR 28 2016

S.C. SUPREME COURT

Re: LeArthur v. State, 2015-CP-26-02226

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.; LeArthur Hills 296523.

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 28 2016

S.C. SUPREME COURT

Case No.: 2015-CP-26-2226


LeArthur Hills 296523.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner LeArthur Hills appeals the Honorable D. Craig Brown's March 7, 2016, Order of Dismissal. Undersigned counsel received notice of entry of the order on March 25, 2016. A copy of the order on appeal is attached hereto.


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

March 25, 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

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APPEAL FROM HORRY COUNTY

MAR 28 2016

Court of Common Pleas

Honorable D. Craig Brown, Circuit Judge

SC SUPREME COURT

Case No.: 2015-CP-26-02226

LeArthur Hills 296523.....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 March 25, 2016.



James K Falk
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Charleston, SC 29402

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS)
FOR THE FIFTEENTH JUDICIAL CIRCUIT)

LeArthur Hills, #296523,)

Case No. 2015-CP-26-2226)

Applicant,)

v.)

ORDER OF DISMISSAL
(Ends action)

State of South Carolina,)

Respondent.)
_____)

HORRY COUNTY
2016 MAR 11 PM 1:21
MELANIE HUGGINS-WARD
CLERK OF COURT

This matter came before the Court by way of an Application for Post-Conviction Relief filed March 24, 2015. Respondent filed a return and motion for more definite statement on or about July 15, 2015. The Court convened an evidentiary hearing 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, J. Eric Fox, 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 2014, the Horry County Grand Jury indicted Applicant for Shoplifting, third or subsequent offense (2014-GS-26-02495). In July 2014, the Horry County Grand Jury indicted Applicant for Shoplifting, third or subsequent offense (2014-GS-26-02748). Jonathan Eric Fox, Esquire, represented Applicant on both charges. On January 21, 2015, Applicant pled guilty as indicted to both Shoplifting charges. The Honorable R. Markley Dennis, Jr., sentenced Applicant to six (6) years imprisonment for Shoplifting, third or subsequent offense (2014-GS-26-02748) and ten (10)

copy

years imprisonment for Shoplifting, third or subsequent offense (2014-GS-26-02495) suspended to 5 years probation; the latter charge was to run consecutively to the former charge. 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 Cancel (sic)"
2. "Predigest (sic) from the Judge"

Applicant amended his PCR filing the day before the hearing to add the following: "Involuntary non-informed plea. His lawyer promised him a 5 year deal. He "signed" papers for a 5 year deal. He was unaware he could get 6." The hearing proceeded on all of the above grounds.

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, who stated that he had represented the Applicant several times, for a total of three charges. He stated that he met Applicant four times in regard to these charges. He also stated that he reviewed the surveillance videos, though he may not have watched them with the Applicant, but saw that Applicant was readily identifiable, particularly because he was in a wheelchair. Applicant raised in his application a concern about the solicitor on this case being biased. When questioned regarding this, plea counsel stated that one is bound to work with the same solicitors

repeatedly, and that there was nothing improper in this situation. Regarding plea negotiations, these were undertaken with the realization that Applicant faced a ten year enhancement for a long list of property crimes. An offer was made for five years, which was mailed to him along with information regarding its expiration, and Applicant hoped for a treatment program; however, when he could not get in, plea counsel was unsurprised because of the numerous convictions on his record. He further testified that it is usually the case that someone with so many property crimes has a history of drug use. When the plea was entered, the Court was ready to go forward with a trial that day, which is part of what led to Applicant receiving the sentence that he did. Plea counsel testified that Applicant had a habit of putting off his decision as long as possible and would plea at the last minute. Plea counsel testified that, during a pre-trial conference, the plea judge alluded to the fact that he was inclined to give Applicant the full ten years at trial. It was at this time that he recommended Applicant take the current plea offer. This Court finds plea counsel's testimony to be consistent with the underlying transcript and very credible.

Applicant testified next, and the bulk of his testimony was that he wanted to accept the five year plea he had been offered. He testified that he had mailed the correspondence from plea counsel back in to the solicitor's office, but had never heard back about it. Upon further questioning, it did not seem apparent that Applicant merely misspoke regarding who he returned the plea acceptance to; also, he testified that he never followed up with plea counsel regarding whether the plea acceptance had been received. Applicant testified that he did not want to go to trial because he did the crime, but he also wanted anything but jail time, and hoped for a treatment program. He attributed the fact that he was not accepted into drug court or a treatment program to the fact that the solicitor had an issue with him, rather than his lengthy criminal history. This Court does not find Applicant's testimony to be credible or persuasive.

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. There is discussion in the transcript of whether Applicant had effectively hired a new attorney, and this was determined not to be the case. The plea judge carefully went through what that meant for Applicant and Applicant testified that he was ultimately satisfied with plea counsel's performance and representation. 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. This Court finds plea counsel adequately conferred with Applicant and was thoroughly competent in his representation. For these reasons, the request for relief on this ground is denied and dismissed.

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 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 84, 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 convinced that Applicant's guilty plea was entered into freely, voluntarily, knowingly, and intelligently. 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. 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. Specifically, this Court finds that, because Applicant was extended the five year plea offer, there is no deficient performance on the part of plea counsel.¹ 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), SCRPC, provides that if Applicant wishes to seek appellate review, PCR counsel must


¹ Bell v. State, 410 S.C. 436, 765 S.E.2d 4 (Ct. App. 2014) (failure of counsel to communicate a plea offer that would have changed Applicant's course of conduct is ineffective assistance of counsel).

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 7 day of March, 2016.



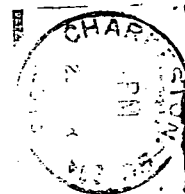
The Honorable D. Craig Brown
Presiding Judge

Florence, South Carolina

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Clerk of Court.

Supreme Court of South Carolina

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