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GIESE

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APR 06 2016

S.C. SUPREME COURT

April 4, 2016

Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

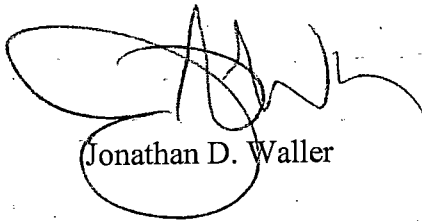
Re: James M. Jones vs. State of South Carolina
C/A No: 2013-CP-38-01202

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Jones in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-708-6767.

Sincerely,



Jonathan D. Waller

Cc: J. Clayton Mitchell, South Carolina Office of Attorney General

Enclosures

STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM ORANGEBURG COUNTY
Maité Murphy, Circuit Court Judge APR 06 2016

2013-CP-38-01202

S.C. SUPREME COURT

James M. Jones, #351732,

Appellant,

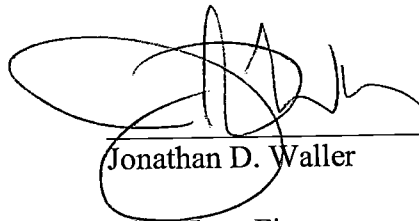
v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

James M. Jones, #351732, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed August 26, 2015 and served on counsel by letter dated March 7, 2016, issued by the Honorable Maité Murphy, Presiding Judge, First Judicial Circuit.



Jonathan D. Waller

Giese Law Firm
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Columbia, SC 29201
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803-708-6769 (fax)
jwaller@thegieselawfirm.com
ATTORNEY FOR PETITIONER

This 4 day of April, 2016.

Other Counsel of Record:
J. Clayton Mitchell, Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3319

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Maité Murphy, Circuit Court Judge

2013-CP-38-01202

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APR 06 2016

S.C. SUPREME COURT

James M. Jones, #351732,

Appellant,

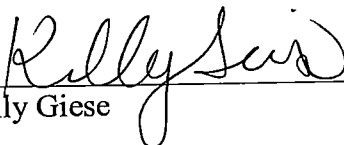
v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, J. Clayton Mitchell, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 4th day of April 2016, to his office located at P.O. Box 11549, Columbia, SC 29211.



Kelly Giese

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

James M. Jones, #351732,

2013-CP-38-01202

Applicant,

AT ST. JOHN'S COPY

ORDER OF DISMISSAL

v.

Winnifred Clark

State of South Carolina,

CLERK OF COURT

Respondent ORANGEBURG COUNTY, SOUTH CAROLINA

FILED FOR RECORD
WINNIFRED CLARK
CLERK OF COURT
ORANGEBURG, SC

2015 AUG 26 1 A 1202

This matter comes before the Court pursuant to an application for post conviction relief (PCR) filed October 4, 2013. Respondent made its Return on March 7, 2014, requesting an evidentiary hearing be convened. Johnathan D. Waller, Esquire, was appointed by the Orangeburg County Clerk of Court.

South Carolina Court Administration informed Respondent by written letter dated August 20, 2014, that a transcript of Applicant's guilty plea hearing could not be produced. Respondent made three (3) requests for the transcript to be produced.

An evidentiary hearing was held on May 20, 2015, at the Dorchester County Courthouse. Applicant and Counsel Waller were present. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent. Applicant testified on his own behalf at the PCR hearing. Also testifying was Applicant's plea counsel, R. Douglas Mellard, Esquire. The Court had before it the Orangeburg County Clerk of Court records, Applicant's South Carolina Department of Corrections records, the PCR application, the Return, and the appellate records.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. Applicant was indicted

during the February 2011 term of the Orangeburg County Grand Jury for Murder (2011-GS-38-0154). Applicant was represented by Counsel Mellard. On July 23, 2012, Applicant appeared before the Honorable Edgar W. Dickson, where he pled guilty to the lesser included offense of voluntary manslaughter pursuant to North Carolina v. Alford¹. Sentencing was deferred until July 25, 2012, where Judge Dickson sentenced Applicant to twenty-five (25) years' imprisonment in accordance with negotiations between Applicant and the State.

Applicant filed a notice of appeal, which was dismissed by the South Carolina Court of Appeals for failure to establish any preserved issues pursuant to Rule 203(d)(1)(B)(iv), SCACR. The Remittitur was sent on October 15, 2012.

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

1. Involuntary and coerced guilty plea.

II. SUMMARY AND EVIDENCE PRESENTED AT THE PCR HEARING

Applicant's Testimony

At the PCR hearing, Applicant testified that he was arrested on burglary and homicide charges. He acknowledged that he gave a statement admitting his involvement to law enforcement but explained he was on Xanax at the time. He testified Counsel was appointed to represent him and that they met about four (4) or five (5) times. He testified he was charged with murder and that Counsel reviewed the charges but did not review the elements that the State must prove in order to convict him. He understood that he was facing a maximum of a life sentence. He knew his cousin had given multiple statements that implicated him in the killing.

Applicant testified a private investigator was hired by Counsel and that he met with him two (2) or three (3) times. He alleged that Counsel did not review the investigator's findings with

¹ 400 U.S. 25, 91 S. Ct. 160 (1970).

him. Applicant testified he moved to have Counsel relieved and that a hearing on the issue was convened before Judge Dickson. This motion was denied and Counsel remained on the case. Applicant testified that he wanted to proceed to trial, but Counsel advised him to plead guilty. Applicant did not believe the State had sufficient evidence to convict him, even under a hand of one, hand of all theory of liability. He testified he and Counsel had not talked about defenses. He believed Counsel would "sell him out" if he took the case to trial. He testified he pled guilty pursuant to Alford because he was not comfortable going forward with Counsel as his attorney.

Applicant acknowledged that Judge Dickson was the presiding judge at his plea hearing. He testified he read the charges contained in the indictments and the facts that supported them. He did not recall the specific questions asked of him but conceded that he was asked some questions by Judge Dickson.

Counsel Douglas R. Mellard's Testimony

Counsel testified that he was appointed to represent Applicant through his position with the Orangeburg County Public Defender's office. He testified that Applicant pleaded guilty to a negotiated twenty-five (25) year sentence to the lesser included offense of voluntary manslaughter. He testified Applicant gave a statement that there was a tussle over a weapon and that it went off and the victim was killed.

Counsel testified he hired a private investigator to look into Applicant's cousin's statements. He testified he needed to get the full story from the victim's parents and other family members. He testified that the investigator did not uncover anything helpful to his defense. Counsel testified there were holes in Applicant's version of the facts and that he attempted to investigate the inconsistencies.

Counsel, while referring to notes from his case file, noted that he met with Applicant around eight (8) separate times. Counsel testified he met with Applicant in April 2011 along with the investigator where Applicant narrated his version of events where he claimed his cousin was responsible and not him. They met again in September 2011 where they discussed contacting the victim's family to get more information. Counsel testified they spoke on the phone in October 2011, along with the investigator, where they discussed the investigator's interview with Applicant's grandmother. Counsel, the investigator, and Applicant met again in January 2012, and two more times in June 2012 leading up to Applicant's guilty plea. Counsel noted that Applicant had failed a polygraph exam administered by law enforcement.

As to any issues with the plea transcript, Counsel testified that he reviewed with Applicant the various rights he would waive by pleading guilty. He stated his PCR testimony was not impacted by the lack of a plea transcript and emphasized that Judge Dickson is a resident judge who has presiding over a number of Counsel's client's guilty pleas. Counsel testified he is very familiar with Judge Dickson's typical plea colloquy and emphasized that he asks nearly the same questions at every guilty plea hearing. Counsel testified that he could not recall exactly what Judge Dickson asked Applicant during the colloquy, but did agree that in his experience it was Judge Dickson's normal practice to review: indictment(s), potential sentence and collateral consequences, whether the defendant was promised or threatened to plead guilty, whether defendant was pleading guilty freely and voluntarily, Constitutional rights that must be waived, the defendant's prior record, the State's recitation of the facts, and any mitigation offered by a defendant. Counsel testified that if he believed there were any problems with the plea proceeding, he would have objected or made a motion to withdraw the plea. He stated that was not the case here and that Applicant knew what rights he was waiving by pleading guilty. He also

testified that Judge Dickson would not have accepted the plea or allowed the plea to go forward if any issues arose.

III. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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." Id. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show 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, 59 (1985).

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, Applicant's appellate records, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds Counsel's testimony to be credible and persuasive on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below.

Plea Transcript

This Court finds that although a transcript of the guilty plea proceeding was not available for review, it is not necessary to its determinations and ruling. See Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008) (In determining guilty plea issues in a PCR proceeding, it is proper to consider the plea transcript *as well* as evidence at the PCR hearing.) (emphasis added). A presumption of regularity attaches to proceedings in the Court of General Sessions. Pringle v. State, 287 S.C. 409, 411, 339 S.E.2d 127, 128 (1986) (citing State v. Britt, 235 S.C. 395, 111 S.E.2d 669 (1959); State v. Jones, 211 S.C. 319, 45 S.E.2d 29 (1947); State v. Waring, 109 S.C. 52, 95 S.E. 143 (1918)). It is incumbent upon one who challenges a proceeding to prove his

claims. See Tate v. State, 345 S.C. 577, 549 S.E.2d 601 (2001). This Court finds the record was adequately reconstructed at the PCR hearing. It is important to note that Applicant pled guilty before Judge Dickson, the resident Orangeburg circuit court judge, with whom Counsel has appeared before numerous times. Counsel is familiar with the structure of Judge Dickson's normal plea proceedings and testified that there is no reason to think Applicant's plea deviated from those practices. Applicant's testimony supports this finding. Applicant testified that he was asked a number of questions at the plea hearing including whether he wished to waive his Constitutional rights, and whether he agreed with the solicitor's recitations of the facts. Therefore, this Court finds that the plea transcript is not necessary to its ruling and that the record was adequately reconstructed.

Involuntary and Coerced Guilty Plea

Applicant argues he did not plead guilty knowingly and voluntarily because he was forced to plead guilty. This Court finds otherwise and concludes that Applicant's guilty plea was entered freely and voluntarily. 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. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969). Defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). 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, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing

Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621, 52 L.Ed.2d 136 (1977)). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir.1975).

Applicant claims he did not plead guilty knowingly and voluntarily. This Court finds this contention without merit. This Court finds the record reflects Applicant was advised of the waiver of his constitutional rights by the plea court. This Court finds very credible Counsel's testimony regarding his preparation and advice concerning the case and the amount of time he met with Applicant. This Court finds Applicant's testimony not credible. This Court finds that Applicant presented *no* evidence that he was coerced or forced to plead guilty. This Court finds Applicant's intent to plead guilty was made clear to the plea judge. Applicant was fully informed of the nature and consequences of his plea by his attorney and was advised further by the plea court. This Court finds Counsel's testimony credible and persuasive on the issue. Applicant knew he was pleading guilty but explained that he felt forced because Counsel advised him he was likely to be convicted if he chose to go to trial. This Court notes Applicant pled guilty to a negotiated plea offer. This Court finds the plea judge correctly found Applicant's plea was freely, voluntary, and intelligently made. This allegation is denied and dismissed with prejudice.

All Other Allegations

As to any and all allegations that were raised in the application 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.

V. CONCLUSION

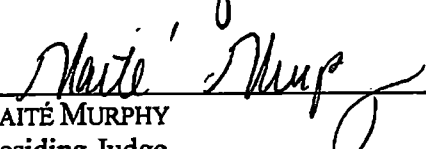
Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate counsel's performance was unreasonable under prevailing professional norms or that the outcome of his plea would have been different had counsel performed differently. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). 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.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 18 day of Aug., 2015.


MAITÉ MURPHY
Presiding Judge

St. George, South Carolina

THE

GIESE

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