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SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Edgar W. Dickson, Circuit Court Judge

Case No: 2009-CP-32-4821

James Livingston.....Petitioner.

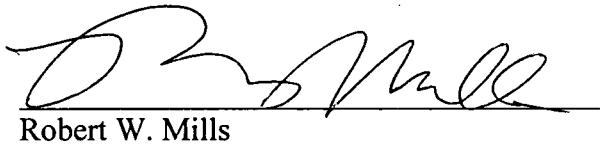
v.

State of South Carolina.....Respondent.

NOTICE OF APPEAL

James Livingston appeals the orders of the Honorable Edgar W. Dickson dated May 13, 2015 and March 9, 2016. Attorney for Appellant received written notice of entry of the final order on March 23, 2016.

April 20, 2016



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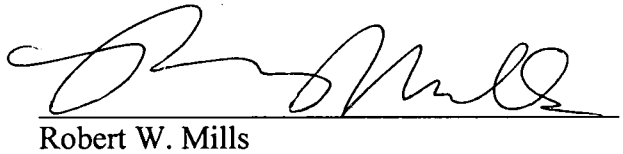
PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on April 20, 2016, addressed to the attorney of record, Patrick Schmeckpeper, Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina 29211-1549

April 20, 2016



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ORIGINAL

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	
		2009-CP-32-4821
James Livingston, #226920,	)	
	)	
Applicant,	)	
	)	
v.	)	**ORDER OF DISMISSAL**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

This matter comes before the Court by way of an Application for Post-Conviction Relief filed October 28, 2009. An evidentiary hearing was convened on August 16, 2013, at the Lexington County Courthouse. The Applicant was present at the hearing and was represented by Robert W. Mills, Esquire. The Respondent was represented by Mary S. Williams of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Also testifying was Joshua Kendrick, Esquire. This Court had before it the records of the Lexington County Clerk of Court, the guilty plea transcript, the probation revocation transcript, the Applicant's records from the South Carolina Department of Corrections, and exhibits introduced at hearing.

PROCEDURAL HISTORY

The records before this Court indicate that The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. The Applicant was indicted for Trafficking in Cocaine (2008-GS-32-2647) and two counts of Distribution of Cocaine Base – 3rd or Subsequent Offense (2006-GS-32-0170 & -172).

Joshua Snow Kendrick, Esquire, represented him. On April 13, 2009, the Applicant pled guilty before the Honorable J.C. Nicholson, Jr., to both counts of Distribution of Cocaine Base – 3rd or Subsequent Offense and to the lesser offense of Distribution of Cocaine – 3rd or Subsequent Offense.[1] Applicant was sentenced to three (3) concurrent terms of eighteen (18) years each.

At the time of his plea, Applicant had been on probation for Possession With Intent to Distribute Cocaine (2005-GS-32-2325) and Possession of Crack Cocaine (2005-GS-32-1921) since October 5, 2005. On May 22, 2009, Applicant appeared without counsel before the Honorable Knox McMahon. Judge McMahon revoked a portion of the probationary sentences, the revocation to be served concurrently with other charges, and terminated probation.

In his application for post-conviction relief (PCR), Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
    a. "Counsel failed to properly advise Applicant, failed to investigate the facts and law, failed to show Applicant all of the evidence."

In an addendum to his application, Applicant set forth his allegations as follows:

1. Ineffective assistance of counsel.
    a. Failure to fully inform applicant of all of the facts of the case;
    b. failure of trial counsel to review evidence with applicant before the court date;
    c. failure of trial counsel to fully investigate the facts;
    d. failure of trial counsel to advise applicant of the full nature of the sentence;
    e. failure of trial counsel to advise the applicant of the full nature of the chemical analysis;
    f. failure of trial counsel to properly advise applicant on the choices of pleading to a lesser offense;
    g. failure of trial counsel to properly advise applicant about the possible

[1] In addition to the reduction, the State *nol prossed* three additional counts of Distribution of Cocaine Base – 3rd or Subsequent Offense and two counts of Distribution of Crack Cocaine within Proximity of a School or Park. (Plea Tr. p. 10, line 24 – p. 25, line 3.)

sentence if applicant chose to go to trial;

h. failure of trial counsel to file a motion of reconsideration as he told the applicant he would;
i. failure of trial counsel to advise applicant of his right to challenge any statements made to law enforcement;

2. Failure of the trial judge in the probation violation hearing to properly warn applicant of proceeding without counsel.

At his PCR hearing, Applicant presented testimony regarding ineffective assistance of counsel based on Counsel's failure to investigate, failure to advise him regarding the defense of entrapment, advice regarding possible sentences, failure to file a motion to reconsider, and failure to adequately warn of dangers of proceeding without counsel during probation revocation hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80.

Ineffective Assistance of Counsel

The 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, 80 L.Ed.2d 674, 692 (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, supra). 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland). 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, 88 L.Ed. 2d 203 (1985).

Entrapment

Applicant contends that he had a viable defense to the charge involving the transaction on February 27, 2008, and Counsel's failure to adequately explain the defense to him constitutes ineffective assistance of counsel. During the plea hearing, the solicitor recited the facts as follows:

> ...agents with SLED, with the aid once again of a confidential informant, conducted a controlled purchase of powder cocaine from [Applicant] at [Applicant]'s residence located at 3111, Highway 6, in the Gaston area of Lexington County.
>
> Your Honor, at that time in exchange for $1,625, the informant received 228 grams of powder cocaine from [Applicant]. The $1,625 constituted the first of four payments that were to be made to [Applicant] for the cocaine.
>
> [Applicant] was essentially fronting six of the approximately eight ounces of cocaine involved in the transaction. This transaction was once again under continuous audio electronic surveillance by SLED agents and an officer with the Lexington County Narcotics Enforcement team.

(Tr. p. 13, line 22 – p. 14, line12.) The solicitor went on to note that Applicant's daughters were present, and a search warrant executed on March 4, 2008, yielded a finding of $10,751 in a closet, though none of the cash was associated with the February 27, 2008, buy. (Tr. p. 14.) Finally, the solicitor noted that Applicant gave a statement after receiving Miranda[2] warnings in which he admitted to his involvement in dealing cocaine. (Tr. p. 15.) Applicant was asked during the plea if he disagreed with any of the facts recited by the solicitor, and Applicant assured the plea judge that all of the facts given were indeed correct. (Tr. p. 15.)

Applicant stated at the PCR hearing that the actual transaction on the video involved the CI coming to pick up drugs from his house because the drugs were not any good. Appellant stated he was given the option to sell the drugs, but he refused to do so. Applicant stated that he was merely returning the cocaine to its "rightful owner." Appellant maintained that while his children were home when the CI came, they left the room prior to the transaction with the CI.

The defense of entrapment requires a showing that the defendant was induced, tricked, or incited to commit a crime which he would not otherwise have committed. The entrapment defense

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

consists of two elements: (1) government inducement, and (2) lack of predisposition. State v. Brown, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004). Entrapment is "an affirmative defense which necessarily assumes that the acts charged were committed." State v. Haulcomb, 260 S.C. 260, 195 S.E.2d 601 (1973).

Counsel explained that the defense of entrapment would not be successful at trial. One problem with a defense of entrapment in Appellant's case was that when the informant arrived on February 27, 2008, the cocaine was in Applicant's house. The cocaine was present before the informant made his appearance under control of law enforcement officers. Because Appellant had cocaine in his house, under his dominion and control, prior to the informant approaching him under government surveillance, Counsel rightly had doubt that a jury would believe Appellant had no predisposition to participate in drug activity but for the government inducement. Counsel noted that Applicant had a prior record involving drug crimes and felt that this record would weigh against his claim of entrapment before a jury. U.S. v. McLaurin, 764 F.3d 372 (4th Cir. 2014) (proving predisposition is one of the purposes for which prior bad act evidence may be admissible); See also 2 Crim. Prac. Manual §41.4 "Subjective test-Evidence of prior bad acts, good acts." (noting that courts have admitted evidence of prior similar drug offenses to rebut defense of entrapment as such evidence goes to the question of propensity). Counsel also noted Appellant's statement as a concern in presenting a defense of entrapment. Counsel testified that even if he were able to get a jury instruction on entrapment, he did not feel he would prevail in a jury trial under the defense of entrapment given these aspects of the case.

I find Counsel's assessment of the matter to be reasonable. Further, I find no evidence of prejudice where the defense of entrapment was highly unlikely to be successful at trial. Counsel is

not required to present his client with every potential defense, particularly, where, as here, the defense was so unlikely to prevail.

Failure to Investigate

Applicant further argues that Counsel failed to adequately investigate the undercover purchases in West Columbia prior to his guilty plea (2006-GS-32-0170 & -172). Applicant asserts that the undercover informant in those two instances was deceased at the time of his plea, and Counsel should have discovered this. Applicant testified that he did see paperwork regarding the two West Columbia charges, but he did not see the audio and video. Counsel explained that the normal practice at that time was that the undercover informant would not be revealed unless the defendant decided to go to trial. As Applicant did not go to trial, he would not have received the informant's name.[3] Counsel further noted that once Applicant was charged with Trafficking, that charge became his primary concern. Counsel explained that the offered plea included the two charges of Distribution, and if they did not accept the offered plea, they would be proceeding to a jury trial on the charge of Trafficking. By entering the plea agreement, the count of Trafficking was reduced to Distribution, thus lowering his minimum sentence requirement from 25 years to 15 years. As discussed previously, Counsel had well-founded concerns that Applicant would be convicted during a jury trial. Because Trafficking carried a far greater sentence exposure than the Distribution charges, Counsel noted that the inclusion of the two counts of Distribution had little practical effect in terms of sentence for Appellant. Further, the plea deal meant that several other pending drug charges would be *nol prossed*. (Tr. pp. 10-11.) Had those charges not been *nol prossed*, he would be facing those additional charges as well. Given the benefits of the plea deal, Counsel would have drastically

[3] Applicant testified during the PCR hearing that he knew who the confidential informant was in those cases because

affected his client's sentence exposure had he insisted on going to trial and having the CI revealed.

Even if the CI was deceased, Applicant has failed to show that those cases against him would be unsuccessful. Appellant cites State v. Ezell, 345 S.C. 312, 548 S.E.2d 852 (2001) for the proposition that the State would not have been able to present a case without the CI . The Ezell case hinged on the fact that the CI identified the defendant in an audio tape, and the CI was not available to testify, thus rendering those portions of the tape where the defendant was identified inadmissible hearsay. The entire tape was not subject to the hearsay rule. The court further found that there was not strong testimony from any other witness identifying him. Ezell does not stand for the broader position stated by Applicant. Applicant has not shown that the audio and video surveillance tapes from the two West Columbia cases would have been excluded in their entirety where the CI was deceased. Finally, even if those two charges were not brought to trial, the other *nol prossed* charges could have been brought to trial. Where Applicant was faced with a very beneficial plea offer, and in light of all the circumstances noted above, I do not find that Counsel was ineffective. Further, I find that Appellant has failed to demonstrate that his pleas would have been altered.

Possibility of Life Without Parole (LWOP)

Applicant testified that his attorney advised him that he could face an LWOP sentence if he did not accept the plea offer. Counsel explained that in his experience, clients had received notices of LWOP where drug charges which were considered serious and/or most serious were strung together separately. S.C. Code §17-25-45. Based on the string of charges Appellant amassed, this was a legitimate concern. Counsel explained that the possibility of LWOP was discussed not as a concern on the day of the plea, but as a concern if other charges were not dismissed. I find Counsel's

---

he was present when the transactions occurred.

testimony credible and his advice well within reasonable professional norms.

Reconsideration

Applicant testified that Counsel informed him that he could file a motion to reconsider and could file a PCR application after his plea, but Counsel did not file a motion to reconsider sentence. However, Applicant has presented no new matter upon which to base a motion to reconsider sentence. Absent any non-frivolous basis for filing such a motion, Counsel was not ineffective in failing to do so.

Probation Revocation

Counsel did not appear with Applicant at his probation revocation hearing on May 22, 2009. There is a right to counsel at probation revocation hearings. Salley v. State, 306 S.C. 213, 410 S.E.2d 921 (1991). "The trial judge should advise the defendant of the dangers of self-representation. However, in the absence of a specific inquiry by the trial judge to determine whether the defendant has made his decision to proceed pro se 'with eyes wide open,' [the appellate court] will look to the record to discern whether there are facts to show the defendant had sufficient background or was apprised of his rights by some other source so as to constitute a knowing and intelligent waiver of the right to counsel." Id. at 215, 410 S.E.2d 922. Ten factors have been enumerated to determine if a probationer has the requisite sufficient background to understand the dangers of self-representation. State v. Bryant, 383 S.C. 410, 680 S.E.2d 11 (2009).

In the present case, the hearing judge posed no questions to determine whether petitioner was aware of the dangers of self-representation. The court's inquiry on the subject was limited:

THE COURT: Okay. You do not have an attorney?

MR. LIVINGSTON: No, sir.

THE COURT: And you say you do not want an attorney?

MR. LIVINGSTON: No, sir.

THE COURT: You want to proceed today without an attorney?

MR. LIVINGSTON: Yes, sir.

(Probation Revocation Tr. p. 4, lines 17-25.) Applicant's probation was revoked solely on the basis of his recent conviction. The probation agent indicated that Applicant had been compliant with terms of probation since 2005 and had no prior violations.

Applicant's probation was revoked less than one month from his guilty plea. During the plea, Applicant stated that he was 33 years of age, completed 10th grade, and had worked in construction and restaurants, working his way up to head cook. (Plea Tr. pp. 4-5.) In his most recent employment, Applicant worked at a transmission shop and had partial ownership of the shop. (Plea Tr. pp. 15- 16.) Applicant stated that his plea was his third involvement with the justice system. (Plea Tr. p. 6.) The solicitor rendered a record of several convictions ranging from minor offenses to drug offenses. (Plea Tr. pp. 18-19.) At the time of his plea he was not on any medications and indicated that he had never been treated for any emotional, nervous, or mental condition. (Plea Tr. p. 7.) Counsel discussed constitutional rights with him, and Counsel never had any problems communicating with Applicant. (Plea Tr. pp. 8-10.)

At PCR hearing, Applicant stated that he had retained Counsel to assist with charges in 2005 and retained him on these matters as well. This court has also observed Applicant in court and finds him to be by all indications competent and appropriately conversant about his case.

Of the factors listed by our appellate courts for consideration in determining whether the accused has sufficient background to understand the dangers of self-representation, I find the following to be particularly relevant in this matter:

- The accused's age, educational background, and physical and mental health: At the time of his probation revocation, Applicant was an adult father of four, age 33. His education extended only to tenth grade, but he has exhibited through his work history and presence in court a satisfactory education such that he is capable of understanding criminal proceedings. The record reflects no health concerns.
- Whether the accused was previously involved in criminal trials: While Applicant had not previously been involved in probation revocation proceedings, he had substantial contact with the justice system in other proceedings.
- Whether he knew of the nature of the charge and of the possible penalties: Appellant was aware of his guilty plea, which was the sole basis for the revocation.
- Whether the accused's waiver resulted from either coercion or mistreatment: There is no evidence in the record of either.

For all these reasons, I believe Applicant's decision to waive his right to have counsel present was valid.

Other Allegations

No other allegations were raised at the PCR hearing. Therefore, any additional allegations are deemed waived because no evidence was presented.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the 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.

This Court advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order to secure the appropriate appellate review. His attention is also directed to Rule 243, SCACR, for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be DENIED AND DISMISSED WITH PREJUDICE; and

2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 13th day of May, 2015.

EDGAR W. DICKSON
Presiding Judge
Eleventh Judicial Circuit

Orangeburg, South Carolina.

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT
James Livingston, # 226920, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2009-CP-32-4821 **ORDER**

This matter comes before this Court by way of a post-conviction relief (PCR) application filed by James Livingston (Applicant) on June 12, 2009. An evidentiary hearing into the matter was convened on August 16, 2013, at the Lexington County Courthouse. Applicant was present at the hearing and was represented Robert W. Mills, Esquire. Respondent was represented by Assistant Attorney Mary S. Williams, Esquire. This Court issued an Order dated May 13, 2015, and filed May 19, 2015, denying the application for post-conviction relief.

Applicant filed a motion pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure on June 2, 2015, in which he asks this Court to alter or amend its order dismissing his PCR application. He also filed motions pursuant to Rule 59(a) and Rule 60(b) requesting a new trial and relief from judgment or order. Respondent made its return to these motions, requesting that each be denied.

Motion to Alter or Amend

Based upon careful reconsideration of the evidence in this case, including Applicant's motion and supporting memorandum, this Court is not persuaded to alter or amend its judgment. This Court further finds a hearing would not aid in the

reconsideration of the original judgment. The Order of Dismissal issued by this Court contains the required findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code (2015) and Rule 52(a) of the South Carolina Rules of Civil Procedure. As a result, this motion is denied and dismissed.

Motion for a New Trial

In his motion for a new trial, Applicant asks this Court to grant a new trial because "Applicant . . . has ordered the transcript . . . and has discovered and alleged [to his PCR counsel] that the transcript is lacking much of the matters that were presented at the hearing." This Court finds that Applicant has failed to present a sufficient reason for grating a new trial. A new trial may be granted in a trial without a jury for any reasons for which rehearings have been granted in the courts of South Carolina. Rule 59(a) SCRCP (2015). Applicant has failed to raise any rule, case, or statute which would allow a new hearing for the reason he has submitted. Moreover, Applicant's allegation is extremely vague, to the point that it does not raise any specific issue to this Court. This Court finds that a hearing in this matter is therefore not necessary. In any event, even if what Applicant alleges is true, the proper remedy to an incomplete transcript is not to immediately grant a new trial. See State v. Ladson, 373 S.C. 320, 324, 664 S.E.2d 271, 273 (Ct. App. 2007) ("the inability to prepare a complete verbatim transcript, in and of itself, does not necessarily present a sufficient ground for reversal"). A new trial would be appropriate only if Applicant can establish that "the incomplete nature of the transcript prevents the appellate court from conducting a 'meaningful appellate review.'" Id. at 325, 644 S.E.2d at 274. No such allegation has been made in this case. Accordingly, this motion is denied and dismissed.

This Court further note that this pleading does not comply with Rule 11, SCRCP, and must therefore be dismissed. Under Rule 11, "[e]very pleading, motion or other paper of a party represented by an attorney shall be signed . . . by at least one attorney of record." Id. "The . . . signature of an attorney . . . constitutes a certificate by him that he has read the pleading, motion or other paper" and "that to the best of his knowledge, information and belief there is good ground to support it." Id. Concerning the present motion, the alleged transcript discrepancies come from Applicant's knowledge, and counsel has no firsthand knowledge of their existence. See also Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002) (counsel cannot serve as a mere conduit for pro se documents in an effort to avoid the prohibition against hybrid representation and the displeasure of his client).

Relief from Judgment or Order

Applicant's motion for relief from judgment or order is based on the same ground as his motion for a new trial. Accordingly, it is denied and dismissed for the same reasons.

IT IS THEREFORE ORDERED that each of Applicant's post-hearing motions be denied and dismissed.

AND IT IS SO ORDERED this 9th day of March, 2016.

EDGAR W. DICKSON
Presiding Judge
Eleventh Judicial Circuit

Orangeburg, South Carolina