THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case Nos.: 2013-cp-10-4153

Darius L. Green . . . . . Appellant

v.

State of South Carolina . . . . . Respondent

NOTICE OF APPEAL

Appellant appeals the Court's denial of his application for Post-Conviction Relief. Attached is the order from the Court dated April 22, 2016 and received May 2, 2016.

May 3, 2016

CHRISTOPHER L. MURPHY
MURPHY LAW OFFICES, LLC
Post Office Box 2008
Mt. Pleasant, South Carolina 29465
Phone: (843) 278-9025
Facsimile: (843) 278-8988
Email: chris@chrismurphylawfirm.com

Other Counsel of Record

Rutledge Johnson, Esquire
Assistant Attorney General
South Carolina Office of the Attorney General
1000 Assembly Street
Columbia, SC 29201
(803) 734-3737
rjohnson@scag.gov

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PROOF OF SERVICE

I CERTIFY that I have served APPELLANT'S NOTICE OF APPEAL by delivering a copy via U.S. Mail First-Class postage prepaid on the 3rd day of May, 2016, on the following:

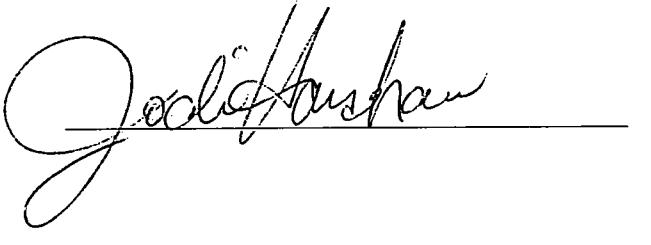
Rutledge Johnson, Esquire
Assistant Attorney General
South Carolina Office of the Attorney General
1000 Assembly Street
Columbia, SC 29201

The Honorable Julie J. Armstrong
Clerk of Court, Ninth Judicial Circuit
100 Broad Street, Suite 106
Charleston, SC 29401

Darius L. Green (#354407)
Lieber Correctional Institution
P.O. Box 205
Ridgeville, SC 29472

The Honorable Deadre L. Jefferson
Circuit Court Judge, Ninth Judicial Circuit
Charleston County Judicial Center
100 Broad Street, Suite 336
Charleston, SC 29401

Robert M. Dudek, Esquire
Office of Appellate Defense
Post Office Box 11433
Columbia, SC 29211-1433



STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT
Darius L. Green, #354407, Applicant, v. State of South Carolina, Respondent.	)	2013-CP-10-4153 **ORDER OF DISMISSAL**

Presiding Judge:	Hon. Deadra L. Jefferson
Applicant's Attorney:	Christopher Murphy, Esquire
Respondent's Attorney:	J. Rutledge Johnson, Esquire
Trial Counsel:	W. Ted Smith
Date of Hearing:	December 14, 2015
Court Reporter:	Denise Lauder

This matter comes before the Court by way of an Application for Post-Conviction Relief filed July 16, 2013. Respondent made its Return on March 20, 2015. An evidentiary hearing into the matter was convened on December 14, 2015 at the Charleston County Courthouse. Christopher L. Murphy, Esquire represented Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. Ted Smith, Esquire also testified. This Court had before it records of the Charleston County Clerk of Court, records from the South Carolina Department of Corrections, the application, the State's Return and the guilty plea transcript.

PROCEDURAL HISTORY

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

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indicted at the February, 2012 term of the Charleston County Grand Jury for murder[1] (2012-GS-10-0422). The Applicant was represented by Ted Smith, Esquire, and Megan Ehrlich, Esquire.

On February 25, 2013, the Applicant pled guilty to the lesser included offense of voluntary manslaughter.[2] The Honorable Stephanie P. McDonald sentenced the Applicant to confinement for a negotiated period of twenty five (25) years. The Applicant did not appeal his conviction or sentence.

ALLEGATIONS

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

1. Ineffective assistance of counsel.
    a. Counsel failed to advise of the right to appeal.
2. Involuntary guilty plea.
    a. Applicant's guilty plea was rendered involuntary.
    b. Erroneous advice of counsel.

At the hearing, the Applicant proceeded on his claims of ineffective assistance of plea counsel.

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[1] "A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life or by a mandatory minimum term of imprisonment for thirty [(30)] years....For purposes of this section, "life imprisonment" means until death of the offender without the possibility of parole...No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. No person sentenced to a mandatory minimum term of imprisonment for thirty years [(30)] pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty [(30)] years required by the is section." S.C. CODE ANN. §16-3-20 (2008). Murder is a violent most serious felony. S.C. CODE ANN. §17-24-45 (2008); S.C. CODE ANN. §16-1-60 (2008).

[2] "A person convicted of manslaughter, or the unlawful killing of another without malice, express or implied, must be imprisoned not more than thirty years or less than two years." S.C. CODE ANN. § 16–3–50 (2011).

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 (2003).

SUMMARY OF TESTIMONY

At the evidentiary hearing, Applicant testified that he was charged with murder, but did not discuss the charge with Counsel, did not make bond, and never got a bond reduction. Applicant also stated he did discuss the elements of the charge, but only somewhat discussed a defense. Applicant testified it was best to take the plea because he made statements to law enforcement and because it was difficult to prove self-defense or accident. Applicant admitted he understood the sentencing range for murder was 30 years to life. Applicant testified he met with Counsel twice; once for 15 to 20 minutes at the County jail and the other for an hour at court before the guilty plea. Applicant also stated he met with Counsel for an hour at the jail and was shown some pictures as evidence against him.

Applicant stated he pled to voluntary manslaughter, but did not really discuss the voluntary manslaughter elements with Counsel. Applicant stated he wanted to pursue a trial and discuss some defenses with Counsel, namely self-defense. Applicant claimed he did not intend to take Victim's life. When Applicant and Counsel discussed self-defense, Counsel said he would investigate it. Applicant claims he told counsel five different times he did not wish to plead guilty. Applicant stated

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there was an offer of 0 to 20 years, which he rejected and insisted on a trial because he claimed self-defense. The next offer was 25 years negotiated, which he accepted. Applicant claimed the victim hit him while fighting and because Victim was getting the best of him in the fight, Applicant panicked and pulled out a knife. Applicant stated Counsel explained a trial would be a 50/50 chance. Applicant also stated Counsel discussed the evidence against him and the witnesses the State would call at trial. Applicant claimed he pled guilty, but did not feel prepared for a plea and did not feel Counsel was prepared for trial; he felt like he had no choice. Applicant claimed he pled because of his Counsel. Applicant also stated Counsel never discussed his right to appeal, even though he wanted to appeal and wanted a motion for reconsideration.

On cross-examination, Applicant agreed to the facts as presented by the Solicitor. Applicant also stated he pled guilty because he is guilty and on the advice of his attorney. Applicant admitted he knew the victim had a right to be at the Walmart where he was an employee. Applicant stated he is willing to face the potential of a life sentence on retrial.

Counsel testified he has been practicing for 13 years and was appointed to this case September 30, 2011. Counsel stated he filed for discovery and forwarded a copy to Applicant. Counsel stated he met with Applicant 14 different times and was prepared to move forward with the plea. Counsel stated he discussed the charges, elements and range of penalty with Applicant. Counsel testified Applicant rejected the straight up plea to manslaughter, but accepted the negotiated 25 year plea offer. As far as defenses were concerned, Counsel testified that between the witnesses and the evidence, self-defense was not viable. Counsel explained this to Applicant and Applicant understood; Applicant was on board with the plea. Counsel stated he neither threatened nor promised Applicant to induce him to plead guilty, and that it was Applicant's decision to plead guilty. Counsel

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then stated Applicant understood he was waiving his constitutional rights and that Counsel was fully prepared for trial. Counsel stated although he had no concerns he had the Applicant mentally evaluated out of an abundance of caution. Counsel testified he agreed with the plea decision. Counsel stated Applicant never told him to appeal and that he does not think there were appealable issues in this case. He lastly testified Applicant did not ask for a motion for reconsideration.

Counsel testified this incident stemmed from a fight over a girl. Counsel stated the State's theory was that Applicant went to go kill Victim, but there was a question as to who started the fight. Applicant was 19 years old at the guilty plea and seemed nervous; however, Applicant was the one who made the decision to plea. Counsel stated he would have asked for lesser included offenses at trial if the evidence supported the charges. Counsel testified that he does not recall telling the applicant that trial was a 50/50 prospect.

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. See Strickland at 690, 104 S. Ct. at 2066. Courts presume that counsel rendered adequate assistance and made all significant decisions in the

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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 the 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 has been a practicing attorney for thirteen (13) years. Counsel met with him fourteen (14) times at the jail. In addition, Counsel requested Ms. Ehrlich meet with the Applicant as well and she did so three (3) times before the plea. Counsel advised Applicant of all of the charges and the range of penalty for each charge. Counsel negotiated with the State in Applicant's best interest. Applicant testified he pled because he thought he had no other choice; this Court does not find this allegation credible, as Applicant certainly could have pursued a trial and defended against the murder charges. The Defendant was informed of the charges against him, the range of penalty, the negotiation of twenty-five (25) years, and that the Court could only accept or reject the negotiated plea. (Tr. 16: 3-25). The Applicant allocated to the facts as they were presented. (Tr. 16:19-25; 17: 1-2). The Applicant was

informed of the violent and most serious/strike classification of the voluntary manslaughter charge. (Tr. 17: 8-25; 18: 1). This Court finds the Applicant knowingly and intelligently waived his right to a jury trial and his constitutional rights. (Tr. 22:10-25; 23: 1-25; 24: 1-4). This Court also finds no one threatened the Applicant to plead guilty, nor were there promises other than the negotiations to entice him to plead guilty (Tr. 24: 4–11). In addition to allocating to the facts presented by the Solicitor, the Applicant admitted he was the aggressor and not the victim (Tr. 26: 8–17). Additionally, this Court finds Applicant made this decision freely and voluntarily without any threats or promises from anyone else (Tr. 26: 18–25; 27: 1–5). Furthermore, this Court finds that it was ultimately the Applicant's decision to plead guilty (Tr. 24: 5–11).

This Court also finds Counsel would have discussed the right to an appeal. Counsel has a constitutionally-imposed duty to consult with a defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029 (U.S. 2000.) This Court finds the plea colloquy is dispositive in this case, as it is a contemporaneous record. The plea colloquy clearly shows that the plea judge advised Applicant of his right to an appeal; however, Applicant did not request one (Tr. 26: 18–22). This Court further finds in light of the negotiated sentence in this case it is unlikely that Applicant would have prevailed on a motion for reconsideration. Therefore, this allegation is denied.

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.

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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.

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 also finds as to all other allegations that Applicant failed to present evidence of such claims and thus, this Court deems them abandoned.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel 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 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant's attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

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!

Hon. Deadra L. Jefferson
Presiding Circuit Court Judge
Ninth Judicial Circuit

April 20, 2016
Charleston, South Carolina

9069

MURPHY LAW OFFICES, LLC

POST OFFICE BOX 2008
MT. PLEASANT, SOUTH CAROLINA 29465
TELEPHONE: 843-278-9025 FACSIMILE: 843-278-8988

May 3, 2016

The Honorable Daniel E. Shearouse
Clerk of South Carolina Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, South Carolina 29201

Re: *Darius L. Green, #54407 v. State of South Carolina*
Case No.: 2013-CP-10-4153

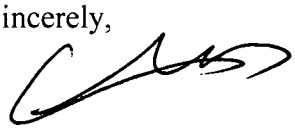
Dear Mr. Shearouse:

Enclosed for filing, please find an original and two copies of Appellant's Notice of Appeal of the denial of his application for Post-Conviction Relief. If you find everything in order, please file the original and return the clocked in copies in the enclosed self-addressed envelope.

Please note I was appointed and copy the Office of Appellate Defense who will handle the appeal. Please call if you have any questions.

With kindest regards, I am

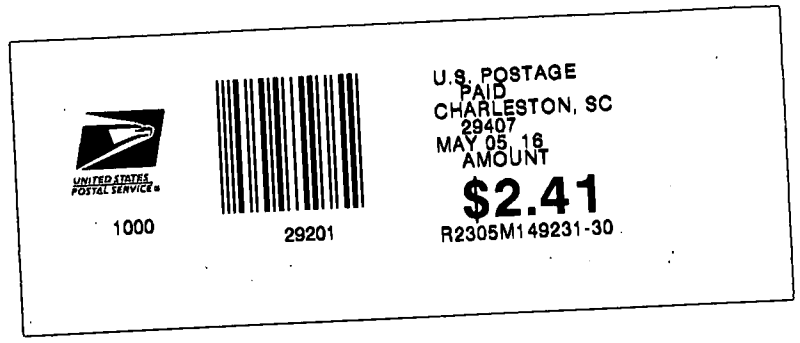
Sincerely,



Christopher L. Murphy

CLM:jh
Enclosures

cc (e/ encls.): Mr. Darius Green
Robert M. Dudek, Esq.
PO Box 11433
Columbia, SC 29211-1433
The Honorable Deadre L. Jefferson
The Honorable Julie J. Armstrong
Rutledge Johnson, Asst. AG



Christopher L. Murphy
PO Box 2008
Mt. Pleasant, SC 29465

The Honorable Daniel E. Shearouse
Clerk of South Carolina Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, South Carolina 29201