

The Law Office of Tristan M. Shaffer

Litigation • Injury Law • Criminal Defense

May 27, 2016

Janet Johnson
The Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED

MAY 31 2016

S.C. SUPREME COURT

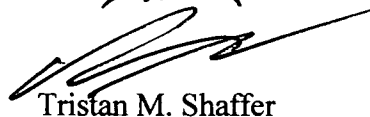
Re: Erick Hernandez v. State 2013-CP-26-4030

Dear Janet Johnson,

Enclosed is a copy of my Notice of Appeal and Certificate of Service in the above referenced case. Please file these documents.

Thank you for your assistance. If you have any questions or concerns, please notify me.

Sincerely,



Tristan M. Shaffer

CC: Caitlin Hastings, Horry County Clerk of Court, Lorie French

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Thomas Russo, Circuit Court Judge

Case No. 2013-CP-26-4030

RECEIVED

MAY 31 2016

S.C. SUPREME COURT

Erick Hernandez #352808,

Petitioner,

v.


The State of South Carolina,

Respondent.

NOTICE OF APPEAL

Petitioner appeals the order dismissing his post-conviction relief action filed on April 21, 2016. This order was received by Petitioner on April 28, 2016.

May 27, 2016



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Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
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S.C. SUPREME COURT

Erick Hernandez #352808,

Petitioner,

v.


The State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on The State of South Carolina by mailing a copy to the Attorney General's Office at P.O. Box 11549, SC 29211 on the date listed below.

May 27, 2016



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Other Counsel of Record:
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Attorney for Respondent

STATE OF SOUTH CAROLINA)
 COUNTY OF HORRY)
 Erick Hernandez, SCDC No. 352808,)
 Applicant,)
 v.)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No. 2013-CP-26-4030

ORDER OF DISMISSAL

2015 APR 21 PM 1:43
 Horry County
 Clerk of Court

This matter comes before the Court by way of an Application for Post-Conviction Relief filed June 11, 2013. Respondent made a Return on or about October 24, 2013. The Court convened an evidentiary hearing into the matter on November 13, 2015, at the Horry County Courthouse. Applicant was present at the hearing and represented by Tristan M. Shaffer, Esquire. J. Croom Hunter, Esquire, of the South Carolina Attorney General’s Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant’s plea counsel, Fran Humphries, Esquire, also testified. The Court had before it a copy of the transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant’s records from the South Carolina Department of Corrections, and the pleadings in this matter. The Court finds as follows:

I. PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Horry County Clerk of Court’s orders of commitment. The Applicant was indicted at the August 2012 term of the Horry County Grand Jury for trafficking cocaine (2012-GS-26-3383). Fran Humphries, Esquire represented the Applicant.

On October 8, 2012, the Applicant pled guilty. The Honorable Edward B. Cottingham sentenced the Applicant to fifteen (15) years imprisonment. The Applicant did not appeal.

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II. ALLEGATIONS

At the PCR hearing, Applicant proceeded with the following allegations:

1. Involuntary guilty plea.
2. Ineffective Assistance of Counsel.
 - a. Failure to provide adequate representation.
 - b. Conflict of interest.

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. This Court finds Counsel's testimony credible and Applicant's testimony not credible. 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 (2003). Furthermore, this Court finds that Applicant abandoned all allegations except for those specifically addressed below.

A. Involuntary Guilty Plea

In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (2000) (citing Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993)). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citing Hill v. Lockhart, 474 U.S. 52; Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v.

State, 314 S.C. 46, 443 S.E.2d 805 (1994)). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. at 56. Furthermore, "[a] guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant. Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Id. at 137-38, 654 S.E.2d at 874 (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)).

Applicant testified at the PCR hearing that he felt his plea was entered involuntarily because the plea judge told him the State's plea offer would be revoked if the plea did not go forward that day. The allegation is without merit. The record shows the solicitor indicated to the plea judge that Applicant's plea offer was only good for the remainder of the day. As such, the State, not the judge, placed that condition on Applicant's plea. "The State may withdraw from a plea bargain arrangement at any time prior to, but not after, the actual entry of the guilty plea by defendant or any other change of position by him constituting detrimental reliance upon the arrangement. Detrimental reliance may be demonstrated where the defendant performed some part of the bargain; for example, where the defendant provides beneficial information to law enforcement." Custodio v. State, 373 S.C. 4, 11, 644 S.E.2d 36, 39 (2007). Furthermore, Applicant did not have a constitutional right to a plea bargain. See Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (Ct.App.1999). As Applicant was not entitled to any sort of plea bargain in the first place, and he has shown no detrimental reliance, his allegation that the threat of the offer's revocation unlawfully induced him to plead guilty is without merit.

Furthermore, this Court has reviewed the record, and, in particular, the plea colloquy in its entirety and can find no evidence Applicant's plea was not entered freely, knowingly, and voluntarily. Applicant's allegations are just one more example of a defendant swearing to tell the truth and pleading guilty, only to come back years later, unsatisfied with his sentence, and telling the Court that even though he swore to tell the truth, everything he said at the guilty plea was a lie. Accordingly, this Court finds Applicant's testimony to be not credible and his allegations to be without merit.

B. Ineffective Assistance of Counsel

In this 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 trial counsel as a ground for relief, Applicant must prove trial 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." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether trial 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 trial 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 trial counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove trial counsel's performance was deficient. Id. Under this prong, the Court measures trial counsel's performance by its "reasonableness

under prevailing professional norms.” Id. (citing Strickland, 466 U.S. at 688). Second, trial 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.

1. Failure to Provide Adequate Representation

This Court finds Applicant has failed to show Counsel’s performance fell below an objective standard of reasonableness. Counsel’s testimony indicated he was extremely familiar with the facts of Applicant’s case. This Court finds Counsel met with Applicant an adequate number of times and was familiar with the discovery materials. Counsel indicated he explained Applicant’s constitutional rights, and he explained the differences between going to trial and entering a guilty plea. Counsel indicated he never had trouble communicating with Applicant, and he never had any concern that Applicant did not fully understand their conversations. Counsel testified Applicant made a fully informed decision to plead guilty, and Counsel agreed with the decision. As such, Counsel’s testimony indicated his performance was well within the range required under the law. This Court finds no reason to believe Counsel’s testimony was not credible. Accordingly, this Court finds Applicant’s allegations are without merit.

2. Conflict of Interest

At the PCR hearing, Applicant alleged he was prejudiced at his guilty plea by a conflict of interest existing because his attorney also represented his codefendant. This allegation is without merit. Testimony elicited at the PCR hearing from both Applicant and plea counsel indicated that counsel did not, in fact, represent Applicant’s codefendant because the charge at issue, to which Applicant pled guilty, did not involve the person in question. Additionally, Applicant was not charged with any type of conspiracy. In fact, the alleged codefendant had nothing to do with the charge to which Applicant

pled guilty. Plea counsel testified that prior to Applicant's plea, the solicitor made sure that none of Applicant's charges involved the alleged codefendant. "An applicant alleging his conviction was due to a conflict of interest from counsel's representation bears the burden of showing that a potential conflict actually materialized into a realized conflict adversely affecting counsel's performance." Jackson v. State, 329 S.C. 345, 495 S.E.2d 768, 773 (1998). Here, Applicant has not shown the existence of any conflict, nor has Applicant shown how said conflict might have affected counsel's performance. As such, this allegation is without merit. As Applicant has shown no ineffectiveness, he can show no prejudice.

C. 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. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

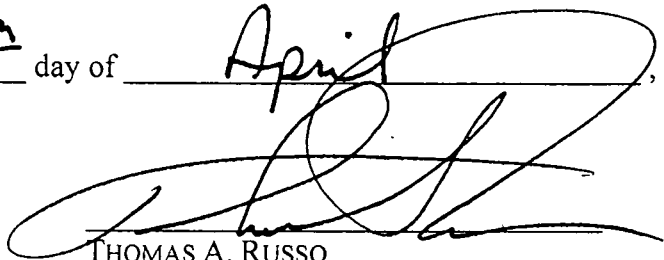
The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate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

must serve and file a notice of appeal on Applicant's behalf. Applicant and his attorney are 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 13th day of April, 2016.



THOMAS A. RUSSO
Presiding Judge
Fifteenth Judicial Circuit

Florence, South Carolina

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The Supreme Court of South Carolina
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